Journal of Gender, Social Policy & the Law

Volume 7 | Issue 2 Article 17

2011

Is Law and Art or a Science?: Comments on Objectivity, Feminism, and Power

Joan Williams

IS LAW AN ART OR A SCIENCE?: COMMENTS ON OBJECTIVITY, FEMINISM, AND POWER

JOAN WILLIAMS

I begin from Aldo Facio's wonderful, awful story of writing an exam question on whether law is an art or a science, and receiving a harsh F with the comment "Who asked your opinion?" This story raises two important questions for Latin American lawyers committed to the perspective of gender. The first concerns whether they should make assault on objectivity an integral part of their agenda. The second concerns their analysis of gender and power.

I. IS LAW OBJECTIVE?

In her insightful analysis of the jurisprudence surrounding Peru's Law on Family Violence, Rocio Villanueva Flores notes that judges have been reluctant to apply that law on the grounds that it is a vague statute and does not include an adequate definition of family violence.[1] This explains the urgency of Alda Facio's sense that feminists need to undermine the traditional notion that law is a neutral, self-executing system of rules.

If the goal is to challenge this vision of law, one possible resource is the so-called "indeterminacy critique" developed in critical legal studies in the United States during the 1980s. Authors such as Joseph William Singer[2] and James Boyle[3] argued that law is "indeterminate."

1. Rocio Villanueva Flores, *Notas sobre interpretacion juridica (A proposito de la ley 26260 y la violencia familiar*), *in* VIOLENCIA CONTRA LA MUJER: REFLEXIONES DESDE EL DERECHO (1996).

2. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 9 (1984) (stating that the law is a description of the arguments and theories that are currently used by judges and scholars to justify outcomes and rules).

3. *See* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133

Others, such as Mark Kelman deconstructed legal arguments by "trashing" legal arguments' claims to objectivity.[4] Robert Gordon showed how existing patterns of argumentation served to "freeze social reality" and make alternative visions seem implausible.[5] This critique often focused on rights, which were attacked on the grounds that they alienated people from authentic expressions[6] or that they blinded people to utopian possibilities.[7]

It is nice to know one does not have to reinvent the wheel, but several notes of caution are in order. First, having read both the indeterminacy literature and the Villanueva article, it seems to me that Villanueva knows most of what was said within critical legal studies in the 1980s, and that in many ways, she says it better.

A second question is whether this is a battle feminists want to fight. Within American jurisprudence it proved bitter and divisive, with constant charges that the objectivity-critiquers were "nihilists" whose only interest was in trashing. The very considerable costs of this battle are heightened in Latin America for two reasons.

In the United States, the indeterminacy critique drew upon a tradition already well-established within American law. The legal realists attacked the idea that law is neutral and objective in the 1920s, drawing upon a still older tradition of jurisprudence dating to Oliver Wendell Holmes.[8] My understanding of Latin American jurisprudence remains sketchy, but my impression is that Latin American countries generally lack a tradition similar to legal realism. If this is true, a critique of objectivity will place feminists in a much more exposed position than critical legal scholars in the United States.

The potential exposure is even greater for another reason. The final session of the Pan American Conference suggests that a critique of objectivity, in the Latin American context, pits feminists squarely against other progressive forces whose identities have been forged by

---

U. PA. L. REV. 685, 779 (1985) (arguing that the law is somewhat indeterminate shaped by social subjectivism and structural strands).

4. *See* Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (defining "trashing" as the theory which takes specific arguments in their own terms, discovers that they are "foolish" and then looks externally for some order in the internal chaos).

5. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987).

6. Peter Gabel, *Reification in Legal Reasoning*, 3 RES. IN L. & SOC. 25 (1980).

7. Robin West, *Murdering the Spirit: Racism, Rights & Commerce*, 90 MICH. L. REV. 1771 (1992).

8. *See* WILLIAM W. FISHER III, MORTON J. HORWITZ, THOMAS REED, AMERICAN LEGAL REALISM (1993); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (arguing that the legal system is inconsistent in its objectivity).

advocacy of human rights and the rule of law. Human rights advocates, who have forged their identities through fights against repression and dictatorship, generally have rested their claims for authority and legitimacy on the charge that existing authorities have violated universal norms.

The language of human rights rests heavily on notions of universality of the type that the critique of objectivity targets. Thus, a feminism focused on the jurisprudential issue of whether objectivity is possible pits feminists' claims for legitimacy against those of other progressive forces in Latin America. Is this wise? It seems to me that, in a *machista* culture, the perspective of gender is threatening enough without burdening it with this additional fight.

Do any alternatives exist? Two deserve consideration. One is to argue in a pragmatist vein, stressing what law is, rather than what it is not. While law is not a neutral, self-executing system of rules, it is not totally indeterminate either.[9] The processes by which language generates meaning are related less to logic than to the form of life of which the language is a part; law is part of language.[10] The key point, from a pragmatist perspective, is that certainty represents a statement about the role a tenet plays in one's form of life, not a statement about some ultimate truth with which agreement of all rational beings is, or should be, automatic.[11]

Yet even this formulation presents difficulties. Although in my writings outside of feminism I am best known as a critic of objectivity, I do not carry that intellectual agenda into my writings on gender. For one thing, people often confuse objectivity critiques with the belief that nothing is true, so that one's feminist credos are quoted back as evidence of self-contradiction.[12] This is silly: it mistakes a conversation on epistemology, on what truth claims mean, with a claim that truth claims are incoherent. These are technical issues, best left for conversations on philosophy. Conversations on gender

---

9. *See* Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 588 (1987) (stating that both arguments are premised upon an "either/or" approach); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986) (arguing that practical legal reasoning and process demonstrates how the indeterminate argument fails).

10. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1968) (stating that the definition of the law is dependent upon the society over which it governs).

11. *See* Joan C. Williams, *Symposium: Michael J. Perry's Morality, Politics, and Law: Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651 (1989) (critiquing absolutes and a persisting focus on the way viewpoints may affect perceptions).

12. *See, e.g.*, Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992) (questioning the viability of feminism during postmodern critique of reason).

are already too fraught with difficulties to allow these issues to enter and confuse.

An alternative approach is to entirely evade profound questions concerning objectivity. In the context of gender, the key problem is that even conceding that objectivity is possible, courts and legislatures fail to live up to their own stated standards of objectivity in their treatment of women. Thus, the Peruvian Law on Family Violence is not enforced on the grounds that it is too vague, whereas other equally vague laws are enforced without comment. One does not have to engage in philosophical discussions to mark this as inappropriate and unfair.

From the perspective of gender, all we need to show is that current laws, and the ways they are interpreted, do not live up to their own claims to objectivity. Let human rights advocates argue that law can be neutral and objective; we may disagree, or argue that its objectivity means something much more complex and contingent than they assume. But the key point for feminists is that, bracketing the question of whether law is ever objective, the laws we object to are not.

II. WHICH ANALYSIS OF GENDER AND POWER?

My second brief comment concerns gender and power. Ten years of work in feminist jurisprudence in the United States has informed me about the relationship between gender and power. But it has also confused me, in ways that only began to clear up when I read Alda Facio's subtle and astute *Cuando el Genero Suena, Cambios Trae*.[13]

Feminist jurisprudence in the United States often elides the question of whether feminists need an analysis of gender and power. Catherine MacKinnon's analysis of gender as dominance has many strengths. Her theory picked up a theme that has been around since the early years of second-wave feminism, for example in the influential *Desire and Power*,[14] and has developed it into a full-blown theory of gender. MacKinnon's sustained analysis of the ways our sexuality eroticizes dominance and submission is an important and enduring contribution, and has been accompanied by movements designed to separate power from desire in the workplace (sexual harassment law), the home (domestic violence law), and in entertainment (pornography).

---

13. ALDA FACIO, CUANDO EL GENERO SUENA CAMBIOS TRAE (1996).

14. Catherine A. MacKinnon, *Desire and Power, in* FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW 46 (Catherine Stimpson ed., 1987) [hereinafter FEMINISM UNMODIFIED].