A Companion to Philosophy of Law and Legal Theory

Second edition

Edited by

Dennis Patterson

A John Wiley & Sons, Ltd., Publication

This edition first published 2010
© 2010 Blackwell Publishing Ltd

Edition history: Blackwell Publishing Ltd (1e, 1996)

Blackwell Publishing was acquired by John Wiley & Sons in February 2007. Blackwell's publishing program has been merged with Wiley's global Scientific, Technical, and Medical business to form Wiley-Blackwell.

Registered Office
John Wiley & Sons Ltd, The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, United Kingdom

Editorial Offices
350 Main Street, Malden, MA 02148-5020, USA
9600 Garsington Road, Oxford, OX4 2DQ, UK
The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, UK

For details of our global editorial offices, for customer services, and for information about how to apply for permission to reuse the copyright material in this book please see our website at www.wiley.com/wiley-blackwell.

The right of Dennis Patterson to be identified as the author of the editorial material in this work has been asserted in accordance with the UK Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, except as permitted by the UK Copyright, Designs and Patents Act 1988, without the prior permission of the publisher.

Wiley also publishes its books in a variety of electronic formats. Some content that appears in print may not be available in electronic books.

Designations used by companies to distinguish their products are often claimed as trademarks. All brand names and product names used in this book are trade names, service marks, trademarks or registered trademarks of their respective owners. The publisher is not associated with any product or vendor mentioned in this book. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold on the understanding that the publisher is not engaged in rendering professional services. If professional advice or other expert assistance is required, the services of a competent professional should be sought.

Library of Congress Cataloging-in-Publication Data

A companion to philosophy of law and legal theory / edited by Dennis Patterson. – 2nd ed.
p. cm. – (Blackwell Companions to Philosophy)
Includes bibliographical references and index.
ISBN 978-1-4051-7006-2 (hardcover : alk. paper)
1. Law–Philosophy. 2. Jurisprudence–United States. I. Patterson, Dennis M. (Dennis Michael), 1955–
KF379.C66 2010
340′.1–dc22
2009037493

ISBN: 9781405170062

A catalogue record for this book is available from the British Library.

Set in 10/12.5pt Photina by Toppan Best-set Premedia Limited
Printed in Singapore

01 2010

18

Feminist Jurisprudence

PATRICIA SMITH

Since the 1980s, a substantial amount of challenging and creative legal scholarship has come to be known as feminist jurisprudence (see Smith, 1993). The character of this scholarship is quite diverse. Just as it has been noted that there is not one feminism, but many, so there is not one feminist legal theory, but many. The question is: what is feminist jurisprudence and what makes it worth attending to? What (if anything) do all these divergent views have in common that binds them together and distinguishes them from all other theories? (What makes them all feminist?) Second, what do they tell us about law? (What makes them jurisprudence?) Third, what is important about this form of legal analysis? Supposing that there is a distinctively feminist jurisprudence, why is law in need of it? These questions are derived from the major objections leveled against feminist jurisprudence, namely: (a) it is not "proper" jurisprudence; (b) it is not distinctively feminist; and (c) it is not philosophically interesting. These objections challenge the very existence or legitimacy of feminist jurisprudence as a philosophical discipline. So it is worth considering each question (or objection) separately.

What makes "feminist jurisprudence" jurisprudence? Since jurisprudence is the analysis of fundamental legal relations, concepts, and principles, and the feminist legal theory that identifies itself as jurisprudence is, in fact, engaged in such analysis, the real question is why there should be any objection to classifying it as jurisprudence? It is claimed that feminist jurisprudence is a contradiction in terms. Jurisprudence, it is argued, is supposed to be the neutral analysis of universal legal principles, so given that feminism is self-interested, it produces a self-interested jurisprudence, which is a contradiction in terms. But this argument is misguided in both of its central premises: (1) it assumes that feminism is somehow unfairly self-interested, which is false; and (2) it assumes that jurisprudence is neutral (meaning nonmoral or apolitical), which is also false.

The feminist answer to (1) is that feminist jurisprudence is no more self-interested than supposedly universal jurisprudence, which, in fact, is patriarchy masquerading as the objective analysis of neutral legal principles and concepts. In fact, much feminist jurisprudence is dedicated to proving that traditional jurisprudence and law are not neutral or universal, but biased in favor of the dominant culture, at the expense of all others (see Smith, 1993; Estrich, 2001; MacKinnon, 2006). So this objection to the

legitimacy of feminist jurisprudence relies on denying or ignoring the central claim of feminists about the nature of jurisprudence and law. Thus, it embodies a fundamental misconception about the object of feminist jurisprudence, which is not intended to reconstruct legal institutions so as to favor women. It is intended to reconstruct legal institutions so as not to disfavor women. That is, it is intended to eliminate bias against women. So, while feminism is self-interested, it is self-interested in the sense that self-defense is self-interested, which is to be interested in promoting justice, not privilege. Therefore, the assumption that feminism is illegitimately self-interested is false.

As to point (2), that jurisprudence is neutral, this objection relies on a particular interpretation of what counts as jurisprudence. The idea of jurisprudence in common usage today can be divided into a broad and a narrow sense. Broadly speaking, jurisprudential theories are political theories which have legal ramifications. For example, liberal, Marxist, and socialist political theories spawn jurisprudential views (that is, legal theories) that follow from and reflect their implications. When people talk about liberal jurisprudence or socialist jurisprudence, that is what they are talking about. Clearly, this broad sense of jurisprudence does not entail neutrality in its theories. Quite the contrary.

Much (although not all) feminist jurisprudence is associated with one or more of these political theories. For example, liberal feminists since Mary Wollstonecraft have always argued that liberal values should be applied equally to women as in Baer (2004). Socialist feminists argue that socialist principles should be used to alleviate the oppression of sexism as in Jaggar (1983). Feminist theories often point to the omission of women or the presence of gender discrimination within the general political theories with which they are associated. And feminist jurisprudence can be combined with any number of other political views, such as pragmatism (Williams, 2001), postmodern critical theory (Cornell, 2007), purely radical (MacKinnon, 1989, 2006), critical race theory (Crenshaw et al., 1996), post-Colonial feminism (Mirza, 2006), or critical legal studies (Minow, 1991; Rhode, 1997). There is no single feminist jurisprudence, no single political view associated with feminism, except feminism itself, which is also a political view (the view that advocates freedom and justice for women). So, all feminist theory is political. Its form varies depending on the other theories with which it is combined. Yet, all these views fit within the broad sense of jurisprudence that informs all feminist work.

There is also a narrow, technical sense of jurisprudence, however, which is sometimes equated with all jurisprudence. Thus, the legitimacy of the broad sense is sometimes questioned, and that is the ground for denying that feminist jurisprudence is "really" jurisprudence. It does not fit the narrow sense of jurisprudence. But the narrow sense of jurisprudence – at least in the form that denies the legitimacy of feminist jurisprudence – is itself open to question.

The narrow sense of jurisprudence has traditionally been concerned with the question: what is law? Addressing this question, philosophers have focussed on the concept of law as such, on legal concepts and relations, and legal functions, particularly legal reasoning. Historically, three major theories were advanced to deal with these issues.

The oldest, natural law, commonly defined law as a precept of reason promulgated for the common good by those in authority to do so. Natural law holds, among other

things, that there is a necessary connection between law and morality, such that an immoral law is invalid or not binding.

The second view, legal positivism, which became predominant in the nineteenth century, objected to the natural law view as confusing what law is with what law ought to be, and attempted to construct a value-neutral definition of its own. Positivists today generally define law as a system of rules promulgated by authorized procedures, recognized as binding by officials and obeyed by the bulk of the population.

The third theory, legal realism, a twentieth-century development, objected to the natural law approach as too obscure and metaphysical, and to the positivist approach as too rigid and abstract. Arguing that law is fundamentally and inescapably political, the realists defined law roughly as a method of dispute settlement by appeal to the authority of an office, especially a court; or to put it more succinctly, they claimed that law is what judges say it is. Proponents of these well-known theories continue to debate the fundamental nature of law and the appropriate function of jurisprudence to this day.

Given this history we can see that traditional jurisprudence was not always divided, but has long been divided into two major subcategories: normative and descriptive jurisprudence. This division was instituted by John Austin, the nineteenth-century positivist who dedicated his famous lectures to "determining the province of jurisprudence, properly so called." According to Austin, the proper domain of jurisprudence was the descriptive analysis of the positive law, its basic concepts and relations. Normative analysis of law, he thought, was the proper domain of legislation, not jurisprudence, and the two should not be confused, just as law and morality should not be confused.

The powerful influence of this view can be seen in the official definition of jurisprudence found today in *Black's Law Dictionary*:

> that science of law which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order … but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation.

Notice that this definition conveniently settles the long and continuing controversy between positivists and natural law theorists, by making positivism the only true jurisprudence. Unfortunately, philosophical questions are not often answered so easily, and presumably those who find natural law insightful will not have their questions answered by *Black's Law Dictionary*. Nevertheless, the dictionary entry does show the power of positivist influence in American legal thought, as well as the problematic nature of the approach taken by Austin to define natural law out of existence. And it is precisely this view which provides the grounding for the objection that feminism, not being neutral, is contradictory to jurisprudence.

According to *Black's Law Dictionary*, natural law theory is not jurisprudence (and legal realism is not jurisprudence either), so perhaps feminists should not be disturbed if their theory is not considered to be jurisprudence for the same reasons. But the impor-

tant point is that *Black's Law Dictionary*, in its attempt to be neutral, is blind to its own bias against all theories but one, which it assumes by adopting a positivist definition of what qualifies as jurisprudence: hardly a neutral definition.

What this demonstrates is that given the nature of law as *arguably* political, jurisprudence cannot be made neutral in any way and certainly not by stipulative definition, because arguing and examining the political implications of law – or lack of them – is a central issue of jurisprudence. So jurisprudence is not and cannot be neutral, and that shows that both the assumptions that underlie the objection to the legitimacy of feminism as jurisprudence are false. So feminist jurisprudence is indeed jurisprudence or else natural law is not. This is not to say that they cannot both be wrong. Positivists can claim that natural law is wrong, but not that it is not jurisprudence. Similarly, feminist detractors.

The more difficult question is what makes feminist jurisprudence feminist? The great diversity within feminism has led some critics (and even some feminists) to argue that there is no common feminist perspective. There is no feature that distinguishes feminist jurisprudence from all other legal philosophy. All feminism is actually reducible, or so it is argued, to those theories that inform its many facets. Liberal feminism is reducible to liberalism; postmodern feminism is reducible to postmodernism, and so on. Thus, it is claimed, feminism provides no new idea, or distinctive theory. It is simply the application of old theories to the particular problem of women's oppression.

Furthermore, it is claimed, there is no point of view of all women. Feminism, if it can be identified as one view, is the view of a few women who are seeking to impose it on everyone else. The fact is that the majority of the women of the world either disagree with the views of feminists, or else never thought about the issues feminists raise. So it is highly problematic for feminists to represent themselves as speaking for all women. These are serious charges.

It is true without question that women are as diverse as human beings can be. Women can be rich, poor, weak, strong, dominating, passive, upper class, lower class, rational, irrational – the list could go on indefinitely. Women are members of every race, religion, nationality, class, or ethnic group. So what is the supposed perspective of all women that is the putative foundation of feminism? What do all women have in common?

What do I have in common with the homeless women I walk past in Grand Central Station, or the invisible ones that I do not see in my hometown? What do college professors have in common with prostitutes, or drug addicts, society women, or corporate executives, cashiers, or the lonely invalids who inhabit the nursing homes? How can anyone presume to speak for all of them? The women of South Africa, Bangladesh, former Yugoslavia, China, the Brazilian rainforests, and the Australian outback are all women. Can they possibly all have something in common?

When I think of the problem in these terms it reminds me of when I was trying to figure out exactly what it is that makes human beings human. It turns out that there is no set of necessary and sufficient conditions that delineates the classification and distinguishes it from all others. There is no property common to all and only human beings. And I think that is true about women as well.

Nevertheless, it is not reasonable to conclude that therefore there is no such thing as a human being or a woman. Isolating necessary and sufficient conditions is not the

best approach to solving all problems or answering all questions. So, it is still possible that there is something we share that makes us all human, even if we cannot say exactly what it is with logical precision. Similarly, there can be something common to all women that feminism addresses, despite our profound differences. Even if we are unable to specify it precisely, we can indicate generally what this is.

So what is it? What do all women have in common regardless of race, class, religion, station, nationality, ethnicity, or background? All women live in a patriarchal world. All women function within an environment that is patriarchal. It is unavoidable, like the air. We eat, sleep, and breathe it (as do men). But all women hold a certain position within that world (despite the qualification of our other differences) because it is precisely the function of patriarchy to specify that position and preserve it. Thus, all women operate within a worldview that constitutes a certain picture of reality – a picture that is profoundly and systematically gendered, even if that picture is beginning, just beginning, to crack and dissolve. That is the insight of radical feminists, that gender itself is a social construction based on and reflecting sexism: that is, male dominance and female subordination, male autonomy and female restriction, and male glorification and female devaluation, all supposedly justified as a result of natural needs and differences, or the protection of women, or simply as a value-neutral description of the world (see MacKinnon, 1989, 2006). This theory is not reducible to any other.

Of course, this description of patriarchy as sexism is an oversimplification. One of the problems all feminists face is that any description of patriarchy will inevitably be an oversimplification because patriarchy is an entire worldview. It is enormously complex. By comparison, if you asked ten people for a description of, say, the United States (or any complex entity), you would get ten different descriptions. They could all be true. They would all be incomplete. No one of them could be the best description for all purposes. And they could all disagree with one another and still be accurate because they would differ in focus, purpose, characterization, and so forth. But patriarchy is much more complex than any single nation or culture. It is an entire worldview, with a million implications and effects, which has structured reality since the prehistory of human existence without any serious objection, challenge, or change until the second half of the twentieth century. This is a profoundly effective worldview, as Catherine MacKinnon put it, the most perfect ideology ever invented. It structures virtually everything that exists in its own image of reality. There is almost nothing that it does not touch. A comprehensive description of something like that is utterly impossible. So it is hardly surprising that different feminists provide different descriptions of it and different approaches to it. In fact, it would be surprising if that were not the case.

It does not follow, however, that because patriarchy is a complex worldview that cannot be described comprehensively, that there is no such thing as patriarchy or that women are not subject to it. Patriarchy is the systematic subordination of women to men, and that is the experience that all women share. The point of view of all women is the point of view of those who are subordinated on the basis of their sex regardless of what else may be different about them. Even if some individual personal relationships deviate from this norm, systematic social organization still conforms to it everywhere. And even if particular women are in positions of power because of wealth, class, or

accomplishment, they are not real exceptions to the point because they still function in a sexist world overall.

So the one experience common to all women is living in the subordinated half of a patriarchal world, and the one feature common to all feminism is the rejection of that worldview. The focus and result of this rejection may vary a great deal. Feminists may disagree with one another about what constitutes a rejection of sexist domination, or about which approach is likely to improve the condition of women, or is most susceptible to abuse or misinterpretation. They may disagree about which element gets to the essence of the problem, or even whether there is an essence to this problem. Nevertheless, all feminist theories are intended to liberate women from sexist domination in one form or another.

Sexist domination comes in many forms. It is found in social attitudes about rape, wife battering, sexual harassment, employment practices, educational expectations, workplace design, advertising, entertainment, and family responsibilities, to name just a few. Most of these social attitudes are reflected in law. They are part of the million effects and implications of patriarchy. And all these effects and implications are the legitimate domain of feminist theory. Thus, the diversity of feminist theories is in part a reflection of the pervasiveness of patriarchy and the great variation of its effects.

The diversity is also due to other perspectives on which feminists diverge. That is, feminists adopt many different approaches to addressing patriarchy. For example, some have focussed on the global failure of law to adequately address violence against women in the form of rape, incest, and domestic violence (see, e.g., Schneider, 2000; Estrich, 2001; Manderson, 2003; Husseini, 2007). Others are analyzing the disadvantage caused by hierarchical economic structures, and particularly the division between the family and the market (see, e.g., Olsen, 1983; Williams, 2001; Fineman, 2004; McClain, 2006). Yet others are challenging the value structures associated with traditional male and female roles, insinuated in law and supposedly justified by religion (e.g., Peach, 2002; Reed, & Pollitt, 2002; Mirza, 2006). Still others are examining the intersection of gender with other factors of identity and discrimination, such as race, ethnicity, class, disability, or age (see Crenshaw, 1989; Crenshaw et al., 1996; Roberts, 2002; Nussbaum, 2006). All these approaches are partial and all are needed. Each addresses some aspect of the pervasiveness of patriarchy.

Yet it does not follow that feminist theories share no common, distinctive feature. To see what makes feminist theories distinctive, we should compare them not with each other, but with antifeminist or nonfeminist views. These differences make clear that what is common to all feminist theories is also what is distinctive about them.

Consider the debate between Catherine MacKinnon and Phyllis Schlafly over the ERA as an example of the feminist antifeminist dispute (see MacKinnon, 1989). What was that debate about? It was, at bottom, a disagreement over whether the traditional roles of men and women should be changed or preserved. How these traditions are described depends on the point of view. The feminist describes the effects of these traditional roles and institutions as sexist domination. The antifeminist describes them as the preservation of family values. The feminist is arguing that patriarchy should be changed and the antifeminist that it should be preserved. Both agree that this issue is crucially important.

The nonfeminist theory on the other hand either argues that patriarchy is not important or simply does not address it. But a feminist generally thinks the implications and effects of patriarchy are relevant to many more subjects than the nonfeminist recognizes. In fact, a significant part of the feminist project is to educate the nonfeminist, so to speak, to make clear the significance of patriarchal influences where they commonly go unrecognized. For example, a central project of feminists is to make clear that certain institutional structures – such as equal protection law founded on male norms as the standards of comparison (see Allen, 2005 or Fineman and Dougherty, 2005), concepts such as force and consent in rape law (Estrich, 2001), or policies such as noninterference with family violence as respect for privacy or family (Schneider, 2000; Husseini, 2007), or judicial review based on the intent of the framers (Minow, 1991) are biased or value laden, when they are assumed to be neutral.

Overall, then, the antifeminist supports patriarchy. The nonfeminist overlooks or ignores patriarchy. And the feminist opposes patriarchy. The one feature that defines or identifies a theory as feminist, then, is that it takes the changing of patriarchy as its central focus. That is precisely what makes feminist jurisprudence feminist, despite all its variations.

So feminist jurisprudence is jurisprudence because it is the analysis of fundamental legal relations, concepts, and principles. It is feminist because it examines and opposes patriarchy. But why is that project central to jurisprudence as a whole, rather than a specialized topic for a small subgroup? The formulation of the question betrays its answer. The feminist claims that patriarchy unfairly structures virtually all social arrangements, and is dedicated to reforming that structure. Anyone who denies the broad significance of that sort of project is like the feudal lord who denied that the industrial revolution was relevant to him because his fief was in the country. If you think the claim is narrow, it is because you do not believe it, or perhaps do not understand it because it is undertaken incrementally and peacefully.

Yet, for the unbeliever, instrumental arguments can also be given. First, law, given its nature, tends to preserve the status quo. Law is a system of order intended to provide stability. That is its value; but that also makes it poorly suited to deal with change, especially broad based, systemic social change. Second, law naturally embodies the values, attitudes, expectations, and presumptions of the dominant culture (which it generally represents as universal values and/or neutral descriptions of facts of nature). This feature makes law badly suited to deal with diversity in a truly open and equitable manner. Yet in a world of fast paced social change, pressing pluralism and global diversity these limits are serious.

If law is supposed to promote the general welfare, it must be able to accommodate social change and cultural diversity better than its current structure and tradition allow. The dominant culture – those who hold power, make law and public policy, and influence institutional development – have no stake in solving these problems, and their training, background, and position militate against their being able to recognize such problems as central, to see them, let alone deal with them.

If law stands for justice, it must be justice for all. But the fact is that law has been notoriously bad at providing justice for those outside the dominant culture. Blacks, Native Americans, and Chinese (to mention three of the most infamous examples) as well as all women did not get the same standard of justice that the founding fathers set

up for themselves and those who were much like them, even as they called it "justice for all." Nor is this deficiency yet corrected. Our blind spots are still significant. Feminist analysis is one of the best corrective lenses available today because it speaks from the position of the outsider. This enables it to be more creative, less tied to the tradition, less blinded by its own prominence.

Feminists have enormous motivation to find ways to accommodate change and diversity in law, because the feminist program is part of the new development that will otherwise be left out, and because women are among the legal outsiders who are vying for recognition. In fact, some feminist work has provided unusually insightful observations about whether norms are neutral or biased, and about how legal mechanisms might be revised and developed to increase its flexibility and responsiveness. Feminists are very good gadflies.

For these reasons, feminist jurisprudence is clearly of general interest. It is the only legal philosophy that currently confronts patriarchy as a central issue. Contrary to the objection that this is not philosophically interesting, it provides a vantage point for truly creative and insightful analysis of the most basic structures of law and society. We have hardly begun to explore its implications.

References

Allen, A. 2005. *After Privacy. A Feminist Analysis of Preferential Regulation*. New York: Oxford Univerity Press.

Baer, A., ed. 2004. *Directions in Feminist Liberalism*. New York: Routledge.

Cornell, D. 2007. *Moral Images of Freedom: A Future for Critical Theory*. New York: Rowman & Littlefield.

Crenshaw, K. 1989. Demarginalizing the Intersection of Race and Sex. *University of Chicago Legal Forum* 1989:139.

Crenshaw, K., Gotanda, N., Peller, G., and Thomas, K., eds. 1996. *Critical Race Theory: Key Writing that Formed the Movement*. New York: New Press.

Estrich, S. 2001. *Sex and Power*. New York: Riverhead Press.

Fineman, M. 2004. *The Autonomy Myth*. New York: New Press.

Fineman, M., and Dougherty, T., eds. 2005. *Feminism Confronts Homo Economicus*. Ithaca, NY: Cornell University Press.

Husseini, R. 2007. *Murder in the Name of Honor*. Oxford: Oneworld Publishers.

Jaggar, A. 1983. *Feminist Politics and Human Nature*. Totowa, NJ: Rowman & Allenheld.

MacKinnon, C. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press

MacKinnon, C. 2006. *Are Women Human?* Cambridge, MA: Harvard University Press.

Manderson, L. 2003. *Violence Against Women in Asian Societies*. New York: Routledge.

McClain, L. 2006. *The Place of Families: Fostering Capacity, Equality and Responsibility*. Cambridge, MA: Harvard University Press.

Minow, M. 1991. *Making All the Difference*. Cambridge, MA: Harvard University Press.

Mirza, Q., ed. 2006. *Islamic Feminism and the Law*. London: Routledge Cavendish.

Nussbaum, M. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA: Harvard University Press.

Olsen, F. 1983. The Family and the Market. *Harvard Law Review* 96:1497.

Peach, L. 2002. *Religious Lawmaking in a Secular State*. New York: Oxford University Press.

Reed, B., and Pollitt, K., eds. 2002. *Nothing Sacred: Women Respond to Religious Fundamentalism*. New York: Nation Books.

Roberts, D. 2002. *Shattered Bonds: The Color of Child Welfare*. New York: Basic Books.

Rhode, D. 1997. *Speaking of Sex: The Denial of Gender Inequality*. Cambridge, MA: Harvard University Press.

Schneider, E. 2000. *Battered Women & Feminist Lawmaking*. New Haven, CT: Yale University Press.

Smith, P. 2005. Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity & Denial. In *Philosophy of Law and Legal Theory*, eds. M. Golding & W. Edmundson. Oxford: Blackwell Publishing.

Smith, P., ed. 1993. *Feminist Jurisprudence*. New York: Oxford University Press.

Williams, J. 2001. *Unbending Gender: Why Family and Work Conflict and What to Do About It*. New York: Oxford University Press.