GENDER NEUTRAL LAW AND OTHER BEDTIME STORIES FOR GIRLS:

THE CAPABILITY OF FEMINIST LEGAL AND SOCIAL THEORY TO REVOLUTIONIZE THE LENS FROM WHICH WE VIEW THE LAW

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I say, give women equal power in social life…Take your foot off our necks, then we will hear in what tongue women speak. So long as sex equality is limited to sex difference…women will be born, degraded, and die. We would settle for that equal protection of the laws under which one would be born, live, and die, in a country where protection is not a dirty word and equality is not a special privilege.[1]

- Catharine McKinnon

Radical feminist legal and social theories, if accepted for even the most basic shared principles, have the ability to revolutionize our understanding of the function and character of law in western societies. Any revolution, however, may be limited to understanding the true character of the law without the veil of neutrality. It may only amount to the recognition that the character of the law is male, and one of its functions is to perpetuate and protect the gender hierarchy. Any further revolution, such as one where the substance of the law moulds to represent a female perspective as well as male, may be impossible without radical systemic change, likely including state intervention.

The seeming impossibility of the realisation of gender-neutral law lies in a number of political and historical factors which interplay with complex social realities to mask the dire state of women's protection in western societies. The masculist nature of the law's conception coupled with the timeless subordination of women continues to silence any female voice to the extent that a voice has ever existed. Unsurprisingly, the law itself protects and perpetuates this subordination in its very foundations. Through the common law precedent system we see the proliferation of areas of law and lines of decisions that were created to deal with issues that arose when free and voting citizens interacted with each other in business and public life. The nature of this system, and one of its strengths according to its advocates, is that the law evolves slowly as the system is bound to follow past decisions; the system is therefore fundamentally bound to protect itself from radical change. However, a radical change may be what is needed if the law is to incorporate women, given that both common-law precedent and rules alienate and repress the female voice. Even radical legal change may not be enough, as it is the very principles that constitute our freedoms-based legal system that are to blame for gendered law. Changing current law to reflect women's needs and voices will inevitably fail if the rights or freedoms based system that produces that body of law – and the social conditions to access it – does not recognise its own propensity to make laws that protect the freedoms of men at the expense women's protection.

Perhaps the only opportunity for constructing a truly feminine legal and social system begins with the recognition that the law is gendered and exclusionary, and perpetuates the social conditions currently in place allowing for the systematic rape, abuse, harassment and oppression of women. Only then will the conditions be ripe for a female voice to be born, and thus a feminine law constructed.

FEMINIST LEGAL THEORIES AND THEIR ABILITY TO STRIP THE LAW OF ITS FALLACIOUS 'NEUTRALITY'

DISCLAIMER:

There is not one feminist theory. Feminist theories are as diverse as the people who come up with them. A common definition of feminism can at best be reduced to: "a shared concern for the unequal position of women in society."[2] To describe a 'feminist lens' from which to view the law without first qualifying it, would be to neglect the importance to many feminists of not "essentialising" diverse voices, that is, of not regarding the essence of one's own experience as representative of others.[3] With that in mind, I will first qualify that this article largely draws from radical feminist theorists, particularly Catharine McKinnon, an eminent radical legal scholar and Professor of Law at the University of Michigan. I have drawn from radical theorists for this article not in order to criticise substantive law, but the underlying socio-political conditions that facilitate gendered law and lack of access to it.

RADICAL FEMINIST LEGAL THEORY

Some radical feminists view the oppression of women as emanating from a society created by and in the image of men. They view legislative reforms as fallacious victories that have done little to challenge or change the legislative foundations that allow for the systematic abuse and oppression of women within western societies.[4] What's more, any victory won for women's equity is qualified by social factors affecting them uniquely, and by the fragile and political nature of parliament-made law. An example of this is in the economic arena, where feminist lawyers in Australia who had "campaigned for years around pay equity watched with dismay as childcare funding was slashed, forcing many women to leave the paid workforce; and women's wages decline as enterprise bargaining and individual contracts replaced centralized wage fixing."[5] It is not only a lack of female representation in the legislative assembly that accounts for such a gross negligence of women's economic and social welfare, but the silencing of women's unique voice to articulate those needs.

Some theorists view even sex equality legislation as potentially harmful to women, as gender-neutral language in legislation inevitably uses the male standard, and is therefore only accessible to women who can "show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident at birth."[6] Sex equality law potentially masks the roots of female oppression and leads to the false impression that equal to men under the law equates to protection for women. In Australia,

> *[s]ince the introduction of Commonwealth EEO and sex discrimination legislation the decrease in the earnings gender gap has been negligible. More disturbingly[…] according to the OECD data[…] the gender gap actually widened[…] Statistics from the Australian Bureau for statistics confirms this and indicates that during the last decade not only has the gap between the earnings of male and female workers widened, but also between the top ten percent and the bottom ten percent of workers. A statistic double affecting women as women are often relegated to industries with the lowest pay itself not subject to regulation as there exists no male standard to ensure equal and fair pay.*[7]

To gain access to rights, women initially needed to prove they were equal to men; this left industries that were not traditional employers of men, unable to claim a standard by which to judge labour standards. "To claim special needs placed women at risk because they were then automatically deemed not similarly situated to men" in which case it was not sex discrimination in need of legal amelioration, but a difference between the sexes outside the sphere of the law.[8] Some feminist theorists however, have resisted the urge to translate the needs of women into a "similarly situated rule;" preferring to recognise the gender of the law and demanding that it recognise women's needs in their own right.

Other theorists however, have regarded the process of translating women's complex and intertwining needs into a male-centric legal framework as limiting, with the issue remaining defined in narrow legal terms that do not account for feminist frameworks. For example, "when

ONCE WE ACCEPT THE NOTION THAT MEN DOMINATE WOMEN SOCIALLY, WE MUST ACCEPT HOW THIS IS REFLECTED IN LAW, WHICH DEMONSTRATIVELY PROTECTS THE [CURRENT] SOCIAL HIERARCHY

the issue of armed combat is taken into court on an equality module, the issue becomes whether or not women, excluded from such combat, are being treated equally. There is no space for introducing the feminist issue of opposition to militarism."[9] Despite the obvious dangers, the doctrine behind western sex discrimination and equality laws largely have their roots in these conceptions of sameness or difference, one forcing women to the male standard in order to not be discriminated against, the other using special protections to account for the ways in which women are different to men. In both, the law is shaped by how close one is to the male standard. This is deficient for female protection in a variety of ways;

> *[a]s applied, the sameness standard has mostly gotten men the benefit of those things women have historically had[…] Almost every sex discrimination case that has been won at the Supreme Court level has been brought by a man[…]they get preferred because society advantages them before they get into court, and the law is prohibited from taking that preference into account.*[10]

GENDER-NEUTRAL LAW?

The liberal state, in its definition of the rule of law "—neutral, abstract, elevated, pervasive—both institutionalises the power of men over women and institutionalises power in its male form."[11] "Simply by treating the status quo as 'the standard,' it invisibly and uncritically accepts the arrangements under male supremacy."[12] Thus, when viewed through a feminist lens, the revolution in our understanding of the character and function of the law would shift from the understanding of the law as neutral and passive, to understanding the law as enforcing 'abstract rights', which "authorize the male experience of the world.[13]

For some radical feminists, the neutral veil of the law "reinforces the legitimacy of the male viewpoint as the standard upon which the law is based." This veil is propelled by the myth of the reasonable person,[14] a gender, race, age and income neutral person who erases the reality of real social hierarchies reflected in the law. This "male supremacist jurisprudence erects qualities valued from the male point of view as standards for the proper and actual relation between life and law."[15] This male standard is pervasive in all law from criminal to civil, corporate to family.

> *[F]or instance in the criminal law defense of provocation which is structured around (socially constructed) masculine responses to affront or perceived threat[…] Standards assumed to be normal, universal, even common-sensical, are often derived from specific socio-political locations where power to define and legislate for others is concentrated. The result is a silencing of certain voices and certain types of narrative in the construction of law's official identity.*[16]

In the case of sexual assault, it is then the reasonable male's idea of consent. This can be extremely problematic when we acknowledge the sexualisation in society of non-consensual sex or the 'coy' female,[17] and the pervasive idea in feminist literature that men construct female sexuality.[18] Laws that require positive consent are to be lauded, but will not empower a woman who is economically or socially dependent on her partner from accessing the legal system in the first place. In this scenario the law is created for someone who is able to access it in the first place, again meeting a male standard (economic and social independence often denied women) to reap the benefits.

Analysing three areas that have contributed to both the fallacy of legal neutrality and the continuance of female social and legal oppression may allow us to better understand the arguments of feminist legal and social theory and realise just how revolutionary the change in our understanding of the law must be. These areas – constitutional inception, silencing of women, and western liberal legal features – are discussed below.

RULE OF LAW: SOME MORE EQUAL THAN OTHERS

"Those with power, not usually women, write constitutions, which become the law's highest standards."[19]

INCEPTION OF MODERN WESTERN LAW, AND SILENCING OF WOMEN

In Australia, the "first stage in the process of building a constitutional system based of representative democracy was the holding of a series of constitutional conventions in 1891, 1897 and 1898, at which the Constitution was drafted. Women were not merely underrepresented in this process; they were virtually not represented at all."[20] This, according to Catharine McKinnon, led to a cycle of discrimination whereby women where barred from deciding the content of the constitution, and thus were ultimately barred from voting. "The exclusion of women, once institutionalised in the constitution-making process, legitimated any subsequent exclusion and also provided a reason for excluding women."[21] The inception of the Constitution in Australia did not introduce the oppression of women. It simply ensured its progression by codifying the separation of the public and private sphere in the law, excluding women from being represented, and ensuring

that freedoms guaranteed were those that protected the interests of men at the expense of women's protection.

WESTERN LIBERAL LAW AS PERPETUATING SUBORDINATION

The foundation for the myth of gender-neutral law is in the pervasive "assumption that sex inequality does not really exist in society[…]

> *The Constitution[…] with its interpretations assumes that society, absent government interventions, is free and equal; that its laws in general reflect that[…] This posture is structural to a constitution of abstinence. Those who have freedoms like equality, liberty, privacy, and speech socially, keep them legally - free of government intrusion. No one who does not already have them socially is granted them legally.*[22]

As a result of this liberal ideology, 'civil society,' the arena where women are uniquely vulnerable and powerless, has been placed outside the reach of legislators.

The notion of the law floating above judge's heads, waiting to be 'discovered' reinforces the perceived neutrality of the law while the reality is that law is man-made, with all the bias that comes with it.

> *Lines of precedent fully developed before women were permitted to vote, continued while women were not allowed to read and write, sustained under a reign of sexual terror and abasement and silence and misrepresentation continuing to the present day are considered valid bases for defeating 'unprecedented' interpretations or initiatives from women's point of view.*[23]

The cyclical nature of exclusion provides for an insurmountable obstacle to inclusionary law without radical change to the system. When we establish the massive obstacles to women accessing their voice and protections under western law and society, we can no longer see the law as protecting all citizens, it must be viewed as a part of the oppression itself.

Despite the consequences of exclusion from the constitution making process – and they were far reaching – some theorists argue it would have mattered little in the effect of the constitution had they been. Perhaps voting rights may have come more quickly, but the silence perpetuated by the abuse and trivialisation of women, would have ensured their voice be de facto excluded in any meaningful way regardless. The silencing of women is the social conditions that will continue to bar women along the way from accessing what protections the law does afford. The law in its male form leaves little protection for women in the ways they are subjugated the most, in the so-called 'private sphere.'

LIBERTY AT WHO'S EXPENSE?

The very nature of the rule of law in liberal democracy is that no person is above it. It is in the context of this premise that we see the protection of citizens from their state and the individual liberty of a person to own land, lead a private life, and pursue interests unhindered by the government. The notion of small-government and protection from intervention in one's private

life creates the conditions necessary for the subordination of women, as inequality is protected from state intervention. The powerful, in social standards, are free to carry out their dominance unhindered by interference in this hierarchy. Issues that face women alone are largely seen as outside the sphere of the law.

Catharine McKinnon, argues in relation to women that,

> *[w]hen you are powerless, you don't just speak differently. A lot, you don't speak… You aren't just deprived of a language with which to articulate your distinctiveness, although you are, you are deprived out of a life with which articulation might come… Sometimes it is permanent… the damage of sexism is real, and reifying that into differences is an insult to our possibilities*[24]

What McKinnon is describing is the idea that what women may appear to be – labeled femininity – does not reflect their possibilities, as it is a reflection of a mythological femininity mirrored in male perception and shaped by abuse, dominance and adaptation from necessity. Input women may have under the 'feminine' construct will still be male input in that it is a male construction of 'feminine' from which it is derived. Protecting and nurturing a genuine female voice is more than 'allowing' women to speak without state intervention. Rights only "work where people are in a position to press for them; for others they give only the caricature of justice."[25] Protecting female voice means intervention where the male voice actively and successfully seeks to silence it. When viewed through this lens, rights protecting the private sphere of the home become the conditions for the abuse of power of one group over another. To use a popular slogan from the second wave feminist movement 'the private becomes the political." Ironically, the very basis of our law: individual freedoms, is the basis on which women are oppressed, as it becomes freedom for the powerful to act accordingly.

CONCLUSION

The first step in the road to inclusionary law is to claim women's concrete reality.

> *Women's inequality occurs in a context of unequal pay, allocation to disrespected work, demeaned physical characteristics, targeting for rape, domestic battery, sexual abuse as children, and systematic sexual harassment, Women are daily dehumanized, used in denigrating entertainment, denied reproductive control, and forced by the conditions of their lives into prostitution. These abuses occur in a legal context historically characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and lack of recognition of sex-specific injuries. Sex inequality is thus a social and political institution.*[26]

Once we accept the notion that men dominate women socially, we must accept how this is reflected in law, which demonstratively protects the social hierarchy currently in place. The next step is putting the two notions together, which necessarily leads to a revolution in how we view the function and character of the law; from a protective, neutral shield, to an oppressive gendered sword. From the recognition of the masculist foundations of western constitutions

that allow for the dominance of one group's freedoms over another, to the perpetuation of that dominance through the common law precedent system; western societies must necessarily view their law through an entirely new lens.

Once we are in a position to see the law as exclusionary and gendered – itself a revolution in understanding – we can work towards social and systemic changes in order to reverse the effects and lead to inclusionary law. Once we realise the law is already biased and benefits one group of people over the other, it is a short jump to understanding the law as capable of propping one group up – in this case, a socially dominated group – in order to reverse the damage and allow women a voice. A revolution in our understanding of the character of the law is to recognise its ability to magnify, create and mirror embedded social inequality. This has the potential to name and shame a creature currently invisible in our present understanding of it.

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3. Ibid 5, referring to Harris 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stan. L. Rev. 581.
4. The Law Reform Commission, Equality Before the Law: Justice for Women. (1994) Report No 69, Part 1: "1.12 Work undertaken by the Commission and by others has exposed how serious and widespread the problems of women's inequality are…Gender bias is embedded in the legal system. Addressing specific issues in particular areas will not solve the problem unless that underlying bias is also addressed. 2.3 Women's social inequality is fundamentally connected to their inequality before the law. Their unequal social status prevents or inhibits them from gaining access to the legal system on an equal basis with men. The law not only reflects women's unequal status. It can also cause, perpetuate and exacerbate that inequality.
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9. Anne Simone, in Razack, above n 8, 23.
10. McKinnon, above n 1, 237.
11. MacKinnon, Toward a Feminist Theory of the State (Harvard University Press, 1989) 238-248.
12. McKinnon, above n 1, 237.
13. MacKinnon, above n 11, 238-248.
14. Drucilla Cornell 'Review: Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State' (1991) 100 The Yale Law Journal 2247.
15. McKinnon, above n 11, 237-249.
16. Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 Maquarie Law Journal 5.
17. Visible in every facet of the media and reinforced through stereotyping women's dress and lifestyle choices. One might bring to mind a recent statement made by a Canadian police officer that led to thousands of women around the world taking a 'slut-walk' to raise awareness of the impacts of female stereotyping.
18. Anne Koedt, 'The Myth of the Vaginal Orgasm' (1970) Chicago Women's Liberation Union: This work discussing the social construction of female sexuality discusses several factors that have led a fundamental divide between actual and fantasized female sexuality. They include pornography and early psychologists, such as Freud who first discussed the 'vaginal female orgasm' as a 'mature orgasm' compared with the clitoral, which was allegedly juvenile. Freud's work in this area, since discarded in the scientific community, has come to be 'common-knowledge' in the public arena of female sexuality. Generations later, and one would be hard-pressed to find women who can comfortably admit to their partners let along publically that the so-called 'vaginal' orgasm continues to evade them; lest they stray too far from the pornographic norm of female sexual convention.
19. Kim Rubenstein and Deborah Cass, 'Representation's of Women: Towards a Feminist Analysis of the Australian Constitutional System.' (1995) 17 Adelaide Law Review 3, 30.
20. Ibid 28.
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23. McKinnon, above n11, 238.
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25. Elizabeth Wolgast, 'Wrong Rights' (1987) Hypatia 2, 25.
26. McKinnon, above n 1, 238.