ON DISCIPLINE AND CANON

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While the title of the panel I participated in was "Why Do We Eat Our Young?", I think I prefer: "On Discipline and Canon," or to rework the title of the panel in the program, "Why Do We Eat Our Girlfriends?"

In my short remarks, I would like to raise a set not of answers, but of questions that over the last year or so a few of us have been discussing outside of our published work. These questions seem apt both for this panel and for this conference. Last November a group of really wonderful women at the University of Texas put together a conference called "Subversive Legacies: Learning From History/Constructing the Future." A number of the people attending this conference at Columbia were in Austin for that gathering. What took place there was what Martha Fineman has termed an "uncomfortable conversation"[1] about what it means to write as a feminist, what it means to write about feminism, and what it might mean to write from outside feminism on issues that have been thought of as the intellectual property and proper terrain of feminism. Janet Halley raised some of these questions in Austin, and again at this symposium.

I regard this last move as one that is epistemic in nature. It is primarily one of vantage point and offers an important heuristic opportunity.[2] What if we stepped outside of a perspective self-consciously

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[1] *See*, *e.g.*, Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403, 1404 n.3 (2001).

[2] I have described this epistemic move elsewhere as follows:

> Imagine for a moment four people sitting around a table upon which has been placed a drinking glass. Each person is asked to describe the shape of the top of the glass. Each person independently responds, "Round, of course." The questioner pushes a little. "But is round what you actually see?" "Well, no, I see it as oval, but its real shape is round," they all concur.
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> Every day, in life's most trivial and momentous moments, we interpret our experiences in ways that create not only facts, but meaningful facts. Most often, this is accomplished through the acquisition and internalization of publicly agreed upon points of view or reference. So, we all agree that the glass's true shape is determined from the perspective of an idealized point of view directly above the glass. Our assent to the use of such an idealized point of view allows us to answer the question in an intelligible way, and on a deeper level, it makes a right

labeled "feminist" and re-examined issues typically regarded as the target of feminist inquiry? What do we see differently about them? What do we learn differently? I would like to pick up a set of those conversations that were started for me last fall in Austin and try to engage them here.

This conference takes place at a particularly interesting moment for feminist theory, a time when we can say that feminist jurisprudence has in many ways become a discipline. We have mountains of casebooks.[3] Many law schools—not all, and I do not think that I can say most—offer a course called feminist jurisprudence, feminist legal theory, or the jurisprudence of gender. There is even an endowed chair in feminist theory that Martha Fineman held up at Cornell Law School. We might even say that a kind of canon has been established in feminist legal theory, concretized, or canonized if you will, in the various readers that many of us know well. There is Fran Olsen's two-volume set collecting the writings that were, in 1995, formative and that "position[ed] feminist theory within the law."[4] There are Bartlett and Kennedy's reader,[5] Adrienne Wing's Critical Race Feminism,[6] and Martha Chamallas's Introduction to Feminist Legal Theory,[7] that many of us use in our own teaching. While there are doubtless new readers in press—this is an evolving area of jurisprudence—I think you will see similarities across books that both create and reflect the canonical texts in feminist legal theory.

It is exciting that we can claim, and we can claim credibly, that we are writing in a *field* called feminist legal theory. There is a thing there; there is a field there; there is a discipline there. But it is exactly these moments in field formation that I think are quite dangerous as we risk being disciplined by the field, by the canon, and by our more prominent scholars.

> answer possible. That is, our assent creates truth conditions. It determines what it would mean to get the answer right.
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> Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. Pa. L. Rev. 1, 70 (1995).

[3] *See*, *e.g.*, Cases and Materials on Sex-Based Discrimination (Herma Hill Kay & Martha S. West eds., 4th ed. 1996); Feminist Jurisprudence: Taking Women Seriously: Cases and Materials (Mary Becker et al. eds., 2d ed. 2001); Gender and Law: Theory, Doctrine, Commentary (Katharine T. Bartlett et al. eds., 3d ed. 2002); Mary Joe Frug's Women and the Law (Judith G. Greenberg et al. eds., 2d ed. 2001); Sex Discrimination and the Law: Causes and Remedies (Barbara Allen Babcock et al. eds., 1978); Sex Equality (Catharine A. MacKinnon ed., 2001).

[4] Feminist Legal Theory I: Foundations and Outlooks (Frances E. Olsen ed., 1995); Feminist Legal Theory II: Positioning Feminist Theory Within the Law (Frances E. Olsen ed., 1995).

[5] Feminist Legal Theory: Readings in Law and Gender (New Perspectives on Law, Culture, and Society) (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

[6] Critical Race Feminism: A Reader (Adrienne Katherine Wing ed., 2d ed. 2003).

[7] Martha Chamallas, Introduction to Feminist Legal Theory (2d ed. 2003).

In some ways and in some places we hear the charge that you are not doing feminism if you are not asking the question in such and such a way, according to either a set of substantive commitments, starting points, or accepted methodologies that are widely accepted as feminist.

Why do I call these moments dangerous? I think it is precisely at this juncture, as feminist theory becomes disciplinized, that the nature of critical work becomes multivalent and more complicated. Many of us are undertaking projects designed to subvert or critique larger cultural and social inequalities based on gender, but we also need to undertake critical projects from within feminism—not from within feminism outward, but from within feminism inward—by resisting the disciplinary power of the canon and continuing to critically engage the baselines, the methodologies, or the settled questions in feminist theory from within and among us. Feminists of color and lesbians have been doing that work from the start, but I regard these critical projects as the obligation of all of us regardless of our proximity to margin or center of the field. Given this, what I want to focus on is a weakness in these internal critiques among feminists.

Let me just say this: I believe *that we disagree badly as feminists*. Partly this is because the personal is political. Many of us—and I will include myself in this group—autobiographize our theoretical work. We are writing about ourselves, either explicitly or implicitly. We all risk this kind of standpoint epistemology even as we critique standpoint epistemology. It is what gives passion to our work. But it is something to be careful about. Given the personal stakes in our work, in our ideas, in the values we operationalize in our work, we take disagreements personally. We are hurt by them. And surely at times they become less than scholarly.

A few examples will illustrate this concern although they surely do not capture the entire field or the entire range of the concern that I have. First, in the inaugural feminist theory lecture in 1999 for the Gender, Work, and Family Project at American University, Kate Bartlett provided one of her overviews of feminist theory in law. The lecture was called "Cracking Foundations As Feminist Method,"[8] in which she noted with puzzlement that some of our most prominent theorists in feminist theory do not cite or acknowledge one another's work. She and I share a worry about a tendency in some feminist theory to purport once and for all to have gotten it right. You do not need to cite anyone else if your own work has both considered and answered all the important issues facing women.

Second, a very thoughtful group of feminist legal scholars have sought to bring insights from postmodern theory to bear on some of the most difficult problems in feminism. Surely, Mary Joe Frug must be

[8] Katharine T. Bartlett, Cracking Foundations as Feminist Method, 8 Am. U. J. Gender Soc. Pol'y & L. 31 (2000).

mentioned at the top of that list.[9] While we have been denied the benefit of her ongoing work due to a horrific act of violence, others have picked up the project by asking complicated questions about agency, subordination, and identity formation. Consider how the work of Kathryn Abrams[10] and Tracy Higgins,[11] have been parodied and ridiculed by the likes of Catharine MacKinnon or Martha Nussbaum who cynically summarized the insights of postmodern feminism as making room for women to choose to be raped or sexually assaulted.[12] This is not principled disagreement or engagement; it is parody.

Third, thoughtful interventions into feminist legal theory from a queer perspective have been made by Janet Halley[13] and Mary Anne Case.[14] They too have been ungenerously read by peer feminist scholars in such a way as to point them to the door.[15]

I raise these issues not to identify victims of feminist orthodoxy. This story is more complicated. Many of the feminists who write against an exogenous stereotype of what is thought of as *feminist* have been at once rewarded by those who sit outside the field and punished by those within feminism. This is worth thinking about. The law schools at Harvard, Yale, Columbia, University of Chicago, and Boalt, for example, have hired

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[9] *See*, *e.g.*, Mary Joe Frug, Law and Postmodernism: The Politics of a Marriage, 62 U. Colo. L. Rev. 483 (1991). For more discussion of Frug's life and work at the Columbia conference, see Regina Austin & Elizabeth A. Schneider, Title, 12 Colum. J. Gender & L. _ (2003).

[10] *See*, *e.g.*, Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 Wm. & Mary L. Rev. 805 (1999); Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304 (1995).

[11] *See*, *e.g.*, Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 Cornell L. Rev. 1536 (1995); Tracy E. Higgins & Laura A. Rosenbury, Discrimination and Inequality: Emerging Issues Agency, Equality, and Antidiscrimination Law, 85 Cornell L. Rev. 1194 (2000).

[12] *See*, *e.g.*, Catharine A. MacKinnon, Points Against Postmoderism, 75 Chi.-Kent L. Rev. 687 (2000); Martha C. Nussbaum, The Professor of Parody, The New Republic, Feb. 22, 1999, at 45 (launching a similar critique of Judith Butler's work).

[13] *See*, *e.g.*, Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 Va. L. Rev. 1721 (1993); Janet Halley, Sexuality Harassment, *in* Left Legalism/Left Critique 80 (Wendy Brown & Janet Halley eds., 2002).

[14] *See*, *e.g.*, Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1 (1995).

[15] *See*, *e.g.*, Mary Becker, Care and Feminists, 17 Wis. Women's L.J. 57, 78-95 (2002). Halley's new work on sexuality harassment has frequently received a critical, if not hostile, response from audiences where she has discussed the work. Guido Calabresi, while not a prominent "feminist," but surely a prominent legal theorist and jurist, has recently described Halley's work as "nearly heretical." Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 Stan.L.Rev. 2113, 2128 n. 61 (2003).

feminist scholars whose work is considered by other feminists as rather, if not quite, controversial. They are disciplined from within the field, and rewarded from without. To my mind, this complex set of interest convergences and divergences brings with it particular ethical obligations for those who are occupying that difficult, albeit privileged, space.

Among the obligations this positioning implies surely may include a duty to think critically about where we publish our work. Perhaps we should take the opportunity provided by feminist law journals or women and law journals[16] to duke out some of these tough issues in a different way than we have in the past. Those of us who are privileged enough to occupy these spaces in the academy have some obligation to publish in those journals. It will help the journals and it will help our scholarship. This may lead to new and better ways to disagree with one another and to test one another's ideas, all in the service of keeping this field dynamic during this moment of disciplinarity.

In the end, it seems, the real title that I want to give to my talk is not "Why Do We Eat Our Girlfriends?" but "Where Should We Eat Our Girlfriends?"

[16] It is interesting that it is a Columbia Journal of *Gender* and Law that is holding a conference on *feminism* in law journals.