WHY A DUCK? ARE FEMINIST LEGAL JOURNALS AN ENDANGERED SPECIES, AND IF SO, ARE THEY WORTH SAVING?

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In the movie Cocoanuts Groucho Marx is explaining the blueprints for a real estate development. He has just pointed out a viaduct, when Chico interrupts:

> Why a duck? Why a—why a duck? Why-a-no-chicken?"
> [Groucho] . . . You try to cross over there a chicken, and you'll find out why a duck. It's deep water, that's viaduct.
> [Chico, still puzzled, asks again, and Groucho replies] Look. . . . Suppose you were out horse-back riding and you came to that stream and wanted to ford over there, you couldn't make it. Too deep.
> [Chico] But what do you want with a Ford when you gotta horse?[1]

"Why a duck?" you may be thinking when this symposium asks "Why a Feminist Law Journal?" The answer is not quite as absurd as you may think (and the dialogue may indicate). The development needs viaducts (and horses as well as Fords) because no one method of transportation works best in all situations. Similarly, legal scholarship needs feminist law reviews because a variety of journals can best transport ideas to people. Nevertheless, the symposium's invitational letter asked whether feminist legal journals have become "a victim of their own success" and whether "they [have] outlived their usefulness?" These questions imply two facts. First, that feminist legal scholarship is no longer marginal; second, that its marginal status is (or was) the *raison d'etre* for the existence of feminist journals.[2] Both "facts" do not hold up under scrutiny. In other words,

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[1] This excerpt from the script is in Why a Duck?, 41-42 (Richard J. Anobile ed., 1972).

[2] At least three of the words in this sentence need definitions, but unfortunately there are no clear definitions for any of them. "Feminist scholarship" has variously been defined to include articles that use feminist theory, articles that use a feminist style (e.g. narrative, personal), articles that centralize—as oppose to marginalize—women's experience, and/or even those that merely have a female outlook. *See, e.g.*, Marjorie E. Kornhauser, A Taxing Woman: The Relationship of Feminist Scholarship to Tax, 6 S. Cal.

marginalization may be *a* reason for the existence of feminist journals, but it is not the only one. Even if it were however, that justification would still exist because feminist scholarship has not yet been fully accepted into the mainstream of legal scholarship. Indeed, the simple act of asking questions indicates feminist legal scholarship's continuing marginal status.

Let us start with the second question first and assume for the moment that feminist law journals have been successful. Success in this context presumably means that these journals have established (or helped to establish) feminist legal scholarship as a full member of the legal scholarship family with access to publishing in general law reviews equal to that available to other types of legal scholarship.[3] In other words, assume that it is no harder to publish feminist legal scholarship in prestigious general journals than it is to publish, for example, articles on criminal law. Why would success in these terms lead to the second question: have feminist journals outlived their usefulness?

The Cocoanuts dialogue reveals—at least according to my deconstruction of it—that any transportation choice operates best within certain parameters. Sometimes cars are a better means of transportation than horses are, sometimes you use a road to get to your destination, and sometimes you need a viaduct. Although any transportation choice has both advantages and disadvantages, rarely is a method so disadvantageous or outmoded that it is eliminated entirely.[4] Indeed, people generally do not ask whether specialty journals in other fields, such as criminal law, are useful once the field is successful. General wisdom acknowledges that these journals are appropriate highways of communication, good for both authors and readers. They allow, for example, for broader, deeper, and more sophisticated explorations of topics than would otherwise occur since they are written for experts in the field. They also help an author reach her targeted reader, although the advent of electronic databases decreases the importance of this reason for specialty journals. True, there is always the debate about whether an untenured faculty member should publish in a top-tiered specialty journal or a mediocre general law review. However, that question is a far cry from wondering whether there is no longer any need for specialty journals.

Rev. L. & Women's Stud. 301, 303-07 (1997). By marginal, I mean that the scholarship is not quite accepted into the mainstream and therefore has more questionable legitimacy in academia than other fields. The invitational letter did not define "feminist legal journals." I use the term broadly to include all women's law journals.

[3] Some recent studies indicate the success of women scholars. *See, e.g.*, Deborah Jones Merritt, Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts, 29 J. Legal Stud. 345 (2000).

[4] And when elimination occurs, it often turns out to be a mistake. Think, for example, of streetcar lines torn up in the 1950s and 60s and now being rebuilt at great expense in cities such as New Orleans.

So why are we asking whether feminist legal journals have outlived their usefulness, when we have assumed for argument's sake that access to general reviews is not the issue? We acknowledge the worth of other specialty journals (even though articles in the field are accepted in general journals) because we acknowledge the worth of the field to which they are dedicated. If "successfully" integrating a particular type of legal scholarship into general law reviews extinguishes the need for publications devoted to it, then arguably that field of legal scholarship does not have enough intrinsic worth to merit its own publications. Feminist legal scholarship, however, is as worthy a field as other specialty and multidisciplinary fields and should have journals devoted to it for the same reasons that we acknowledge the worth of journals in other fields. Therefore, to suggest that feminist legal journals are somehow victims of their own success and no longer necessary indicates an undeserved inferiority that is derived from feminist legal scholarship's continuing marginal status. In short, the initial assumption of "success" is faulty.

A large quantity of anecdotal evidence attests to the fact that feminist legal scholarship, despite its increased recognition and acceptance, has not yet achieved complete success, measured as parity with mainstream scholarship. I present four pieces of "casual" empirical data to buttress this vast quantity of anecdotal evidence. By "casual" I mean that the data is empirical but does not meet strict statistical tests for any number of reasons, such as limited sample size. It does, however, lay the groundwork for more extended exploration.

The first piece of data is the small number of feminist articles published in all the 2002 issues of eleven top general law reviews. Of the approximately 200 non-student authored articles published, only ten articles (five percent) were feminist, defined briefly—and broadly—to include not only articles dealing with feminist theory but also articles dealing with subject matter central to women's experience.[5] Of course, some traditional areas of law also appear infrequently in general reviews.[6] Yet the fact that another relatively new, cross-disciplinary area—law and economics—had

[5] I did not include feminist style or outlook in this definition. *See supra* note 2. The journals were from the following law schools: Berkeley, Chicago, Columbia, Duke, Harvard, Pennsylvania, Michigan, Stanford, Virginia, Yale, and UCLA. The term "article" also included essays and responses to articles. Approximately half of the feminist articles were published in one symposium issue.

[6] For example, Professor William Turnier has shown that few journals publish articles about taxation. William J. Turnier, Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship, 50 J. Legal Educ. 189, 192 (2000) (In 1996-97, tax articles in major law reviews comprised 2.27% of the articles published). But tax is also frequently perceived as a marginal subject in academia because it is considered too technical and not academic in the way other subjects are.

almost 300% more articles in these same journals[7] increases the suspicion that the scarcity of feminist articles results, at least in part, from marginalization. The exact numbers might vary given a different selection of particular "top" eleven journals, or choice of particular year(s), or definition of both law and economics and feminist articles, since both are difficult to define, but the general results would probably be similar. This is especially true since, if anything, I under- rather than overcounted the law and economics articles given the degree to which law and economics's vocabulary has infiltrated legal discourse. My examination of the same journals for 2001 confirmed the general results of 2002; that is, law and economics articles greatly outnumbered feminist articles. In fact, the disparity was even greater.

My second piece of data supports the first. A search of Lexis's "Law Review, Combined" database for the year 2002 for "feminism" or "feminist" within three words of "theory" or "jurisprudence" retrieved only 277 documents whereas a search for "law and economics" retrieved 962.[8] Similarly, searching the same database for the quintessential feminist scholar, Catharine (or Catherine) MacKinnon, resulted in only twenty-five percent of the number of hits that obtained from searching for the quintessential law and economics author Richard Posner (233 versus 947 respectively).[9]

Although there may be other explanations of this disparity besides the marginal status of feminist articles, marginal status probably plays a role in these explanations as well. For example, one possible cause of the disparity would be that law review editors pick more law and economics articles than feminist ones because the former are deemed to be of higher quality. Another possible cause would be that student editors who select articles for publication prefer law and economics articles. Yet another would be that more readers are interested in law and economics articles (or are perceived to be so by the selecting editors). Even if these interpretations are "true," they may be so in part because feminist scholarship has marginal status. For example, it is difficult for marginal scholarship to be judged meritorious because the standards by which quality is judged are set by the

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[7] I also defined law and economics broadly so that the definition encompassed articles specifically using economic theory to analyze legal rules and institutions, articles that generally analyzed the effects of legal rules and institutions on outcomes, and articles substantially concerned with topics of interest to law and economics analysis such as agency costs. Again, one symposium accounted for approximately half of the law and economics articles, but it had many more articles in it than the symposium with feminist articles.

[8] March 3, 2003, search of Lexis, "Law Review, Combined" database for 2002 using the following searches: "feminis! w/3 theory or jurisprudence" and "law and economics."

[9] August 27, 2003, search of Lexis, "Law Review, Combined" database with a date restriction of "01/01/2002 to 12/31/2002" for "Catherine w/2 MacKinnon" and "Catharine MacKinnon." The same database and date restriction was used for "Richard w/2 Posner."

mainstream.[10] If selection bias exists, it may be because student editors think that law and economics is more important than feminist legal scholarship based on how frequently the former is incorporated into a variety of their classes and textbooks in contrast to feminist legal theory. Alternatively, if more readers are interested in reading law and economics articles, the greater interest may also reflect the belief that feminist legal scholarship is less important to the legal enterprise.

All these issues require more investigation, but I will look briefly only at readership. Broadly speaking, both law and economics literature and feminist legal scholarship appeal to two types of readers. The first is interested in the field *per se*, someone, for example, specializing in law and economics. Readers in the second category specialize in another area but are interested in a particular article because of its specific application of law and economics analysis to her field, such as a tort lawyer interested in an article on a "reasonable woman" standard. I will call the first type a content reader and the second a methodology reader. Readers may further be categorized according to whether they are legal practitioners, whether they are academics, and so forth. Although there are many such categories, a large, if not the largest, source of readers of law reviews is law professors. Among this group there is no obvious theoretical reason why more methodology readers should be interested in law and economics than in feminist scholarship since both of these fields have broad application to numerous other legal areas. However, the continued marginal status of the latter may cast explanatory light on this situation. Since marginal scholarship is by definition less relevant to mainstream academia, law professors generally are less likely to spend their limited time reading it. It is possible that women law professors might find feminist legal scholarship more relevant, but of course, women are still a minority of law professors.

My third piece of data concerns content readers, again concentrating on law professors. One might expect that the larger the number of professors in a specialty, the more readers of articles about the subject. Yet the contrary is true in connection with the number of professors teaching Law and Economics courses and the number teaching Women and the Law courses. According to the Association of American Law Schools (AALS) Directory of Law Teachers the number of professors teaching Women and the Law is 26 percent larger than the group teaching Law and Economics.[11] These numbers are curious, to say the least, especially when

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[10] Of course, some feminist articles will still meet these standards. For example, if citations are an indication of quality, then Angela Harris's article Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) meets that criterion. *See, e.g.*, Ian Ayres & Fredrick E. Vars, Determinants of Citations to Articles in Elite Law Reviews, 29 J. Legal Stud. 427, 433-34 (2000) (the article is in the top five articles cited, but when the authors control for subject matter it drops off the list).

[11] Information compiled by Rick White of the AALS from AALS 2002-03 data (on file with the author). Of course there are other readers, such as law students, judges,

coupled with the fact that 93 percent of those listed as teaching women and the law courses are female and 91.7 percent of those teaching law and economics are male.[12]

My fourth piece of casual data regarding the marginal status of feminist legal scholarship is a poll I conducted on the CrimProf bulletin board. I asked professors to choose, in a series of paired questions, which journal they would publish in if their sole criterion for the decision were prestige: a top twenty general law review, a top rated criminal law review, a law and policy review, or a women and gender law review.[13] The results are consistent with what most intuit: a majority of respondents preferred publishing in a top twenty general review as opposed to a top criminal law journal. When choosing between specialty journals, the number of respondents choosing women/gender law reviews was always the smallest by a considerable percentage. No male respondent chose a women's law journal over a criminal law journal. Although none of the differences in the percentages achieve "statistical significance," largely due to the small number of respondents, they are, as my statistical expert commented, "meaningful" and "suggestive in a substantive sense."[14]

Although each piece of data I have presented may be partially explained by factors other than the marginal status of feminist legal scholarship, their collective weight seems to be "suggestive in a substantive sense." And what they cumulatively suggest is that feminist legal scholarship has not yet attained full membership in the family of legal scholarship. This brings me full circle back to the topic of this symposium and the specific question of whether feminist law journals have been endangered by their own success. If the sole purpose of these journals is to help create parity—or simply provide an outlet for publication until parity provides better outlets in the form of general law reviews—then clearly the journals are not in danger of obsolescence. However, it is important to remember that this is not the only purpose of feminist journals. Consequently, even when feminist legal scholarship does achieve parity with other forms of legal scholarship (a goal that I hope will be accomplished in the not-so-distant future), feminist law journals will not

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practitioners, and non-lawyers. It is unclear what the gender is of non-lawyer readers but they probably are not that important in determining the content of legal journals. Although women law students comprise approximately half the law school population, law students are probably also not significant target readers. However, practicing lawyers and judges are important targets and the majority of that population is male.

[12] *Id.*

[13] Details of the search on file with the author.

[14] E-mail from April Brayfield, Associate Professor, Tulane University, to Marjorie Kornhauser, Professor of Law, Tulane Law School (Feb. 11, 2003) (on file with author). Professor Brayfield is a quantitative sociologist who both uses statistics in her research and teaches statistics.

have outlived their usefulness. Certainly, the need for so many such journals may diminish, just as the need for so many viaducts presumably decreased after the establishment of the modern highway system. However, as I discussed at the beginning of this paper, it is always a good idea to have a variety of means of conveyances—regardless of whether it is goods, people, or ideas that are being conveyed. Thus, although certain specific feminist journals might be endangered if or when parity is achieved, just as some ducks—I mean viaducts—may have been endangered,[15] the genus will—and should—continue.

[15] Note that as of January 23, 2003, the United States Fish and Wildlife Service listed two ducks under the Endangered Species Act: the Hawaiian duck and the Laysan. *See* http://ecos.fws.gov/tess-public (last visited June 11, 2003). I thank my colleague Jonathan Nash, a fellow Marx Brothers fan, for this information.

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