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KEEPING STUDENTS AWAKE: FEMINIST THEORY AND LEGAL EDUCATION

Martha Minow*

I am not exactly sure why, but when I turned to think about legal education for today's conference, Mary Shelley's *Frankenstein*¹ came to mind. It was not because of my own nightmares that my chosen profession as law professor involves turning ordinary people into monsters, although that's a thought we can explore perhaps over drinks. It was because of this comment Shelley makes in the book: "If the study to which you apply yourself has a tendency to weaken your affections, and to destroy your taste for those simple pleasures in which no alloy can possibly mix, then that study is certainly unlawful, that is to say, not befitting the human mind."²

This gives me a starting place to talk about legal education. For Shelley's spiritual heirs include contemporary feminist lawyers who have sketched three fundamental challenges to legal study as usually practiced: the first is a critique of pedagogy; the second, a critique of mission; the third, a critique of content. Each critique starts with women—as students, as a topic, and as a cause—but opens into larger visions of who and what matters.

Thus, the critique of law teaching starts with claims that law schools alienate women students: from themselves, their feelings, their communities, and their own capacities to excel.³ In 1984, Sheila McIntyre said that, "Going to law school is learning to speak male as a second language, and learning it fluently,"⁴ or, in Lani Guinier's terms, "becoming gentlemen."⁵ As one second-year student from the University of Iowa wrote, "[L]aw school makes me feel as if I am trapped in a mental straitjacket. And it makes me feel as if I am in danger of losing the intellectual courage I possessed as an undergraduate."⁶ But it is not just women who report such feelings. Here, as in each of the critiques, the focus on women affords what many call the miner's canary. As Susan Sturm put it:

Miners used to bring a canary into the mines with them as a way of detecting toxicity in the air. When the canary became sick or died, miners knew that the environment had become toxic for everyone. . . .

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1. MARY W. SHELLEY, *FRANKENSTEIN, OR THE MODERN PROMETHEUS* (J.M. Dent & Sons 1963) (1818).

2. *Id.* at 49.

3. See, e.g., Cheryl M. Herden, *Women in Legal Education: A Feminist Analysis of Law School*, 63 *REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO* [REV. JUR. U.P.R.] 551, 551 (1994).

4. K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 *AM. U. L. REV.* 1141, 1145 (1985) (quoting an address by Sheila McIntyre).

5. See generally LANI GUINIER ET AL., *BECOMING GENTLEMEN* (1997).

6. Herden, *supra* note 3, at 552.

The experience of women and other previously excluded people can provide an angle of vision enabling the transformation of legal education to prepare lawyers and law for the twenty-first century.⁷

Lani Guinier and her co-authors, Michelle Fine and Jane Balin, quickly explain in their report on a study of the University of Pennsylvania Law School that it is not just women who never or rarely participate in class, lose confidence, voice, aspirations, and the ability to achieve. The competitive, adversarial environment, the reliance on quick, disjointed verbal comments and one-time written exams, and the problems abstracted from context, persons, and purposes impair the learning opportunities for many men as well.

For feminist critics, legal pedagogy should promote listening as well as talking and collaboration as well as individual excellence. Teachers should call not on the first or second hand up, but instead on a hand raised after most hands in the classroom are up. Students should have many occasions to work in groups, in and out of class. More basically, recognition that students come with learning styles should guide instruction.

The second, related critique challenges the implicit mission of law schools of training litigators and hired guns. Instead, or in addition, law schools should train problem-solvers: civil leaders, and activists able to advance social movements, rather than individuals willing to serve only the highest bidder. To be problem-solvers, students must learn to be listeners, and to be able to understand multiple viewpoints. In her disability law class, Professor Taunya Banks requires her students to spend several hours trying to maneuver around the law school using a wheelchair.⁸ Legal education should enlarge students' capacities for empathy and appreciation of the perspectives of others so that they can be lawyers with those abilities. Obviously this critique and vision extend beyond women to all students and lawyers.

The third critique looks directly at the content of legal education. What demeans women or relies on gender stereotypes must change. Mary Joe Frug's classic critique of a standard contracts casebook may not have excised the gender stereotypes but the casebook has changed—and her article now joins the canon of first year readings.⁹ Equally important as sins of commission, though, are sins of omission: the historical exclusion of topics of concern to women from the law school curriculum and the continuing devaluation of perspectives and concerns held by women. By now, much of this critique seems antique. Rape *is* taught in criminal law; sexual harassment and sex discrimination appear in civil procedure and torts classes as well as gender

7. Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 126 (1997).

8. See Herden, *supra* note 3, at 567.

9. See generally Mary Joe Frug, *Rereading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1984).

discrimination courses. Feminist scholarship proliferates. You've heard about excellent examples at this conference. And these ideas make their way into not just gender, and family law, but also courses in contracts, tax, and bankruptcy. Still, though, often omitted from legal education are strategies of feminist argument such as narrative and consciousness-raising.

Yet even to talk in these terms is to run directly into a debate among feminists: what strategies do all feminists adopt, and what are distinctively feminist approaches? Is mediation a feminist problem-solving approach or an innovation that hurts women? Is narrative advanced by feminists any different than narrative advanced by critical race scholars? Do feminist narratives battle subordination in any special ways? These questions can be shunted aside if we resist desires for exclusivity; it shouldn't matter if others besides feminists want particular content to change. But the divisions among feminists about content does render the relevance of feminism to legal education more problematic.

Feminist legal theory actually has a positive program in the area of legal education, and one that can and should inspire coalitions for change. Yet, at times, feminism's own internal divisions make this claim difficult to comprehend, much less advance.

Perhaps the greatest hope here is opponents. Opponents who raise objections to feminist legal scholarship and teaching give us two wonderful gifts. The first is essentially a certificate of influence. Only if we are threatening enough would we warrant opponents. The second is the possibility of renewed unity. If feminists engage in debate with opponents, we may help to clarify what we are for and what we are not about.

Here I think we could start by trying to identify common themes in the work already underway. In the three critiques of legal education, the starting point may have been asking the "woman question," but that is not what holds them together now. Instead, I suggest one basic theme is resistance to the assumption that human beings are and should be fundamentally separate, self-interested, and competitive. That assumption renders typical pedagogy impoverished. It shrinks the potential mission of law schools to the production of self-interested litigators. It narrows the content of law school classes. In contrast, feminists juxtapose the assumption of human separation and selfishness with the facts of human interdependence. This interdependence is often laden with hierarchies of domination and subordination, but only if human connections are at the center can these patterns in all their persistence be seen. Interdependence itself is not the problem; instead, it is a wellspring of potential resistance and sustenance.

We each know how much we depend on others to get by, get through, and even to get up. Perhaps you already know the research findings highlighting the relationship between health and social supports through family and friends. A town noted for having less than fifty percent of the national average rate for heart attacks is also characterized by

closely-knit family and community relations.¹⁰ Couples get fewer illnesses and live longer than their single counterparts.¹¹ One study found that most of a group of 275 sudden deaths of older persons followed a traumatic disruption of a close human relationship or the anniversary of the loss of a loved one.¹² Membership in networks of close friends and family seems to reduce risks of mental illness.¹³ People offer emotional support to one another that buffers against the stresses of life. Emotional support also offers a sense of meaning, purpose, and value. Studies, in short, confirm what my grandmother, and the lyrics from *Funny Girl*, taught me. People need people. Yet people also misuse and hurt others. How can connections be safe and fair?

If this were the starting point, law schools would spend as much time on duties as rights, and as much time on consumer protection as freedom of contract. Human interdependence certainly characterizes the practice of law. You know the old story about the one-lawyer town, not too far from here? A newcomer arrived and hung out a shingle to practice. A friend asked the formerly solitary lawyer, "Aren't you worried? There wasn't enough business for you before and now you have competition." "Why no," replied the first lawyer, "Now we'll both have plenty of business."

An adversary system needs adversaries. It also needs clerks, paralegals, magistrates, computer technicians, accountants, librarians, forensic scientists, police, bailiffs, and managers. Of course lawyers need clients as much as clients need lawyers. But what perhaps goes without enough attention is how much lawyers need membership in circles of associates and friends. Working with other lawyers—on the same side or across the table—is what most lawyers (but not most law students) do. The quality of those relationships makes all the difference to a lawyer's ability to be a problem-solver rather than a problem-deepener. In addition, colleagues and friends are often all that stand between a lawyer and ethical disaster. Once we concede that legal ethics should be something other than an oxymoron, we come to the first rule of legal ethics: never resolve an ethical problem without talking it over with someone you trust.

The interdependence lawyers have with one another is second in importance only to a more profound cultural interdependence. People these days call it civil society: the patterns of association and mutual aid that connect people in groups larger than households and smaller than the entire world, or country. The United States has had a particularly vital civil society, being as we are a nation of joiners and volunteers. It

10. See MARK PILISUK & SUSAN HILLIER PARKS, *THE HEALING WEB: SOCIAL NETWORKS AND HUMAN SURVIVAL* 32 (1986) (describing a study published in 1964 in the *Journal of the American Medical Association* which examined a small community).

11. See *id.* at 33.

12. See *id.* (describing a study published in 1977 in *Psychology Today*).

13. See *id.* at 36.

is the Women's Bar Association, the Big Brothers clubs, the NAACP, the League of Women Voters, the church choir, the grassroots community organization, the battered women's shelter—and countless others—that draw the talents and energy of people to make things better.

Political theorist Robert Putnam calls the results “social capital”¹⁴—meaning the resources that come when people rub shoulders with others outside their immediate circles and learn to care for one another. I do have to laugh a bit; lots of us have talked and worried about this without giving it an economic name like “social capital,” but that very name has arrested attention from leaders here and around the world. Putnam is the one who warns we have declining social capital; rather than bowling in leagues, for example, he says Americans are more and more “bowling alone.”¹⁵ The result, he says, is erosion of the crucial materials for democracy.¹⁶ People feel less connected to larger communities and issues, so they do not vote or otherwise participate in self-governance.¹⁷ And when they do, it is with an attitude of private consumption: asking “what will be good for me?” rather than “what will be good for all of us?” There is a bit too much nostalgia for what probably never existed in all this for my taste, but also some important ideas. Putnam studied towns in Italy where self-governance worked and compared them with towns where democracy failed.¹⁸ The crucial difference, he concluded, was the traditions of informal organizations, choirs, and the like in the towns where democracy worked.¹⁹ These activities created social capital by helping people relate to people unlike themselves.

Now, social capital does not appear in the GNP or other economic measures. It is precisely the set of social relationships that usually stand apart from legal regulation. Yet for lawyers, specifically, declines in social capital pose serious dangers. We who use words to promote transactions and solve problems, to push for changes in the workplace, schools, and the entire society, depend upon the crisscrossing networks of civil society. Distrust, disorder, and potentially explosive violence by both private and public actors endanger what we do and also undermine any vision of the good life.

It may be clever to appropriate the language of economics to talk about interdependence, but that move carries with it two dangers. The first is obscuring the patterns of power and exclusion that can operate through associations and human connection; the second is entering into, rather than critiquing, the economic language sweeping through law

14. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 66 (1995) (crediting James S. Coleman).

15. See *id.* at 70.

16. See *id.* at 77.

17. See *id.* at 67-68.

18. See *id.* at 66 (citing ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993)).

19. See *id.*

schools and the larger society. The dominant discourse of economic necessity and market choice risks squeezing out the equally important language of responsibility, care, equality, fairness, and compassion. Engendering this alternative language is something law schools could do, especially if informed by feminist work. We cannot cede to the economists, the corporations, and tax classes any more than the worlds they address. Students also need to understand that attention only to time sheets and cost-effectiveness leads to slighting the human interactions that are the soil we all need to survive.

Lawyers have the opportunity to express and sustain another set of values: the values of fairness and duty, civility and community, reliance and justice. These values are seldom captured, and sometimes undermined, by bottom-line thinking and efficiency concerns. Yet these values historically represented crucial contributions of law to society. Now, law schools are themselves often taken over by the economists' world view, and it is not even a hostile takeover.

Treating lawyers as especially attuned to the values of interdependence may seem odd given the feminist critiques of adversariness and the assumption of selfish, autonomous individualism in American law. Yet feminist legal theories do show and revitalize the traditions already present in law. Dare I say it: the "j" word—justice. Justice fundamentally attends to our interdependence as moral beings. Feminists can be the miner's canary in law schools and law firms, in community organizations, and in the political scene by exposing how little talk there is of justice. Indeed, if we don't hear the "j" word in the corridors of our workplaces, with our neighbors, in classrooms, in political discussions, and in talk of the global economy—it is partly our job to ask: "What about justice?" It is also our job to ask: "What will replenish the sense of community and interdependence as factories, executives, workers, and capital move across enterprises, and across borders, with no time or continuity to cultivate human relationships or sustain the security that allows people to challenge exploitation?"

As I gathered my thoughts for today, I talked with Brenda Cossman, a law professor in Canada. I asked, "What would you say to a conference about the relevance of feminism to legal education?" She answered with bell hooks's marvelous phrase, "from margin to center."²⁰ And indeed, in Canada, already, feminism is a mainstream subject, approach, and mission in legal education. Some forms of feminism are also pervasive in law schools in Norway, Denmark, Australia, the Netherlands, and parts of Britain and South Africa. Comparative projects may be all the rage now—excuses to travel?—but it does seem a fascinating and crucial question to understand when and how feminist ideas affect legal education in different countries. How do the differences in the laws and legal cultures influence the reception of feminist ideas? How do different feminisms fare? Yet, more than

20. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

fascinating, these sprouting feminisms around the world could be the bases for a global challenge to the global forces that threaten interdependence, justice, and respect for human beings. The creativity manifested in a conference like today's is exploding elsewhere, too. Can we join together?

That extraordinary woman of dance, Agnes de Mille, once said, "I learned three important things in college—to use a library, to memorize quickly and visually, to drop asleep at any time given a horizontal surface and fifteen minutes."²¹ Law school adds the ability to drop asleep at any given time even while sitting. Feminism, I think, can keep students awake, and alert to both what is monstrous in our midst, and what we ourselves can work to change.

21. AGNES DE MILLE, *DANCE TO THE PIPER* 90 (1952). She added, "What I could not learn was to think creatively on schedule." *Id.*

