

Commentary

FEMINISM, CONSEQUENCES, ACCOUNTABILITY[©]

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I.	INTRODUCTION	

Any discussion of the fate of feminist legal advocacy becomes itself a site for the production of feminist legal knowledge. These exercises in stock-taking create narratives that define the scope of initiatives and outcomes that will be regarded as feminist.¹ Moreover, they establish which

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¹ For examples of “stock-taking,” see *e.g.* Anita Bernstein, “Symposium On Unfinished Feminist Business: Foreword Still Unfinished, Ever Unfinished” (2000) 75 Chicago-Kent L. Rev. 641; Victoria Nourse, “Symposium On Unfinished Feminist Business: The ‘Normal’ Successes and Failures of Feminism and the Criminal Law” (2000) 75 Chicago-Kent L. Rev. 951 [Nourse]; Richard Kamm, “Symposium On Unfinished Feminist Business: Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker Women” (2000) 75 Chicago-Kent L. Rev. 765; and Jennifer Ferarda Brown, “Symposium On Unfinished Feminist Business: Apostasy?” (2000) 75 Chicago-Kent L. Rev. 837. See also Jane E. Larson, “Introduction: Third Wave—Can Feminists Use The Law To Effect Social Change In The 1990s?” (1993) 87 Nw. U.L. Rev. 1252; Laura M. Padilla, “Gendered Shades Of Property: A Status Check On Gender, Race & Property” (2002) 5 J. Gender Race & Just. 361; Ann Scales, “Disappearing Medusa: The Fate Of Feminist Legal Theory?” (1997) 20 Harv. W.L.J. 34; Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

results will be considered failures for feminism and which will be considered successes. They also describe and create feminist power that can be wielded in internal and external conflicts. When these feminist discussions feature the theme of feminist insignificance, the conclusions about future strategizing will fail to adequately take account of the results of feminist advocacy. Feminism *has* been significant.

Our refusal to recognize this significance may lead to failures of accountability for the results of the feminist law reform project. This refusal may also stunt the development of healthy and constructive internal critiques, and cause a loss of the credibility that is required to mobilize women.² While the claim of insignificance may be partly driven by a desire to protect feminism from internal and external forms of backlash, it is a move that carries with it a whiff of self-fulfilling prophecy.³ At the same

² See Katherine Franke, "Why do we eat our young?: Journals as a Feminist Battleground: On discipline and canon" (2003) 12 Colum. J. Gender & L. 639 at 641. Arguing that contemporary feminist legal theory has become a "field" and therefore subject to the dangers of discipline, Franke points to the weakness of internal critiques which she blames on the fact that "*we disagree badly as feminists.*" Franke's use of the identifier "young" leads me to wonder if *one* of the reasons I am interested in the narratives of feminist legal activism's past is because I "wasn't there" (I entered university at the very beginning of the 1990s, and became interested in/aware of the legal battles fought by feminists at some point after that). I must rely heavily on accounts provided by others and am perhaps particularly sensitive to the impressions created by these accounts.

³ While my concern, and therefore my focus, is on the discourse of insignificance, other writers have pointed out that feminism also employs a narrative of success (or redemption) at times alongside the more negative story. See Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change" (1991) 100 Yale L.J. 1731 at 1732, who writes, "[a]sking about the impact of feminism typically yields an uplifting account off Pilgrim's Progress, which stresses the dramatic changes in legal institutions and ideologies over the last two decades. Asking about the lack of impact evokes a competing myth of Sisyphus, which recites research on occupational inequality, income disparities, and sexual violence, and concludes that too many of us are still pushing the same rock up the same hill." See also Thomas Ross, "Despair and Redemption in the Feminist Nomos" (1993) 69 Ind. L.J. 101 at 130. Describing the narrative of despair and the ways in which feminist scholarship is redemptive Ross writes, "[f]eminist legal scholars like Susan Estrich have told stories of despair as a means of working toward redemption." He also argues (at 135) that feminist legal scholarship cannot be measured in terms of its success in reforming law because:

the moment one considers feminist legal scholarship and its law through the ideas of precept, narrative, and commitment, everything changes. First, the scholarship assumes a different cast. It helps maintain a community of committed individuals who share basic precepts and the narratives that supply legal meaning. The scholarship does not take the form of the rhetoric of the State's apologists precisely because the feminist scholarship is part of an altogether different activity. Most importantly, the feminists' use of narrative is not a rhetorical gambit; it is the essential teaching of the normative community. Precisely because the State's narratives and the narratives of the opposed normative communities are in the discourse, the feminist must keep telling [and] retelling her stories to maintain the community and to work toward redemption.

See also the website of the National Association of Women and the Law (NAWL), which states: "NAWL has played a major role in the following milestones towards women's equality: Sections 15 and 28 in the

time, there is a disturbing instability to some of the feminist reforms of the past decades. Feminism has to take account of this instability, recognizing it as endemic to law, and strategize with it in mind.

In describing the claim of insignificance, I refer to only one of many feminisms and only one of many claims. The specific feminism in play here is one that is hard to define by its politics (liberal, radical, et cetera). Strands of diverse feminisms appear together inside many feminist institutions and shift over time and with the emergence of new issues. It is the positioning of this particular feminism within the many feminisms that draws my attention, rather than the politics it espouses. This is a feminism that is institutionalized, in the academy, in national legal organizations such as the Women's Legal Education and Action Fund (LEAF) and the National Association of Women and the Law (NAWL). Its practitioners are legal feminists with the credentials and connections (read: power) to participate in government consultations, to develop legal strategies for nationally significant test cases, and to publish feminist research on legal issues.⁴ Perhaps I can use the term "professional legal feminism," since I am mainly referring to women who perform at least some of their paid work with law and with feminism, and to the feminist institutions where some of that work is done.

I am not, then, referring to smaller, local, grassroots organizations and their members, or to women who, without any institutional connections to feminism, describe themselves as feminists. The use of the term "professional legal feminism" is not intended to attach to specific people or to be derogatory. It is an attempt to describe differences among feminists and feminisms in a way that focuses attention on variations in access to resources for undertaking feminist research and engaging in law reform. Essentially, I am concerned with who has power within feminism, how they are wielding it, and how these factors connect with the claim that feminism is not wielding any power in the larger zone of law and law reform.

Charter of Rights and Freedoms, the amendments to the sexual assault laws, positive changes to family law and to the divorce act, rape shield legislation, criminal harassment legislation." "About NAWL," online: <<http://www.nawl.ca/about.htm>>. In addition, there are volumes of feminist and non-feminist literature which identify the failings of particular kinds of feminism, or failings in particular areas of intervention. These are not really the focus of my piece.

⁴ See Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 42. McIntyre writes about the high risk of exclusion in feminist activism (at 78): "power likes dealing with power, [so] governments are most likely to invite the most high-profile organizations to their round-tables. A high profile often can be correlated with mainstream politics, privileged credentials, and/or privileged perspectives and self-conduct." She warns of "privileged erasures by unaccountable and unrepresentative progressive scholars and activists ..." (at 81).

My suggestion is that the discourse of insignificance in professional legal feminism serves particular purposes inside the feminist arena. In light of the fact that Susan Boyd and Claire Young focus on and locate themselves within professional legal feminism, their article provides a useful starting place for exploring this idea. The article certainly displays a tendency among legal academics to find feminism's contributions to law reform to have been minimal.

While Boyd and Young are enthused about feminist research over the last three decades, they are decidedly down on the ways this research has permeated case law and public policy.⁵ Although this is a view that I have repeatedly heard expressed in public and private conversations, my own view of feminism's impact on law and public policy is more mixed.⁶ Certainly, some conditions for many women have improved. The wage gap between men and women has narrowed.⁷ In Canada, abortions have remained legal.⁸ More women are entering post-secondary education than ever before, and now outnumber men in law school.⁹ LEAF has been on the winning side in a number of cases.¹⁰ The number of women lawyers has

⁵ See Susan B. Boyd & Claire F.L. Young, "Feminism, Law and Public Policy: Family Feuds and Taxing Times," (2004) 42 Osgoode Hall L.J. 545.

⁶ I have heard the negative view expressed quite forcefully in conversations and presentations at two meetings of "professional legal feminists" over the past year, as well as in private conversation. For a more mixed review of feminism's impact, see especially Diana Majury "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297 at 336 [Majury, "The Charter"]; see also Radha Jhappan, "Introduction: Feminist Adventures in Law," in Jhappan, *supra* note 4, 3 at 6-12.

⁷ See e.g. Marie Drolet, *The Persistent Gap: New Evidence on the Canadian Gender Wage Gap* (Ottawa: Statistics Canada, Business and Labour Market Analysis Division, 2001) online: <<http://www.statcan.ca:8096/bsolc/english/bsolc?catno=11F0019M2001157>>.

⁸ Clearly, abortion access remains an enormous issue. For information about growing problems with accessing abortion, see the disturbing results of a study done by the Canadian Abortion Rights Action League (CARAL): "Freedom of Choice: Protecting Abortion Rights in Canada," online: <<http://www.caral.ca/uploads/caralreporti.pdf>>. For the "success" part of the story, see Sheilah L. Martin, Q.C., "Abortion Litigation" in Jhappan, *supra* note 4, 335 at 344 (describing "direct benefits ... symbolic gains ... [along with] noteworthy limits" and arguing that "legal strategies ... can achieve some positive results" in combating gender bias).

⁹ See e.g. Statistics Canada, *Education in Canada* (Statistical review series 81-229-XIB) (Ottawa: Statistics Canada, 1985-2000).

¹⁰ See McIntyre, *supra* note 4 at n. 66 listing twelve such cases: see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Eldridge v. A.G.B.C.*, [1997] 3 S.C.R. 624; *Winnipeg Child and Family Services v. G. (D.F.)*, [1997] 3 S.C.R. 925; *Vriend v. A.G. Alberta*, [1998] 1 S.C.R. 493; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *M. v. H.*, [1999] S.C.R. 3; *B.C. v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3; *N.B. (Minister of Health and Community Services) v. J.G.*, [1999] 3 S.C.R. 46; *R. v. Mills*, [1999] 3 S.C.R. 668; *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307; *R. v. Darroch*, [2000] 2 S.C.R. 443; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

rapidly increased.¹¹ There have been changes to criminal law, some of which were recommended by feminists (even if this area of law remains less than satisfactory for feminists).¹² Pay equity programs, the closure of the Prison for Women, the introduction of “no drop”¹³ policies with respect to domestic violence—all of these are reforms that are at least linked to feminist proposals.¹⁴

I am not arguing feminism has won its fight, become irrelevant, or anything of the sort. Feminist research, including that carried out by scholars like Boyd and Young, identifies many ongoing concerns, and most of the successes I have pointed to came in the form of improved conditions for women, not ideal ones. In fact, my argument leads me to the conclusion that there is an infinite amount of work for feminism, since legal change is a never-ending process. As I will argue, all past feminist victories have to be defended (or perhaps revisited). My curiosity is piqued, however, by the reluctance to celebrate or even recognize many of the quite significant feminist achievements of the past few decades. Some women of my generation, who started university in the 1990s, see the feminists of the 1970s and 1980s as pioneers who did much of the back-breaking labour, clearing our way into the academy and the profession, introducing the

¹¹ See e.g. Mary Jane Mossman, “Gender equality education and the legal profession” (2000) 12:2 Sup.Ct. L. Rev. 187 at 189ff.

¹² See e.g. McIntyre, *supra* note 4 at 80. McIntyre describes annual consultations on violence against women held from 1994-97 and reports that “[s]ome misguided state policies were abandoned on the basis of our articulated opposition. Only a few of our proposals were embraced. The inspired analysis recorded in the transcripts of each consultation is plainly having an effect on how politicians and bureaucrats think about equality” See also Bill C-46, *An Act to amend the Criminal Code (Production of Records in Sexual Offence Proceedings)* 2d Sess., 35th Parl., 1997, introduced after the decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*]. Bill C-46, supported by feminists, was unsuccessfully challenged in *R. v. Mills*, [1999] 3 S.C.R. 668.

¹³ Although there are significant variations on the theme, the term “no drop” refers to mandatory charging and prosecution policies. In the Canadian context, see e.g. Cynthia L. Chewter, “Violence Against Women and Children: Some Legal Issues” (2003) 20:1 Can. J. Fam. L. 99 at 103; Myrna Dawson, “Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time” (2004) 38 Law & Soc’y Rev. 105 at 130. See also Donna Coker, “Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review” (2001) 4 Buff. Crim. L. Rev. 801 at 806-58ff.

¹⁴ See e.g. Chewter, *ibid.*; *Commission of Inquiry into Certain Events at the Prison for Women in Kingston, Report* (Ottawa: Canada Communication Group, 1996). I might also include in these improvements the fact that there are numerous women, many of them feminists, teaching in Canadian law faculties (a recent meeting for feminist law teachers organized by the Institute for Feminist Legal Studies at Osgoode Hall brought together over thirty women); that some hold important administrative positions (for instance, Claire Young is Associate Dean at UBC); that their scholarship is, at times, recognized and celebrated by the profession as a whole (for instance, Mary Jane Mossman received awards from both the Canadian Association of Law Teachers and the Law Society of Upper Canada in 2004).

courts to feminist arguments, pushing governments to reform sexist laws, and engaging in grassroots political work. Why do so many professional legal feminists not see the same thing? My tentative and partial answer is that denying the victory allows professional legal feminists to deny the power they hold within feminism.¹⁵

While many of the “old” battles are still being fought (equal pay for equal work, recognition of reproductive and household work, et cetera), feminism’s victories brought with them new challenges. Feminism must now exercise the measure of power that came with these victories, and this is a complicated task that risks implicating feminists in various forms of oppression and subordination.

Feminists must address the fact that feminist achievements have not had an equal impact on all women’s lives. Denying the achievements of feminism may elide this differential impact in a way that eases professional legal feminism’s burden of accountability. Without a clear-eyed appraisal of our victories, we will inevitably fail to see that some women have been left behind, and indeed that some women are being harmed by initiatives that have benefitted others.

I want to focus on this professional legal feminist narrative of insignificance. My critique is not novel—in fact, it is a rather old internal critique—but it is nevertheless a feminist critique of feminism. This critique proceeds through three arguments. First, that professional legal feminism has had some success on its own terms, obtaining litigation victories and legislative redrafting based on feminist theorizing. Second, that some of feminism’s successes and strategic choices are neither successful nor strategic for certain groups of women. Together, these two arguments suggest that the narrative of feminist insignificance drowns out internal critiques and recognition of the need for reflective criticisms. Third, I argue that there are dynamics at play in law and legal reform that may urge us towards greater recognition of the complexities of any effort to change law, and the difficulties of assessing the contributions of feminism to law reform. Victories may lack substance, due to some of the more subtle manifestations of law’s resistance to change. Early litigation “successes” may now seem fragile or even threatening, suggesting that categorization as success or failure is perhaps impossible. When we engage the law,

¹⁵ See Mary Louise Fellows & Sherene Razack, “The Race to Innocence: Confronting Hierarchical Relations among Women” (1998) 1 *J. Gender Race & Just.* 335 at 339: “Women challenged about their domination responded by calling attention to their own subordination. The impasse that results depends on the idea that if a woman is subordinated herself, she cannot then be implicated in the subordination of others.” Fellows and Razack suggest different reasons for the perceived need to stake out positions on the margins, including the fear of erasure. They end by reiterating the “urgency of abandoning positions of innocence.”

feminists are not entering a struggle that can be decisively “won.” Paying more attention to these features of law may transform our understanding of what the feminist legal reform project is aiming for, and allow us a more subtle approach to reviewing “progress.” My goal in setting out these possibilities and arguments is to broaden the discussion that Boyd and Young began with their lecture and urge feminism and feminists to look inwards as well as outwards for success, failure, self interest, and power.

By raising these concerns I do not mean to suggest that there is any easy solution. Rather, I think that professional legal feminism has an obligation to foster open dialogue on these issues. Particularly when we engage in assessments of feminist contributions with a view to planning our future, there are important dynamics that must be exposed. This exposure will require difficult debates, but such challenges are the mark of feminism’s maturity as a school of thought and action and should not be avoided.

II. ASSESSING THE SUCCESS OF FEMINISM

We can point to evidence of certain feminist “victories”¹⁶ as evidence of some feminist power. A significant variation of this conclusion would suggest that feminism is only victorious when it finds itself aligned with the interests of other powerful groups in society, a feminist version of Derek Bell’s interest convergence thesis.¹⁷ Boyd and Young appear to propose some version of this theory when they describe how feminist test cases can end up supporting the withdrawal of the state and the construction of the family as the appropriate source of support. Either way, however, my point is the same: professional legal feminists and feminism have achieved some success on their own terms in that they have occasionally been able to access the power of the courts and the legislature.¹⁸

¹⁶ I use quotation marks here because in the third part of this article I will argue that the word is misleading in the context of law reform. However, at this point, I use the word to imply that feminism succeeded on its own terms. That is, a test case was successful, a new feminist-drafted provision was adopted, et cetera.

¹⁷ Derrick A. Bell, Jr., “*Brown v. Board of Education* and the Interest Convergence Dilemma” in Kimberlé Crenshaw *et al.*, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) 20 at 22. Bell argues that racial equality for minorities is offered only when it is possible to believe that it is in the best interest of the majority group.

¹⁸ See Majury, “The *Charter*,” *supra* note 6, text accompanying n. 120. Majury’s analysis of women’s equality under the *Charter* left her, as she says, both equivocating and celebrating. She did, in the end, find some limited successes: “In terms of women and equality, in my assessment, the most clear-cut gains have been with respect to reproduction and violence against women, although even in these areas the victories have been only partial and feel insecure. Although the risks of essentialism and

Why might professional legal feminism maintain a narrative of insignificance in the face of these achievements? One possibility is the feeling that this narrative motivates us in this sustained struggle to improve women's lot. I am sure that many feminists were energized by the rebellious nature of their early experiences with feminism. I have often wistfully thought that I must have missed out on times when the answers for feminists seemed simpler (though in hindsight, they were not). Another part of the answer seems to be that there is a sense that failure is more mobilizing than any other narrative.

"We need you," it says to the grassroots, the unsure, and the feminist but opposed. In addition, for those who see themselves as activists, it must be more motivating to have to "fight the power" than to negotiate with it, compromise with it, and have intermittent access to it. Given the political commitments of many feminists, it may be particularly difficult for those prominent in feminist institutions, that is, professional legal feminists, to accept that *they* are at least a power if not the power.

Maintaining a rebellious stance and asserting outsider status may also, however, require denying or downplaying the gains that feminists have made, including the creation of their own institutions of power. This "backs against the wall" stance also creates an imperative of unity that serves to discourage critiques from the inside questioning whether professional feminist activism is promoting the well-being of all women. Why complain about the exercise of power by a powerless group? And if you are complaining, what separates you from all the other anti-feminists out there, trying to destroy the movement?

The discourse of insignificance masks the internal power struggles in feminism by making them seem insubstantial. Yet the ways in which professional legal feminists describe their interactions with law are part of the internal struggles within feminism to define priorities and choose strategies.

Advancing the view that there have been no successes blunts the point of feminist critiques of feminism. It allows us to forge ahead with law reform strategies and legal interventions while ignoring internal critiques about privilege and exclusion that we ostensibly accepted. By pushing on without attending to those critiques we are failing in our responsibility to consider the possibility that reform efforts, however well-intentioned, can have serious adverse consequences for some even if they produce positive

overprotection are high, these may be areas in which the gender analysis is more easily grasped and perceived as less systemically threatening. Family issues are mired in the tension between formal equality and substantive equality; the vision of independent ungendered 'equal' participants and the reality of gendered dependencies, assumptions, and values clash. Deeper equality analysis and more creative responses are needed" (at 335).

results for others.

We can then express concern about those groups of women still lagging behind, and vow to do more in the future, without interrogating the question of how they are being affected by what we are doing *now*.¹⁹

III. DISCOURSE, DIFFERENCE, DISSONANCE

The gains from feminist legal research and activism seem to have gone mainly to middle class, white, usually educated women.²⁰ Yet at the same time, the gap between rich and poor in Canada (regardless of gender) continues to grow. Some women are doing very well, others are sinking deeper into the quicksand of poverty and lack of opportunity. Erasing discussion of the progress made by some allows us to both ignore and escape our implication in the lack of progress made by others. Yet this elision is both disingenuous and dangerous.

Denying the social and economic advancement of some women only undermines the credibility of feminist claims that women are still being left behind. We are ignoring critical questions about the exercise of feminist power in determining feminist goals. Are we failing to support the needs of some less fortunate women? Does our activism fail to challenge the mechanisms that oppress these women? To the view that feminists can be mobilized only by a clear call for rebellion, I suggest that, at this point, taking a more critical and nuanced approach to our goals and activities as feminists may make the difference in attracting and maintaining a strong grassroots base for feminist legal activists.

This is a familiar argument to most feminists. The problem is essentialism, the suggestion that all women have similar experiences by virtue of being women.²¹ Behind the unifying language of essentialism lurks the essential woman herself, de-raced, not disabled, not an immigrant, not poor, not uneducated, a woman who carries the privileges and problems of middle class life. Women who do not fit this mould can be, and have been, left out of reforms crafted to benefit women who do. The Canadian feminist movement has long struggled with critiques of essentialism, and with the charge that the “essential woman” is just as Boyd and Young

¹⁹ See Boyd & Young, *supra* note 5 at 580, especially text accompanying n. 148.

²⁰ The claim that this group of women has reaped most of the benefits from feminism is connected to, but not the same as, the claim that feminist legal research and activism has been directed by and for middle class, white, educated women. Neither of these points is new in any way, of course.

²¹ A helpful description of how this plays out in the context of *Charter* equality litigation is provided in Lise Gotell, “Towards a Democratic Practice of Feminist Litigation? LEAF’s Changing Approach to *Charter* Equality” in Jhappan, *supra* note 4, 135 at 138-46.

describe her: white, middle class, well-educated.²²

Canadian feminists have taken these issues seriously. My reading of the current literature is that the mainstream feminist movement has accepted the idea of intersectionality as the key to anti-essentialism.²³ To a lesser extent, the idea of strategic essentialism is also invoked.²⁴ Intersectionality refers to the idea that those who are identified as members of more than one oppressed group have a quantitatively and qualitatively different experience of oppression when compared to those who hold only one marker of disadvantage.²⁵ Thus, for instance, white, middle class women without disabilities experience discrimination in ways that are different in kind and in degree from poor women with disabilities. Strategic essentialism, on the other hand, refers to the idea that these groups can and should coalesce around the shared part of their identity—gender—in order to achieve common goals despite the likelihood that this coalition will mask their differences.

What remains slightly unclear is how intersectionality and strategic essentialism are being deployed in professional legal feminist prioritizing and strategizing. My sense is that these critical theories about difference are often used in ways that allow professional legal feminism to avoid serious reconsideration of its project, while still acknowledging the existence of difference. Thus, intersectionality is invoked only to suggest that women

²² There is a wealth of literature on these debates. For an elegant rendering of these changes in the feminist movement, see Rebecca Johnson, *Taxing Choices: The intersection of class, gender, parenthood and the law* (Vancouver: University of British Columbia Press, 2002) c. 1. Another helpful description in the section 15 context is provided by Gotell, *ibid.*

²³ Gotell, *supra* note 21.

²⁴ See Leti Volpp, “(mis)Identifying culture: Asian women and the ‘cultural defence’” (1994) 17 Harv. Women’s L.J. 54 at n. 162, describing arguments made by Gayatri Chakravorty Spivak in “Subaltern Studies: Deconstructing Historiography” in *In Other Worlds: Essays in Cultural Politics* (New York: Methuen Inc, 1987) 197. Spivak has warned that the choice to invoke strategic essentialism should come from the subaltern group: “the emphasis falls on being able to speak from one’s own ground ... on noting how we ourselves and others are what you call essentialist, without claiming a counter-essence disguised under the alibi of strategy.” Gayatri Spivak, “In A Word: Interview with Ellen Rooney” (1989) 1 Differences 124 at 128.

²⁵ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U. Chicago Legal F. 139; Kimberlé Crenshaw, “Mapping The Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1251 at 1252; Nitya Duclos, “Disappearing Women: Racial Minority Women In Human Rights Cases” (1993) 6 C.J.W.L. 25; Trina Grillo, “Anti-Essentialism and Intersectionality: Tools To Dismantle The Master’s House” (1995) 10 Berkeley Women’s L.J. 16; Nancy Levit, “Theorizing the Connections Among Systems of Subordination” (2002) 71 U.M.K.C. L. Rev. 227 at 228-30. For intersectionality in contexts other than race/gender, see Mary Eaton, “At The Intersection Of Gender And Sexual Orientation: Toward Lesbian Jurisprudence” (1994) 3 S. Cal. Rev. L. & Women’s Stud. 183 at 217; Anita Silvers, “Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights” (1998) 13 Berkeley Women’s L.J. 81.

from different groups suffer heightened discrimination. When discussing topics that have long been central to professional legal feminism (for instance, the question of spousal support), intersectionality is employed to ensure that we consider the situation of, for example, immigrant women with respect to spousal support.

How does their immigrant status make their situation with respect to spousal support worse? Yet adopting this approach betrays a misunderstanding of the challenge intersectionality theories pose to professional legal feminism's claim to represent women's issues. Those who proposed intersectionality as a heuristic device described a non-linear, non-additive process, in which the dynamics of, for instance, racism and misogyny combine and reinforce each other in complicated, tangled ways. Increased harm is not, therefore, the only result for those in the intersections. Disabled women, or women of colour, or any women facing multiple vectors of discrimination, may have needs and wants that are different from those of the professional legal feminists setting the agenda. They may have different priorities and strategies.

Difference, and the implications of difference, are at the heart of this critique. Failing to recognize feminist victories helps to hide the ways in which these victories have been hollow for some women, offering no benefits at all, or simply reinscribing and validating systems that serve to oppress. If we described the ways in which feminist interventions have improved the lot of some women in this country, it might illuminate the harsh implications of difference. Under conditions of difference, needs may be different, and needs, wants, harms, and benefits may collide.²⁶ Some women want to reduce their tax burden; others are largely dependent on the state. Some women want to strengthen the criminal justice system in its protection of women; others are living in communities devastated by the racist exercise of power by the police and the courts. Negotiating the subtleties that could reconcile these differences is extremely difficult in a litigation context. In some cases, I would argue, it is impossible. But in all cases, it is impossible if, in taking stock of the current situation, we ignore the differential impact of feminist advocacy.

Recognizing difference is not the same as taking account of divergent interests, and I would argue that professional legal feminism now does the former and not the latter, thus leaving out the reason (or one of the main reasons) that differences amongst women ought to matter to

²⁶ Although I am prepared to leave open the question of whether this collision is theoretically necessary, I see no way to eliminate the conflict in the world of practical politics. An interesting and forceful argument on this point can be found in Sumi Cho, "Commentary: Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions" (2002) 71 U.M.K.C. L. Rev. 399.

feminism. Today, the vast majority of Canadian feminists are aware of the challenge the articulation of difference has posed to feminisms, including professional legal feminism. Boyd and Young, for instance, describe feminism's (past) theoretical and practical failings with regard to difference, with particular reference to race. They cite with approval the work of Canadian feminists who detailed the movement's exclusion of "other" women, and, with dismay, the fact that "white women with some higher education and skills ... are taken as emblematic of the modern woman ..."²⁷

When it comes to describing the harm of this exclusion, however, professional legal feminists tend to suggest that what hurts women who are also disabled, raced, or otherwise "othered" is the exclusion itself. This constructs the problem as an error of omission, a failure to grant a benefit, a gap that can be closed. It also means that differences among women affect only the degree of suffering, not the form and the source of the oppression.²⁸ Finally, the fact that we are dealing with a question of degree and not a major theoretical challenge ensures that the question of *when* to close the gap is also treated as a matter of degree. A harm of continued exclusion is something that we can take care of in the future, perhaps by a concerted effort to improve the position of, for instance, disabled women. We will, we promise, meet the challenge of helping the "others" catch up.²⁹

The problem is, however, much more serious. The possibility that we are currently contributing to the worsening of the situation of, for instance, disabled women through our tactics is not explored. By failing to grapple adequately with this problem, or at least with the very hard parts of it, the feminist movement in law continues to espouse ideas that, directly or indirectly, harm women outside the "emblematic" zone. These harms, which exceed the harm of exclusion, can arise from the pursuit of goals that explicitly harm "other" women, strategic decisions not to challenge systems and institutions that oppress these groups of women, and strategic choices to treat systems and institutions as normal, natural, and neutral *as between women* in scholarship and advocacy.

The possibility that some feminist advocacy could harm some women does not seem to have been given sufficient weight in professional legal feminist analysis. In particular, reassessing past choices with these

²⁷ Boyd & Young, *supra* note 5 at 576, 579.

²⁸ Others have argued differently. See e.g. Gotell, *supra* note 21 at 149, referring to LEAF's factum in *O'Connor* and LEAF's attempts to "break away from the quantitative logic (more vulnerable than white women) inscribed in the discourse of double discrimination." I think that *O'Connor* might be one of those cases in which the racist and colonial context was so clear that to ignore it would have been inexcusable.

²⁹ Boyd & Young list this as a "challenge for the future." *Supra* note 5 at 555.

possibilities in mind gets short shrift. For instance, in their article Boyd and Young treat *Symes* as a feminist failure.³⁰ Others might argue that *Symes* represents a powerful counter-example to the argument I have made about professional legal feminists. LEAF refused to support the case over concerns about the possibility that some women would be adversely affected if *Symes* won.³¹ Had the case been decided in favour of Beth Symes, we could now read it as supporting the system of live-in domestic help then existing in Canada, with all its race and class minefields. Ignoring these aspects of *Symes* reduces the case to the way it was framed by the plaintiff, a white, very well-educated, upper middle class, prominent professional legal feminist.³²

Defining out the aspects of the case that caused controversy within feminism allows a focus on the use of class to trump gender in the Federal Court of Appeal decision. Adopting this argument, Boyd and Young imply that the alternatives can be represented by the “two solitudes” of the Supreme Court decision in the case: either we accept that women bear the social and economic burdens of child care, or we do not; either we accept class and ignore gender, or we ignore class to validate gender. Yet the public policy issues at stake in *Symes* cannot be reduced to a binary decision of whether or not to recognize women’s burden through public support of child care. It was also about the privilege of self-employed businesswomen who can afford to hire live-in caregivers as compared to the caregivers themselves, a group characterized by gender, racialization, and immigrant

³⁰ Claire Young herself has, in the past, written about the problems with the claim in *Symes*. See Claire Young, “Child care and the Charter: Privileging the Privileged” (1994) 2 Rev. Const. Stud. 20.

³¹ For another reading of *Symes*, one that ignores those aspects of the case that troubled other feminists, see Susan D. Phillips, “Legal as Political Strategies in the Canadian Women’s Movement: Who’s Speaking? Who’s Listening?” in Jhappan, *supra* note 4, 379 at 396. Phillips argues that the *Symes* case could be read as a strategic move to force the government into action on the issue of child care. For analyses more critical of the claim and the case, see Young, *supra* note 30; Rebecca Johnson, “If Choice Is the Answer, What Is the Question? Spelunking in *Symes v. Canada*” in Dorothy E. Chunn and Dany Lacombe, eds., *Law as a Gendering Practice* (Don Mills: Oxford University Press, 2000) 199; Brenda Cossman, “‘Dancing in the Dark’: A Review of Gwen Brodsky and Shelagh Day’s Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?” (1990) 10 Windsor Y.B. Access Just. 223; Audrey Macklin “*Symes v. M.N.R.*: Where Sex Meets Class” (1992) 5 C.J.W.L. 498; Joanne St. Lewis, “Beyond the Confines of Gender: Locating the Space of Legal Existence of Racialized Women” in Jhappan., *supra* note 4, 295 at 309-10; Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen’s L.J. 179 at 199-203.

³² My comments are not intended to criticize the decision of Beth Symes to bring the case. Despite the fact that she is a founding member of LEAF, it would be unfair to argue that she was required to look beyond her own situation. I do not want to hold her to a higher standard than any other plaintiff. However, when feminists treat her loss as a loss for feminism, more complicated issues arise.

status.³³ By deliberate choice, Boyd and Young's narrative sidelines race and class. Yet in my view, LEAF's decision to avoid the case based on concerns about the race and class implications was profoundly important for professional legal feminism in Canada. That *Symes* is still invoked as a feminist failure suggests fissures in the movement that are going unexplored. These are lost opportunities to build Canadian feminism into something that coheres through honesty if not through total agreement.

Boyd and Young acknowledge the feminist scholarship that has interrogated the complications of *Symes*, but ultimately reject those analyses and employ a different feminist theory to critique the approaches to the case adopted by the Supreme Court and Federal Court of Appeal. This move reflects a common approach to dealing with the struggle over "difference." Difference is acknowledged, but it does not necessarily enter the analysis. Yet the profound challenge to some aspects of feminist thought posed by "difference" critiques requires a careful and nuanced response. Can we describe such reforms, which benefit a particular group of women while they move "other" women further from justice, as either "feminist" victories or "feminist" losses? I would argue that such a description fails to recognize the complexities posed by "difference" critiques and questions the ostensible acceptance of intersectionality by professional legal feminism in Canada.

Illustrations of other unintended effects of feminist activism are visible in the area of criminal law. In the fight for women's right to be free from violence, activists have aligned themselves with institutions like the courts, the police, and the prison system. By critiquing the practices of these institutions and proposing reforms that would benefit some women and perhaps harm others, feminist activists are now implicated in the injustices perpetrated by these systems. Racial injustice is a relatively easy example. Urging stricter police responses, longer prison sentences, and "no drop" policies on a racist system means that all these innovations will have predictably uneven results.

Dianne Martin described how feminist engagement with the criminal justice system has generally not been critical of the systemic racism and classism that lie thinly veiled beneath the criminal law.³⁴ This is not

³³ See e.g. Sedef Arat-Koc, "'Good Enough to Work but Not Good Enough to Stay': Foreign Domestic Workers and the Law" in Elizabeth Comack, ed., *Locating Law: Race/Gender/Class Connections* (Halifax: Fernwood Publishing, 1999) 125.

³⁴ "Retribution Revisited" (1998) 36 Osgoode Hall L.J. 151. One possible counter example is Andrée Côté, Diana Majury & Elizabeth Sheehy, "Stop Excusing Violence Against Women: NAWL's Position Paper on the Defence of Provocation" (April 2000) online: <<http://www.nawl.ca/provocation.htm#Sentences>>. This document urges reconsideration of the entire regime of mandatory minimum sentences based in part on the concern that they will have a

merely about representing women's diverse experiences. It is about seeking and acknowledging places where our self-interest as women may diverge and choosing how to deal with those divergences.

Two questions remain. First, does this critique from difference leave scope for feminist action? Second, does this critique treat feminism unfairly by assigning responsibility for harms not created by feminism?

The first question acknowledges that my critique casts a wide net. If professional legal feminists ought never to act unless their action will improve the situation of all women, then there may be no safe ground. However, my concern is not necessarily about the choices we eventually make. It is about the way we make those choices, the way we attend to the differences among women, and the way we describe the successes and failures of this feminist project. There is no way to avoid the fact that feminist action aims to produce change, and that much of this change will involve shifting entitlements and privileges. In addition, we need to establish some priorities for the attention of professional legal feminism. It would therefore be useful to pay particular attention to the ways in which priorities are set, to acknowledge what those priorities are, and to be prepared to be accountable for the balance that we strike.

Second, this argument does not suggest that feminism is "responsible" for the increasing withdrawal of state support mechanisms. Instead, it urges professional legal feminism to assess critically the implications of its own work, and to be prepared to justify the balance that was struck and why particular arguments were adopted while others were rejected. Certainly feminism did not cause women's poverty, nor does it bear responsibility for the racism that permeates our society. In choosing to recognize and address the problem of essentialism, however, professional legal feminism accepted the argument that issues like justice for the poor and racialized women were feminist concerns. It thereby committed to a process of self-reflection and reform that requires, at the very least, openness about the priorities it sets and the tradeoffs it makes.

This commitment also means that feminism is properly exposed to criticism for failing to adhere to or operationalize the principles of anti-essentialism. Finally, this commitment requires that feminism admit the possibility of its own ambivalence toward the anti-essentialist project and its continued adherence to strains of theory that are incompatible with the recognition of differences—and indeed, conflicts of interest—between and among women.

IV. FEMINISM, FINALITY, AND LAW

I have been arguing that professional legal feminism has a tendency to use its power, internally and externally, to secure victories that benefit subgroups of women. Another viewpoint, however, might focus on the medium of struggle, and point out the fragility of all legal victories. This argument suggests that I may have been wrong to argue that feminism has had notable success, since it questions the possibility of a clear “success.” It also suggests that reviewing the impact of feminism is necessarily an ongoing task rather than one that can be performed with a snapshot. Changes in legal rules may be particularly difficult to classify as successes or failures, since their influence may shift and change over time, and they sometimes end up operating in ways that differ from the intentions of reformers.

This critique points to the bluntness of litigation, which tends to eliminate nuance in order to preserve clarity. As many have pointed out, the process of moulding and arguing a cognizable claim often requires the reading out of peripheral doubts, the reasons behind subtle compromises, and the nuances of positions. Making a claim requires accepting many of the background conditions. Legal challenges may reify and validate their social context, as I discussed above. In addition, litigation-based victories lack solidity. Whether *Charter*-based or grounded in ordinary statutes and the common law, feminist litigation victories contain, as Victoria Nourse describes it, “a kind of built-in, albeit unpredictable, capacity for failure; like the apple harboring the worm, they harbor the possibility of their own undoing.”³⁵ Nourse points to the persistence of “old” norms in the face of legal reform. These norms continue to animate the application of law, finding their way into empty legal spaces and ambiguous texts—and what legal text avoids ambiguity?

There are a number of ways of exposing this phenomenon. One is to look at lower court cases applying statutory and common law changes. Taking this approach, Nourse analyzes three major areas of criminal law in the United States that have traditionally been considered successes for the feminist reform movement: the resistance requirement for rape convictions, marital rape, and the battered woman syndrome defence. She finds ambiguity in each case. Regarding rape, she argues that removing the requirement of resistance has created a “myth of reform,” because of

³⁵ Nourse, *supra* note 1 at 953. See Diana Majury, “Women’s (In)Equality before and after the *Charter*” in Jhappan, *supra* note 4, 101 at 124. Using language similar to Nourse’s, but referring to a specific Canadian context, Majury writes of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the first *Charter* equality case in Canada, “the *Andrews* formulation of equality contained the seeds of its own limitations and inadequacies.”

persisting societal norms about consent to sex.

Somewhat surreptitiously, courts have reached back to the notion of resistance as an indicium of consent.³⁶ In the second instance, the supposed victory over the marital rape exemption has actually been narrow and incomplete. Many U.S. states offer differential punishment depending on the identity of the victim, which tend to lessen punishment for the sexual assault of wives and intimate partners.³⁷ Finally, in the case of the battered woman syndrome defence, what could be considered a straightforward application of the doctrine of self-defence to battered women has been treated as a “special rule” for women.³⁸ In all of these cases, Nourse locates the problem in the persistence of non-feminist societal norms about relationships, which thwart efforts to reform the law.

Nourse concludes that these failures of feminist reform are best described as normal, given that feminism is challenging the content and structure of deeply rooted norms.³⁹

Following the approach of a particular court to the same issue over time should also reveal the persistence of old norms. Reva Siegel has described a phenomenon she names “preservation through transformation,”⁴⁰ in which status hierarchies persist in the face of legal reforms that remove formal supports to these hierarchies. She has written about the legal treatment of spousal assault to demonstrate the ways in which feminist challenges to inequality in marriage have not been able to eradicate that inequality. However, they have been connected to a series of reforms that have produced law that, over time, appeared increasingly disconnected from the status inequality that remained.

Thus nineteenth-century feminist efforts to abolish marital chastisement at law were successful, but subsequently judges avoided interfering with cases of spousal abuse by invoking the idea of marital privacy. Tellingly, Siegel notes racial and class differences in the experiences of women under this new regime:

Women of the social elite might escape husbands who beat them by obtaining a divorce, if they were not deemed blameworthy, and if they were willing to subject themselves and their children to the economic perils and social stigma associated with single motherhood. Women of poorer families might have a husband fined, incarcerated, or perhaps even flogged, if they

³⁶ *Supra* note 1 at 959.

³⁷ *Ibid.* at 957.

³⁸ *Ibid.* at 971.

³⁹ *Ibid.* at 977.

⁴⁰ Reva Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy” (1996) 105 *Yale L.J.* 2117 at 2119.

were willing to turn him over to a racially hostile criminal justice system.⁴¹

By the twentieth century, special courts existed in most U.S. cities to handle domestic violence cases. These courts reflected the belief held by judges, social workers, and police that domestic violence was not properly considered criminal (even though it was at law). Thus, they tended to offer “therapeutic” rather than judicial services.⁴² Siegel concludes that law reformers have to be wary of calling for the elimination of overtly status-based laws, since it is relatively simple and common for elites to retain the effects of the status law without the law itself simply by “[translating] ... it into a more contemporary, and less controversial, social idiom.”⁴³ Thus victory in the courts or the legislature may tell us little or nothing about the norms that guide judges, legislators or other elites, and little or nothing about the extent to which the intended beneficiaries of the reform will actually benefit. Only long-term scrutiny of action can reveal whether feminist ideals lie behind ostensibly feminist reform. As Siegel concludes, “[i]f civil rights reform is to be effective, civil rights law must continually adapt, striving to remain in critical dialogue with the evolving rules and rhetoric of any status regime it aspires to disestablish.”⁴⁴

What these theories suggest is that it would be naïve and possibly disheartening to expect feminist legal victories to “stick.” More realistically, we should expect these victories in court to reveal, over time, the state of social norms and the extent to which these norms diverge from feminist beliefs. The idea that social norms persist in spite of legal victory is not novel,⁴⁵ but it may offer some suggestions in terms of feminist strategizing.

⁴¹ *Ibid.* at 2141.

⁴² *Ibid.* at 2170.

⁴³ *Ibid.* at 2119. Siegel describes the contemporary situation in the United States as one in which law may escape interrogation for its role in inequality: “Under the pressure of [the constitution] ... laws that only recently were cast in race- or gender-specific terms have been revised so that they are now cleansed of any race- or gender-specific references. As a consequence, the persisting race and gender stratification of American life is commonly (and often legally) attributed to ‘the continuing effects of past discrimination,’ rather than to current, ‘facially neutral’ forms of state action” (at 2180).

⁴⁴ *Ibid.* at 2207.

⁴⁵ See e.g. Richard H. McAdams, “Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination” (1995) 108 Harv. L. Rev. 1003 and “The Origin, Development and Regulation of Norms” (1997) 96 Mich. L. Rev. 338; Lior J. Strahilevitz, “How Change in Property Regimes Influences Social Norms: Commodifying California’s Carpool Lanes” (2000) 75 Ind. L. Rev. 1231; Lisa R. Pruitt, “No Black Names on the Letterhead? Efficient discrimination and the South African Legal Profession” (2002) 23 Mich. J. Int’l L. 545; Christopher Jensen, “The More Things Change the More They Stay the Same: Copyright, Digital Technology and Social Norms” (2003) 56 Stan. L. Rev. 531; Robert H. Mnookin & Eleanor Maccoby, “Facing the Dilemmas of Child Custody” (2002) 10 Va. J. Soc. Pol’y & L. 54; Victoria Nourse, “Law’s Constitution: A relational critique” (2002)

Even if professional legal feminists proposed reforms that, in good faith, attempt to address the position of, for example, racialized or disabled women, feminists must realize that amelioration of the position of these women is likely to be resisted even more strongly by elites. All of this suggests again the tremendous importance of monitoring the reception of feminist legal reforms and litigation victories as these are played out in the lives of Canadian women.

V. CONCLUSION

When we attempt to take stock of what feminism, particularly legal feminism, has accomplished in Canada, the discourses produced are more than backwards-looking assessments. They represent important statements of contemporary feminism's view of its role and responsibilities. The story being told is as relevant for the future as for the past. In this article, I have tried to call for greater attention to the complexities of these stories.

As Canadian legal feminism looks back over its decades of engagement with law, questions of our relationship to power—and power relationships between groups of women—must be appraised. In addition, greater attention to the complicated (and perhaps unpredictable) dynamics of law's interaction with social norms might help legal feminism assess its contribution differently.

Ultimately, looking back at what we have done as feminists is one of the most critical parts of the feminist law reform project. There is a great need for careful, critical, reflexive, and constructive evaluation of feminism's impact. My purpose has been to urge caution and reflection when we find ourselves drawn to the narrative of insignificance. In addition to reflecting on when or why we might claim this insignificance, we might also consider the difficulties with assessing the significance of proposed legal reforms. Legal reforms can slip their bonds and have effects beyond those that were intended. The flexibility and deep-rootedness of the norms on which legal reform rests combine to make it particularly and peculiarly unstable. Boyd and Young have provided us with an important warning about how feminist causes in tax and family law are being threatened by countervailing ideologies. Their article also offers feminists an incentive to pursue (again, still, forever) a process of internal renewal that critically re-evaluates our priorities, strategies, and legacy.

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