

CRACKING FOUNDATIONS AS FEMINIST METHOD

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I. INTRODUCTION

Two facts: one, Martha Fineman is a feminist; and two, in this lecture and in her other work, she makes a case for greater public responsibility for society’s caretakers and their dependents. Is there a connection?

In this essay I use Fineman’s lecture on dependency as an excuse to explore what makes a scholar, or her work, “feminist.” Many scholars have attempted to define “feminist” in relation to law, particularly as it is used in the terms “feminist” legal theory and “feminist” jurisprudence. All agree that the term refers in some way to the subject matter of women.¹ Few claim, however, that *anything* having to do with women is, on that account, feminist.² Most understand feminism to mean something more. But what more, exactly? And is it a matter of method or substance? As method, feminism refers to the nature of the questions asked, the criteria of relevance and proof applied in addressing those questions, and other methodological

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1. Some commentators have pointed out, however, that feminism needs to be concerned about the way men, as well as women, are constructed. See, e.g., NANCY LEVIT, *THE GENDER LINE, MEN, WOMEN, AND THE LAW* (1998).

2. Some definitions stop at this point. See Larry Alexander, *What We Do, and Why We Do It*, 45 *STAN. L. REV.* 1885, 1889 (1993) (“I will define feminist jurisprudence to include all scholarship that focuses on the legal system’s impact on women and women’s impact on the legal system.”).

issues. If feminism is viewed in terms of method, Fineman is a feminist so long as she asks the right kinds of questions and otherwise respects the appropriate protocols and standards of proof in trying to answer these questions. The label would say nothing, however, about the content of her substantive analysis, or the correctness of her conclusions from a prescribed feminist viewpoint.

As substance, feminism refers to the answers feminists get. If whether an analysis is feminist is judged in substantive terms, it is evaluated according to the content of the conclusions, rather than the method by which they were reached. Within this view, Fineman's analysis of dependency and the proposals that follow are feminist only if they conform to whatever substantive criteria are attached to the term.

Given how often critiques or reforms are said to be feminist, there is surprising ambiguity as to whether this refers to saying the right (feminist) things, or to arriving at conclusions in the right (feminist) way, or some other combination of these or other possibilities.³ In defining feminist legal scholarship, feminist scholars often emphasize its methodological aspects.⁴ To the extent feminists recognize the validity of disagreement on substantive positions within feminism, as they frequently do,⁵ they also seem to be presupposing a methodological over a substantive definition of the term.

Viewing feminism as *just* method in the sense of mere process,

3. Among other possibilities, for example, proposals could be considered feminist if they are made by anyone who claims to be a feminist, or if they simply purport to advance women's interests. See Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL'Y 325 (1995) (discussing the dangers of defining certain ideas or sets of ideas as "feminist legal theory"). In this essay, I stick to the method and substance explanations, both because they are the two most significant and plausible possibilities, and because my real purpose is to explore the relationship between the two.

4. See generally Jeanne L. Schroeder, *Abduction From the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109 (1991); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 106-25 (1989); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989) (Book Review).

5. See generally ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983) (distinguishing liberal feminism, Marxist feminism, radical feminism, and socialist feminism, in accordance with the different accounts of human nature, political values, and epistemological assumptions underlying each type); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 31-112 (1999) (distinguishing feminist theories associated with the "equality stage," the "difference stage," and the "diversity stage" (including "postmodern feminist") of feminist legal thought); Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994) (distinguishing formal equality, substantive equality, nonsubordination theory, different voice theory, and postmodern feminism as different frameworks of feminist analysis); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992) (referring to differences between "equality" feminists and "difference" feminists, and between "cultural" feminists and "radical" feminists).

however, does not seem quite right. Feminism is a movement that professes the desirability of social change. Surely a movement committed to social change is not indifferent to the substance of that change. In fact, feminists *do* appear to share certain substantive commitments: equal pay, the end of sexual harassment in the workplace, protection for victims of domestic violence, a woman's right to choose an abortion, and equality in family life. Feminism's opponents certainly assume that feminism stands for *something*—often typecast in exaggerated, unappealing ways—and decline to identify as feminists because of what they claim that something to be. In light of these general understandings, how can it be seriously contended that feminism has no substantive content?

The meaning of method and substance in feminist thought is a larger topic than can be tackled in one short essay. I have addressed aspects of the two elsewhere⁶ and do not intend to repeat my previous observations. In this essay, my limited goal is to probe some aspects of feminist method, including its relation to the content of feminist analysis, using the work of Martha Fineman as a focus. Fineman makes a particularly good subject for an exploration of the relationship between feminist method and feminist substance. Her global reputation is, indisputably, that of a feminist legal scholar. Her *Feminism and Legal Theory* workshop, which she has run since 1984 from the various universities at which she has been located (the law schools at the University of Wisconsin, Columbia, and Cornell), has drawn together feminist scholars from all over the world to discuss specific, cutting-edge topics in feminist legal theory and practice. Fineman now holds the *Dorothea S. Clarke Professor of Feminist Jurisprudence* Chair at Cornell Law School—the first “feminist” chair to be endowed at an elite U.S. law school. She has been as prolific as any other feminist legal scholar, the author of numerous books and articles, and editor of several collections of essays. In her writing, Fineman does not hesitate to take clear stands and advocate specific, substantive positions.⁷ At the same time, she is difficult to pigeonhole

6. See generally Bartlett, *supra* note 4 (detailing feminist legal methods, and discussing the method-substance dichotomy and the status of truth claims feminist methods produce); Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303 (discussing use of tradition and change in feminist method); Katharine T. Bartlett, *Minow's Social-Relations Approach to Difference: Unanswering the Unasked*, 17 L. & SOCIAL INQUIRY 437 (1992) (Book Review) (discussing the link between progressive legal methods and progressive programs); Katharine T. Bartlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559 (1987) (Book Review) [hereinafter Bartlett, *MacKinnon's Feminism*] (evaluating the method of Catharine MacKinnon).

7. See *infra* Part III.

into a particular brand of feminism. Many feminists, including myself, have disagreed with her on some matters. Given all of these factors, her scholarship should tell us something about what makes a scholar's work feminist, or what, if anything, knowing that an individual is a *feminist* scholar tells us about her, or about feminism.

I conclude in this essay what others have concluded before me, which is that the adjective "feminist," when applied to legal scholarship, is best understood as a methodological description. Understanding feminism in methodological terms acknowledges the commonality in the questions feminists ask about women's situations, over and over, in different contexts. Asking these common questions has produced many overlapping and alternative analyses of how gender is constructed and how it operates in the law. Most of these analyses, regardless of their incompatibilities, have contributed to a deeper understanding of how law affects what gender means, or could mean, in this society. Together, these multiple understandings of gender arrangements, along with the habit of questioning these arrangements, have given feminism a greater edge and made it more productive than any single view of these arrangements could provide. The alternative of understanding feminism in substantive terms, in contrast, risks locking it into a fixed, uncorrectable view of the world.

But while the crux of the term feminist is method, there is a critical aspect of feminist method that is substantive in nature. Feminist method works from a hypothesis which, in its simplest terms, boils down to something like this: the circumstances of women are unjust in significant respects and ought to be improved. This working hypothesis is sometimes characterized as a judgment⁸ or a belief,⁹ which suggests something fixed or settled. It is best understood, however, as an essential part—albeit substantive and provisional—of feminist method.

In Part II of this essay, I describe more fully what I mean by

8. See Janet Radcliffe Richards, *Feminism and Equality*, 9 J. CONTEMP. LEGAL ISSUES 225, 225-26 (1998) (speaking of the "judgment" that "[a]ll feminists must, presumably, be united in thinking that women have been, and still are, wrongly treated [or thought about, or regarded, or valued], and that this should be remedied"). Richards argues that while feminists may agree as a general matter that women's situation is unsatisfactory and should be improved, there is nothing within feminism itself that would account for any particular set of substantive views about what should be changed, why, and how. *Id.*

9. See, e.g., Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 1-2 (1987-88) ("[t]o be a feminist today . . . is to believe that we belong to a society . . . in which women are and have been subordinated by and to men, and that life would be better, certainly for women, possibly for everybody, if that were not the case."). See also JAGGAR, *supra* note 5, at 5 (noting that feminism includes "all those who seek, no matter on what grounds, to end women's subordination").

feminist method, and its relationship to the substantive conclusions feminists reach. In Part III, I use Martha Fineman's work to illustrate the significance of feminist method and the advantages of viewing it as both distinct from substance, and related to it.¹⁰ I further explore this particular methodological understanding of the term feminist by comparing it in Part IV to the method of Catharine MacKinnon. MacKinnon's method merges and becomes virtually indistinct from her substantive theory. In her skilled hands, this method-as-substance view has generated tremendous insights, perhaps made more easily understood by the uncompromising, unqualified nature of her claims. I argue, however, that as a general matter, her view is a less promising model for most feminist scholars than the model that can be derived from Fineman's work.

II. FEMINIST METHOD

Elsewhere I have explored three methods that feminists bring to legal analysis—asking the woman question, feminist practical reasoning, and consciousness raising.¹¹ Together, these methods comprise an enterprise of looking for bias in the way the law relates to women, and proposing changes to eliminate that bias. As a result of engaging in this enterprise, feminists have generated significant new insights and analyses.

Feminist method was first applied by women suffragists when they challenged the self-rule premises of an all-male political system, a system that kept women from serving on juries, working in certain professions, becoming educated, owning property if they married, having custody of their children in the event of divorce, and controlling their own physical and sexual lives.¹² These restraints had been rationalized on the grounds that women were different from men, that women needed special protection, and that the role assigned to them by God and nature was domestic and did not befit them for participation in government, commerce, or higher

10. I both criticize and defend the method/substance distinction in Bartlett, *supra* note 4, at 843-47 (addressing the charge that the woman question is a mask for legal substance or politics).

11. See Bartlett, *supra* note 4, at 831.

12. See Declaration of Sentiments, Seneca Falls Convention, Seneca Falls, New York (July 1848), in HISTORY OF WOMEN'S SUFFRAGE, VOL. I, 1848-1861, at 70-71 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., reprint ed. 1985) (1881-1922); Elizabeth Cady Stanton, Address to the Legislature of the State of New York (February 14, 1854), *in id.*, at 595-605; *United States v. Anthony* (1873), in HISTORY OF WOMEN'S SUFFRAGE, VOL. II, 1861-1876, at 688-89. These documents can all be found in KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 55-65 (2d ed. 1998).