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From the Selected Works of Kim Brooks

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Why Feminism Matters to the Study of Law

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Queen's University's Faculty of Law is home to Feminist Legal Studies Queen's (FLSQ), a research group that expands awareness and development of scholarship in feminist legal studies, enables the development of feminist legal scholars at Queen's, and fosters connections among feminists with an interest in law. In the fall of 2014, I had the privilege of returning to Queen's Law to give the first seminar in FLSQ's 2014–15 lecture series. I was tasked with providing some reflections on why feminist legal theory matters. Some of the people attending the talk were also enrolled in Queen's Feminist Legal Studies Workshop. The readings assigned for those students were (1) Toni Pickard's (retired Queen's law faculty member) wonderful introduction to law students at Queen's from 1987,¹ (2) Patricia Monture's (a graduate of Queen's) 2004 piece, "Women's Words,"² and (3) Ruthann Robson's (lesbian legal theorist and class critic) piece "To Market, To Market."³ What follows is the text from that talk.

Let me begin by acknowledging that we are gathered on the traditional lands of the Haudenosaunee and Anishinaabe peoples. Feminism is not something you put on or try out like a coat or something you look through like a window or a pair of glasses. It is a dream.

Let me back up to 1985. Michael Jackson and Lionel Richie write "We Are the World," following Band Aid's, "Do They Know It's Christmas?" and sell over twenty million copies. The *Atlantic Accord* captures the arrangements for oil and gas offshore Newfoundland and Labrador.

¹ Toni Pickard, "Is Real Life Finally Happening?" (1987) 2:2 Canadian Journal of Women and the Law 432.

² Patricia A Monture, "Women's Words: Power, Identity and Indigenous Sovereignty" in Patricia A Monture & Patricia D McGuire, eds, *First Voices: An Aboriginal Women's Reader* (Toronto: Inanna Publications and Education, 2009) 116.

³ Ruthann Robson, "To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms" (1995) 5:1 Southern California Review of Law and Women's Studies 173.

Mikhail Gorbachev becomes the general secretary of the Soviet Communist Party. Wham!'s "Careless Whisper" tops the musical charts. Ronald Reagan and Brian Mulroney agree on free trade. Rick Hansen starts his Man in Motion tour. The "Court Challenges" program expands to include the now-effective equality section of the *Canadian Charter of Rights and Freedoms*.⁴ South Africa ends its ban on interracial marriage. Air India Flight 182 explodes over the Atlantic Ocean. Teams led by Jean-Louis Michel and Robert Ballard discover the *Titanic* shipwreck site. Margaret Atwood receives the Governor General's Literary Award for fiction for *The Handmaid's Tale*.

Also in 1985, an editorial board, twelve women strong and twelve unquestionably strong women, publish the first volume of the *Canadian Journal of Women and the Law (CJWL)*. The editorial board was drawn from across Canada's broad geography. The twelve women had their homes in academia, practice, government, and activist circles, not to suggest those are necessarily distinct. Among the editorial board members were Beverley Baines and Kathleen Lahey from Queen's.

The editorial in that first volume credits the idea for the journal to Ruth Lipton, a then law student at the University of Windsor.⁵ The journal expressly embraces interdisciplinarity, profiling in the first volume work by women in history, sociology, education, philosophy, and human rights. The editors boldly claim equality as a concept with meaning for women as well as for men and frame equality with the aim of transformation. In short, 1985 was a big year.

What does it mean to be feminist, to care about the contours of equality, for women and men, with the aim of transformation? In her opening remarks to first year students at Queen's in 1987, Toni Pickard asserts that "it's not as if legal education is all that different from anything else—in fact, its issues, strains, strengths and contradictions are in many ways like those of the legal system itself, like our social/ political life at large, like the issues and contradictions we each have to struggle with as decent and caring people in the world."⁶ What a sentence. And it rings true for feminism. One might quite sensibly say that feminism is not that different from

⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁵ "Editorial" (1985) 1:1 *Canadian Journal of Women and the Law* viii at xi.

⁶ See Pickard, *supra* note 1 at 433.

anything else: it calls out the issues and contradictions we each have to struggle with as decent and caring people in the world.

See also Nancy Folbre, from the Department of Economics at the University of Massachusetts, Amherst. Peering over red-and-white-striped half-glasses, she suggests in her 2013 Clemens Lecture: “[W]e’re accustomed to thinking about feminism as a set of moral values and political priorities ... But it’s not all that’s there ... Feminist theory is a social theory ... [A]n effort to understand gender inequality can teach us something about other forms of inequality and on a more profound level, teach us about what we think is right and what we think is wrong,” which she locates in that lecture in an examination of economic systems.⁷

Katharine Bartlett and Rosanne Kennedy open their 1991 *Feminist Legal Theory* reader,⁸ one of the earliest collections of feminist legal theory work, with a definition that, twenty-five years later, still resonates. It takes the more general approach of the *CJWL* editorial board, an approach that locates feminist legal theory within the contours of equality with the aim of transformation and drives it more squarely into law. They explain that feminist legal theory “draws from the experiences of women and from critical perspectives developed within other disciplines to offer powerful analyses of the relationship between law and gender and new understandings of the limits of, and opportunities for, legal reform.”⁹

What I want to do today is spend some time on that thought: on the connections between issues and contradictions and on what it is to be feminist—as in, what it is to be a decent and caring person in the world, a person who is willing to inhabit a dream, a dream of equality. I want to spend some time laying things out, and then returning to them, rethinking them, and recasting them. I would like to tell you some stories along the way—stories of women, some of whom are feminists; stories as illustrative of the dream of equality, as centring the importance of narrative as feminist method, as a means of laying bare something, often something seemingly small, which can lead us to ask questions and take issue with the way things seem to be. As Patricia Monture reflects, in the context of Indigenous storytelling traditions, “[t]hrough our

⁷ College of Saint Benedict and Saint John’s University Digital Commons, “2013 Clemens Lecture: Woman Up: How Feminist Theory Can Strengthen Economics” (30 October 2013), YouTube <www.youtube.com/watch?v=ssnLVJB3oc8>.

⁸ Katharine T Bartlett & Rosanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* (Boulder, CO: Westview Press, 1991).

⁹ Bartlett and Kennedy, *supra* note 8 at 1.

stories we learn who we are. These stories teach about identity and responsibility ... And sometimes we just tell stories for fun, to laugh, because laughter is healing.”¹⁰

Let me return to Ruth Lipton. The editorial board of the *CJWL* credited Ruth with its origination—Ruth, the law student at Windsor. The *CJWL*, Canada’s only feminist law journal, has published some of the most important articles about law and legal regulation in the last thirty years. That is in part the result of Ruth’s contribution. Think about the move Toni Pickard makes when she urges first-year students to understand themselves as “responsible for the way in which you personally will be creating this community and its practices.”¹¹ Ruth Lipton made a contribution as a law student at Windsor that has affected your lives. That is part of the dream.

Back to 1985 and Margaret Atwood, but, first, an introduction to Ms. Adelle. Ms. Adelle taught me grade eleven English at Humberview Secondary School in Bolton, Ontario. We read Margaret Atwood’s *The Handmaid’s Tale*¹² and Gwendolyn MacEwen’s *Afterworlds*.¹³ MacEwen won the Governor General’s Award for poetry in 1987. She received it posthumously because she died in 1987. Her alcohol addiction may have killed her at forty-six years old or her death may be better explained by a less earthly descent into darkness. Imagine this, from “Let Me Make this Perfectly Clear”:

You actually think I care if this
Poem gets off the ground or not. Well
I don’t care if this poem gets off the ground or not
And neither should you.
All I have ever cared about
And all you should ever care about
Is what happens when you lift your eyes from this page.¹⁴

¹⁰ Monture, *supra* note 2 at 116.

¹¹ Pickard, *supra* note 1 at 434.

¹² Margaret Atwood, *The Handmaid’s Tale* (Toronto: McClelland and Stewart, 1985).

¹³ Gwendolyn MacEwen, *Afterworlds* (Toronto: McClelland and Stewart, 1987).

¹⁴ *Ibid* at 36.

Being in Grade 11, and wanting as high school girls sometimes are to speculate, we talked a lot about Ms. Adelle. Someone thought she had been married once. We heard she had a horrible divorce. We were pretty sure she was a lesbian. Certainly, she had short hair. She loathed when you used the word “nice” in your writing. And she insisted we read Atwood and MacEwen with care. We were pretty sure *The Handmaid’s Tale* and *Afterworlds* were not required books on the Grade 11 curriculum. I have a vague recollection that some of my friends’ parents called the school to complain. Ms. Adelle never faltered. We read the books. We talked about what they meant. She was seemingly unmoved by our uncertainty or discomfort about classroom discussions of women’s lives and what we could learn of those lives by a close reading of these texts.

I loved Ms. Adelle—privately. Separately, and additionally, she terrified me. I never asked her about her life outside literature, and she granted me the same grace. After I graduated from high school, I wrote her a hand-written letter in December each year. (Ms. Adelle had views about the necessity of writing letters by hand.) She wrote back, by hand, each year. Her letters set out what she was reading, and I learned about her through her books from 1991 until 2010. In 2011, before December, she died of cancer. I never saw her in person after high school. But I know that her world admitted the insights of Shani Mootoo’s *Cereus Blooms at Night*,¹⁵ Barbara Gowdy’s *The White Bone*,¹⁶ and Eden Robinson’s *Monkey Beach*.¹⁷

Ms. Adelle was unabashedly feminist. She wore feminism like a dream for what was possible in women’s lives. And when we talked about Margaret Atwood and Gwendolyn MacEwen in Grade 11 she introduced us to that dream.

I should talk about whether you can have it all, which is something of a preoccupation of feminists of my generation, perhaps yours too, who find themselves in law. I love Laurie Penny’s

¹⁵ Shani Mootoo, *Cereus Blooms at Night* (Vancouver: Press Gang, 1996).

¹⁶ Barbara Gowdy, *The White Bone: A Novel* (Toronto: HarperCollins Canada, 1998).

¹⁷ Eden Robinson, *Monkey Beach* (Toronto: Alfred A Knopf Canada, 2000).

articulation of what “it all” entails in her Salon article, “[m]ainstream feminism is tepid and cowardly”:

The women of my generation were told that we could ‘have it all’, as long as ‘it all’ was marriage, babies and a career in finance, a cupboard full of beautiful shoes and terminal exhaustion – and even that is only an option if we’re rich, white, straight and well behaved.¹⁸

I have no idea what “it all” is, or why, if it is a career and family, we should want it. I can speak only to my experience of being radically mid-life, assuming that life will extend me the actuarially expected number of years, which is to reflect that it is all undoubtedly hard.

Don’t get me wrong. If you are lucky, you have already learned that you are living a great life—a charmed life. That during your time in law school you have the opportunity to think deeply about intrinsically interesting topics. You are able to engage in discussions about some of the world’s most complex problems, problems that have troubled feminists for generations. And that you have views about those problems and you can defend them. When you graduate, odds are good that you will have careers that challenge and engage you.

Your life will be hard, though, because you will spend at least some of it, hopefully much of it, tilting at enormous problems. You will fail in this pursuit, not because you are not good enough, or trying hard enough, or smart enough but, rather,

- because you are entering a profession that fails to service huge communities of people—middle-class people, people with mental disabilities, immigrants and new arrivals to Canada, non-English speakers, and myriad other communities—well;
- because we live in economic times that are tough for a lot of people—a time when businesses falter and people lose their jobs;

¹⁸ Laurie Penny, “Mainstream Feminism Is Tepid and Cowardly: Work, Sex, Race, ‘Having It All’ and True Liberation,” *Salon* (14 September 2014), Salon <www.salon.com/2014/09/14/mainstream_feminism_is_tepid_and_cowardly_work_sex_race_having_it_all_and_true_liberation>.

- because the environment continues to be battered by our destruction of resources and the extinction of wildlife; and
- because we continue to live in a world that tolerates sexual and other violences.

Given even a small snapshot of this context, how could you possibly have it all? I have not even started on what will happen in your personal life. Of course, that will be a mess.

But here is what feminism promises you: examples of person after person who, in the face of all of that—the exhaustion, the challenges, the pressures, and the disappointments—get up the next day, put their head back down, and try again. And, as feminists, decent and caring people, I promise there will be moments in your life that will be so extraordinary that you will wonder how you got so lucky. And when you have those moments, stop, get a coffee, revel. Whatever “it all” is, I have no idea why anyone thinks we are in a position to ask for it. And I can assure you, if you are a feminist, you will not get it. Set your sights on coffee instead.

Let’s talk about Elizabeth Sheehy. Liz graduated from Osgoode Hall Law School in 1981 with her LLB and from Columbia’s law school in 1984 with an LLM. She was the first holder of the Shirley Greenberg Chair for Women in the Legal Profession at the University of Ottawa from 2002 to 2004 and she returned to the chair, holding it again from 2013 to 2015. Liz is brilliant. She teaches criminal law and all of its related topics. She has received the Excellence in Teaching Award from the Common Law Students’ Society at the University of Ottawa. She is a member of the Law Society of Upper Canada and received an honorary degree from them. She is a member of the Royal Society. She served as intervener co-council in *R. v JA*,¹⁹ and she has been engaged in the drafting of intervention materials in *R. v Ryan*,²⁰ *R. v NS*,²¹ *R. v Ewanchuk*,²² *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*,²³ and

¹⁹ *R v JA*, 2011 SCC 28, rev’g 2010 ONCA 226, aff’g 2008 ONCJ 195.

²⁰ *R v Ryan*, 2013 SCC 3, rev’g 2011 NSCA 30, rev’g 2010 NSSC 114.

²¹ *R v NS*, 2012 SCC 72, aff’g 2010 ONCA 670, rev’g in part (2009) 95 OR (3d) 735.

²² *R v Ewanchuk*, [1999] 1 SCR 330, rev’g 1998 ABCA 52.

²³ *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (ONSC).

Mooney v British Columbia (AG).²⁴ She has authored briefing materials on a wide range of legislative reform topics. She raised a crackerjack kid, now an adult, Fregine.

I am confident that even with this profile, which includes among it every marker of academic success and all of the incidents of belonging to an often highly elitist academic community, Liz has not “had it all,” or if she thinks she has, I can guarantee there have been moments when it has not been pretty. In 2014, Liz published *Defending Battered Women on Trial*.²⁵ Liz starts the introduction in Kingston in 1826, with the early guiding case on the use of violence against women by their husbands, *Hawley v Ham*.²⁶ She builds through to *R. v Lavallee*,²⁷ a case authored at the Supreme Court of Canada by Justice Bertha Wilson, our first woman on the Supreme Court of Canada, who was elevated to the Court in 1982. In *Lavallee*, the Court affirmed a reinterpretation of self-defence that recognized the experience of women in situations of domestic violence and that identified the stereotypes about women in abusive relationships that had previously prevented them from using self-defence.

Imagine this work. In *Defending Battered Women on Trial*, Liz carefully chose eleven cases, from 1990 to 2005, where women were charged with killing their male partners. She reviewed all of the case material and meticulously read all of the transcripts. In her book, which includes one hundred pages of fine-print endnotes, she thoroughly documents each woman’s engagement with the law. Listen to Liz’s concluding paragraph:

Battered women’s moral courage deserves our respect. While other vigilantes might escape criminal condemnation and are often seen as folk heroes, battered women are rarely treated in this manner. Elisabeth Ayyildiz argues that a battered woman should be hailed as “a defender of justice, one repairing the moral order when the state has failed to do so.” When women kill to save their own lives, they assert that they matter, that their lives count—even more than the lives of their abusers. After everything that their batterers have done to them, told them, and called them, after

²⁴ *Mooney v British Columbia (AG)*, 2004 BCCA 402, aff’g 2001 BCSC 419.

²⁵ Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014).

²⁶ *Hawley v Ham*, [1826] OJ No 45 Tay 385 (Upper Canada Court of King’s Bench) (Campbell CJ & Sherwood J).

²⁷ *R v Lavallee*, [1990] 1 SCR 852.

their own efforts to please, to placate, to abnegate themselves to meet the unreasonable demands of petty tyrants, they have somehow taken a stand for their own humanity and saved themselves. And for this we should also be grateful.²⁸

Look at the beauty of where Liz's work takes her. Feminist theory provides a space where we can dream humanity where it was occluded. It offers us a chance to open our eyes to something unseen, perhaps deliberately.

Now listen to what feminist legal theorists, such as Liz, who create this dream for us face. Barbara Kay at the *National Post* opens her article about Liz's work with the title: "Barbara Kay: Prof Makes Bizarre Plea to Place Battered Women above the Law." The opening sentences include the following: "When ideology takes up the brain space normally reserved for reason and the golden principle of equality under the law, the very best minds can go AWOL. That seems to be the case with University of Ottawa law professor Elizabeth Sheehy."²⁹ Robin Urback, also of the *National Post*, steps in ten days later to ask the apparently vital question, "what about men who are chronically abused by the women in their lives?"³⁰ Five days later George Jonas, again in the *National Post*, is back at Liz as part of a longer anti-equality rant, stating:

Special interest groups trying to exclude parts of the community from the ordinary protection of the law—as feminists try to exclude men, socialists try to exclude the rich, and socialist-feminists try to exclude both—promote lawlessness. BWS [battered woman syndrome] is BS [translation less necessary]. Compensatory justice isn't the end of existence, only the rule of law.³¹

²⁸ Sheehy, *supra* note 25 at 319.

²⁹ Barbara Kay, "Barbara Kay: Prof Makes Bizarre Plea to Place Battered Women Above the Law," *National Post* (13 December 2013), National Post <fullcomment.nationalpost.com/2013/12/13/barbara-kay-prof-makes-bizarre-plea-to-place-battered-women-above-the-law>.

³⁰ Robyn Urback, "Robyn Urback: Some Battered Women Can't 'Just Leave'—Canadian Law Already Recognizes That," *National Post* (23 December 2013), National Post <fullcomment.nationalpost.com/2013/12/23/robyn-urback-some-battered-women-cant-just-leave-canadian-law-already-recognizes-that>.

³¹ George Jonas, "George Jonas: of Lady Justice and Robin Hood," *National Post* (28 December 2013), National Post <fullcomment.nationalpost.com/2013/12/28/george-jonas-of-lady-justice-and-robin-hood> [translation by author].

By 6 January 2014, A Voice for Men is into the game, circulating a petition protesting “the spread of mortal violence against males” being propagated by Liz, who they state, “wants to legalize murdering men.”³² And so it goes. Feminism is work that doesn’t garner thank yous.³³ And it doesn’t garner them because we live in a world where some people profoundly hate women.

There are ways in which feminist projects, supported by feminist legal theory, have not gained traction in our own educational spaces and workplaces: law schools. Let me provide two relatively easy examples. While many courses now include explicitly feminist materials, or challenge the hegemony of legal fictions such as the “reasonable man,” the curriculum itself is fundamentally the same as it was decades ago. The first year program provides a reasonable illustration. Most law schools continue to offer the standard cluster of first-year courses: contracts, property, torts, and criminal law. They vary on the fifth and sixth courses, offering a mix, but not a wildly unpredictably mix, of legal institutions, public law, constitutional law, legal foundations, and legal research and writing. Feminist legal scholars have argued for decades in favour of reframing those classical boxes and of focusing our sense of the fundamentals of law

³² Dean Esmay, “Protesting the Spread of Mortal Violence by Law Professor Elizabeth Sheehy,” *A Voice for Men* (6 January 2014), A Voice for Men <www.avoicemen.com/allbulletins/protesting-the-spread-of-mortal-violence-by-law-professor-elizabeth-sheehy>.

³³ Always willing to care for and about women who have survived and are surviving violence, Liz ably responded to these attacks. See Elizabeth Sheehy, “Elizabeth Sheehy: the Law, and History, Speak for Themselves,” *National Post* (17 December 2013), National Post <fullcomment.nationalpost.com/2013/12/17/elizabeth-sheehy-the-law-and-history-speak-for-themselves>; Elizabeth Sheehy, “Fairness for Battered Women: Re: Victims of Abuse Are Not Above the Law, Robyn Urback, Jan. 3” in Paul Russell, “Today’s Letters: ‘The Next Time They Might be Carrying Guns or Bombs,’” *National Post* (8 January 2014), National Post <fullcomment.nationalpost.com/2014/01/08/todays-letters-the-next-time-they-might-be-carrying-guns-or-bombs>; Interview of Elizabeth Sheehy by Anna Maria Tremonti (19 December 2013) reprinted in “Do Abused Women Have the Right to Kill Their Abusers?” *The Current*, CBC Radio, Ottawa, The Current Archives (podcast), <www.cbc.ca/radio/thecurrent/dec-19-2013-1.2908920/do-abused-women-have-the-right-to-kill-their-abusers-1.2908923>.

around the lived experience of the real people for whom justice might be sought, instead of around the shape of the legal doctrines that have emerged. So, a first-year curriculum might instead be taught through the lens of money, violence, and work, for example.

There are a whole host of reasons why you shouldn't expect to see that kind of transformation soon—from the institutional stickiness of casebooks to the general risk aversion of the legal profession. Nevertheless, feminists have asked us to look at the world differently: not as lawyers imposing the law on people but, rather, as people who care about people, learning law in a way that reflects the needs of those real people and the public policy dilemmas we face as a community.

Let me set up my second example by introducing Ruthann Robson. Ruthann writes in a way that reaches into your heart and mind at the same time and squeezes. After a few hours with her work, I feel juiced. She calls to mind two important topics for feminist discussion: one, our practices of policing one another and, two, our adventures down mistaken paths. On the first, Ruthann captures her fascination succinctly, writing: “I have long been interested in the ways in which we police each other with the best of intentions.”³⁴ In the context of her article “To Market, to Market,” she is talking about the ways in which we reinforce certain class norms and standards, without expressly acknowledging those underlying norms. In the article, she provides a typical law school hypothetical. An applicant appears for a job interview at a law firm. The applicant does not get the position because she is “dressed inappropriately.” Is it discrimination if she is dressed in a sari? If the applicant is a woman wearing a man's suit? And what if the applicant is wearing a dress made by her mother, that is “pink and satiny and has rickrack stitched on its borders.”³⁵ According to Ruthann, when she raises this hypothetical in class, students see the discrimination where the dress is interpreted as cultural, ethnic, or religious, and they usually see it if the clothing challenges gendered assumptions, but where the clothing is “classed,” the discrimination is less obvious. Students are quicker to argue that the clothing is not appropriate because it will be perceived negatively by judges or clients. In this way, we police each other. Ruthann carries on this theme in “To Market,” talking about how we ask each other to engage in the right kind of way, wear the right kind of clothes, observe the right kind of politics. Even with our best intentions, with our hope that we will remain open to the possibilities

³⁴ Robson, *supra* note 3 at 174.

³⁵ *Ibid* at 175.

of others, we wear our preconceived notions about the world with ease, and they are hard to see and to step away from.³⁶

Second, Ruthann asks us to see the ways in which we have, as feminist theorists, travelled down unhelpful paths.³⁷ Feminism offers us the chance to open our minds to new possibilities and to admit we were wrong. I confess that as feminists—perhaps, I speak just for myself—we can tend to the strident, which is a natural response to being told that we are wrong or that we miss-tell the truth when we use feminist theory to bring to light practices that run counter to the dream of equality. So, let me turn to a second illustration of how we haven't had traction in law schools and perhaps give some scope to the possibility that we can change our minds.

Go to the bathroom at law school. If you have lived a gender-conforming life, if you didn't arrive at the law school until after the 1980s, or if you have not read a lot of feminist theory, you may not know that you are in a hotly contested regulatory space. In 1986, Christine Boyle wrote an article published in *CJWL* entitled “Teaching Law As If Women Really Mattered, or, What About the Washrooms?”³⁸ Boyle taught me contract law in first year and evidence law in second year at the University of British Columbia's (UBC) Faculty of Law. She was electric in a classroom. She would scowl at us when we offered up inadequate answers, raise her right hand to her face, and rest her index finger over her top lip. She could stare for what seemed like hours waiting for someone to offer up something, anything, helpful. She loved referring to conversations as “intercourse,” having just a bit of the cheek in her. She was the only professor I went to ask a question to in first year. I asked her what a “head of damage” was in April of first year, after eight months in law school. She looked at me for a long time and eventually said “a category of damages.” She raised her index finger over her lip. I left her office.

Embedded in the middle of the article, Christine asks some questions about what we can learn about the priority of women in the institutional signals sent by law school washrooms: “[w]hat is the graffiti like in the washroom? Where are the washrooms? Is the faculty washroom

³⁶ *Ibid.*

³⁷ *Ibid* at 183–84.

³⁸ Christine Boyle, “Teaching Law as If Women Really Mattered, or, What About the Washrooms?” (1986) 2:1 *Canadian Journal of Women and the Law* 96.

male?”³⁹ A little over ten years later, Christine Overall, a philosopher here at Queen’s produced: “Public Toilets: Sex Segregation Revisited.”⁴⁰ In that piece, she uses public toilets as a vehicle for exploring the way we manage the urban environment to support sex segregation. She does a wonderful job of exploring each argument in favour of sex-segregated public washrooms, finding each to be wanting. While some universities have made some strides in thinking about toilets; as feminists, we have made surprisingly little difference in their institutional presence. Most notably, and well documented, sex-segregated toilets cause harm to gender non-conformists. Women in the women’s washroom are often stared at by other women who assume they are men. Think of the moment when you are standing at the sink, washing your hands, and another woman comes in, looks at you, and goes back out to look again at the little person in the dress on the door to make sure she is in the right place. You don’t look like that little person on the door. (For the record, no one does.) Trans-people, gender-queers, and anyone else who does not meet rigid notions of gender conformity are forced to confront sex every time they need to pee.

It seems so easy to imagine gender-irrelevant washrooms: individual stalls, drop the doors to the floor. The general step taken by most universities these days is to have a washroom somewhere in the building that bears the welcoming title: “A Washroom for Everyone.” There is often a wheelchair accessible symbol on it and the mixed/women/men sex symbol. Gloriously, it is a washroom for everyone. Or, maybe it is “A Washroom for Everyone Else.” It is wheelchair accessible and private. If you’ve been in it, though, you will know that it is the best washroom in the building. That’s not a great secret—it is where everyone goes when they want a little time to themselves, which often makes it the most used washroom in the building. Why can’t they all be like that?

Frustrated by my own inability to adapt our law school building so that every washroom could be a washroom for everyone—seems easy, yes?—I emailed my feminist colleagues at other institutions to see why this particular problem was so hard to resolve. I was surprised by the answers: women do not like to deal with menstruation in stalls next to men, they do not feel safe sharing washrooms, and, most fundamentally, they assert that men’s washrooms are filthy. I

³⁹ *Ibid* at 101–2.

⁴⁰ Christine Overall, “Public Toilets: Sex Segregation Revisited” (2007) 12:2 *Ethics & the Environment* 71.

have not been in a men's washroom. But I have been in the washroom for everyone, and it is amazing. And we could pay for more janitorial support. In the calculus of equality interests, and in light of the violence of being forced into sex-conforming roles that do not fit, surely we could live with a little dirt.

I want to talk about feminist professors, feminist students, and the ways in which feminist legal theory has made a real difference to real people. When Queen's Law started in 1957, it had no women professors. Irene Bessette, the faculty's first full-time librarian, joined in 1968. 1970 saw the arrival of Toni Pickard, Gail Brent found her way to Queen's in 1971, and Bev Baines arrived in 1974. Brent left in 1974, leaving the faculty with three women in a faculty complement of over thirty.⁴¹

Today, there is no shortage of great feminist legal theory to read by women who are appointed at Canadian law schools. Pick up anything by Jennie Abell, Annalise Acorn, Wendy Adams, Elizabeth Adjin-Tettey, Natasha Affolder, Efrat Arbel, Constance Backhouse, Reem Bahdi, Jane Bailey, Martha Bailey, Bev Baines, Natasha Bakht, Marie-Claire Belleau, Janine Benedet, Stephanie Ben-Ishai, Adelle Blackett, Jennifer Bond, Suzanne Bouclin, Susan Boyd, Ruth Buchanan, Sarah Buhler, Marie-France Bureau, Karen Busby, Rosemary Cairns-Way, Gillian Calder, Angela Cameron, Camille Cameron, Angela Campbell, Nathalie Chalifour, Kathy Chan, Jennifer Chandler, Frances Chapman, Mary Childs, Patricia Cochran, Lynda Collins, Mary Condon, Brenda Cossman, Carys Craig, Elaine Craig, Emma Cunliffe, Deborah Curran, Catherine Dauvergne, Maneesha Deckha, Nathalie Des Rosiers, Jocelyn Downie, Susan Drummond, Isabelle Duplessis, Donna Eansor, Joanna Erdman, Angela Fernandez, Michelle Flaherty, Pascale Fournier, Kerri Froc, Shelley Gavigan, Elaine Gibson, Daphne Gilbert, Joan Gilmour, Isabel Grant, Donna Greschner, Vanessa Gruben, Brenda Gunn, Margaret Hall, Gail Henderson, France Houle, Julia Hughes, Martha Jackman, Rebecca Johnson, Alana Klein, Freya

⁴¹ Mark D Walters, "'Let Right be Done': A History of the Faculty of Law at Queen's University" (2007) 32:2 Queen's Law Journal 314 at 350, Queen's University, <<http://law.queensu.ca/sites/webpublish.queensu.ca.lawwww/files/files/About/historyQueensLaw.pdf>>.

Kodar, Jennifer Koshan, Shauna Labman, Kathy Lahey, Lucie Lamarche, Louise Langevin, Nicole LaViolette, Michelle Lawrence, Sonia Lawrence, Hester Lessard, Jamie Liew, Mary Liston, Maggie Little, Jennifer Llewellyn, Sarah Lugtig, Vanessa MacDonnell, Audrey Macklin, Diana Majury, Kathleen Mahoney, Charlene Mandell, Isabelle Martin, Sharon Mascher, Carissima Mathen, Nancy McCormick, Jena McGill, Heather McLeod-Kilmurray, Janet Mosher, Judy Mosoff, Mary Jane Mossman, Claire Mumme, Ronalda Murphy, Roxanne Mykitiuk, Val Napoleon, Vrinda Narain, Jenny Nedelsky, Tara Ney, Wanjiru Njoya, Shannon O’Byrne, Valerie Oosterveld, Julie Paquin, Mona Paré, Debra Parkes, Karen Pearlson, Patricia Peppin, Lisa Philipps, Tina Piper, Marilyn Poitras, Janna Promislow, Melanie Randall, Denise Réaume, Kerry Rittich, Annie Rochette, Carol Rogerson, Rakhi Ruparelia, Kate Sutherland, Amy Salyzyn, Janis Sarra, Teresa Scassa, Nicole Schabus, Jennifer Schulz, Dayne Scott, Sara Seck, Martha Shaffer, Elizabeth Sheehy, Colleen Sheppard, Heather Shipley, Penelope Simons, Zoë Sinel, Colleen Smith, Gemma Smyth, Gabrielle St-Hilaire, Joanne St. Lewis, Saul Templeton, Lorna Turnbull, Lucinda VanderVort, Shauna Van Praagh, Jonnette Watson-Hamilton, Wanda Wiegers, Faye Woodman, Alice Woolley, and Margot Young. I’m sure I am missing people. And that is just the list of feminist academics who are currently on faculties at Canadian law schools. It does not include any of our outstanding retired colleagues, nor does it include feminist interdisciplinary scholars whose work intersects with law.

The feminist legal theory work in Canada was already voluminous enough to fill an annotated bibliography compiled by Susan Boyd and Elizabeth Sheehy in 1989.⁴² In the ten years between 1989 and 1999, enough additional material was published that they put together a second, truly massive annotated bibliography, joined by Josée Bouchard.⁴³ The material in the area of Canadian feminist legal theory is so thick that you could not read it all in a lifetime. There are, however, some familiar threads in discussions undertaken by feminist legal theorists. We bemoan the conservatizing force of working in a system deliberately designed to encourage incrementalism over transformation, we tease out the tensions between advocating for an

⁴² Elizabeth A Sheehy & Susan B Boyd, *Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings* (Toronto: Resources for Feminist Research, Ontario Institute for Studies in Education, 1989).

⁴³ Josée Bouchard, Susan B Boyd & Elizabeth A Sheehy, *Canadian Feminist Literature on Law: an Annotated Bibliography, 1988–1998 in English* (Toronto: Canadian Journal of Women and the Law, 1999).

individual client and legal work that will ameliorate the conditions of a group of marginalized peoples, we agonize about whether law is an effective tool to effect social change, and we regret the tendency of feminist theory to privilege the voices of some women over others—academic feminists over grassroots feminists, white women over racialized women, rich women over poor women, straight women over queers, and so on.

Let me return to 1985. Each of the highlighted events in 1985 yields legal issues calling for feminist legal theory's insights—natural resource extraction, so-called terrorism, copyright, international trade, disability rights, equality jurisprudence, property rights, and racism. Every news item offers up something for law and, as a result, offers scope for work by feminist legal theorists. Look at the work taken on by feminists at Queen's law. Consider:

- Allison Harvison Young's work on the norms of exclusivity in family law;
- Anita Anand's work on representativeness of corporate boards;
- Bev Baines work on secular citizenship;
- Bitu Amani's work on the stake we all have in the development of intellectual property law;
- Cherie Metcalfe's work on indigenous environmental rights;
- Gail Brent's work on the participation of Canadian women in public life;
- Hilary Young's work on defamation damages;
- Kathleen Lahey's work on gender-based budgeting;
- Lisa Dufraimont's work on offence-based challenges for cause in cases of violence against women and children;
- Lynne Hanson's work on the interaction between feminism and Dworkin's theory of interpretive concepts;
- Martha Bailey's work on the regulation of cohabitation and marriage;
- Patricia Peppin's work on what feminism can show us about the pharmaceutical industry;
- Rosemary King's work on violence against women in Ghana;
- Rosemary Rafuse's work on climate change;
- Sarah's Slinn's work on structuring reality in the collective bargaining context so that the law will follow;

- Sharryn Aiken's work on national security and Canadian refugee policy;
- Sheila McIntyre's work on systemic inequality in laws proscribing sexual offences;
- Sheila Noonan's work on the relationship between the foetus and the woman;
- Tanya Monestier's work on class actions;
- Toni Pickard's work on culpable mistakes and rape;
- Virginia Bartley's work on immigration and refugees; and
- Wanjiru Njoya's work on stakeholders in corporate governance.

Not all of this work, which spans tax and intellectual property and criminal law and environmental law, is explicitly feminist, but I think that it is all informed by a feminist ethic, and certainly it all borrows insights from feminist legal theory. And this list is just a start on the kinds of work produced by feminist theorists here at Queen's. It undoubtedly misses people, and it certainly misses men. I embrace the view that men can be feminist, although I think they need to work hard at it because the world is so busy socializing men to devalue equality. And given the continued prominence of men's work, I am not going to spend more time on it here.

My grandmother died in 2013. She was ninety-seven years old. She was raised by a single mother, along with her sister and two brothers, largely in rural Alberta. Her family never had any money. Her siblings were significantly older than she was and had moved away from home for most of my grandmother's childhood. My grandma moved with her mother from one small one-room teacherage to the next. Sometimes, when there wasn't enough money to feed her, my grandmother was sent to stay with relatives for a time. She eventually went to normal school, what they called teacher's college in those days, and became a teacher herself. She spent most of her adult life earning a living teaching kids with a variety of disabilities.

My grandmother was the smartest person I have ever met. When I was in Grade 13, I took calculus. The subject eluded me. So much so that my mother, who was also a teacher, marched me into the math teacher's office and insisted that I be kept after school to work on calculus, lest I fail the course. In December, our family flew from Toronto to Rutland, just outside of Kelowna, British Columbia, where my grandmother lived. Preparing for January's

high-school calculus exam, I sat up most nights struggling with the calculus textbook. I suspect (in fact, I know) I cried a few times. After a couple of nights, my grandma asked me what I was doing, and I explained. She asked if I minded if she took a turn at it. I passed over the textbook and went to bed. When I got up the next morning, there she was, still at the table. “I think I’ve figured it out,” she said. And she had. She’d taught herself calculus that night.

It is hard to figure out how to say this in a way that pays tribute to the work my grandmother did, which was important work, essential work. Perhaps my father said it best at her memorial, when he said, without insult to the great difference my grandma had made in her lifetime: Imagine what she could have done. Without the strictures of her sex, without the limits of poverty, without the pressures of a rural life, my grandmother could have changed the world. So, law school was not an option for my grandma. She was born in 1915, and if she had gone to law school at the average age, she likely would have been part of the class of 1941. Queen’s did not have a law school in 1941, so I have to borrow from Dalhousie. At Dalhousie, there were no women in the class of 1941, although our first female graduate, Frances Fish, had graduated quite some time before that, in 1918.

Dalhousie’s graduating class for 1941 had twenty-four men. They had short hair, longer at the top than on the sides. Moustaches were decidedly out, although the dean, ever out of step with fashion as deans are, sported one. George Curtis was teaching at Dalhousie in 1941. He later went west to start UBC’s Faculty of Law. He was greatly influenced in his thinking by one of the graduates in the class of 1941—George Tamaki. George Tamaki was from Vancouver. In the 1930s, British Columbia prohibited Japanese people from being members of the bar. Tamaki applied to Dalhousie. The dean at the time, Vincent MacDonald, moustache sporter, was reportedly worried that if the school admitted Tamaki, and Tamaki went back to British Columbia, the BC government would be embarrassed, angry, or both. George Curtis and the other new recruit to our faculty, John Willis, met with the dean. They reportedly said that if Tamaki wasn’t admitted, the two men—Curtis and Willis—planned to finish teaching the term and then leave Dalhousie.⁴⁴

⁴⁴ Agnes Huang, “Dean Emeritus George Frederick Curtis: His Stories Are Endless and Timeless” (November–December 2003) 1:2 *The Legal Eye* 1 at 7, *The Legal Eye* <faculty.law.ubc.ca/legaleye/PDF/LegalEye%20-%202003Nov.pdf>.

Tamaki was admitted. He led the class every year and ended up as the gold medalist. He became one of this country's greatest tax practitioners. But he never went back to British Columbia. Look around now. When Queen's Law opened in 1957, the student body had twenty-three men and one woman, not to go all gender-binary on you. Sometimes we think that we don't live in revolutionary times, and I ask you to reconsider that. In 1941, it would have been inconceivable for my grandmother to go to law school, and it was precluded in some provinces for George Tamaki. The make-up of students in law school has changed dramatically in living memory. You ride the cusp of transformation.

It is comfortable to sit as a critical observer on the sidelines. It is so much harder, of course, to accept responsibility for change. Think Toni Pickard. She reflects that "[l]aw has the life and meaning its practitioners give it every day (and by practitioners, I do not mean only judges, legislators, and lawyers but also police, administrative agency personnel, arbitrators, political leaders, mediators, prison officials, building inspectors and now I mean you too). Every choice each legal practitioner makes helps create the current fabric of what law actually is."⁴⁵ More emphatically, she claims: "Whether the law (legal education) can become richer and more textured and more responsive to the rapidly changing complexion of Canadian society or not will depend on who you are, what you do, what you care about, stand up for, commit yourselves to, and resist. Or not. Every step of the way. Starting now."⁴⁶ It is a terrifying charge. And if you accept it, you inhabit the dream. Let me suggest that in the moments when you wonder what you can do, that you channel George Curtis, perhaps, and think about what it would be like to put something significant at stake for something you care about—the dream of equality, say.

I have talked about what we might understand as the aspiration of feminist legal theory, offered a nod to how we find ourselves brought into its dream, displaced the narrative that our work as feminist legal theorists might lead to a happy or easy existence, illustrated the resistance feminist

⁴⁵ Pickard, *supra* note 1 at 434–35.

⁴⁶ *Ibid* at 435.

legal theory receives, revealed a few places where our efforts have not had traction or have been misplaced in the law school context, celebrated the achievement of bringing women to legal education, and underscored the rich range of substantive areas where we have made considerable contributions in feminist legal theory scholarship. What remains is to show you how feminist legal theory can effect law reform. Let me use two feminist professors at Queen's to illustrate.

Sheila McIntyre recounts the story of the consultation process that shaped Bill C-49 in a chapter in Julian Roberts and Renate Mohr's book *Confronting Sexual Assault: A Decade of Legal and Social Change*.⁴⁷ Bill C-49 was legislation in 1992 that introduced a new test for whether a complainant's sexual history may be admitted at trial; defined consent for the purpose of sexual assault offences; and restricted the defence of mistaken belief in consent in sexual assault.⁴⁸ Sheila's chapter chronicles the coalition building by Canadian women that resulted in law reform that many have suggested transformed our sexual assault laws in progressive and feminist ways, if not perfectly.

I was teaching here at Queen's when Kathleen Lahey was instrumental in the work around same-sex marriage in Canada. I was in my first year or two, and keeping long hours in my office, desperately trying to learn something about law, enough, at least, so that I was a day or two ahead of the students. Kathy was also here keeping long hours—writing and drafting facts and photocopying. (One of the glorious jobs of feminist activism is learning how to work a photocopier.) There was often a gaggle of students around, too, revelling in the chance to ride legal change. Kathy theorized same-sex marriage, wrote scholarship about it,⁴⁹ discussed it with students, litigated some of the court challenges in British Columbia⁵⁰ and at the Supreme Court of Canada,⁵¹ and eventually was able to celebrate changes to the law. While one person is never

⁴⁷ Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

⁴⁸ *An Act to Amend the Criminal Code (sexual assault)*, SC 1992, c 38.

⁴⁹ See Kathleen A Lahey & Kevin Alderson, *Same-Sex Marriage: The Personal and the Political* (Toronto: Insomniac Press, 2004); Kathleen A Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999); Status of Women Canada, *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat 'Equivalent'*, by Kathleen A Lahey, Catalogue no SW21-82/2001 (Ottawa: Status of Women Canada, 2001).

⁵⁰ *Barbeau v British Columbia (AG)*, 2003 BCCA 251, rev'g 2001 BCSC 1365 (CanLII).

⁵¹ *Reference re Same-Sex Marriage*, 2004 SCC 79.

responsible for anything alone, if there was a hub for the same-sex marriage moment in Canada, it was Kathy's office, and her enormous efforts resulted in the same-sex marriage victories.

I should end by saying thank you. Thanks to Kathy and Bitá for organizing this series. When Kathy first emailed me about the series, about a year ago, I knew it would be a pleasure to come back to Kingston. What I wasn't expecting was how grateful I would be for the excuse to spend some time thinking about what feminist theory brings to law. It has been a particular honour to do that in your company. I think of feminism not as something we wear or see through, but as the dream we inhabit. When we inhabit that dream together, it is all the more glorious. You have my thanks.