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Lucinda Finley

University at Buffalo School of Law

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WOMENS' EXPERIENCE IN LEGAL EDUCATION: SILENCING AND ALIENATION

LUCINDA FINLEY*

In these remarks, which I will confine to the personal and anecdotal level, I wish to examine what women students say is their experience of silencing in legal education. The remarks describe how this comes about and why the experience of being silenced is so troubling, not for just women but also for the law. I will also address how I, as a feminist law teacher, teach my classes — not just my classes in feminist theory but also those in labour law, torts or whatever else my Dean might persuade me to teach at some time.

My interest in gender and legal education grew out of the experience of having numerous women students at Yale law school approach me to confide how they felt silenced by and alienated from their legal education. This was painful on two levels. First, I was hearing their profound expressions of pain, and, as a teacher, I was distressed that they were learning to dislike the law and fight the law, instead of becoming attracted to it. But it was also painful because it reminded me that I, too, had felt that my views were not always heard nor appreciated when I was a law student. I continue to feel this every day, as one of the token women on a law school faculty — and one foolish enough to identify myself publicly as a feminist, thus facing the risks of marginalization to which Catharine MacKinnon has referred. Women students tell me that their classroom comments get swallowed up by what seems to them like a “black hole”; they are completely ignored. These reactions make them feel that they must have said something very stupid — until, five minutes later, a male makes the same comment and

suddenly the professor's reaction is, "what a brilliant remark," and the point becomes the focus of discussion for the next ten minutes. I knew exactly what they were talking about because this had happened to me as a student; it still happens to me when I try to speak at a faculty meeting or workshop.

But there is another aspect of the women students' silence which raises questions about the nature of law and demonstrates how fundamental is the feminist challenge to law and legal education. This aspect is also raised by comments women students make to me. They feel resistant to, and often profoundly angered by or alienated from, what they are learning, because gender is always being ignored. Women notice when the gender implications of a legal issue or doctrine are being ignored. Sometimes this noticing, especially with confused, frightened or intimidated first year law students, takes the form of a woman feeling, based on her life experience, that there is a gender issue here. She wonders if she should mention it, thinking perhaps she is wrong because the professor who is supposed to know so much has not mentioned it. Occasionally, one of these women students finally becomes bold enough or angry enough to raise her hand, and her comment is met with the professor saying something like, "well, could you rephrase that like a lawyer please", or "next", or "I fail to see the relevance of that." This sort of professorial reaction — dismissing the student's point of view — reinforces men students' pervasive blindness to gender, or reinforces their sense that gender issues are trivial and unimportant. For the women, it reinforces the vague doubts they had that their life experiences or their perspectives are not integral to the law after all.

Let me give some concrete examples of this kind of reaction by women to gender issues being ignored, and the silencing and alienation that can result. I have had many women students come to me (so many that I can no longer count the number on both hands) and say something like, "I turned off from law school when *Roe v Wade*,¹ about the constitutionality of state regulation of abortion, was being discussed in class as if it were solely a matter of the appropriate boundaries between the authority of courts and legislatures." These frustrated women students would be sitting there, often for two or three days, while the case was being discussed in this abstract doctrinal fashion. It seemed to them that the professor did not even dare mention abortion, much less that

abortion is something that is important to women's status in society because they are subject to societal control over their bodies and reproduction.

The constitutional law professor would discuss this loaded issue of abortion or the criminal law professor would discuss rape or battering as if it had never occurred to him that in this group of students there were some who may have experienced abortion, or rape; or that some of them, even if they have not yet experienced it, know that they may have to face it at some point in their life. For no woman can abortion be simply a matter of the appropriate division of authority between courts and legislatures. When women students sit in such a law class and hear it treated as if that is the only issue, it produces one of two reactions. For some it produces a reaction bordering on rage and fury, either at the professor or the law, that the law — or the professor — could completely ignore women and act as if issues of governmental structure were more important. For others it creates a sense of frustration and puzzlement — a sense that maybe there is something wrong with them, because they think this issue is there but the professor acts as if it does not arise. Often, either of these two reactions causes women to turn from the law. And, the failure to discuss the gender implications means the men students never have to grapple with the fact that abortion is a gender issue, and not just a matter of the appropriate division of authority between courts and legislatures.

There are many other examples of women noticing gender issues and the professor not, some in much less loaded contexts. For example, some students told me about their frustration with the decision of the United States Supreme Court in *Gilmore v Utah*,² in which the Court held that the mother of convicted murderer Gary Gilmore had no standing to intervene in the sentencing hearing, because she was an uninterested, unaffected outsider. Another student once came to me and said, "I was in contracts class today and we were reading a case from 1860 where the woman had done something but the husband was the party suing. I felt like it was a stupid question to ask, but since the woman was really the party involved, why was the husband suing? I was afraid that if I asked this question the professor would have told me it was a stupid question." So she came to me to ask the question. I gave her an explanation of the old laws that meant that, once women were married, they became in the eyes of the law non-persons and were

disabled from suing on their own behalf. A light bulb went on for the student. She said, “that changes the old case; that is really central to the case. How could the professor not have mentioned that?” I gave her a pep talk and encouraged her to raise her hand in class the next day to share this enlightenment with the rest of the class. And, of course, much as she had feared, the professor’s comment was, “I utterly fail to see the relevance of that. Contract law is contract law. The gender of the parties, who can make the contract and who can sue on the contract are completely irrelevant to the formulation of the doctrinal rules of contract.” Not only was this erroneous historically, but, as I subsequently learned, it was a long time before that student ever felt comfortable speaking in class again. From that day on she decided that she disliked and distrusted the law of contract. The class lost the important perspective of her voice, and she lost some respect for the law and had to spend a lot of the rest of her first year in law school struggling with the law instead of learning.

These incidents suggest that sometimes the kinds of comments that women might want to offer, because they think the comments should be profoundly relevant to the law, may be silenced in legal education. Professors think they are legally irrelevant and additionally they tread into the scary, forbidden realm of emotion. Consider the woman who has had an abortion who becomes angry when abortion is discussed in class as about something other than women’s lives, and who finally becomes angry enough to say, “wait a minute!” Often what happens is that once women decide to speak, the comments do sound like emotional outbursts. But one of the central insights of feminist theory is to challenge directly the reason/emotion dichotomy by asking why it is that whatever ignores gender is considered “neutral reason”, and why it is that insisting gender not be ignored, is so often labelled as “emotion” — and thus irrelevant to law? I think my answer to that question is quite obvious — our understandings of the categories “reason” and “emotion”, and “legal relevance” are affected by the fact that for centuries men have shaped and defined what counts as theory, as reason and as law.

I will now elaborate what I try to do when I teach to overcome the pervasive treatment of gender as irrelevant and to respond to women’s complaints of silencing and alienation. I think what distinguishes my teaching, perhaps first and foremost, from that of

many of my colleagues is that gender and power are never ignored regardless of the subject. I discuss how a legal doctrine may be based more on the experiences of one gender group rather than the other — the reasonable man standard in torts, for example. I also discuss how a legal doctrine may have different impacts on, and consequences for, people of different genders — such as the linkage between tort damages and lost wages. I wish to add a caveat to comments earlier this morning that we teachers make our perspectives known from the outset in the classroom, and pick up on Catharine's reference to the risks for women in doing this. I must say that the one time I decided I would be open with the students and announce publicly at the beginning of semester that I was a feminist and would develop a feminist perspective on torts, was the one time I had a rather rebellious group of male students in the class who kept groaning that they did not see what women's lives had to do with them at all. Fortunately, the women students were emboldened enough by me to answer those objections for me so that I never had to say anything. I have found that if you wish to discuss gender issues in mainstream doctrinal courses, it is better simply to do so, treating them as they are — an important part of real tort law.

Neither do I ignore the experience of peoples' lives. I treat experience as fundamentally relevant to the law and often use that experience to test, critique and challenge the law. Consider labour law, for example. My class in employment law begins by discussing our experiences with employment. Chances are, if there are women in the class, and there always are, we quickly move, from their experiences at work, into discussing gender dynamics of the work place, including gendered notions of work and the value of work. That raises important questions about what labour law regulates and what aspects of human work it leaves invisible. Once students' experiences of work are raised, a wonderful basis is offered against which to test and critique the legal doctrine which sees work primarily as a contractual exchange. The use of their own experiences engages the students in the law in a way that offering various theories and doctrinal approaches does not. But it also signals to the students, black, white, Hispanic and female, that the experience of each of them and every one else is profoundly relevant. It also provides a wonderful occasion for asking why some peoples' experiences are much more reflected in the law than

others. The students' experiences are used as the lens for examining the ways in which certain aspects of human experience, often the male ones — such as work being separate from family demands — are much more embraced by and reflected in the law. In tort law, for example, that enables me to raise questions such as, who is this fictional reasonable person? What is his gender? Why are things that seem so ordinary and commonplace to women so often branded as the reactions of unreasonable people in tort law? I use women's experiences — the labelling of what they do from nine to five being labelled work, and what they do from five p.m. to nine o'clock the next morning not work — both as a way of critiquing the measure of damages in tort law, which privileges work activity over other kinds of fundamental human activity, and also as a way of critiquing the law of employment as being fundamentally gendered in its definition of work.

So, I teach law as Catharine MacKinnon has mentioned, as a fundamentally gendered subject, as something that has been defined by and shaped by men. I examine the consequences of this for the people — white, black, Hispanic and female — who historically in the United States were excluded from participating in shaping it. This latter remark should suggest to you that feminism is not just about women. I think it is about using the experiences of women to help us see the various forms of oppression. It is useful for seeing new possibilities for, or needs for, changing the law to make it less oppressive and more a positive tool for overcoming the many forms of oppression and disempowerment that exist.

* Law School, State University of New York at Buffalo. © 1989. (1989) 1 *Legal Education Review* 101.

1 (1973) 410 US 113.

2 (1976) 429 US 1012.