Changing the Topic

Judith Resnik
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
Resnik, Judith, "Changing the Topic" (1996). Faculty Scholarship Series. 785.
https://digitalcommons.law.yale.edu/fss_papers/785
Context is all. Hence a word of explanation about why I provided this commentary at a Law and Literature symposium, jointly sponsored by United States and Australian organizations. The conveners invited me because, a few years earlier, Carolyn Heilbrun and I had co-authored an essay in which we discussed the development, in the United States, of courses about law and literature in law schools and the growing set of related commentaries, most of which neither addressed feminist thought nor incorporated feminist concerns. When asked to participate in the 1995 conference 'as a feminist' and assigned a position on a panel entitled 'Feminisms: The View from Australia and the United States', it seemed plain that the task was to revisit the issues that we had considered in the late 1980s, and to see if and how the world of either law within the academy, law outside the academy, or 'law and literature' had changed.

The battle for voice — for the authority to describe, at times with narrative power — is painful at this moment in the United States. Below, I sketch three contexts in which such voice is in issue: in legal doctrine, in the systems of courts themselves, and in the world denominated 'law and literature'. In all three, women have asserted alternative conceptions. In each of these settings, that claimed space is contested, and in each, a conflict exists about who has authority to shape the contours of discussion. As women make visible a distinctive array of experiences and then gain power to alter laws and reframe contexts, counterclaims of neutrality and timeless truths attempt to quiet these voices and diminish their power.

* Orrin B. Evans Professor of Law, University of Southern California Law Center. 'Changing the Topic' was presented in the Panel, Feminisms The View from Australia and the United States, Law and Literature Symposium, Berkeley, California, USA, Oct. 1, 1995. My thanks to Dennis Curtis, Carolyn Heilbrun, Vicki Jackson, Rosemary Lemmis, Nancy Marder, Kelley Poleynard, Ramona Ripston, Linda Thomas, and Barrie Thorne for their help and friendship. Thanks also to Stanley Fish, whose presentation at a seminar at the University of Southern California prompted some of these thoughts. All rights reserved; Judith Resnik.

1 Law and Literature Symposium, sponsored by the Law & Humanities Institute, the Law and Literature Association of Australia, and the University of California, Berkeley, 30 September-2 October 1995, Berkeley, California.

A. THE WORLD OF LEGAL DOCTRINE

One way to tell the story of doctrinal developments, circa 1996 in the United States, is that women have successfully told 'stories' – been heard, sometimes individually and sometimes in the aggregate – within law. Take, for example, the recognition of the right to be free from sexual harassment while working. For years, women were supposed to understand either that sexual advances were a part of the terms and conditions of employment or, if the aggression was sufficiently insistent, that perhaps the criminal law or the law of torts might respond to an individual instance of wrongdoing.

Within the last decades, however, has emerged a story of cumulative experiences too frequent to deny. Women are slowly starting to reshape the prior version, to move from being the object of the gaze to reporting what women see, experience, and think – and to imagining alternatives. And slowly (sometimes, it seems excruciatingly slowly), women have begun to make their views heard, in the academy, in reported opinions of judges, in the shape and structure of decision making. Those experiences have pushed law in this particular context to generate something called a legal right against sexual harassment. This is, like all of law's reforms, by no means perfect. One finds the problematic incorporation of the mores of rape law and a focus on the victim of the harassment, as inquiries are made about whether the plaintiff welcomed the harassment, what she wore, whether her behavior was 'ladylike', whether she willingly participated, whether she purposefully seduced, and the like. But nevertheless, there it is: women's law in the making. Judges and juries have found or upheld liability of employers and supervisors, and some institutions have altered their policies and practices to attend to the problems of sexualised oppression within work places. We might rightly celebrate a sense of place, of voice, of power.

But now, in the second decade of this work, the tone is changing; other claims are being made about this body of law. One case serves as exemplary. A woman, Lois Robinson, alleged a Title VII violation, that she was discriminated against at work because she was a woman. Ms. Robinson was one of very few 'female skilled craftsworkers'; that is, a woman welder. Over the ten years of her employment, she was promoted from 'third class welder', to 'second class welder', to 'first class welder' While employed over those ten years, she also suffered a barrage of injuries.
In the words of Howell W. Melton, the federal judge who presided at the trial, '[p]ictures of nude and partially nude women appear throughout the [shipyard] in the form of magazines, plaques on the wall, photographs torn from magazines', and by virtue of advertising calendars, distributed by the company. In contrast, no pictures of male nudes were tolerated. (As one worker testified, were someone to have a picture of a nude man, the worker would think that 'son of a bitch' was 'queer'.)

Further, the company denied requests to post political materials, advertisements, and commercial materials.

For the ten years in which she worked at the shipyards, Lois Robinson was confronted with an array of incidents—such as finding explicit, pornographic pictures by her locker, at her work station, or handed to her. Some of the pictures were of white women, some black. She found graffiti on her locker—vivid, sexual imagery, directed at or implicating her. She suffered thousands of small and large verbal and sometimes physical insults, as her co-workers pinched and grabbed her. The district judge found more than a hundred facts, forming the predicate to his judgment that Lois Robinson had been discriminated against because she was a woman—and further, that the sexualization of the workplace imposes burdens on women that are not borne by men. Moreover, to reach his conclusion, Judge Melton decided that 'the objective standard asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive' the comments she received to be abusive. No longer did that judge believe the phrase 'reasonable person' without further specification captured the experiences to which justice had to respond.

---

8 Ibíd., 1493.
9 Ibíd., 1494.
10 Ibíd.
11 Ibíd.
12 Ibíd., 1505.

14 Subsequent to the Robinson decision, the United States Supreme Court discussed sexual harassment claims in Harris v Forklift Systems, Inc., 114 S. Ct. 367, 370-71 (1993), and concluded that the inquiry centered around whether a work environment was one 'that a reasonable person would find hostile or abusive. The Court's test requires a factfinder to consider 'all the circumstances', including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' According to the Court, psychological harm is a factor but none of the individual factors are required. Ibíd., 371. While Forklift, 114 S. Ct. at 370-71, described the standard both as an objective one from the standpoint of a 'reasonable person' as well as a subjective one (the charging party must 'perceive' the environment to be hostile or abusive), that decision has not necessarily precluded a formulation that invokes a reasonable woman in a particular case. See, e.g. EEOC Notice 915.002, 8 March 1994, EEOC Compliance Manual §§ 3114, 3115 (CCH) (using a reasonable person standard but also observing that the 'Court's decision [in Forklift] is consistent with the Commission's view that a reasonable person is one with the perspective of the victim').
The *Robinson* case is important not only for its documentation of horrid facts and its explicit incorporation of a woman's point of view in a legal rule. It is also important because of the claim made by the defendant, Jacksonville Shipyards, when it appealed the judgment. One of the grounds raised for overturning the decision was that the offensive behavior is protected by constitutional guarantees of free speech. For many years, Title VII law had accrued with relatively little discussion of the fact that (of course) Title VII affects speech, that Title VII regulates, limits, indeed punishes some speech as well as some conduct in the workplace. But in these last few years (as exemplified by the Jacksonville Shipyards' defense and now that of other defendants in Title VII cases), a line of argument against Title VII relies on free speech claims.

For example, the issue of the interaction between the First Amendment and Title VII has been a compelling topic for the American Civil Liberties Union. Within the last few years, the National Board has revisited its policy twice. In 1993, after much debate, the National Board altered its policy and concluded that 'where conduct or expression is sufficiently pervasive or intense that its effect on a reasonable person in those particular circumstances would be to hinder significantly a person from functioning as an employee or significantly adversely affect mental, emotional, or physical well-being on the basis of sex', the behavior (including 'conduct or expression') is actionable, although in non-workplace settings, such conduct might not be actionable. Soon thereafter, the policy was under consideration again; the 1996 policy continues to insist on limiting the reach of its policy to

---

15 Long after the appeal was filed in the early 1990s, a settlement occurred. *See Robinson v Jacksonville Shipyards, Inc.*, Case No. 91-3655 (U.S. Court of Appeals, 11th Cir.), Joint Stipulation of Dismissal (9 February 1995) (noting that the dismissal is not contingent on Jacksonville Shipyards' filing for bankruptcy, apparently a possibility at the time of dismissal). The Shipyards closed in the early 1990s, and since then Jacksonville Shipyards have been embroiled in disputes with creditors, including lawyers who had represented the Shipyards in 'labor and employment disputes.' Paul Dillon, 'Two More Sue Shipyards to Collect Overdue Debts', *Jacksonville Business Journal*, 16 June 1995, Vol.10, No. 35, section 1. According to lawyers for the parties in *Robinson*, the terms of the settlement are confidential (telephone interviews, February, 1996).

16 *See Brief for Amicus Curiae, American Civil Liberties Union ('ACLU') Foundation of Florida, Inc. and American Civil Liberties Union, Inc. at 5, 8, Robinson v Jacksonville Shipyards, Inc.*, Appeal from the United States District Court for the Middle District of Florida, No. 91-3655 (U.S. Court of Appeals, 11th Cir.) (urging that Title VII's law on hostile work environments be 'carefully crafted to reconcile the First Amendment's guarantee of freedom of speech' and Title VII rights; 'expressive activities cannot constitutionally be held to be unlawful "harassment" simply because of their offensiveness'). *See also Brief Amicus Curiae of the American Civil Liberties Union and the American Jewish Congress in Support of Petitioner, Harris v Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), No. 92-1168, U.S. Supreme Court (filed, April 30, 1993) (available in LEXIS, Genfed library, 'Briefs file') (urging that the 'effort to eradicate discrimination not ignore First Amendment rights'). *See also Diane Rado, 'ACLU's Capital Lobbyist Ousted', *St. Petersburg Times*, 3 March 1995 (discussing conflict between the ACLU affiliate and the national office over what position to take in the Jacksonville Shipyards case).

17 *See, e.g., Eugene Volokh, 'How Harassment Law Restricts Free Speech' (1995) 47 Rutgers Law Review 563, 567 (arguing that the 'vagueness of harassment law means the law actually deters much more speech than might ultimately prove actionable'); Eugene Volokh, 'Freedom of Speech and Workplace Harassment' (1992) 39 UCLA Law Review 1791, 1793, 1871 (noting that 'harassment law ... has faced remarkably few First Amendment challenges', and then arguing that, given Title VII values, only 'directed speech-offensive speech that is targeted at a particular employee because of the employee's race, sex, religion, or national origin' be actionable).

18 Policy No. 316, ACLU National Policies (Sexual Harassment in the Workplace).

19 Policy 316, as revised in April of 1995 by the ACLU National Board (on file with the author).
workplaces, amplifies concerns for discrimination based on either ‘sex or sexual orientation’, and shifts the focus to equality by describing the ‘sexual conduct or expression’ that is actionable as that which is ‘severe or pervasive enough to create unequal working conditions based on sex or sexual orientation by, among other things, significantly hindering a reasonable employee in performing his or her job because of the employee’s sex or sexual orientation or significantly harming the employee’s physical, mental, or emotional well-being because of the employee’s sex or sexual orientation’. 19

Thus, the first amendment questions compel attention from many institutions; moreover, the effort to move the focus away from Lois Robinson and her legal right to be free from sexual harassment to the question of free speech is not limited to Title VII cases. ‘Political correctness’ is the phrase used as an attack, when women of all colors and men of some colors bring up problems of exclusion, of living with painful epithets, of being neither heard nor read.20 The argument advanced is that freedom of expression – or great literature – is at stake, if the excluded cultures were now so powerful as to be able rapidly to undo accrued years of culture, tradition, books, and legal rules.

Notice the change in the subject. For a few brief moments, I was speaking about Lois Robinson and her struggles as a worker, as a woman welder, and about the vicious aggression that met her entry into the workplace. Now, I’m speaking about speech. How did that happen? Why the switch in topics? What’s so appealing about a First Amendment conversation that it can so readily reframe the discussion?

The First Amendment is attractive because it appears to offer neutrality.21 We (legal scholars) are also drawn to First Amendment discussions because they are so familiar, so comfortable, so easy. We are, to be frank, in a safe conversation. To borrow my friend and colleague Carolyn Heilbrun’s terms, this is a very familiar plot.22 Or as Annette Kolodny pointed out:

We read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works from which we developed our expectations and our interpretative strategies).23


21 Stanley Fish (among others) has argued that the supposedly neutral stance of First Amendment discussion is not without its own politics and its position. See, Stanley Fish, ‘fraught with death: skepticism, progressivism and the first amendment’ (1993) 64 University of Colorado Law Review 1061, 1070 (‘it is ideology and politics all the way down’); Stanley Fish, There is No Such Thing as Free Speech and It’s a Good Thing, Too, New York: Oxford University Press, 1994, 102-19.

22 Carolyn G. Heilbrun, Writing a Woman’s Life, New York: W.W. Norton, 1988, 27-47 (‘There will be narratives of female lives only when women no longer live their lives isolated in the houses and the stories of men.’).

First Amendment conversations are deeply routine. We can quote Holmes, or James Madison; we can invoke Nazi Germany or other totalitarian regimes. Our metaphors are ready made, we know well the 'marketplace of ideas'. We know the intellectual moves, about whether particular terms are or are not - 'fighting words'. Has someone done the equivalent of yelling 'fire' in a crowded theater? Is this parody, comedy, humor, political invective, literature or art? We know the boundaries; we can be secure; we are not terribly likely to put our feet in our mouths.

The First Amendment is a distraction. The First Amendment offers us a way in which we can feel some sense of engagement with contemporary problems, yet keep them at a safe distance. We can be very busy (literally), arguing actual cases, writing speech codes or inveighing against them, debating and accusing - all the while cushioning the fact that we are actually at a loss for words (as well as of ideas) when confronted with the stunning horror of the underlying stories.

Go back to Lois Robinson, who went into the Jacksonville Shipyards as one of 'two female skilled craftworkers' among 960 men. She was confronted with a hostility that at least I, sitting far from that place, have difficulty in fathoming. What was so awful about her entrance? What fear, of what forms of integration, did her very presence prompt? What did her co-workers mean when they called their employment 'more or less a man's world'. How did her presence - as a woman - inspire so much hate? What was the imagined and real taboos that she breached? Why was she there as one of so few woman welders? Why not in a clump of 25? (By the way, the same questions can be asked in the context of the effort in 1995 by Shannon Faulkner, lone female, to enter the all-male Citadel, the Military Academy of South Carolina.)

What kinds of structural changes should/may/could we impose to make the world a place in which a woman could enter a new workplace, as a lone woman, and not fear physical and verbal abuse? Are the 'we' here collectively much more willing to do so when the workplace is one connected...

26 See, e.g., Hustler Magazine, Inc. v Falwell, 485 U.S. 46 (1988) (First Amendment protects political cartoons, including offensive parodies, as long as they are not reasonably believable).
27 See, e.g., American Booksellers Assoc., Inc. v Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding unconstitutional an Indianapolis ordinance, prohibiting the traffic in pornography and providing rights of action against it, concluding that definitions of pornography that referred to the "graphic sexually explicit subordination of women" were too vague), summarily affirmed, 475 U.S. 1001 (1986); Doe v University of Michigan, 721 F. Supp. 852 (E. D. Mich. 1989) (holding that the University's anti-discrimination policy, which included sanctions for discriminatory or racist verbal conduct or speech but that varied by the location of the conduct at issue, violated the First Amendment); Thomas C. Grey, 'Discriminatory Harassment and Free Speech' (1991) 14 Harvard Journal of Law and Public Policy 157 (discussing his work as a drafter of the Stanford University campus disciplinary code that regulated speech intended to insult or degrade specific individuals or a small group, that was directly at them, and that used "fighting words").
29 'Women craftworkers are an extreme rarity'. Ibid, 1493.
with blue collar workers than with upper class professionals? The footnote here is that Congress was, until recently, totally exempt from Title VII, and that relatively few judicial systems have policies for how to respond to allegations that a judge (rather than a staff member) is alleged to be a sexual harasser.

Moving from law to literature, note the problem of authorship, of who sets the contours of the problem and generates the 'relevant' context. Those who say we should be pursuing a conversation about the First Amendment? Or those exploring the new plots offered out of the lives and experiences of women? Women are now actually claiming not only a space in the conversation but authoritative voice, to name the problem and require its redress, yet are finding that the discussion is moving away, even as they gain a plank from which to speak.

We know how to tell First Amendment stories; their patterns are familiar. We have no knowledge of what a world with powerful women resisting male advances can provide. Via Thomas Hardy, we can peek at women like Sue Brideshead, insisting on a right of refusal. When we read George Eliot's Daniel Deronda, we learn of a nineteenth century woman who declined motherhood. But where will those heroines, or Lois Robinson, take us?

Thus my first point is that contemporary law in the United States is filled with conflict over who has control over both the underlying narratives and the resulting shape of legal doctrine, as well as whether the culture will recognise, let alone explore, new plots. In the specific context of Title VII, a concerted effort is underway to reassert the authority of a particular narrative voice by forcing the story down familiar lines that both alter the focus and divert attention away from stunning claims of hostility flowing toward individual woman and toward women collectively.


B. DESCRIBING THE COURTS

My second point is about a parallel on a larger scale – the narrative of courts themselves. In the 1960s and 1970s, as litigators went to court to get legal protections for women, they noticed that some of the pains of discrimination came from that very venue, courts. Some of the judges shared the biases of the defendants. Stereotypes about women abounded, as judges upheld rules refusing employment to women with small children\(^3\) or ignored claims of physical abuse.\(^6\)

In response, the National Organization of Women’s Legal Defense and Education Fund (itself started in 1970) and the National Association of Women Judges (begun in 1979) joined together in 1980 to create a new organization – the National Judicial Education Program to Promote Equality of Women and Men in the Courts – to educate judges about gender stereotyping.\(^37\) The short hand for this effort became ‘gender bias in the courts’. The method of choice for education became the creation, jurisdiction by jurisdiction, of task forces on gender bias in the courts. (The rationale for such jurisdiction-specific work is that, when given concrete examples of discrimination, a judge would respond by explaining that, while such a problem might exist in jurisdiction X, it was not a problem in his own jurisdiction. These studies focus on particular jurisdictions, thus undercutting the plausibility of such claims.)

Over the past twenty years across the United States, courts have launched these projects – about gender bias in the courts and about race and ethnic bias in the courts. Typically, such commissions are chaired by judges and lawyers, and their studies are formally adopted by the courts themselves. In 1988, the chief justices of all the state courts adopted a resolution in support of these efforts.\(^38\)

\(^{35}\) Phillips v Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969) (holding that an employer, who would not hire women with pre-school age children as an assembly trainee but would hire men with pre-school age children for that position, did not violate Title VII), vacated & remanded by 400 U.S. 542 (1971).

\(^{36}\) See, e.g., Nancy S. Erickson with Nadine Taub, 'Final Report: “Sex Bias in the Teaching of Criminal Law”', (1990) 42 Rutgers Law Review 309, 320-338 (a review, completed in 1985, of casebooks used in first year criminal law classes and of survey data from those teaching that course; concluding that most courses did not address in any details issues such as spousal abuse and self-defense and that the case law was similarly unfocused on women’s experiences). Some of those stereotypes persist today, exemplified by current case law describing questions addressed to victims of sexual assault. See, e.g., Catchpole v Brannon, 42 Cal. Rptr. 2d 440 (Cal. Ct.App. 1995) (reversing a trial judge who questioned a victim of sexual assault by asking her what her father thought of her lawsuit and whether she had considered attempting to escape without her clothes); other cases are described in Lynn Hecht Schafran, 'Blinded by Rape Myths', The National Law Journal, 11 September 1995, A21; Lynn Hecht Schafran, 'Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist' (1993) 20 Fordham Urban Law Journal 439.


The American Bar Association has sponsored meetings and created commissions devoted to these issues. The Judicial Conference of the United States (the policy making body of the federal courts) has endorsed these projects three times since 1992.\(^3\) The net output—a new literature—includes more than forty published reports, about thirty on gender, and a dozen on race and ethnicity.\(^4\)

Study after study shows widespread perceptions that the justice system is not uniformly fair, that gender, race, and ethnicity have inappropriate effects on processes and outcomes. From states as disparate as California, Georgia, Kentucky, Maryland, and Minnesota, one learns that women seeking redress for violence in the home are sometimes blamed, accused of provoking attacks, or treated as if their experiences were trivial.\(^4\) Race reports provide parallel descriptions: people of color are more likely to be held in custody after conviction than are whites, and evidence of racial disparities in sentencing exist.\(^4\)

Once again, celebration is in order. Women created a space as they told stories, both individual and aggregate. This work has licensed thousands of conversations within the halls of justice. Out of dozens of studies (built on social science empirical data and on individual accounts, repeated and collected) came a new narrative. A now accepted statement—in public settings at least—by many judges and lawyers in courts around the United States is that women suffer from the harms of gender-based discrimination and those harms can reach even inside the courthouse doors.

Given that the Robinson case comes from Florida, I will use that state's report as an illustration. The 1990 Report of the Florida Supreme Court's Gender Bias Study Commission concluded that the

---


\(^4\) See The D.C. Circuit Task Force on Gender, Race, and Ethnicity, 1 The Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit, 1995, IVB-145 to IVB-146 [hereinafter D.C. Circuit Task Force] (‘after controlling for various factors, being African-American and being male was significantly related to not being released “both at the initial hearing and at some time during the pendency of their cases.”’); Washington State Minority and Justice Task Force, Final Report, 1990, 10-11 (‘perception that in criminal proceedings, minorities receive disparate treatment and harsher sentences’ despite sentencing guidelines). See also Commission on Systemic Racism in the Ontario Criminal Justice System, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, 275, 280 (‘white (30%) were almost twice as likely as black (16%) convicted men to have been released by the police’ prior to trial;’judges were more likely to resort to imprisonment to punish black than white men’, when the length of incarceration was calculated as including both pre-trial custody and post-trial custody).
overwhelming weight of evidence and research ... [demonstrates that] gender bias permeates Florida's legal system today' 43 The Florida report considered issues relating to family and criminal law, as well as the legal profession. Specific findings ranged from concerns about divorce (that, while Florida's 'no-fault' divorce statute was gender neutral in its language, judicial decisions were not; rather, judges held the 'unrealistic assumption ... that men and women are economic equals in present society')44 to the criminal law ('women generally commit less serious offenses but are treated more harshly than similarly situated male offenders')45. As for the legal profession, Florida's task force found that '[w]omen attorneys still encounter both flagrant and veiled antagonism throughout the legal system', and that such antagonism 'can influence the outcome of cases and client relationships'.46 Other task force reports have considered issues ranging from bankruptcy to benefits law, in part in an effort to make plain that laws relevant to women are not limited to those regulating violence, the family, and bodies.47

A key to the task force literature is that women and men have very different comments on the justice system, as do people of color when contrasted with whites. Women lawyers, in significantly higher percentages than men lawyers, report that gender is a variable that shapes their careers, from hiring to retention and promotion. Significantly higher percentages of women judges (be they trial or appellate, in administrative tribunals or courts) report incidents in which they deem gender to be relevant. In contrast, most male lawyers and judges report that gender has little or no effect, in a courtroom or in a law firm, on process or on outcome.48

Out of these many reports develops, if not a metanarrative, what Nancy Fraser has in other contexts called 'a medium level historical project'49 that captures the views of some women who are participants in the justice system. While one might have predicted that the male perspective would simply be seen as neutral and 'true', and the female discounted, the opposite has occurred. Task force reports – issued by judicial officials – accept as true the beliefs and perceptions of some women (by and large lawyers and judges). Task forces move feminist criticism of the court from allegation to fact.

Applause is in order; women have made power, forced unwilling individuals into conversations and made a space for women to acknowledge pain, and then pushed men to state their appreciation of women's distress. Unlike experiences of Nancy Miller within academic English literature, task forces have succeeded somewhat in 'splitting the subject in power from the fascination of his own

43 Florida Supreme Court Study Commission, Report of the Florida Supreme Court Gender Bias Study Commission, 1990, 2.
44 Ibid, 4.
46 Ibid, 234. Credibility of women was of particular concern. The Commission heard repeated concern about male lawyers and judges 'impugning the credibility of their female colleagues' and of women witnesses. Ibid, 197-209.
48 See, e.g., 'Ninth Circuit Report, The Effects of Gender', above n38, 950-51.
CHANGING THE TOPIC

representation'. Similarly, task forces respond to Carol Smart's complaint about the law: that it 'disqualifies women's experiences of knowledge'.

This new narrative, in some ways tied to two hundred years of tradition and in some ways innovative, has however recently come under assault. The authoritative voice gained by women and men sharing their concerns that created institutional authorship for forty reports is now being attacked, as efforts to undermine such voices are underway even as I write. Prominent critics include Judge Lawrence Silberman of the District of Columbia's federal circuit court; he is described in the press as 'blast[ing] some of the findings' of the District of Columbia Circuit's federal task forces and giving speeches explaining his and other judges on that circuit's 'disassociation' with this work.

Such objectors are aided by women in an organization called the Independent Women's Forum and by at least one history professor who has himself been the subject of debates often termed the 'cultural wars'. These opponents have attempted to block gender race task force efforts, in the judiciary, in bar association meetings, and in Congress.

In the summer of 1995, at the request of Senator Charles E. Grassley, a Republican from Iowa who is on the Senate's Judiciary Committee, the General Accounting Office launched an 'investigation' of federal funds spent on these task forces. On 29 September 1995, Senator Grassley, joined by Senators Orrin G. Hatch and Phil Gramm, engaged in a colloquy on the Congressional Record. Discussing appropriations for the judiciary, Hatch stated that studies on gender and race were:

ill conceived, deeply flawed and divisive … [T]hey threaten the independence of the Federal judiciary … There are to be no funds expended on these studies in the future.

51 Carol Smart, Feminism and the Power of Law, New York: Routledge, 1989, 2.
52 See, Bruce Brown, 'Are Bias Reports Headed for Extinction?' Legal Times of Washington, 6 November 1995, 6; see also The Honorable Lawrence H. Silberman, The D.C. Circuit Task Force on Gender, Race and Ethnic Bias: Political Correctness Rebuffed, The Federalist Paper, Federalist Society for Law and Public Policy Studies, February 1996, 15, 22 (stating that '[t]his misconceived effort should never have been launched in any circuit. It should be opposed everywhere.'). See also Statement of Disassociation by Circuit Judges Buckley, Ginsburg and Randolph in The D.C. Circuit Task Force, above n42, Pt. V-1–V-8 (objecting to inquiries into 'non-court entities', to anonymous responses, and charging that the report is an effort to mandate 'quota-conscious hiring' of law clerks).
54 See Stephan Thernstrom, 'Critical Observations on the Draft Final Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias' in D.C. Circuit Task Force, above n42, V App. 1-1. Thernstrom, a professor at Harvard, was the center of some controversy relating to his teaching of issues on race and ethnicity; a description of the episode is provided in Dinesh D'Souza's book, Illiberal Education: The Politics of Race and Sex on Campus, New York: The Free Press, 1991, 195-97 (D'Souza recounts that, upon reflection over the issue, Thernstrom described himself as feeling 'like a "rape victim"').
55 Charles E. Grassley, Phil Gramm, and Orrin G. Hatch, 'Colloquy on Gender Bias Studies', Congressional Record, 29 September 1995, S14691.
56 Ibid.
As of this writing, the future of federal funding for these projects remains in doubt.57

What is the objectors' plot line? What objections can be framed against these generally mild-mannered efforts, supported by judiciaries and organised bar associations and written largely by volunteer judges and lawyers, all in quest of improvements in the ‘administration of justice’? Task forces, the critics claim, violate ‘our’ traditions by creating ‘faction in a civil society’. Under this plot, we (here, literally all of us) are equal before the law. Courts are blind to distinctions based on race, color, gender, and/or ethnicity. Objectors accuse task forces that mark differences of making differences by seeking special favor and undermining the impartiality of law. Echoing the commentary about ‘speech police’ that is being developed in the Title VII/First Amendment context, the objectors claim that task forces pressure judges into ‘politically correct’ postures.58 In other words, the assaults on task forces are from the same people hostile to other innovations aimed at enabling equality by critical appraisals of the assumptions of formal equality. These opponents link gender, race, and ethnic bias task forces to affirmative action and political correctness.59 The arguments in these different contexts echo each other – that naming differences between women and men creates differences, that affirmative action creates prejudice rather than responds to it.

Hence, at both doctrinal level and at the systemic level of courts, a genuine shift has occurred in the last two decades in the United States. In both arenas, women’s voices produced a counter-narrative; they detailed through law the existence of harms. Women also began to elaborate, by exploring the interplay among and between women of all colors, sexual orientations, ages, and classes, that they were by no means singular and univocal but have multiplicities complicating any

57 After that Grassley-Gramm-Hatch colloquy on the Senate floor, the Executive Committee of the Judicial Conference of the United States Courts voted to seek additional funds from Congress to continue the task force work. But, according to press reports, Chief Justice Rehnquist reviewed the matter with the head of the Administrative Office, and then a decision was made ‘not to appeal the deletion’ of federal funding for bias task forces. Bruce D. Brown, ‘Judiciary Won’t Fight for Court Bias Studies’, Legal Times of Washington, 13 November 1995, 1. The appropriations bill that formed the basis for these exchanges was vetoed for other reasons. See, Bruce D. Brown, ‘Judiciary’s Stopgap Funds Running Dry’, Legal Times, 1 January 1996, 1 (the Federal judiciary’s spending bill is ‘packaged with the appropriations measures for the departments of Commerce, State, and Justice’, which President Clinton vetoed).

In the interim, nine democratic Senators, Paul Simon, Edward Kennedy, Joseph Biden, John Kerrey, Bill Bradley, Dale Bumpers, Barbara Boxer, Frank Lautenberg, and John Glenn, and at least one member of the House (Constance Morella, Maryland) ‘counter-colloqued’ – expressing their support for federal task force work and reminding everyone that there is actually enacted legislation – The Violence Against Women Act – supporting these projects. 141 Cong. Rec. S18173, 7 December 1995; 141 Cong. Rec. E2302, 6 December 1995. The judiciary then received continuing funds; the issue remains as to how the life-tenured judges will spend their moneys in light of the hostility expressed about these projects by the (current) majority party in Congress.


59 Stanley Fish, ‘How the Right Hijacked the Magic Words’, New York Times 13 August 1995, Section 4, 15 (discussing how the ‘eye is deflected from the whole – history, culture, habitats, society – and the parts, now freed from any stabilizing context, can be described in any way one likes’ and that the success of this strategy relies on appropriation of ‘the vocabulary of America’s civil religion … equal opportunity, color-blindness, race neutrality, and, above all, individual rights.’).
simplifying plots. Women made space, achieved stature, offered new stories that shifted the frames of reference. And plainly this power scared a lot of people. That fear is not beyond understanding; it is unnerving because none of us (feminist or not) know how it will end.

C. MAPPING A FIELD: LAW AND LITERATURE

A third arena, and the one with which I will conclude, is the subject of the symposium that prompted this comment – Law and Literature. What is its relationship to these feminist narratives and the counter–narratives that I have just outlined?

For description of United States 'law and literature', summations are available from a variety of sources, including from one of the symposium's conveners, Richard Weisberg, as well by participants Gary Minda and Robert Weisberg. A different kind of insight into the field comes from Elizabeth Gemmette, who provides (like gender, race, and ethnic bias task forces) a window into the daily, ordinary practice of law and literature. Gemmette seeks to understand the effect that concerns going under the rubric of law and literature have had on legal education in the United States. To do so, she has twice sent survey questionnaires to law schools and thus provides us with a thick description of what practitioners assign as readings and describe as their primary teaching goals. Her approach enables insight into what people think they are doing when they 'do' law and literature in the United States, and I am grateful for her work.


Robert Weisberg, 'The Law–Literature Enterprise', (1988) 1 Yale Journal Law and Humanities 1, 2-3 (critical of the law–literature scholarship because of its 'overly conventional readings of literature' and its 'complacent understanding of law').


For example, in 1993, Gemmette sent questionnaires to 199 law schools in the United States; 84 reported offering some kind of law and literature course, while 111 reported not doing so. Gemmette, 'Joining the Class Action,' above n64, 666.
and law have long been allies; both have worked – separately and together, via canonised texts and legal rules, to suppress and make silent much of the world inhabited and understood by women. Women literally lacked juridical voice. Until quite recently, women were the objects of the discussion, as property, as victims, as defendants, but not the authors, the speakers, the witnesses, the lawyers, the judges, or the jurors.

But there is also a sustained counter-narrative, in both law and literature and the intersection thereof, comprised of a rich array of readings and commentaries. Feminist theory in literature and feminist theory in law are both contexts in which a host of professors specialise, and have done so for more than a decade. Yet here, with a relatively new course in law schools called 'Law and Literature', coming into its own at just the point in time when literary criticism is filled with questions of the canon, here, once again, women are almost invisible.

Reviewing the 1995 summary provided by Gemmette, twenty-two works of non-fiction are assigned or recommended by teachers three or more times; only one is authored by a woman (Patricia Williams). The remaining twenty-one works are by men; Richard Posner, current president of the American Law and Economics Association, heads the citation list. Moreover, given the focus on Richard Posner, the absence of one woman in particular—Robin West—is all the more surprising. As Posner describes, his interest in law and literature was first engaged when reading one of Robin West's works. According to Gemmette, 'Joining the Class Action,' above n64, at 666, 38 law schools reported teaching law and literature courses in the 1980s, while 84 describe themselves as doing so in the early 1990s.

I find insufficient Richard Weisberg's suggestion that the addition of books by a few women novelists to the group of great works (e.g., Billy Budd, Bleak House) provides the 'central feminist questions.' Richard Weisberg, Poetics, above n61, 119-20. I prefer not only to be seen through the lens of men's description but also to be heard from directly; of equal import, the issues are not simply access and inclusion, but the introduction of new plots and the resulting transformations.

Both Fish and Balkin argue that Posner writes in an effort to deflect the power of the interdisciplinary work of law and literature and to reassert the authority of law and economics within legal discourse. For example, Balkin argues that 'Posner's strategy ... is to reinterpret literature and literary theory in a way that is not relevant to political and social issues ... Thus, the most interesting thing about Law and Literature:A Misunderstood Relation by Richard Posner is how the book uncannily reenacts its own title—how the relation of law and literature is systematically misunderstood by Richard Posner'. Balkin, above, 799-800.

West’s essays, and West and Posner have since been in an extended conversation about the relationship between law and literature.

One other oddity in current courses is worth noting. Gemmette describes a change over the last half dozen years. The contours of what she terms an ‘emerging Law and Literature Canon’ (as contrasted with the ‘Established Canon’) are evident in assignment of works of fiction, such as Susan Glaspell’s short story, *A Jury of Her Peers,* and the novels *Beloved* by Toni Morrison and *The Handmaid’s Tale* by Margaret Atwood, as well as in other fiction works, ‘mentioned only once or twice’ by law and literature teachers and mostly by women. Yet compare again the list of non-fiction works: women as professors of the metier, as critics, as shaping the discourse remain unrecognised as authoritative by teachers of the domain.

A second problem relates to the purposes of law and literature, as important a question today as when Carolyn Heilbrun and I wrote several years ago. According to Gemmette’s overview, law professors report that their efforts to teach law students literature are based either on a desire to find literary depictions of lawyers and the legal system – and thereby to understand law, or to teach law-as-literature, as texts to be critiqued and analyzed – and thereby also to understand law. Thus, what Carolyn Heilbrun and I described in 1990 as the two identities of law and literature (what we called ‘law in literature’ or ‘law as literature’) remain central today. When asked the ‘why’ of their courses by Gemmette, law professors explained that their principle reasons for teaching law and literature were to expose students to grand literary style, make them critical readers, contemplate the power and morality of judges and lawyers, prepare them to understand the human condition, and to strengthen humanities within law schools. (Teaching about women made the list of purposes in 1995 as the thirteenth rationale out of fourteen.)

---


73. Gemmette, ‘Joining the Class Action’, above n64, 686-88, 691.


77. Gemmette, ‘Joining the Class Action’, above n64, 672.
What a lopsided hierarchy, with literature in the service of law. I do not see literature as the 'handmaiden' (a word chosen deliberately) of law but on equal footing. I bring literature to law students to show them what lawyers cannot yet imagine: stories that law has yet to invent, rights yet to be seen, and how to cope with problems seen but that stymie us by their pain. We (here, law professors and our students) need to read Alice Walker's *Advancing Luna* and *Ida B. Wells* to help think about rape law, which cannot be revised without remembering not only the distrust of women that it reflects but also that United States' history is filled with accusations that men of color have raped white women. We need to read *Jude the Obscure* to understand laws about sexual aggression, to consider under what conditions a woman saying no to sex might ever be heard. We need to see the brilliant film, *A Question of Silence*, to understand the pervasive modes by which men dominate women, and to consider how much to be a part of legal institutions, when to stand outside them, and when to laugh.

Yet a third example of feminist problems with 'law and literature' are the texts of law — relied upon both by law professors (to teach 'what law is about' to new generations of lawyers) and by English professors (to write about what literature and law have in common). For many (but not all) English professors who do 'law and literature', the principle texts are authored by very few actors: Supreme Court justices in particular, appellate judges in general, and sometimes members of Congress or their staff. These are the pronouncements that, in theory, bind the nation. The choice of text assumes, reiterates, and affirms the primacy of those who are currently hierarchically superior and further assumes that the hierarchy is itself fixed — and appropriate.

But other speakers are critical in law: lawyers, speaking through documents that they draft; judges of the lower courts; witnesses in depositions or in trial transcripts; court staff who are key to entry and participation. Indeed, gender, race, and ethnic bias task force reports are full of testimony by these many participants. Further, to the extent law and literature proponents stay within the texts generated at the highest courts, one hears from a singular set of actors, positioned by class, race, ethnicity, and gender. In contrast, as is well known today in part by Court TV and the ubiquitous OJ Simpson trial, Marcia Clark, Johnny Cochran, and Mark Fuhrman are also voices in courts that form

---


80 Hardy, *Jude the Obscure*, above n33.

81 *A Question of Silence* (Quartet Film Inc., Marleen Gorris, director, 1986).


CHANGING THE TOPIC

the basis of law. For literature to study law as if the texts were only Supreme Court opinions is to miss a lot of law.

Note that here I am not making a claim at all about hearing so-called 'outsiders' voices. My point is that, by reading only the pronouncements from on high, one misses hearing insiders, key actors currently in the plot. Further, it is the behavior and activities of these speakers and those who hear them that constitute part of law, as much as law is constituted by jurisprudential fiat.

Feminism in law and feminist theory in literature have much to bring to the practice of law and literature within the legal academy. Given that law and literature is coming of age within the legal academy as both the disciplines of law and of literature are much engaged with canonicity, the fledgeling project 'law and literature' (itself something of an 'outsider') could be the source of lively contributions to such debates. Yet this domain seems as traditional as those it seeks to supplement. A feminist counter-narrative exists, at the periphery, as does a plentitude of discussions about the role of narrative in law and the legitimacy of what some term 'outsider narratives.' Here too the struggle for authority to speak dominates these last few years of the century.

In each of these domains – in legal doctrine, in the construction of the self-descriptions of courts, and in the conscious crafting of an interdisciplinary field of study – the tension remains constant about a struggle for the meaning of meaning. That such struggle exists is evidence that law and literature are both engaged in the practice of power, and it is that shared enterprise that binds them so tightly together.

---

84 See, e.g., Resnik, 'Constructing the Canon', above n82 (upon reading lower court as well as Supreme Court opinions, literary interpretation of Supreme Court opinions needs to be revised to consider the ways in which justices' voices are not only 'interrogative, monologic, declarative' and freighted with inevitability but also how such opinions are recreations and sometimes distortions of narratives in assistance of their advocacy).

85 See Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4 (discussing the 'jurisgenerative' role of communities and how courts, as instruments of the state, can be 'jurispathic'); John Frow, 'Comments on Steven Mailloux, Measuring Justice in Legal and Literary Theory' (presentation at the Symposium, manuscript on file with author, 30 September 1995) (discussing the role of law as bridging relations among the living and the dead).

86 West, 'Law, Literature, and Feminism', above n76, manuscript at 2-4 (comparing law and literature's marginal status to that of law and economics, now considered a necessary part of the education of lawyers in the United States).

87 Some of the work about such 'outsider' voices might also be understood as a part of classes or scholarship about law and literature. This set of writings is much concerned with the role of narrative and the issue of what stories have authoritative character. See, e.g., Kathryn Abrams, 'On Hearing the Call of Stories' (1991) 79 California Law Review 971 (describing feminist narratives, the critiques of them, and offering a rich analysis of the challenges posed); Susan Bandes, 'Empathy, Narrative, and Victim Impact Statements' (1996) 63 University of Chicago Law Review (forthcoming, 1996) (examining the relationship between calls for narrative and claims for empathy in judging and distinguishing among the kinds of empathic responses the law should provide).