

Yale Law School  
Yale Law School Legal Scholarship Repository

---

Faculty Scholarship Series

Yale Law School Faculty Scholarship

---

1-1-1993

# Two Cheers for Feminist Procedure

Harold Hongju Koh  
*Yale Law School*

Follow this and additional works at: [http://digitalcommons.law.yale.edu/fss\\_papers](http://digitalcommons.law.yale.edu/fss_papers)



Part of the [Law Commons](#)

---

## Recommended Citation

Koh, Harold Hongju, "Two Cheers for Feminist Procedure" (1993). *Faculty Scholarship Series*. Paper 2082.  
[http://digitalcommons.law.yale.edu/fss\\_papers/2082](http://digitalcommons.law.yale.edu/fss_papers/2082)

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

## TWO CHEERS FOR FEMINIST PROCEDURE

*Harold Hongju Koh\**

When I first told my wife, who is also a lawyer, that I was going to be on a panel about feminism and civil procedure, she asked me who else was going to participate. When I read her the list of names, she smiled a bit and asked, "So how does it feel to be the token international lawyer?"

For me, her question summarizes both the disadvantages and the advantages that I have felt in confronting this subject. On the one hand, because I have spent a lot more time in the last few years grappling with the work of Oliver North than Catharine MacKinnon, I have little background in feminist theory. On the other hand, as someone who teaches international law and procedure, I have been forced from the very beginning to take as a given one of the core assumptions of feminist procedure: that our procedural rules are not a set of rules that are laid down. They are a choice, that grows out of our peculiarly American system of culture, biases, societal norms, and power relations.

On the one hand, this perspective has helped me to appreciate what I think are very substantial contributions that feminist theory can make to the study of procedure. On the other hand, I am not convinced that the case has been made that feminist theory offers a coherent, alternative, distinctive vision of procedure. That is not to say that no such distinctive vision exists; only that feminist scholars have not yet made the case for one.

So, for example, when I read that adjudication is a distinctively adversarial, structured, "male" approach to dispute resolution, to be contrasted with a consensual, communitarian, conciliatory, "female" approach, I ask, as an Asian American, why don't we call the ADR approach the "Japanese approach"? And how does feminist theory explain the persistence of conciliatory, nonadversarial dispute techniques in Asian society, the most sexist of societies? And, as an international lawyer who regularly watches sovereign states fighting with each other through mediation, such as the good offices of the United Nations Secretary General, I wonder whether these so-called "male procedures" are in fact better styled as "domestic procedures," with conciliation procedures being thought of as "international" dispute-resolution procedures.

---

\* Professor of Law, Yale Law School.

In short, I view feminist procedure as an important and promising, but at this time largely unfinished scholarly project. To evaluate its merits, we first need criteria for evaluation, and second we need to try to measure its value without falling prey to either overestimation or underestimation. Let me briefly suggest that we can think about feminist procedure along three dimensions: first, its cognitive or explanatory dimension; second, its critical dimension; and third, its constructive dimension.

The cognitive or explanatory dimension asks: when one looks at things in a feminist perspective, does one see things that one does not see otherwise? Does this lens explain things for which one does not otherwise have a good explanation? Do practices that appear to be natural or invisible suddenly become visible and socially constructed?

The critical dimension asks: if we see the world in this new light through these different lenses, are we more or less happy with it? Are we more or less likely to criticize? Does a system that appears and purports to be neutral actually entrench particular power relations?

The constructive dimension asks: if feminist theory does lead us to criticize procedure, what reforms, if any, follow? Does feminist procedure have a constructive reform agenda similar to the new remedial agenda for the federal courts prescribed in the wake of the civil rights movement?

Measured along these three dimensions, I would give feminist procedure very high marks on the cognitive and critical dimensions. But with regard to the third, constructive dimension, the jury is still out.

First, does a feminist perspective add to our ability to see the world? The answer, I think, is emphatically, yes. When one reads the gender bias studies from Connecticut, New York, New Jersey, Rhode Island, or Florida,<sup>1</sup> the world of process looks a lot bleaker than Hart and Sacks's wonderful world of reasoned elaboration.<sup>2</sup> The various strands of feminist theory all suggest that the structure of modern procedure is not neutral, but that it in fact reinforces certain values which could be called "male": individualism, neutrality, formality, separateness, and autonomy. At the same time, procedure tends to devalue other values which could be considered

---

1. For a listing of these and other studies on gender bias, see Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, app. (1993).

2. See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958).

female, for example, connectedness, reciprocity, empathy, relationship informality, and context.

Modern procedure's favoritism of certain values over others has dramatic doctrinal consequences. Far from being neutral with regard to forum, decisionmakers, parties, and participation, modern procedural doctrine systematically favors adjudication over alternative dispute resolution, formal adversary process over informal process, and law over equity. Moreover, it privileges federal over state forums, Article III over Article I, and the independence and neutrality of lawyers over concerns for empathy and consideration. Discrete claims of individual right are generally favored over contextualized narratives of systemic wrong, claims of power and sovereignty valued over claims of reasonableness, and finally, claims of finality and closure valued over claims of reconsideration and open-endedness.

Indeed, if one were to guess what kind of procedural world a male perspective would construct, one would guess that a first-year procedural course would emphasize the study of: (1) formal civil actions (2) at law (3) in the federal courts (4) before independent decisionmakers, (5) with strict rules of jurisdiction, (6) preclusion, and (7) role definition for all participants. Thus, one does not have to accept all or most of the distinctions that have been suggested to agree that a gendered perspective carries a lot of explanatory water. It appears to explain much of what we actually see, and therefore clearly deserves to be seriously debated and disputed. Moreover, in recent weeks you would have to be wilfully blind, if you did not see that national events of gender politics have been turning on very fine points of procedure. In my procedure class last year, I spent an entire session talking about procedural issues in the Anita Hill-Clarence Thomas proceeding. We examined the impact of the Senate Judiciary Committee's decision implicitly to place the burden of proof on one or the other, the decision to exclude questions regarding certain kinds of evidence from the Committee's inquiry, the appropriate use as "evidence" of lie detector tests, what constitutes corroborating testimony, and the like.

Then only a month later, I spent another full class talking about procedural rulings in the William Kennedy Smith rape case: jury selection, exclusion of the defendant's history with regard to three other women who were claiming assault, whether the victim's statements should have been grounds for a mistrial, etc. In both cases, I was forced to recognize that the relationship between gender and the supposedly "neutral" application of procedural rules was a more urgent and pressing concern to the students than the study of *Pen-*

*noyer v. Neff*.<sup>3</sup> Moreover, in each of the cases, gender-based explanations provided more persuasive reasons for why procedural rules were applied in a certain way than did the traditional doctrinal explanations we always give—for example, fairness, efficiency, finality, judicial economy, neutrality, and maintenance of the adversary process. So, on the first evaluative criterion, the cognitive or explanatory value of feminist procedure proves quite striking.

Feminist procedure has also had a very powerful critical impact. In my procedure course, the students who were most celebratory about our judicial system were deeply troubled to read the Connecticut Gender Justice Task Force Report.<sup>4</sup> It made them question, for the first time, the neutrality of the procedural system in operation. In a more subtle way, after the students read Susan Glaspell's short story, "A Jury of Her Peers"<sup>5</sup>—which focused on the interrelationship between judgment and feminist vantage point—one student commented, "This story condemns everything we've done in this course. Why does a 'fair' procedural system demand that judges strip themselves of their biases? Why do we have rules against ex parte contacts? Why do we have rules against jury nullification?" Indeed, one surprising side effect of reading that story was that one female student came to me and said Clarence Thomas's remark that " 'When I saw black prisoners being led to the bus, I say that there but for the grace of God, go I', was a very 'feminist' statement. Thomas was judging others in the same empathetic light used by the women asked to 'pass judgment' on other women in 'A Jury of Her Peers.' "

To sum up: on the critical score, I think that feminist theory has made an important contribution by introducing a new dichotomy—the male/female dichotomy—to the study of procedure, a dichotomy that serves as both an explanatory and a critical variable. In the 1990s this new dichotomy can energize the way we think about civil procedure in the same way that the Civil Rights Movement energized the way we thought about procedure in the seventies. We are all familiar with the by now well-investigated conflict between the federalist and nationalist views of federal courts and procedure.<sup>6</sup> The federalist vision views state sovereignty as important, state and

---

3. 95 U.S. 714 (1877).

4. REPORT OF THE CONNECTICUT TASK FORCE, GENDER JUSTICE AND THE COURTS (Conn. 1991).

5. Susan Glaspell, *A Jury of Her Peers*, in CHILLING AND KILLING (Joan Kahn ed., 1978).

6. See, e.g., Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

federal courts as functionally interchangeable, the federal system as owing great deference to the states, and state courts as properly engaged in traditional private law adjudication.

This federalist vision stands in stark contrast with a nationalist paradigm which advocates less federal deference to state sovereignty, the myth of parity between the federal and state systems, the view that the state courts are insufficiently protective of federal rights, and the focus on new "public law" models for adjudication. On reflection, these dichotomies between a nationalist and federalist approach and the reactions that have been spawned by it—the split between traditional adjudication and public law litigation, between simple and complex litigation, and between adjudication and alternative dispute resolution—have largely dominated the study and scholarship of procedure for the last ten years. In the gender-based distinctions feminists offer we potentially have a new dichotomy which has at least as much explanatory power. So my message so far is, two cheers for feminist procedure; the glass is at least half full.

But like most critics of traditional perspectives, feminist procedure has only just begun to address a constructive program of reform, of imagining an alternative procedural world in which gender issues are taken systematically into account in reforming procedural rules. In one respect, feminist procedure has taken significant steps to prescribe an affirmative reform program in the area of gender bias. The recommendations of the various state gender bias movements suggest recommendations with regard to a whole set of institutional actors—judicial selection committees, law schools, bar associations, judges, lawyers, prosecutors, witness, and court personnel. But once we move beyond the task of eliminating indicia of overt gender bias in our procedural system, a more difficult constructive task awaits. How do we integrate a distinctively feminist voice into a procedural system? Once one starts thinking about that problem, six questions immediately arise.

First, the terms of feminist discourse are by their nature difficult to operationalize, particularly in a black-letter rule setting. What exactly does it mean to value or undervalue notions like "nurture," or "interconnectedness," and how does proper evaluation of those notions meaningfully affect the day-to-day operation of, say, Rule 11 or a § 1404 transfer or a § 1292 interlocutory appeal?

Second, which of these concepts are distinctively "feminist," as opposed to concepts that are implicitly shared with other critical perspectives, such as CLS, or critical race theory, or communitarianism, or neo-republicanism? Do we risk falling into a trap of as-

signing the "male" label to everything that the status quo values and the "female" label to everything that it undervalues, without asking whether the undervalued things are in fact distinctively feminine? For example, I teach a "soft," undervalued subject—International Law—but does that automatically mean that it is a "feminine" or feminist subject?

Third, in some procedural contexts, the different strands of feminist theory push in very different directions with regard to what particular procedural rule should be adopted. Take, for example, the case of evidentiary issues involving Asian battered women. Different subsets of feminist theory—equality theory, dominance theory, different voice theory—might all push for different results on whether evidence of any pattern, practice, or syndrome in such cases should or should not be excluded from trial in such cases.

Fourth, gender values sometimes come into conflict with what we consider to be universal procedural values, particularly in the case of rape as we found in the William Kennedy Smith case. A constant tension exists, for example, in trying to balance concerns about the victim with the defendant's right to confront, or with strict application of evidentiary rules, press access to criminal trials, and the like.

Fifth, a tension exists between formulating rules that are more informal and less adversarial and ensuring that the female litigants are not victimized in those informal settings because of their relative lack of bargaining power. Does feminist procedure favor formal rules or discretion? If we rely on discretion, are we not leaving female litigants at the mercy of the unreviewable discretion of judges who are almost exclusively male?

Sixth, and finally, we must consider the "slippery slope" problem. Introduction of feminist values into procedure attacks a core presumption of the Federal Rules of Civil Procedure, in Robert Cover's memorable term, the notion that we have a single "transsubstantive" set of rules to cover all cases.<sup>7</sup> It may well be that we do not want the same procedural rules for corporate takeovers as for child custody cases, but does that mean that we also have to have different rules for welfare cases and race discrimination cases? To what extent are we going to tailor the procedural rules to the personal attributes of the litigants, and at what point should uniformity still carry the day?

In raising all of these concerns, I am acutely aware that I could be accused first, of asking that feminist procedure be delivered up in a

---

7. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

nicely wrapped box, and second, that I may be engaging in traditional male criticisms: formalistically demanding that values be operationalized into rules or that all internal inconsistencies of an emerging theory be eliminated. In my defense, I can only say I am who I am. Nor do I believe that feminist procedure can develop its distinctive voice unless it reaches out beyond the converted, to people who want to incorporate its insights into their teaching and scholarship without totally converting it. I believe that there is a big difference between feminists doing procedure and the development of a distinctively "feminist procedure." Right now we have feminists *doing* procedure; we even have people who are not feminists speaking about and debating issues of feminist procedure. But we have not yet moved to a distinctively "feminist procedure," and that remains the unfinished task.



