

To Question Everything: *The Inquiries of Feminist Jurisprudence**

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a political theorist who does not explore her own emotions is in danger of turning against herself

—SUSAN GRIFFIN, *The Way of All Ideology*¹

What questions are we asking, we women, myself included, who call our work feminist jurisprudence?² What questions are other women asking, the women whose work I would call feminist jurisprudence?³ As I wonder about this I realize I am using Catharine MacKinnon's suggested definition: "Feminist jurisprudence is an examination of the relationship between law and society from the point of view of all women."⁴ What are

* In the foreword to her collection of essays, Adrienne Rich says that one of feminism's tasks is "[t]o question everything. To remember what it has been forbidden even to mention." A. RICH, *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966-1978* 13 (1979).

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¹ Griffin, *The Way of All Ideology*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 273, 283 (N. Keohane, M. Rosaldo, B. Gelpi, eds. 1982).

² Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387, 429 (1984). See also MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983) [hereinafter cited as *Feminism*]; MacKinnon, Book Review, 34 *STAN. L. REV.* 703 (1982); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *HARV. WOMEN'S L.J.* 83 (1980); Scales, *Towards a Feminist Jurisprudence*, 56 *IND. L.J.* 375 (1980-81); H. Wishik, *A Feminist Critique of Divorce Mediation: Toward Feminist Jurisprudence* (March, 1984) (unpublished manuscript).

³ See, e.g., A. DWORKIN, *RIGHT-WING WOMEN* 71-105 (1983); A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); Olsen, *supra* note 2, at 429; Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 *U. PA. L. REV.* 1249 (1984); MacKinnon, *Not a Moral Issue*, 2 *YALE L. & POL'Y REV.* 321 (1984); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 *HARV. WOMEN'S L.J.* 57 (1984); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *YALE L.J.* 913 (1983); Joselson & Kaye, *Pro Se Divorce: A Strategy for Empowering Women*, 1 *LAW & INEQUALITY* 239 (1983); Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294 (D. Kairys ed. 1982); Note, *Towards a Redefinition of Sexual Equality*, 95 *HARV. L. REV.* 487 (1981).

⁴ C. MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National

our questions, and what do these questions indicate about our experiences, methods, and intentions?

INTRODUCTION

This Article began as a list of questions. Since then I have expanded my initial inquiries and have attempted to explore the developmental nature of feminist legal criticism and its methodological implications. Feminist jurisprudence is a form of feminist theory-making. Feminist theory-making is a form of feminist political activity. Both as theory-making and as political practice, feminist jurisprudence must be self-conscious about its visions and methods. This Article is an exploration of the questions we are asking, how these recent questions differ from the conventional questions asked about women and the law, and what methods we may need in the future to formulate our questions well.

Feminist jurisprudence has links to several strands of legal scholarship. It shares with "law and social sciences" scholarship⁵ frequent emphasis on the connections between law and society and the ways in which law is non-autonomous.⁶ Like law and social sciences scholarship, feminist jurisprudential scholarship also often refers to empirical data. In feminist jurisprudence the data are usually from women's experiences,

Conference on Women and Law, Washington, D.C. (April 9, 1983); see also MacKinnon, *Feminism*, *supra* note 2, at 637 n.5. MacKinnon has explained the attempt at common vision:

This feminism seeks to define and pursue women's interest as the fate of all women bound together. It seeks to extract the truth of women's commonalities out of the lie that all women are the same. . . . This politics is struggling for a practice of unity that does not depend upon sameness without dissolving into empty tolerance, including tolerance of all it exists to change whenever that appears embodied in one of us. A new community begins here. As critique, women's communality describes a fact of male supremacy, of sex "in itself": no woman escapes the meaning of being a woman within a gendered social system, and sex inequality is not only pervasive but may be universal. . . . For women to become a sex "for ourselves" moves community to the level of vision.

MacKinnon, *Feminism*, *supra* note 2, at 639-40 n.8.

To look at a life situation from the point of view of *all* women means defining a situation shared by *all* women and including in the experiential data about that situation the experiences of women as they differ by age, race, class, religion, and sexual preference. Feminist jurisprudence must understand and be a practice which includes the understanding that all these factors are variables by which a woman's life situation is specified. Thus teenage sexuality and parental control as a life situation, see *infra* text accompanying notes 40 and 41, will vary based on the sexual preference of the teenager and of her parents, the economic class of the family, and the religion and race of the family. These variances will include issues as basic as the likelihood that biological parents will even be in the teenager's life to present issues of parental control or whether control agents are more likely to be social welfare workers, foster parents, teachers, or others. Risk of pregnancy has different meanings depending upon the race, class, and sexual preference of the teenager because the occasions giving rise to the risk and the *consequences* of the pregnancy vary drastically. Feminist jurisprudence must include the intertwined and layered specificity of women's lives at every stage of inquiry in order to be accurate.

⁵ Friedman, *American Legal History: Past and Present*, 34 J. LEGAL ED. 563, 565-67, 570 (1984); Yeager, Review Essay: *The Limits of Law: On Chambliss & Seidman's Law, Order and Power*, 1983 AM. B. FOUND. RESEARCH J. 974, 975.

⁶ Friedman, *supra* note 5, at 570.

and they reveal how women use and are affected by law and by law's absence.⁷

Feminist jurisprudence also has links to "critical legal studies" (CLS).⁸ It shares with CLS scholarship a focus upon the "politics of law,"⁹ that is, upon the ways law legitimates, maintains, and serves the distribution and retention of power in society. Some feminist jurisprudence is also linked to CLS and other critiques of rights theories.¹⁰ These feminist scholars recognize indeterminacy problems in rights analysis and view rights analysis and "liberal legalism" as patriarchal forms which may serve to mask patriarchal bias in law.¹¹

Feminist jurisprudence owes its method and "form of attention"¹² to the development of the women's movement and feminist scholarship and theory. The questions posed by the women's movement and by feminist scholars and theorists about gender—its creation, meaning, and implications—are placed in the context of the law by feminist jurisprudential inquiry. As has happened in other disciplines, the asking of such questions leads to a critique of the discipline itself.¹³ Thus feminist jurisprudence inevitably raises questions about the methods of jurisprudential inquiry and how these have been or are gender-biased.

Seeing, describing, and analyzing the "harms" of patriarchal law and legal systems is a part of feminist jurisprudential inquiry. As feminist theory-making and political practice, feminist jurisprudential inquiry must go further. Seeing the harm is only the beginning. The act of seeing patriarchal gender bias as harm contains the implication that a harm-free alternative might be possible.¹⁴ Feminist theory and political practice are occupied in part with imagining and describing a woman's existence unharmed by patriarchy,¹⁵ and with planning and strategizing for her existence. Feminist jurisprudence thus inquires not only into the

⁷ See, e.g., L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

⁸ Jaff, *Radical Pluralism: A Proposed Theoretical Framework for the Conference on Critical Legal Studies*, 72 GEO. L.J. 1143 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

⁹ The phrase comes from the title of a collection of articles from the critical legal studies movement: *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982).

¹⁰ See Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975; Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For a recent defense of individual rights as a structure for state action see D. MEYERS, *INALIENABLE RIGHTS: A DEFENSE* (1985).

¹¹ Olsen, *supra* note 2, at 388-94, 400-01 and *passim*; Klare, *Law-Making as Praxis*, TELOS, Summer 1979, at 123.

¹² E. FOX KELLER, *REFLECTIONS ON GENDER AND SCIENCE* 6 (1985); Schniedewind, *Feminist Values: Guidelines for Teaching Methodology in Women's Studies*, in *LEARNING OUR WAY: ESSAYS IN FEMINIST EDUCATION* 261, 262 (C. Bunch & S. Pollack eds. 1983); see *infra* note 17 and accompanying text.

¹³ E. FOX KELLER, *supra* note 12, at 6, 177.

¹⁴ M. FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY*, 52-53 (1983).

¹⁵ *Id.*

harms of patriarchal law, but also into the possibility and characteristics of a world without patriarchal law, and of a non-patriarchal legal system.¹⁶

In Part I of this Article, I explore the development and scope of feminist inquiry in law and in other disciplines and try to situate such inquiry in feminist political practice. In Part II a list of questions—a tentative epistemology—for use in feminist jurisprudential inquiry is presented and briefly explained.

I. LEGAL SCHOLARSHIP ABOUT WOMEN/FEMINIST LEGAL CRITICISM/FEMINIST JURISPRUDENCE: THE DEVELOPMENT OF INQUIRY AND SOME POLITICAL RAMIFICATIONS OF METHOD

Legal scholarship about “women and law” has followed the developmental transitions seen in feminist scholarship in general.¹⁷ It has included:

1. compensatory scholarship,¹⁸ the “add-women-and-stir”¹⁹ approach to correcting what male legal scholars leave out;²⁰
2. criticism of the law and of inquiries about law and society because they exclude women and use patriarchally biased assumptions to further the oppression of women;²¹
3. collection of information about women’s experiences of law from the perspective of women;²²
4. conceptualization of a feminist method with which to understand and examine law.²³

¹⁶ Bunch, *Not by Degrees: Feminist Theory and Education*, in *LEARNING OUR WAY: ESSAYS IN FEMINIST EDUCATION*, *supra* note 12, at 248, 252-53.

¹⁷ G. LERNER, *THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY*, 145-59 (1979); E. FOX KELLER, *supra* note 12, at 177; Kelly-Gadol, *The Social Relation of the Sexes: Methodological Implications of Women’s History*, in *THE SIGNS READER: WOMEN, GENDER, & SCHOLARSHIP* 11 (E. Abel & E. K. Abel eds. 1983); Boxer, *For and About Women: The Theory and Practice of Women’s Studies in the United States*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY*, *supra* note 1, at 237.

¹⁸ G. LERNER, *supra* note 17, at 145; Boxer, *supra* note 17, at 243, 249.

¹⁹ Boxer, *supra* note 17, at 258 (quoting Charlotte Bunch, “Visions and Revisions: Women and the Power to Change,” National Women’s Studies Association Convention, June 1979).

²⁰ For an example of compensatory scholarship see Weitzman, *supra* note 7.

²¹ For examples of feminist critiques of law’s methods and exclusion of women’s experiences see S. GRIFFIN, *PORNOGRAPHY AND SILENCE* (1981); Rifkin, *supra* note 2; Taub & Schneider, *Perspectives on Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 3, at 117; Polan, *supra* note 3.

²² For examples of constructions of law from the point of view of women’s experiences see Scales, *supra* note 2; Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN’S RIGHTS L. REP.* 175 (1982); A. DWORKIN, *RIGHT-WING WOMEN*, *supra* note 3.

²³ For conceptualizations of feminist methods with which to understand and examine law see Olsen, *supra* note 2; MacKinnon, *Feminism*, *supra* note 2. The categories of scholarship’s development are Cheri Register’s, *Brief, Amazing Movements: Dealing with Despair in the Women’s Studies Classroom*, 7 *WOMEN’S STUDIES NEWSLETTER* 7-10 (1979) (noted in Boxer, *supra* note 17, at 249).

It is the last task which I attempt and about which I speculate in this Article.

Compensatory scholarship, the uncovering of heretofore "hidden" female experiences which fit within the categories used by traditionally male modes of scholarship, was an essential beginning of feminist scholarship in many disciplines.²⁴ Our realization that women are left out or their experience distorted is often the first evidence suggesting that there is something gender specific about the aspect of culture being examined. Yet compensatory scholarship does not question patriarchy's categories, definitions of experience, or assumptions. It simply suggests that there has been an error—the failure to include women. Its solution is to add women.

Reclaiming "lost" women's lives and experiences provides initial insight into the genderedness of culture, but if inquiry stops at such reclaiming, patriarchal assumptions and definitions are legitimized. Feminist jurisprudence must go further by questioning the methods and scope of inquiry, the categories which structure how questions are formed, and the rules which both legitimize sources of information and govern modes of interpretation. We must be cognizant of patriarchal epistemology, and must reconstruct ways of knowing to avoid distortion of female experience. If in the course of our criticism of law and collection of information about women's experiences of law, we fail to ask all the questions about how to know, as well as about what is known, we risk legitimizing patriarchy again, even as we attempt to change it.²⁵

Male-vision legal scholarship is to law what law is to patriarchy: each legitimates, by masking and by giving an appearance of neutrality to, the maleness of the institution it serves. Our understanding of this legitimation renders meaningless the idea that any inquiry into law is not political. Feminist jurisprudential inquiry is, methodologically and substantively, inquiry from the point of view of women's experiences. It criticizes and subverts patriarchal assumptions about law, including patriarchal attempts to present law as without a gendered "point of view."²⁶ To fail to make inquiries about law that are inclusive of the point of view of women's experiences is to support patriarchy.

For example, in his overview of the development of critical legal theory, Robert Gordon says that law is one of the belief systems humans use: "to deal with one of the most threatening aspects of social existence: the danger posed by other people, whose cooperation is indispensable to us . . . , but who may kill us or enslave us. It seems essential to have a

²⁴ See generally, D. FOWLKES & C. MCCLURE, *FEMINIST VISIONS: TOWARDS A TRANSFORMATION OF THE LIBERAL ARTS CURRICULUM* (1984).

²⁵ See Kelly-Gadol, *supra* note 17, *passim*; MacKinnon, *Feminism*, *supra* note 2; Polan, *supra* note 3; Olsen, *The Politics of Family Law*, 2 *LAW & INEQUALITY* 1 (1984).

²⁶ MacKinnon, *Feminism*, *supra* note 2, at 638-39.

system to sort out positive interactions . . . from negative ones”²⁷ To say, as if the statement was not open to question, that other people are “one of the most threatening aspects of social existence” because we are at once interdependent and mutually vulnerable, is to assume that people are not only capable of being, but likely to be, aggressive and competitive. This assumption, however, ignores much of culturally female behavior.²⁸

If people are expected to be competitive and aggressive or are presumed to be so by nature, then interdependence appears to be dangerous. Safety then requires rules guaranteeing separation from others—that is, a legal system which limits and structures interactions between people. As Carol Gilligan suggests, separation as the motif for safety is a typically Western male motif, one grounded in Western male experience and consistent with continued male domination.²⁹

Both the notion that people are dangerous and the idea that personal safety requires protection from that danger are descriptive rather than analytic. They describe the culturally accurate fact that males in patriarchy are frequent “aggressors in sex and in war,”³⁰ and that such frequent male aggression presents danger to everyone, male and female. But to assume such aggression is “human,” rather than descriptive of male behavior in patriarchy, legitimates male aggression and the male dominance facilitated by fear of such aggression. Outside patriarchy, fear of “human” aggression and the need for definitions of safety designed to protect against it are not inevitable. Law outside patriarchy would not necessarily serve the function of providing barriers between people in the name of safety.

Feminist jurisprudence, like male-vision critical legal studies, inquires into the politics of law. Yet feminist jurisprudential inquiry focuses particularly on the law’s role in perpetuating patriarchal hegemony.³¹ Such inquiry is feminist in that it is grounded in women’s concrete experiences. These experiences are the source of feminism’s validity and its method of analysis. Feminist inquiry involves the understanding and application of the personal as political.³² Feminism’s method is consciousness-raising, “the collective critical reconstruction of the meaning of women’s social experience, as women live through it.”³³

²⁷ Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 3, at 288.

²⁸ J. BAKER-MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* 69 (1976).

²⁹ C. GILLIGAN, *IN A DIFFERENT VOICE* 32-33, 40-44 (1982).

³⁰ Olsen, *supra* note 2, at 423 n.168.

³¹ MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda For Theory*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY*, *supra* note 1, at 2 [hereinafter cited as *Theory*]; this does not mean to deny the variability of women’s experiences by economic class.

³² A. RICH, *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966-1978* 215 (1979); Joselson & Kaye, *supra* note 3, at 239, 260 n.54; MacKinnon, *Theory*, *supra* note 31, at 20-21.

³³ MacKinnon, *Theory*, *supra* note 31, at 29.

We who wish to look at law and society from the point of view of all women's experience may help ensure our ability to see from that point of view by collectivising our process of inquiry. This may mean both asking questions which by their scope are careful to be inclusive of *all* women's experience and working collectively with other women in the formulation and exploration of our questions.

* * * *

When I reached this moment in my thinking I felt troubled, troubled by the idea that it might be "unfeminist" to do feminist jurisprudential inquiry alone. I live in rural New England, and there are few feminist legal scholars within commuting distance with whom I might collectivise my work. It occurs to me that I don't have to do this work only with legal scholars, that many women experience the life situations law affects. I could do this work by participating in a consciousness-raising group of diverse women interested in questions about law and society. Then I remember the pressure upon me as a non-tenured member of a law faculty to produce published work that is "clearly my own," so that I, as an individual scholar, may be evaluated. If I do my scholarly work collectively, and with non-lawyers, is the work "my work," and is it "scholarly?" Some male colleagues' voices in my head say in unison, "NO" (unless of course I put only my name on it and don't tell them what my process was). Even calling the process "empirical research" makes the work suspect to some colleagues, as too participatory or experimental to be "scholarly."

I realize that the acknowledgements portion of almost every feminist jurisprudence article gives thanks to the women who undoubtedly talked and shared in a consciousness-raising fashion with the author. The author's name is a representation of a collective process taken further and into words by her alone—a process that is part consciousness-raising and part solitary listening and creating. I remember that there is nothing unfeminist about the creations of one woman. It is only that each of us must remember her responsibility to remain accurate and honest about whose experiences form the bases for our insights—whose experiences we purport to describe when our thinking goes beyond the collective to the sole.

This is easy when I write poems; I am not afraid then that I am distorting anyone else's experience.³⁴ It is harder when I write an article about divorce mediation from a feminist perspective, and I am afraid, despite all the talking with women mediators, attorneys, married and divorced women, afraid I don't know enough about all women's experiences to be accurate about what we experience in common, as women. And then I remember to look forward to the chance to share another

³⁴ I write poems from lived experience *and* shared and interiorized experiences of other women, from that which I see, hear, know in my heart. Many of the poems talk of experiences which feminist legal scholarship also addresses, violence in our lives, for example:

woman's experience which might reveal the genderedness of some aspect of mediation I have not yet seen. I anticipate the gift of her vision rather than feel afraid of that vision.

* * * *

Just as feminist jurisprudence is political, it is a form of action. The distinctions between theory and practice, thought and action, collapse. Inquiries undertaken from the point of view of all women into the past, present, and imagined future relationships between law and society are not simply academic exercises: they are feminist lawyering tasks. These inquiries are part of feminist legal practice, as well as, in other settings, feminist political action. The questions are questions that must be asked in the course of feminist work for legislative change. They can be asked as part of probing or studying any aspect of law, society, and female experience. They must be asked by feminists in the context of work for a particular case or client. And, of course, they are integral in teaching or preparing to teach any aspect of law, society, and female experience from a feminist perspective. To make the inquiry is an act of "re-vision,"³⁵ an act of survival.

We risk promoting women's oppression if we attempt only to change the law as it impacts on women's lives and neglect to ask the questions suggested by feminist jurisprudence. Without such inquiries, reforms which may appear positive due to their short-term ability to ameliorate women's oppression may strengthen patriarchy in the long run. Feminist jurisprudential inquiry can help enable women to see such dual effects and to make conscious decisions about whether or which way to proceed.

Andrea Dworkin, for example, has eloquently explicated the simultaneously ameliorating and oppressive effects of current abortion law.³⁶

WEST FAIRLEE, VERMONT

The way home at night,
this unlit village street

Women here
are captives in their houses.
All the men are armed.

The impulse to flee
is strongest late at night.
If we wait 'til morning
we know we will not go.

I walk past the single lit window,
see her pacing, packing, unpacking—
she has her coat on, her red hat

Outside her window three stars
line up like knots on a climbing rope.
She is ready. She leaves her bag
below the sill and hauls herself up
hand over hand. Her hat falls.
Her coat floats behind her as she climbs.

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³⁵ "Revision—the act of looking back, of seeing with fresh eyes, of entering an old text from a new critical direction—is for women more than a chapter in cultural history; it is an act of survival." A. RICH, *supra* note 32, at 35.

³⁶ Dworkin suggests that women have a powerful reason to say no to intercourse, a reason some men accept: the risk of pregnancy. According to Dworkin, this reason protects some women

Continued use of the privacy doctrine in the name of women's "rights" carries with it risks to women's continued ability to use the law at all to address many aspects of our lives, particularly those having to do with "family."³⁷ The inquiries of feminist jurisprudence can provide the crucial clarification and understanding necessary to prevent feminists from falling unwittingly into such traps in the future.

In addition, feminist jurisprudence can help us envision the world we wish to create—that is, a world without patriarchy. It can also assist us in focusing our deliberations about the nature of that world.³⁸ We must "remember where we are going—and, in Monique Wittig's words, 'failing that, invent'. . . ."³⁹ Since we have never experienced any reality but patriarchy, to remember where we are going is necessarily an act of invention.

II. THE INQUIRIES OF FEMINIST JURISPRUDENCE

The following list of questions might be posed by a feminist inquiry into the relationship between law and society. The questions can be posed as to any aspect of the law.

1. What Have Been and What Are Now All Women's Experiences of

from forced sex. When abortion is legal and actually available this risk-of-pregnancy as protection-from-forced-sex disappears. A. DWORKIN, *RIGHT-WING WOMEN*, *supra* note 3, at 71-105.

³⁷ Privacy doctrine is the body of law evolving from a line of Supreme Court cases beginning with *Poe v. Ullman*, 367 U.S. 497 (1961) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The doctrine suggests that there are areas of life or activities which the state should not regulate or intrude upon because these areas or activities are "private," and that immunity from state intrusion is part of such constitutionally protected rights as freedom of speech and association, liberty, and due process. Privacy has been used as a reason for the state not to "intrude" upon the marital relationship, *Griswold*, *supra*; as a reason not to criminalize marital rape or domestic abuse, Freedman, *Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?* 3 CAN. J. FAM. L. 377 (1980); Olsen, *supra* note 2, at 388; and most currently as a reason for courts to resist making child custody decisions, leaving them instead to the couple in mediation where the power imbalances in the couple may operate without judicial intervention. Wishik, *supra* note 2; see also Bottomley, *What is Happening to Family Law? A Feminist Critique of Conciliation*, in *WOMEN IN LAW* 162 (J. Brophy & C. Smart eds. 1985). As MacKinnon and others have pointed out, privacy presumes that all who are in the private sphere have sufficient autonomy and power to exercise their individual rights in private, an assumption which too often fails to describe women's reality in the private sphere of family life. MacKinnon, *Feminism*, *supra* note 2, at 656-57. For a history of the cultural constructs of public and private see generally J.B. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* (1981). See also Shultz, *Contractual Ordering of Marriage*, 70 CALIF. L. REV. 204 (1982); Colker, *Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy*, 1 LAW & INEQUALITY 191 (1983); Polan, *supra* note 3, at 297-98; Wishik, *supra* note 2. For a critique of ideas of intervention and non-intervention, see generally Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. (1985).

³⁸ "To the feminist critique of sexist societies it is now important to add the exploration of alternate possibilities." *Introduction to WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS*, xi (E. Hoffman Baruch & R. Rohrlich eds. 1984).

³⁹ MacKinnon, *Excerpts from MacKinnon/Schlafly Debate*, 1 LAW & INEQUALITY 341, 348 (1983) (quoting M. WITTIG, *LES GUÉRILLÈRES*, 89 (1973)).

the “Life Situation” Addressed by the Doctrine, Process, or Area of Law Under Examination?

The choice of the phrase “life situation” is deliberate. The inquiry is not about women’s experiences of a “problem” as defined by male law, a definition which presumptively distorts women’s actual experiences. Rather, feminist inquiry looks to and tries to describe all women’s lived experiences, and tries to define “situation” so as to include all women.

For example, if the law defines the problem as the economics of divorce, feminist jurisprudential inquiry might describe the situation as the economics of intimacy and parenthood. By widening the definition of the inquiry we can include unmarried teenage mothers of all races, lesbians, and other unmarried women. This larger scope of inquiry differs from the legal category “economics of divorce” by including all the women left out in an economics of divorce study because they are not, or are not allowed to be, married. Or, for example, if the law defines a problem in the United States as public funding of nursing home care for elderly women, feminist inquiry would examine the life situation of *all* elderly women. Such inquiry would include women who are homeless in old age and who don’t receive or have access to publicly funded aid, and might reveal some of the differential impacts of aging by race and class.

2. What Assumptions, Descriptions, Assertions and/or Definitions of Experience—Male, Female, or Ostensibly Gender Neutral—Does the Law Make in This Area?

The first question, inquiring into women’s life situation, addresses the need to collect data about women’s actual experience. This second question addresses the need to collect data about the law’s assertions regarding women’s experience. Legal definitions, assumptions, or assertions—especially those which claim to be either gender specific or gender neutral—reveal what the law is saying about women and how the law operates politically and socially in relation to women’s lives.

For example, in *H.L. v. Matheson*,⁴⁰ a case that challenged Utah’s parental notice requirement in its abortion law, the statute required that parents of minors seeking abortions be notified of the planned abortion, but it did not require that parents of minors seeking medical prenatal services be notified of the pregnancy and the planned medical services. In justifying Utah’s distinction between abortion and pregnancy, Chief Justice Burger asserted that for a pregnant minor, the choice to continue pregnancy does not involve medical decisions as needful of parental involvement as are the medical decisions involved in abortion. “If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and

⁴⁰ 450 U.S. 398 (1981).

psychological consequences of the decision to abort."⁴¹

The second inquiry, in addition to examining Burger's assertions about young women's experience, would examine other legal assertions about teenage sexuality and parental control. These assertions might include venereal disease treatment laws giving medical providers permission to treat minors without parental notification or consent. Such laws, by implication if not legislative history, acknowledge that many teenagers will not seek medical care related to sexual activity if they must involve their parents.

3. What Is the Area of Mismatch, Distortion, or Denial Created by the Differences Between Women's Life Experiences and the Law's Assumptions or Imposed Structures?

Analyzing the mismatch between the data from women's lives (Inquiry One) and the data from the law's articulated definitions and assumptions about particular life situations (Inquiry Two) helps reveal whose power is being served by the law as it exists, what aspects of women's lives are legally visible, and how women's experience is distorted by law. These are all aspects of understanding the relationship between law and society from the perspective of women's experience.

To examine the mismatch between the life situation and the law's assumptions in the *Matheson* example, we need first to look to the young women's "life situation" at issue in *Matheson*. That life situation might be described as sexuality and the risk of pregnancy as experienced by young women who, due to youth, have even less economic and personal autonomy than do many adult women. The life situation information might refute Burger's assumption by suggesting teenage women find the medical decisions involved in carrying a child to term—such as amniocentesis, caesarian section, choice of analgesia during labor—at least as complex, difficult, and consequential as the choice to have an early abortion in a particular location with a particular method. The life situation information might also suggest that for teenage women parental notification requirements operate as an effective barrier to their exercise of choice regarding contraception, abortion, and other aspects of their sexuality.

4. What Patriarchal Interests Are Served by the Mismatch?

Having collected the contrasting data, and having described the distortions and inaccuracies in the law's view of women's experience, Inquiry Four attempts to analyze the functional nature of that mismatch, to see how the mismatch serves patriarchy.

There are several sub-inquiries which may be necessary in order to

⁴¹ *Id.* at 413-14.

locate the patriarchal interests served by the law's distortions of women's experience:

- a. What social, political, economic, and cultural events occurred at or near the time this law or doctrine emerged, and during its development what events marked the moments when the law or doctrine shifted?
- b. What ideology or statements of belief surround this area of the law?
- c. What past or present women's interests and needs were or are met by this area of law, and what ones were or are not met?

5. What Reforms Have Been Proposed in This Area of Law or Women's Life Situation? How Will These Reform Proposals, if Adopted, Affect Women Both Practically and Ideologically?⁴²

Given the resilience and adaptability of patriarchy, we cannot always predict future effects with accuracy. Yet careful inquiry is, nonetheless, an important means of revealing those effects we can anticipate. Given that patriarchy is "metaphysically nearly perfect,"⁴³ we must probe for the ways in which a proposed reform may be co-opted or oppressive in its long term outcome.⁴⁴

6. In an Ideal World, What Would This Woman's Life Situation Look Like, and What Relationship, if Any, Would the Law Have to This Future Life Situation?

It is the creation of ourselves as "a sex 'for ourselves'"⁴⁵ which is inevitably the core of feminist enterprise. In the act of discovering what we share because of the patriarchal oppression within which all women live, we begin to change our world and ourselves.⁴⁶ As Marilyn Frye suggests, it is very important that we attempt this self creation or envisioning. If we fail to do so our political practice is not whole.⁴⁷

7. How Do We Get There From Here?

The first four inquiries are fairly universal in current feminist jurisprudence. They are not easy questions: "To do this kind of work takes a capacity for constant active presence, a naturalist's attention to minute phenomena, for reading between the lines, watching closely for symbolic arrangements, decoding difficult and complex messages left for us by women of the past."⁴⁸ They help us to identify how law and existence is

⁴² I added this inquiry after reading Fran Olsen's *The Politics of Family Law*, *supra* note 25, at 4-6, 18-19; Olsen suggests that the choices about reform are always political ones made without *a priori* formulas for accurate assessment of all the eventual effects. She simply notes the choices cannot be avoided and ought to be made after careful contextual evaluation of the anticipated effects.

⁴³ MacKinnon, *Feminism*, *supra* note 2, at 638.

⁴⁴ See *supra* text accompanying notes 36 and 37.

⁴⁵ MacKinnon, *Feminism*, *supra* note 2, at 639, 640 n.8.

⁴⁶ *Id.* at 638.

⁴⁷ M. FRYE, *supra* note 14, at 52-53. See *supra* text accompanying note 13.

⁴⁸ A. RICH, *supra* note 32, at 14.

gendered by patriarchy. This clarity about the patriarchally determined and dependent aspects of law and existence helps us envision alternatives.⁴⁹ The last three questions, however, involve the challenge of inventing, of imagining a world for which we have no givens. It is the world that might come into being were patriarchy nonexistent or eradicated. This exercise is not as alien to daily life as it at first appears. Feminists do this kind of inventing every day as we become or struggle to become self-created women, rather than patriarchally defined women. There are no precedents except the very minutiae of our lives which the first four inquiries help reveal. Based upon what we know of our lives in patriarchy, we may begin to imagine life outside patriarchy, or without patriarchy.

If we take the time to imagine and to articulate our visions, we will then have descriptions of possible modes of being and of relations between law (if any) and society which will serve to test current reform proposals. We can ask about every proposed change in the law: Does it ameliorate a present problem in women's lives; does it constitute a step toward the end of patriarchy and toward the preferred imagined future; or does the reform ameliorate but also reinforce male dominance?

Even though visions of the preferred future will change over time, the ongoing articulation of them helps clarify our actions. Feminist jurisprudential inquiry is in part an attempt to bring about change. Every such attempt involves assumptions about principles and goals. Our methods must include bringing these assumptions to consciousness, making them available for debate, clarification, and modification. Articulating visions of the future is one way of making explicit our assumptions.⁵⁰ Feminists may rightly be afraid of the complexities of such inquiries. The essential and fragile support we find in community with one another

⁴⁹ Marilyn Frye suggests that "thinking back through phallogocentric process turns out to provide valuable clues for the Feminist visionary." M. FRYE, *supra* note 14, at 53. There are helpful ways of imagining futures of which we have no experience and about which we have been systematically blinded. One reason imagining a non-patriarchal world is so difficult is that the amount of change necessary to get from now to that other state seems overwhelming. A method of bridging this gap was developed by some futurist theorists. Elise Boulding, one of these theorists, in working with people to imagine a world without weapons (a task perhaps almost as difficult), suggests that people project forward 30 years and tells them to describe the world assuming there are not weapons any more. People work in small groups elaborating visions of a weaponless world 30 years hence. She then asks the groups to imagine the world 25 years hence; weapons not yet abolished. The groups proceed to write backwards histories in five year increments towards the present. Elise Boulding, Workshop Presentation, "Imagining a World Without Weapons," in Hanover, N.H. (February, 1982). Feminist utopias exist in novel and essay form; reading these might assist in clarifying visions about feminist society or societies. See, for example, Gearhart, *Future Visions: Today's Politics: Feminist Utopias in Review* in *WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS*, *supra* note 38, at 296. Rohlich and Hoffman Baruch suggest that "feminism is utopian in its emphasis on the possibility of 'new modes of living,' [and] . . . for most women, utopia is statelessness and the overcoming of hierarchy." *WOMEN IN SEARCH OF UTOPIA: MAVERICKS AND MYTHMAKERS*, *supra* note 38, at xii.

⁵⁰ Bunch, *supra* note 16, at 252.

may be strained by the revelation of our differences about methods like rights analysis, let alone about visions of the imagined future. Some of the differences which now surface often in our attempts to explain the origins of patriarchy or to advocate for particular legal changes are differences which we will understand better if we try to share our visions of the future, and try to explicate our choices about short-term goals in terms of particular future visions.

What kind of world is it we are trying to create? The analytic frames of patriarchal law are not the spaces within which to create visions of feminist futures. Nothing about existing law should remain immutable in our inquiries, and nothing about existing law should constrain the construction of our visions.⁵¹ Once we have probed the data from law and women's lives and the distance in between, then it seems necessary to skip to an imagined future when all is possible in order to envision what we want. Afterwards we can look at whether and how our desires can be made real through changes in or in spite of existing law. To make the inquiry this large whenever we examine any aspect of law is to help ensure we won't forget to see everything, won't forget to question everything. "Where an old paradigm exists, a new paradigm can come into being. . . . Thus we may have to relearn thinking. We have to learn to tolerate questions . . . we may have to cultivate paradox, welcome contradiction or a troublesome question."⁵²

⁵¹ At the pornography debate between Nan Hunter and Catharine MacKinnon on March 24, 1985, at the 16th National Conference on Women and the Law in New York City, one of the starkest contrasts between the statements of Hunter and MacKinnon was Hunter's focus on the "appropriate" rules for legal involvement in sexuality versus MacKinnon's focus upon what kind of life situation she envisions as desired for women. As a member of the audience I felt it was the statement of vision which made room for creative and principled consideration of methods and strategies. The Hunter attempt to reinforce principles about "rights" and rules for legal function within which any examination of and attempt to remedy the life situation of women "should" be explored seemed to shut down creative envisioning about how to change women's lives.

⁵² Griffin, *supra* note 1, at 289.