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Looking Back, Looking Forward: Feminist Legal Scholarship in SLS

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Looking Back, Looking Forward: Feminist Legal Scholarship in *SLS*

Abstract:

This article offers a review of shifts in feminist legal theory since the early 1990s. We first use our respective histories and fields of expertise to provide a brief overview and highlight some key themes within feminist legal theory. We then examine *Social & Legal Studies*, asking whether it has met its key goal of integrating feminist analyses at every level. Our review suggests that *SLS* has offered many important contributions to feminist legal scholarship but has not fulfilled its lofty goal of integrating feminist analyses at every level of scholarship. It features feminist work quite consistently and some degree of mainstreaming is evident, as is the international reach of *SLS*. Too many articles fail, however, to incorporate or even mention feminist approaches. We end with thoughts about, and hopes for, the future of legal feminism, examining efforts to revitalize the field and suggesting possible directions for the future.

Keywords: Feminist Legal Studies, Law and Gender, Feminist Legal Theory, the State, Materialist Feminism

Social & Legal Studies has four main aims [including] ... the integration of feminist analyses at every level of scholarship.

With these words the editors of *Social & Legal Studies* (*SLS*) signaled a major commitment to feminist scholarship in their first Editorial (1992: 5). There was no shortage of feminist scholars to provide content when the journal was born in 1992. The number of women in legal academia and related fields began to increase during the 1980s and, especially, the 1990s. Feminist literature grew exponentially, even if it took some time for women to achieve numeric equality. Not all women law professors held feminist worldviews and then, as now, some who did published in fields often not assumed to be directly relevant to feminist legal theory (e.g. Sarra 2013). Nevertheless, the entry of feminists into academia had a significant impact on legal scholarship (Bartlett 2012, 383-386; Davies 2007: 651)¹ and some male legal scholars also published work that was influenced by feminist perspectives.

Feminist legal theory has as its focus women and law, but in recent decades, much feminist scholarship has problematized both concepts (Painter 2015). Feminist scholars working in law schools, as well as in sociology, philosophy, criminology and other disciplines have drawn on a variety of theoretical sources and developed the field in ways that have influenced law reform and litigation, while also critiquing some of those reform efforts, narratives of progress, and strategies for achieving equality and liberation. Many feminist legal scholars continue to draw on studies outside law (Davies 2007: 651), and some have home disciplines other than law, as is evident in *SLS* (e.g. Ahmed 1993, Smart 1992).

This article offers a review of shifts in feminist legal theory since the early 1990s. Because we represent different generations of feminist legal scholars, we first use our respective

¹ By 1993, 28% of Canadian law professors were women (Canadian Bar Association 1993, 49) in contrast to only 12% in 1971-72 (Bich 1992, 58). In many law faculties, women now constitute 50% of academic staff.

histories and fields of expertise to provide a brief overview and highlight some key themes within feminist legal theory. We then examine *SLS* itself, asking whether it has met its key goal of integrating feminist analyses at every level. We end with thoughts about, and hopes for, the future of legal feminism.

Situating ourselves and the field

Our histories in legal academia began during different periods in the trajectory of feminist legal theory. Susan was a junior academic in the mid 1980s when feminist law professors were a minority, but interest in applying feminist theory to law accelerated. Even then, scepticism arose about the extent to which law or legal rights alone can provide remedies for inequality. Reflecting a heightened appreciation of the complex factors at work in sustaining inequality, many feminist interventions moved away from formal legal equality towards approaches that take structural impediments seriously. This work accepted the challenges of feminists who pointed to the limits of formal equality in achieving meaningful change (e.g. Lawrence 2006) due to its elision of substantive inequalities. In countries such as Canada with constitutional equality guarantees, considerable time has been devoted to considering which theories of equality might best provide remedies for systemic inequalities and which fields of law might most usefully be challenged to promote equality. This is not to say that scholarship focused on equality was the only approach, even in the earlier days.

Indeed categorizing the different approaches within the proliferating feminist literature on law was in vogue in the 1980s. In her early bibliographical work with Elizabeth Sheehy, Susan used the then dominant theoretical categories such as liberal, radical, and socialist feminism (Sheehy and Boyd 1989: 1-2; Boyd and Sheehy 1986). Only a decade later, in a second annotated bibliography, these categories no longer resonated (Bouchard, Boyd and Sheehy 1999). Entries related to Black, lesbian, aboriginal, and disabled women had multiplied, reflecting, *inter alia*, the increased numbers of such voices in law and academia as well as important litigation on questions such as equality and sexual orientation; equality and disability. The rise of postmodernism and the deconstruction of universalizing concepts such as 'patriarchy' also played a role in diverting feminist attention away from a focus on any unitary notion of 'woman' as a subject. Concepts of power were rendered more complicated, challenging the radical feminist association of oppression with male-identified culture, law, and state (Davies 657-658). As Belcher (2000: 539) puts it, the feminist debate shifted 'away from the emphasis on how women differ from men and toward acknowledgement of differences among women'.

Anticipating the rise of theories of intersectionality, Sheehy and Boyd highlighted the 'dialectical development of feminist perspectives on law which helps us to understand and combat the complex social construction of women's oppression and must involve constant attention to the interplay of gender, race, class and other factors shaping power relations and domination' (1989: 3).² By the time of their 1999 bibliography, the title of 'Intersecting Oppressions' was used as an overarching framework for several categories of identity and oppression (Bouchard, Boyd and Sheehy 1999).³

² Works from a class perspective, inspired by Marxist or socialist feminism, number fewer than those in the other categories, despite frequent calls to attend to race, class and gender.

³ The actual categories were: Anti-Semitism, Class/Poverty, Disability, Elderly Women, Lesbianism, and Racism. Works in these sections dealt with the intersection of gender and at least one other factor that contributes to oppression.

The trajectory of Susan's family law work illustrates another trend: the waning influence of 'materialist' approaches to law. Whereas her earlier work in the family law field drew heavily on socialist feminist critiques of how marriage, the nuclear family form, familial ideology, and the sexual division of labour related to women's oppression within capitalism, her later work rarely referred explicitly to this 'second wave' literature (for a critique and call for a more materialist feminist approach, see Boyd 1999). Nevertheless, critical analysis of the consequences of (re)privatizing economic and caregiving responsibilities within the family under neo-liberalism, which creates particularly onerous responsibilities for women, features in her later work (e.g. Boyd 2010, 2013). As we discuss later, interest in materialist feminist approaches to law has resurfaced.

Debra entered law school at a time when many of the above-mentioned shifts, notably away from 'grand theories' and towards intersectional approaches to oppression, were occurring. As such, her career mirrors the time frame that this article addresses and, largely, the period during which *SLS* has existed. Her research engages with criminal law and punishment practices, particularly incarceration and experiences of women as accused persons and prisoners. Beginning in her student days, Debra has been involved in feminist legal advocacy and prisoner rights organizations, and that community engagement informs her scholarly work. In the years since Debra began her academic career in 2001, the global population of women in prison has grown rapidly, increasing at a substantially higher rate than the men's prison population.⁴

Feminist and other critical criminological approaches influenced law and society scholarship in the 1990s and 2000s, as feminists brought intersectional and Foucauldian analyses of power to bear on the criminalization of women and girls (Hannah-Moffatt 2001, Naffine 1997) and connected aspects of women's criminalization to features of the neo-liberal state (Balfour & Comack 2014, Snider 2003). Also during this time, feminists have increasingly attended to the role of state violence in criminalizing racialized and poor populations, including Indigenous and racialized women, illustrating the difficulty of understanding these fields without employing an approach that is attentive to the intersections of gender, race, Indigeneity, and class. Since at least the 1990s, feminist scholars have turned a critical eye on the extent to which feminist-inspired law reforms to address violence against women have been absorbed or co-opted by punitive agendas and contributed to increasingly criminalized societies (Snider 1994, Bumiller 2008). Some feminists, including Debra, have developed anti-carceral feminist analyses following these insights (Davis 2003, Monture 2006, Baldry, Carlton & Cuneen 2015, Parkes 2016). As described by Carlton, anti-carceral feminism is a unique voice within the prison abolitionist movement, one "grounded in intersectional feminist critiques, strategies, and actions driven to struggle against and undermine structures of oppression that give rise to violence and injustice" (2016: 3), engaging strategically with reform efforts in pursuit of decarceration and structural change.

In the next section, we use our fields of expertise (especially criminal law, family law, and sexuality and law) to illustrate some key themes in feminist legal theory. There are many substantive themes in the literature such as sexual and gender-based violence, work and income inequality, and inequality in the legal profession, to name just a few. Our focus is on

⁴ It is estimated that the overall world prison population increased by around 20% from 2000-2015. However, at the same time there was a 50% increase in the number of imprisoned women and girls (Walmsley 2015).

the themes of strategic engagement; women versus gender; and choice and constraint, which we view as cutting across subject areas and significant in understanding the trajectory of feminist legal scholarship in recent decades.

Key Themes in Feminist Legal Theory

Strategic Engagement

Feminist legal theory has always been informed by, and grounded in, the need to engage strategically with law to improve social conditions for women. Praxis remains a strong element of feminist legal theory, reflecting strategic feminist involvement and scholarly engagement with law reform and litigation. What has shifted are the dominant approaches that influence the field.

Since the 1980s, an appreciation of the complexity of inequality and the intersecting nature of oppressions has informed the trend away from universalizing theories focused on gender and law or 'the state'. It is our impression that less publication space has been devoted to works exploring the more abstract questions about feminist legal theory *per se* than was true in the 1980s and, to some extent, in the 1990s, as grand theories about the sources of, and remedies for, women's oppression were challenged and dismantled. Nevertheless, the insights of feminist legal theory remain highly relevant to such endeavours, even if less space may be devoted to overarching questions such as the material sources of inequality.

Criminal law, particularly in the area of sexual and other gender-based violence, has been a significant site of feminist legal scholarship, both informing and critiquing reform efforts. Reforming the law of sexual assault in some jurisdictions, including Canada, involved eliminating immunity for marital rape, a terminological change from rape to the gender neutral sexual assault, the adoption of an affirmative standard of consent, and a rape shield provision limiting access to a complainant's sexual history. Feminists also advocated for changes in police and prosecutorial practices around intimate partner violence, as well as new sentencing provisions meant to take domestic violence seriously. They then watched as some of these reforms, such as the rape-shield law and restrictions on access to complainants' private records (Gotell 2001), were rolled back by courts. Many problems that women have long confronted in fields such as sexual assault law are ongoing (Larcombe 2016; Craig 2016) and are exacerbated for particular groups such as Indigenous women (Cossins 2003), asylum seekers (Baillot, Cowan & Munro 2012), and women with disabilities (Benedet & Grant 2007). Other reforms had unintended consequences such as the increased criminalization of women, especially racialized and Indigenous women, who were charged along with, or instead of, their violent male partners (Martin 1998, Majury 2002). How wartime rape is dealt with in international criminal law also has taken up considerable feminist attention (e.g. Buss 2009). Feminist scholars – particularly Black and other racialized scholars – also began to question the impact of criminalization and mass incarceration of racialized men on communities (Harris 2011).

The radical or dominance feminism of the 1980s and 1990s provided the primary conceptual framework informing the earlier reform efforts, with its insights about power, male privilege, and the way rape law has been written from a male point of view (MacKinnon 1983; McIntyre et al 2000). This analysis had thoroughly discredited the myth of law's neutrality and provided a language for law reform to address violence against women through criminal law. However, by the 1990s, the turn to postmodern theory, notably the work of Michel Foucault

and Judith Butler, provided an alternative to dominance feminism's totalizing view of power and oppression, and complicated understandings of power, victimization, agency, and identity in producing inequality in and through law. Some feminist legal scholars also asked questions about the pervasive conceptualization of sex as a site of danger to women and called, for example, for more theorizing of 'yes' to sex (Franke 2001; Kapur 1999).

Due to these differing approaches, criminal law has been a site of significant disagreements among feminists, and the criminal prohibition of prostitution/sex work is a prime example of these tensions at play. Feminist scholarship on this issue reveals familiar differences between the radical feminist focus on the oppression of women and the sex-positive feminist attention to the harms of criminalization in these fields, informed by post-structuralism and gender theory (Munro & Della Giusta 2008; Bouclin 2012). Much of the recent feminist work that addresses these issues, including that found in *SLS*, adheres to a decriminalization approach that now dominates. Nevertheless, strong feminist voices still argue that prostitution is a practice of sex inequality that is inherently degrading to women and girls (Benedet 2008). Some of this feminist scholarship brings diverse methodological and theoretical tools, such as ethnography and political economy, to bear in complicating the narratives of both abolitionists and sex work decriminalization advocates about the relationships between criminal law and sex markets (Kotiswaran 2008).

Feminist legal scholars have also highlighted the risks of engaging with the state's punishment apparatus in seeking to end violence against women, particularly in a neo-liberal political environment that can mediate any positive impact and where punishment is not evenly distributed across racial and class lines. While surveillance and incarceration grow, the state retreats from its redistributive, socio-economic responsibilities to provide real safety and empowerment (Munro 2013, 242). Indigenous feminists have called attention to the role of state violence and colonialism in facilitating the current hyper-criminalization and incarceration of Indigenous women and caution against 'gender responsive' prison reform efforts (Monture 2006). The need to improve laws related to economic and social supports, such as social assistance, is highlighted by many who are concerned about criminalization (Cruz 2013; Balfour & Comack 2014).

Women or Gender?

Another notable trend is to focus less on the category of 'women' and more on gender oppression, and its intersection with other axes of oppression such as race, class, and disability. This trend stems from a desire to look at inequality more broadly and from the influence of critical theorizing including critical race and intersectionality, postmodernism, and queer theory. In describing law as gendered, second wave feminists meant that it was male-oriented (Cowan 2013, 106) or organized around traits and experiences associated with masculinity, thereby normalizing the power and dominance of men over women in a range of ways. With postmodern and queer theory came a different understanding of gender and sex in much feminist theorizing. Significantly, Judith Butler understood gender as performative, generative, 'always doing', and sex as therefore produced by gender (Butler 1990). Queer theory and attention to the experiences of transgender and intersex people fundamentally challenged the binary categories of male/female and man/woman, positing instead a multiplicity of genders, sexes, and sexualities.

Sparked by these developments in feminist theory and scholarship, many university departments formerly called Women's Studies became Women & Gender Studies or simply

Gender Studies. So, too, law school courses called Women and the Law often gave way to courses on Gender and Law or Gender, Sexuality and Law. These courses generally remain feminist in orientation and include significant attention to discrimination, inequality and violence experienced by diverse groups of women, while also broadening their focus to topics such as gender identity, masculinities, and sexuality in law.

Feminist legal scholars similarly widened the scope of their inquiries. In Canada, a human rights complaint concerning a transwoman who tried to volunteer as a peer rape counsellor for a rape relief shelter generated numerous articles considering the implications for 'women only space' and the very definition of 'woman' (e.g. Gotell 2011; Mathen 2004). Such shifts away from focusing on women's specificity raise important and difficult questions about the extent to which the category 'woman' has meaning and the extent to which law should rely on definitions of woman and man/male and female. In addition, the need to include in feminist legal theorizing the experience of intersex, trans and other queer voices and insights from queer theory has involved important and necessary 'uncomfortable conversations' (Fineman, London & Romero 2009). Many feminist legal scholars would agree with Ann Scales (2009) that the supposed 'debilitating contradiction' between feminism and queer theory is more apparent than real.

Nonetheless, some suggest that as analysis has moved into fields further away from gender, including sexual orientation, the distinctiveness of feminist legal theory has been diminished (Bartlett 2012: 427) or is possibly not relevant (Halley 2008). Catharine MacKinnon cautions that feminists are at risk of losing 'meaningful delivery on civil and human rights for women' (2009-2010: 177). Others suggest that the strategy of moving away from legal language focused on women is important for feminism. One familiar argument is that a focus on women, or women's difference from men, risks defining women in a protectionist manner and over-emphasizing their vulnerability. Another is that important possibilities are opened by using the language of 'gender' and that feminism will be strengthened, not weakened as a result. For example, Otto urges that 'embracing sex/gender as a fully social category does not mean forsaking feminism's long-standing commitment to addressing women's disadvantage' (Otto 2013, 198).

Some shifts away from woman specific language in legislation have arisen from practical or semantic difficulties. In fields such as family law that rest on legal recognition of 'spouses' to distribute or remove benefits, it is difficult, for example, to recognize specifically female disadvantage whilst also recognizing same sex relationships. As a result, many laws on spousal rights and responsibilities have adopted gender neutral definitions of 'spouse', not due to feminist concerns about reinforcing women's dependency on men, but rather to recognize non-heterosexual relationships. Only rarely do feminist legal scholars suggest that a way to exit the eternal debate about whether or not to acknowledge gender based differences in law is to argue for enhanced collective responsibility for economic wellbeing and caregiving rather than privatized remedies that rely on spousal relationships. Although these voices certainly exist and may be on the rise (e.g. Eichner 2016), it is difficult, especially in litigation scenarios, to make such arguments (Boyd 1999: 379-382).

Choice and Constraint

Feminist legal scholars have subjected key liberal concepts such as choice and autonomy to critical analysis, suggesting that few choices are unconstrained by the material and ideological conditions surrounding them. For example, marriage, a quintessential contract that influences

the lives of so many women, has rarely been a free choice for women, even putting aside the fraught question of 'forced marriage' (Bunting, Lawrence & Roberts 2016). The choice to marry 'has been constrained by class, religion, race, nationality, family and social pressure, ideas of morality and respectability, and, above all, financial considerations' (Auchmuty 2013: 298).

Much recent feminist legal scholarship argues for nuanced, contextual, and gendered understandings of choice. For example, in considering women in polygamy, sex work, and surrogacy, Campbell suggests that 'women exercise resilience, resistance and agency, and make reasoned and deliberate choices, even when they live and work within oppressive patriarchal contexts' while maintaining that 'the mere fact of recognizing women's ability to make choices in the face of imposing constraints must not serve to justify the state's abdication of responsibility for addressing gender-based discrimination' (Campbell 2013, 2). Empirical feminist inquiry and studies such as Campbell's that allow women to speak to their lived experiences (for example, in surrogacy, sex work, drug use, incarceration, etc.) can complicate feminist analyses of victimhood and agency (Campbell 2013; Busby & Vun 2010; Gregory 2010; Carlton & Segrave 2010).

Feminists have also complicated liberal individualist approaches by emphasizing that 'autonomy requires constructive relationship through a person's life' (Nedelsky 2011: 39), suggesting that 'relational autonomy' is more apt. For example, the care relationship between mothers and children precisely enables children to aspire towards autonomy, whilst simultaneously constraining that of their mothers. Moreover, care relationships remain deeply gendered. As Young (1990) has suggested, women's 'pregnant embodiment' – that is, their more continuous physical experience in relation to children due to pregnancy, breastfeeding, and care responsibility – prevents them from being able to opt in and out of involvement with children in the same way that men can choose to do (but see Karaian 2013). Women's autonomy is thus arguably an even more unattainable goal than men's, subject perhaps to the possibility of transgressive caregiving (Kessler 2005). Indeed some feminists suggest that autonomy is a myth (Fineman 2005).

That choices remain constrained even as women exercise agency is illustrated by a study of the extent to which motherhood can be meaningfully autonomous even in an era that offers more reproductive choice and fewer moral constraints concerning single motherhood (Boyd, Chunn, Kelly & Wiegiers 2015). Women certainly exercise choices to be mothers autonomous of genetic fathers or partners, but nevertheless are constrained by many material and ideological factors, including the law's apparent desire to 'find fathers' for children. Interviews revealed that 'single mothers by choice' typically plan carefully prior to raising a child and rely on support networks of various forms, thus refuting any notion that their 'autonomous' mothering is conducted in splendid isolation. The study also revealed class aspects of the 'choice' to be a single mother. A woman who responsibly marshals the resources to be self-sufficient as a mother will be viewed more positively than one who relies on social assistance. The first woman is also more likely to be able to negotiate the laws that surround legal parentage. Finally, an excessive focus on choice can ultimately divert attention from the goals of feminism, including the transformation of the conditions under which parenting takes place.

Social & Legal Studies

Smart's influential article 'The Woman of Legal Discourse' published in the very first issue of *SLS* (1992) explained how legal discourse creates a particular idea of 'Woman' and argued that law is a site of struggle. This article reflected an effort to rejig feminist legal theory, taking account of postmodernist approaches that rejected 'second wave' socialist and radical feminist theories (Conaghan 2013). The inaugural issue also included an article by Dutch feminist political theorist Selma Sevenhuijsen (1992), examining law's discursive effects in relation to the reconfiguring of the legal treatment of motherhood and fatherhood and the importance of looking at the specific historical context of feminist claims. This focus on the legal regulation of motherhood and reproduction was followed up in later issues (e.g. Belcher 2000, Diduck 1993, Fegan 1996, 2002; Sheldon 1996, Boyd 1996, Hacker 2005, Chunn & Gavigan 2004, Lttichau 2004).

Several important feminist legal theorists published in *SLS* in the 1990s, asking 'big' questions about the field. A few offered a nascent intersectionality analysis. Nicola Lacey (1992) offered an important critique of the limits of liberalism, theories of justice, and the deeply entrenched gendered (and racialized and classed) nature of the welfare state and the public/private divide. Very much a product of the times, the work of Scandinavian feminists on 'women's law', reflecting feminist standpoint epistemology, appeared (Petersen 1992). 'Women's law' highlighted the innovative challenges of feminist legal analyses that refused 'to start out with preconceived legal concepts from above' (Widerberg, and Hellum, 1993: 372) and instead began with women's life experiences to better understand their actual legal situation (see also Graycar and Morgan 1990). Petersen's inquiry (1992) led her to focus on informal as well as formal law, an approach she suggested was consistent with postmodernist legal theory. Australian Margaret Davies ambitiously grappled with the problem of how women's knowledge is made the object of property, and then 'patronized, abstracted, defended, and subjected to rigid limitations' (1994: 366), later extending her property analysis to queer theory and praxis (1999).

Early *SLS* issues also offered important debates on 'rights discourse' and the merits of engaging in litigation rooted in equality or human rights (Fudge and Glasbeek 1992; Thornton 1993), acknowledging feminist work in this field and flagging the role of new social movements such as lesbian and gay struggles for rights (Herman 1993). Gotell (1995) used a case study of the early years of Canada's Women's Legal Education and Action Fund to show how translating feminist claims into rights discourse can reproduce an 'essential woman' and erase the difference that race and class make in women's lives. Lacey (1996) highlighted feminist critiques of both rights and equality discourses as well as the risks of reformism, but considered the potential for reimagining these concepts. In so doing, she echoed a point made in the first *SLS* editorial (1992), the importance of integrating theoretical insights (e.g. from critical legal theory and the sociology of law) with socio-legal research. Lacey noted the Marxist insight that 'the deep reconstruction of the legal has to be premised on the reconstruction of economic, social, political relations: on massive changes in the configuration of social power at every level' (1996: 151). Asking whether law is irretrievably male, and offering critiques of that notion, an early work by Ahmed asked whether rights necessarily occupy a masculine, liberal discourse or whether they can be mobilized and embodied differently to become 'a site and signifier within a radical feminist politics' (1993: 57). Ahmed proposed a deconstructive *and* pragmatic feminist approach, suggesting that a feminist politics of law requires a necessarily pragmatic ability 'to differentiate between specific citational practices according to the effects they may elicit on subject formations' (63).

Over time, the focus on 'big' questions about feminist legal theory seemed to fade in favour of strategic feminist engagement with particular legal issues. *SLS* also published important interventions illustrating the innovation and importance of feminist methods (e.g. Adjin-Tettey et al 2008). Angela Harris (1999) emphasized the need for intellectual communities such as critical race theory to avoid the problems of identity politics and attend to 'private' or process issues such as caretaking that are traditionally viewed as 'women's work'. A serious consideration of intersectionality of race, gender and sexuality as well as strength in diversity and coalition building is required. Increasingly occupying space were topics that traditionally had received less attention, such as religion, gender and culture (Bakht 2015; Vakulenko 2007), trafficking, migration, and citizenship (Askola 2012; Wilton 2009), transitional justice (e.g. McEvoy and McConnachie 2013; Sankey 2015), sex work (e.g. Fizgerrald and McGarry 2016), and transgender identity and experience (Cowan 2009; Sharpe 1997, 1999, 2007). These and other topics require attention to intersectionality of oppressions.

Questions of longstanding feminist interest also maintained a clear presence in *SLS*, including sexual violence, the regulation of marriage and relationships (Thomson 2009), motherhood (e.g. Gregory 2010), and women in the legal profession (e.g. Rackley 2006). Even authors who do not examine issues such as marriage through an explicitly feminist lens often reference feminist scholarship and offer complementary critical analyses (e.g. McGowan 2016; Osterlund 2009). Despite Sheldon's concern in 1996 that abortion was slipping off feminist agendas (1996: 90), a recent special issue of *SLS* edited by Mullally and Murray (2016) featured feminist work on rights discourse in the abortion context and assessed how rights gained may play out unevenly or problematically in practice. The regulation of reproduction remained a focus of scholarship (eg Priaulx 2004; Toscano 2005). Moreover, building on feminist insights, contributions to scholarship on masculinity and male (hetero)sexuality have appeared, including Collier's exploration of how the legal institution of marriage constructs 'natural' sexual intercourse (1992). Collier later published a piece focused on legal conceptions of fatherhood and paternal masculinity (1995). Scholars such as Park (2012), Ballinger (2007) and Gadd (2002) turned attention to work that masculinities do in legitimizing sexual violence.

The use of law to regulate sexual conduct, particularly gendered sexual violence, remains a prominent area of inquiry for feminist and other socio-legal researchers. Analysis in *SLS* often draws on substantial empirical work (Larcombe 2016, Ellison & Munro 2014, Finch and Munro 2007, Gunby, Caroline & Beynon 2013), including mock jury research and the reports of medical examiners in rape cases, in addition to doctrinal and theoretical work. The writing on sexual violence includes attention to long-standing areas of feminist interest such as the standard of consent (Larcombe 2016, Arstein-Kerslake & Flynn 2016, Gunby, Caroline & Beynon 2013, Rees 2010), but also male rape (Graham 2006), asylum decisions (Baillot, Cowan & Munro 2012), and politically motivated sexual assault in Arab Spring protest spaces (Tadros 2016).

Numerous examples of feminist scholarship in *SLS* consider questions of legal strategy and effective (or not) reform efforts in areas such as domestic violence (Lewis et al 2001), sex work and trafficking (Munro 2005), labour rights for sex workers (Cruz 2013), intersexuality and the right to bodily integrity (Ammaturo 2016), technology-facilitated sexual violence (Henry & Powell 2016), sexual assault (Arstein-Kerslake & Flynn 2016), and forced marriage (Park 2006).

Reflecting the influence of gender and queer theory, and the questions we raised earlier about 'women or gender', the pages of *SLS* include several articles by feminist scholars on the legal regulation of gender identity and trans experience. Lambie (2009) examines the legal invisibility of lesbian and trans bodies in the Toronto Women's Bathhouse Raids, Karaian (2013) problematizes 'repronormativity' by considering how the law conceives (or not) of pregnant trans men, and Grabham (2010) considers how notions of time and permanence figure in the legal recognition and regulation of people who are transitioning. A trilogy of papers (Sharpe 1997, Sharpe 1999, Sharpe 2009) interrogate judicial attitudes, regulatory regimes, and legislative changes on gender recognition and trans legal subjects.

Interestingly, extensive feminist treatments of choice, constraint, and autonomy do not appear in *SLS*. Discussion arises most often in research on forced marriage (Shariff 2012), the limits of women's ability to choose in relation to abortion (Fegan 2002; Jackson 2000), and trafficking or prostitution/sex work (Bradley & Szablewska 2016; Doezeema 2005; Priaux 2004). As well, Gregory (2010) problematizes choice under neo-liberalism in a nuanced discussion of mothers who engage in prenatal drug-use, especially choice exercised by women marginalized by race and poverty, to limit their reproductive capacity, including by medical sterilization. For instance, a drug-user's choice may be 'constrained by the very possibility that their (unborn) child(ren) may be taken away from them' should they fail to choose to limit their reproduction (Gregory 2010: 58). Finally, in discussing medicalization and gender recognition legislation, Cowan (2009: 249) points to problematic consequences that may arise due to financial constraints on 'choice' to pay for surgery.

Our review suggests that *SLS* has offered many important contributions to feminist legal scholarship but has not fulfilled its lofty goal of integrating feminist analyses at every level of scholarship. It features feminist work quite consistently and some male authors incorporate feminist insights or concepts into their legal research (e.g. Leckey 2011; Keren-Paz 2005), suggesting some degree of mainstreaming. The international reach of *SLS* is also notable, moving beyond Europe and North America to offer articles on feminist and related struggles in Africa and India, among other formerly colonized regions (e.g. Kapur 1999; Krishnadis 2007; O'Rourke 1995; Stewart 1995; Rai 1995). Too many articles fail, however, to incorporate or even mention feminist approaches. As well, over time, our impression is that the journal has featured fewer articles addressing feminist legal theory *per se*, as opposed to feminist analyses of particular legal issues and debates. We have not tested empirically whether this impression would apply across legal publishing venues and, indeed, the field is so vast that it would be difficult to do so. No doubt the question of the merits of a movement away from feminist legal theory and towards feminism as a strategic methodology would generate lively debate.

Into the Future

We now turn to efforts to revitalize feminist legal theory and possible directions for this field. Some feminists despair that due to the impact of neo-liberalism and other more socially conservative forces, resort to the state (and law as a key state tool) to assist in remedying gender-based inequalities is increasingly futile (e.g. Bumiller 2008). We suggest, however, that feminist legal theory remains vibrant and that its diversity points to new possibilities and avenues for critique and social change. As Painter points out, the 'problem-driven impetus of feminist legal theory contributes to its present-day heterogeneity' (Painter 2015, 918). Over the past three decades, feminist legal scholars have tackled more diverse legal fields, including those that do not at first glance involve gender, such as environmental law (e.g. Scott 2016).

We anticipate that feminist legal theory for the future will draw upon various theoretical tools that have been offered by feminists over time, including those in the materialist tradition, those from the deconstructionist or postmodernist tradition, and those from critical race and intersectionality theory. Harris (2016) recently offered a critical analysis of the rise of 'therapy culture' (which promisingly brings a feminist 'different voice' of empathy, caring and relationship into public spheres) and its tendency to ignore institutional and structural inequalities and power differentials. Rather than stop at critique, Harris calls for feminist engagement with therapy culture in order to render these problems visible. Her example shows that feminist work is important in fields that might not take female subjects as their focus (132). Harris's article draws on different strands of feminist theory, including difference feminism as well as materialist strands that point to the brutal impact of neo-liberalism, especially on poor and racialized communities, and the need to restructure the state itself in order to realize a transformative version of justice (Fineman 2010).

Materialist feminist approaches indeed appear to be making somewhat of a comeback in feminist legal theory, even in the United States where feminist legal scholars rarely took them seriously. Cynthia Grant Bowman recently presented a powerful argument for 'recovering socialism' for feminist legal theory in the 21st century (Bowman 2016), as has Maxine Eichner (2016). Bowman revisited socialist feminist literature and made a plea for recovering its insights for feminist legal theory. She suggested that an emphasis on the incompatibility of capitalism with full human flourishing, especially for women, as well as on the importance of economic forces (both production and reproduction) as essential explanatory tools would be fruitful and would usefully guide strategic choices for women looking to law as a remedy. She notes that socialist feminism generally acknowledged the interrelated nature of race, sex, and class, and so would be consistent with an analysis that took seriously the need for alliances between different groups (2016: 165-166).

Socialist feminist insights about the fundamental relationship between the sexual division of labour and the limits of law reforms emanating from liberal feminist law reforms to both public (e.g. employment law) and private spheres (e.g. family law) still resonate. Both second wave socialist and radical feminist theories were highly critical of marriage and the heterosexual nuclear family form for its oppressive enclosure of women (see Barker 2012: 129-144). Because capitalism relies upon patriarchal family arrangements, a symbiotic relationship exists between the two systems (Bowman 2016: 141); as such challenges to the sexual division of labour and to the privatization of the costs of social reproduction threaten the existing economic system. In recent decades, the privatization of responsibility for care and dependency within the family actually *increased*, coincident with the rise of neoliberalism and neoconservatism (Barker 2012: 131). Women thus experience difficult contradictions in their lives, with heavy demands made upon them in the public sphere of employment as well as in the private sphere of family. These contradictions point both to the limits of law reforms to date, which tinker with family law rules on compensation through property and support law and make promises of 'work-family balance', and to the radical potential of challenging taken-for-granted arrangements related to the sexual division of labour. Therein lies some hope for future action.

Critical reflection on attempts to engage with the state also features prominently in the feminist literature on violence against women and resort to the criminal law, discussed earlier. Feminist scholars, particularly racialized scholars, have called for new ways of responding to harm and victimization that understand incidents of personal violence in a larger context of structural violence (Harris 2011). This kind of *transformative justice* differs

from conventional criminal justice responses that are rooted in liberal notions of punishment and individual responsibility, as well as from alternative restorative justice models that feminists have critiqued as particularly inappropriate to address sexual and intimate partner violence (Daly & Stubbs 2006; Cameron 2006). Calls for transformative justice ‘place anti-subordination at the centre’ of responses to harm and reject an uncritical reliance on state institutions, as well as institutions of civil society, including the family and ‘the community’ (Harris 2011, 58), both of which have been the location of oppression for women.

Crucially, calls for state action must go beyond calls for law reform. As Basu (2015) concludes in her study on marriage in India, law forms only a small, if influential, piece of the major rearrangement needed to transform structural problems such as the gendered dependency of marriage, the labour market, and familial transmission of property and other resources. Feminist legal strategies could benefit from considering the limits on legal change in this context: what strategic engagement with law might be useful and what requires more systemic change?

Feminist voices calling for a return to materialist analysis stress strategies deriving from collective action and collective (rather than individual or private) responsibility for all in society in order to combat oppression. This approach might provide an avenue, potentially, to move beyond differences based on identity, keeping in mind the insights of postmodern and intersectional analysis. While some focus on differences (e.g. between women and men) might be needed to ground claims about oppression and to consider remedies in an unequal world, a focus on collective responsibility could empower all, across differences.

Conclusion

Our review leads us to differ from those who observe that few feminist legal scholars in academia now devote time to activism, advocacy or practice (Bartlett 2012, 429), thus diminishing the dialectical relationship between scholarship and practice. As we have seen, ‘feminist legal thought is often “applied” theory because it uses theory to critique a practical area of activity’ (Davies 2007: 651-652). For instance, feminist legal theory has been used to rewrite judicial decisions from a feminist perspective (Majury 2006, Hunter et al 2010, Enright et al 2017). Another example is that intersectionality theory has been employed to subject the operations of Royal Commissions to critical analysis for their failure to take appropriate account of racism and the experiences of racialized women (e.g. Marchetti 2008). Moreover, at least in the Canadian context, many (perhaps most) feminist legal scholars are engaged in some activist or legal advocacy work, although the pressures of academia may restrict these efforts.

One recent example is the attention to issues of sexual harassment and sexual assault on university campuses and the involvement of feminist legal scholars in institutional or activist responses to it. In Canada, many prominent feminist legal scholars have played leadership roles in leading institutional responses to sexual assault on campus, pushing for more fundamental, survivor-focused, change. With respect to sexual harassment, prominent feminist scholar Sara Ahmed resigned her position as Director of the Centre for Feminist Research at Goldsmiths University due to the university’s failure to meaningfully address instances of sexual harassment that she and others, including many students, had been raising for some time. Ahmed’s recent book, *Living a Feminist Life* (2017), and her blog feministkilljoys.com, provide important, current examples of feminist praxis. The figure of the

feminist killjoy reclaims the stereotype of humourless feminist, calling out sexism, racism, and other forms of injustice, while being committed to building a better, less oppressive world.

Conaghan (2013) links any gap between theory and activism to a divide between the discursive and the material, and argues for attention to the *relation* between the world and our knowledge of it (47). In so doing, she emphasizes 'the need to resist conceptualizations of feminist legal engagement as *either* material or discursive, modern or postmodern, reform-based or theoretical' as the outcomes of legal engagements will be shaped by both language and reality. We endorse this sentiment and urge that legal scholars of the future draw on useful tools from the extensive history of feminist thought and on the urgency felt by many activists for pragmatic engagement with fields that generate oppression or that offer a path forward.

Recalling the words and the work of Carol Smart, we suggest that feminist legal scholars and the journals that publish their work recall the importance of empirical, theoretical *and* historical scholarship, sometimes done separately and sometimes integrated (Smart 1999: 391). As Maureen Cain has suggested, once we have deconstructed the ways in which law too often disempowers its would-be users, we must turn to the possibilities for reconstruction, requiring 'a *relational* politics, of people coming together to develop their arguments, find channels for the dissemination of their ideas, decide how best to influence others' (Cain 2002: 383).

Franke has observed that 'we disagree badly as feminists' (2003, 641). We may overly police the boundaries of our field, particularly as feminist legal scholarship has grown and become a discipline in its own right; or we may take disagreements too personally. This is partly because the personal is indeed the political and we are deeply invested in the work we do. But, as Ahmed (2017) writes, feminism is a way of life, a movement, a world-building project. We will get our hands dirty and we will be bruised along the way. Brooks (2015) has observed that '[f]eminism is not something you put on or try out like a coat or something you look through like a window or a pair of glasses. It is a dream' (208). Feminist legal scholarship is strongest when we are able to talk across differences in analysis and strategy and, yes, to dream a better world. Working on this article together and coming, as we do, from different generations of feminist legal scholars, prompted us to talk through differences and to find a way to discuss them. Academic publishing can play a role in facilitating dialogues across differences as well as generations, and we look forward to many more years of *SLS* providing such a venue.

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