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Listen to the Voices: An Essay on Legal Scholarship, Women, and Minorities

Jean Stefancic

INTRODUCTION

Legal scholarship is at a crossroads, its shape and content buffeted by two forces that are about to converge. Those two forces are outsider jurisprudence—principally the writing of feminists, Criticalists, and minorities of color; and the electronic revolution. My task will be twofold, to describe briefly the two new forces—the new scholarship and the computer revolution. Then, I will speculate on what will happen when they merge. Will one cancel the other out? Will both combine in a single powerful force for social and legal change? What can information scientists do to assure that the second option, not the first, takes place?

THE FIRST REVOLUTION: OUTSIDER JURISPRUDENCE

Outsider jurisprudence contains a number of separate strands: principally critical thought, feminism, and critical, or "the new," race theory. Critical thought has its roots in European writers such as Heidigger, Gramsci, Marx, and Foucault. It first gained a stronghold in the disciplines of philosophy, literature, anthropology, and sociology.

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For further treatment of some of the ideas discussed in this essay, see Stefancic & Delgado, Outsider Jurisprudence and the Electronic Revolution, 52 Ohio St. L. J. 885, 1991.

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Law had lagged far behind its sister text-based disciplines in implementing new methodologies in thought and scholarship. Hermeneutics, the science and methodology of interpretation, entered the study of scriptural texts in the nineteenth century through the work of Friedrich Schleiermacher. In the 1970s, study of literary texts was radically changed by the introduction of structuralism and deconstruction, both processes driven by hermeneutical methodology. In the 1980s, scholars associated with the Critical Legal Studies movement introduced deconstruction into legal analysis. A number of women and minority legal scholars initially found Critical Legal Studies attractive because it questioned the liberal emphasis on the objectivity of the rule of law and the traditional acceptance of the sacredness of text.

Other CLS scholars developed the idea of indeterminacy—that legal and judicial reasoning never has only "one right answer," but many, among which the judge or other legal actor may choose in accord with self or class interest. Other writers wrote about legal culture—the form, structure, presuppositions, and hidden assumptions underlying the Western liberal legal tradition. CLS scholars are predominately male and white. They teach in highly regarded law schools and publish in prestigious law reviews.

CLS spun off and influenced two movements—feminism and critical race theory—that soon developed separate existences. Femcrits, like legal feminists generally, are concerned with patriarchy, the idea that our society is consciously and unconsciously male-dominated.

Feminists write about bias in the curriculum, and lack of opportunities for women in the legal profession. They show that the climate of the law school classroom is inhospitable for women. They evaluate unorthodox scholarship in relation to appointments, tenure, and promotion. Some do research on women's legal history and women's representation in legal texts; others do critiques of conventional casebooks and textbooks which exclude women or show gender bias. Legal scholars such as Catharine MacKinnon and Robin West have been addressing issues of pornography, the workplace, divorce laws, and the inability of law and economics to capture and give voice to a feminist sense of justice.

Hundreds of articles have been written about employment dis-

crimination, comparable worth, reproductive rights, fetal protection rights, abortion rights, rape, pornography, battered wives, welfare reform, adoption, surrogate motherhood, lesbian and gay rights. Most of them appear in traditional student-edited law reviews.

Women's issues are the specific focus of at least six law reviews: Berkeley Women's Law Journal, Harvard Women's Law Journal, Wisconsin Women's Law Journal, Women Lawyers Journal, Women's Rights Law Reporter, and Yale Journal of Law and Feminism, the preface of which states:

> . . . we seek to reinforce the place of feminism in mainstream legal thought. We are constantly reminded of the constraints of existing legal fora for legal discourse. We hope to expand both the format and the substance of law journal fare by publishing artwork, poetry, fiction, essays, interviews, and letters, as well as book reviews and articles.

Some feminists would not wish to place feminist theory within mainstream legal thought; they seek to distinguish feminism by encouraging discussions of difference. Indeed, one of the foremost debates, due to continue well into the twenty first century, is whether it is necessary to define an essentialist position for the movement. Savvy theorists know that engaging in framework debates between the masculine and feminine perspective are usually fruitless because they require homogenizing numerous women's perspectives into one unitary theory.

The quest to define a comprehensive program or agenda can lead to privileging some women's perspectives over others – a process which eventually weakened the women's movement in the 1980s. None know the futility of this dilemma better than the minority feminist legal scholars who stand at the intersection of race and gender, and whose identities are defined as much by one condition as the other.

Critical race studies developed in the late 1970s with the path breaking work of Derrick Bell, who first questioned the adequacy of conventional, liberal-constructed civil rights law. CRT scholars wrote that the gains of the 1960s and 1970s had proved illusory; indeed, in many cases were being rolled back. New theories and

strategies were needed to deal with the complex interaction among race, racism, and American law. Among the principles developed by this group is the concept of "interest-convergence"—the idea that advances in racial justice only come when they advance the interest of the majority group; altruism, or fundamental fairness, in short, mean little.

Other writers in this group show the circularity and self-referential quality of conventional scholarship in the civil rights area, or offer innovative forms of writing—parables, narratives, or "Chronicles"—to illustrate racial justice and injustice. Much of the work in this field is in the modernist vein. Yet other pieces, clearly critical in tone and approach, deal with classic civil rights issues such as racist speech, federal Indian law and Indian sovereignty, unjust treatment of Asian groups, reparations, immigration policy, alternate dispute resolution, capital punishment, bilingual education. Almost all of this scholarship appears in mainline law reviews. Because some of this work is interdisciplinary, some scholars are now publishing books and collections of essays through academic and university presses.

Critical race theory seems to be having an influence on mainstream legal education. The theme of the AALS Annual Meeting (San Francisco, 1990) was "A Time for Sharing: Speaking Difference, Sharing Strength." The meeting included plenary speakers and panelists of color addressing such issues as narrative theory and race, and majority mindset in educational institutions.

A loose coalition of scholars met in Madison, Wisconsin in 1989 and 1990 to discuss Critical Race Theory. The scholarship of this group examines beliefs that permeate dominant discourse about race, analyzing them to show that they are neither objective nor neutral. They propose that "voice" in legal scholarship is particular, and that minorities present unique experiential perspectives that have traditionally been excluded. The movement has recently drawn criticism from mainstream minority writers such as Randall Kennedy who attacked the group, its politics, and some of its most central claims, in a scathing article in Harvard Law Review. The group, however, seems to be withstanding this criticism, and indeed, gathering forces for yet further critiques of the racial status quo.

As we have seen, legal scholarship is currently at an exciting

stage. Outsiders of various stripes have been experimenting with new modes of writing and expression. They have been challenging law's central premises, such as its stability and predictability, and have been relentlessly showing its indeterminacy and hierarchical quality and character. Many of these new voices have begun to win acceptance; at any rate they are being heard. Whether the ferment will continue and what form it may take are considered following a brief discussion of the second revolution currently taking place in the world of legal letters, commonly the electronic transformation of media.

THE SECOND REVOLUTION: ELECTRONIC REVOLUTION AND COMPUTERIZATION

The development of electronic data processing led to the construction of online databases such as LEXIS and WESTLAW and other proprietary research services designed to afford attorneys and legal scholars rapid access to large bodies of data including cases, statutes, administrative materials, and law reviews.

The last decade brought not only CD-ROM technology, but online library catalogs, and bibliographic access to specialized computer databases through RLIN "set processing."

Changes in access to information have already affected ways in which knowledge is conceptualized. It is no longer necessary, for instance, to carry the West Digest classification system as mental baggage when, with the touch of a few keystrokes, it becomes available online. Free text searching may even lead to the construction of subject headings which are thesaurally based rather than precoordinated.

Legal databases now serve as gateways to larger and more general networks of information. The law library of the future will not be limited to traditional legal materials. Faculty, students, librarians, lawyers, and paralegals will have easy, though costly, access to news reports, statistical data, journal literature of other academic disciplines, and even to monographs. The first book to be published electronically will be a legal treatise. Eventually—a hundred years from now—there may be no viable print alternative; scholars and researchers may be forced to use online services to stay current in their fields.

SYNERGY? HOW WILL THE TWO MOVEMENTS AFFECT EACH OTHER?

Word based computer searches enable the searcher to devise research strategies that are flexible and innovative; they avoid the fetters of preconstructed subject headings and keynotes. Nevertheless, computer based research has not proved the panacea to information retrieval, much less to law reform. Some key articles and cases dealing with concepts like civil disobedience or legitimation do not refer to these ideas by name. Some that do may not be included in standard legal databases. Moreover, the efficacy of a free text search depends on a court's and a searcher's having used the same word or phrase for the concept in question. Computers have proved to be excellent ways of finding cases about cows wandering onto highways; they are less useful for finding cases bearing on or illustrating complex, abstract concepts such as those entering into the new reform minded areas of scholarship discussed above.

Finally, computerized research can "freeze' the law by lulling the searcher into looking for cases containing particular words or expressions. Research should ideally encourage browsing and analogical reasoning. Paradoxically, computer assisted research can discourage innovation and law reform.

Further, computer assisted research is expensive. Since many law reform cases are brought by small law firms or even solo practitioners, computer assisted research may turn into a tool for large, rather than individual, interests. Many feminists and critical scholars are young, and associated with law schools that lack unlimited computerization. Thus, although the electronic revolution offers a promising way of breaking legal lockstep, and reassembling data—cases, statutes, narratives, and other unconventional material—in novel ways, its potential to promote rather than impair the development of outsider jurisprudence and law reform remains undemonstrable.

Other respects in which the electronic revolution may affect legal knowledge and practice include dealing with the proliferation—the sheer bulk—of court opinions. As ever more case reports become available, the practicality of establishing precedent will become more difficult. This, in turn, could lead to a "cut and paste"

method of judicial decisionmaking. Judges, or more likely their clerks, will find it expedient and necessary to construct opinions by splicing and recombining previous ones—a kind of recombinant CPA (cut and paste adjudication). Such bureaucratized routinized law probably bodes ill for the cause of the legal reformer. New cases or those presenting novel legal issues may fail to be perceived for their importance. The routinized treatment judges and clerks afford the research and writing aspects of their work may carry over to other aspects.

The accelerating overload of the court system will lead to settling more disputes by alternate dispute resolution. Precedent will not be as important. Results may be more or less available, depending on whether mediation outcomes will be made accessible through electronic format. Legal commentators have pointed out ways this may not be advantageous to women and members of minority groups. The national office of the ACLU is currently examining the likely impact of the deformalization movement on civil and constitutional liberties.

Law training is becoming interactive. We have entered the era of the electronic courtroom, as well as the classroom. The capability for combining computer and video technologies exists now. Architects use "virtual reality" to create three dimensional simulations of interior physical space. Will lawyers and legal educators be able to present evidence, model hypotheticals, show the effects of discrimination with forms of imagistic electronic technology?

One minority scholar has observed that as the ability to marshal electronic data in favor of discrimination claims advances, the substantive law simply retreats. In a provocative short article in Wisconsin Law Review, Richard Delgado shows that as plaintiffs' attorneys show ever and ever more powerful statistical evidence of discrimination, for example in employment cases, courts simply redefine doctrine in narrower ways and cancel out any gains.

But it is possible to take a more optimistic view. Just as the authority of abstract legal principles has been eroded by the deconstructors, so has the stability of the printed text of law been affected by electronic media. As issues in the private realm become more complex, precedent will be harder to establish. Arguments and lines of cases for opposing viewpoints will be readily available. Our soci-

ety is less monolithic, less monocultural; hard boundaries between certainties will soften. Judicial decisionmaking will be framed between competing contexts of values even more than in the past. New legal theories may reshape legal thought. If this is the case, the path of the opposition legal scholar may be made easier rather than harder.

What *is* certain is that legal commentators committed to social justice will need to think, write, and publish articles about these issues relentlessly to affect any positive change. Their work will provide the information that lobbyists need to change public opinion and institutional policy. Vigilance against discrimination has recently taken a giant step against tokenism in medicine. The General Accounting Office, responding to Congressional prodding, revealed that women were being routinely excluded as research subjects in biomedical research federally sponsored by the National Institutes of Health. This finding led to the introduction of legislation promoting equitable treatment of the health needs of women. Can we hope that gender and racial bias in the prevailing legal mindset might be as amenable to change?

How can librarians respond to this new scholarship? We can study the concepts and language of feminist and minority jurisprudence, thus enabling us to provide better access through free-text searching of electronic databases. We can be aware when subject headings do not fit the materials they index, and then bring those discrepancies to the attention of catalogers, editors and indexers. We can become informed about trends and writers of new critical scholarship so that we may make intelligent decisions about collection development. We can construct bibliographies. We can even become research liaisons to feminist and minority legal scholars, and perhaps participate in the new scholarship ourselves.

CONCLUSION

Our tools of thought, means of expression, ways of researching, vehicles for writing and publishing—the metaphors of our professions—are changing. These intellectual changes are mirrored in new critical legal scholarship. As our country becomes more multicultural, tensions will increase. Economic scarcity will increase

fear and loathing, when what we really need is more respect and concern for those designated as "other."

Women number half the population. In the next century, the number of minority peoples will exceed the white majority. But numerical majority does not equate to power majority. If democracy values diversity, ways must be found to allow for inclusiveness, new voices, and dialogue between differing perspectives. Only by keeping our redefinitions fluid and vital will we be able to avoid chaos and breakdown as we accommodate ourselves to living with more difference than we have ever known before.

Some will choose to opt out of these debates, but those who continue will participate in the best of times, the worst of times. As Richard Delgado so aptly stated,

> Reality, like our hopes for it is not fixed. We construct it through conversations, through our lives together. The sad fact of race is that too few of these conversations ever take place; to that extent our lives are diminished.