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***Feminist Legal Academics: Changing the Epistemology of
American Law Through Conflicts, Controversies
and Comparisons***

*(Chapter 1N: Gender and Careers in the Legal Academy, Ulrike Schultz, editor, Hart
Publishing-Onati Series, forthcoming)*

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Feminist Legal Academics: Changing the Epistemology of American Law Through Conflicts, Controversies and Comparisons

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**(to be published in *Gender and Careers in the Legal Academy*,
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I. Introduction: Generations of Women Law Professors Making New Legal Memes

There are many ways that the story of women's entrance to the American law professoriate can be told. It is important to note the numbers of first women at various stages of legal history, years of first entry, first tenured professors, first deans and administrators,² and other important demographic milestones.³ It is

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² Herma Kay, 'Women Law School Deans: A Different Breed or Just One of the Boys?' (2002) 14 *Yale Journal of Law and Feminism* 219.

³ Herma Kay, 'What I Learned About Feminism From the Early Women Law Professors,' 9 *Issues in Legal Scholarship* 2 (2011); Herma Kay, *The First Few and Those Who Followed: Women Law Professors in the United States During the Twentieth Century* (forthcoming); Herma Kay, 'The Future of Women Law Professors,' (1991) 77 *Iowa Law Review* 5; Cynthia Fuchs Epstein, *Women in Law*, Ch. 12 (New York: Basic Books, 1981); Donna Fossum 'Law Professors: A Profile of the Teaching Branch of the Profession,' 1980 *American Bar Foundation Research Journal* 501; D. Kelly Weisberg, (1979) 'Women in Law School Teaching: Problems and Progress, 30 *Journal of Legal Education* 229; Marina Angel, 'Women in Legal

important to describe and account for the location of women law professors in the much stratified profession of law teaching in the United States,⁴ from “doctrinal” research producing full professors to clinical professors, lawyering skills (legal writing) professors, adjuncts and academic counselors and administrators.⁵ It is

Education,” (2012) 80 University of Missouri-Kansas City Law Review 711; Ann McGinley, ‘Reproducing Gender on Law Faculties,’ (2009) Brigham Young University Law Review 99; Nancy Levit, ‘Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics,’ (2001), 49 University of Kansas Law Review 775; Meera Deo, ‘Looking Forward to Diversity in Legal Academia,’ (2014), 29 Berkeley Journal of Gender Law and Justice 352. For a more conservative and male-oriented history of the American legal professoriate see Stephen B. Presser, *Law Professors: Three Centuries of Shaping American Law* (St. Paul, Minn.: West Publishing Co. 2017).

⁴ Herma Kay’s important work, *ibid*, focuses exclusively on women law professors, beginning with Barbara Nachtrieb Armstrong (1919, Berkeley), who were appointed to tenure track positions at the American Bar Association/Association of American Law Schools formally recognized schools, without paying much attention to the early women practitioners who educated other women in the late 1880s and early 1890s, either in law office settings (where many men were still learning their trade) or in unaccredited schools. Notably, two women founded a law school just for women (Washington College of Law-now American University College of Law- in Washington DC in 1898), fueling a debate about whether lawyers (like doctors) should learn law separately from men or not. See Carrie Menkel-Meadow, ‘The Feminization of the Legal Profession: The Comparative Sociology of Women in the Legal Profession,’ in R. Abel and P. Lewis, (eds.) *Lawyers and Society Vol. III Comparative Theories* (Berkeley, University of California Press, 1989); Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America: 1638 to the Present* (Boston: Beacon Press, 1986); Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge, Mass: Harvard University Press, 1998); Virginia G. Drachman, *Women Lawyers and the Origins of Professional Identity in America* (Ann Arbor, University of Michigan Press 1993); see also Regina Markell Morantz-Sanchez, *Sympathy and Science: Women Physicians in American Medicine* (New York: Oxford University Press 1985); Penina Migdal Glazer and Miriam Silver, *Unequal Colleagues: The Entrance of Women into the Professions* (New Brunswick, New Jersey: Rutgers University Press 1987). In fact, many of the first women teaching law did so from practice or in non-professorial capacities so statistics on the first women law teachers are difficult to compute and different from the first women who were formally recognized as “legal academics” when more conventional or elitist standards are used as the measure.

⁵ See Marina Angel, “Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms,” (2006), 26 UCLA Chicano/a Latino/a Law Review 169; Marina Angel, “The Class Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure,” (2000) 50 Journal of Legal Education 1.

instructive to compare women law professors with women's entrance into other professional and academic fields (medicine, science,⁶ literature, social science, etc.). I leave these topics for others to pursue. Our standard story is one of growing numbers, continued stratification, but also increased diversification (race, ethnicity, if not class and political affiliation⁷) and now multiple generations of women law professors contributing to a vastly transformed understanding of what it means to study, research, define, interpret and teach legal concepts (and practice them) in American (post-graduate/professional certification) legal education.⁸

In this Chapter I will describe the inter-generational contributions of the first few decades of women law professors who have created a contested "canon" of new understandings of legal concepts in American jurisprudence and legal practice.⁹ I describe here the way in which several generations of women law professors (some

⁶ See recent obituary of the first woman tenured professor at the Massachusetts Institute of Technology, Mildred Dresselhaus, *The Queen of Carbon Dies at 86*, Natalie Angier, *New York Times*, February 23, 2017.

⁷ American Bar Association, Section on Legal Education and Admissions to the Bar, *ABA Approved Law School Staff and Faculty Members, Gender & Ethnicity*, Fall 2013, available at http://www.americanbar.org/groups/legal_education/resources/statistics.html; James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013* (2015) (Northwestern Law & Econ. Research Paper No. 15-07, available at <http://ssrn.com/abstract=25816575>; Richard Chused, 'The Hiring and Retention of Minorities and Women on American Law School Faculties,' (1988) 137 U. Penn. Law Review 537; Deborah Jones Merritt and Barbara F. Reskin, 'Sex, Race and Credentials: The Truth about Affirmative Action in Law Faculty Hiring,' (1997) 97 Columbia Law Review 199.

⁸ The American Association of Law Schools Section on Women in Legal Education is currently completing a project of oral histories of several generations of women law professors, starting with Chairs of the Section since its founding, and law professors who have led theory development, course instruction and leading litigation strategies and cases.

⁹ As evidence of this considerable canon of work, it is essential to consult two of the first great compilations of feminist legal theory and writing about the law: F.C. De Coste, K.M. Munro and Lillian MacPherson, *Feminist Legal Literature: A Selective Annotated Bibliography* (New York: Garland Publishing 1991) and Betty Taylor, Sharon Rush and Robert J. Munro, *Feminist Jurisprudence, Women and the Law, Critical Essays, Research Agenda and Bibliography* (Littleton, Colorado: Rothman & Co. 1999).

working with legal practitioners) have forged new legal ideas or “memes” (cultural units of understandings¹⁰), and legal causes of action that have reframed not only “women’s issues” (reproductive rights, employment and labor rights, family law, violence, rape and criminal law, as well as constitutional jurisprudence and different conceptions of “equality”), but have also contributed new conceptions or interpretations of mainstream legal concepts (e.g. in contracts, property, and torts etc.¹¹).

Those of us who have written about these developments over the years all acknowledge the inter-generational differences in meanings attributed to our goals as participants in the making of new legal epistemology¹²—the interpretation of law

¹⁰Richard Dawkins, *The Selfish Gene* (1976) Oxford: Oxford University Press.

A “meme” (the concept derived from evolutionary biology and “gene”, as a unit of transmission of genetic material) is now described and used in cultural terms to mark an “idea, concept, behavior, style, or practice” (now even picture, symbol, logo or internet phrase) that is transmitted within a culture to describe phenomena in a compressed and influential sphere of influence. “Memes” are now also applied to intellectual ideas and concepts, not only in the sciences, but also in all spheres of learning, including law, as scholars hope to “create” significant new ideas and then track their influence in creating new knowledge, as well as mapping their influence, transformation, acceptance or rejection. I use the term here to describe exactly what the first generation of legal feminist theorists and academics did to law study and practice, in creating new legal theories, new causes of action, new forms of legal education and method, and contested categories of meaning and interpretation in law. The study of “memes” has become part of a larger field of study of human creativity, see e.g. Mihalyi Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention* (New York: Harper Collins 1996); Howard Gardner, *Creating Minds: An Anatomy of Creativity* (New York: Basic Books 1993); Carrie Menkel-Meadow, “Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?” (2001) 6 *Harv. Neg. L. Rev.* 97-144.

¹¹ See Carrie Menkel-Meadow, ‘Mainstreaming Feminist Legal Theory,’ (1992) 23 *Pacific Law Journal* 1493.

¹² Carrie Menkel-Meadow, ‘Women’s Ways of Knowing Law: Feminist Legal Epistemology, Pedagogy and Jurisprudence,’ in N.R. Goldberger, J.M. Tarule, B.M. Clinchy & M.F. Belenky (eds.) *Knowledge, Difference and Power: Essays Inspired by Women’s Ways of Knowing* (New York, Basic Books, 1996); Martha Chamallas, *Introduction to Feminist Legal Theory* (3rd ed., New York, Aspen Law and Business, 2013); Cynthia Grant Bowman and Elizabeth M. Schneider, ‘Feminist Legal Theory, Feminist Lawmaking and the Legal Profession,’ (1998) 67 *Fordham Law Review* 249; Patricia Cain, ‘Feminist Jurisprudence: Grounding the Theories,’ (1989-90) 4

and doctrine, the creation of new concepts, causes of actions, or legal “memes,” the creation of new courses and methods for learning law,¹³ whether and how our new epistemology should be integrated (or more controversially “assimilated”) into mainstream American law doctrine and education,¹⁴ how we have or have not influenced the legal academy and legal thought generally, as well as legal practice and law reform measures, and what lessons we offer for future generations of “outsiders” who are increasingly populating our profession with more diverse bodies and ideas.

It is common to speak of at least four stages of modern American legal feminism as theories in the development of different conceptions of women’s issues with and in the law. The first generation, now called “equality” feminism, focused on seeing the equivalence of men and women as human beings entitled to many “equal” rights, including entrance into the Bar itself¹⁵ (and later, the professoriate). Early entrants to both the bar and the professoriate concentrated on seeing women and men as entitled to the same legal rights, and both litigated and educated to achieve as much gender parity as possible in the doctrine of law itself,¹⁶ in law school classrooms, and in the practice of law. Our most distinguished first explicitly self-identifying feminist law professors, Ruth Bader Ginsburg, Herma Kay, Barbara

Berkeley Women’s Law Journal 191; Katherine T. Bartlett (1990) “Feminist Legal Methods,” 103 *Harvard Law Review* 829.

¹³ Katherine Bartlett, ‘Feminist Legal Methods,’ (1990), 103 *Harvard Law Review* 829; Carrie Menkel-Meadow and Shari Seidman Diamond, (1991) ‘The Content, Method and Epistemology of Gender in Socio-Legal Studies,’ 25 *Law & Society Review* 221.

¹⁴ Carrie Menkel-Meadow, ‘Mainstreaming Feminist Legal Theory,’ (1992) 23 *Pacific Law Journal* 1493.

¹⁵ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1872). Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (Stanford: Stanford University Press, 2011).

¹⁶ In the early years of the equality movement, much attention was spent on changing male pronouns and language in statutes to either more inclusive or neutral pronouns (s/he, they, he or she), a movement calling for “gender neutrality” in the law. This was uncontroversial in some subject areas, but much more controversial in others (definitions of rape, pregnancy and reproductive rights, etc.) and began to expose the difficulty of assuming true existential “equality” or equivalence where trying to achieve legal substantive equality (sometimes requiring “different” or “special” treatment, see below).

Babcock, Wendy Williams, Nadine Taub, Rhonda Copelon and others (in the late 1960s and 1970s) began work on the first women's rights and sex discrimination casebooks, development of legal strategies for claims and assertion of "equal rights" in legislatures and courts, and courses that focused on women's issues in the law (employment, reproductive rights, criminal law, domestic relations and an assortment of laws that either ignored women or excluded them from legal rights and responsibilities that men had.¹⁷)

The second generation (of which I am a part), often educated in the exciting and turbulent years of the growth of the "second wave" of feminism in the larger American political and social culture¹⁸ and the development of "women's studies" as an academic field,¹⁹ later became known as "difference" or "cultural" feminism, because of its focus on the differences, rather than the similarities, between men and women (including the treatment of pregnancy and child-leave legal issues) and the controversial valorization of "women's particular values" (to be brought to law, culture, and other institutional aspects of organizational and social life).

As more fully outlined below, in a series of important legal issues and cases, these generations and the issues they represented engaged in a variety of creative conflicts about how many legal issues should be treated (prostitution,²⁰

¹⁷ Reed v. Reed, 404 U.S. 71 (1971); Elizabeth Schneider, 'The Dialectics of Rights and Politics: Perspectives from the Women's Movement,' (1986) 61 *NYU Law Review* 589.

¹⁸ Betty Freidan, *Feminine Mystique*, (New York: W.W. Norton, 1963); Gloria Steinem, *Outrageous Acts and Everyday Rebellions*, (New York: New American Library, 1983); Germaine Greer, *The Female Eunuch* (New York: Harper Collins 1970); Kate Millett, *Sexual Politics*, (New York: Columbia University Press, 1969); Carole Pateman, *The Sexual Contract* (Stanford University Press, 1988); Sara Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (1980) (chronicling "second wave" feminism).

¹⁹ Margaret Anderson, *Thinking About Women: Sociological Perspectives on Sex and Gender* (New York: Macmillan Publishing, 1993); Suzanne Kessler and Wendy McKenna, *Gender: An Ethnomethodological Approach* (Chicago: University of Chicago Press (1978); Beth B. Hess and Myra Marx Ferree, *Analyzing Gender: A Handbook of Social Science Research* (Newbery Park, Calif., Sage Publications, (1987); Carol Tavris, *The Mismeasure of Women* (New York: Simon & Schuster: 1992).

²⁰ See e.g. Deborah Rhode, *Justice and Gender* (1989) pp. 253-257; Dorchon Leidholdt, 'Prostitution: A Violation of Women's Human Rights,' (1993) 1 *Cardozo*

pornography,²¹ rape, ²² pregnancy,²³ and employment²⁴), resulting in some fractures and breaks in theory, ideology and practice.²⁵ As I review more fully below, some of these complex controversies and debates recapitulated, for those of us who knew women's history, the divisions in the nineteenth century women's suffrage movement in the United States (which divided over anti-slavery abolitionist and "women's" rights).²⁶ If women were different from men in some ways (both physical/biological and socialized behaviors), how the law should treat these differences was very complicated. And this generation also began to observe, though comparative law and social practice study, that different legal systems treated such differences differently (e.g. pregnancy and child care and employment policies in Europe). ²⁷

Women's Law Journal 133; Amy Cohen & Aya Gruber, 'Governance Feminism in New York's Alternative "Human Trafficking Intervention Courts,"' in *Governance Feminism: A Handbook* (Janet Halley, Prabha Kotiswarn, Rachel Rebouche & Hila Shamir, eds, University of Minnesota Press, forthcoming).

²¹ Catherine MacKinnon, 'Not a Moral Issue,' in *Feminism Unmodified* (Harvard University Press, 1987); Andrea Dworkin, *Pornography: Men Possessing Women* (1989); *American Booksellers v. Hudnut* (771 F.2d 323 (7th Cir 1985), *aff'd* 106 Sup. Ct. 1172 (1986))

²² Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis in Feminist Legal Theory,' (1984) 63 Texas Law Review 387.

²³ Sylvia Law, 'Rethinking Sex and the Constitution,' (1984) 132 U. Penn. Law Review 955.

²⁴ See conflicts over women's employment in the case of *EEOC v. Sears*, 628 F. Supp 1264 (N. D. Ill. 1986), *affirmed* 839 F. 2d 302 (7th Cir. 1988) and protective labor legislation, discussed more fully in the text and in Richard Chused and Wendy Williams, *Gendered Law in American History* (Durham, North Carolina: Carolina Press, 2016), chapters 9 and 10.

²⁵ For representative articles and cases of this period see Frances Olsen (ed.) *Feminist Legal Theory, Vols. I and II* (Aldershot: Dartmouth, 1995); Katherine Bartlett & Rosanne Kennedy (eds.) , *Feminist Legal Theory: Readings in Law and Gender* (Boulder, Colorado: Westview Press (1991); Elizabeth Schneider & Stephanie Wildman, *Women and the Law Stories* (New York: Foundation Press 2011).

²⁶ Ellen Dubois, *Feminism and Suffrage: The Emergence of an Independent Woman's Movement in America 1848-1869* (1978) (now called "first wave feminism in American history"); Ibid, Chused and Williams, chapters 1 and 8.

²⁷ Barbara Bergmann, *Saving Children from Poverty: What the United States Could Learn from France* (1996).

Differences themselves were highly contested by feminist law professors and theorists as feminist theorist and activist Catherine MacKinnon focused on an explanatory sexual “dominance” by men approach²⁸ and others attributed “difference” to women’s childbearing potential or more socialized “caring” natures.²⁹ Although present (and latent in some ways) in the first generation, the claim by lesbian feminist law professors³⁰ that first generation feminism assumed heterosexuality in its theory and practice, began to sow the seeds of complexity of identity, as an assumed “essentialism” of “womanhood” (resulting in more divisions in legal theory development and practice.)

Second generation feminism also produced more explicit courses in law schools on “women’s rights/ gender discrimination,³¹ feminist legal theory, women’s legal clinics (e.g. domestic violence, ³² employment discrimination,³³ etc.)

²⁸ Catherine Mackinnon, ‘Difference and Dominance,’ in *Feminism Unmodified*, (Cambridge, Mass: Harvard University Press, 1987); Catherine MacKinnon, ‘Reflections on Sex Equality Under Law,’ (1991) 100 Yale L. J. 1281..

²⁹ Robin West, ‘Jurisprudence and Gender,’ (1988) 55 University Of Chicago Law Review 1; *Id. Caring For Justice* (New York: NYU Press, 1997) ; Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on A Women’s Lawyering Process,’ (1985) 1 *Berkeley Women’s Law Journal* 39; Martha Fineman, ‘Challenging Law: Establishing Differences: The Future of Feminist Scholarship,’ (1990), 42 *Florida Law Review* 25.

³⁰ Rhonda R. Rivera, ‘Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,’ (1978) 30 *Hastings L.J.* 799; Patricia Cain, *Rainbow Rights, The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* (2000); Nan Hunter, ‘Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws,’ (2000) 17 *N.Y.L. Sch. J. Hum. Rts.* 565-587.

³¹ Uses of the words “sex” discrimination, “gender” discrimination and “feminist” or “gender studies and theory” roiled some of the early years of academic theory development and teaching in the field. None of these terms were conceptually “neutral.” Whether to problematize “sex” as a biological or socialized category and whether to include men and masculinity studies as a more expanded “gender discrimination” concern became significant in theory building and litigation strategies., Ann C. McGinley and Frank Rudy Cooper, *Masculinities and the Law* (New York: NYU Press, 2012).

³² Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press 2002).

³³ Laura Sager’s Civil Litigation Employment Discrimination clinic at NYU is decades old.

and more participatory and experiential methods of teaching (drawing from the women's liberation movement method of "consciousness raising"³⁴).

A deep challenge to legal feminism came (as it did to feminism in the United States generally), from women of color, various ethnic, racial, religious and "non-white" women, and also women from working classes who argued in a variety of venues that American legal feminism was "essentialist," middle class, and "white."³⁵ With the increased (though still highly marginalized) representation of more diverse women in the legal professoriate, theorists and activists Angela Harris, Patricia Williams, Kimberle Crenshaw, Mari Matsuda, and others³⁶ interrogated the assumptions of an "essential" feminist theory and called for both new conceptualizations (e.g. "intersectionality"³⁷) and new legal claims in a wide variety of legal subjects (e.g., criminal, family, discrimination and employment law). As more fully canvassed below, these law professors were often identified with other legal movements (e.g., critical legal studies, ³⁸ critical race theory,³⁹ lat-crit

³⁴ Carrie Menkel-Meadow, 'Women's Ways of "Knowing" Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence, in *Knowledge, Difference and Power* (Bilenky, Clinchy, Goldberger & Tarule, editors) New York: Basic Books, 1996.

³⁵ Angela Harris, 'Race and Essentialism in Feminist Legal Theory,' (1990) 42 *Stanford Law Review* 581; Elizabeth Spelman, *Inessential Woman* (1988); bell hooks, 'Essentialism and Experience,' (1991) 3 *American Literary History* 172; Gloria T. Hull, *All the Women Are White, All the Blacks are Men, But Some of Us Are Brave* (Feminist Press: 1982); Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics (1989), University of Chicago Forum ; C. Moraga & G. Anzaldúa, (eds) *This Bridge Called My Back: Writings by Radical Women of Color* (2nd ed. 1983).

³⁶ Mari Matsuda, *Where is Your Body?* (Boston, Mass: Beacon Press, 1996); Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991).

³⁷ Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity, Politics and Violence Against Women of Color,' (1991) 43 *Stanford Law Review* 1241.

³⁸ Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies and Legal Education, or the "Fem-Crits" Go to Law School,' (1988) 38 *Journal of Legal Education* 61

³⁹ Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas, (eds.) *Critical Race Theory: The Key Writings That Formed the Movement* (1995).; Adrienne Wing, *Critical Race Feminism: A Reader*, 2nd ed. (2007).

theory⁴⁰), which provoked a turn to “identity” in legal theory and practice.⁴¹ Whether called “multi-cultural feminism”⁴² or diversity feminism, the contributions of a far more diverse professoriate expanded legal ideas, legal claims and a variety of new courses and programs in American legal education.⁴³ Within this context a series of claims and arguments were made that gender (sociological) or sex (biological) could and did have different effects when added to other biological, socially constructed, or identity characteristics, sometimes called “sex plus” theories and practices.

Another major challenge disrupted the development of the ideas of modern legal feminism, when fueled by “identity” politics, “queer theory,”⁴⁴ and concerns about “essentialism,” when linked to the “post-modern” turn in academic theory generally. Now called “post-modern feminism,”⁴⁵ borrowing from theories of post-modernism in literary and philosophical scholarship more generally, these theories challenge conventional categories of law, knowledge and epistemology generally. At least one post-modern feminist (and gender and trans-gender theorist) has called

⁴⁰ Richard Delgado & Jean Stefanic, *The Latino/a Condition: A Critical Reader* (2nd ed. 2010); Margaret Montoya, ‘Mascaras, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse,’ (1994), 17 *Harvard Women’s Law Journal* 185 (1994).

⁴¹ Devon Carbado and MItu Gulati, *Acting White: Rethinking Race in Post-Racial America* (Oxford Univ Press 2013); Ian Haney Lopez, *White By Law* (New York: NYU Press, 1996).

⁴² Ellen Dubois and Vicki Ruiz, (eds.) *Unequal Sisters: An Inclusive Reader in U.S. Women’s History* (New York: Routledge, 4th ed. 2007).

⁴³ Carrie Menkel-Meadow, ‘Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law,’ (1987) 42 *University of Miami Law Review* 29 (1987).

⁴⁴ Martha Albertson Fineman, Jack E. Jackson and Adam Romero, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Farnham: UK; Ashgate, 2009).

⁴⁵ Mary Jo Frug, *Postmodern Feminism* (New York: Routledge, 1992); Judith Butler, *Gender Trouble: Feminism and the subversion of Identity* (New York: Routledge 1990); Ann Scales, ‘Post-structuralism on Trial,’ in Fineman, *ibid*, note 44.

for a “break” from feminism⁴⁶ and a rethinking of all categories that are reified in law and gender difference.

In the rest of this chapter I will elaborate on how the increased numbers and diversification of the American legal professoriate to include women, of many races, cultures, ethnicities and classes, has altered, contributed to and challenged traditional legal ideas or “memes”, including challenges to legal concepts, legal practice and also to legal education. As I am a participant-observer in these processes, it is important to remember that this narrative is likely contested by others who have also contributed to or studied these processes, and also to see a parallel and more conventional story that simply recounts the addition of more women professors, many of whom seek a more simple assimilation to the law professoriate, as doctrinal or clinical or lawyering skills professors, in a wide variety of subjects which, to them, are not necessarily affected by or influenced by feminist theoretical concerns. I will argue here, however, that whatever their sources, an important number of ideas and methods have indeed been “mainstreamed” from feminist legal thought into American law and legal education.

II. The First Generation: Equality

Women began trickling into the legal academy one by one in the early to mid-twentieth century, after the first few women lawyers had won their battles to study law, either as apprentices to relatives or other progressive men, and state by state to gain licensure. In the United States legal education had been primarily a private, apprenticeship process until well into the latter half of the nineteenth century, when men could enter the profession either through apprenticeship or law study. The early part of the twentieth century in American legal education was characterized by several controversial projects to “professionalize” law training by requiring some admissions standards, beginning to require college degrees before law study, and the installation of the famous “Langdellian method” of inductive study of cases in a

⁴⁶ Jane Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006); writing also as Ian Halley, see ‘Queer Theory by Men,’ in Fineman, *Ibid*, note 44.

law school to derive common law principles.⁴⁷ There continued to be a bifurcation of law study in law offices and law schools, and also between private proprietary for-profit schools and university law schools for decades before women finally were admitted to formal law study.

Unlike in medicine, although a few law schools attempted to be for “women only” (Portia Law School in Boston and Washington College of Law in the District of Columbia in the late 19th century), a few law schools began to admit women, alongside men, in the early 20th century, but with a few exceptions (University of Michigan⁴⁸) most of the elite schools (Ivy League) in the United States did not admit women until mid-century. Harvard, one of the latest to admit women (in 1950), hired, in 1947, its first women law professor, the brilliant Soia Mentschikoff⁴⁹ (born in Russia, but educated in the United States, and later married to one of the most distinguished American law professors, Karl Llewellyn (drafter of the Uniform Commercial Code) before women law students were admitted. If anyone exemplifies this first generation it was Dean Mentschikoff—brilliant as a legal practitioner, academic, teacher and scholar and an expert in traditionally male fields—commercial and labor law and Socratic legal method. Though she served as a role model to many women in academe (notably former Dean (Berkeley) Herma Kay

⁴⁷ Robert Stevens, *Law School: Legal Education in America from the 1850's to the 1980s* (Chapel Hill, University of North Carolina Press, 1983); Carrie Menkel-Meadow, ‘Too Little Theory, Too Little Practice: Steven's *Law School*,’ 1985 *Am. B. F. Res. J.* 675-690. Tom C. Grey, ‘Langdell's Orthodoxy,’ (1983) *University of Pittsburgh Law Review*.

⁴⁸ See V. Drachman, note 4 .

⁴⁹ Soia Mentschikoff was a woman of many firsts. She was a first women partner in two Wall Street law firms after graduating from Columbia Law School, she actually did some of the drafting of the UCC, and was the first woman Reporter for a Restatement of the Law for the American Law Institute; she was the first woman hired as a professor at the University of Chicago Law School (after her alma mater Columbia would not hire her) and she later became a Dean at the University of Miami and the first women President of the Association of American Law Schools. In my field, she was renowned for writing some of the first academic (and empirical) studies about commercial, labor and international arbitration and mediation. Decades of her students, male and female, extolled her teaching abilities, including mastery of the Langdellian (or Kingsfieldian, see John Jay Osborn, *The Paper Chase*, 1971) method of rigorous Socratic questioning of students to derive common law principles.

who studied at the University of Chicago when Mentschikoff was a professor there), her project was professionally traditionally legal –no feminist theory to speak or write of.

Others who followed shortly after her (such as Dean Kay) also excelled in traditional male subjects (conflicts of law, oil and gas law, business law, trusts and estates) but many also began, whether from choice or not, to take on some of the “women’s subjects”—family and domestic relations law-- and often proudly worked on law reform projects in those areas.

The first generation of women law professors also included a woman known to most readers of this essay, Ruth Bader Ginsburg, first at Rutgers University in New Jersey, then as the first tenured woman law professor at Columbia (1972),⁵⁰ later second woman Justice on the United States Supreme Court (after serving for many years on the District of Columbia Court of Appeals). Justice Ginsburg, along with my former (now retired, Georgetown) colleague Wendy Webster Williams were architects of a litigation strategy that took many “gender” equality cases through the federal courts, as both of them served both as professors and as litigators (and occasionally as legislative draftspersons⁵¹) to articulate the legal policy that women were, in every relevant way, “equal” to men and deserving of all

⁵⁰ In the 1970s as a young scholar (at the University of Pennsylvania law school) I was often asked to write reviews and letters of recommendations for Professor Ginsburg as several schools tried to hire her away from Columbia because they were interested in getting her husband (a distinguished tax practitioner and scholar, and later my colleague at Georgetown) to join them. See Carrie Menkel-Meadow, ‘A Special Kind of Equality: Remarks for the Acceptance of the Wendy Webster Williams Award for “Significant Contributions to Gender Equality Through Law” on behalf of Award Recipient The Honorable Justice Ruth Bader Ginsburg,’ (2000) 2 Georgetown Journal of Gender and the Law 149.

⁵¹ Professor Williams was largely responsible for drafting the Pregnancy Discrimination Act of 1978 (amendment to the 1964 Civil Rights Act prohibiting discrimination in employment, after several cases held that pregnancy discrimination was not “sex” discrimination, *Geduldig v. Aiello*, 417 U.S. 484 (1974). Pregnancy was, after the new Act, to be treated “equally” to other “temporary disabilities” affecting work and benefits.

rights of legal equality.⁵² In the litigation brought by Justice Ginsburg when she was the founding lawyer for the American Civil Liberties Union's Women's Right Project, she often represented men to obtain recognition of "equal rights" (e.g., for federal widow (widower) benefits⁵³) of both genders to jobs, federal and state benefits (and "burdens" as well, including estate administration and taxation). The commitment of this first generation was to "equality" *tout court*, men and women were equal in competence, ability to work, provide for families, to think and to engage in reproductive behavior. Therefore, all laws that treated the genders differently should be reversed and made to include both genders within their ambit.

This was the commitment to see "equality" as the basic idea in legal formation of laws, conceptions of human beings and legal duties and responsibilities. In the 1980s and 1990s a series of Task Forces, sponsored by national and state bar associations (e.g., American Bar Association on the Commission on Women⁵⁴) and courts (many of the major American federal courts of appeals and some state systems), conducted extensive studies and issued many reports on such issues as underrepresentation of women in the judiciary, the treatment of women lawyers, witnesses, court employees and substantive legal issues, all to be reformed in the name of equality and parity.⁵⁵

⁵² Wendy W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," (1984-85) *13 New York University Review of Law and Social Change* 325.

⁵³ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

⁵⁴ Chaired at one point by Hillary Rodham (Clinton). See also Commission on Women in the Profession, American Bar Association, *Elusive Equality: The Experiences of Women in Legal Education* (1996).

⁵⁵ See e.g., Judith Resnik, 'Gender Bias: From Classes to Courts,' (1993) Yale Research Paper, commenting on Ninth Circuit Gender Bias Task Force Report (Procter Hug, J.); Vicki Jackson, 'What Judges Can Learn from Gender Bias Task Forces,' (1997) *81 Judicature* 15; *Report of the DC Circuit Gender Bias Task Force*, 84 *Georgetown Law Journal* 1651 (1996); See Elizabeth Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 *Journal of Legal Education* 87 (1988); Barbara A. Babcock, 'Introduction: Gender Bias in the Courts and Civic and Legal Education,' (1993) *45 Stanford Law Review* 2143.; see Bowman and Schneider, note 3.

As this first generation focused on a litigation strategy of equality, using both “equal protection” Constitutional theories and a variety of statutory and other claims, a growing number of first law students, and then feminist law teachers, began to offer courses in “Women in the Law” or “Sex Discrimination ” to study all the categories of law in which the equality principle required legal revision. These courses were often taught with ad hoc prepared material (my own course first taught in 1973), but eventually with a series of new texts and casebooks on Sex Discrimination Law or Women’s Rights.⁵⁶ In 1971, a male Yale Law professor joined with several of his students to provide the legal justification for a new Constitutional amendment, (the Equal Rights Amendment) to make “equality” of the genders a foundational principle.⁵⁷ This was the second time in American history such an amendment was proposed. The original amendment proposed by Alice Paul⁵⁸ in the early 20th century failed to gain appropriate approval, as women’s suffrage became the dominant issue and “other” women’s rights were treated as either secondary or interfering with the politics of suffrage.

Legal academics began writing articles to argue about what “equality” meant for parenting, criminal responsibility, protection from violence, property rights, employment, education, contracting, inheritance, tort liability and compensation and almost every area of law was questioned. Some argued for simple “search and

⁵⁶ See e.g., R. M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Text, Cases and Materials on Sex-Based Discrimination* (St. Paul: West Publications, 1974); Barbara A. Babcock, Ann Friedman, Eleanor Holmes Norton, Susan Deller Ross, Wendy Williams, *Sex Discrimination and the Law: Causes and Remedies* (Boston: Little Brown, 1974). The first text in the field was actually written by a man (and was the one used in my own first course in Women and the law, see Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (1969). Professor Kanowitz taught Women in the Law at the University of California, Hastings until the late 1970s when women professors took over the course. He devoted much of his distinguished career (as a labor expert, to classic equal rights advocacy (including the ERA) and to the elimination of all formal differences between men and women in the law.

⁵⁷ Barbara Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, (1971) ‘The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,’ 80 *Yale Law Journal* 871.

⁵⁸ J.D. Zahniser & Amelia Fry, *Alice Paul: Claiming Power* (New York: Oxford Univ Press, 2014).

replace” for every time “man” or “he” appeared in a law, with a substitution of “woman” or “she” or a search for neutral pronouns in laws.

These efforts spawned a new annual meeting, the “Women and the Law Conference”, beginning in 1969-70, as organized by a group of New York University Law students (among them Susan Deller Ross, who also was my colleague later on the Georgetown Law faculty), and traveling for several decades, (not every year) until 1992, to cities on both United States coasts and in between, to bring together feminist activist lawyers, legal academics and students to meet, discuss and eventually argue about interpretations of law, legal strategies, cases to litigate and organize around, and how to advocate and teach about the different areas of law. ⁵⁹

During this period a number of activist law professors and lawyers began to focus on particular areas of law requiring law reform to ensure women’s equal participation in society. In addition to claims for increased participation and representation in the work force (at both professional and blue collar levels), activists created liability (criminal) for domestic violence,⁶⁰ and civil liability for sexual harassment,⁶¹ changed definitions of rape and consent⁶² (including the first trials of husbands raping their own wives), demanded reproductive rights (not only access to contraception and abortion, but also changes in the treatment of pregnancy in the workplace) and reframed many family law issues (custody preferences in the law), as well as litigating for a variety of equalizing “benefits”

⁵⁹ Elizabeth Schneider, ‘Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future’ (1994) 2 Virginia Journal of Social Policy and Law 1.

⁶⁰ Elizabeth Schneider, *Battered Women: Feminist Law Making* (New Haven: Yale University Press, 2002); Clare Dalton, *Battered Women and the Law* (Foundation Press, 2001); Elizabeth Schneider, *Domestic Violence and the Law: Theory and Practice* (Foundation Press 2007).

⁶¹ Catherine MacKinnon, *Sexual Harassment and Working Women* (New Haven: Yale University Press 1979); Nadine Taub, ‘Defining and Combatting Sexual Harassment,’ in *Class, Race and Sex: The Dynamics of Control* (Amy Swerdlow and Hannah Lessinger, eds., Boston: GK. W. Hall, 1983); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

⁶² Susan Estrich, *Real Rape : How the Legal System Victimizes Women Who Say No* (Yale University Press 1987); Susan Estrich, ‘Rape’ (1986) 95 Yale L. J. 1087.

under the law.⁶³ Despite the complaints of later generations that the first generation was “white and middle class”, the records (and my own experience) of these Women and the Law Conferences are full of workshops and materials on Women of Color, Disabled Women, Lesbian Women, Immigrant Women, the economics of the workforce, Single Mothers, and the rights of children.⁶⁴

These meetings and the political struggles over the meaning of the Equal Rights Amendment (with a politically conservative movement founded by Phyllis Schlafly to oppose it,⁶⁵ with concerns about uni-sex bathrooms, privacy, military service and child support) began to expose the differences within legal feminism:

- how should pregnancy be treated under law (women got pregnant; men did not)
- should prostitution be legalized (with women in control of their own bodies)
- should pornography (harmful to women in fact and image) be regulated or banned in a country with a First Amendment guarantee of free speech
- was feminism only about marriage equality (what about lesbians or straight women who either couldn’t or didn’t want to be married)
- where were the struggles of minority or working class women in the early cases of wage equality waged on behalf of the professional classes
- did women need “special” or “protected” working conditions (especially when pregnant)

⁶³ Accompanied by several failures, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974), retaining certain gender preferences in taxation, and *Feeney v. Massachusetts*, 442 U.S. 256 (1979) preserving the “veteran’s preference” in employment settings, despite its obvious sex disparate outcomes.

⁶⁴ See *Schneider*, note 59.

⁶⁵ Jane J. Mansbridge, *Why We Lost the ERA* (University of Chicago Press, 1986) p 110. The ERA received ratification by 35 states; it required 38 to become part of the United States Constitution.

- should women's advocates fight hard in litigation to gain rights or was it acceptable to use other methods of organizing (legal vs. political) or dispute resolution (was mediation a "sell-out" process for women, encouraging compromise)?

These fractures in the "equality" conception exposed that "substantive equality" might be reached in ways that demanded "special" or "different" treatment for women in some contexts (e.g. pregnancy leaves and benefits, as more common in Europe⁶⁶). Could gender "parity" be better achieved by acknowledging some "gendered" (biological/sociological) differences?

III. *The Second Generation – "Difference" (or Cultural) Feminism*

In the 1980's four issues split the feminist legal community into several ideological and practical factions: treatment of pregnancy under law, employment discrimination litigation in the case of *EEOC v. Sears*, pornography (and its regulation or treatment as a compensable tort) and the rise of a theory of "women's psychological (and or biological or sociological) differences" from men, made popular by psychologist Carol Gilligan,⁶⁷ which could valorize and claim women's differences, from men. Social and legal justice might not depend entirely on the legal concept of "equality" in a traditional legal sense but needed to be taken account of in different and more complex ways.

In one of the first dramatic schisms of American legal feminism, two sets of law professors (and activist lawyers) divided over how pregnancy should be treated in American law. When pregnant women in several occupations were either fired during, or not returned to their jobs after, pregnancy they sued, in both private and public contexts, that such treatment was sex discrimination. Remarkably, the United States Supreme Court held, in both the public and private sectors, that different

⁶⁶ California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987).

⁶⁷ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press 1982); Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process,' 1 *Berkeley Women's Law Journal* 31 (1985).

treatment of “pregnancy” (from other “temporarily” disabling conditions) was not sex discrimination, because although only women could become pregnant, the class of non-pregnant workers included both women and men.⁶⁸ Law professor Wendy Webster Williams led a group of dedicated feminist activists to draft and then advocate for passage in the United States Congress, the Pregnancy Discrimination Act, which, when it eventually passed, required pregnancy to be treated like other temporary disabilities.⁶⁹ This became a victory for “equality” feminists as pregnancy was treated in employment like other short-term illnesses or absences from work for disabling (temporary) conditions.

Unfortunately for any desired theoretical uniformity, many states in the United States (mostly in the newer, western states) actually provided “special” benefits for pregnant workers, whether in formal recognition of the importance of reproduction (as many European countries gave bonuses, special leaves and other benefits to either mothers alone or eventually to all parents⁷⁰) or as benefits for women to keep them in the workforce as needed (in 19th century labor shortages in the western states). California, for example, provided for guaranteed four-month “pregnancy/maternity” leave and a guarantee of a job on return to work. This law was challenged as sex discrimination under Title VII of the United States Civil Rights law⁷¹ by both the conservative Reagan administration and the National Organization for Women (a feminist organization), for including gendered categories within formal law. One group of professors (I was among those) wrote briefs and argued for sustaining the law, with the recognition that, at least with respect to pregnancy, women were indeed “different” from men and required “accommodation” (a term used from other legislation) or “special” treatment in

⁶⁸ *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

⁶⁹ 42 U.S.C. 2000e-k (as amended by Pregnancy Discrimination Act of 1978).

⁷⁰ See Bergmann, *ibid*, note 27 and Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About it* (New York: Oxford Press 2001).

⁷¹ 42 U.S.C. 2000-e.

order to achieve substantive equality (the opportunity to participate fully in the workplace.)⁷²

Another group of women law professors and activists argued, on the other side, for no formal recognition in the law of “gender-specific” differences.⁷³ This group, fearing repetition of gender specific “protective” laws in the workplace (maximum hours, minimal wages and “safe” conditions of work), which had, in the 19th century, limited women’s participation in the workforce, wanted to preserve total equality of conditions in the workplace.

Ultimately, the United States Supreme Court sustained the “special treatment” of pregnancy benefits, approvingly citing the brief written by law professor Christine Littleton (my colleague at the time at UCLA Law School).⁷⁴ In 1993 one of the first bills signed into law by President William Clinton was the Family and Medical Leave Act (allowing for *unpaid* leave of 12 weeks for anyone attending to the birth, illness or required family care of a relative, in employment sites of more than 50 employees⁷⁵). Current advocacy (unlikely to succeed any time soon) seeks to convert such family leaves into paid leaves, as is common in much of the rest of the developed world.

The pregnancy leave, or *CalFed* issue as we called it then, was the legal embodiment of a continuing dilemma for legal feminists—when and for what purposes do biological (or sociological) differences of the genders justify different legal treatment? What began as a dispute with obvious biological differences (pregnancy) next emerged with respect to what were called “socially constructed” differences – did women have different “preferences” for the kinds of work they sought? And if there were such differences were they “innate” to women or structured by discriminatory expectations of employers and the larger society?

⁷² Christine Littleton, ‘Reconstructing Sexual Equality,’ (1987) 75 California Law Review 1279; Herma Kay, ‘Equality and Difference: The Case of Pregnancy,’ (1985) 1 Berkeley Women’s Law Journal 1.

⁷³ Williams, *Ibid*, note 52; Law, *Ibid*. note 23

⁷⁴ California Federal Savings and Loan Association v. Guerra 479 U.S. 272 (1987).

⁷⁵ Family and Medical Leave Act, 29 U.S.C. 2601-2654 (West Supp. 1995, signed into law 1993).

The case of *EEOC v. Sears* (1984) brought this issue to the fore, and once again, leading legal feminist academics, this time joined by conflicting sets of feminist historians, were on opposite sides of the case, with different underlying conceptions of what it means to be a woman and what constitutes gender discrimination.⁷⁶ The Equal Employment Opportunity Commission (the administrative tribunal tasked with enforcing employment discrimination laws) brought a class action lawsuit against the nation's largest (then) retailer, Sears Roebuck, with several claims of discrimination: 1) that women were denied employment in higher paying commission paid (not straight salary, but percentage of total sales, usually of appliances, cars and other "larger" priced items) jobs by not being hired for them in the first place or 2) by not being allowed to transfer to such jobs from lower paid salaried jobs and 3) lower wages for certain classes of work. Typically such cases were proven by two different theories – explicit *disparate treatment* or more complicated, *disparate impact* (the effects, demonstrated by statistically significant empirical exclusion, of so-called "neutral" employment rules).

The EEOC hired as its expert a prize-winning women's historian, Rosalind Rosenberg,⁷⁷ who testified and presented affidavits of opinion that women did not seek such riskier, "harder" jobs, but preferred to work with the greater certainty and ease of "softer" item jobs; therefore the absence of women in such jobs was the result of their "choice," not the result of employer discrimination. On the other side was an equally notable women's historian (of labor in particular), Alice Kessler Harris⁷⁸ who testified that if women did not apply for or get hired for those jobs it was due to discriminatory factors, including both those explicitly and subtly enforced by employers, as well as by "socially constructed" expectations of the larger society which constructed the labor market. Professor Kessler Harris'

⁷⁶ See Ruth Milkman, 'Women's History and the Sears Case,' (1986) 12 *Feminist Studies* 375.

⁷⁷ Rosalind Rosenberg, *Beyond Separate Spheres: Intellectual Roots of Modern Feminism* (New Haven: Yale University Press 1982).

⁷⁸ Alice Kessler Harris, *Out to Work: A History of Wage Earning Women in the United States* (1982).

testimony and affidavits described many situations in which women, were in fact, quite interested in more difficult, harder machinery employment (e.g. during World War II and among different classes of workers). Both the trial and appellate courts, despite many briefs and arguments from feminist historians and law professors on the plaintiff's side,⁷⁹ ruled in favor of Sears (finding no evidence of discrimination) and for the most part, not taking much notice of the larger debate among the academics on both sides of the case.⁸⁰

In this case most feminist legal academics (but not all!) were aligned with the Kessler-Harris-plaintiff side of the case. Even if some women might have had different "preferences" for particular jobs, those preferences were likely the product of discriminatory "socialization" processes, not physical or biological differences, and the "preferences" (whether real or not) of some should never prevent the hiring or promotion of the few who actively sought or wanted such jobs and should have been encouraged to apply for them. Thus, issues of litigation strategy (class actions vs. individual cases; disparate treatment and disparate impact, statistical vs. testimonial evidence) made more complex some of the underlying conceptions of gender and its treatment in the law.

The next and probably most dramatic split among legal feminists came with what later became known as the "pornography debate." As perhaps the most original and important feminist legal theorist of this time, Catherine Mackinnon's "sexual dominance" theory of women's subordination became a powerful organizing principle for the feminist movement, as class had been for Marx.⁸¹

⁷⁹ Professor Rosenberg was denounced at several academic historians meetings for her work for Sears and later wrote that she was isolated by other feminist historians. In this case Professor Kessler Harris commanded the greater number of supporters among legal academics, including many who were "special" or "difference" feminists in other contexts.

⁸⁰ See discussion in Chused and Williams, *Ibid* note 24.

⁸¹ See Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge, Mass: Harvard Univ. Press 1987); *Id. Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard Univ. Press 1989); *Id.* 'Feminism, Marxism, Method and the State: An Agenda for Theory,' (1982) 7 *Signs Journal of Women In Culture and Society* 515.

Already one of the creative “authors” of the new legal theory of sexual harassment as a civil wrong (tort) and ultimately an employment discrimination theory,⁸² Mackinnon partnered with feminist activist Andrea Dworkin to frame a creative cause of action to attack the abuse of women in pornography. Rather than arguing for the criminalization of pornography, which given American Constitutional law, was likely to meet with freedom of speech (First Amendment) objections,⁸³ Mackinnon framed a civil action (tort) which permitted any woman who was “harmed” in any way by pornography to bring a damage action against the offending pornographers. The harms covered by the statute she wrote included not only the physical harms to those who acted in pornography films or photography but harms experienced by any woman who could prove she had been ill used (dominated by men, coerced in any way) or affected adversely by pornographic-subordinated depictions of women. The city of Minneapolis (Mackinnon taught at the University of Minnesota) and Indianapolis (in alignment with some conservative forces) enacted Mackinnon’s famous pornography ordinance, allowing such civil actions to be brought.

This was among the most creative forms of feminist lawmaking ever—reconceptualization of a harm to be rectified by a civil action and monetary damages (and injunctions) rather than criminal punishment, with women, rather than men, defining for themselves what was considered harmful.⁸⁴ Almost immediately, another group of feminists, aligned with freedom of speech and expression advocates, and the more sexual liberation and lesbian part of the feminist

⁸² Catherine Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press 1979).

⁸³ Catherine Mackinnon, *Only Words* (Cambridge, Mass: Harvard University Press, 1993).

⁸⁴ See explication of this legal story by one of the nation’s great constitutional scholars in Paul Brest, & N. Vandenberg, ‘Politics, Feminism and the Constitution: The Anti-pornography Movement in Minneapolis,’ (1987) 39 Stanford Law Review 607.

movement aligned against Mackinnon and the Anti-pornography movement and joined in lawsuits to have the new statute declared unconstitutional.⁸⁵

There ensued a storm of controversies, conferences and highly politicized confrontations between several parts of the feminist movement. Those opposing the anti-pornography ordinance claimed it was based on a theory of women's passivity and inability to choose (and even consume) different models and practices of sexuality and that it would result in censorship of such important books as the feminist manifesto for health (with sexually explicit photographs), *Our Bodies, Ourselves* by the Boston Women's Health Collective, a virtual "bible" of women's health issues for the feminist movement.⁸⁶ On the anti-pornography side, feminist legal theorists and practitioners argued that the ordinance gave women the right to choose their own litigation strategies and to seek compensation and other relief for domestic violence "caused" by pornography.⁸⁷ For several years, formerly good friends and compatriots in the feminist legal movement argued with each other, both in public and privately, and some stopped speaking to each other altogether. Ultimately, the anti-censorship movement won their victory in the US Supreme Court when the court struck down the ordinance as violative of First Amendment protections for free speech and expression (as being too vague and overbroad.)⁸⁸

⁸⁵ See e.g. Sylvia Law and Nan Hunter, Brief Amicus Curiae of Feminist Anti-Censorship Task Force et. Al in *American Booksellers v. Hudnut*, (1987) 21 Michigan Journal of Law Reform 69 (known as the FACT "brief" arguing against censorship or explicitly sexual materials as detrimental to women's freedom of choice).

⁸⁶ *Our Bodies, Ourselves* (Boston: Boston Women's Health Collective, first published in 1971).

⁸⁷ This claim of causation in turn led to an explosive period in social science and law as scholars and social scientists tried to "prove" or disprove that pornography was a contributing "cause" of men's violence toward women, see Neil Malamuth, (1998). Commentary on pornography research and testimony before the Attorney General's Commission on Pornography. 13 Journal of Interpersonal Violence, 528-529 -543; Attorney General Commission on Pornography (1987).

⁸⁸ *American Booksellers v. Hudnut*, 475 U.S. 1001 (1986). The United States Supreme Court has an extensive and complex jurisprudence on when and how pornography and obscenity can be regulated, restricted or criminalized (famously, "we know it when we see it", see *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Potter Stewart, J. concurrence).

The issues of women's "equality" or "sameness" or "differences" from men (and from each other) were formed in the disputes that arose around legal strategies in particular cases. In the mid-1980's these issues grew larger with a new generation of feminist jurisprudents and theorists who explored gender differences through philosophical, sociological, psychological and literary criticism lenses.⁸⁹ In 1982 Carol Gilligan, a developmental and social psychologist, published *In A Different Voice: Psychological Theory and Women's Development*,⁹⁰ which argued, from several empirical studies, that women and men engaged in different styles of moral reasoning, with boys using a "logic" of individualism, property and ownership principles and hierarchical values, and girls using a "web of connection" to hold people and values together simultaneously in a more "horizontal" relationship. This book and its theories exploded with acclaim and derision in feminist theory generally and in law in particular.⁹¹

Equality feminists feared that acknowledgement of any biological or sociological "differences" would allow legal concepts and doctrines to continue to support different and subordinate treatment of women in so many spheres of legal

⁸⁹ See e.g. Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory,' (1987) 2 Wisconsin Women's Law Journal 81; Robin West, 'Jurisprudence and Gender,' (1988) 55 University of Chicago Law Review 1; Robin West, *Caring for Justice* (New York: NYU Press 1997). See also Hester Eisenstein and Alice Jardine, eds. *The Future of Difference* (New Brunswick, New Jersey: Rutgers University Press 1985); Virginia Goldner, 'Toward a Critical Relational Theory of Gender,' 1992, 1 Psychoanalytic Dialogues 249; .

⁹⁰ Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press 1982); see also Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge 1993).

⁹¹ I was among the protagonists in the legal theory disputes, see Ellen DuBois, Mary C. Dunlap, Carol Gilligan, Catherine Mackinnon and Carrie Menkel-Meadow, 'Feminist Discourse, Moral Values and the Law—A Conversation,' (1985) 34 Buffalo Law Review 11; Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process (1985) 1 Berkeley Women's Law Journal 39; Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender Feminism and Legal Ethics, (1994) 2 Virginia Journal of Social Policy and Law 75. See Symposium Women and Morality, (1983) 50 *Social Research* 487-695.

regulation⁹²—family law, labor law (“protective” labor legislation), criminal law, and economic regulations, as well as the all important interpretations of the Equal Protection clause in Constitutional law. “Difference” feminists sought legal and nuanced recognition of the complexity of gender identity and social structuring, optimistically believing that the law would be able to distinguish unlawful subordinate treatments (exclusion of women) from necessary acknowledgement of different treatment (pregnancy) and even some “temporary” affirmative action of special treatment to achieve substantive equality.⁹³ Many “difference” feminists took their arguments from biological and social science, as well as from European literary and psychoanalytic theory, particularly the work of French feminists, Julie Kristeva, Helene Cixious and Luce Irigaray ⁹⁴who deconstructed the oppression of gender in body, language and philosophy to recreate a “*feminine*” new consciousness in self-conception, writing, literature, morality, physicality and ultimately a valorization of “the feminine” for an alternative “truth.” (see discussion of post-modernism in Section V below).

Although “equality” feminists and “difference” feminists often shared the same goals of removal of oppressive and exclusionary laws and legal treatment of women that would encourage their equal participation in social, legal, work and family life, these schools of thought differed on whether it mattered if the “origins” of differences were traced to “essentialist” and biological “sex” or socially constructed or socialized “gender” (a debate now raging in the transgender, LGBT human rights movement). “Difference” feminists who focused on socially constructed difference were labeled “cultural feminists,” both by themselves and others because they often argued that regardless of its origins, women’s “connection” to others (notably children and family) and heightened sense of responsibility, produced a different conception of the purposes of law –to provide

⁹² Joan Williams, ‘Deconstructing Gender,’ (1989) 87 Michigan Law Review 797.

⁹³ See arguments canvassed in desegregation of Virginia Military Institute, United States v. Virginia, 518 U.S. 515 (1996).

⁹⁴ Domna Stanton, ‘Language and Revolution: The Franco-American Dis-Connection,’ in *The Future of Difference* (Hester Eisenstein and Alice Jardine, eds. New Brunswick, N.J. Rutgers University Press (1985).

positive rights (not only liberal values of autonomy) but social welfare rights and different conceptions of constitutional obligations and duties, as well as different conceptions of tort and contractual liability.⁹⁵ My own work on negotiation and legal dispute resolution (in “adjectival” or procedural law) sought to reconstruct conventional categories of game theoretic distributional and legal adversarial “zero-sum” acts of competition over scarce resources to the recognition in legal problem solving of needs and interest based efforts to pursue joint, not only individual, gain and social resource expansion and more “just” and integrative allocations.⁹⁶

Thus, cultural or difference feminists made enormously creative interventions into the jurisprudential discussions of what law is for, what ends it should serve, what legal claims can be made, what processes should be used to effectuate its aims and what remedies it should offer. Although equality feminist theorists accused difference feminists of assuming too much “passivity” or deterministic definitions of identity and gender content, cultural feminists in fact embraced more agentic and “plastic” conceptions of the role of women in the law. Feminists could create new legal claims and theories (sexual harassment, domestic violence, anti-pornography civil actions, “intersectionality”(see section IV below), advocate for different interpretations of old doctrines (hedonic measures, contract formation) and pursue new remedies (restraining orders, new forms of damages and civil actions and new definitions of rape and domestic violence). Cultural feminists also argued that theirs was a theoretical approach that in fact allowed for cultural change and adaptation and a continually changing, evolving and relational sense of gender identity and legal treatment. This argument later became important

⁹⁵ Robin West, note 87 ; Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort,’ (1988) 38 Journal of Legal Education 3; Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine,’ (1984) 94 Yale Law Journal 997; Mary Jo Frug, ‘Re-reading Contracts: A Feminist Analysis of Contracts Casebooks,’ (1985) 34 American University Law Review 1065.

⁹⁶ Carrie Menkel-Meadow, ‘Toward Another View of Legal Negotiation: The Structure of Problem Solving,’ (1984) 31 UCLA Law Review 754.

for the growing recognition of cultural change in gender roles and studies among those who also focused on “masculinities.”⁹⁷

Feminist legal academics were also important in this era (1980s) in the development of “critical feminist theory” a dialogic and critical encounter with the New Left Critical Legal Studies movement in American Law from the 1980’s, lingering until the late 1990s. Active in the founding of Critical Legal Studies (a left critique of the indeterminacy of the American common and constitutional law regimes that allowed courts to exploit their class preferences in legal interpretation⁹⁸), feminist law professors developed a critique of Critical Legal Studies’ own masculinist, dominating, Marxist approach to law and legal decision making and organized the first Critical Legal Feminist meeting to use “feminist processes” (smaller group discussions, uses of literary texts and films, uses of feminist consciousness raising methods) and theories for discussion.⁹⁹ Critical feminist theorists were concerned about the deconstruction of the importance of “legal rights” as indeterminate in the critical legal studies canon of thought. Women’s progress, after all, had been marked throughout the “equality” period with some successful claims for “equal rights” under the “positive” law of the Constitution and other legal statutory regimes. Opening up a serious discourse of the role of “rights” and the State¹⁰⁰ in furthering or hindering civil and human rights, the feminist critique of critical legal studies soon inspired an explosion of work in

⁹⁷ Ann C. McGinley, *Masculinity at Work* (New York: NYU Press 2016).

⁹⁸ Duncan Kennedy and Karl Klare, ‘A Bibliography of Critical Legal Studies,’ (1984) 94 Yale Law Journal 461; Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass: Harvard University Press, 1987); Roberto Unger, *Knowledge and Politics* (1975); Roberto Unger, ‘The Critical Legal Studies Movement,’ (1983) 96 Harvard Law Review 561.

⁹⁹ See Carrie Menkel-Meadow, ‘Feminist Legal Theory, Critical Legal Studies and Legal Education, or “the Fem-Crits” Go to Law School,’ (1988) 38 Journal of Legal Education 61.

¹⁰⁰ See DuBois et. al, Ibid note 91 for a spirited debate about the role of the state in improving or diminishing the quality of women’s lives.. I argued there that women’s relationship to the state was ambivalent- both wanting its protection and promises of equality but recognizing its role in the legalization of women’s historical oppression.

Critical Race studies, a parallel exploration of the role of legal rights and strategies versus political and social movements in the American quest for racial justice and equality (see Section IV below).

IV. Multi-cultural or Diversity Feminism

As newly admitted to the profession, women legal academics (mostly white) grappled and contested with each other over issues of work, family, reproductive rights, pornography, sex and prostitution, a third generation of new entrants, more diverse in race and ethnicity, and somewhat more diverse in class background, burst on the theory scene to challenge and critique the new field of feminist legal theory, sometimes from a sympathetic “inside” view, but more often with a sense of outrage, outsider perspective and challenge to claims of “universal” essentialism of “women’s situation” in the law. Several powerful theorists, including Angela Harris, Patricia Williams, Mari Matsuda and Kimberle Crenshaw, among others, awakened their sisters in theory development to “multiple consciousness”¹⁰¹ and the need to understand and “see” the reality of the lives of women of color (Black, Asian, Latina, Native and “other”) in both law reform and theoretical projects. At the same time, the Lesbian challenge to heterosexist notions of marriage, family and social life also challenged many assumptions made (whether implicitly or explicitly) in the work of the first two generations.¹⁰²

Law professors who were/are also women of color argued that anti-discrimination law (Crenshaw) and feminist theory in general (Harris) ignored the particular experiences of Black (and Latina (Montoya) and Asian-American (Matsuda) women by assuming that family and reproductive rights issues meant challenging the “separate spheres” doctrine (women traditionally in the home, now seeking employment) and failed to take account of the experiences of minority

¹⁰¹ Mari Matsuda, “When the first Quail Calls: Multiple Consciousness as Jurisprudence,” (1989) 11 Women’s Rights Law Reporter 7.

¹⁰² See also, Francisco Valdez, “Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities,” (1995) 5 Southern California Review of Law and Women’s Studies 25.

female work (and exploitation in lower paid jobs), where the “luxury” of staying home and the valorization, of “traditional” motherhood were often unavailable. Stereotypes of gender when coupled with race or ethnicity (the “China doll” or Black or Latina domestic worker) demonstrated that women of color did not share the assumed uniform experiences of white (presumably middle class) women as feminist theory formed on individualistic “equality” models. Women of subordinated or dominated races and ethnicities had/have more complicated relationships, they argued, with their similarly subordinated or dominated male relatives, companions and group members. Thus, among the major contributions of this newer and more diverse feminist theorizing was to :

1. problematize “equality” theories based on *individual* rights of access and measurement of comparisons of “merit” to (white) men (in employment, family rights, constitutional law);

2. question the assumptions of “women’s” experiences as mothers or rape victims¹⁰³ as “*essentially*” derived from white women’s experiences;

3. demonstrate the “*intersectionality*” of discrimination and subordination in more complex demographic “identities” (Black women had to be either “Black” or “female” to succeed in early employment discrimination cases; there was no formal legal recognition of “Black women” as a separate legally protected category; welfare policies were often directed at conceptions of welfare recipients as “undeserving” Black women (“the welfare queen” stereotype);¹⁰⁴

¹⁰³ In American history, Black women had been raped, with impunity, for over one hundred years, as slaves and domestic workers, see Patricia Williams, “On Being the Object of Property, in *The Alchemy of Race and Rights* and ‘Alchemical Notes: Reconstructed Ideals from Deconstructed Rights,’ (1987), 22 Harvard Civil Rights-Civil Liberties Law Review 401 (describing the phenomenological differences in the “experience” of legal rights of white and Black people).

¹⁰⁴ Kaaryn Gustafson, ‘Degradation Ceremonies and the Criminalization of Low-Income Women,’ (2013) 3 University of California Irvine Law Review 297; Kaaryn Gustafson, ‘Breaking Vows: Marriage Promotion, The New Patriarchy and the Retreat from Equalitarianism,’ (2009) 5 Stanford Journal of Civil Rights and Civil Liberties 269.

4. illuminate the complexity of *group membership* and contradictory pulls on *identity*; minority women suffered greatly from domestic violence and at the same time were active as mothers, sisters, daughters, wives and companions in representing and supporting male offenders in prison and criminal justice reform (now particularly salient again in the Black Lives Matter movement in the United States); minority women often work for “justice” not only as women but as members of other historically subordinated groups;¹⁰⁵

5. interrogate the *class* assumptions in much of the earlier feminist theory; although “sex plus” doctrines sought recognition of the multiplicity of ways that gender could be experienced through the lens of gender interacting with other characteristics, critical race theory coupled with critical feminist race theory,¹⁰⁶ demonstrated that women of color often suffered from many simultaneous forms of stereotyping and interactive identity assumptions. Thus, simple legal categories of “gender” or “race” or “ethnicity” failed to fully capture the particular forms of discrimination suffered and provide adequate remedies.;

6. acknowledge that different *experiences of patriarchy* (marriage as desirable or not), *parenthood* and *criminalization* (disparities in drug, sexual assault, welfare fraud definitions and law enforcement) might militate in favor of more complicated and variable efforts to reform the law;

7. *narrate the particularities* of the differences of women’s lives. The brilliant linkage of storytelling (by among, others,¹⁰⁷ Patricia Williams,¹⁰⁸ and Mari

¹⁰⁵ See the difficult (for many feminists) case of *Martinez v. Santa Clara Pueblo*, 436 U.S.49 (1978) in which tribal definitions of voting rights and citizenship was held to “trump” gender equal protection provisions in the United States Constitution.

¹⁰⁶ Dorothy Roberts, ‘BlackCrit Theory and the Problem of Essentialism,’ (1998) 53 U. Miami Law Review 855.; see generally *Minority Critiques of the Critical Legal Studies Movement*, 22 *Harvard Civil Rights Civil Liberties Law Review* (1987).

¹⁰⁷ The use of storytelling and narrative to “counter” universalist legal generalizations began with the work of Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books: 1987) (and the novelist Toni Morrison, see e.g. *Sula* (1973) and *Beloved* (1987).

¹⁰⁸ Patricia Williams, ‘On Being the Object of Property’ in *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass: Harvard University Press, 1991).

Matsuda¹⁰⁹) to challenges of conventional legal categories and the call for “outsider” voices to be heard in legal argument and doctrinal formation has inspired a whole new generation of critical race/gender theorists to argue against “over abstraction” in legal theory and to “particularize” and study (empirically¹¹⁰) the concrete conditions of women’s needs in the law;

8. *challenge* all assumptions about male dominance of women made on assumptions of heterosexuality;

9. *recognize that gender is often “relational”* to other categories of identity, both subjective and objective, and dependent on how it is used in particular contexts¹¹¹ and

10. *produce more diverse discussion and ideas* in law school classrooms.¹¹²

This paradigm shifting move to more “bottom-up,” empirical particularism has broadened the issues of concern to feminist legal academics to a whole set of “newer” issues of gender, legal theory and legal doctrine and policy as experienced “on the ground”: immigration,¹¹³ religion, human rights, globalized labor, and prostitution¹¹⁴ and human trafficking,¹¹⁵ among others, often exposing the painful divisions among feminists who have “multi-cultural” or “multi-dimensional

¹⁰⁹ Mari Matsuda, *Where is Your Body?: Essays on Race, Gender and the Law*, (Boston: Beacon Press (1996)

¹¹⁰ A new generation of critical race/gender scholars has formed around “empirical critical race studies”, see e.g. Mario Barnes, ‘Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology, 2016 Wisconsin Law Review 2043; Kimani Paul-Emile, ‘Foreword: Critical Race Theory and Empirical Methods Conference (2015) 83 Fordham Law Review 2953.

¹¹¹ Martha Minow, ‘Justice Engendered: The Supreme Court Term 1986,’ (1987) 101 Harvard Law Review 10; Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* Ithaca, N.Y. Cornell University Press 1990).

¹¹² Meera E. Deo, ‘Paint by Number? How Race and Gender in Law School Faculty Affect the First Year Curriculum,’ (2010) 29 Chicano/Latino Law Review 1; Id. ‘Faculty Insights on Educational Diversity,’ (2015) 83 Fordham Law Review 3115.

¹¹³ See Jennifer Chacon, ‘Feminists at the Border: Militarism in the Work of Ann Scales,’ (2013) 91 Denver University Law Review 85.

¹¹⁴ Amy J. Cohen, ‘Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City,’ (2017) Texas Law Review.

¹¹⁵ Aya Gruber, Amy Cohen and Kate Mogulescu, ‘Penal Welfare and the New Human Trafficking Intervention Courts,’ (2017) Florida Law Review.

consciousnesses". Consider the conflicts among this generation of feminist legal academics on such issues as veiling and headscarves,¹¹⁶ female genital circumcision,¹¹⁷ single-sex education,¹¹⁸ food production and consumption,¹¹⁹ military service and peace, among others.¹²⁰

V. Post-Modern Feminism

Just as demographic and theory-driven disruptions to the first waves of legal feminisms were beginning to challenge essentialist notions of "women's issues" and feminist theory, intellectual movements from outside, in European post-modern and post-structuralist theory in philosophy, literature and ultimately (through Critical Legal Studies), American legal theory also challenged universal or essentialist ideas about gender in law. Legal academic (Professor at New England School of Law) Mary Jo Frug, a post-modern feminist (whose murder near her home in Cambridge, Massachusetts in 1991 was never solved) wrote most extensively at the beginning of the "post-modernist" turn that gender is "constituted" by words, language, interpretations by particular authoritative figures (male scholars and judges) and she urged new conceptions of legal ideas from the "deconstructive" analysis which became so important in literary criticism. Nothing in "modern" categories are to be taken for granted as "stable" or fixed meanings. Women are sometimes "equal" to or "the same as men" (perhaps in work performance), but also

¹¹⁶ *The Burqa Affair Across Europe* (Alessandro Ferrari and Sabrina Pastorelli, eds.) (Routledge, 2016); *S.A.S. v France*, 2014 Eur. Ct. H. R. 695; *R (Begum) v. Headteacher and Governors of Denbigh High School*, 2006 U.K. H. L. 15 (see decisions of Brenda Hale, J.)

¹¹⁷ Isabelle Gunning, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries,' (1992) 23 COLUM. HUM. RTS. L. REV. 189.

¹¹⁸ *United States v. Virginia Military Institute*, 518 U.S. 515 (1996, Ruth Ginsburg J.)

¹¹⁹ Amy J. Cohen, 'Everything is Not About Convenience: State, Family, and Supermarket in Middle-Class West Bengal' (2017) *University of California Irvine Law Review*; Id. 'The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small,' (2015) 78 *Law & Contemporary Problems* 101.

¹²⁰ Susan Moller Okin, *Is Multi-Culturalism Bad for Women?* (Princeton University Press 1999).

they are different at the same time (in capacity to become pregnant and bear children). Women are not all alike—they are different among their own gender/biological classifications—some are white, some are of color, they have different sexual orientations and desires, they are of different classes and they value and identify differentially with men, with political movements and with social institutions. They are sometimes agentic and in control of their own destinies and sometimes they are “dominated” or “abused” or “exploited” by men. Women often have different interpretations of the same texts (law, erotic texts, literature), but their “power” to interpret as authority or law is often still unequal to men. Frug’s arguments were that legal interpretations and concepts embedded in law often “constructed” women as maternal, unequal, sexualized, terrorized and weak (historically unable to make and enforce contracts in business, in labor, etc.). But, at the same time Frug, and other post-modernists, saw gender and interpretation as “fluid,” “plastic” and mutable by legal advocacy, and by textual and political interpretation.

Frug was among the first legal academics, along with Clare Dalton, another Contracts (at Harvard) professor to “deconstruct” common contracts doctrines (impossibility of performance, enforceability of domestic promises) and to suggest that feminists could (and did) successfully re-interpret conventional legal doctrines, to produce greater gender justice. In one of her most sustained and creative works, Frug completed a literary and legal exegesis of the conventional, male authored, Contracts text¹²¹ she was teaching with to interrogate and upend conventional interpretations of what promises should be legally enforced, how women were conceptualized in contracts cases (weak, needing of protection, lacking capacity), how law structured remedies and how women authors might write a different text and develop different doctrines, reclaiming women’s interests in conventional doctrine and interpretation.¹²² As I discuss in the next section, the post-modern “move” in legal theory, while often criticized for being “indeterminate” and

¹²¹ J. Dawson, W. Harvey & S. Henderson, *Cases and Comment on Contracts* (4th ed. 1982).

¹²² See Mary Jo Frug, *Postmodern Legal Feminism* (Routledge, 1992) at 53-124.

destructive of stable meaning, in fact was instrumental in opening up legal concepts and doctrines not typically associated with “women’s issues” to feminist analysis and re-interpretations. In this sense, the post-modernists made great and creative contributions to new ideas in law and new methods of interpretation.

The contributions of post-modernist scholars like Frug, Dalton, later Janet (Ian) Halley and others in the 1990s and onward were to:

1. see gender as always fluid, *contingent* and *relational* (differing in context);
2. emphasize the *agency of feminists to self-describe and “perform” gender*,¹²³ and to wrest control of definitions away from others (men, authority figures, legal interpreters¹²⁴);
3. analyze the *discursive process* by which *language and law* both create categories that become “reified” and made “real” but also can be destroyed or re-interpreted by different actors (consider the evolution of marital rape and the complex issues surrounding what constitutes “consent” to rape in different contexts¹²⁵);
4. *problematize the “binary” of definitive gender lines*; along with lesbians, gay activists, trans and bi-sexual , queer theorists,¹²⁶ post-modern feminists see gender and sex as having blurred boundaries,¹²⁷ allowing greater choice than stable legal

¹²³ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990)’ Id. *Undoing Gender* (2004).

¹²⁴ An important part of feminist legal theory was to explore the epistemology of knowledge, understanding that knowledge itself is produced and created through the gender lenses of the creator of knowledge, see, e.g. Sandra Harding, *The Science Question in Feminism*, (Ithaca: Cornell University Press, 1986); Sandra Harding, *Whose Science, Whose Knowledge: Thinking from Women’s Lives* (Ithaca, Cornell University Press 1991).

¹²⁵ Robin West, ‘Sex, Law and Consent,’ In *THE ETHICS OF CONSENT: THEORY AND PRACTICE* (Alan Wertheimer & William Miller eds. 2008); Katherine Franke, “Theorizing Yes,” (2001), 101 *Columbia Law Review* 181.

¹²⁶ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Duke University Press, 2015); Janet Halley, *Split Decisions: How and Why to Take a Break From Feminism*, (Princeton University Press, 2008); Eve Sedgwick, *Epistemology of the Closet* (University of California Press, 1990).

- ¹²⁷ So did Sigmund Freud, in his theories of polymorphous perversity, Freud, Sigmund. *The Standard Edition of the Complete Psychological Works of Sigmund Freud*. (Trans. James Strachey. 24 vols. London: Hogarth, 1953–74).

gender categories permit, not only in choices about sexuality and “cross-dressing”¹²⁸
:

5. consider how the *constitutive* processes of law both disadvantage or advantage gender in particular contexts and how such processes can be “used” to *create and change legal meanings*.¹²⁹

Though critics fear that the fluidity and indeterminacy of interpretations around gender and sex will hinder a “unified” theory or legal strategy to deal with continued gender inequality,¹³⁰ the richness of the feminist deconstructive, post-“structuralist” turn in questioning all legal categories, has, in my view, produced some of the most creative interpretations, new concepts, legal memes, and reinterpretations of law, explored below.

Vi. Mainstreaming Feminist Legal Memes in Law and Legal Education

The increased number of women legal academics in the 1980s and 1990s did not mean they were all focused on so-called “women’s subjects.” But, with a feminist sensibility, many of these new entrants began to question conventional “man-made” legal doctrine, even without the literary and philosophical abstractions of post-structuralist theory. Here I review just a few of these feminist contributions to general legal theories and doctrines.¹³¹ As I was wont to say in the early years of this effort some decades ago, the question of “assimilation,” “integration” or “mainstreaming” of any “outsider” theory or doctrine is the problem of whether

¹²⁸ Duncan Kennedy, *“Sexy Dressing, Etc.: Essays on the Power and Politics of Cultural Identity,”* (Cambridge, Mass: Harvard University Press, 1993).

¹²⁹ Dennis Patterson, ‘Postmodernism/Feminism/Law,’ (1992) 77 Cornell Law Review 254.

¹³⁰ Catherine Mackinnon, ‘Points Against Postmodernism,’ (2000) 75 Chicago-Kent Law Review 687.

¹³¹ For a fuller, if earlier review, see Carrie Menkel-Meadow, (1992) ‘Mainstreaming Feminist Legal Theory, 23 Pacific Law Review 1493. See also Mary Dunlap, ‘The “F” Word: Mainstreaming and Marginalizing Feminism,’ (1989-90) 4 Berkeley’s Women Law Journal 251 (discussing how the US Supreme Court dealt with feminist challenges to Constitutional and other cases).

there will be enough “chocolate” in the marble cake or as said more recently, more than just “chocolate chips in the vanilla ice cream.”¹³²

Feminist attention to women’s issues made Constitutional “equal protection” concepts more complex (formal or substantive equality?) (e.g., see discussion of pregnancy above, and the “sameness-difference” debates), challenged American conceptions of “freedom of expression” in First Amendment jurisprudence and the pornography debate¹³³ (which differed from the more successful efforts of Canadian feminists and constitutionalists on the same issue¹³⁴), changed the definitions of rape (including marital rape) and consent in criminal law,¹³⁵ which in turn modified important evidence doctrine,¹³⁶ introduced new criminal law defenses to murder or injury (“battered woman syndrome”¹³⁷), created a new cause of action (under both common law tort doctrine and also in statutory definitions of employment discrimination) for sexual harassment,¹³⁸ and, of course, challenged many concepts

¹³² See also Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature (1984)” 132 U. Penn. Law Review 561; Menkel-Meadow, *Ibid*, note 132 and “Michael” in Meera Deo, ‘Faculty Insights on Diversity in the Classroom,’ (2015) 83 Fordham Law Review 3115, at 3147.

¹³³ Attorney General’s Commission on Pornography, *Final Report* (Department of Justice, 1986), the “Meese Report”, cf. Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights* (1995); see also, Henry Louis Gates, Anthony Griffen, Donald Lively, Robert Post, William Rubenstein and Nadine Strossen, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties* (1994); Catherine Mackinnon, *Only Words* (Harvard University Press, 1993).

¹³⁴ Katherine Gelber and Adrienne Stone, ‘Constitutions, Gender and Freedom of Expression,’ in *Research Handbook on Gender and Constitutions* (Helen Irving and Ruth Rubio-Marin, eds. Forthcoming).

¹³⁵ Susan Estrich, *Real Rape* (Yale University Press 1987); Carole Goldberg-Ambrose, ‘Theory, Practice and Perception in Rape Law Reform,’ (1989) 23 Law & Society Review 949.

¹³⁶ Leon Letwin, ‘Unchaste Character: Ideology and California Evidence Rape Laws,’ (1980) 54 Southern California Law Review 35; Margaret Berger, ‘Man’s Trial, Women’s Tribulations: Rape Cases in the Courtroom,’ (1977) 77 Columbia Law Review 1.

¹³⁷ Elizabeth Schneider, *Battered Women and Feminist Law Making* (New Haven: Yale University Press, 2002).

¹³⁸ Catherine Mackinnon, *Sexual Harassment of Working Women* (Yale University Press, 1978).

in conventional family law (child custody, alimony and marital support, and legal benefits for unmarried co-habitation¹³⁹).

Feminist legal theorists also contributed ideas and re-interpretations of more conventional legal doctrines, such as the presumed “reasonable *man*” in American tort law,¹⁴⁰ and its presumptions of a “neutral” and “objective” standard of legal liability. Feminists questioned the definitions and assessments of compensable harms in tort law¹⁴¹ and suggested that both standards of liability and compensable claims (a different form of loss of consortium) would apply if a “reasonable” *woman’s*” conceptions were included in the tort canon (later criticized for essentializing women as much as the male “objective” standard for correct human behavior).

Feminist contracts scholars suggested that recognition of only commercial contract and not domestic contracts failed to take account of legal realities,¹⁴² such as family owned businesses, as well as ante and post-nuptial agreements,¹⁴³ as well as now far more complex contracting around reproductive issues.¹⁴⁴ Such contracts are now often the subject of adjudication in state courts.

¹³⁹ Grace Blumberg, ‘Adult Derivative Benefits in Social Security, (1980) 32 Stanford Law Review 233; Grace Blumberg, ‘Cohabitation Without Marriage: A Different Perspective, (1981) 28 UCLA Law Review 1125; Frances Olsen, ‘The Family and the Market, (1983) 96 Harvard Law Review 1497.

¹⁴⁰ Leslie Bender, ‘A Feminist Primer on Feminist Theory and Tort,’ (1988) 38 Journal of Legal Education 3; Lucinda Finley, ‘A Break in the Silence: Including Women’s Issues in a Torts Course,’ (1989) 1 Yale Journal of Law and Feminism 41.

¹⁴¹ Robin West, ‘The Difference in Women’s Hedonic Lives,’ (1985) 3 Wisconsin Women’s Law Journal 81.

¹⁴² Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, (1985) 94 Yale Law Journal 997; Mary Jo Frug, ‘Rescuing Impossibility Doctrine: A Post-Modern Feminist Analysis of Contract Law (1992) 140 U Penn. Law Review 1029.

¹⁴³ Marvin v. Marvin, 557 P.2d 106 (California 1976) in which the California Supreme Court enforced a contract for marital like benefits and promises made between co-habitants who were not formally married.

¹⁴⁴ Michele Goodwin, *Baby Markets and Money: the New Politics of Creating Families* (Cambridge University Press, 2010).

Feminist property scholars questioned the very definitions of legally recognized “property” rights in ownership (slavery¹⁴⁵), bodies, body parts,¹⁴⁶ reproduction (fetuses), reputation, “intangible” interests in investments of future spousal income,¹⁴⁷ and now intellectual property and property rights in culture (presciently predicting some of the most contested issues in intellectual property law now).¹⁴⁸

Beyond what are often considered “core” doctrinal areas of law, feminist legal scholars have made many contributions and interventions in both substantive and adjectival areas of law. A new generation of feminist scholars, has suggested that “feminist governance”¹⁴⁹ (building on older theories of collaborative or experimentalist governance and “feminist public administration”¹⁵⁰) will modify administrative, legislative and even judicial regulation (in a common law system) to be more “responsive” to the particularities of “lived experiences” in a variety of areas (family law and domestic violence, labor conditions, prostitution and vice, food and workplace safety), by avoiding overly generalized, universalized and abstract ideas for regulation, and focusing instead on social problem solving,

¹⁴⁵ Patricia Williams, *On Being the Object of Property*, (1988) 14 *Signs* 5.

¹⁴⁶ Michele Goodwin, *Black Markets: The Supply and Demands of Body Parts* (Cambridge University Press, 2006).

¹⁴⁷ Grace Blumberg, ‘Identifying and Valuing Goodwill at Divorce,’ (1992) *Law and Contemporary Problems*.

¹⁴⁸ Margaret Radin, ‘Property and Personhood,’ (1982) 34 *Stanford Law Review* 957; Margaret Radin, *Market (in)Alienability* (1987) 100 *Harvard Law Review* 1849; Carol Rose, ‘Women and Property: Gaining and Losing Ground (1992) 78 *Virginia Law Review* 421; Ruth Okediji, ‘Contracts, Persons and Property: A Tribute to Margaret Jane Radin, 22 *Michigan Telecommunications and Technology Law Review* 143 (2015).

¹⁴⁹ Janet Halley, Prabha Kotiswarin, Rachel Rebouche and Hila Shamir, *Governance Feminism: A Handbook* (University of Minnesota, forthcoming)

¹⁵⁰ Cynthia Farina, ‘Getting From There to Here,’ (1991) *Duke Law Journal* 689; Carrie Menkel-Meadow, ‘The Lawyer’s Role in Deliberative Democracy,’ 2004-5 *Nevada Law Journal* 1; Kathy Ferguson, *The Feminist Case Against Bureaucracy* (Philadelphia, Pa: Temple University Press, 1984).

interventionist, therapeutic and preventative methods, as alternatives to punitive and adjudicative methods, using such innovations as “problem solving courts”.¹⁵¹

Like the earlier generation, of which I am a member, these governance feminists have to confront the question of the role of the state in securing equality and quality of life for women—in the United States (unlike in more socially progressive countries) this is a complex and ambivalent relationship,¹⁵² as the state both giveth (some social security and welfare benefits, some legal protections in domestic violence¹⁵³ and anti-discrimination law¹⁵⁴) and taketh away (surveillance, criminalization of welfare and poverty¹⁵⁵ and sex work, work requirements, etc. and ongoing rigid gender classifications in many legal spheres (military, some work and labor rules)).

Like their public governance sisters, modern feminist scholars of the private corporation have urged more “feminist governance”, represented in the growing requirement in some countries for quotas of women on governing boards, arguing that profits are higher, management is better and corporate reputations rise with increased representation of women.¹⁵⁶ These arguments for more women in various legal and economic institutions, of course, replicate the early issues with

¹⁵¹ Judith Kaye, “Changing Courts in Changing Times: The Need for a Fresh Look At How Courts are Run,” (1997) 48 Hastings Law Journal 851.

¹⁵² Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); DuBois, Dunlap, Gilligan, Mackinnon, Menkel-Meadow, Ibid note 81; Linda Gordon (ed.), *Women, the State and Welfare* (Madison: Wisc.: University of Wisconsin Press 1990).

¹⁵³ But see Jane Stoeber, *Mirandizing Family Justice*, 39 Harvard Journal of Law and Gender 189 (2016); Kristin Bumiller, *In An Abusive State: How Neo-Liberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press, 2008).

¹⁵⁴ But see Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore, Johns Hopkins University Press, 1992).

¹⁵⁵ Kaaryn Gustafson, *Cheating Welfare: The Criminalization of Poverty* (New York: NYU Press, 2011).

¹⁵⁶ Linda-Eling Lee, Ric Marshall, Damion Rallis and Matt Moscardi, *Women on Boards* (MSCI Research Institute, 2015); (finding that critical mass of women on boards increased profits and decreased governance problems); Lahey and Salter, ‘Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism,’ (1985) 23 Osgoode Hall Law Journal 543.

“essentialism” – how do women “act” on corporate boards, differently than men? More responsibly? More honestly? More relationally? Feminist political scientists have made similar arguments for increased female representation in legislatures.¹⁵⁷ Similarly, feminist labor scholars have argued that the greater participation by women in trade unions would affect both processual decision making in unions, but also likely modify the issues of greatest salience to modern workers (health and safety, participatory governance, as well as wages and working conditions).¹⁵⁸

Feminist legal scholars of the economic order have also suggested both doctrinal and policy changes. Bankruptcy scholars (based on empirical work) have argued that individual bankruptcies (affecting women and families) may play as great a role in the health of an economy as corporate reorganization, and need as much legal attention and reform.¹⁵⁹ Marjorie Kornhauser has argued for changes in tax policy and increased progressivity as a feminist intervention in a corporatist, capitalist and individualist tax system in the United States.¹⁶⁰

Building on second generation “cultural” or “difference” feminism, so many of these creative suggestions for law reform depend on the claims that women will be concerned about the “relational”, caring and interdependence of human beings in lawmaking. When she spearheaded the attempt to overhaul the American health care system in the mid 1990’s First Lady (later Secretary of State and Presidential candidate) Hillary Clinton heralded this claim that the nation’s health was built on the “interdependence” of human beings (bacteria, germs and viruses do not know class or borders) and it “takes a village” to raise healthy children.¹⁶¹

¹⁵⁷ Mary Becker, ‘Politics, Differences and Economic Rights,’ (1989) University of Chicago Legal Forum 169.

¹⁵⁸ Marion Crain, ‘Feminizing Unions: Challenging the Gendered Structure of Wage Labor,’ (1991) 89 Michigan Law Review 1155.

¹⁵⁹ Theresa Sullivan, Elizabeth Warren and Jay Westbrook, *As we Forgive Our Debtors, Bankruptcy and Consumer Credit in the United States* (1989).

¹⁶⁰ Marjorie Kornhauser, ‘The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction’(1987) 86 Michigan Law Review 465.

¹⁶¹ Hillary Rodham Clinton, *It Takes a Village*, (New York: Simon & Schuster, 1996). HRC was an early “feminist” (part-time) legal academic when she and her husband both taught at the University of Arkansas Law School in the early years of their careers.

Women in international law have for decades made similar arguments about the need for increased inclusion of women in international law making and now in conflict resolution, peace negotiations, and transitional justice.¹⁶²

These, and many other contributions too numerous to mention here, demonstrate that the increased numbers of women in the legal academy has creatively and controversially challenged much of the conventional legal canon in so many areas of law. But note that even acknowledging these contributions continues to raise the issue of whether women “think” or “act” differently from men (and those who made the laws in most countries for centuries). Is there some kind of essentialist claim that remains? Are women making contributions to legal academe and legal thought through a “reactive” epistemology to what has gone before or creating, with agency, different conceptions of what a legal system could provide?

These issues continue to exist not only in substantive law, but in procedural law and education as well. American feminist legal academics have transformed legal education by offering smaller seminars with greater personal self-disclosure, modeled on the earlier feminist consciousness raising groups of the 1960s and 1970s. Seminars and more participatory (and clinical and experiential) legal education are now offered in virtually every American law school. As students demand more choice and less required curricula to meet the challenges of an increasingly complicated world, electives have now proliferated. Some scholars note that women professors are still disproportionately represented among those who counsel students, administer and manage the law school (which does include greater representation of women deans), but feminist and female (not always the same thing) professors are also increasing their productivity and recognition in almost every field of law.

If I had to suggest one particular contribution of modern feminist law professors it would be called “the Contextual Turn,” as feminist legal academics have

¹⁶² Hillary Charlesworth, Catherine Chinkin, and Wright, ‘Feminist Approaches to International Law,’ (1991) 85 *American Journal of International Law* 615; Martha Fineman and Estelle Zinsstag (eds.), *Feminist Perspectives on Transitional Justice* (Belgium, Intersentia, 2013).

resisted the kind of overly abstract and universalist thinking that fails to account for so much of our human, cultural and legal variability. Feminist scholars are now working on many particular sites of the interaction of gender and law (employment, organizations, welfare, family life, constitutional adjudication, contracts, property and torts, as well as newer areas of concern—migration, intellectual property,¹⁶³ or my own special area of interest—different methods of legal and international dispute resolution¹⁶⁴

VII. Conclusions: Where do we go from here? (Post-feminism?)

At the time of this writing women legal academics have made enormous inroads into the American legal academy, though many still claim underrepresentation (based either on comparisons to women in the workforce generally, to women in the legal profession, to location within the academy,¹⁶⁵ or by race and ethnicity¹⁶⁶). One scholar, however, claims that women are now, in fact, overrepresented in the legal academy (as compared to their representation in the legal profession) and that diversity and affirmative action programs have, in his view, been largely successful, in the appointment of many women of color to faculties.¹⁶⁷ In a comprehensive empirical study of the legal professoriate, James Lindgren argues that if any group is underrepresented in the legal academy it is Conservatives, Christians, Republicans and especially Republican women, but not white women, or women of color either.

¹⁶³ See e.g., Dan Burk, 'Do Patents Have Gender?' (2011) 19 American University Journal of Gender Social Policy and the Law 881 ; Kara Swanson, 'Intellectual Property, Gender: Reflections on Accomplishments and Methodology,' (2015) 24 American Journal of Gender, Social Policy and the Law 175; Rebecca Tushnet, (2007), 'My Fair Ladies: Sex, Gender and Fair Use in Copyright Law,' 15 American University Journal of Gender, Social Policy and the Law 273; Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (New York: Routledge, 2005).

¹⁶⁴ Carrie Menkel-Meadow, *Mediation and Its Applications For Good Decision Making and Dispute Resolution*, (Belgium, Intersentia, 2016)

¹⁶⁵ Angel, Ibid note 5 .

¹⁶⁶ Deo, Ibid; Merritt and Reskin Ibid; see also Gabriella y Muhs et.al. eds, *Presumed Incompetent: The Interactions of Race and Class for Women in Academia* (2012).

¹⁶⁷ James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013* (2015),

As of the 2013-14 academic year women constituted 35.9% of all fulltime law teachers, men were 64.1% of full time teachers, compared to women as constituting 32.4% of all working lawyers and men 67.6% of all working lawyers.¹⁶⁸ Minority (all groups combined, African-American, Asian, Hispanic and Native) women constituted 9.4% of the legal professoriate (6.7% of the working legal profession) and minority men constituted 10.5% of the legal professoriate (and 7.4% of the practicing legal profession¹⁶⁹). Women are still more likely to be found in skills, legal writing and librarian positions in the legal academy and are also still underrepresented among deans (144 male deans to 58 female deans in 2013) but there has been a steady increase of women in full time academic positions and in deanships. As of 2013, 27% of the total of legal educators were tenured male law professors, and 16.3% were female so the gap at the top reaches of the profession are slowly closing.

What do these numbers mean for gender equity in the legal academy? Many years ago sociologist Rosabeth Moss Kantor, who studied women's influence and participation in American corporate life, argued that it took a "critical mass" (somewhere over 30% of a particular workplace) for women to have two kinds of efficacy in the workplace: 1) to have ideas and contributions truly "heard" and recognized and 2) to be seen as "non-token" representatives of their demographic group.¹⁷⁰ As women in the legal academy now do constitute this "critical" mass in numbers (nationally, that is not necessarily distributed the same way at all law schools¹⁷¹), there are several consequences of this change in the American legal

¹⁶⁸ ABA Approved Law School Staff and Faculty Members by Gender and Ethnicity; Lindgren, Ibid.

¹⁶⁹ These data are derived from the ABA data, Lindgren's analysis that includes data sets from the US Census, American Communities Survey 2011, 2012 and 2013.

¹⁷⁰ Rosabeth Moss Kantor, *Men and Women of the Corporation* (New York: Basic Books 1977); Joyce K. Fletcher, *Disappearing Acts: Gender Power and Relational Practice at Work* (Cambridge, Mass: MIT Press 1999); see also M. Torchia, A. Calabro and M. Huse, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass, (2011) 102 Journal of Business Ethics 299.

¹⁷¹ Measuring diversity in legal education includes both this "counting" of numbers, (faculty, students, administrators) called "structural diversity," as well as trying to assess more "interactional diversity" –do increases in numbers of diversity of

professoriate, especially when the female student body in American law schools has been near or over 50% of the total population for about twenty years.

First, there is still some evidence of stratification by subject matter, Constitutional law, at the top of the informal prestige scale, still has some underrepresentation of women, though that is rapidly changing with several distinguished women (and two former law professors) on the United States Supreme Court (Ruth Bader Ginsburg and Elena Kagan) now pre-eminent in the field (and several female Deans of major law schools who are also Constitutional scholars, Martha Minow (Harvard), Heather Gerken (Yale), and Kathleen Sullivan (Stanford), as well as legal historian Barbara Black (Columbia). Women now teach and publish research in virtually every area of conventional law school study including contracts, property, torts, civil procedure, criminal law, as well as business subjects, commercial law, banking, bankruptcy, taxation, legal ethics, immigration, intellectual property, labor and employment law, health law, and all advocacy and skills subjects. This means that for women law professors who seek “assimilation” or “integration” into the legal academy, almost every subject has become accessible for teaching and scholarly production, whether the development of conventional doctrinal analysis, or a particularly “feminist” take on any of these subjects. Gone are the days of tenure denials for women who worked primarily on “feminist” or “women’s issues.”¹⁷²

At the same time, however, the increased numbers of women in the legal academy has ironically accompanied (or produced?) a decrease in the number of explicitly feminist theory, jurisprudence and “women and the law” classes. Whether this is due to the integration or assimilation of feminist concerns into Constitutional,

demographic representation actually lead to enhanced diversity of interactions in classrooms, scholarship and governance, see Deo, *Ibid*.

¹⁷² Notorious cases in the 1980s included tenure denials at Harvard (Clare Dalton), Yale (Lucinda Finley) and the University of Pennsylvania (Drucilla Cornell). My colleagues at UCLA, Christine Littleton and Frances Olsen (mid-1980s) were among the first to be awarded tenure precisely because they had done high quality work on exclusively feminist issues. But see Katherine Barnes & Elizabeth Mertz, ‘Is it Fair? Law Professors’ Perceptions of Tenure,’ (2012) 61 *Journal of Legal Education* 511.

family, employment and criminal law classes and scholarship,¹⁷³ or is the product of generational change, to a “post-feminist” era,¹⁷⁴ or the deconstruction of gender into other critical “identity” concerns and courses,¹⁷⁵ separate treatment of feminist theory and jurisprudence is clearly not as prominent as it was when there were fewer female legal academics. Perhaps, as my generation likes to think, it was our passionate commitment to feminist issues and our advocacy in both substantive and professional participation activities that cleared the way for new generations to work directly on all issues in the law (though issues of parental leave, tenure clocks, etc. continue to have disparate impacts on women in the professoriate, as in the legal profession generally.¹⁷⁶)

And in a greater irony, younger generations of law students (and some faculty) have upturned some of the earliest feminist concerns. While my generation expended enormous energy on teaching, scholarship and advocacy to have rape and domestic violence included in the criminal law curriculum, some young women have asked that these subjects not be taught (to avoid reliving their own trauma from these events) or that syllabi and classes be marked with “trigger warnings” so

¹⁷³ The coverage of rape law in criminal law was itself a huge controversy in the early days of legal feminism, see e.g. Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Mass. Harvard University Press, 2000); Sanford Kadish, Stephen J. Schulhofer and Rachel Barkow, *Criminal Law and Its Processes: Cases and Materials* (10th ed. New York: Wolters Kluwer, 2016).

¹⁷⁴ Katie Roiphe, *The Morning After: Sex Fear and Feminism* (Hamish Hamilton, 1993).

¹⁷⁵ My own law school now has more “Critical Identity” and “Critical Race” courses and seminars than “separate” gender or feminist courses.

¹⁷⁶ Carrie Menkel-Meadow, “Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering,” (1994) 44 *Case Western Reserve University L. Rev.* 621; Carrie Menkel-Meadow, “The Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers” in *Lawyers in Society: Vol. 3 Comparative Theories* (R. Abel & P. Lewis, eds) (Univ. of Cal. Press, Berkeley and Los Angeles, 1989), Carrie Menkel-Meadow, “Exploring A Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change,” (1989) 14 *Law & Social Inquiry* 289-319; Carrie Menkel-Meadow, “The Comparative Sociology of Women Lawyers” (1986) 24 *Osgoode Hall L.J.* 897.

students will know in advance (and can sometimes opt-out of class, for “safe spaces”) that these subjects will be covered.¹⁷⁷

Treatment of women’s or feminist issues can now be found in several places in the legal academy—a few specialized courses remain, some taught as the study of a “historical” movement within the context of other jurisprudential schools,¹⁷⁸ as assimilated into the conventional curriculum (discrimination in Constitutional, employment and family law), domestic violence, prostitution or “sex work” and rape in torts or criminal law, reproductive rights in health law, constitutional law, torts and contracts (e.g., surrogacy and adoption contracts) and as parts of larger advanced and elective courses (intellectual property, gender difference in dispute resolution¹⁷⁹ immigration law, human and civil rights). In a few schools with empirical or socio-legal research agendas new generations of scholars pursue important empirical projects on how gender is experienced, policed and regulated in a variety of legal settings.¹⁸⁰ Like earlier generations, many here are looking at the role of the “rule of law” and the State and its institutions more generally as both

¹⁷⁷ The “trigger warning” controversy in United States higher education has erupted on many campuses with great disagreements about freedom of speech, educational values and protection or some (including me) arguing that this is “overprotection” of students, The controversy has divided feminists on many campuses. See e.g. Greg Lukianoff and Jonathan Haidt, “The Coddling of the American Mind” *The Atlantic*, September 2015; Jeannie Suk, ‘Shutting Down Conversation about Rape at Harvard Law,’ (2015) *New Yorker*, Dec. 11, 2015; Mick Hume, *Trigger Warnings: Is the Fear of Being Offensive Killing Free Speech*, (London: William Collins, 2015).

¹⁷⁸ Stephen Gottlieb, Brian Bix, Timothy Lytton and Robin West, *Jurisprudence Cases and Materials: An Introduction to Philosophy of Law and Its Applications* (Lexis-Nexis, 2006).

¹⁷⁹ Carrie Menkel-Meadow, ‘Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers – What Difference Does ‘Gender Difference’ Make? (2012) *Dispute Resolution Magazine* (ABA April 2012).

¹⁸⁰ Laura Beth Nielsen and Robert L. Nelson, eds., *Handbook of Employment Discrimination Research: Rights and Realities*, (Springer, 2005); Gustafson, *Ibid.*, (welfare and poverty); Aya Gruber and Amy Cohen, *ibid.*, Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (Civitas, 2002); Rachel Kahn Best et. al., ‘Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation,’ (2011) 45 *Law & Society Review* 991; Lynette Chua, *Mobilizing Gay Rights in Singapore: Rights and Resistance in an Authoritarian State* (Philadelphia, Pa: Temple University Press, 2015).

facilitating and claiming to promote equality, and also hindering substantive justice with rigid categories, disparate enforcement, benefits, punishments and treatments, and through co-opted reinterpretations of advocacy categories, when controlled by the state or disputed by different political interpretations.¹⁸¹

And, as many queer, post-modern and critical race theorists deconstruct (and reconstruct) more complex identities in the law, many scholars have come to question what they call the artificial “binary” of either biological sex or sociological “gender.”¹⁸² Thus, feminist theory, teaching and advocacy has “deconstructed” into more complex, less essential, categories and more “context specific” or particularized subjects of study.

At the same time a few in the older generations continue to pursue theories and issues that build on earlier conceptualizations, such as continuing gender (essentialist?) specific projects, such as the important efforts to have rape formally recognized as an international war crime, the role of women in transitional justice and peace seeking activities, and the recognition of women’s rights as international human rights.¹⁸³ Throughout the decades Professor Martha Fineman has held yearly scholarly conferences (and published books almost annually) to study gender issues but to broaden, deepen and “universalize” feminist interests into concerns

¹⁸¹ See Catherine Mackinnon, *Toward a Feminist Theory of the State* (Harvard Press, 1987); Amy J. Cohen, ‘Trauma and the Welfare State,’ (2017) *Texas Law Review*; Gustafson, *Ibid*, Serena Mayeri, *Reasoning From Race: Feminism, Law and the Civil Rights Revolution* (Cambridge, Mass: Harvard University Press, 2011); Id, “Historicizing the ‘End of Men’.: The Politics of Reaction(s)’ (2013) 93 *Boston University Law Review* 729.

¹⁸² Butler, Fineman, and Halley *Ibid*. See bibliography: Empirical Methods and Critical race Theory, Center on Law, Equality and Race, University of California, Irvine, at <http://law.uci.edu/academics/centers/clear/research.html>.

¹⁸³ Catherine Mackinnon, *Are Women Human? And other international Dialogues* (Harvard-Belknap Press, 2007); See Rome Treaty (Statute of International Criminal Court), Art. 7 (1) (g) Crimes Against Humanity, including “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity,” (in force, July 1, 2002); see also Rhonda Copelon, ‘GENDER CRIMES AS WAR CRIMES: INTEGRATING CRIMES AGAINST WOMEN INTO INTERNATIONAL CRIMINAL LAW,’ *McGill Law Review* (2000).

about subordination and vulnerability more generally, with emphases on children, abused people, gay, lesbian and transgender individuals, migrants, sex workers and other victims of oppression or discriminatory activity.

Whether we now inhabit a “post-feminist” world in which women legal academics now teach with a great variety of teaching methods, and pursue research and study of law reform in virtually every area of human endeavor, with an increasingly diverse student body, as well as the law professoriate, is one, perhaps overly “optimistic,” conclusion to be reached from the American experience. In my own view, the influx of women legal academics in the 1980s to the present remains significant not only for the demographic diversification of the professoriate, but more importantly, for the intellectual contributions of a variety of contested conceptualizations of how gender and law structure, constitute, and regulate all human activity. I still think that gender matters (whether from oppressive discrimination and stereotyping, or more socially constructed “differences”) and that different ideas about how gender matters in law will continue to provoke and inspire new legal “memes” (whether in formal doctrinal law, legal scholarship and research or instruction).