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Feminist Jurisprudence: Why Law Must Consider Women's Perspectives

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Abstract
A growing number of scholars are asking how the law would be different if it took women's points of view and experiences into account. Feminist Jurisprudence argues that we must look at the norms embedded in our legal system and rethink the law. It is about being inclusive of women, and of all people who differ from the norms of the law as it is today. The endeavor will necessarily shake up established relations between family, the workplace and the state. Lawyers, judges, and legislators should get ready for the changes.

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IN SUMMATION:

FEMINIST JURISPRUDENCE: WHY LAW MUST CONSIDER WOMEN'S PERSPECTIVES

By Ann Juergens

A growing number of scholars—and people in general—are asking how the law would be different if it took women's points of view and experiences into account.

They are critical of a justice system that imagines a world where money damages solve most problems. They see social madness in the rule that a person may be sued successfully for negligence if she helps an accident victim imperfectly but not if she ignores the person altogether. They are appalled at how the Internal Revenue Service seems bound by the idea that marriages are of one type: a "head" partner who makes money and another partner who does not. They think lawyers need to listen more carefully to their clients.

If these concerns ring a bell, you may take comfort from Feminist Jurisprudence.

Feminist Jurisprudence argues that we must look at the norms embedded in our legal system and rethink the law. What is "equality" or an "injury" in light of broader understandings of those norms?

An example of the influence of Feminist Jurisprudence is a recent case adopting the "reasonable woman" standard when judging whether a work environment is so hostile as to constitute sexual harassment. In *Ellison* v. *Brady* (924 F. 2d 872 [1991]), the U.S. Court of Appeals for the Ninth Circuit reversed a ruling that a man's behavior toward a woman co-worker was "trivial" and found that women could have found the behavior frightening. The court decided that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." Since it was decided in January, *Ellison* has been cited by federal district courts in Maine and Hawaii and by the Third and Ninth Circuits.

The federal courts finally are recognizing what feminist scholars have been urging for over a decade: women may see things differently from men. Traditional "equal rights" approaches to the treatment of women by the law have not taken our different points of view into account. As a result, the law has tended to give women the right to be the same as men—a goal that is impossible for some and not desired by others.

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For example, in *General Electric Co.* v. *Gilbert* (429 U.S. 125 [1976]) the Supreme Court reasoned that excluding pregnant women from medical benefits was a gender neutral practice, because nonpregnant women were not affected. Congress passed the Pregnancy Discrimination Act in 1982 to begin to remedy that idea.

A more subtle example of "gender neutral" gone awry comes from family law. In the '60s and '70s, many states changed the preference for giving custody to mothers to a "best interests of the child" standard. Studies show that those changes have given custody preference to the parent with the greatest economic power. That custody preference may be traded by the wealthier parent for lower property settlements and child support payments. The effect is that mothers still get custody more often than fathers, but women and their children are more impoverished than ever before by divorce.

Though we aspire to have the government treat us in "gender neutral" ways, the reality is that our lives are gendered. Ignoring that fact may perpetuate an inequality more insidious than before. Rules that prefer the wealthier parent, in a society where women still earn only 70% of what men earn, in practice grant special favor to men.

Feminist Jurisprudence points out that what is neutral or natural for one person is a distortion for another person. Pregnancy, child rearing and other caregiving activities are still treated in the workplace as peculiar occurrences, rather than what they are: commonplace functions that serve the larger good. This reflects the reality that the workplace was designed largely from a traditional male viewpoint.

For instance, state laws may disqualify women from unemployment insurance benefits when they leave a job because of childbirth, though a person laid off because of a broken leg or refusing to work on a religious holiday would be eligible (*Wimberly* v. *Labor & Industrial Relations Commission of Missouri*, 107 S. Ct. 821 [1987] and *Hobbie* v. *Unemployment Appeals Commission*, 107 S. Ct. 1046 [1987]). There's no sense of the unique requirements of childbirth nor of children as a natural part of a worker's life here: there is supposed to be someone at home full-time to take care of them and of other details.

In Minnesota, 90% of judges are men, 80% of lawyers are men, 80% of the state legislators are male, and 72% of law professors are men. This social reality means that women's experiences need advocacy

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and explaining.

The Minnesota Court of Appeals recently took the real facts of a woman's life seriously in a precedent-setting case. In *McCourtney* v. *Imprimis Technology, Inc.* (465 N.W. 2d 721 [1991]), the court acknowledged that it may not always be possible to keep care-giving responsibilities at home separate from the workplace. The judges decided that a woman who was fired for missing too much work to care for a chronically sick baby had not shown a lack of concern for her job and was eligible for unemployment insurance. A woman attorney—Martha Ballou, '87—brought the case, and it was decided two to one by a panel that included a woman judge in the majority.

If the case had been appealed to the Minnesota Supreme Court, the appellants would have faced a new female majority and at least two justices who had primary responsibility for raising children while working. No one expects these distinguished women to make any sudden departures from precedent. Nor should women judges be expected to side automatically with women litigants. Yet we can hope that having a female perspective built in to Minnesota's highest court will mean that not as much time will have to be spent litigating the subtleties of women's experience.

Feminist Jurisprudence asserts that each of us has a perspective and must become more conscious of that perspective. We must learn to take all kinds of other people's experiences into account when arriving at solutions for our clients, our constituents, our communities. One of the values in having women, poor people, and men of color allowed to enter law schools, courtrooms and legislatures is that different lenses are focused on the law.

The power of perspective was illuminated in the '80s by Carol Gilligan, a social scientist who sparked much of the thinking that we refer to as Feminist Jurisprudence. Gilligan wondered why girls and women consistently scored lower than boys and men on tests for moral development. She found that the scales for measuring moral development were developed by men researchers using male subjects.

Those moral development scales were used for years. Yet no one before asked the question that now seems obvious: might the test be unconsciously biased? Might the testers have failed to take into account their male point of view when finding that females were less morally developed than males?

Gilligan's research found that girls more often approached problems with an "ethic of care," while boys more often used an "ethic of justice." Further research has shown that women in our society, when responding to moral dilemmas, are more likely to ask how everyone can be taken care of and relationships maintained, while men are more likely to ask which individual's rights are higher on the justice ladder. Men tend to place a higher value on rules, competition, and reason; women tend to value relationships, nurturing, and empathy.

It is still a matter of debate whether those and other differences between men and women are innate or good—the result of women's ability and training to bear and nurture children—or whether the caring traits have been inculcated in women for the comfort and pleasure of men, the group in power.

A proponent of the latter view is Catherine MacKinnon, another thinker who has inspired much feminist legal scholarship. MacKinnon began prodding the liberal women's movement in the late '70s on grounds that the push for equality had not addressed the real issues of male dominance and the reduction of women to sex objects. She was a law professor at the University of Minnesota when she co-authored the Minneapolis antipornography ordinance, which redefined pornography as discrimination against women and sparked much debate about free speech and violence against women. (The ordinance was passed by the Minneapolis City Council in December, 1983, then vetoed by Mayor Donald Fraser.)

MacKinnon's ideas have been influential. She is credited with developing the now orthodox idea that sexual harassment in the workplace is a form of discrimination. Until the latter half of the '70s, sexual harassment on the job was not considered an actionable injury to women, and several national studies showed that it was very common. Now defined as a violation of Title VII, it was the first area of discrimination law where the perspective of the victim was legally as important as the intentions of the perpetrator. MacKinnon (now a professor at the University of Michigan Law School) points out that sexual harassment law is also the first time in history "that women have defined women's injuries in a law."

Feminist Jurisprudence, which includes the work of many scholars, lawyers, judges, legal workers, legislators, and scientists, is looking at methods of lawyering, at the content of the law, and at the structure of the law. For example, Leslie Bender, a professor at Syracuse University Law School, has developed the idea that torts rules should incorporate care and concern into their standards, rather than focusing solely on reason and caution. Bender will deliver the annual Pirsig lecture at William Mitchell College of Law this fall (see page 16).

The laws of wills and marital property have been critiqued by Prof. Mary Louise Fellows, holder of the Everett Fraser chair at the University of Minnesota Law School, in her inaugural lecture earlier this year. She is the first woman to hold an endowed chair at the entire University of Minnesota, not just the law school.

Fellows said the failure of most states to adopt community property laws, in spite of their income tax advantage, was the result of an unwillingness to give women property rights based on their contributions to the family. In a majority of states, including Minnesota, a husband may have the duty to provide for the "maintenance" of his wife, but her right to "his" wages is contingent on surviving him; nor can she direct the disposition of that money unless she survives him.

The problems with the criminal law from a women's perspective are being debated in the popular press as well as in law journals. Acquaintance rape, the facts of a battered woman's life, the blame rape victims face when prosecuting their rapists, sentencing of sex offenders, and intraspousal immunity from rape are being examined. Many who look at these issues call for change in the law *and* for change in society.

Feminist Jurisprudence is not just for women. It is not about replacing all the male values with female values. It is about being inclusive of women, and of all people who differ from the norms of the law as it is today. The endeavor will necessarily shake up established relations between the family, the workplace and the state. Lawyers, judges, legislators—all of us—should get ready for the changes.