The law of contract and the taking of risks: feminist legal theory and the way it is

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This is not about contract law, but it is about taking risks. To be specific, it is about why teaching contract law, studying contract law, does not, or need not, involve taking risks. It is possible to learn what constitutes an offer without ever thinking about who does the offering and why, or without ever seeing offer as an issue of power.[1] It is possible to teach the law of contract as though it only applies to white middle class men wearing matching tie and braces. It is possible to teach the law of contract without reference to domestic agreements. It is possible to avoid discussion of the contractual reality of most people's lives. That's just the way it is. The learned descend to town and practise contract law that way. They may get thrown briefly one day by a dispute between old friends, especially when both friends call up to offer their solution and both solutions seem right. When the lawyer finds a doctrine to fit the facts as he sees them, he breathes a sigh of relief, and tells the old friend who lost that it is nothing personal, that's just the way it is.

Feminist legal theory is about the law the way it is. It is also about the way the law could be. In providing a solution within the law as it is, feminist legal theory offers, at best, a compromise. But even then, it is not a compromise performed by finding the woman and adding her in. She will not fit. Feminist legal theory is about why she will not fit. It is about why she does not fit the role of an offeror; why she does not fit in as a reasonable man or even a reasonable person;[2] why her story of rape fits his story of sex;[3] why she does not fit in a lecture hall where participation is measured by verbal aggression; why it is not enough to fit her out in matching tie and braces. Feminist

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1 For feminist commentary on the substance and teaching of the law of contract see E Anderson "Women and Contracts: No New Deal" (1990) 88 Mich LR 1792; C Dalton "An Essay in the Deconstruction of Contract" (1985) 94 Yale LJ 997; MJ Frug "Re-reading Contracts: a Feminist Analysis of a Contracts Casebook" (1985) 34 Am ULR 1065; MJ Frug "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law" (1992) 140 U Penn LR 1029; C Pateman *The Sexual Contract* (Stanford University Press, Stanford, California, 1988).

2 See H Allen "One Law For All Reasonable Persons?" (1988) 16 Int'l J of the Sociology of Law 419; P Crocker "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence" (1985) 8 Harvard Women's LJ 121; N Ehrenreich "Pluralist Myths and Powerless Men: the Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale LJ 1177; L Bender "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J of Legal Education 3; L Bender "Changing the Values in Tort Law" (1990) 25 Tulsa LJ 759; N Cahn "The Looseness of Legal Language: the Reasonable Woman Standard in Theory and Practice" (1992) 77 Cornell LR 1398.

3 C MacKinnon "Feminism, Marxism, Method and the State: Toward Feminist Legal Theory" (1983) 8 SIGNS 635, 647.

legal theory is not law with the hard questions taken out. It is the hard questions. It makes my head hurt. It makes students' heads hurt. It makes it harder for them to fit but it makes it easier for them to understand why they do not.

Law school is also about fitting. In learning how to fit facts to doctrine students are also learning how to fit themselves out as lawyers. They learn that there are certain ways of talking about the law. They learn how to take the "I" out of everything, especially when it is accompanied by "think", "feel" or "believe". They learn how to footnote everything they write unless it is commentary. Commentary must then be in the third person, separated. They learn to work alone because collaboration is viewed with suspicion. Even in group discussion they will hold back a good idea because they want the credit for it later. They learn to hide books from other students. They learn that there is always an answer. It may not be the only answer, but it is *the* answer. They learn this at the same time that they learn things are always arguable. But argument has rules too. The distancing of self from subject. The use of only material facts when relevance is result-driven, rather than perception-driven. The linear method. The tableau of boredom when someone cries context.[4] A class in feminist legal theory must begin by taking these rules away.

The biggest absences in the feminist legal theory class should be the absence of a concentration of power and, as the corollary of this, the absence of a concentration of fear and a lack of trust. The traditional legal classroom is paradigmatic of oppressive relationships.[5] As feminism is about the recognition of, and challenge to, domination by men over women, so a feminist response to legal education is about challenging domination in the classroom. Giving up control does not mean there are no constraints on learning. It means that students learn to take control of, and responsibility for, their learning. Advocates of socratic teaching claim this also, but vast differences exist between the two participatory models.[6]

Feminism claims consciousness-raising as method. Consciousness-raising is also a learning process. Learning by talking about experience. Learning by discovering that

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4 KC Worden "Overshooting the Target: a Feminist Deconstruction of Legal Education" (1985) 34 Am ULR 1141, 1154.

5 For a critique of legal education see for example: D Kennedy "Legal Education and the Reproduction of Hierarchy" (1982) 32 J of Legal Education 257; C Menkel-Meadow "Feminist Legal Theory, Critical Legal Studies, and Legal Education, or 'The Fem-Crits Go to Law School'"(1988) 38 J of Legal Education 61; M O'Brien and S McIntyre "Patriarchal Hegemony and Legal Education" (1986) 2 Canadian J of Women and the Law 69.

6 See J Morgan "The Socratic Method: Silencing Cooperation" (1989) 1 Legal Education R 151; C Hantzis "Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching" (1988) 38 J of Legal Education 155; T Pickard "Experience as Teacher: Discovering the Politics of Law Teaching (1983) 33 U Toronto LJ 279; S Gibson "Define and Empower: Women Students Consider Feminist Learning" (1990) 1 Law and Critique 47.

experiences are not isolated or unique. Feminist critiques of law have emerged from such discovery, as have new laws.[7]

Setting up a place for discoveries is difficult. Students need to remember how to talk to one another, without an interpreter, without being asked, without expecting answers. There is as much silent affirmation as there is verbal response. It is all part of affirming experience, a validating of personal voices.

The stating of the personal requires the taking of risks. In other classes responses involving context or emotion are not asked for. When they are given gratuitously, they are edited, talked over or ignored. Getting students to live the methodology requires mutual trust, respect and tolerance. It does not always happen. Even when there is agreement about how the conversation should proceed, not all can forget to ask for evidence, to reword the already spoken, to talk over the softness.

I remember a woman crying as she recounted how her mother had lived. We were talking about the changing definitions of sexual harassment in slow response to women's realities. A male (it need not have been, but it usually is) questioned the lack of statistics which would (perhaps) validate the need for our concern. He had heard nearly all the women in the class recount a tale of harassment, yet that was not enough. For him there was no connection between what this woman was saying and the law. Which was true. Nor did he believe there should be. He needed to take what some women in the class had named a "quantum leap". Not the living of another's reality, but having faith that for them, it could be so.

Women law students must do this all the time. They must learn law that responds to lives they do not live. It is not only women students who must take the quantum leap. Any member of a minority group must do this. Which is odd when it is really those in matching tie and braces who are out-numbered, but not, of course, over powered.

Taking power out of classroom conversations can be attempted in various ways. Talking about the course as experience rather than theory helps; having a small group of people who sit at a round table helps; a commitment to respectful discussion is more than helpful, as is letting students make decisions about process for themselves.

The first important recognition is that the best way to learn about feminist legal theory is by talking to each other. During the course students increasingly value the discussion model. At the beginning of the term I encourage them to talk by asking for their opinions on areas of the law which have not traditionally been seen as raising gender issues. This exercise reminds them that there are several legitimate ways of

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7 For example, in response to the plight of battered women and their inability to satisfy the traditional criminal law defences, the Homicide (Defence of Provocation) Bill 1992 (UK) has been introduced and recognises that provocation includes "the cumulative effect of things done ... and any conduct of the deceased, including domestic violence ...".

viewing the same set of rules. When we ask of each other, "why do you say that about the law?", we are able to trace any statements back to the speakers themselves. Recognition of individual responsibility for anything said is one of the beginnings of critical thought. We realise that what makes any one view into "the law" is not intrinsic validity, but the position of the person giving that view. As feminist legal theory recognises the legitimacy of the views of any person, particularly women, having a conversation in which we may explore each others' views is as much a part of the substance of the course as it is the process.

This recognition comes with a cost. It is risky because claiming responsibility for statements about the law exposes students to personal criticism. Statements starting with "I think" cannot provide the shield supplied by the words "the law states". But it is a risk worth taking. It is only by taking personal responsibility that we can recognise the personality of the law. Exposing this personality makes the claim "that's just the way it is" transparent. The recognition of this transparency is an empowering process, especially for women. For women law students the task of changing minds seems possible. Changing the law does not. Knowing that there are people responsible for the law may not hasten reform, but it makes debate purposive. There is still a need for rules within *this* debate, as the necessary corollary of personal disclosure is respect for the personal. The empowerment which arises from challenging the law cannot be lost by the challenging of personal experiences. The second essential decision for students of feminist legal theory therefore concerns *how* they talk to each other.

Feminist legal theory tends to attract students who have already thought about their position as law students, so a number of alternatives are offered readily. We talk about not interrupting, not "translating", not editing. We talk, as we will over and over, about taking responsibility for our contributions to the class. The importance of saying "I", especially when followed by "feel" or "believe"; the value of saying "that happened to me"; the need to be supportive of the people who will say, as they always do, "that happened to me, and I have never told anyone this before". We talk about the irrefutability of any statement that begins with "I think". I tell them the story of a Professor who told me that I was wrong because I held a (contrary) opinion about the quality of support for junior faculty members. Opinions, I tell them, cannot be wrong. They may be based on a lack of information or on an unadmitted bias, but they are not *wrong*, any more than they are right. I tell them that they may agree or disagree, as I hope they will do with passion, but that opinions cannot be dismissed on the basis of such pronouncements.

Creating rules about listening is only part of challenging the power relationships in the classroom. The hardest part, for the students and for me, is that I have given up much of the power that accompanies the role of a teacher. This is the risk that I take, but each year I take it, it becomes less risky. It has become easier to relinquish responsibility for their learning. It is easier to hear them challenge my choice of materials, my choice of assessment. The fear that remains is that I will one day have to have to respond to their challenge with "that's just the way it is". For now, I welcome hearing their concerns and make the process and assessment of their learning as open and negotiable as the University allows me. Even now I cannot take full responsibility for

my place in the feminist legal theory course. My role has been defined by the students and changes with them.

The first year that I ran a course in feminist legal theory I took on the role of facilitator. I introduced every session and then started the discussion on the reading for that week. Despite not lecturing to the group, nearly every time a student contributed, they would look at me. If a difficult point came up, the class would expect me to resolve it. If there were control problems (interruptions) they would expect me to solve them. I did not want these tasks and saw my performance of them as an impediment to creating the kind of place I wanted the classroom to be. Some students saw this problem clearly. In one class a male student challenged one of the women on her interpretation of the readings. It became clear in the course of their discussion, which rapidly involved the rest of the class, that he had not read the material. I suggested that he not contribute for the rest of the session, or for as much of it as related to the readings. After class he criticised my handling of the situation, arguing that I had retreated into a position of power. I agreed. I realised that I had retained too much control of the process, with which neither I nor my students felt comfortable. For the last two years I have instead become more like the Faculty's representative in the feminist legal theory course. I am still responsible for the assessment and most of the material, but I do not take any of the classes. At the beginning of the term, students in groups of two sign up for the week in which they will take responsibility for the class.

The idea of taking responsibility for a class is a frightening prospect for some students. On occasion, after answering nervously asked questions before their class, I have had doubts about my approach as an improvement on the socratic method (or its variations) used in most compulsory subjects at Victoria University. One common complaint about the socratic method, aside from the translation and editing aspects, is that it makes students unnecessarily apprehensive about contributing to the class, or even attending it. Advocates of the technique insist that it makes student prepare, equips them for the rigours of practice, makes them think quickly and promotes their ability to speak in public. As part of my concern is to take fear out of the classroom, the anxiety some students confront while preparing to run a session may seem counter-productive. What saves me, perhaps inappropriately, from forming that conclusion, is that most of the traditional fear triggers have been removed. Students are faced with a small, and largely sympathetic, audience. They are in control of the subject matter, the emphasis and the questions. They have usually read more widely in the area than the rest of the class. They will not be assessed on their ability to respond to a lecturer, but on the originality and clarity of their presentation and their ability to encourage and direct the discussion. The assessment criteria are transparent and are open for amendment by the students.

We also spend time in the first class talking about ways of presenting material. Some students have had experience with this kind of contribution in either honours seminars or in tutorials in their non-law subjects. For most law students this is their first attempt at helping their peers to learn in any formal way. The options of using role plays, small group discussions with question sheets, videos, overhead projectors, guest speakers, mini-lectures or debates are outlined. Most students use handouts and a

whiteboard, but the presentations have included: watching a date-rape scene from a television drama; guest lecturers from the New Zealand Prostitutes' Collective; a mock socratic lecture; and a role play on women in the family in the 1950s, the 1990s and the future.

In writing down this list of some of the successful class presentations, I am taking the risk of hearing again the predictable criticism that feminist legal theory is not law at all. This criticism has been rarely made directly to me, but rather to the students in at least two courses taught by other Faculty members.

Certainly, feminist legal theory is not "law" as it is written in text books, statutes or judgments. If feminist thought was to be found in recognisable quantities in such sources, the "tools" of the legal trade, there would be a less urgent need for such a course. Of course, the mere fact that feminist legal theory is not a source of law, should not prevent it from being recognised as a legitimate subject within a law school curriculum. The fact that the course does not dwell on the analysis of vast amounts of case law, as do most of the compulsory law courses, does not mean it is not a valid study of the law. A course in contract law is not law either; it is about the law, as is feminist legal theory. A course in contract law may even cover feminist criticism of contract law, although not at Victoria University.

I constantly hear from my (male) colleagues, resisting the pressure to provide clinical legal education, instruction in memorandum drafting or basic conveyancing procedures, that The University, and especially The Law Faculty, is a place for the academic study of the law. It is not a technical institute, nor should it attempt to train lawyers for the profession. Without challenging the definition of "academic", or asking who decides what is suitably academic (which is clearly at stake in the case of feminist legal theory), my argument is, phrased in that irrefutable manner, that I think feminist legal theory is incredibly academic.

Feminist legal theory is academic in both senses of the word. It is worthy of academic attention because it challenges the process and substance of an institution that controls most details of our lives (and arguably should control others). It is worthy of academic thought because it requires students to move beyond an understanding of the way legal rules work to an understanding of the impact of those rules. It is worthy of academics' time because it asks students not only to apply concepts, but also to analyse them; not only to learn the law but to try to make it better. In these days when we still insist that the university does more than train lawyers for the profession, it is an appropriate academic subject because it seeks to give meaning to that requirement. It is academic, in the colloquial sense, because only those in universities have the time, and then only in some of them the blessing, to develop the conversation. It is academic because the thoughts of a few university lecturers can never hope to compete with tie and braces sets as a topic of social conversation or economic action.

I continue to argue that, as the substance of feminist legal theory is worthy of attention, so is the process by which it is taught. As the subject exposes the slant of the law, so the classroom experience in feminist legal theory exposes the myth of

objectivity of material and assessment. By allowing the students to take responsibility for their own learning, they are made aware of the control any teacher has over any student. By selecting readings, by requiring discussion of selected issues (and expecting exam answers to reflect that selection), lecturers in most other law courses have the ability to, and do, confine the boundaries of thought and so knowledge. They also have the ability to push at those boundaries and let students see them do so. Some will do this, but many more will not. In feminist legal theory students become aware of this power dimension in learning by performing the tasks of selection and control themselves. In doing so they become aware of the boundaries set in other courses and the gendered nature of learning the law.

In learning to take responsibility for their own knowledge and the collective knowledge of the class, students discover the value in preparing for class. It may be that students, faced with the prospect of being questioned in front of 200 others by a Professor who makes a show of recording their success or failure on the seating chart, rarely fail to prepare. Does it matter, the same Professor might even ask, that they prepare for the wrong reasons: out of fear rather than a concern to learn? Maybe not. Fear might mean that they read the case, but does fear mean they can talk about it in class? A student who takes responsibility for her own learning will read the case and think about questions that may never be asked in class. In feminist legal theory classes, students get a chance to ask those questions.

For me, as a teacher, I must be content to watch the process of learning. I do not control it or limit it. Sometimes, because of the assessment requirements at Victoria University, I must direct it, but I do so believing that is my only appropriate role. I am reminded of another teacher who, while sitting inside preparing his lectures on a warm Sunday afternoon, saw his students lying in the sun and realised that the wrong person was doing the learning.[8] I am reminded of a woman law lecturer who was forced to turn up half an hour late for class and, rather than finding an empty lecture theatre, found her students had started without her.[9] To provide students with the desire to learn, even in our absence, must be the goal of all teachers.

Helping students become responsible for their own learning is not easily measured, or, it would seem, valuable. Teaching evaluation forms used at Victoria do not ask students to comment on this aspect, apart from the slightly ambiguous question "did this lecturer (or class presentations) stimulate my interest in the subject?" Although students of feminist legal theory always respond positively to this question, the big question ("how do you rate the overall effectiveness of this lecturer?") cannot be answered. Alternative ways of helping students learn must be recognised, in the end, by the students themselves:[10]

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8 J Powell "Reducing Teacher Control" in D Boud (ed) *Developing Student Autonomy in Learning* (Kogan Page, London, 1981) 71.

9 Recounted by Marlene Le Brun at the 1991 Australian Law Teachers' Association Teaching Workshop.

10 Written comment by student at the end of the feminist legal theory course.

I don't think anyone told you at the time, but we were just *living* that course. The classes were just great, quite the best way to learn. I learnt so much more than ever before, and it was so *right* to learn that I can't remember learning it anew. It was more like remembering it, really. *This* is what education is really about.

A risk worth taking.