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*Published by the National Association of Women
and the Law Charitable Trust for Research and Education*

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About the National Association of Women and the Law Charitable Trust for Research and Education

The National Association of Women and the Law (NAWL) is an incorporated not-for-profit feminist organization that promotes the equality rights of Canadian women through legal education, research, and law reform advocacy.

To promote understanding of the status and role of women in Canadian society, NAWL established the NAWL Charitable Trust for Research and Education in 1983. The Trust funds, prepares and disseminates research and education about legal issues in all aspects of the social, economic and political life of Canadian women.

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In 1991, the National Association of Women and the Law Charitable Trust for Research and Education published a Gender and the Law Manual as a means of reaching out to law students in friendship and in recognition of the unique concerns of women in law. Twenty years later, we believe such a handbook is still relevant. While a small number of pieces that appeared in the original Manual have been reprinted here, the working group that compiled this guide laboured to ensure that law students would have some current reference material to assist them in meeting the challenges presented by law school and legal practice today.

It is our hope that by exposing some of the institutional barriers that make the law school experience difficult for many women and individuals from equality seeking groups, we will effectively encourage more awareness and discussion of the issues – and perhaps even encourage small steps to be taken toward the development of practical answers as well.

The editors of the earlier release of this handbook wrote: “we believe that a handbook such as this will make an important contribution toward our long-term objective of making the law and the legal profession more sensitive to women.” That long-term objective is far from realized: there remains much work to be done to reduce systemic discrimination embedded in the law, as well as in legal education and practice. By publishing this revised handbook, we renew our commitment to achieving our goal of advancing the equality rights of Canadian women.

Please let us know if you have found this handbook useful. We welcome ideas for future iterations of this orientation guide should it continue to be necessary and relevant.

Introduction from the Gender and the Law Manual Working Group

In February 2011, the National Association of Women and the Law hosted a leadership summit for 21 feminist law students from across the country. The opening address began with these words: “Law school can be a really lonely place.”

Following the leadership summit, a group of eight participants from across the country embarked on updating a law school orientation manual that the NAWL Charitable Trust for Research and Education had created in the 1990s with the aim of reminding feminist first year law students that, in fact, you are not alone. There are feminists in law school everywhere—as well as in legal practice—and we are challenging ourselves to think about the law through a feminist and equality rights focused lens.

The law school machine tends to channel students into one specific path: get the best grades, take black letter law classes, learn ratios by rote, study the right six-part tests, and work at the “right big firm”. For some, it is easy to forget that there are other ways to think about the very real and important issues arising in your classes, and that there are people who are actually affected by the law that you are studying. For others, these things are impossible to forget! Because sexual assault, racism, criminalisation, institutionalized homophobia, poverty and lack of access to property are issues that affect our lives.

For many of you, the formal orientation and professionalization process of law school itself will be alienating. Law school is generally bad at making space for the experiences and lived realities of people in equality seeking groups.

Know that if you stray from that “one specific path” at law school, you will be just fine. Even if some of your professors appear to have no clue what you’re talking about when you raise your hand in class, frustrated by law’s contribution to what you understand to be substantive inequality—it is extremely likely that at least someone else in your class will be grateful that you raised your hand. Whatever experiences brought you to your faculty, you are an invaluable resource to your school and to your peers. Your feminist analysis, your life experience, your questions and your opinions matter. Your voice should be heard.

The following pages provide a series of articles and excerpts written by feminist academics, activists and lawyers and compiled by feminist law students. This manual does not attempt to provide insight into the full range of feminist issues that you will encounter as you study and practice law. It is not meant to be comprehensive. Instead, it is meant to spark your curiosity, to challenge you to think about alternative perspectives, and to ask the questions no one else may be asking. It is meant to remind you that you are not alone.

We hope that this collection of ideas brings you encouragement, hope and inspiration. Good luck!

Yours in solidarity,

Tamera Burnett, Julia Crabbe, Danielle Fostey, Madeleine Gorman,
Nita Khare, Catherine Kim, Laure Prévost, Simone Samuels

Feminism 101: Why the F Word is Still Important

“Feminist” might be a description that you have avoided in the past or it may be one that you wear comfortably. Regardless, feminism is neither singular in its approach nor narrow in its scope. It has come to embrace many intersecting identities and perspectives, and bears little in common with images of the demanding, oversensitive and humourless woman simultaneously demonized and delegitimized by mainstream media and popular culture. At its core, it is a social movement aimed at combating sexism, but it also works to address racism, heterosexism, ableism, poverty and numerous other oppressive frameworks. It recognizes that these frameworks still exist, are systemically embedded in society, and that they have real and measurable negative impacts on the lives of equality seeking groups. Instead of representing one monolithic identity of “woman”, today there are many feminisms that arise from the different people claiming membership in the movement.

Feminism is also a tool. It is a tool that we can use to understand, challenge and dismantle systemic discrimination in our societies. Rather than taking rights away from men in order to give them to women, feminism strives to ensure that everyone has access to the rights and opportunities available to those who are in dominant positions in society. Feminism seeks to ensure that all people are treated as equally worthy of respect and dignity.

In this section, the articles presented address this broad definition of feminism and highlight why the movement and its goals are still important in today’s society, particularly for law students.

Where Would I Be Without Feminism in Law School?

Patricia Barkaskas

It is an unfortunate truth that law school can be a harrowing experience. Among the first examples that spring to my mind of the more difficult issues one must face are: first year's onerous schedule and the brutal introduction to the Socratic method, which makes first year notoriously difficult to endure; the anxiety invoked by the approach of 100% exams in second year; the need to resist the persistent push toward big firm practice—a push that results from the profession's influence on the law school... I have spent many sleep-bereft nights wondering: Why am I doing this to myself?

Of course, I should qualify my characterization of law school by highlighting several facts: I am an Aboriginal, anti-racist feminist with a BA in History and Women's Studies and a MA in History focusing on Aboriginal women's political activism; I have been an activist for many years; and I am in my thirties and a mother. All of the above separate me in many ways from the average law school student, a fact that is obvious to me daily in my interactions with some other students and professors, and the law school as an institution.

I perceived law school as such a foreign and hostile environment in my first term that I almost dropped out on several occasions. The constant sense of lack of belonging and my general confusion about what a JD degree would do for me and the people that I want to work with—namely, urban Aboriginal populations within a social justice context—persisted day in and day out. So, why did I stay?

I owe that to the amazing women, and a few fabulous men, I met at law school, in my own

small group and year, and those in L2 and L3 who I had the privilege of getting to know who inspired me to stay the course. (You all know who you are and you rock!) I met most of these women and men, feminists and/or activists, through the UBC Centre for Feminist Legal Studies (CFLS). In my first semester at UBC Law, the CFLS was my refuge from the generally unwelcoming atmosphere of “Curtis High.” In the Centre, respectful, meaningful, and relevant discussions—and arguments I might add—about how the law, legal system, and legal profession intersect with politics, social justice, and culture (among other things!) took place on a regular basis. The women and men, who worked with and in the Centre on a regular basis gladly shared knowledge with me, mentored me, and gave me advice about how to survive life as a law student.

The Centre was also where I met and started to get to know feminist professors and those interested in social justice more broadly. Having no feminist professors assigned to my small group, my first year legal education was entirely lacking of any of the rigorous intellectual social, cultural, or political critique that I was used to, given my academic background. I felt that without this perspective and context the case law and legal procedure I was learning about had no real value.

I was so grateful and inspired by my experiences with the Centre in my first few weeks of law school that I applied for the position as the Student Coordinator of the CFLS. Imagine my joy and surprise when I got the position! Working as the Student Coordinator changed my first year law school experience from one in which I dreaded

getting up to face every day to one that I was excited about. I met the new challenges of helping to run the Centre while attending my classes, doing my readings, and meeting my deadlines with a renewed sense of hope and determination.

As the Coordinator, one of my responsibilities was to assist in the running, and then the planning of, the Lecture Series for the Centre. The weekly talks, which I had been attending already, were (and remain) a source of interdisciplinary discourse about the law, legal issues, and the broader socio-cultural, political, and intellectual issues affected by legal norms. My involvement with the Lecture Series and the activists and intellectuals who took part reassured me constantly that there were people who cared about more than the ratio of a case and/or IRAC analysis. I saw that there were other people who were asking questions about and interrogating the law and power—two concepts intrinsically linked and rarely discussed in law school classrooms.

So, as I enter my third year of law school, much changed, much inspired, much determined, and

much prepared for the long fight ahead of me, I wish to thank the friends, colleagues, professors, academics, activists, and/or community members who have inspired, and who continue to inspire, me to keep my head up and rail against injustice as I see it within and without the walls of law schools across the country. Without all of you, this journey would have ended before now and with a different outcome.

And, to those of you just entering the halls of these seemingly hallowed institutions all over Canada—I only hope that students who represent a breadth of backgrounds and first hand experiences can provide similar forms of support that were given to me. Whether in the form of wisdom, mentorship, or friendship, this support, in creating a sense of solidarity, will be invaluable in helping you make the most of your law school journey. I wish you the best in all that is to come.

Why we still need feminism in law school

Pam Cross

These remarks were made at the University of Western Ontario Faculty of Law on November 11, 2009.

"Feminist law students, and law students who bring an analysis of other anti-oppression/social justice issues, need to feel that their comments and analysis are welcome in the classroom, not feel afraid to express their beliefs."

Law can function as either a tool or a weapon. Used well, it can be a tool to effect social justice. Used badly, it is a weapon that will increase social injustice.

Either way, law, and those who study, understand, apply and interpret it, have a lot of power in our society.

I want to encourage you to find ways to use the law as a tool for social justice. In particular, I want to encourage you to use it as a tool to increase women's equality in this country.

On December 6, it will be 20 years since 14 women were murdered at Montreal's École Polytechnique.

We have done a lot in those 20 years, but there is one thing we have not done: we have not achieved equality for women. We have not even reduced the rates of violence against women, which is one of the most notable symptoms of women's inequality.

Canada prides itself, quite rightly in some cases, on its human rights record both domestically and internationally. The present government, in particular, likes to assure all of us that women in Canada have achieved equality. However, the reality is quite different. There is a serious societal reluctance to contemplate the extent of misogyny in

Canadian culture. We are quite enthusiastic about speaking out against women's equality in other parts of the world, but we are generally notably reluctant to do so here, despite the fact that equality remains little more than an illusion for many women in Canada, especially those who are marginalized.

Here are just three examples of women's inequality in this country.

Because women are not equal, women are poor. Women working full time in the permanent workforce earn about 73 cents for every dollar earned by men. This goes down to 69 cents for women who have a post-secondary education. This is around the same amount that women earned when I was 19 years old and a new mother. It never occurred to me that my daughter, who will be 36 in a couple of weeks, would face the same wage inequity that I did when she was born.

Because women are not equal, we are under-represented politically. Canada has fallen to 48th place in the world in terms of women's representation in electoral politics, with only 20% of federal MPs and 27% of provincial MPPs in Ontario being women. We see the impact of the lack of representation by women in the kinds of policy decisions being made in areas such as child care, maternity/parental benefits and pay equity.

Because women are not equal, we remain very vulnerable to violence, largely perpetrated by men. Across Canada, more than 70 women a year are killed by men who claim to love them. That is only the most extreme tip of the iceberg in assessing the rate of violence against women. Thousands of women and their children flee violence every

year, many of them finding safety and support in women's shelters, others turning to family and friends, others, unfortunately, with nowhere to turn finding themselves on the street.

Between 2000 and 2006, 101 Canadian police officers and military personnel, including those serving in Afghanistan, were killed in the line of duty. In the same period of time, 500 women were killed by their partner or former partner.

It is especially poignant to think about these numbers because today, November 11, is Remembrance Day; a time when Canadians, from the youngest schoolchild to the oldest veteran, take at least a moment or two to reflect on the sacrifices made by soldiers and others in wars past and present. As I noted earlier, December 6 is just a few weeks away. It, too, is a national day of remembrance, but business does not stop for December 6th, there are no cenotaphs at which people can gather and commemorate the dead, school children do not make roses or wear buttons to show their remembrance.

As many of you know, Canada and all of the provinces and territories have signed the CEDAW (International Convention to End All Forms of Discrimination Against Women). This means that Canada is reviewed on a regular basis by a committee of the United Nations to see whether the country is living up to its obligations under this convention. The most recent report card cites Canada for its lack of compliance with the Convention, noting in particular federal government cuts to funding for equality rights research and advocacy and government in-action on violence against women, women's poverty, women's access to justice and racism against Aboriginal women.

So, what does any of this have to do with feminism in law? Because at least at the formal level, it is law that guides and influences the development

of policy and, later, interprets that policy. And, too often, law does neither of those things from a feminist perspective.

We hear a lot in law school about the formal equality that has come with the Charter of Rights and Freedoms, case law and human rights legislation and cases. Despite this, women in Canada have little substantive equality. Of course, life is much better for women in Canada than it is for women in many other parts of the world. And, of course, some women – women who are marginalized by reason of race, skin colour, immigration status, economic situation or disability -- face more inequalities than others, but inequality to some extent is the reality for all of us.

There is no area of law that does not require a feminist analysis and understanding. This is as true of how we approach torts, contracts and income tax as it is of family and criminal law, but let's stick to the more obvious for now or my lack of torts and contracts background will quickly become more apparent.

We just cannot look at law properly without bringing an intersectional analysis that features feminism.

One of the biggest battlegrounds for feminists has been the criminal response to rape, now more politely called sexual assault. And, no wonder.

Before 1983, men could rape their wives. Before feminists spoke up, drunkenness was a defence in a rape case. Before feminists spoke up, private records of complainants in sexual assault cases were handed over willy nilly to the accused.

Rape and the law continues to provide serious challenges for those who are working for women's equality, but it is also true that the improvements to the criminal response to rape have come about because and only because a feminist analysis has been applied to those issues.

"We need courses on feminism and the law, to be certain, but we also need feminism woven through every course. Learning feminism should not be an optional course. Why? Because law students are among the elite in this country, no matter your background before you get here. And once you graduate, you become more privileged. If you practice law, you hold people's futures and fortunes in your hands or you work with and for corporations that have enormous power over people's lives."

Women's ability to control our reproductive lives is surely at the cornerstone of equality. It was the work of feminist legal minds, grassroots activists and, of course, Henry Morgentaler, that led to the decriminalization of abortion.

Most of you will be familiar with the name of Dr. George Tiller, an abortion provider in the United States who was assassinated last spring. He was well known for saying that his work was based on his trust of women – the trust that women are capable of and will make the best decision given all the circumstances of their situation.

Trust women – what a simple concept. Yet, an examination of the law and how it treats women makes it clear that there is little trust of women in that system.

Let's look at a few other areas of law that have benefited from having a feminist lens applied.

It was feminists who ensured that stalking became the criminal offence of criminal harassment.

It was feminists, many of them with legal training, who worked to establish victim supports in criminal court.

Family law practically screams for a feminist analysis and understanding. Why? Because many women remain primarily defined by their role within the family. Particularly when there is violence, the family unit becomes a trap and the law, instead of helping women out of the trap, can further imprison them there.

Remember that it was only in the 1970s that the law was changed to ensure that married women could share equally in family property.

It was only in 2006 that child custody legislation in Ontario was amended to make it mandatory for judges to consider family violence in making their decisions.

It was also only in 2006 that the use of religious laws, which often reflected patriarchal and even outright misogynist principles and values, in family law arbitration was banned.

Most of these are areas where much has been done to increase women's access to justice, to increase women's equality. Does this mean we are done; that we don't need feminism anymore?

If only that were the case.

It is important to note the successes – and there have been many more than I have mentioned.

But there is a lot to do.

I spent two days earlier this week with a group of engaged, activist young women, most of them in law school, from across the country who came together to talk about where feminist law reform advocacy should go in Canada.

They had a lot of exciting positive ideas about what they want to do for women's equality in this country, but they also had a lot to say about the absence of feminism in law schools. In fact, their experiences of law school sounded more lonely and isolating than mine was.

Feminist law students, and law students who bring an analysis of other anti-oppression/social justice issues, need to feel that their comments and analysis are welcome in the classroom, not feel afraid to express their beliefs.

We need courses on feminism and the law, to be certain, but we also need feminism woven through every course. Learning feminism should not be an optional course.

Why? Because law students are among the elite in this country, no matter your background before you get here. And once you graduate, you become more privileged. If you practice law, you hold people's

futures and fortunes in your hands or you work with and for corporations that have enormous power over people's lives. If you work in government, you will influence policy. If you research, you will influence policy. If you teach, you will influence more lawyers. And so on.

You have an obligation, if you plan to wear this mantle of privilege, to ensure that you understand the fundamental lack of equality that is the reality of more than 50% of the Canadian population.

We still have work to do. Trust women.

Reproduced from notes of a talk given at the University of Western Ontario on November 11, 2009: Pam Cross, "Why we still need feminism in law school" online: Women, Equality, Law and Policy in Canada <<http://pamelacross.blogspot.com/2009/11/why-we-still-need-feminism-in-law.html>>. Reproduced by permission of the author.

Feminist warning

Jane Doe

Did I tell you that I am a feminist? Card-carrying, with capital letters and without apology or equivocation? Did you just roll your eyes? It's okay, this won't take long.

I understand feminism to be a social justice movement that has served more people, effected more progressive change in its first and second waves, than any other documented social justice movement before or since. Feminism resulted in the vote for women, property ownership and business management by women, reproductive choice and freedom, daycare, improved health care, fewer child mortalities, education, legislation, the recognition of violent crime against women and children, and a higher standard and quality of life for everyone affected by it.

There are many feminisms, many practices and applications. Feminism can be radical, socialist, liberal and postmodern. Well maybe it can't be postmodern... but it can be, and is, defined differently by academics, legal practitioners, front-line workers and women who do not work directly under its umbrella. It is neither a new concept nor one that can be considered redundant. Its objectives have not been met. It's not dead and it's not going away, although it has been wounded and held captive at different times. While often not successful at either, feminism implies an analysis that is anti-racist and anti-oppressive. It works to free women from historical patriarchal bonds and strictures [sic]. It would free me too, if they wanted it to.

Oh sure, there are a lot of feminists who bother me, and I know that I am seen as a nutbar by others, but in the larger scheme of things, feminism is a practice, a way of being, that is about five minutes old, barely a toddler really and continuing to evolve in its form and understanding of the world it inhabits. It is quite capable of excess and error. But it is evolutionary, revolutionary and dedicated to social, political and economic equality. So what's the problem? Why in the last decade has feminism come to generate so much backlash and fear?

I have a cousin who is the superintendent of all the school boards in his province. He is an educated man and interesting, interested. In conversation with me, he claimed that feminists have no sense of humour and need to lighten up. Not take things so seriously. I agreed and suggested that this sometimes might be a little difficult when three women are murdered by their male partners every month in my home province and a woman is raped every seventeen minutes nationally and that women as a group remain severely economically and politically disenfranchised. I asked him if the political leaders he generally supports are known for their sense of humour, and whether that affects his decision to vote for or against them.

Okay then.

Excerpted from *The Story of Jane Doe* by Jane Doe. Copyright © 2003 Jane Doe. Reprinted by permission of Random House Canada.

Law School Curriculum: What to Expect and How to Survive in Your Classes

Many of you probably came to law school with the idea that studying law would better equip you to fight for social change and address inequalities. However, within the first few months you may have found yourself disappointed. You may have been dismayed at the scant course offerings in the areas of feminist legal theory, critical race theory, disability law and other social justice topics. On a micro level, you may have been unnerved that a feminist perspective was absent when discussing sexual assault in your criminal law class, that your common law property class glossed over the racism and classism inherent in the buying and selling of human chattel, or that most discussions of family law are mired in heterosexist norms. Perhaps you were surprised. Perhaps you were angered. Perhaps you felt that having these all too important voices and perspectives silenced in the curriculum meant that your anti-racist, social justice, feminist views were not welcomed in law school.

This section is intended to re-affirm your many perspectives and lived experiences as valid and important to your studies and to law school curriculum.

Some Guidelines for Feminist Legal Pedagogy

Suzanne Bouclin

Law professors across the country have managed to (and often despite considerable animosity and resistance from other faculty members) ensure that law schools engage with feminist content or substance within the classroom. Fostering feminist pedagogical forms or structures, however, remains a challenge for many of us. As one of my senior colleague's has astutely pointed out, feminist professors often feel that they simply do not have the privilege of implementing feminist teaching practices. Indeed, in my first year of teaching, I have already been publically called out as 'pre-menstrual' for asking a student whether he had done his readings and as having caused another student to suffer actionable emotional damages because I would not raise her grade from the C range to the A range. Every feminist professor I know has shared similar experiences with me. And so my vision for feminist form and substance in law teaching and learning remains aspirational (perhaps even overly idealistic), deeply personal (these guidelines are meant as my own rules) and contextual (fluid, unfixed, tentative, and always subject to revision).

This 'feministo' was declared on February 12th 2011 as part of the National Association of Women and the Law's *Leadership Summit*.

Five principles of feminist pedagogy (teaching):

1. I endeavour to critically engage with the 'Capital P professor' and 'small s student' relationship. The responsibility for feminist teaching and learning is, consequently, shared by *students* and *professors*.

2. I endeavour to emphasize empowerment in my classroom. I have as much to learn from my students as I have to offer them.
3. I endeavour to generate conditions of community-building and collaborative learning. Feminist movement requires intellectual spaces in which we can refine pragmatic skills that will help us all respectfully engage when faced with differences within the feminist movement.
4. I endeavour to create participatory and 'safe' learning spaces. Law school learning can occur in a space where feminist students (in their multiple ways of being feminists) feel that their critiques of dominant modes of thinking and their analysis is valued and important.
5. I endeavour to critique formal and informal legal processes that do not take into consideration women's multiple legal subjectivities. In the feminist law classroom, there is an explicit and implicit assumption that how we experience the world is deeply rooted in our social and cultural positions based on race, class, ethnicity, sexual identity and orientation, ability, the languages we speak, and the religious practices in which we engage.

What this means:

- Teachers are not there to tell students how the legal world 'really' is. That is insulting to the rich experiences of students. Students already have knowledge when they enter the classroom and may even have sharper critical analysis than their teachers.

- Students should not dismiss their feminist professor's knowledge, analysis, and experience.
- Feminist teaching should foster an environment of dialogue, of information-sharing that goes both ways and in classrooms that are organized around principles of substantive equality.
- The feminist classroom integrates multiple skill-building exercises including how to navigate difficult questions.
- The responsibility for creating and protecting feminist learning spaces is also shouldered by students.
- Feminist learning in law schools may be furthered by developing evaluation methods that take into consideration critical thinking and empathy.
- Feminist students' and professors' critiques of law, legal structures and legal institutions should not be dismissed as 'irrelevant' to the study of law (from more orthodox sources) nor as 'anti-feminist' (if taking a more marginal position within feminist movement).
- We should all strive to foster conditions of discussion and dialogue that allow for grey zones, nuance, complexity and uncertainty.
- Students should not try to dissolve the (very healthy) boundaries between themselves and their professors. Destabilizing hierarchies does not mean fostering conditions of disrespect for professors (especially professors who may well be marginalized within more orthodox learning environments).
- There is no template for creating feminist learning environments. Each feminist classroom is a new attempt, an invitation to be self-reflexive about our teaching and learning practices.

A Feminist Take on First Year Criminal Law

Elizabeth Sheehy

The following piece is an excerpt. Please see the full-length piece available on NAWL's website at www.nawl.ca.

Be thankful for one thing: as a feminist student in first year Criminal Law you will not be bored. Confused and shocked—sometimes, and rightly so. Angry—often! But bored? Never. That's because criminal law is premised on inequality. Sadly, our jurisprudence is largely indifferent to this reality,¹ making the legal education of feminist advocates an urgent priority.

I use a two-volume casebook¹ developed with Professor Jennie Abell and more recently Professor Natasha Bakht. I take the position that to teach criminal law as if it were neutral and inevitable is indefensible intellectually and professionally limiting for the next generation of lawyers. You must be able to prosecute corporations, defend Aboriginal and African-Canadian accused and women, not only white men and women, develop criminal law policy, right wrongful convictions, and demand accountability and transparency from police, corrections, immigration officials and other state bodies, all with intelligence and passion. Our democracy depends on it.

Our casebook examines the role of racism, misogyny, colonization, disability-ism, hetero-sexism and corporate power in shaping the substance and process of criminal law in Canada. We encourage students to ask the hard questions: Who stands to benefit and who to lose from the criminalization and the de-criminalization of certain conduct? What assumptions, values, and beliefs are embedded in criminal law decisions? Are they supported by evidence and if so, is the evidence sound or are there other truths to be explored? Can faulty assumptions be exposed and rules thereby undermined? How is discrimination embedded in language structures?

Which legal and political strategies might successfully challenge the discriminatory impact of criminal law?

If you are among the majority of Canadian law students, you will not be taught Criminal Law by feminist professors using critical materials. You will therefore need to find allies among your classmates, read additional materials to maintain your balance, and strategize about whether and how you will raise feminist questions in your classes. Women have comprised the majority of the law student population for at least five years; women constitute the fastest growing prison population in Canada;² and women are overwhelmingly at the receiving end of sexual assault,³ battering and coercive control,⁴ and intimate homicide.⁵ You are entitled to an education that reflects these realities!

Feminists have identified many issues in our criminal law. First is the definition of crime. Historically, the power to criminalize has been held exclusively by white men of wealth and power, and that remains more or less the case today. Consider the use of criminal law to strip Aboriginal peoples of their wealth, their lands, their culture, and their children. The *Indian Act* created a whole host of criminal offences specific to Aboriginal peoples, including the criminalization of legal, cultural, and spiritual practices such as the Potlatch and the Sun Dance, and sanctions for defiance of the "Pass System," for resisting removal of children into residential schools, and for employing lawyers in actions against the government. The legacy is, according to Justice Murray Sinclair, cultural genocide and "collective social depression."⁶ You simply cannot begin to understand the current crisis of over-incarceration of Aboriginal people and the futility of the Supreme

Court's response in *R. v. Gladue*,⁷ without knowing the roots of this oppression. If you want to dream big, read *A Feminist Review of Criminal Law*,⁸ which dares to imagine what the criminal law would look like had women been its drafters.

Not only is the definition and content of the criminal law biased, but its enforcement by police is also skewed by racism, homophobia, and misogyny. While white-collar and environmental crimes remain under-enforced, numerous wrongful convictions have been produced at least in part by systemic bias,⁹ and examples of discriminatory enforcement of penal law abound.¹⁰

Many criminal procedure topics are compelling for feminist students. The law of arrest demonstrates that our courts have widened police powers to arrest without judicial warrant requirements, subjecting citizens to relatively unchecked police authority. At the same time, police remain unaccountable for the decision not to arrest for wife assault, even when their decisions are negligent.¹¹ Our law is only just beginning to respond to racial profiling by curbing police powers to engage in "investigative detention."¹² Criminal lawyers who "see" racism and are willing to confront it in their legal arguments remain at a premium.¹³ Police search and seizure powers are abused through strip searches of women by men;¹⁴ the right to counsel is an illusion for most women and poor people charged with minor offences;¹⁵ and neither bail nor sentencing practices come anywhere close to protecting women and denouncing wife battering.¹⁶

We teach the case of Jane Doe's win against the Toronto Police for sex discrimination in the investigation of rape and for failure to warn her of a serial rapist.¹⁷ Her case graphically exposes how rape myths continue to shape the police response to women's reports of rape, shows that rape is still "unfounded" by police at a far higher rate than any other crime,¹⁸ explains why rape is vastly under-reported by women, and prepares students to read sexual assault cases with a critical eye. If Jane Doe does not usually come to speak to your

law school class about her case, try to organize her visit yourselves—your legal education will be deeply enriched. Read her book!¹⁹ It will make you laugh, and her gripping account of this incredible legal saga will nourish your rebel spirit.

Whether or not you study the *Jane Doe* case in your Criminal Law class, sexual assault will reappear in your casebooks as you study the elements of proof, the physical act (*actus reus*) and the mental element (*mens rea*). With respect to the *mens rea* for sexual assault, Professors Toni Pickard and Phil Goldman have argued that "the subjective standard in sexual assault generally protects patriarchal interests by validating and protecting male understandings of the world."²⁰

The cases that you will study when considering the defence of mistake of fact, a *mens rea* defence, are almost exclusively sexual assault cases where the accused man claims that he honestly but mistakenly believed that the woman consented, rendering him "morally innocent." Although some argue that the "mistake" defence is simply an example of a neutral, principled and coherent doctrine with perhaps an unfortunate application to rape cases, feminists argue that the defence has taken the form it has *because* its almost exclusive origins and applications arise out of misogynistic beliefs and patriarchal values such that "sexual assault is only sexual assault in the eyes of the law if the man who is doing it thinks it is."²¹

You will probably study other cases that deal with sexual assault,²² including those dealing with the defence of intoxication²³ and automatism.²⁴ Try not to get discouraged—get mad instead! Read Justice L'Heureux-Dubé's full dissent in *Seaboyer*, where she uses the legal history of rape law reforms (undone repeatedly by the judiciary) and the social science evidence to demonstrate convincingly that "[s]exual assault is not like any other crime." You should also read the work of Lucinda Vandervort, who argues that men's claimed mistakes are not factual errors of misperception, but rather legal errors as to the permissible norms for sexual force and coercion. Such

errors ought not afford a defence because mistake of law is barred at law.²⁵

The feminist student will see many more issues that will interest and inflame her critical mind. So few defences appear to reflect women's realities! The defence of necessity, for example, seems to have been crafted to preclude women and their doctors from its shelter when it comes to abortion.²⁶ And while it may be available for what the Supreme Court poetically refers to as the "lone alpinist" forced to break into a cabin to save [his] own life, it is not available for crimes committed to secure food, shelter and medications, as these are part of the slow grind of poverty—always cast as avoidable with some hard work and self-discipline.²⁷

Another defence that leaps out for feminists in first year Criminal Law is the partial defence of provocation, used primarily to excuse homophobic violence by claiming "homosexual advance"²⁸ or "homosexual panic," but also to mitigate intimate femicide. The vast majority of wife murders are committed by men who will not accept a woman's separation from the marriage or her new relationship. Often these men are batterers, and their crimes are predictable and preventable,²⁹ which ought to undercut the claim of "sudden provocation."³⁰

Perhaps not surprisingly, provocation is difficult to argue on behalf of women who kill. Further, self-defence is really what battered women ought to argue when charged with homicide. That's because unlike provocation it is a complete defence resulting in acquittal if successful; it also more fairly represents the moral claim that sometimes it is rightful—not just excusable—to kill another. Although like provocation the historic roots of self-defence are premised on men's lives and confrontations, it has undergone some modern adjustment for male violence in women's lives through the introduction of "battered women's syndrome" (BWS) as evidence to support self-defence.³¹

Don't swallow any of the "abuse excuse" hype: read the real story behind *R. v. Whynot (Stafford)*,³² or watch the made for tv movie *Life With Billy*.

The feminist student doesn't stop there, however. She asks whether BWS fairly represents the experiences of ALL women; does this strategy pathologize women's reasonable responses; and will women fail in self defence if they do not meet some stereotype of a "real" BWS "victim." She also wants to know what has happened since the *Lavallee* case. Turns out, not as much as we hoped. Some women have secured acquittals³³ but the vast majority have instead pled guilty to manslaughter and used BWS in mitigation of their sentences.³⁴ The crucial issue remains whether battered women will get access to justice: are women equally able to have access to a trial on the merits whereby they can put to the jury the full context of their acts and receive the benefit of judicial instruction that relates the context to the law?³⁵

Hopefully, this article has armed you to survive—even to enjoy Criminal Law and Procedure! Be sure to read the news daily—criminal law issues are at the forefront every single day. More importantly, be sure to support your colleagues—not just your feminist ones but also your African-Canadian classmates who raise racial profiling, the Aboriginal students who must suffer through the ignorant comments of their classmates, the gay students who want to challenge homophobia embedded in the cases, and the students with disabilities who ask you to focus on disability discrimination as opposed to "their handicap." Even if you cannot back your mates in class, do it out of class—align yourselves with those who have the courage of their convictions. You will need each other not just to get through law school but in the profession as well, if you are to re-make the law and its practice.

Establishing a Student-Initiated Seminar at your Law Faculty: Suggestions and Challenges

Abigail Radis and Suzanne Jackson

Dear Future Student-Initiated Seminar Organizers,

During the fall 2010 semester, a group of students at the McGill Faculty of Law organized and ran a seminar on Sexual Assault Law. We identified a gap in our law faculty's curriculum and developed a student-run course, following models of comparable seminars at other law faculties.

This letter aims to inform and inspire. It seeks to provide advice to those of you, students at fellow law faculties, who are interested in setting up a student-initiated seminar focused on sexual assault law; on related issues pertaining to gender and the law; or on any topic of interest not being addressed in your course offerings. Whoever you may be, in whatever year or faculty, we hope that these reflections will be of some assistance in the creation and success of your course and that you will also encourage others to implement comparable projects.

Why Did We Decide to Organize a Course on Sexual Assault Law?

During our first year of law school, a number of us attended an inspirational lecture by activist and teacher, Jane Doe. She encouraged us to establish a course on sexual assault law at our law faculty in order to address the systemic issues surrounding the prevalence of crimes of this nature. As first year law students, we grappled with the questions that she posed to the audience: What are *you* going to do about the prevalence of sexual assault in society? How will *you* work and engage with a woman who asks *you* to represent her in a sexual assault case? Those of us who reflected on these questions after her lecture admitted that that we did not yet have a response

to her questions. Knowing that a course on sexual assault law was not offered at our law faculty, and knowing that none of the courses offered at the faculty engaged with the topic in any depth, a group of student organizers decided to develop our own course. It would be a pass-fail, 3-credit student-led seminar that would allow us to examine sexual assault law from a critical third-wave feminist, critical race, and anti-oppressive perspective.

While an extremely supportive professor acted as our faculty supervisor, the course was entirely student-led. Our supervisor neither attended our weekly classes, nor closely monitored the development and weekly structure of our course. We are very pleased that a group of passionate young women will be continuing the Sexual Assault Law course during the 2011-2012 school year. If you are interested in developing a student-initiated seminar at your own law faculty, we would offer the following advice.

Does your Law Faculty not Currently Recognize Student-Initiated Seminars?

The majority of law faculties do not yet recognize student-initiated seminars within their course offerings.¹ In fact, their acceptance at McGill is a relatively recent phenomenon. After a group of persistent McGill Law students lobbied for administrative support for these student-led endeavors, permission was granted under strict circumstances. Consequently, if your law faculty does not support student-initiated seminars or a similar model, we would advise you to encourage your own faculty to adopt a comparable model.

Advice on the Creation of Your Student-Initiated Seminar:

Organizing our course required a significant amount of administrative and substantive academic planning and work. Throughout this process, we learned a number of lessons, the most salient of which are listed here:

1. If at all possible, speak with students who have developed comparable courses in order to share and learn from their experiences. Talking with students and professors who have conducted student-initiated and professor-led seminars will give you guidance on the best way to present your course to faculty administration, on effective navigation of the course approval process, and on what you can do to ensure the successful development of your course. For instance, we modeled our course after a similar course taught by an inspiring team of professors at the University of Ottawa Faculty of Law.² Their support of the development of our course was crucial to our success.
2. Begin planning your course *as early as possible*. At our school, student-initiated seminars are rarely approved, and this is often either due to an insufficient course structure, or low student enrollment. However, if you begin the process of developing a student-initiated seminar at an early stage, you can also begin engaging in a dialogue with the administration that will enable you to most effectively develop your syllabus. It is also essential to prepare yourselves for a significant workload stemming from the development of the course, both prior to and during the semester.
3. Due to the chosen structure of our course, we spent a significant amount of time during the summer before the course and throughout the semester developing the daily structure for each class. We included a variety of in-class discussion questions and issues to consider throughout the duration of the course. Additionally, we created summaries of the assigned readings. As these readings were often quite extensive, we requested that student presenters address only selected components of their assigned portions. I highly recommend adopting this course structure as students found it to be an engaging method that helped them focus on the crucial ideas behind the theme of the course. Moreover, I highly recommend that the organizers establish firm deadlines for completing these structural components of the course in order to ensure that the students and the presenters receive these materials within an appropriate time frame.
4. We encourage identifying a group of students with a similar vision to share the organizational responsibilities. An equitable division of tasks amongst organizers should be established at the start of the course in order to make certain that these tasks are effectively accomplished, and to ensure that certain organizers do not undertake a burdensome share of the tasks. Face-to-face organization meetings should be held on a regular basis and at a set time as long email chains can cause confusion and leave some issues unresolved. Coordination of six different schedules was difficult; however, regular meetings can create a plan that organizers can budget their time around.
5. Due to the likely sensitive nature of your course subject, safe-space exercises should be conducted at the start of the semester in order to define and come to agreement on shared understandings of how an open and respectful discussion should operate. We also strongly encourage student-initiated seminars to hold regular and pre-set healing circles, or another appropriate restorative justice model, throughout the semester.³ While we learned a great deal from participating in our course, and while students' experiences in the course were largely positive,

issues inevitably arose within the classroom. Without the model of the healing circle, we were unable to provide an effective forum for addressing these issues, which made it difficult for us to re-establish the safe space.

6. Also potentially of great worth is the expertise of and facilitation by an effective and experienced professor, particularly within the initial few meetings of the class.

We highly recommend establishing the following course structure: weekly student presentations and student-led discussions, supplemented by guest lectures from professors, practitioners and community activists. By sharing the responsibility of teaching the course evenly among the organizers, we strongly believe that the learning experience is significantly richer. Although the course was graded on a pass/fail basis, we were continually impressed at the significant amount of work that the students invested in their presentations and at how prepared and engaged students were in the course. We also strongly recommend holding guest lectures on your topic both within your course and within the campus community in order to significantly expand and diversify the learning experience of the students and the campus community.

To conclude, we strongly encourage you to develop a student-initiated seminar on an under-acknowledged topic, such as sexual assault law. The significant gaps in law school curricula and the prevailing and pervasively dismissive and sexist responses to issues such as sexual assault within society need to be properly addressed by lawyers when they begin their education in order to truly change society's inequitable realities. Student-initiated seminars offer a crucial support framework for student empowerment. Within law faculties,

we are rarely given the opportunity to engage in a thoughtful, critical, and anti-oppressive examination of the law. We believe that these experiences should be cultivated whenever possible.

Please feel free to contact us with questions as we would be happy to provide you with additional advice and support as you begin this important and challenging endeavor! Good luck!

Contact Abigail Radis and Suzanne Jackson at abigail.radis@mail.mcgill.ca and at abbey.radis@gmail.com.

We were joined by the following inspirational student organizers of the Sexual Assault Law Student-Initiated Seminar (McGill Faculty of Law-Fall Semester 2010): Breagh Dabbs, Meena Gupta, Tara Santini, and Marlene VanderSpek.

Julie Lassonde Interview

When NAWL first re-envisioned this manual, one of our interns interviewed Julie Lassonde about her perspectives on law school, feminist lawyering and dancing.

A feminist, lawyer, artist, executive director of Toronto's (first!) French-speaking women's shelter, and a former member of NAWL's National Steering Committee, Julie Lassonde takes to heart the defense of women's rights in both Ontario and Quebec. A strong believer in interdisciplinary programs, she benefited from them herself at McGill University (B.C.L./LL.B.) and University of Victoria (LL.M. in Law and Visual Arts).

Q: If you were able to change three elements in the teaching of Law, what would be your priorities?

A: I would favour more teamwork. I would insist that classroom interventions alternate between genders – women, men (and otherwise identified) – encouraging women to raise their hands and speak in class. I find it unbelievable that in 2010, men go on dominating public speech in classes, conferences, and any other public forums. Finally, I would make a course on Aboriginal Law compulsory, for a number of reasons, including the fact that the conditions facing Aboriginal women in this country put Canada to shame.

Q: Do you have advice for first-year women as they begin their legal studies?

A: I would tell them: Picture yourself about to start studies in mechanical engineering. It is true that there are many women in law school and in the profession, but there remains a lot of discrimination based, among other reasons, on women's child-bearing capacity and the possibility of a pregnancy. You must forge ahead and work at maintaining your self-confidence. Keep an open mind, nurture your passions and stay connected to friends who are not studying law! Take advantage of possibilities to acquire interesting career skills, both for the

openings they create and for their capacity to provide financial security. Find domains of law and people that really interest you, and leverage these against the aspects of legal culture that you may come to find less appealing.

Q: I know you have a passion for juxtaposing law and dance. Can you comment on what you found in this interrelation?

A: The strangest thing is that law has renewed my relationship with artistic creation, a relationship that has always been part of my life. By refusing to give up arts during my legal studies, I started to draw links between both fields. I discovered that law isn't just stuff written on a sheet of paper or a small red codebook. It is also a set of rules and standards which we have internalized. We may not be conscious of them, but these rules and standards govern our everyday lives – now, doesn't that ring a feminist bell for you? Law is created in action, through everyday gestures. Practicing a movement-art allowed me to explore, for instance, the body's gendered habits: how one sits or takes up room in public space when one happens to have a female sex. I then drew a parallel with the power of artistic creation, which allows for an exploration of other meanings associated with the body, and that of legal transformation, to which we can commit ourselves.

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Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education

Natasha Bakht, Kim Brooks, Gillian Calder, Jennifer Koshan, Sonia Lawrence, Carissima Mathen and Debra Parkes

Notes renumbered from original.

[...] Asian-American critical legal scholar Mari Matsuda was one of the first to use the term “outsider jurisprudence” to refer, in particular, to the scholarly and teaching work of feminists and scholars of colour.¹ Matsuda deliberately uses the term “outsiders” instead of “minorities” because the latter term “belies the numerical significance of the constituencies typically excluded from jurisprudential discourse.”² In Matsuda’s view, an outsider’s methodology rejects “presentist, andocentric, Eurocentric, and false-universalist descriptions of social phenomena” and “offers a unique description of law.”³

We use the term outsider to describe those who are members of groups that have historically lacked power in society or have traditionally been outside the realms of fashioning, teaching, and adjudicating the law. Outsider pedagogy denotes approaches to teaching by members of these groups, including critical race and post-colonial theorists, Aboriginal scholars,⁴ feminists, those concerned with class oppression and subordination based on disability, and those broadly characterized as queer.⁵ Importantly, we use outsider to describe not the identity of the teacher but, rather, his or her efforts to bring the experiences of outsiders to law into the law school classroom. One could, of course, teach a required course such as criminal or contract law from an outsider perspective. However, outsider courses are those in which the outsider orientation is critical to the very nature of the course itself. In this article, we also use the term outsider to describe the identity of law students from outsider groups.

It is important to recognize at the outset that outsiders are not a monolithic group with similar

approaches, experiences, or needs in relation to legal pedagogy. Different concerns and considerations may arise between and within outsider groups, and of course there are intersections amongst the various outsider identities and perspectives.⁶ As much as possible, we seek to be attentive to these differences in this project.

[...]

Most fundamentally, outsider pedagogy matters because it ensures that the relationship between law and marginalized groups is the focus of some attention in legal education.⁷ Some scholars have been highly critical of the ways in which legal education tends to conceptualize people with legal problems as “generic,” ignoring issues of identity and how they condition relations to law.⁸ In addition, outsider pedagogy ensures that attention is focused on the perspectives that marginalized peoples bring to that relationship. As American feminist scholar Christine Littleton has written:

Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us.⁹

Outsider courses offer the very real possibility of creating environments in which otherwise silent voices have not only space, but credibility and perhaps even power.

Many of the law's more inspirational stories have sprung from the legal struggles and triumphs of outsider groups, yet examining these narratives rarely forms a significant part of legal education.¹⁰ Instead, many students are able to proceed through their entire legal education learning only that, as a lawyer, their primary focus will be to use relevant skill sets to solve their client's legal problems. The lawyer is not involved in any real or personal way in the substance of the dispute, nor is he or she responsible for its outcome, except as it affects the particular client. The distance, for example, between law students and the poor is highlighted in a discussion of the role of poverty law courses and clinical programs by Barbara Bezdek, an American law professor in a clinical program:

[A]s evidenced in the standard law school curriculum, the legal profession is not particularly curious or concerned about the material conditions or life chances confronting poor people. Nor is it anxious to see its own complicity in powering the engines of the law that do the business of lawyers' paying clients.¹¹

The ability of students to distance themselves altogether from the reality and effects of their work with outsider clients is disrupted when the experiences of those groups with the law becomes a focus of students' legal education. Some students' lack of familiarity with outsider groups can cause them to miss important legal arguments and mischaracterize legal issues, with negative consequences for their future clients.¹² For example, lawyer and scholar Cynthia Petersen has noted: "[s]ince the overwhelming majority of lawyers have been educated in courses devoid of lesbian content, most are not sufficiently skilled to provide adequate legal advice to lesbian clients."¹³ Thus, Petersen's priorities have been to teach law

with the "knowledge that lesbians exist and with the conviction that lesbians matter."¹⁴

The issues canvassed through outsider pedagogy may also provide the sole opportunity for students to try to see the law through the eyes of those subject to it.¹⁵ After law school, the lens through which current students will most frequently encounter the law is as a lawyer or as an advocate for someone else. Thus, the vantage point through which students are exposed to the law is unique in the law school setting in that "the education students receive at the degree level is the only time that their education is focused towards them as a person rather than as a lawyer."¹⁶

[...]

In order to better understand what Canadian law schools are offering to facilitate focus on outsider pedagogies, and what kind of perspectives law school students have on outsider courses, the authors of this article surveyed seven law schools across the country. The study focused on what outsider courses law schools are offering, who is and is not taking them, as well as collected opinions on students' impressions of outsider courses and their relevance.

[...]

Our quantitative analysis of the student survey data revealed some results that we might have expected. In conclusion, we underline four. First, generally speaking, students who might be considered "outsider students" were more likely to express an interest in outsider courses. This fit with our sense, supported by the literature, that outsider courses are important because they treat outsiders and outsider perspectives as a valuable part of legal education.

Second, students who identified as coming from a lower income background were more likely to be interested in outsider courses, including poverty and the law courses, than students who

identified as coming from a middle or higher income background. Similarly, women were more likely than men to be interested in outsider courses generally, as well as feminism and the law specifically. These results aligned with our suspicion that students who have experienced some form of outsider status might be more interested in courses that spoke in some way to that experience.

Third, it was also not surprising that students' political views have a statistically significant bearing on their plans to take outsider courses. This result aligned with our hypothesis, and with students' qualitative responses, that outsider courses generally are perceived to align with perspectives on the political left and with an understanding of law that is ideologically different from mainstream, doctrinal approaches.

Fourth, students who did not plan to take an outsider course cited as their primary rationale a perceived lack of any useful legal skills taught in such courses. While expected, this answer should provide instructors with a reminder of the importance of including in their teaching some explicit discussion of what constitutes a legal skill: not merely the drafting of a contract, but also the means of thinking deeply about difficult legal problems. Indeed, we suggest that outsider courses might be expected to provide students with a very good sense of how law works "on the ground" and how they might analytically respond to the real implications of law for people. Further on this point, many of the students who did plan to take outsider courses ranked very highly the rationale that those courses would provide them with useful legal skills.

[...]

In light of the findings from our enrollment and survey data, the quail's call--the alarm bell--of this article is complicated and comes in several forms. First, we were discouraged by the decline in students

taking feminist courses since 2000, particularly given the general increase in the number of female faculty and students at our seven institutions. However, we recognize that it may be too early to make a generalized statement of this nature and that our findings may only reflect a short-term variation. Nevertheless, this study, including some of the students' qualitative responses, should raise some questions for instructors about the content of the courses we offer--are the ideas and perspectives we present reflective of the work undertaken in other disciplines, and are they relevant to the lives of our students? What can we do to make them more so?

Second, we noticed with concern the relative absence of outsider courses focused on issues other than feminism or Aboriginal law. Perhaps it is not surprising that most of the anecdotal concerns about enrollment decline we have heard have been expressed around the feminist courses in particular, but in many ways these courses appear to have been relatively well preserved at our schools and are regularly offered. By contrast, courses like disability and the law, racism and the law, and sexuality and the law are rarely offered at many of our institutions. As outsider instructors, we need to look critically at why we work so hard to preserve the feminist courses at our institutions while ignoring the relative absence of other important outsider courses.

Third, the students' qualitative responses underscore the value of resisting real or perceived pressure from the profession to limit such courses in the name of "getting back to basics" and promoting a view of law schools that is solely concerned with preparing students for the practice of law, while minimizing the role of broader critical inquiry in legal education. Perhaps this pressure is reflected in our result that students' stated interest in outsider courses was highest among first year students and lowest among those in third year. This real or perceived devaluation during the course of

legal studies should also be explored at our own institutions. Factors such as the relationship of outsider courses to other parts of the curriculum, placement in the course schedule, and credit weight accorded to outsider courses send important, if implicit, messages to students about the value law faculties themselves place on the material taught in these courses.

The aim of this article was to highlight the importance of outsider pedagogy in Canadian legal education, to begin a conversation about the perceived decline in student enrollment in some such courses, and to offer some possible explanations for student choice in this area. Although it is difficult to test with any degree of accuracy the complex processes at play, in this

exploratory study we sought to provide a forum for students and faculty to enrich this debate by sharing their views and experiences of taking or not taking and teaching outsider courses.
[...]

Involvement or Alienation: Identity, Intersectionality and the Law School Experience

"Imparting critical feminist theory in the law school classroom is about more than identifying, deconstructing, and hopefully obliterating the inconsistencies and injustices that pervade society and the law: it is also about understanding the hierarchies of privilege and power that raise race, class, and able-ist concerns."

- Rosemary Cairns-Way and Daphne Gilbert, "Teaching Sexual Assault Law: The Education of Canadian Law Students" (2009/2010) 281 Canadian Woman Studies at p70

When a discriminatory law or policy affects someone's life, there can be an intersecting impact depending on the person's sex, marital status, sexual orientation, race, age, ethnicity, religion, as well as whether or not the person is living with a disability. Given the way in which systemic discrimination operates in society, often we find that several prohibited "grounds of discrimination" are triggered by one single discriminatory law or policy. Focusing on only one ground of discrimination does not, in many cases, give significant enough emphasis to other aspects of an equality seeking person's identity. To address this, feminist legal scholars and lawyers have contributed to the advancement of "intersectionality" in equality jurisprudence. Critical race scholars explain "intersectional claims" as claims of discrimination based in the distinct stereotyping and historical treatment experienced under multiple enumerated and analogous grounds.

As you read cases in first year law school, you may be alarmed at the extent to which judges and decision-makers fail to understand the reality of intersectional oppression. This can be particularly frustrating when it is clear that an exclusive focus on one characteristic of a litigant's identity (like disability) provides an inadequate analysis of the manner in which a law or policy is discriminatory (on intersecting grounds, for example, of disability, race, poverty and gender).

Critical race and disability theorists are writing increasingly about the complexity of disentangling interlocking patterns of discrimination. We were not able to include as many excerpts from this body of literature as we would have liked, and so we encourage you to read far beyond this manual. We encourage you to find and read anything by Patricia Williams, to read Peggy McIntosh's now-famous paper on White Privilege, to consult the Ontario Human Rights Commission's discussion paper entitled "An Intersectional Approach to Discrimination", and to check out LEAF's Ontario Court of Appeal factum in *Falkiner et al v The Queen*.

When the First Quail Calls: Multiple Consciousness as Jurisprudential Method

Mari J Matsuda

Let us imagine a student with women-of-color consciousness sitting in class in the first year of law school. The dialogue in class is designed to force students to pare away the extraneous, to adopt the lawyer's skill of narrowing issues and delineating the scope of relevant evidence. The professor sees his job—and I use the male pronoun deliberately—as training the students out of the muddleheaded world where everything is relevant and into the lawyer's world where the few critical facts prevail.

The discussion in class today is of a *Miranda*-type case. Our student wonders whether the defendant was a person of color and whether the police officer was white. The student knows the city in which the case arose, and knows that the level of police violence is so high in that place that church groups hold candlelight vigils outside the main police station every Sunday. The crime charged is rape. The student wonders about the race of the victim, and wonders whether the zealous questioning by the police in the case was tied to the victim's race. The student thinks about rape—the rape of her roommate last year, and her own fears. She knows, given the prevalence of violence against women, that some of her classmates in this class of 100 students have been raped. She wonders how they are reacting to the case, what pain it resurrects for them.

In the consciousness of this student, many facts and emotions are relevant to the case that are extraneous to standard legal discourse. The student has decided to adopt standard legal discourse for the classroom, and to keep her women-of-color consciousness for herself and for her support group. This bifurcated thinking is not unusual to her. She's been doing it throughout her schooling—shifting back and forth

between her consciousness as a Third World person and the white consciousness required for survival in elite educational institutions.

This student, as she has become older, has learned to peel away layers of consciousness like layers of an onion. In the one class where she has a woman professor—a white woman—she feels free to raise issues of violence against women, but she decides to keep to herself another level of consciousness: her nationalist anger at white privilege and her perception that the dominant white conception of violence excludes the daily violence of ghetto poverty.

This constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both. You can hear it in the music of Billie Holiday. You can read it in the writing of Professor Pat Williams—that shifting in and out, that tapping of a consciousness from beyond and bringing it back to the place where most people stand.

Let's give an ending to the student I described: she goes on to excel in law school, she becomes an international human rights activist, and she writes poems in her kitchen in her spare time while she waits for the pies to cool. She doesn't go mad because she continues to meet with her support group and they continue to tell her “No, you are not crazy, the world looks that way to us, too.”

What does a consciousness of the experience of life under patriarchy and racial hierarchy bring to jurisprudence? The ideas emanating from feminist legal theorists and legal scholars of color have important points of intersection that assist in the

fundamental inquiries of jurisprudence: what is justice and what does law have to do with it?

Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice. “The personal is the political,” we hear from feminists, and “Everything is political,” we hear from communities of color. Not much time is wasted in those communities arguing over definitions of justice. Justice means children will full bellies sleeping in warm beds under clean sheets. Justice means no lynchings, no rapes. Justice means access to a livelihood. It means control over one’s own body. These kinds of concrete and substantive visions of justice flow naturally from the experience of oppression.

And what of procedure; of law? Here outsiders respond with characteristic duality. On the one hand, they respond as legal realists, aware of the historical abuse of law to sustain existing conditions of domination. Unlike the post-modern critics of the left, however, outsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice. Thus to the feminist lawyer faced with pregnant teenagers seeking abortions it would be absurd to reject the use of an elitist legal system, or the use of the concept of rights, when such use is necessary to meet the immediate needs of her client. There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.” Sometimes, as Angela Davis did,

there is a need to make both speeches in one day. Is that crazy? Inconsistent? Not to Professor Davis, a Black woman on trial for her life in racist America. It made perfect sense to her, and to the twelve jurors good and true who heard her when she said “your government lies, but your law is above such lies.”

Professor Davis’s decision to use a dualist approach to a repressive legal system may very well have saved her life. Not only did she tap her history and consciousness as a Black, a woman, and a communist, she did so with intent and awareness. Her multiple consciousness was not a mystery to her, but a well-defined and acknowledged tool of analysis, one that she was able to share with the jury.

A professor once remarked that the mediocre law students are the ones who are still trying to make it all make sense. That is, the students who are trying to understand law as necessary, logical, and co-extensive with reality. The students who excel in law schools—and the best lawyers—are the ones who are able to detach law and to see it as a system that makes sense only from a particular viewpoint. Those lawyers can operate within that view, and then shift out of it for purposes of critique, analysis, and strategy. The shifting of consciousness I have thus far ascribed to women of color is a tool used—in a more limited way—by skilled lawyers of many ideological bents. A good corporate lawyer can argue within the language and policy of anti-trust law, modify that argument to suit a Reagan-era judge, and then advise a client that the outcome may well turn on some event in Geneva wholly irrelevant to the legal doctrine. Multiple consciousness as jurisprudential method, however, encompasses more than consciousness-shifting as skilled advocacy. It encompasses as well the search for the pathway to a just world.

The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible

to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3 a.m. in a shelter for battered women, our sisters holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua. The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important as we set out on the road to justice. These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading, studying, listening, and venturing into different places. For lawyers, our pro bono work may be the most effective means of acquiring a broader consciousness of oppression.

Abstraction and detachment are ways out of the discomfort of direct confrontation with the ugliness of oppression. Abstraction, criticized by both feminists and scholars of color, is the method that allows theorists to discuss liberty, property, and rights in the aspirational mode of liberalism with no connection to what those concepts mean in real people's lives. Much in our mainstream intellectual training values abstraction and denigrates nitty-gritty detail. Holding on to a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge.

Now that the Door is Open: First Nations and the Law School Experience

Patricia A. Monture

Excerpts from: (1990) 15 Queen's LJ 179 at 185, 205 and 207. Reproduced with permission from Queens Law Journal.

Notes renumbered from original.

“If the goal of women or Aboriginal peoples is to change the structure of society, we must also develop new ways of challenging the philosophies and beliefs of the mainstream.” - Patricia Monture.

Trish was a Mohawk woman who not only wrote these wise words but also lived them. As a writer, lawyer, academic, activist and mother, Trish was dedicated to improving the lives of women and Aboriginal peoples in Canada. As a Haudenosaunee community member she brought awareness and intellect to Indigenous theory, intersectionality, law, governance, political and social equality. She passed away on November 17, 2010 and is deeply missed by family and colleagues alike. While some leaders close the door after their journey is complete, Trish was a leader who opened the door and encouraged others to lead as she had. She was and still is an inspiration.

[...]

Just as the expectations of my grandmothers were never met, I always felt during my law student days that I was waiting for my legal education to begin. I always felt that “something” was missing or perhaps that I was missing something. It is not clear to me that I have yet mastered precisely what this struggle was. Nor am I certain that I am now able to define clearly what exactly this “something” is. I know it is very important, though. And I know it is a concept shared among many First Nations students who have studied law. In my first year at law school, I felt it was my problem, just as Duncan Campbell Scott, and many others in the 1920's and later, were able to characterize the “Indian problem” as the sole fault of First Nations. Then the solution rested on changing the “Indian” into a civilized and assimilated being. In first year, I internalized this characteristic of colonialism and oppression, believing that if I could only change, perhaps fit in a little better, my law school experience would also be rewarding. Since then, I have understood that the greatest obstacle was not myself but the very structure of the institution and the program.

In speaking to other First Nations law students, it is easy to recognize this “something missing” feeling in their personal stories as well. The feeling that “something” is missing, is knowing that you are an outsider. Often, this feeling is internalized. The student is left feeling that there is something the matter with me because I do not fit in here. Many of us want to leave after first year, if indeed we were fortunate enough to be one of the ones who did not fail (and I believe there is a direct relationship between the “something missing” feeling and failure at law school). It is, therefore, easy for me also to conclude that something specific is “wrong” in legal education.

[...]

The challenge of transforming the law school is not as simple as I have thus far led you to believe. It is not enough to embrace only race and culture. My experience of law school of course was coloured by the fact that I am not just a citizen of a First Nation. I am also a woman. As indicated in the 1986 Census data,¹ First Nations women are slightly more likely to hold a university degree than are First Nations men. This is the reverse of the trend in the Canadian population, where men are more

"As indicated, an Aboriginal woman's experience of mainstream criminal justice is not only an experience of "otherness" based on gender, but also an experience of "otherness" based on both culture and race."

- The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" in Thunder in My Soul: A Mohawk Woman Speaks (Halifax: Fernwood Publishing, 1995) at 11

likely to hold a university degree. However, the data available from the Native Law Center indicate that until 1985 men were nearly twice as likely to be admitted to the pre-law program." Although to date it has been largely overlooked, attracting First Nations women to law schools must also become an issue of affirmative action. Attracting First Nations women to law schools brings with it certain unique challenges beyond issues of culture, such as child care issues, economic support, role models, and part-time education. These are concerns for women students generally which are already documented in the feminist literature. Issues such as child care and economic support are of special importance considering both the recent funding cuts to education made by Indian and Northern Affairs Canada and the knowledge that First Nations women are more likely to be single mothers.

[...]

This discussion of women and legal education is much too brief to build conclusions. Just as further research and discussion must be devoted to the serious concerns of First Nations and legal education, research and discussion must also be

devoted to the experience of women and legal education. The point I desire to make is simple. These two important and necessary discussions must not occur in total isolation from each other. Not only can valuable lessons be shared across these experiences of "outsider," but it must be remembered that my experience as a woman flows through my race and culture. Do not force women of colour to stand on their heads for you. I am not woman first and Mohawk second. If indeed a linear relationship exists, it operates in the opposite way.

"Individuals of Aboriginal ancestry who try to walk in both the academic world and the Aboriginal world are confronted by the profound cultural differences in the ways in which truth, knowledge and wisdom are constructed. The instructions we receive through institutionalized education indicate that we must locate truth and knowledge outside ourselves. Introspection is not a proper research method. It is improper to footnote the knowledge that my grandmother told me."

- The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" at 3.

The experience, however, does not feel like a linear one. Rather, it is layered, like an onion, or perhaps more complexly. To achieve true equality, we must resist the desire to create the hierarchies of our "isms" and hierarchies within those experiences.

Excerpts from: (1990) 15 Queen's LJ 179 at 185, 205 and 207. Reproduced with permission.

Miles To Go: Some Personal Reflections on the Social Construction of Disability

Dianne Pothier

Dianne Pothier is a professor in the Schulich School of Law at Dalhousie University where she has taught since 1986. She works primarily on constitutional law, human rights, equality rights and labour law issues. Among her professional commitments, Pothier is a member of DAWN (DisAbleD Women's Network) and LEAF (Women's Legal Education and Action Fund).

Notes renumbered from original.

In the segment featured below, the author reflects on an incident that occurred while she was a law student at Dalhousie. A professor gave her a failing grade in the oral presentation component of a moot exercise because she read with her face almost pressed up against her notes as a result of her very poor eye sight (a trait commonly associated with albinism, a condition that Pothier has had since birth). Although the overall mark for the course was high, on this component she was being penalized for her difference. Pothier is careful to point out that these attitudes are not limited to this particular school or to the legal sphere in general; they are widespread and systematic ableist reactions to differently-abled persons. Through articles such as this one, Dianne Pothier has made a strong impact on disability, feminist and legal theory.

I think there is a clear analogy to issues of gender. The professor would never have dared to say that he was giving me a lower mark because I am a woman, and this area of law was one in which it would be difficult for a woman to break into. The professor would have recognized such a comment as blatantly sexist, even though it was quite true that this area of law was quite male dominated and oriented. He would have recognized this was not a problem that reflected on my capacities as a lawyer, but as a systemic problem about sexism in the legal profession that had to be confronted. The fact that my disability was not analysed within the same framework is an indication of just how far there is to go in tackling the social construction of disability.

Many may contest the analogy just drawn, largely because of a distinction between what one is (which is accepted as an invalid basis for judging performance) and what one does (which is assumed to be a valid basis for assessment). To me, this is a false dichotomy.¹ In many ways, what you do is intimately connected to what you are. It is

not enough to simply have an official policy that all are welcome. The more pervasive question is whether people are, nonetheless, expected to act like men, like whites, like heterosexuals, like middle class, and/or like able bodied people. If people are expected to act as something they are not, they are either doomed to failure or are robbed of part of their identity.

“Objective” standards of performance need to recognize and accept that there are different ways of doing things, none of which is inherently the best way. Translated into legalese, it is not a “bonafide occupational requirement” or a “bonafide justification” to say that this is the way it has always been done, or the way most people do it.

If perceived problems in the performance of a disabled person are really simply a reaffirmation of the way able bodied people usually do things, the standard of assessment needs to be re-evaluated. In my experience there is a long way to go in avoiding the expectation that, in many contexts, disabled people must act like able bodied people in order to be accepted.

Excerpted from: 14 Dalhousie LJ 526 at 533-534. Reproduced by permission of the author and the publisher.

Queering Legal Education: A Project of Theoretical Discovery

Kim Brooks and Debra Parkes

Notes renumbered from original.

Experiential accounts underscore the importance of validating and making queer lives present. Those with the courage to write and publish stories about their experiences tend to focus on the absence of, or hostility to, queer perspectives in law school classrooms. The following stories by queer law students and professors are illustrative of a range of scholarship that seeks to uncover the queer experience of law school.

In one article, University of Minnesota law student Scott Ihrig describes how it felt to discuss *Bowers v. Hardwick*¹ in his first-year constitutional law class.² In *Bowers*, a majority of the United States Supreme Court upheld as constitutional a state criminal prohibition on sodomy.³ When Ihrig, a gay man, questioned the professor's summary agreement with the majority's holding and reasoning, the professor cut him off, advising, "Mr. Ihrig, you need to divorce your personal politics from your constitutional law."⁴ This incident led Ihrig to ask other queer students about their experiences in law school and, ultimately, to conduct a mail-in survey, to which thirty-two queer law students from various American universities responded.⁵ The survey asked open-ended questions about classroom experiences, the atmosphere of law schools, and the role of sexual orientation in the students' study of law.⁶ A number of the surveyed students described experiences similar to Ihrig's.⁷ Some even reported acts of open hostility, such as vandalism of queer student group bulletin boards and ostracism by other law students.⁸

Ihrig's experiences are also reflected in other accounts written by students. Kevin Reuther, who was openly gay when he entered Harvard Law School, writes of the gay men and lesbians he encountered in the first-year curriculum.⁹ They all appeared in criminal cases: men

convicted of possessing nude photos of boys; unnamed individuals engaged in "criminal homosexual conduct"; Michael Hardwick, who was charged with committing sodomy in his own bedroom; and a "group of lesbians" in a state prison who offered other prisoners the option to "fuck or fight."¹⁰ Another gay Harvard Law student, Brad Sears, describes the "isolation" of being surrounded by a heterosexual world, with its "overwhelming power," while at law school.¹¹

He notes that

[i]n the rare instances when issues of race, gender, or sexual orientation came up in discussion, I was amazed with [the other law students'] lack of familiarity with the issues and the terms of the discourse They could talk about "those people" and "some of my best friends" who were black or gay without a trace of bitter irony.¹²

Students' accounts of their experiences at law school reveal, at a minimum, isolation and even ridicule and ignorance. Queer lives are restricted to particular stereotypes, and some nonqueer students and faculty lack any ability to address legal issues that involve queer identities.

The experience is somewhat different, although often not much better, for queer law professors. Mary Becker at the University of Chicago explains,

Standing at the front of the room does not eliminate either the necessity or pain of being "out" in an environment in which "reasonable" people ... can disagree about whether you

are entitled to basic human dignity and respect, whether your speech should be suppressed, whether your most intimate relationships should be criminalized. Being a member of the faculty does not eliminate the discomfort and hurt one feels when discussing whether government can legitimately and reasonably discriminate against you. Sometimes this happens with colleagues who, even if supportive of lesbian and gay rights, may regard the discussion as one delectable course in the wonderful “intellectual feast” that is the law ... Just writing this makes me feel tense and inarticulate.¹³

Other narratives by queer faculty similarly reflect the isolation inherent in being the person whose identity and rights have become subjects of academic debate. Being out both at the front of the classroom and with her colleagues caused Kristian Miccio to reflect on the effect that identity has on both teaching and the development of policies in law schools.¹⁴ She sees the value placed on teaching law in a detached, objective manner as not only disingenuous, but dangerous.¹⁵ She notes that in teaching and practicing law we are not structural equals, yet typically only faculty members from underrepresented groups such as gays, lesbians, and people of color are perceived as having an identity that influences their teaching and interactions with students.¹⁶ Miccio reflects that her colleagues express some willingness to hear about issues facing gay and lesbian students when she raises them, but they still consider them her issues and not ones that they are willing to address themselves.¹⁷ When ideas that concern sexual orientation are raised, Miccio experiences frustration at being expected to address them alone without the support of other faculty

members.¹⁸ While she finds this visibility painful at times, Miccio views it as a necessary part of linking academia to the world about which it theorizes.¹⁹ Focusing on the stories of queer students and professors is one method of beginning to connect legal pedagogy with the broader experiences of queers.

[...]

Another significant theme in queer scholarship is the extent to which the identity categories associated with the pursuit of queer equality have been useful or problematic to the deconstructive project of queer theory. Very generally, queer theory seeks to demonstrate that all sexual behavior is socially constructed and that sexuality is not determined by biology. Instead, sexuality is understood as a matrix of social codes; sexual difference cannot be disaggregated from culture. Queer legal theory applies this understanding of how sexuality is constructed to law. This conception of sexuality clearly conflicts, at least at some level, with an approach to legal theory that posits discrete, identifiable categories—gay or lesbian. In a recent award-winning student essay, Laurie Rose Kepros states that it is “time for Queer legal theory ... to enter jurisprudence and the law school classroom.”²⁰ To Kepros and other queer legal theorists, queer legal theory is not simply about the use of law and legal arguments to improve the lives of people who fall within the familiar gay, lesbian, bisexual, transgender, and transsexual categories. It is a term of art that draws on postmodern theory, specifically deconstruction, to “critique the concept of ‘identity’ and the identity-based rights discourses that rely on definitional and categorical identity closure.”²¹ Instead of focusing on an equality based on the assumption that the categories of gay and lesbian are relatively stable and viable descriptors of real people who are oppressed by law and other means, queer theory concerns itself with exposing and deconstructing the normative nature of heterosexuality and other dominant gender models.²²

Excerpted from: (2004) 27 Harv Women’s LJ 89 at 94-97. Reproduced by permission of the authors and the publisher.

Judging, Lawyering, Teaching, and Theorizing: A Feminist Lens

So far, this manual has explored some of the realities of being immersed in law school curriculum, and the different ways oppression and inequality can affect your law school experience. As the next generation of legal professionals, however, our experiences with and knowledge of oppression and inequality should not (and invariably do not) stop at the door of law school. Neither should our awareness or dedication to challenging the status quo in the legal profession cease when law school ends. Regardless of where you practice law, or if you decide to practice at all, it is up to you to decide *how* you will enact your feminist, social justice perspectives once you graduate. This next section will hopefully offer you some guidance on how you might use your legal education to make a positive impact in society. It reminds us that as lawyers we are responsible for more than the immediate consequences of our actions, and our practices should account for this. It asks you to imagine a world in which the Supreme Court of Canada makes decisions based on a robust understanding of substantive equality—and calls on you to act to help bring about such a world.

Introducing the Women’s Court of Canada

Diana Majury

Notes renumbered from original.

The Women’s Court of Canada describes itself in the following manner on its website:

“The Women’s Court of Canada (WCC) is an innovative project bringing together academics, activists, and litigators in order literally to rewrite the Canadian Charter of Rights and Freedoms equality jurisprudence. Taking inspiration from Oscar Wilde, who once said “the only duty we owe to history is to rewrite it”, the Women’s Court operates as a virtual court, and ‘reconsiders’ leading equality decisions. The Women’s Court renders alternative decisions as a means of articulating fresh conceptions of substantive equality.” <http://womenscourt.ca/>

“When re-writing decisions, the WCC has] been drawn to the adage that ‘the decisions of the Supreme Court are not final because they are authoritative; they are authoritative because they are final.’ The Women’s Court is disrupting this finality in the hope, not of offering a finality of its own, but rather of bringing its experience and knowledge to bear on the cases it reviews, with the goal of opening up the dialogue and offering alternative and more substantive vision of equality.” (2006) 18 CJWL 1 at 12.

[...]

The Women’s Court of Canada is a spontaneous project born of the moment and the place that we were in and are in. As such, it is fluid and indeterminate. It will grow and change, and perhaps morph into something quite different, depending on who joins the court and what is going on in the legal arena. At present, the court has [sixteen] members—those who were present at the founding dinner [in 2004] and rallied around the idea, plus a few others we asked to join us to help with the specific cases we were working on. We are self-appointed volunteer members of a court we have fantasized into being. We are lawyers, academics, and human rights activists. We are a loose and growing collection of equality thinkers from across the country that has joined together to rewrite Canadian equality jurisprudence. We are a collection of women, rather than a collectivity. We have no membership screening process

beyond a feminist commitment to substantive equality and the desire to participate. We did not advertise or try to bring on board the multitude of fabulous feminist Charter activists who did not happen to be at our dinner. We seized the moment and the momentum it created, and we went ahead. We are keen to expand and to pass on this fledgling in the hope that it will soar in new directions.

In our early discussions, we raised the possibility of doing a women’s court as satire or spoof. Interestingly, none of us was really drawn to this idea. We all very seriously wanted to see what we could do in the challenging arena of judging, to see how we would respond to the demands of writing a legal decision that reflected our best hopes for equality. That we have styled ourselves the Women’s Court of Canada reflects a commitment to articulate how equality can be taken seriously in section 15 jurisprudence and to demonstrate that a formalistic turn in

the doctrine was not inevitable, that equality can be given more substance while observing recognized forms of legal argument. In a very real sense, we wanted to explore the capacity and the limitations of the courts to further equality and social justice and to prove to ourselves as well as to others that our idealism could also be realistic. Accordingly, we decided to write these decisions within the existing parameters of the law, applying traditional legal language and principles. We are offering alternative decisions on cases that were before the Supreme Court of Canada, following the same rules and law as the Court but applying different equality analyses and coming to different conclusions.

A successor Women's Court might try to envision a very different legal system from the existing one and explore what judicial decisions might look like in that context. We are a bit aghast at ourselves as a Women's Court issuing thirty-five page decisions written in technical legal language.¹ Future Women's Court judges may opt to be bolder and more visionary. However, we chose to stay very much in the here and now and work with the tools that are currently available to courts. The decisions [written by the Women's Court] are decisions that could have been written by the Supreme Court of Canada at the time the case was decided by them. We have occasionally relied on current information and data rather than on what was available at the time but not if the updated information might affect the analysis or the decision. Beyond this basic premise, to the extent that we had "court rules," we developed them as we wrote in response to specific issues raised by the authors.

[...]

One frustration that was shared by almost all of the judges was the limited information provided by the record that was before them.

The gaps in the evidentiary record may have been there from the outset, but, without access to the original record, it is impossible to know where the shortcoming lies. This is one of the tricky aspects of adjudication. While the initial decision may well be based on a full panoply of evidence, once that first decision is made, the description of the evidence is necessarily filtered through that decision in the process of writing the reasons. Once the record enters the appeal process, it becomes increasingly difficult to see where evidentiary misinterpretations might have occurred. Each level of court sifts through the facts and decides which ones are relevant in light of the decision reached. Evidence continues to be discarded or recharacterized as the case winds its way through the appeal process. When a reviewing judge wants to redirect the analysis, there may be factual gaps that are difficult, if not impossible, to fill. All Canadian courts, including the Supreme Court of Canada, have the power to appoint counsel or *amicus curiae* to address affected interests not represented by the parties before the court. In addition, the Supreme Court of Canada may choose to receive further evidence on any question of fact.² Our experience in writing these decisions tells us that the Court should invoke these powers more often in order to assist the justices in more fully understanding the equality issues before them in their social context and to help in fashioning an appropriate remedy.

[...]

[Each Women's Court] judgment was written by an individual author or team of authors and is the responsibility of its author(s). Other members of the group have provided feedback on each draft, and at least two external reviewers for each decision have provided extensive comments. But the judgments are not pronouncements of the group as a whole.

They are the decisions of the individual judge or judges. Our aim was to let equality theorists and advocates show the concrete results of the application of what they each consider to be the best account of equality. There was disagreement among us over a number of these decisions—relating to the analysis presented, the specific issues in the decision, even about whether a case warranted review. We do not all agree with one another about the theory of equality or its best doctrinal shape, but we respect each other's views enough to think that this collection of judgments will provide a rich and illuminating store of argument and analysis.

One of our points in writing these decisions is to demonstrate that the Supreme Court of Canada decision in each of these cases is but one of many decisions that could have been written. The same of course applies to the decisions of the Women's Court of Canada. We hope that future judges of the Women's Court, as well as

others, will review our decisions and challenge, extend, or revise our equality analysis. Any one of the [Women's Court's] decisions could be the subject of a number of different review decisions, each offering a different analytic approach or assessment of the evidence or interpretation of section 15 and other relevant provisions.

To see decisions of the Women's Court, please visit <http://womenscourt.ca>.

Reconceptualizing Professional Responsibility: Incorporating Equality

Rosemary Cairns Way

The excerpts below are taken from a paper based on a lecture delivered at Dalhousie Law School on November 21, 2002. The F.B. Wickwire Lecture on Professional Responsibility is co-sponsored by the Nova Scotia Barristers' Society and Dalhousie Law School.

Notes renumbered from original.

[...] What does it mean to practice law? Is law primarily a business? Or is it (should it be) more than that? My experience on the admissions committee at my law school [...] suggests that at least one segment of the public, potential students, does not envision the practice of law as a business. Applicants to our faculty submit a personal statement explaining their reasons for wanting to study law as part of their admissions portfolio.¹ A common theme in these statements² is the applicants' desire to use a legal education to promote "justice," variously conceived and understood. We rarely receive a statement which expresses a keen interest in what one author has described as the most common work experience for lawyers, that is to provide "legal assistance to business corporations and business officials in their competitive struggles with other business and their compliance struggles with government regulatory authorities,"³ or, even more pragmatically, to sell 1900 hours a year of specialized legal-financial services to corporate interests. Yet, many of our students end up in exactly this kind of practice, and are both envied and admired for doing so. Not surprisingly, the student hierarchy reflects how we seem to measure success in our profession. Even the law schools are trapped in the ethic of profit-making. Every student who heads for Wall Street or Bay Street is a potential donor in ways that those who head for government or public interest advocacy are not.

[...]

[...] The profession has moved too far in the direction of a "billable hours" culture, a culture that

is falling short of the legal profession's obligation as a self-regulated entity to consider and acknowledge the public interest at all points. [...] [There is a need] for a broader conception of professionalism, one that encompasses more than service for the client. This standard cannot be attained without a commitment to incorporating equality into all facets and corners of the profession. The Charter's broad and generous equality provisions, and the Supreme Court's subsequent expansive interpretations have entrenched the equality value as a fundamental component of the legal system. As a result, it is imperative for the legal profession to exhibit a commitment to justice that moves beyond rhetoric and translates into practice.

[...]

[...] It is essential for lawyers to begin thinking about how equality might be incorporated and operationalized into our conception of professional responsibility. Taking equality into account is implicit in our obligation to regulate the profession in the public interest, an interest which includes a commitment to equality.

[...]

[...] One of the important ways in which the profession has responded to the equality agenda is through the creation of formal institutional structures devoted to issues of equity and diversity. [...] These institutional structures are the public face of the profession's commitment to equality and equity. The mandates of these programs are variously conceived but are primarily concerned with issues such as the diversity of the profession,

employment equity initiatives within law firms, the development and implementation of workplace policies on discrimination and harassment, advice and support on the appropriate workplace accommodation for lawyers with special needs, offering training programs on equity and diversity, delivering public education, providing mentoring programs and, in some cases, community outreach. While the goals of equity programs are admirable and the individuals who work within them are dedicated professionals, it is nevertheless true that the capacity to make change is directly linked to the resources and the institutional support accorded the change-agent. In my view, the challenge for equity programs is the seeming immutability of legal practice--the culture of law practice is not a culture which gives priority to equality. If the culture of the professional regulatory body is similarly resistant to equality values, the equity office will remain a bit player in the larger drama of self-regulation.

[...]

[...] The continuing and disproportionate departure of women from the practice of law, the underrepresentation of women and other members of equality-seeking groups in senior law firm positions, the continuing and disproportionate lack of aboriginal lawyers, and the almost complete absence of lawyers with disabilities⁴ suggests that the profession's public stance about the seriousness of our commitment to equity is at odds with the lived private reality of practice.

[...]

[...] In a recent exploration of legal ethics, Justice Bastarache suggested that lawyers take personal and professional responsibility for implementing the ethic of impartiality, by recognizing the reality of unconscious bias and systemic discrimination.⁵ Justice Bastarache went on to suggest that "all

members of the profession must broaden their knowledge of social realities, appreciate the legal significance of stereotypes and promote equality in every way possible."⁶ A commitment to equality [...] requires careful thinking about the nature of professional competence.

[...]

[...] It is "not OK to do more harm than good." A commitment to equality requires that habits of client service be attentive to context, impact and the systemic dimensions of the legal issue. An ethical practitioner takes the public interest seriously, and takes responsibility for the consequences of their professional actions. My final words are directed to law students. A famous educator once spoke about how teachers can appeal to the young.⁷ He said that there are three ways of trying to convince the young. One is to preach--that is the hook without the worm--the second is to command--that is the devil--the third is the appeal which does not fail--to tell you that you are needed. You are needed by the profession and by the public--and you can make a difference.

Spaces and Challenges: Feminism in Legal Academia

Susan B. Boyd

Notes renumbered from original.

[...] The “core” curriculum remains a powerful presence in Canadian law faculties, despite the addition of “law in context” courses on its periphery.¹ What this means is that most law school administrations take the position that courses that are “core” -- not necessarily mandatory, but viewed as essential to a student’s legal education -- must be offered and staffed as a priority. “Law and” courses, such as Feminism and Law or Social Justice and Law courses, are a lesser priority, and are not necessarily offered every year. As a result, students can easily design their upper year program to be virtually devoid of critical approaches to law.

Law students are easily seduced by the core curriculum, for various reasons. We live in an era during which law school tuition fees have risen exponentially (to over \$10 thousand per year in most provinces), as government funding drops and law schools are encouraged to move towards operating on a cost recovery basis. Students who do not have access to wealth incur significant debt to complete the three years of law school, which typically follow an undergraduate degree such as a BA where many students accumulate a debt load.² The incentive for students to obtain articling positions and junior lawyer positions in large law firms is significant. The larger firms not only pay higher salaries, but once they hire a student, they are more likely to cover the student’s expenses during bar admission courses and even pay a portion of their third year university fees. In addition, opportunities for articling are more limited, and less well paid, for students who want to practice public interest or

social justice law. All of this corrals students into the larger firms where a corporate ethos often dominates, which may mean that courses such as Feminist Legal Studies on student transcripts are not valued or viewed as suspicious.

Such suspicion may be informed by a general “backlash” against feminism and a sense that we live in a post-feminist era.³ Students themselves may be far more comfortable expressing an interest in environmentalism or anti-racist or anti-poverty work than they are with identifying with feminism. Feminist students have in the past expressed concern to me about the implications of having feminist courses or feminist volunteer work on their resumés, although UBC Law’s Career Services personnel indicate that this concern has waned.⁴ As a result of these pressures, business law tends to dominate law schools even if many diverse course offerings exist, as they do at my school. Students are advised to be sure to take Corporations and Tax, even if they have no interest in practicing in these fields, because they are more practical and are on the bar admission exams. While I endorse the value of a generalist law degree, my point is that students are rarely advised to be sure to take a critical thinking course such as Feminist Legal Theory. The new minimum requirements for an accredited Canadian common law degree proposed by the Federation of Law Societies in October 2009 are not likely to foster enthusiasm for “outsider” courses, but rather to dampen it.⁵

Student enrolment in feminist law courses has diminished in the 21st century, at least at some law schools, and it has never been high.

Approximately seven to eight per cent of law students take a feminist law course.⁶ These low numbers may reflect wariness on the part of some anti-sexist students to engage with what they see as mainstream feminism produced by academic feminists who are often privileged along lines such as race, class, and disability status. Having said this, other reasons why students do not take these classes include market pressures, not wanting their beliefs to be challenged, stereotyped perceptions of such courses, fear about extra workload, and lack of clarity about their importance.⁷ Diminished student enrolment in feminist law courses may also in part be due to a proliferation of other “outsider” courses, which in itself, is not a bad thing.⁸

[...]

When hiring of faculty members takes place, finding candidates who can teach in core areas -- especially the first year “core” courses such as Property, Contracts, Criminal Law, and Torts -- often takes priority, even in law schools with feminists in the dean’s office. As well, law schools often snap up, as rare commodities, candidates in fields where it is difficult to lure lawyers away from lucrative private practices, such as business and tax law. Graduate students who have focused their research on “core” fields are more likely to be offered interviews than those who have worked more squarely within fields such as feminist legal theory, lesbian legal studies, critical race theory and law, and so on. At our faculty, we have been fortunate to recruit several professors who contribute to the “core” fields and who also identify as feminist. However, few of these professors teach in the feminist curriculum, and their energies are often taken up by activities related to the “core.” Feminists may well be hired, but the rationale for their recruitment is rarely first and foremost for their expertise in feminist theory.

One might argue that it is sufficient to have feminist legal scholars teaching in the core areas, because they will infuse these courses with feminist insight. Specialized feminist law courses might not, then, be necessary. While this development would be welcome, debates continue about whether “mainstreaming” entirely resolves the question of incorporating outsider perspectives into legal education.⁹ Moreover, feminism has not yet been mainstreamed across the law curriculum in the way that mandates elimination of specialized courses, although the situation is much improved from the 1970s. One problem is that not all professors are motivated to include feminist analysis and some are wary of doing so or even hostile. Another is that in most “core” courses, there is so much content to cover that the time spent on feminist perspectives is likely to be minimal, even if the course is taught by a feminist. Finally, if only some sections of a core course feature feminist content, students tend to worry -- and complain -- that they are not being taught the “real” law and that the approach being taken is “biased” or “subjective.”

Why is it important to feature feminist analysis of law? Many law students arrive at law school with an often unconscious allegiance to liberalism, the dominant (and therefore often unarticulated) political philosophy in North America, which assumes that everyone is more or less on a level playing field and, if given the opportunity to compete under “objective” legal norms, will be able to succeed. Given the extent to which law is embedded in liberalism, it takes time and a conscious effort to educate those studying law in the ways that the liberal values underlying most legal norms may marginalize those for whom the level playing field does not work well, such as poor women and indigenous peoples. Even a course in feminist legal theory barely scrapes the surface of this sort of critical analysis. Expecting that complex feminist analysis that

"Given the extent to which law is embedded in liberalism, it takes time and a conscious effort to educate those studying law in the ways that the liberal values underlying most legal norms may marginalize those for whom the level playing field does not work well, such as poor women and indigenous peoples."

applause from students but, ironically, strongly feminist students often find my course rather too liberal and pluralist! All of these problems point towards the need for specialized courses in feminism and law, as well as mainstreaming, at least for the time being until the law school curriculum is thoroughly infused with critical perspectives.

develops a nuanced mode of critique will be taught in courses such as Taxation, Evidence, or even Family Law (which involves many issues involving gender, race, and sexual orientation) is unrealistic.

As well, those professors who explicitly introduce feminist perspectives into their core courses almost inevitably encounter resistance or even hostility from some law students -- even sometimes students who are sympathetic to feminism. Feminist and other critical perspectives such as critical race theory are too often viewed as additional and peripheral to what is viewed as the central purpose of the course -- learning a "neutral" set of legal norms and procedures -- especially if other professors are not introducing them in their core courses. A feminist professor who tries to thoroughly infuse a "core" course with critical analysis of existing norms is almost certain to be penalized by students on her teaching evaluations. My relatively non-ambitious efforts to raise questions about gendered inequalities and sexual orientation in some parts of my Family Law course are typically criticized by several students on their course evaluations, and they often inflate the extent to which these questions permeate the course. I also receive

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Living Dangerously: Speaking Lesbian, Teaching Law

Cynthia Petersen

Notes renumbered from original.

The first principle in my pedagogic agenda is to be out as a lesbian to all of my students and co-workers. I undertook this commitment before I obtained a teaching position. I was therefore out in all of my job applications to Canadian law faculties. I hoped thereby to identify a place of relative safety where I could work openly as a lesbian pedagogue and scholar.¹ Finding a law school at which I felt that I could be out was imperative due to my desire to increase lesbian visibility generally. It was also critical to my own sense of personal integrity.

(...)

I would aggressively maintain my lesbian visibility even if I did not believe in the persistence of the Heterosexual Presumption. I know, for example, that some incoming first year students hear that I am a lesbian from upper year students before I have the opportunity to tell them myself. I nevertheless come out to them in order to preclude the assumption that I am shamed by my lesbianism. Besides, I do not want students to “defend” my reputation by refuting rumours that I am a lesbian. Madiha Didi Khayatt has written about how that happened to her:

One of my students that summer, a young woman of about nineteen, took it upon herself to “expose” my sexual preference ... Because my other students liked and respected me, their response was to silence her, to disbelieve and discredit her intimations that I was a lesbian ... One young man even asked my permission to “beat her mouth shut” if she did not stop.²

The prospect of such a scenario appalls me, so I attempt to prevent it through repeated proud assertions of lesbian self-identification.

The second pedagogic principle to which I am committed is the use of lesbian cases (i.e., cases involving lesbian litigants). I also use articles written about lesbian cases. The manner in which I present these materials is an important element of my pedagogic commitment. I prepare my own casebooks to ensure that the lesbian content (and other non-conventional content) is fully integrated in the course materials. Materials relegated to a supplement are invariably marginalized by students. Furthermore, I never assign a reading that I do not take up in class. Students have complained to me that, although some of their other professors include lesbian content in their course materials, few address it in their lectures. By requiring my students to read lesbian cases (or read about lesbian cases) and by discussing the cases in class, I counter lesbian invisibility. I remind the students that they may one day have lesbian clients. I also promote a more accurate representation of the diversity of the Canadian lesbian population. The use of cases alone is inadequate for this purpose because the majority of lesbians who have had access to the court system have been white and middle-class. It is nevertheless an important first step because it discourages the students’ tendency to generalize from my experiences and/or perspectives, which I share freely with them in class. For example, I personally do not challenge the misconception that “lesbian mother” is an oxymoron because I have no children. However, I am able to use cases involving lesbian mothers in order to explode that myth.

In addition to using cases involving lesbians, I am committed to using hypothetical examples involving lesbians. This third pedagogic principle complements the second. By discussing realistic (albeit fictional) lesbian characters in plausible fact situations, I endeavour to compensate for many of the inadequacies of the existing case law. I attempt to increase the diversity of lesbians to whom my students are introduced (beyond the rather homogeneous population of white middle-class lesbians depicted in the case law). I also attempt to override the “rights” focus of recent reported cases which render lesbians as one-dimensional beings—as the women’s auxiliary of the gay rights movement. It is as though lesbians never confront legal difficulties except when we suffer discrimination specifically because of our lesbianism.

The sexuality of litigants is not revealed in court judgments unless it is considered relevant to the legal issue in question. Due to the Heterosexual Presumption, most students assume (unconsciously) that the people involved in reported cases are heterosexual. When they encounter a lesbian in their readings, it is almost always in the context of a “rights” case.³ I try to disrupt this pattern by discussing hypothetical lesbian cases in which the sexuality of the litigants has absolutely no relevance to the legal issue in dispute. For example, in my Property Law course I have created lesbian characters in fact situations about bailments, easements, and adverse possession. I want my students to know that lesbians are not exclusively involved in anti-discrimination cases and equality rights litigation. Most of us lead ordinary and often mundane lives, and we encounter many of the same legal difficulties as heterosexuals. (...) I believe that it is important to expose the banality and commonness of our lives in order to give true meaning to lesbian visibility.

I also believe, however, that it is equally important to reveal the specificity of our lives. Some of our

legal difficulties do arise specifically because we are lesbian. In order to address this in my classes, I discuss hypothetical cases involving legal issues that arise precisely because of the litigant’s lesbianism. (...)

The fourth pedagogic principle to which I am committed is the critical analysis of the heterocentricity of law. I repeatedly remind my students that lesbians are omitted from provincial and federal statutes, which are designed to respond to the concerns of heterosexuals. My Property Law students learn, for example, that the surviving lesbian partner of a deceased woman cannot inherit the decedent’s property by intestacy, nor claim support from the decedent’s estate, because she is excluded from the relevant provisions of the Ontario Succession Law Reform Act.⁴ If she is an Aboriginal lesbian with Indian status living on a reserve, then she is similarly excluded from the succession provisions of the federal Indian Act.⁵ I believe that it is imperative to teach my students not only that which a statute provides, but also that which it fails to provide, that which it ignores, that which it erases: lesbian existence. This requires a certain vigilance on my part, since lesbian existence has never been acknowledged nor explicitly addressed in any Canadian statute (federal, territorial, or provincial).⁶

In critically analyzing the heterocentricity of law, I do more than draw my students’ attention to the invisibility of lesbians. If I did not, then I would create the impression that the only injustice is our exclusion and the simple solution is our inclusion. Yet not all lesbians want their affairs regulated by the state. Being inserted into existing legislative schemes, which were devised by⁷ and for heterosexuals, is not a satisfactory solution. Moreover, there is no consensus among lesbians about the appropriate solution. I try to convey the complexity of the problem to my students. Whenever possible, I use articles written by other

lesbians in order to represent the diversity of opinions in our communities.

The fifth pedagogic principle to which I am committed is the critical analysis of the heterosexist nature of law. Canadian statutes are not only heterocentric (i.e., they respond exclusively to the needs and concerns of heterosexuals); many are also oppressively heterosexist. They promote the notion that heterosexuality is normal and natural, whereas lesbianism is deviant and perverse. The 1968 Divorce Act is one example of a heterosexist statute that I have criticized in my *Droit de la famille* course. According to the provisions of that statute, if a married woman “engaged in a homosexual act”, then her husband had grounds for a divorce.⁸ The mere fact that a married man could obtain a divorce if he could prove that his wife had a lesbian affair was not particularly objectionable. The heterosexism arose out of the structure of the statute which, rather than treating a “homosexual act” as a form of adultery, grouped it together with “sodomy, bestiality and rape” under the rubric of “unnatural offences”.⁹ The case law that evolved from the interpretation and application of this statutory provision was predictably lesbophobic and heterosexist.¹⁰

By critiquing statutes and court judgments in my classes, I aim to assist my students in developing analytical skills that they can use throughout their legal education. I hope that, at the very least, they notice the heterocentric and heterosexist quality of the laws and cases that they study in their other courses. I also provide my students with opportunities to apply their analytical skills. I do this, in part, by developing hypothetical problems about lesbians whom the students are required to represent or advise. Every year I use such problems to evaluate my students’ knowledge of the lesbian materials that I have taught, either in an assignment

or on an examination. This evaluation represents the sixth pedagogic principle to which I am committed. It demonstrates that the lesbian content is an integral part of the course which must be taken seriously by the students. Failure to examine on the materials (for marks) would undermine all of my other efforts in the classroom.

The final pedagogic principle is, in my opinion; the most important, yet it is the one for which I am the least equipped. I am committed to creating a classroom climate which, if not supportive, is at least not hostile to lesbian students. I know from personal experience that it is difficult, if not impossible, for lesbians to learn course materials while coping with emotional survival issues.”¹¹ I believe that it is imperative to create an environment that is conducive to learning for all students.¹² This is not an easy task. It cannot be accomplished simply by silencing certain students or censoring particular remarks. The mere suppression of offensive and hurtful comments in the classroom does not prevent (and indeed may provoke) their expression in the corridors and bathrooms, where I have no authority and no power to exercise damage control. Incidents that occur outside the classroom inevitably affect the dynamics in the classroom. Thus my aim is not to silence students in my classes but to change their minds, or rather to inspire them to change their own minds (i.e., to alter their consciousness). I try to evoke in them the desire to unlearn as well as to learn. It is a formidable task which overwhelms me and for which I feel wholly inadequate. My inadequacy is manifested primarily in my inability to achieve my objective without sounding either condescending or pedantic. I do not believe that I speak from a position of moral impunity. I recognize that I too have much to unlearn, and also that I have much to learn from my students.

Restorative Justice: Thinking Relationally about Justice

Jennifer J. Llewellyn

Jennifer Llewellyn is an Associate Professor at the Schulich School of Law, Dalhousie University, in Halifax, Nova Scotia. In her scholarly work she develops an account of restorative justice as a relational theory of justice.

Notes renumbered from original.

You are in law school, at least in part, to advance a social justice agenda. Over the course of your legal education and practice, you will no doubt find yourself questioning what is, in fact, “just” and whether notions of “justice” advanced by mainstream legal education and jurisprudence make sense to your critical feminist mind. Below is an excerpt offering an introduction to a relational theory of justice—a theory that aims to recognize the experience and narratives of feminists insofar as these advance an understanding of human beings as fundamentally interdependent and living in relationship with others. The author argues that, when applied to legal theory and practice, relational theory offers us a chance to drastically alter our conceptions about justice and to shape the justice system in a way that more accurately reflects the lived experiences of women.

Feminist scholars have challenged the traditional image of the individualistic human self that rests at the core of much of liberal social and political theory.¹ In place of the liberal individualist vision of the self, relational theorists offer a relational account of the self that takes connection over separation as essential to the constitution and maintenance of the self. Connection and relationship with others is seen as essential to understanding the self and to its making and remaking.² Relational theory thus suggests a different starting point from which to understand the world. It compels us to take the fact of relationship, of connectedness, as our starting assumption. As such, relationality must inform the ideas, principles and conceptions that shape our interactions and social life. Liberal-inspired assumptions about the nature of the self and its interactions with others and the world have shaped and structured (sometimes explicitly but often implicitly) fundamental social, political, and legal ideas, institutions, and systems, among them, justice.

Justice is our response to the powerful moral intuition that something is wrong and begs response and redress.³ In its service, we have created processes, institutions, and systems tasked with recognizing and responding to wrong. Prevailing conceptions of justice that underlie and animate contemporary justice systems (at least in the West and

increasingly exported throughout the world) are rooted in a particular set of assumptions about selves and ideal social conditions drawn from the liberal tradition. As a result, these theories privilege the protection of individual independence through separation as the animating ideal of justice. This is evident in our criminal justice system with its focus on identifying individuals responsible for wrongdoing who can be blamed and punished (often through isolating mechanisms designed to remove them from society).⁴ It is also evident in our civil law system, which conceives of harms as caused by one individual toward another and seeks remedy in a material transfer from one to the other aimed (as much as possible) at a return for the complainant to his or her prior circumstances (without inquiring into the nature of that prior state).⁵ Indeed, the very divisions that rest at the core of our justice system between public and private justice and that separate both from questions of social justice reflect an underlying individualistic approach and set of assumptions.

Insights about the relational nature of the self offered by feminist relational theorists suggest a different starting point for thinking about the meaning and nature of justice and what is required for its doing. If justice is to be relevant to life here on earth and not simply the abstract preserve of poets and gods, then it must take account of

our relationality. Conceiving of justice then must start from the fact of connection and interdependence. What then are the implications of this relational starting point for justice? What difference does it make if we take relationship as the starting point for thinking about justice?

Justice understood relationally is concerned with the nature of the connections between and among people, groups, communities, and even nations. Justice aims at realizing the conditions of relationship required for well-being and flourishing. It identifies as wrong those acts or circumstances that prevent or harm such conditions. With respect to this relational understanding, the goal of justice—either in response to specific wrongful acts or existing states of injustice—is the establishment of relationships that enable and promote the well-being and flourishing of the parties involved. Justice conceived relationally seeks what I refer to in this chapter as “equality of relationship”.

The identification of justice with equality is not unusual. Indeed, Ronald Dworkin has argued that “most theories of justice in the contemporary literature of political philosophy can readily be understood” as “interpretations or conceptions of equality.”⁶ Dworkin’s claim is specifically about theories of political justice or social justice. I have argued elsewhere, though, that both the corrective justice of the civil law system and the retributive justice of the criminal justice system are, at their core, similarly concerned with equality.⁷ Through the use of compensatory damages, corrective justice seeks to correct the inequality created through the interference with the sufferer’s rights.⁸ The conception of justice that some retributivists adhere to is rooted in a commitment to achieving equality between the wrongdoers and victims. Perhaps the most trenchant and persuasive account of retributive justice is that offered by Georg Hegel.⁹ John Rawls has referred to this kind of equality as “fundamental”.¹⁰ According to Dworkin, this notion of equality entails “[t]he right to equal concern and respect [which] is more abstract than the standard conceptions of equality that distinguish different political theories.”¹¹

However, while relational justice shares this focus on equality with other theories and conceptions of justice, the equality at which it is aimed is different from that which is rooted in the liberal tradition. Starting from a relational approach, it aims at more than our familiar notions of formal equality or even substantive equality—both of which take the individual as their point of departure. The equality that rests at the core of a relational theory of justice is necessarily *relational* equality.¹² To claim that justice is, at its core, about relational equality is not to say simply that it is concerned with equality of treatment or outcome for individuals (although, to be certain, this would be a desirable result). Relational equality is a more fundamental commitment to the nature of connection (of relationship) between and among parties. Understanding equality in this way makes it easier to see how relational justice is concerned with equality. It is not to reduce matters of justice (and injustice) simply to inequality or equality claims in the sense we understand them in our Western liberal legal tradition.

[...]

Justice understood relationally, thus, takes as its aim equality of relationship, not in the sense of sameness but, rather, in the sense of satisfying the basic elements required for well-being and flourishing. These basic elements sometimes become more apparent by their absence. We know from experience that certain types of connection (for example, oppression and violence) or the denial of connection (through isolation, neglect, and abandonment) do not promote or permit well-being and flourishing. Indeed, these models of relationships are often described as self-destructive or as destroying lives (even where physical death is not the result).¹³ From this knowledge of what is destructive and harmful, we are able to identify the basic qualities of relationship that are necessary to allow all selves to be well and to flourish. What is required are relationships marked by equal respect, concern, and dignity. These qualities underpin *equality of relationship*

Excerpted from: “Restorative Justice: Thinking Relationally about Justice” in Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (British Columbia: UBC Press, 2011) at 90.
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Conclusion

Justicia in Your Face: How to Survive Law School as an Anti-Colonial, Anti-Racist, Feminist Activist

Leighann Burns and Zara Suleman

Our wishes for all women in law school

Lastly, we offer these wishes to all women entering law school: Aboriginal women, women of colour, women with disabilities, poor women, lesbian, bisexual and transgendered women, immigrant and refugee women, Jewish women, Muslim women, older women, younger women: all women.

We wish you the strength to carry on each day, to go to classes, which might for some of you mean being in places far away from your support systems of family and friends. If you are a mother or co-parent, it might mean that you will be doing the extra work of feeding, clothing, and caring for and organizing the lives of your child(ren). If you are working one job, two jobs, three or more to just survive being in school, so that your bills are paid, and so that you can feed yourself, somehow you will have to get all the reading and assignments done for class the next day. If you live with disabilities, managing to get around a campus, a university, a society that is not accessible, and where your basic needs are unmet can be overwhelming. We wish you all the strength to carry on.

We wish you the confidence to speak your truth, to tell your stories, to share your lived experiences. We hope you will break the silence and make more space in classrooms for experiences that are marginalized and erased. We hope you will believe

"We wish you the confidence to speak your truth, to tell your stories, to share your lived experiences. We hope you will break the silence and make more space in classrooms for experiences that are marginalized and erased. We hope you will believe in yourself to write these experiences down, to analyze, critique, and envision cases with anti-racist, anti-colonial, feminist perspectives."

in yourself to write these experiences down, to analyze, critique, and envision cases with anti-racist, anti-colonial, feminist perspectives. Send your work to law reviews and law journals; get it published! Do not let institutions tell you that you cannot write or that what you have to write is not worthy or valuable or about "law."

We wish for you good health: physical, mental, emotional, and spiritual. Take care of your bodies, minds, spirits, and hearts; they will be put to the test during law school. We hope you look to family, friends, partners, kindred allies and faculty, community members, and faith to get through those times we know will be tough on this journey. Find somewhere you can rant, rage, cry, laugh, vent, be still, and a place where you will be

assured that it will all be okay. Find somewhere your emotions are validated and not minimized or patronized.

Finally, we wish you the ability to imagine a time, a place, a practice in which women in the law do not experience these obstacles. We imagine the possibility of Aboriginal and racialized communities being represented meaningfully and with the power necessary in the creation of law schools, curriculum, pedagogy, and the process of learning the law, making laws, and changing the laws. We hope that you will think out of the boxes that so narrowly define legal reality into tests, standards, and thresholds. Be creative and passionate and dream big in your visioning of law school, the law, and society. Imagine the world you would want for your mothers, daughters, sisters, grandmothers, aunts, partners, and communities. Make this change happen. You are brave and you can do it. You are doing it already!

"Be creative and passionate and dream big in your visioning of law school, the law, and society. Imagine the world you would want for your mothers, daughters, sisters, grandmothers, aunts, partners, and communities. Make this change happen."

Excerpted from: Elizabeth Sheehy & Sheila McIntyre, eds, *Calling for Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006) at 145 at 147-148. Reproduced by permission of the authors, editors and publisher.

Resources

The list of resources compiled below is not exhaustive. It is being provided to give you some examples of organizations you might contact in the event you want to get involved in feminist organizing at your law school.

McGill University:

1. Women's Law Caucus : law.womenscaucus@gmail.com
2. Union for Gender Empowerment: unionforgenderempowerment@gmail.com; <http://unionforgenderempowerment.wordpress.com/>
3. SACOMSS (Sexual Assault Centre of McGill Students' Society): <http://sacomss.org/>; main@sacomss.org

University of Ottawa:

1. University of Ottawa Association of Women and the Law: uoawl.afduo@gmail.com
2. LEAF University of Ottawa Campus Chapter: leaf.in.ottawa@gmail.com.
3. University of Ottawa Women's Resource Centre: <http://www.sfuoc.ca/services/wrc/en/index.htm>
4. University of Ottawa Feminist Legal Mentorship Network: cwolt040@uottawa.ca

Queen's University

1. Feminist Law Student's Association: For contact information, please go to: <http://law.queensu.ca/students/lss/Clubs.html>
2. Queen's Human Rights Office: www.queensu.ca/humanrights/

University of Western Ontario

1. Gender and the Law Association (GALA): law.gender@uwo.ca

University of Victoria

1. University of Victoria Association of Women and the Law: uawl@uvic.ca

University of British Columbia

1. UBC Women's Caucus: ubcwomenscaucus@yahoo.ca;
2. Centre for Feminist Legal Studies: cfls@law.ubc.ca;

University of Alberta

1. Women's Law Forum: wlf@ualberta.ca; www.law.ualberta.ca/currentstudents/getinvolved/lawassociations.php#forum

University of Calgary

1. Association of Women Lawyers: www.awlcalgary.ca/index.asp
2. Student Legal and Action Education Fund: <http://law.ucalgary.ca/current/organizations/leaf>

University of Saskatchewan

1. Women's Law Club: <http://uofslawstudents.com/law-clubs-available.html>
2. USSU Women's Centre (also has list of links to other organizations): <http://ussu.usask.ca/womenscentre/resources.shtml>

University of Manitoba

1. Feminist Legal Forum: fff.robsonhall@gmail.com; <http://feministlegalforum.wordpress.com/>

University of Toronto

1. Women and the Law: women.law@utoronto.ca
2. Family Care Services: www.familycare.utoronto.ca

York University (Osgoode)

1. Centre for Feminist Research: www.yorku.ca/cfr/
2. Institute for Feminist Legal Studies: SLawrence@osgoode.yorku.ca; <http://ifls.osgoode.yorku.ca>
3. Women's Caucus: womenscaucus@osgoode.yorku.ca; <http://ifls.osgoodecaucus.wordpress.com/>

University of Windsor

1. Women and the Law University of Windsor: womenlaw@uwindsor.ca

University of New Brunswick

1. Women in Law Society: www.unb.ca/fredericton/law/groups/index.html

Université de Moncton

1. Fédération des étudiants et étudiantes du centre universitaire de Moncton: <http://etudiants.umoncton.ca/umcm-feecum/>
2. Association des jeunes féministes de l'Université de Moncton: ajfum@live.ca

Université de Laval

1. Université féministe d'été : www.fss.ulaval.ca/universitefeministedete/programme.htm
2. Chaire Claire-Bonenfant: Femmes, Savoirs et Sociétés : www.etudesfeministes.fss.ulaval.ca/ChaireClaire-Bonenfant/index.php?pid=798
3. Répertoire des chercheuses féministes à l'Université Laval: https://oraweb.ulaval.ca/pls/vrr/gexp_prof.html

Université de Montréal

1. Campus féministe de l'Université de Montréal: <http://campusfeministe.blogspot.com/>

Université du Québec à Montréal

1. Comité femmes de l'Association pour une solidarité syndicale étudiante: www.asse-solidarite.qc.ca
2. Centre des femmes de l'UQAM: www.centredesfemmes.uqam.ca
3. Réseau études féministes de l'UQAM: <http://reseautudesfeministes.uqam.ca/> ; assistant_etudesfeministes@yahoo.ca

Université de Sherbrooke

1. Site international francophone sur le droit des femmes: www.usherbrooke.ca/archives-web/sifdf/base_de_connaissance/guides-theorie.html
2. Table de concertation des groupes de femmes en Estrie: www.femmesenestrie.qc.ca

For all Quebec Universities:

Association pour une solidarité syndicale étudiante, section femmes (ASSE-femmes).

Dalhousie University

1. Dal Women's Centre: <http://dalwomenscentre.ca/>
2. Dal Association of Women and the Law: <http://societies.dsu.ca/dawl/>

Endnotes

A Feminist Take on First Year Criminal Law

- 1 Elizabeth Sheehy, "Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet," in Sheila McIntyre and Sanda Rodgers, eds. *The Supreme Court of Canada and the Achievement of Social Justice: Commitment, Retrenchment or Retreat?* (Toronto: LexisNexus, 2010) forthcoming.
- 2 Jennie Abell and Elizabeth Sheehy, *Criminal Law & Procedure: Cases, Context, Critique, 4th Ed* (Concord, ON: Captus Press, 2007) [hereafter Abell & Sheehy]; Jennie Abell, Elizabeth Sheehy, and Natasha Bakht, *Criminal Law & Procedure: Proof, Defences, and Beyond, 4th Ed* (Concord, ON: Captus Press, 2009). See also Toni Pickard, Phil Goldman and Rosemary Cairns-Way, eds. *Dimensions of Criminal Law, 3d Ed.* (Toronto: Emond Montgomery, 2002).
- 3 Laura Stone, "Number of women going to prison jumps 50%" Canwest News Service (10 May 2010).
- 4 Men constitute 99% of offenders and women are 90% of those attacked; the Supreme Court acknowledges that sexual assault is a sex equality issue: *R. v. Osolin*, [1993] 4 S.C.R. 872 at 877.
- 5 Evan Stark, *Coercive Control* (Oxford: Oxford University Press, 2007) Chapter Three.
- 6 Fully 92% per cent of the perpetrators of the 230 domestic homicides committed in Ontario between 2002 and 2007 were men, while only 8% of the victims of intimate homicide were male. In contrast, 8% of perpetrators were female as were 92% of those murdered: *Sixth Annual Report of the Ontario Domestic Violence Death Review Committee* (Ontario: Office of the Chief Coroner, 2008). Even so these data cannot be compared because the most common motivation for men's deadly attacks on their intimate partners is actual or threatened separation, whereas husband killing is most often instigated in self defence: Margo Wilson and Martin Daly, "Spousal Homicide Risk and Estrangement" (1993) 8 *Violence and Victims* 3.
- 7 His Honour Judge Murray Sinclair, "A Presentation to the Western Workshop of the Western Judicial Education Centre" in Abell & Sheehy, *supra* note 2 at 84, 88.
- 8 [1999] 1 S.C.R. 688. As a sentencing decision that requires judges to consider systemic background factors for Aboriginal accused before sentencing them to prison, this case does too little, far too late. The astute feminist reader will also note that Jamie Gladue was a woman, that Aboriginal women are completely disappeared in this decision, that she pled guilty to the manslaughter of an abusive partner, and that while the decision sets new principles, she did not get the benefit of the ruling: Jean Lash, "Case Comment: *R. v. Gladue*" (2000) 20 *Canadian Woman Studies* 85.
- 9 Christine Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Status of Women, 1985).
- 10 For example: Donald Marshall Jr. and Wilson Nepoose, both Aboriginal men, and mothers like Louise Reynolds, Brenda Waudby, and Sherry Sherrett, three female victims of Dr. Charles Smith's misguided "expert" testimony blaming them for the deaths of their children in Ontario. See Abell & Sheehy, *supra* note 2 at 133-135.
- 11 See: *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120.
- 12 *Mooney v. British Columbia*, 2004 BCCA 402.
- 13 See *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.) and *R. v. Mann*, [2004] 3 S.C.R. 59 and the work of Professor David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).
- 14 David Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38 C.R. (6th) 84.
- 15 See The Honourable Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Safety Canada, 1996); *R. v. Hornick*, [2002] O.J. No. 1170 (Ct. Just.); *R. v. S.F.*, [2003] O.J. No. 92 (Ct. Just.).
- 16 See *R. v. Rain* (1998), 223 A.R. 359 (C.A.).
- 17 For example, *R. v. Inwood* (1989), 32 O.A.C. 287 held that wife assault causing bodily harm should ordinarily result in incarceration of several months, but that only "wife battering," defined as repeated attacks upon a woman who is entrapped, warrants substantial incarceration. The Ontario Court of Appeal refused in *R. v. Edwards* (1996), 28 O.R. (3d) 54 to set a benchmark sentence for attempted murder of women who were in intimate relationship with the perpetrator. For a feminist critique see Isabel Grant and Debra Parkes, "Sentencing for Domestic Attempted Murders: 'Special Interest Pleading?'" (1997) 9 C.J.W.L. 196.
- 18 (1998), 39 O.R. (3d) 487 (Ont. Ct. (Gen. Div.)).
- 19 Linda Light and Gisela Ruebsaat, "Police Classification of Sexual Assault Cases as Unfounded: An Exploratory Study" (Justice Institute of British Columbia, unpublished, March 2006).
- 20 Jane Doe, *The Story of Jane Doe* (Toronto: Random House, 2003).
- 21 *Dimensions of the Criminal Law* (Toronto: Emond Montgomery Publications, 1992) at 394.
- 22 Anne Derrick and Elizabeth Shilton, "Sex Equality? Equally and Sex Assault: In the Aftermath of *Seaboyer*" (1991) 11 *Windsor Y.B. Access Just.* 107 at 108.
- 23 *R. v. Pappajohn*, [1980] 2 S.C.R. 120 (note that Bill C-49, a feminist law reform enacted in 1992, reverses the main thrust of this case: an accused must now take reasonable steps to ascertain consent: *Code s. 273.2(b)*), *R. v. Sansregret*, [1985] 1 S.C.R. 570, *R. v. Esau*, [1997] 2 S.C.R. 777, *R. v. Osolin*, [1993] 4 S.C.R. 595, and *R. v. Seaboyer*, [1991] 2 S.C.R. 577.
- 24 *R. v. Leary*, [1978] 1 S.C.R. 29; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Daviault*, [1994] 3 S.C.R. 63.
- 25 *R. v. Rabey* (1977), 17 O.R. (2d) 1 (C.A.), aff'd [1980] 2 S.C.R. 513; now see *R. v. Lueddecke*, [2008] O.J. No. 4049 (C.A.), the "sexomnia" case.
- 26 "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88) 2 C.J.W.L. 233.
- 27 Compare the *Morgentaler* prosecutions ([1976] 1 S.C.R. 616) with *R. v. Perka* ([1984] 2 S.C.R. 232), where the lone alpinist is conjured.
- 28 Compare the heartbreaking decision in *R. v. Gourlay*, [1996] A.J. No. 197 (Prov. Ct.).
- 29 *D.P.P. v. Camplin*, [1978] 2 All E.R. 168 (H.L.); *R. v. Hill*, [1986] 1 S.C.R. 313. See N. Kathleen Banks, "The 'Homosexual Panic' Defence in Canadian Criminal Law" (1997), 1 C.R. (5th) 371.
- 30 Rosemary Gartner, Myrna Dawson and Maria Crawford, "Woman Killing: Intimate Femicide in Ontario 1974-1994" in Katherine M.J. McKenna and June Larkin, eds. *Violence against Women. New Canadian Perspectives* (Toronto: Ianna Publications, 2002) 123.

- 31 See *R. v. Thibert*, (1995), [1996] 1 S.C.R. 37, where the accused had contemplated killing the deceased (wife's lover) and had stalked his wife, with a loaded gun, insisting on his "right" to speak to her alone; he took umbrage at the fact the deceased would not allow him to do so and killed him.
- 32 *R. v. Lavallee*, [1990] 1 S.C.R. 852.
- 33 (1983), 61 N.S.R. (2d) 33 (S.C. (A.D.)); Brian Vallée, *Life With Billy* (New York: Shuster & Shuster, 1986).
- 34 For a discussion of one such case see Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentencing" (2001) 39 *Osgoode Hall Law Journal* 529.
- 35 Her Honour Lynn Ratushny, *Self-Defence Review: Final Report* (Ottawa: Minister of Justice, 1997).
- 36 Holly Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals" (1992) 140 U. Pa. L. Rev. 379.

Establishing a Student-Initiated Seminar at your Law Faculty: Suggestions and Challenges

- 1 Interview with Constance Backhouse (October 2010) (McGill, Montreal).
- 2 The following University of Ottawa Faculty of Law professors developed and taught the Sexual Assault Law course: Blair Crew, Daphne Gilbert & Elizabeth Sheehy (University of Ottawa Faculty of Law: Studies in Criminal Law: Sexual Assault Law).
- 3 Healing circles are a form of Aboriginal restorative justice that "allow participants to speak to their community and find, as well as offer, support. The healing circle reflects the emphasis that many Aboriginal healing traditions place on people's connection to their community." ("A Practical Guide to Complementary Therapies for People Living With HIV-

Complete Medical Systems- North American Aboriginal Healing Traditions" (CATIE, 2004), online at < http://www.catie.ca/comp_e.nsf/3d8bb34bfb735ab885256ea000539508/a124d8675a625e3985256900005820fb?OpenDocument >; Healing circles aim to develop a "consensus on how to repair the harmful results of (an) offence." The model utilized in a student-initiated seminar would typically serve as an adapted healing circle, which endeavors to both address past offenses and to prevent or mitigate future harm or incidents through open, frequent dialogue amongst members of the class ("Aboriginal Restorative Justice Remedies" (Justice Education Society, 2011), online at < <http://www.justiceeducation.ca/research/aboriginal-sentencing/restorative-justice> >.

Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education

- 1 Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320 at 2323.
- 2 *Ibid.*, n. 15.
- 3 *Ibid.* at 2324.
- 4 We use the term "Aboriginal" to connote persons who are First Nations (whether status or non-status), Inuit, and Métis. It is important to recognize that Aboriginal persons are not a homogenous group, and we refer to specific sub-groups of Aboriginal peoples where appropriate in this article (recognizing, of course, that there is also much diversity within those sub-groups).
- 5 We use this term to include people who identify as gay, lesbian, bisexual, transgender, two-spirited, gender transgressive, or queer (collectively described here as "queer"). See Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 Harv. Women's L.J. 89 at n. 1.
- 6 See e.g. Susan P. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations About Women, The Academy, and the Legal Profession" (1997) 4 Duke J. Gender L. & Pol'y 119 at 124, where she notes the "pressing need to reconceptualize race, gender and class in relation to each other and to the project of progressive institutional change." See also Francisco Valdes, "Barely at the Margins: Race and Ethnicity in Legal Education--A Curricular Study with LatCritical Commentary" (2002) 13 La Raza L.J. 119 [Valdes, "Barely at the Margins"] (critiquing the absence of Latinas/os from critical race theory courses in US law schools).
- 7 This is not to deny the importance of other influences present in law school settings and their impact on students' (and others') law school experiences. Student groups, organizations and committees, orientation, law shows, and other extra-curricular events, career services, student newspapers, and the availability of part-time studies and child care may also play a role in creating an environment responsive (or not) to the needs of students, faculty and staff holding outsider perspectives. Christine Boyle calls these the "hidden curriculum" of law schools. See Christine Boyle, "Teaching Law as if Women Really Mattered, or, What About the Washrooms?" (1986-1988) 2 C.J.W.L. 96 at 101-02.
- 8 See e.g. Gerald P. López, "Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education" (1988-89) 91 W. Va. L. Rev. 305, at 307, who argues that generic legal education "teaches law students to approach practice as if all people and all social life was homogeneous." See also Sara Osborne, "These Are Not Our Rules: A Public Interest and Women Oriented Law School to Improve the Lives of Women both Within and Outside the Legal Profession" (2002-2003) 46 How. L.J. 549.
- 9 Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes (Book Review)" (1989) 41 Stan. L. Rev. 751 at 764, cited in Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 at 587 [emphasis in original]. In Canada, see Mary Jane Mossman, "'Otherness' and the Law School: A Comment on Teaching Gender Equality" (1985) 1 C.J.W.L. 213 (discussing the author's early work teaching gender equality at Osgoode Hall law school in the 1970s).
- 10 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) is a classic example. In the Canadian context, see e.g. *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Ont. Ct. (Gen. Div.)); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta (Attorney General)*, [1998] 1 S.C.R. 493. Some of these justice stories have garnered media attention and secured a place in popular culture, even while they have not figured prominently in legal education.
- 11 Barbara Bezdek, "Reconstructing a Pedagogy of Responsibility" (1992) 43 Hastings L.J. 1159 at 1165. See similar comments in John Calmore, "A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty" (1999) 67 Fordham L. Rev. 1927 at 1955.
- 12 See e.g. the risks identified in the context of domestic violence work by Sarah Buel, "The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class" (2003) 11 Am. U. J. Gender Soc. Pol'y & L. 309; see also López, *supra* note 8 at 346, who contrasts a relative lack of preparation for students "who plan to work with subordinated people in the fight for social change" as compared to those planning to practice business law.
- 13 Cynthia Petersen, "Living Dangerously: Speaking Lesbian, Teaching Law" (1994) 7 C.J.W.L. 318 at 319.
- 14 *Ibid.*
- 15 We recognize that some law students have identities and experiences which we would class as outsider, so that some of them will have seen and experienced the law through their own eyes as subjects. However, once in law school, many of these students feel pressured to take a new approach, one which jettisons their previous experiences and knowledge, in order to "think like a lawyer."
- 16 N.K. Sam Banks, "Pedagogy and Ideology: Teaching Law as if it Matters" (1999) 19 L.S. 445 at 451.

Now that the Door is Open: First Nations and the Law School Experience

- 1 It is interesting to note that at both high school and university levels First Nations women are slightly more likely to be educated than are First Nations men. The opposite is true only for the Canadian population holding a university degree. Canadian men are more likely to have degrees, even though Canadian women are more likely to complete high school.
- 2 Until 1985, 191 men had been admitted to the program and only 111 women. See D. J. Purich, "Affirmative action in Canadian Law Schools" (1987), 1987 51(1) Sask. L. Rev., 79, at 102. Statistics for the years 1985 to 1989 indicate that the gender disparity has been, advertently or inadvertently, addressed by the Centre.
S. Deloria, "Legal Education and Native People" (1974), 38(1) Sask. L. Rev. at 23, indicates that the program at the University of New Mexico operated without the need to establish a women's affirmative action component. Men and women were equally represented.
- 3 See, for example, C. Backhouse, "Women Faculty at the University of Western Ontario: Reflections on the Employment Equity Award" (1990) 4(1) C.J.W.L. [forthcoming]; C. Boyle, "Teaching Law as if Women Really Matters, or, What About the Washrooms" (1986) 2(1) C.J.W.L. 96; S. McIntyre, "Gender Bias within the Law School: 'The Memo' and its impact (1987/88) 2(2) C.J.W.L. 362; M. O'Brien & McIntyre, "Patriarchal Hegemony and Legal Education" (1986) 2(1) C.J.W.L. 69.
- 4 The 1986 census data analysis does not provide family composition statistics for First Nations families. The most current statistics available are drawn from the 1981 census. Over 20 per cent of First Nations families are single-parent families, headed by women 80 per cent of the time. Only 10 per cent of non-First Nations families are single-parent, 80 per cent of which are headed by women. This percentage of First Nations single-parents families increases still further in urban areas. See Social Trends Directorate and Native Citizens Directorate, Native Women: A Statistical Overview by P.M. White (Ottawa: Minister of Supply and Services Canada, 1985) at 22.

Miles To Go: Some Personal Reflections on the Social Construction of Disability

- 1 At a recent seminar that I gave, this was accepted up to a point by the professor in question. As an example, he suggested that standards should be adjusted to take account of the fact that women tend to have softer voices; i.e. that it could be acceptable to have submissions made a shorter distance away or with the use of a microphone.

Queering Legal Education: A Project of Theoretical Discovery

- 1 478 U.S. 186 (1986).
- 2 Scott Ihrig, Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students, 14 LAW & INEQ. 555, 555-59 (1996).
- 3 478 U.S. at 186 (Michael Hardwick was charged with violating Georgia's antisodomy statute when a police officer entered his home with an expired arrest warrant (relating to a failure to pay a ticket for drinking outside the Atlanta gay bar where he worked) and observed Hardwick and another man engaging in oral sex.). In a long-awaited decision, the U.S. Supreme Court recently overruled Bowers in Lawrence v. Texas, 123 S. Ct. 2472 (2003).
- 4 Ihrig, *supra* note 2, at 558.
- 5 *Id.* at 559 n.25.
- 6 *Id.* For more details of the study, please see the survey questions and demographic characteristics of respondents in *id.* at 566-67, 589 app. 2.
- 7 One student stated, "I sat through two lectures of mind-numbing right wing ideology when the conservative professor called on the class rel [i]gious zealot and a [W]est-[P]oint-grad-and-squared-away officer to discuss

Bowers and related penumbra rights cases. The treatment was, to say the least, less than understanding." *Id.* at 573. The Bowers case and how it was handled in classes was mentioned by ninety-two percent of respondents. *Id.* at 571. As noted by Ihrig, it has become the "gay case" of (American) law schools. *Id.*

- 8 *Id.* at 568.
- 9 Kevin S. Reuther, Dorothy's Friend Goes to Law School, 1 NAT'L J. SEXUAL ORIENTATION L. 253, 253 (1995), at <http://www.ibiblio.org/gaylaw/issue2/reuther.html>.
- 10 *Id.*
- 11 Brad Sears, "Queer L" (1995) 1 Nat'l J. Sexual Orientation L. 234, 236 online at <http://www.ibiblio.org/gaylaw/issue2/sears>.
- 12 *Id.*
- 13 Mary Becker, Becoming Visible, 1 NAT'L J. SEXUAL ORIENTATION L. 146, 146-47 (1995), at <http://www.ibiblio.org/gaylaw/issue2/mbecker.html>.
- 14 See G. Kristian Miccio, Closing My Eyes and Remembering Myself: Reflections of a Lesbian Law Professor, 7 COLUM. J. GENDER & L. 167 (1997).
- 15 *Id.* at 182.
- 16 See *id.*
- 17 *Id.* at 180. At the time of writing her article, Miccio was teaching at Rockefeller College of Public Affairs and Policy, State University of New York at Albany.
- 18 *Id.*
- 19 *Id.* at 182.
- 20 Laurie Rose Kepros, Queer Theory: Weed or Seed in the Garden of Legal Theory?, 9 LAW & SEXUALITY 279, 280 (2000).
- 21 *Id.* at 283-84.
- 22 For examples of the burgeoning field of queer legal theory, see CARL STYCHIN, Towards a Queer Legal Theory, in LAW'S DESIRE 140 (1995); see also William N. Eskridge, Jr., A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda, 102 YALE L.J. 333 (1992); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 CAL. L. REV. 3 (1995). An example of the approach of these scholars is provided by Mariana Valverde, who states: When I say "queer," I am not invoking and reiterating the gay-straight binary: queer is not another word for gays Gays can name themselves and can thus be easily identified; "queer," by contrast, does not name an identity, deviant or normalized. Queer politics begins where Foucault's analysis of homosexual identity formation ends. Mariana Valverde, Justice as Irony: A Queer Ethical Experiment, 14 LAW & LITERATURE 85, 95-96 (2002).

Introducing the Women's Court of Canada

- 1 We are presently seeking funding to translate these decisions into brief and accessible synopses in both French and English.
- 2 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 62(3).

Reconceptualizing Professional Responsibility: Incorporating Equality

- * *The working group also recommends the following pieces written jointly by this author and Daphne Gilbert: "Resisting the Hidden Curriculum: Teaching for Social Justice" (2008) 2 Canadian Legal Education Annual Review 1-37 and "Teaching Sexual Assault: The Education of Canadian Law Students. (200/2010) 28 Canadian Woman Studies 67-80.*
- 1 Applicants are asked to explain their interest in law studies and to describe how significant achievements in their lives, extracurricular activities, volunteer work or paid work experience have shaped their views or created

an interest in law. Applicants are also invited to discuss how their language, culture, sexual identity, physical or learning disability, or racial background relate to their interest in law studies.

- 2 I read over 6,000 statements during three years as chair and three years as committee member.
- 3 Geoffrey C. Hazard Jr., "Is There an American Legal Profession?" (2002) 54 *Stan. L. Rev.* 1463 at 1469.
- 4 The demographics of the profession have been widely examined. See The Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: The Canadian Bar Association, 1993); Mary Jane Mossman, "Gender Equality Education and the Legal Profession" (2000) 12 *Sup. Ct. L. Rev.* (2d) 187; The Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Legal Profession* (Ottawa: The Canadian Bar Association, 1999), online: CBA <www.cba.org/CBA/Racial/PDF/ReportRacialEquality.pdf> [Racial Equality]. See also Fiona Kay & Joan Brockman, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8 *Fem. Legal Stud.* 169; Alex M. Johnson, Jr., "The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective" (1997) 95 *Mich. L.Rev.* 1005; Chris Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15 *Dal. L.J.* 464; Esmerelda M.A. Thornhill, "Ethics in the Legal Profession: The Issue of Access" (1995) 33 *Alta. L. Rev.* 810; Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001); Michael Ornstein, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, 2001), online: LSUC <lsuc.on.ca/equity/pdf/societyreport_revised16_jan.pdf>.
- 5 The Honourable Justice Michel Bastarache, "The Ethical Duties of the Legal Professional" Speech delivered at the Gale Cup Moot, Toronto, 1998 [on file with the author].
- 6 *Ibid.* at 9.

Spaces and Challenges: Feminism in Legal Academia

- 1 See Annie Rochette & W Wesley Pue, "Back to basics? University Legal Education and 21st Century Professionalism" (2001) 20 *Windsor YB Access Just* 167 at 180-83.
- 2 See Bakht et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45 *Osgoode Hall LJ* 667 at 719; Jo-Anne Pickel, "What Will Rising Tuition Fees Mean for Law and Learning?" (2003) 18 *CJLS* 67.
- 3 See Dorothy E Chunn, Susan B Boyd & Hester Lessard, "Feminism, Law, and Social Change: An Overview" in Chunn, Boyd & Lessard, eds, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) at 1.
- 4 See emails from Pamela Cyr, Jennifer Poon, and Tracy Wachmann (14 June 2010).
- 5 See Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report* (October 2009) (Chair: John JL Hunter), online: <www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf>. For a history of this proposal and critical reactions to it by Canadian law teachers, see "Special Feature -- Dialogue on Legal Education in Common Law Canada" (2009) *Can Legal Educ Ann Rev* 135.
- 6 See Bakht et al, *supra* note 2 at 698.
- 7 See *ibid.* at 714-28.
- 8 "Outsider" courses are defined as those courses for which an outsider orientation (e.g. critical race, Aboriginal, feminist, queer, disability, or class oppression) is central to the very nature of the course. See *ibid.* at 672.
- 9 See Bakht et al, *supra* note 2 at 679.

Living Dangerously: Speaking Lesbian, Teaching Law

- 1 Unfortunately, the hiring process provided only limited contact with students and no contact with staff members. Consequently I was left to judge each faculty's environment by the attitudes of the professors who chose either to meet with me for interviews or to attend my faculty seminar. At the University of Ottawa, I encountered neither awkwardness nor hostility when I discussed my research interests and teaching goals, which involve a commitment to lesbian-positive scholarship and pedagogy. I was, however, concerned because I met with two professors whom I suspected/knew to be lesbian and gay, neither of whom came out to me during my interviews. This led me to doubt the apparent comfort of the law school environment. Nevertheless I chose to accept a position there, in part because it surpassed the other schools to which I applied with respect to the reading registered on my personal lesbian-tolerance meter. At the bottom of the meter fell one particular law school. When I inquired about why I had not been invited to interview there, the Dean responded (on the telephone): "We don't need your kind."
- 2 Khayatt, Madiha Didi (1992), *Lesbian Teachers: An Invisible Presence*, Albany (N.Y), sunny Press, p. 1-2.
- 3 Most recent Canadian lesbian cases focus on human rights issues, particularly equality rights issues (e.g., the right to sponsor a lesbian lover for the purpose of immigration, the right to serve in the military, the right not to be deprived of services, the right not to be denied employment, the right to "spousal" benefits for a lesbian lover, etc.).
- 4 See the definitions of "spouse" in ss. 1 and 57 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.
- 5 See the *Indian Act*, R.S.C. 1985, c. 1-5, s. 48.
- 6 Lesbians have sometimes been lumped together with gay men in the judicial interpretation of statutes aimed at "homosexuals". See *infra* note 8.
- 7 Many provincial and federal legislators are lesbian, gay, or bisexual. However, with the sole exception of Svend Robinson, M.P., they all pass for heterosexual. They generally do not challenge the heterocentric agenda of their respective legislatures. Thus statutes are effectively "devised by heterosexuals", notwithstanding the presence and participation of (closeted) lesbian, gay, and bisexual legislators.
- 8 The expression "homosexual act" was not defined in the statute. The courts concluded that two women could engage in a homosexual act. See *M. v. M.* (1972), 24 D.L.R. (3d) 114 (P.E.I.S.C.), *G. v. G.* (1974), 45 D.L.R. (3d) 317 (Sask. Q.B.), and *T. v. T. and W.* (1976), 24 R.F.L. 57 (Man. Q.B.).
- 9 See s. 3(b) of the *Divorce Act*, R.S.C. 1970, c. D-8.
- 10 See cases listed *supra* note 8.
- 11 After coming out in law school, I joined a small group of lesbian and gay male students and we founded an organization called Queen's Law Lesbians and Gays (QLLAG). Our visible solidarity resulted in an escalation of heterosexist hostility which eventually rose to toxic levels. See note 33 in the original publication of this article. Twice during my second year I decided to quit law school because I could no longer bear the strain. Twice I was persuaded to return by a small group of persistent and supportive friends, without whom I would never have completed my legal education.
- 12 Lesbians are not the only students who suffer hostility in the classroom. Racism, anti-semitism, ableism, sexism, and classism are as rampant as heterosexism. See e.g., Law Society of Upper Canada, *Survey of Black Law Students, Black Articling Students, and Recently Called Black Lawyers* (July-August 1992) (on file with the author). I believe that it is imperative to try to eliminate all forms of discrimination and harassment.

Restorative Justice: Thinking Relationally about Justice

- 1 See generally the discussion and citations in the introduction to the volume this article was taken from [hereafter: "this volume"]: Jocelyn

- Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (British Columbia: UBC Press, 2011).
- 2 Here I recognize that “others” includes human and non-human animals and that a relational conception of the self should also focus attention on the connection between selves and the life world they inhabit. However, this is not my focus in this particular chapter. I am primarily concerned here to explore the implications for thinking about and doing justice in the human realm. I do not intend to suggest by this focus that these issues should take priority over a consideration of justice as it relates to non-human animals or the environment. Indeed, although I do not spell this out within the limited scope of this chapter, I think a relational conception of justice has much to say about justice in the context of non-human animals and the environment. In this volume, Maneesha Deckha explores some of these issues that would illuminate such a consideration of justice in these other contexts in the future. See Maneesha Deckha, “Non-human Animals and Human Health: A Relational Approach to the Use of Animals in Medical Research” in this volume.
 - 3 Llewellyn and Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998).
 - 4 These assumptions are often rooted in a retributive conception of justice. For a fuller discussion of the relationship between relational (restorative) justice and retributive justice, see Llewellyn, “Restorative Justice in *Borde and Hamilton*- A Systemic Problem?” (2003) 8 *Criminal Reports* (6th) 308; Llewellyn and Howse “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission” (1999) 49 *U.T.L.J.* 355.
 - 5 For a fuller discussion of the relationship between corrective and relational conceptions of justice, see Llewellyn, “Dealing with the Legacy of Native Residential School Abuse: Litigation, ADR, and Restorative Justice” (2002) 52 *U.T.L.J.* 253.
 - 6 Ronald Dworkin, “What is Equality? Part 3: The Place of Liberty” (1987) 73 *Iowa L. Rev.* 1 at 10.
 - 7 See, for example, Llewellyn and Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 30-37.
 - 8 See generally Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995).
 - 9 See generally Georg W.F. Hegel, *Elements of the Philosophy of Right*, translated by H.B. Nisbet and edited by Allen Wood (New York: Cambridge University Press, 1991).
 - 10 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 511.
 - 11 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 180.
 - 12 For an elaboration of the concept of “relational equality,” see Christine Koggel, “A Relational Approach to Equality: New Developments and Applications” in this volume. See also Christine M. Koggel, *Perspectives on Equality: Constructing a Relational Theory* (New York: Rowman and Littlefield, 1998). In particular, Koggel distinguishes a relational account from formal and substantive approaches in the liberal tradition.
 - 13 Susan Brison offers a view of the self as “both autonomous and socially dependent, vulnerable enough to be undone by violence and yet resilient enough to be reconstructed with the help of empathetic others.” Susan J. Brison, “Outliving Oneself: Trauma, Memory and Personal Identity” in Diana Tietjens Meyers, ed., *Feminists Rethink the Self* (Boulder, CO: Westview Press, 1997). See also Susan J. Brison, *Aftermath: Violence and the Remaking of a Self*

