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Cultivating Feminist Critical Inquiry

Anne Dailey
University of Connecticut School of Law

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ANNE C. DAILEY[*]

This short essay offers two observations regarding the continuing importance of feminist journals to the broader law school enterprise. I first address how feminist journals help to foster a culture of critical inquiry on law school campuses that is at the core of our ideal of liberal democratic life. Second, I examine briefly how *feminism*, and feminist law journals in particular, are central to this educational endeavor. The goal of these few pages is to make a *liberal* argument for the continuing importance of these distinctly *illiberal* journals in the legal academy.

Feminist journals clearly do not fit comfortably with prevailing liberal democratic values. Contemporary liberalism defines membership in the political community in strictly gender-neutral terms. One might even say that this principle of gender neutrality reflects liberalism's core mission to eliminate group-based exclusions to citizenship in favor of a principle of universal equal treatment. Because feminist law journals define themselves around a principle of gender difference, they inevitably run up against the basic liberal norms of individual equality and gender neutrality. Yet reconciling feminist law journals with liberal values certainly can be done. These arguments will sound very familiar. A liberal argument for feminist journals can emphasize the journals' remedial aim of rectifying the effects of gender inequality, thus putting feminist law journals in the same category as affirmative action policies or other remedial programs and institutions. Another solution is to fit feminist law journals within the long tradition of liberal interest group pluralism. In the interest group account, individual feminists come together to form an association that reflects the pre-existing commitments and values of its individual members. From this perspective, feminist law journals are no different from the other voluntary partisan associations that sustain liberal democratic life, such as political parties, neighborhood associations, environmental clubs, and religious groups.

But I want to make a different, less conventional liberal argument in favor of feminist law journals that captures something important about these journals that is missing from both the remedial and the interest-group accounts. I want to stress how feminist law journals, like feminist institutions and associations more generally, play a formative, *educating* role in the lives of individuals, particularly students. Feminist journals do not just passively reflect the pre-existing interests of their members; they *teach*. Nor is their goal simply to rectify past injustices. Rather, they have a

[*] Professor of Law, University of Connecticut School of Law.

continuing educative role to play in the institutional life of the law school and, consequently, in the broader liberal democratic culture.

So here is my stronger claim: feminist journals help to foster a culture of critical inquiry on law school campuses that is directly tied to the skills of liberal citizenship and the general health of a liberal democratic polity. To the extent feminist law journals help to *maintain group difference*, they are seen—in the conventional view—as violating the liberal norm of individual equality. But *maintaining difference* in the sense of maintaining associations and institutions of *dissent* is also a central part of modern liberalism and essential to the survival of liberal democratic values over time. The modern ideal of free speech, which notably first emerged in a dissent by Justice Holmes,[1] grew out of the progressive-era belief in the importance of critical inquiry—the *scientific method,* as it was then called—to the flourishing of a modern democratic polity.[2] The emergence of robust protection for free speech in the early twentieth century reflects in part a concern for the absence of critical inquiry. In the absence of critical inquiry, the ideal of democratic self-government inevitably withers over time into passive obedience, conformity, and, at its most extreme, political tyranny. Our modern constitutional system of individual rights and democratic institutions is designed not simply to tolerate critical dissent, but to promote it as a fundamental principle of individual liberty and collective self-government in a pluralistic society.

Yet the skills of critical inquiry do not spontaneously emerge in the course of human development; they must be *learned.* Schools, more than anywhere else, are where these habits of thought are first taught in a systematic way. Law school is the apex of this education in critical inquiry. But law school has its own forms of intellectual domination and tyranny, of stifling dissent and criticism, often in the form of neutrality, appeals to objectivity, formal even-handedness, or procedural regularity—or even, simply, the right answer. Feminist law journals are among those places where a spirit of critical inquiry into the mainstream educational enterprise is acquired and sustained. At their best, these journals are not simply ciphers for pre-existing commitments, but places that teach a deeper kind of critical inquiry than the standard classroom education in thinking like a lawyer. Feminist journals—in all their particularity, their dissenting tone, their critical stance, their intolerance of orthodoxy, the illiberal character of their very being—are an essential institutional component of what makes a truly liberal democratic educational enterprise come alive.

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[1] *See* Abrams v. United States, 250 U.S. 616 (1919).

[2] *See* Robert Cover, The Left, the Right and the First Amendment: 1918-1928, 40 Md. L. Rev. 349 (1981).

As institutions, feminist law journals can be places of belonging. Identities are formed, experiences are shared, a spirit of comradeship, connection, and shared purpose can emerge. They are places that allow some students to feel at home in the broader educational institution. But they are also profoundly uncomfortable places at times. Their very existence is a disruption. True dissent, as we have always known, is disruptive. It is always, to some degree, subversive of social order and friendly relations. Dissent sows uncertainty and anxiety. Dissenting legal opinions always hint at the possibility of future reversals. A culture of critical inquiry means that feminists will instill uncertainty, conflict, and doubt not only within the mainstream academy but also among ourselves. This is a sign that feminism is maturing rather than stagnating. Managing this kind of critical self-reflection and internal disruption without falling back upon a policy of censorship or exclusion, or a politics of apathy, alienation, or retaliation, is ultimately what defines the institutions that sustain a truly liberal democratic culture.

Up to this point, nothing I have argued speaks in favor of a *feminist* journal and so I come to my second point. It is possible that any critical perspective would do just as well as feminism at fostering critical inquiry: a Journal of Law and Poverty, for example, or Law and Psychoanalysis, or Law and Theology. In part it is true that the education in critical inquiry I am describing here is more a deliberative process than a particular outcome. Its importance lies in the questioning of accepted norms, whatever they may be. But I also want to argue that there is a deeply-rooted historical connection between this process of critical inquiry and *feminism*. Feminism offers a particular form of critical inquiry that questions the ideal of the rational, unified, autonomous self. More than any other critical discipline, feminism offers a well-developed tradition of *self*-inquiry and *self*-criticism.

An example may help to elucidate the uniqueness of the education in critical inquiry that the feminist tradition offers. My hometown paper recently ran the headline, Prostitute Testifies, in large bold letters, and below this was placed a drawing of a woman weeping on the witness stand.[3] The article reported that, in the course of a municipal corruption investigation in a nearby town, the federal government uncovered evidence of sexual crimes committed by the Mayor against two young girls. At his trial the woman, referred to as Jane Doe, testified that she began having sex with the Mayor in exchange for money when she was nineteen, several times a week, in order to sustain her drug habit.[4] According to Jane Doe, in recent years the Mayor began to ask her to bring him younger and younger girls until she finally provided him with her eight-year-old daughter and

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[3] Manuala DaCosta-Fernandez, Prostitute Testifies, New Haven Register, Mar. 14, 2003, at 1, *available at* http://www.zwire.com/site/news.cfm?newsid=7370176&BRD=1281&PAG=461&dept_id=517515&rfi=8.

[4] *Id.*

ten-year-old niece for sexual encounters.[5] The Mayor was convicted in federal court on seventeen counts related to the child sexual abuse, and was sentenced to thirty-seven years in prison.[6] The mother in this story pled guilty to state and federal charges in an effort, she says, to turn her life around.[7] She has been sentenced to ten years in prison and an additional three years of supervised release during which time she is to have no contact with the children.[8] It is possible that the state will seek to terminate her parental rights altogether.

How should the law understand Jane Doe, a mother who willingly provided her own pre-adolescent daughter and niece for sexual services in order to sustain her drug habit? Traditional accounts of the "good mother" obviously do not work. Neither do straightforward accounts of "the prostitute" or "the drug addict." Clearly there are multiple critical perspectives that intersect here, including race and poverty, which cannot be separated from the issue of gender. But I want to suggest tentatively that the tradition of feminist scholarship has something uniquely important to add to our understanding of individual choice and human agency as they were put so tragically on display in the testimony of Jane Doe. It is simply not possible, I suggest, to understand the complex interplay of sexual exploitation, poverty, race, gender, substance abuse, and spectacular maternal failure in the life of this woman without the kind of critical inquiry into individual choice and personal agency that feminism brings.

Conventional analysis would view this woman as a transgressor. In her line of work, she transgresses norms of female sexuality. In her parental role, she transgresses norms of maternal love and protection. She is the "other" mother in the story of King Solomon and the two prostitutes, the one who cries out, "Cut the baby in two!"[9] Yet in another, more disturbing way, she also fulfills a social norm of woman as the very embodiment of transgression, as disruptive, uncontrollable, sexually promiscuous, dangerous, subversive, *in revolt*. In this role, women are as perceived and treated as dangerous, sexual and irrational beings that pose a direct threat to masculine rationality and power. This woman's testimony indeed unseats the most powerful person in her town, in much the same way another young woman almost unseated the president of the United States several years ago.

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[5] *Id.*

[6] Michelle Tuccitto, Giordano Gets 37 Years, New Haven Register, June 14, 2003, *available at* http://www.zwire.com/site/news.dfm?newsid=8314206&BRD=1281&PAG=461&dept_id=517515&rfi=8.

[7] DaCosta-Fernandez, *supra* note 3.

[8] Michelle Tuccitto, Giordano's Prostitute Gets 10 Years in Jail, New Haven Register, Oct. 18, 2003, at A1.

[9] *See* Anne C. Dailey, The Judgment of Women, *in* Out of the Garden: Women Writers on the Bible 142 (Christina Buchmann & Celina Seigel eds., 1994).

My hometown newspaper attempts to reassure its readership by referring to Jane Doe as the "prostitute," thereby distancing us from her. But the irrational transgressions of this woman cannot be so easily contained. Nor, I would argue, should they be.

I do not mean to romanticize in any way the very real and life-long suffering that Jane Doe caused these children. But there is something distinctly *feminist*, I would argue; in insisting that this woman's tragic failures lie at the extreme end of a continuum that ties us to her. There is something distinctly feminist about a critical perspective that recognizes the conflict, disruption, and revolt that lie just beneath the surface of ordinary, rational life in ways that challenge our stated beliefs and desires. Only a very few commit the egregious kind of child abuse that occurred in this case. But we all do experience, to a greater or lesser extent, a capacity for giving way to primitive fears, uncontrollable aggressions and instinctual needs. For most of us the impulses are not so overwhelming that they cannot be resisted or contained. But the people who do succumb are not just prostitutes, pedophiles, or soldiers of war; they are also ordinary men and women. This insight, one that I would argue is at the core of feminist inquiry, has profound implications for a political culture that aspires to the ideal of personal and collective self-government.

As feminism matures, and as it moves away from a one-dimensional view of women as victims of male oppression, it has turned the lens of critical inquiry inward. In trying to understand how the law should treat Jane Doe, we have access to a rich tradition of feminist work on domestic violence,[10] pornography,[11] female genital surgeries,[12] and sexual harassment.[13] Either directly or indirectly, this feminist scholarship explores themes relating to identity, autonomy, selfhood, agency, and choice, themes that challenge conventional assumptions about the "reasonable person," individual autonomy, and rational decision making in law.[14] Critical race

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[10] *See, e.g.*, Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1991); Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973 (1991).

[11] *See, e.g.*, Catharine A. MacKinnon, Feminism Unmodified (1987); Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097 (1994).

[12] *See, e.g.*, Isabelle Gunning, Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 Colum. Hum. Rts. L. Rev. 189 (1992).

[13] *See, e.g.*, Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998).

[14] *See generally* Anne C. Dailey, Feminism's Return to Liberalism, 102 Yale L.J. 1265 (1993) (book review); *see also* Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304 (1995); Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts, and Possibilities, 1 Yale J.L. & Feminism 7 (1989).

feminists have been at the forefront of exploring questions of multiple selves.[15] Psychoanalytically-minded legal feminists, influenced by the work of Carol Gilligan, Nancy Chodorow, and Judith Butler, have brought an interdisciplinary approach to the study of individual choice and autonomy.[16]

This turn inward might seem risky; one could easily conclude that it runs the risk of fostering a "blame-the-victim" mentality. But rather than subverting feminist goals, I would argue that this inward turn in feminist scholarship provides a model for a deeper, more complex view of the emotional depths and complexities of individual decision making in law and liberal theory, and for recognizing the vital importance of critical inquiry and self-reflection to the ideals of individual autonomy and collective self-government in law. It is my hope that feminist law journals will continue to foster and defend a culture of criticism and self-criticism, however uncomfortable and disruptive this may be or however potentially threatening to the settled legal order. The survival of a liberal democratic polity committed to meaningful choice and democratic self-government could depend on the education in critical self-inquiry that feminist law journals are uniquely situated to provide.

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[15] *See, e.g.*, Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990).

[16] *See, e.g.*, Martha Grace Duncan, "So Young and So Untender": Remorseless Children and the Expectations of the Law, 102 Colum. L. Rev. 1469 (2002).