

IS LAW AN ART OR A SCIENCE?: COMMENTS ON OBJECTIVITY, FEMINISM, AND POWER

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I begin from Aldo Facio's wonderful, awful story of writing an exam question on whether law is an art or a science, and receiving a harsh F with the comment "Who asked your opinion?" This story raises two important questions for Latin American lawyers committed to the perspective of gender. The first concerns whether they should make assault on objectivity an integral part of their agenda. The second concerns their analysis of gender and power.

I. IS LAW OBJECTIVE?

In her insightful analysis of the jurisprudence surrounding Peru's Law on Family Violence, Rocio Villanueva Flores notes that judges have been reluctant to apply that law on the grounds that it is a vague statute and does not include an adequate definition of family violence.¹ This explains the urgency of Alda Facio's sense that feminists need to undermine the traditional notion that law is a neutral, self-executing system of rules.

If the goal is to challenge this vision of law, one possible resource is the so-called "indeterminacy critique" developed in critical legal studies in the United States during the 1980s. Authors such as Joseph William Singer² and James Boyle³ argued that law is "indeterminate."

1. Rocio Villanueva Flores, *Notas sobre interpretacion juridica (A proposito de la ley 26260 y la violencia familiar)*, in *VIOLENCIA CONTRA LA MUJER: REFLEXIONES DESDE EL DERECHO* (1996).

2. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L. J.* 1, 9 (1984) (stating that the law is a description of the arguments and theories that are currently used by judges and scholars to justify outcomes and rules).

3. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133

Others, such as Mark Kelman deconstructed legal arguments by "trashing" legal arguments' claims to objectivity.⁴ Robert Gordon showed how existing patterns of argumentation served to "freeze social reality" and make alternative visions seem implausible.⁵ This critique often focused on rights, which were attacked on the grounds that they alienated people from authentic expressions⁶ or that they blinded people to utopian possibilities.⁷

It is nice to know one does not have to reinvent the wheel, but several notes of caution are in order. First, having read both the indeterminacy literature and the Villanueva article, it seems to me that Villanueva knows most of what was said within critical legal studies in the 1980s, and that in many ways, she says it better.

A second question is whether this is a battle feminists want to fight. Within American jurisprudence it proved bitter and divisive, with constant charges that the objectivity-critiquers were "nihilists" whose only interest was in trashing. The very considerable costs of this battle are heightened in Latin America for two reasons.

In the United States, the indeterminacy critique drew upon a tradition already well-established within American law. The legal realists attacked the idea that law is neutral and objective in the 1920s, drawing upon a still older tradition of jurisprudence dating to Oliver Wendell Holmes.⁸ My understanding of Latin American jurisprudence remains sketchy, but my impression is that Latin American countries generally lack a tradition similar to legal realism. If this is true, a critique of objectivity will place feminists in a much more exposed position than critical legal scholars in the United States.

The potential exposure is even greater for another reason. The final session of the Pan American Conference suggests that a critique of objectivity, in the Latin American context, pits feminists squarely against other progressive forces whose identities have been forged by

U. PA. L. REV. 685, 779 (1985) (arguing that the law is somewhat indeterminate shaped by social subjectivism and structural strands).

4. See Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (defining "trashing" as the theory which takes specific arguments in their own terms, discovers that they are "foolish" and then looks externally for some order in the internal chaos).

5. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987).

6. Peter Gabel, *Reification in Legal Reasoning*, 3 RES. IN L. & SOC. 25 (1980).

7. Robin West, *Murdering the Spirit: Racism, Rights & Commerce*, 90 MICH. L. REV. 1771 (1992).

8. See WILLIAM W. FISHER III, MORTON J. HORWITZ, THOMAS REED, *AMERICAN LEGAL REALISM* (1993); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (arguing that the legal system is inconsistent in its objectivity).

advocacy of human rights and the rule of law. Human rights advocates, who have forged their identities through fights against repression and dictatorship, generally have rested their claims for authority and legitimacy on the charge that existing authorities have violated universal norms.

The language of human rights rests heavily on notions of universality of the type that the critique of objectivity targets. Thus, a feminism focused on the jurisprudential issue of whether objectivity is possible pits feminists' claims for legitimacy against those of other progressive forces in Latin America. Is this wise? It seems to me that, in a *machista* culture, the perspective of gender is threatening enough without burdening it with this additional fight.

Do any alternatives exist? Two deserve consideration. One is to argue in a pragmatist vein, stressing what law is, rather than what it is not. While law is not a neutral, self-executing system of rules, it is not totally indeterminate either.⁹ The processes by which language generates meaning are related less to logic than to the form of life of which the language is a part; law is part of language.¹⁰ The key point, from a pragmatist perspective, is that certainty represents a statement about the role a tenet plays in one's form of life, not a statement about some ultimate truth with which agreement of all rational beings is, or should be, automatic.¹¹

Yet even this formulation presents difficulties. Although in my writings outside of feminism I am best known as a critic of objectivity, I do not carry that intellectual agenda into my writings on gender. For one thing, people often confuse objectivity critiques with the belief that nothing is true, so that one's feminist credos are quoted back as evidence of self-contradiction.¹² This is silly: it mistakes a conversation on epistemology, on what truth claims mean, with a claim that truth claims are incoherent. These are technical issues, best left for conversations on philosophy. Conversations on gender

9. See Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 588 (1987) (stating that both arguments are premised upon an "either/or" approach); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986) (arguing that practical legal reasoning and process demonstrates how the indeterminate argument fails).

10. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1968) (stating that the definition of the law is dependent upon the society over which it governs).

11. See Joan C. Williams, *Symposium: Michael J. Perry's Morality, Politics, and Law: Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651 (1989) (critiquing absolutes and a persisting focus on the way viewpoints may affect perceptions).

12. See, e.g., Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992) (questioning the viability of feminism during postmodern critique of reason).

are already too fraught with difficulties to allow these issues to enter and confuse.

An alternative approach is to entirely evade profound questions concerning objectivity. In the context of gender, the key problem is that even conceding that objectivity is possible, courts and legislatures fail to live up to their own stated standards of objectivity in their treatment of women. Thus, the Peruvian Law on Family Violence is not enforced on the grounds that it is too vague, whereas other equally vague laws are enforced without comment. One does not have to engage in philosophical discussions to mark this as inappropriate and unfair.

From the perspective of gender, all we need to show is that current laws, and the ways they are interpreted, do not live up to their own claims to objectivity. Let human rights advocates argue that law can be neutral and objective; we may disagree, or argue that its objectivity means something much more complex and contingent than they assume. But the key point for feminists is that, bracketing the question of whether law is ever objective, the laws we object to are not.

II. WHICH ANALYSIS OF GENDER AND POWER?

My second brief comment concerns gender and power. Ten years of work in feminist jurisprudence in the United States has informed me about the relationship between gender and power. But it has also confused me, in ways that only began to clear up when I read Alda Facio's subtle and astute *Cuando el Genero Suena, Cambios Trae*.¹³

Feminist jurisprudence in the United States often elides the question of whether feminists need an analysis of gender and power. Catherine MacKinnon's analysis of gender as dominance has many strengths. Her theory picked up a theme that has been around since the early years of second-wave feminism, for example in the influential *Desire and Power*,¹⁴ and has developed it into a full-blown theory of gender. MacKinnon's sustained analysis of the ways our sexuality eroticizes dominance and submission is an important and enduring contribution, and has been accompanied by movements designed to separate power from desire in the workplace (sexual harassment law), the home (domestic violence law), and in entertainment (pornography).

13. ALDA FACIO, *CUANDO EL GENERO SUENA CAMBIOS TRAE* (1996).

14. Catherine A. MacKinnon, *Desire and Power*, in *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* 46 (Catherine Stimpson ed., 1987) [hereinafter *FEMINISM UNMODIFIED*].

Far more controversial is MacKinnon's claim that the linkage of power and desire is the chief engine of gender. This not only posits the controversial and divisive claim that a single engine drives the extremely complex phenomenon of a gendered world; it also glosses over the tradition of socialist feminism, which points to the structure of work and family as a key engine in the "gender factory."¹⁵ Gender can usefully be linked both to the structure of sexuality and to the structure of work and family. This is one important way MacKinnon's analysis needs to be reassessed.

The second is even more basic. MacKinnon's analysis attributes to power an on-off quality that links men with power and women with powerlessness. "[O]n the first day that matters, dominance was achieved, probably by force."¹⁶ This kind of talk is useful for achieving one of the key goals of feminism: women bonding in anger against men (consciousness-raising). It is far less effective at building successful coalitions for gender change. Many women are repulsed by the notion that they are men's victims. They don't feel like victims, and believe that feminists' descriptions make them sound like losers. The critiques of MacKinnon that illustrate this point are often called the agency critiques.¹⁷ Many men, particularly men of color and working class men, become outraged when they are described as privileged. In fact, they don't feel privileged; they feel oppressed by race, class, dictatorship, or other social forces. Working class women and women of color often agree, and point out ways that their experience of gender differs due to their different class and race contexts. The critiques that make these points are often called the anti-essentialism critiques.¹⁸

Agency and anti-essentialism critiques often pinpoint analytical failures of MacKinnon's analysis of gender and power. But the important point is that these analytical failures undercut the ability of MacKinnon's language to persuade a broad range of audiences.

Because of their extensive experience with gender trainings and popular education, feminists in Latin America are developing a

15. See SARAH F. BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* (1985); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L. J. 1903 (1994) (discussing the "hierarchy" in the home and the workplace).

16. FEMINISM UNMODIFIED, *supra* note 14, at 40.

17. See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (discussing the way women view themselves and are viewed by others).

18. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (eluding to the point that gender is not the only variable in the way women are treated).

language of gender and power with the ability to overcome the drawbacks of MacKinnon's dominance feminism. Alda Facio's analysis of stereotypes points the way. The brilliantly simple "When He Works/When She Works," which Alda Facio adopts from what appears to be a popular education bulletin, sets up two columns:

He Works:

He has a photo of his family on his desk.

He's a solid family man, conscious of his responsibilities.

He speaks with his colleagues. He must be discussing his latest deal.

He's not in his office. He's meeting with the delegates.

He lunches with the General Manager. Surely he's going to get a raise.

She Works:

She has a photo of her family on her desk.

Her family will always come before her career.

She speaks with her colleagues. She's gossiping.

She's not in her office. She took off to go shopping.

She lunches with the General Manager. They must be lovers.

This stunningly concrete example gives a graphic picture of gender power at work, in a way that invites laughter, and in my experience, gets it, even in audiences not receptive to the gender perspective. It is an approachable way to talk that presents gender power as something that happens, quite innocently, in an everyday way to transform our societies into what MacKinnon has called "an affirmative action plan for white men."¹⁹ In the United States, this is useful because it graphically illustrates the limitations of our discrimination laws, which are interpreted to limit actionable discrimination to that which is conscious and intentional. It also demonstrates the limitations of an affirmative action jurisprudence that often assumes that the purpose of affirmative action is to remedy past discrimination.²⁰ The He Works/She Works analysis shows that much of the most damaging discrimination, far from being intentional, is not even conscious. It also shows that affirmative

19. FEMINISM UNMODIFIED, *supra* note 14, at 36.

20. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that equal protection laws should protect against unconscious racial discrimination).

action is important not to remedy past discrimination by people long dead, but to remedy the disadvantage created by these and other stereotypes in the present and subconscious default modes within which we all normally function.

What's needed is a new metaphor that crystallizes these insights. The central metaphor of MacKinnon's dominance feminism, taken from Angelina Grimke, is of men's boot on our neck.²¹ This functions well as a language of bonding in anger against men, but less well as a language of persuasion. An alternative is the metaphor of gender as a force field, pulling men and women back towards conventional gender patterns, and perpetuating power differentials through destructive stereotypes that still serve today to undercut the credibility of women and bolster that of men.²²

III. CONCLUSION

In conclusion, although I remain deeply indebted to MacKinnon for her brilliant analysis of how our culture eroticizes dominance, my experiences in Latin America convince me that North American theorists have much to learn from Alda Facio and others. Their experience can help guide North American feminists as we move out of our comfortable but marginalized conversations among ourselves, and begin to engage in some popular education of our own.

United States feminism began in the popular sphere, and needs to be revitalized there. I speak as a theorist committed to the continuation of theoretical discourse. But I am convinced that we must look south for a feminist experienced in talking about gender in ways capable of reaching a broad popular audience.

21. See Catherine A. MacKinnon, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11 (1985) (suggesting that women's actions are controlled by men).

22. JOAN C. WILLIAMS, *RECONSTRUCTING GENDER: WORK, FAMILY, AND GENDER TALK IN THE 21ST CENTURY* (forthcoming 1998).

