Transcending the Boundaries of Law

Transcending the Boundaries of Law is a ground-breaking collection that will be central to future developments in feminist and related critical theories about law. In its pages, three generations of feminist legal theorists engage with what have become key feminist themes, including equality, embodiment, identity, intimacy, and law and politics. Almost two decades ago, Routledge published the very first anthology in feminist legal theory, At the Boundaries of Law (M.A. Fineman and N. Thomadsen, eds. 1991), which marked an important conceptual move away from the study of “women in law” prevalent in the 1970s and 1980s. The scholars in At the Boundaries applied feminist methods and theories in examining law and legal institutions, thus expanding upon work in the Law and Society tradition. This new anthology brings together some of the original contributors to that volume with scholars from subsequent generations of critical gender theorists. It provides a “retrospective” on the past 25 years of scholarly engagement with issues relating to gender and law, as well as suggesting directions for future inquiry, including the tantalizing suggestion that feminist legal theory should move beyond gender as its primary focus to consider the theoretical, political, and social implications of the universally shared and constant vulnerability inherent in the human condition.

Martha Albertson Fineman is Robert W. Woodruff Professor of Law at Emory University and Director and Founder of the Feminism and Legal Theory Project.
Transcending the Boundaries of Law

Generations of feminism and legal theory

Edited by
Martha Albertson Fineman
This book is dedicated to future generations of feminist students curious about the interweaving of gender, law, power, and society. It is hoped that they will be interested in learning the stories of those of us who went before them.
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Contributors

**Michèle Alexandre** is Associate Professor of Law at the University of Mississippi. Her teaching areas are constitutional law, critical race theory, civil rights, human rights, and feminist legal theory. She has been involved with the Feminism and Legal Theory Project for the past six years and has found it one of the most rewarding experiences of her career.

**Mary Anne Case** is an Arnold I. Shure Professor of Law at the University of Chicago Law School. She has presented more than a dozen papers and participated in several Uncomfortable Conversations at the Feminism and Legal Theory Workshop since 1994. She contributed chapters to two other collections developed from the Project: *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero, eds, Ashgate Press 2009) and *What’s Right for Children?* (Martha Albertson Fineman and Karen Worthington, eds, Ashgate Press 2009).

**Fiona de Londras** is a lecturer in the School of Law, University College Dublin where she is also a member of the Institute of Criminology. She primarily researches international law’s capacity to restrain repressive state action. While reading for her PhD in 2006, she spent three very happy months as a Visiting Scholar at the FLTP in Emory and visited once more in the spring of 2009.

**Martha Albertson Fineman** is a Robert W. Woodruff Professor of Law at Emory University and the Founding Director of the Feminism and Legal Theory Project.

**Darren Lenard Hutchinson** teaches constitutional law, equitable remedies, and seminars in critical race theory, law and social change, and equal protection theory at the American University, Washington College of Law. He writes extensively on issues related to constitutional law, critical race theory, law and sexuality, and social identity theory. He also authors *Dissenting Justice*—a blog related to law and politics.
**Isabel Karpin** is Professor in the Faculty of Law at the University of Technology, Sydney. She teaches and researches in feminist legal theory, health law, disability and the law, genetics and the law, reproduction and the law, law and culture, and constitutional law. She has been involved with the FLTP since 1992 when it was based at Columbia University.

**Laura T. Kessler** is Professor of Law at the University of Utah. Her main scholarly interest is discrimination and families. She began her academic career in 1993 through involvement in the FLTP. Her work appears in two other Project anthologies: *Feminism Confronts Homo Economicus* (Martha Fineman and Terence Dougherty, eds, Cornell University Press 2005) and *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero, eds, Ashgate Press 2009).

**Holning Lau** is Associate Professor of Law at the University of North Carolina School of Law. Lau thanks the Feminism and Legal Theory Project for being an invaluable forum for cultivating ideas and an extraordinary source of inspiration, camaraderie, and mentorship.

**Linda C. McClain** is Professor of Law and Paul M. Siskind Scholar of Law at Boston University School of Law. She is the author of *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Harvard University Press, 2006), and co-editor (with Joanna L. Grossman) of *Gender Equality: Dimensions of Women’s Equal Citizenship* (Cambridge University Press, 2009). As a new law professor, she made her first academic presentation at a workshop sponsored by the FLTP and continues to participate in the Project.

**Martha T. McCluskey** is Professor of Law and William J. Magavern Fellow, State University of New York at Buffalo. She contributed to several other FLTP collections, including *Feminism, Media, and the Law* (Martha Albertson Fineman and Martha T. McCluskey, eds, Oxford University Press 1997); *Feminism Confronts Homo Economicus: Gender, Law, and Society* (Martha Albertson Fineman and Terence Dougherty, eds, Cornell University Press 2005), and *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero, eds, Ashgate Press 2009).

**Mary Jane Mossman** is Professor of Law and University Professor at Osgoode Hall Law School, York University, in Toronto, Canada. She teaches courses in family law and property law and is involved in research relating to access to justice and the history of women in law. She considers it an honor to be included in this volume celebrating the FLTP’s 25th anniversary, particularly because the Project has been so significant for Canadian feminist legal scholars.
Siobhán Mullally teaches at University College Cork, Ireland. She publishes widely in the field of gender, human rights, and migration law. She has visited the FLTP Project at Emory, as have her doctoral students. She has worked with international NGOs and UN bodies in Timor-Leste, Afghanistan, and Pakistan, and she previously served as Chairperson of the Irish Refugee Council (2006–8).

Roxanne Mykitiuk is Associate Professor of Law at Osgoode Hall Law School, York University, where she teaches health law and bioethics, law and disability, and family law. In 1991 she attended her first FLTP workshop at Columbia University and resolved to do graduate work there with Martha Fineman, which she did. She has been a participant in numerous Project workshops ever since.

Fionnuala Ní Aoláin is concurrently the Dorsey and Whitney Chair in Law at the University of Minnesota Law School and Professor of Law at the University of Ulster’s Transitional Justice Institute in Belfast, Northern Ireland. She is co-founder and Director of the Institute and was nominated twice by the Irish government to the European Court of Human Rights in 2004 and 2007, the first woman and the first academic lawyer to be nominated. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000 and served until 2005. She began attending FLT Workshops while completing her J.S.D. at Columbia University.

Victoria F. Nourse is LQC Lamar Professor of Law at Emory University. She formerly served as Special Counsel to the Senate Judiciary Committee and to then-Senator, now Vice President Biden and as Assistant Counsel to the Senate Iran–Contra Committee.

Twila L. Perry is Professor of Law and the Alexander T. Waugh Sr. Scholar at Rutgers University School of Law, Newark. Her primary interest is in the intersection of feminist legal theory, critical race theory, and family law. She began attending FLTP conferences in the early 1990s.

Dorothy E. Roberts is the Kirkland and Ellis Professor at Northwestern University School of Law and a faculty fellow of the Institute for Policy Research. She is author of *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*. She began participating in the FLTP, when it was located at Columbia, as soon as she became a professor in 1988. Her early engagement in the Project was pivotal to her development as a feminist legal scholar.

Adam P. Romero holds a J.D. from Yale Law School, and he served as a law clerk to Hon. M. Margaret McKeown of the US Court of Appeals for the Ninth Circuit. A regular participant in the Feminism and Legal Theory Project since 2002, he co-edited with Martha Fineman and Jack E. Jackson the FLTP volume, *Feminist and Queer Legal Theories: Intimate Encounters, Uncomfortable Conversations* (Ashgate Press 2009).
Laura Spitz is Associate Professor of Law at the University of Colorado, where she teaches contracts and commercial law. She has participated in FLTP workshops since September 2002, when she presented a paper at the Corporate Citizens in Corporate Cultures: Restructuring and Reform workshop in Toronto. She spent the 2008–9 academic year at Emory University as a Visiting Professor of Law.

Michael Thomson is Professor of Law, Culture, and Society at Keele University, UK. He is a health care lawyer with a particular interest in the regulation of reproduction, reproductive technologies, and masculinities. He has been involved with the FLTP since 2004 when he was a Visiting Scholar at Cornell Law School.

Margaret Thornton is Professor of Law and ARC Professorial Fellow at the Australian National University in Canberra. Her current research project, “EEO in a Culture of Uncertainty,” examines the retreat from social justice within a neoliberal climate. She has taught and published in the area of feminist legal theory for 30 years.

Robin West is Research Dean and Professor at Georgetown University Law Center. She writes and teaches on law and humanities, feminist legal theory, general jurisprudence, and constitutional law. Her latest book is Marriage, Sexuality and Gender (Paradigm Press).

Patricia J. Williams is the James Dohr Professor of Law at Columbia University. She also writes the column, Diary of a Mad Law Professor, for The Nation magazine. Her books include The Alchemy of Race and Rights, Seeing a Color-Blind Future, and Open House: On Family, Food, Piano Lessons and the Search for a Room of My Own.
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Martha Albertson Fineman
Introduction

Martha Albertson Fineman

Twenty-five years ago, shortly after my own successful, but nonetheless harrowing bid for tenure, I began the Feminism and Legal Theory Project (FLT) at the University of Wisconsin. The explicit purpose was to provide a supportive and encouraging environment for scholars interested in doing feminist theory work. Early workshop sessions were in the summers, often lasting a week or more. They were organized around topics or themes, such as differences and motherhood.

The women and men who came to those early sessions were searching for a way to reconcile growing critical and feminist sensibilities with the study and teaching of law as we had experienced it as students and beginning professors. A handful of Women and the Law courses had been created and were being taught at that time, but there were very few women law professors and the word “feminist” was fairly new to law schools.

During those early sessions, we struggled in our presentations and discussions, often borrowing from feminist work in other disciplines, trying to push the language of feminism found in literature or history into a legal frame. The language found in other disciplines didn’t always fit very well into the legal frame, particularly because the discipline of law had its own discourse and some rather inflexible standards that resisted new ways of approaching old problems.

In so far as feminist theory is critical theory, it faced a formidable subject in encountering the law. The law historically is conservative in nature. Concepts such as stare decisis and adherence to the idea of precedent controlling decisions make change difficult. In addition to valuing stability and continuity, law adhered (at least rhetorically) to principles of neutrality and objectivity. Teaching law was supposed to be a rational and logical exercise, not one that introduced particular perspectives or political positions. Feminism was seen as importing bias into teaching and scholarship, a form of special pleading in which women always came out on top.

Justice is, after all, blind, and we are a nation of laws, not men (sic) as the sayings go. Claims for reform based on the idea that a group (women) was not represented by the men who controlled law and its institutions and that the law was therefore biased were not well received. A large burden for as the first
generation of feminist legal scholars was to convince our colleagues in the legal academy that feminism had its place and was as meritorious as its contemporaries: law and economics and critical legal studies. To some extent feminist legal theorists were able to build on the critiques of legal realists who challenged the objectivity of law during the 1930s and 1940s. Feminist legal theorists also benefited by inroads made at a number of law schools by the fleeting Critical Studies Movement during the 1970s and 1980s.

Law as a discipline remains a tough terrain for feminist thought, however. Even though most US law schools now have courses and seminars on feminist legal theory, many remain skeptical about its contributions, particularly those who have not educated themselves about feminist legal theory and the insights it can bring to their understanding of law and legal institutions. Increasingly feminists themselves raise questions about using the label “feminist,” since it is seen as divisive or off-putting.

Some of our early efforts at feminist legal scholarship were published in 1991 in the first anthology of feminist legal theory, *At the Boundaries of Law: Feminism and Legal Theory*, which I edited along with Nancy Thomadsen. I selected the term “boundaries” for the title because while feminism had made its way into law, crossing some conceptual and intellectual boundaries, it had barely done so. Feminist legal theory clearly stood in law’s margins—near the boundary that marked law off from other academic disciplines. The Introduction to this earlier collection is included as an appendix to this volume.

This new collection marks the passage of a quarter of a century of scholarship supported by the FLT Project. Its title connotes that the current position of feminist theory might be perceived as “transcending” law. This could mean two different things. The first is a mere celebratory claim that feminism is nearer the center than the periphery of law, having transcended or moved beyond law’s boundary. However, some would argue that what has been transcended is not the boundary that marks off law, but law itself. This claim is more controversial, both within and without legal feminism because any claim that feminist theory has gone beyond or transcended law raises a fundamental question about the future of feminist legal theory: what will give focus and content to feminist legal theory if it has left law behind?

The chapters in this collection do not always agree on where feminism should be positioned in regard to law. Some proceed as though feminist insights were central to law and law reform (or at least in legal education). Others see little possibility for real feminist transformation in law, adhering to the notion that law is inherently male and impervious to feminist inroads. A few other authors in this collection seem to have transcended law in their own work. While they might focus on legal institutions and bring an understanding of how law interacts with society and positions of power, their concern is not with changing or reforming law but in better understanding how power is manifested. In that sense arriving at (or in) law is not the goal. In fact, law may be but an obstacle to be understood and ultimately transcended.
This book is divided into seven sections, beginning with reflections on the history of feminist theory and moving on to reflect on key themes in feminist legal theory: equality, bodies, universals and identities, intimacy and family, the state, and politics. These themes and some of the chapters reflect the fact that while much has changed since that first collection of essays, much remains the same. This new collection presents a range of feminist legal scholarship and a diversity of feminist legal scholars, including men, who were absent from the first FLT collection. Readers will encounter exciting and varied scholarship in the following pages that should leave them with a sense of the richness of feminist legal theory as it has developed over the last 25 years.
Section One

From women in the law to feminist legal theory
Introduction to Section One

This section reflects on some of the history of feminist legal theory from its beginnings as women in the law. The chapters include personal reflection and legal research, histories of professional women and of legal theories. They set the stage for the rest of the book by giving a background to the theoretical developments that follow.

Mary Jane Mossman’s chapter addresses the tensions for early women lawyers between gender consciousness and the newly emerging norms of professionalism. She asks whether these women were feminist lawyers or more closely identified with norms of their profession. Mossman considers the French origins of the term “feminism” and its roots in the suffragette movement, highlighting the significance of being “woman identified” to feminism. Her chapter stresses the longstanding nature of the tensions generated by conflicting professional and personal challenges for women and demonstrates that bringing women into law does not necessarily mean feminist sensibilities will follow.

Margaret Thornton traces the history of feminist legal theory in Australian law schools in the changing political climate. This chapter shows how the fortunes of feminist legal theory are dependent largely on the state. She traces the trajectory of a discomfiting liaison between feminism and the legal academy over three decades, highlighting the contingent nature of feminist legal theory, particularly its sensitivity to the prevailing political climate. In Australia, the pendulum has swung from social liberalism to neoliberalism, which has induced uncertainty and instability. While under social liberalism, feminist legal theory received a modicum of acceptance within the legal academy, it contracted then withered with the onset of neoliberalism resulting in the academy’s subtle remasculinization.

Patricia Williams takes us back to the struggles of women in and with law through a humorous but poignant account of the ways in which fashion intersects with power. She discusses the symbolic significance of the requirement that attorneys in the Solicitor General’s Office wear traditional “morning coat” attire when arguing before the Supreme Court. Williams considers the complications this requirement has created for female attorneys and whether it reflects the persistence of law’s failure to accept women into the profession. The chapter
discusses how some fashions have restricted women’s actions, even harmed their bodies (e.g. stiletto heels). However, fashions that constrict can also give women a sense of empowerment. Williams ends by recounting her experience at the 2008 Democratic Convention, where she wore a pair of heels that impeded her ability to move easily around the city of Denver. Even as she regretted her shoe choice, the shoes provided a sense of power or difference while navigating the chaos of the convention.

My chapter considers the legal concept of equality in the US from an historical and analytic perspective. Beginning with the establishment of Portia Law School for women and court decisions such as *Muller v. Oregon*, I discuss the tension between seeking equality as sameness of treatment and seeking positive improvements in women’s lives. While women have officially attained legal equality with men, the benefits of citizenship are still distributed in highly unequal ways. In part this is because as a nation Americans value autonomy over equality, sacrificing substantive equality in the name of greater independence while ignoring the realities of our shared states of episodic dependency and constant vulnerability.
Chapter 2

An inconsistent affair
Feminism and the legal academy

Margaret Thornton

Introduction

The political pendulum that inscribes an arc from social to neoliberalism has shaped the fortunes of feminism in the Australian legal academy. The 1970s represented the high point of social liberalism when notions of the collective good and distributive justice were acknowledged in accordance with the egalitarian ideal. Although the modus operandi of any free-market society is in-equality, in which the values of competition, power, and hierarchy are central, under the Australian version of liberal democratic capitalism that prevailed in the 1970s and 1980s, the play of freedom was restrained by a modicum of state regulation in the interests of the common good.

Social liberalism, with its focus on collective good, not only effected some semblance of equality for women, it enabled legal feminism’s emergence and short-lived tolerance. A noted product of social liberalism in Australia was the existence of a centralized wage-fixing system rather than enterprise bargaining, which benefited women as well as all low-paid workers. While there was a gender gap in terms of pay equity, it was less than in comparable countries. Neoliberal or market liberalism, generally accompanied by a neoconservative morality, has induced a general contraction of civil society and a correlative decline in distributive justice and interest in social movements. Indeed, neoliberalism, with its moral and economic conservatism, has insidiously sought to effect a re-masculinization of the academy. Neoliberal technologies of power subtly carry gendered subtexts that include regimes of depersonalized top-down authority, entrepreneurialism, and promotion of the self. In the absence of restraint on the state’s exercise of power, feminism is struggling to survive within the contemporary academy.

Leaving aside the vagaries of the liberal landscape and its susceptibility to prevailing political mores, feminism will inevitably encounter resistance within the academy since it is an outsider movement. The law’s singular capacity to silence feminist discourse was a familiar refrain of second-wave feminism (e.g. Smart 1989). Nevertheless, feminism has exercised a discursive effect because it is multifaceted and heteroglossic, with a marked capacity to
reinvent itself. Consequently, it defies a neat definition. The tendency to use the plural form feminists underscores the difficulty of setting up one theoretical framework that could offer liberatory or emancipatory possibilities for all women (Caine 1998: 419). Feminist legal theory (FLT) is similarly diverse. As an offshoot of 1970s feminism, it began by addressing the materiality of oppression against women with a platform of reforming the law but progressed to transforming fundamentally the nature of legal knowledge. These reformist and transformative dimensions roughly correspond with what used to be called liberal feminism and radical feminism (Jagger 1988). The influence of postmodernism and deconstructionism further disrupted any notion of a stable understanding of feminism, including the very idea of there being an identifiable woman at the center. FLT is concerned with the ontology and epistemology of law at a meta-level, but the phrase is loosely invoked to embrace the myriad forms of engagement between law and the feminine, broadly defined. This engagement may also include critiquing the imperialism of Western feminism from the perspective of indigenous women and those from developing countries. Nevertheless, in this chapter, I am not addressing the variegated history and philosophy of FLT so much as its dynamic relationship with the legal academy and the state.

While feminism as a social movement is not dependent on the state for its existence, FLT (with an emphasis on legal theory) does seem to need the state for its survival. The relationship with government is not direct but one effected indirectly through the public funding of university law schools, which is the case with most Australian law schools. Additionally, there is a high degree of control of higher education through federal government policy, which has not decreased with the state’s retreat from the funding of law school places. While it is theoretically possible for feminist legal scholars to operate as outside the legal academy, sustained by a commitment to feminism as a “form of life” (Naffine 2002), legal scholarship in the public domain generally requires the imprimatur of an institution for legitimacy. Paradoxically, the grit associated with outsider status may be viewed positively, for the institutionalization of feminism is thought to exercise a deleterious effect on it (Jackson 2000: 2; Thornton 2004; Wiegman 2002: 19). The suggestion is that a too comfortable life may blunt the critical faculties, although residing permanently in Siberia can be chilly.

Life inside the academy undoubtedly poses difficulties for all feminist scholars, but the discipline of law creates a double jeopardy because it is ambivalent about its own academic status. Law is uncertain whether it should be classified as a humanity, a social science, or something altogether different. Women’s studies, usually located within either the humanities or social sciences, originally provided a hospitable intellectual space for feminist scholarship (Jackson 2000: 4), and was not constrained by the intellectual presuppositions that beleaguer law as a professional discipline. Women’s studies developed new ways of seeing by invoking the insights of a range of disciplines (e.g. Langland and
Gove 1983); whereas law was constrained by entrenched cultural and professional norms that sought to ensure its disciplinary autonomy.

A long tradition of positivist legal theory and self-referentialism has added to law’s reticence about embracing feminist insights and alternative perspectives generally. Nevertheless, a short affair between feminism and the legal academy took place from the mid-1980s until approximately the turn of the century. It was inspired by and developed in tandem with initiatives from other parts of the common law world. For example, Judy Grbich and Adrian Howe participated in the Feminism and Legal Theory Project initiated by Martha Fineman, their papers appearing in At the Boundaries of Law (Fineman and Thomadsen 1991). Many fruitful collaborations followed in the heyday of FLT (e.g. Graycar and Morgan 1990, 2002; Naffine and Owens 1997; Thornton 1995). Pathbreaking work emerged in such traditionally masculinist areas as international law (Charlesworth et al. 1991) as well as legal theory and judicial method (Berns 1999). Additionally, the voices of indigenous women legal scholars began to be heard for the first time (Behrendt 1993). As a rich tapestry of scholarship emerged, the postmodern turn ended completely the idea of a grand narrative of feminism. Globalization, culture, whiteness, postcolonialism, lesbianism, and religion all contributed further to the diffusion of feminist scholarship (Australian Feminist Law Journal 1993–2009; Davies 2008; cf. Rosenbury 2003).

Despite this flurry of activity, a national report on teaching and learning claims that the influence of feminism on the Australian legal academy has been almost zero (Johnstone and Vignaendra 2003). How this conclusion was reached in view of burgeoning scholarly publishing is unclear, but it may have been based on the noticeable decline of FLT in the curriculum. The high point of legal feminism that coincided with the emergence of hardline neoliberalism may also have contributed to a desire to erase the seeming success of FLT. Moreover, a reductive view of FLT, as a static materialistic theory of women and the law, may have been hesitant to acknowledge the more diffuse and diverse manifestations as bona fide feminist scholarship. Finally, there is no doubt that the market discourses of consumerism and entrepreneurialism have exercised not just a depoliticizing effect on institutional feminism, but they have been accompanied by a misogynistic rhetoric averring that feminism is passé. This rhetoric is anti-feminist, racist, and homophobic. In a useful media analysis, Margaret Henderson (2008: 33) documents the way the words “feminism” and “feminist” continue to be associated with negative and often violent imagery in the media. Market discourse thereby became a convenient cloak for the reassertion of the dominance of masculinity and the heteronormative family.

**Activist origins**

As a corollary of social liberalism, the 1970s engendered no-fault divorce, sex discrimination, and domestic violence legislation, as well as ongoing efforts to refashion laws that impacted on women disproportionately, like those dealing with
crimes of violence and sexual assault. While bringing the private sphere into the limelight for public scrutiny in accordance with the feminist aphorism “the personal is the political,” unprecedented feminist activism gave rise to a sea change in the official responsiveness to issues affecting women, including the official incorporation of feminism into the polity through initiatives such as the appointment of “femocrats”—feminist bureaucrats who advised on the ramifications of government policy for women (Eisenstein 1996). Evidencing the starkness of the neoliberal turn 30 years later, the phenomenon of the femocrat has disappeared, along with a raft of other women-friendly policies (Sawer 2008).

Historically women were largely absent from the annals of the Western intellectual tradition. Dependency and subordination contributed to general representations of women in a limited range of stereotypical subject positions, such as the foolish housewife who failed to read the contract, the rape victim for whom “no” meant “yes,” the sexual partner who lost her house when she acted as guarantor because she implicitly believed everything he said, etc. The frailty of these stock characters was entrenched by the vestigial causes of action of the common law, such as breach of promise, loss of consortium, and the marriage discount. Critiquing and changing such laws was a priority for feminist legal scholars.

It was one thing to repeal archaic laws but quite another to tinker with legal orthodoxy, especially when the word “feminism” carried connotations of instability and dangerousness. In the mid-1970s, the media was not averse to depicting feminism as “a whore” (Genovese 2002: 163). Thus, some feminist legal academics thought it politically wise to follow the reformist route and not to invite unnecessary scrutiny by using the provocative “F-word.” When I established the Feminist Legal Action Group (FLAG) in 1978, I recall lengthy debate about whether use of the “F-word” would detract from the status of FLAG’s work. Although the word “women” was perceived to be less confrontational, it was nevertheless rejected in favor of “feminist.” A more theoretical bent was evinced when FLAG became FLIG (Feminist Legal Issues Group), and the focus shifted to critique and debate. FLIG was eventually superseded by F-LAW (Feminist Legal Academics Workshop), which included feminist legal academics from Australia and New Zealand who met biennially until the mid-2000s, after which F-LAW petered out. In addition to a scholarly focus, F-LAW provided a forum for discussion of issues confronting feminist scholars in the academy.

I organized the first feminist jurisprudence conference at Macquarie University in 1986. Two hundred people (mostly women) attended, and the papers formed a special issue of the Australian Journal of Law and Society (1986), the first devoted to feminist jurisprudence. Mary Jane Mossman from Canada, a contributor to this collection, gave the keynote address, “Feminism and Legal Method: The Difference it Makes,” (1986), which was also published in the Wisconsin Law Review and At the Boundaries of Law (Fineman and Thomadsen 1991), attesting to the global reach of FLT. The paper
I contributed, “Feminist Jurisprudence: Illusion or Reality?” (1986) questioned whether feminist jurisprudence was possible or whether the concept was oxymoronic. Feminist jurisprudence still retains a discomforting edge, for it suggests a transformation of the entire edifice of law. Perhaps for pragmatic reasons feminist legal theory tends to be the preferred term, although the two are used interchangeably. Yet regardless of nomenclature, feminism in law was firmly on the agenda by the 1980s.

Formal colloquia attested to the increasing acceptance of FLT, while simultaneously underscoring its transgressive role in excavating and scrutinizing the legal landscape. Thus, the new feminist legal episteme was not confined to conventional understandings of women’s rights, as determined by liberal legalism. Reflecting methodological changes in the blossoming of feminist theory more generally, FLT also became more sophisticated and diverse. It soon began to burst out of the limiting and non-threatening confines of formal gender equality to envision justice in ways that were formerly unimaginable. Poststructuralism, for example, with its disregard for orthodoxy and its focus on the way the legal subject is constituted in and by discourse, struck a chord with feminist legal scholars. A new generation of feminist legal scholars sought to invoke the insights of the humanities through semiotics, literature, and cultural studies, as illustrated by the contributions to the Australian Feminist Law Journal.

This new heteroglossia enriched FLT in ways that went beyond the modest beginnings of women and the law. The woman in feminist legal discourse imploded as totalizing and one dimensional. Perceived as the old-fashioned female analogue of Benchmark Man—white, Anglophonic, heterosexual, able-bodied, middle class, and favoring a right of center politics and a mainstream Christian religion—she was the standard against which Others were measured and invariably found wanting. The category “woman,” which remained the subject of feminist activism, can no longer show its face in the academy without qualification and advertence to the multifaceted nature of identity. Any idea that feminism was associated with a single truth has gone out the window. However, a positivist legal system can comprehend only a single characteristic at any one time, not multiple facets of identity. The irony is that, as FLT became more sophisticated, it became less “useful” and correspondingly declined in favor with activists, mainstream theorists, media commentators, and students, which made it difficult to defend when the crunch came.

The symbiotic relationship between activist and academic legal feminism is beset with ambiguities although the material reality of women’s lives has always animated feminist legal scholarship. Feminist legal activists and academics were initially committed to a common purpose, but a rift soon emerged. Martha Fineman (1991c) noted howFLT was moving away from the concrete towards abstract grand theory. This trend continued, and the relationship has become more tenuous. The very act of engaging in women’s studies has been described as an act of political activism (Jackson 2000: 10), an observation that could also be made about legal feminism. However, absorption into the academy meant
that women’s studies became “more bureaucratic, hierarchical and careerist … and made central to the logic of privatization in the increasingly corporate marketplace of higher education” (Wiegman 2002: 19). A similar observation could be made about the status of feminism within the discipline of law. A process of the disarticulation of women’s studies in the academy from feminist politics has been the result (Bird 2003; Shircliff 2000; Wiegman 2002).

**From women in law to feminist legal scholarship**

In the early 1970s, lawyers, in conjunction with the women’s movement, were in demand to facilitate the extensive legislative changes on the political agenda. This demand contributed to the rapid increase in the number of women students in law schools in the 1970s and early 1980s. This was a time of growth and, with the economy booming, the feminized or racialized identity of these new lawyers was of secondary importance. The percentage of women law students increased so markedly that a gendered tipping point was reached by the early 1980s. Suddenly there were more women than men in law schools. Nevertheless, numerosity does not necessarily equal pro-feminist politics. The initial law school response was to “let in” more women without effecting any curricula change. Many of the women who became legal academics had no interest in feminist scholarship as such; they were anxious to assimilate quickly into what remained a highly masculinized profession (Thornton 1996). They believed that a conventional career path was the best way to promote their careers—and they were probably right. At the same time, numerosity cannot be discounted; it constitutes the backdrop to the legitimacy of feminism in the legal academy, and it may embolden feminist legal scholars to persevere against the odds.

Political as well as substantive legal issues quickly came to the fore in the legal academy once feminist scholars had been admitted because they were loath to accept law as it was. The influx of women students into law schools highlighted the underrepresentation of women faculty, particularly in the professoriate (the highest echelon of the academic hierarchy in Australia). This disjunction, that underscores the vexed relationship between the feminine and authority, is ongoing despite feminist lobbying and the enactment of statutory equal employment opportunity (EEO) and affirmative action (AA) measures (Thornton 2008). The otherness of the feminine has been entrenched in law as a result of several thousand years of privileging masculinity in the Western intellectual tradition, and it was not going to change overnight.

Women academics everywhere struggled against the dominant construction of femininity in terms of reproduction, affectivity, and care, not just as an epistemological issue but a political one. The institutional expectation was that women should spend time nurturing students, mentoring colleagues, and promoting the interests of the institution. While feminist scholars sought to develop an alternative model of success built on satisfaction in contrast to the masculinist
model that focused on external indicia of career achievements (Markus 1987: 101), feminist scholars faced the danger of falling victim to these pressures and becoming the public servants of academia (Aisenberg and Harrington 1988: 59), with less time for writing and the development of FLT. The absence of a critical mass of women, particularly more senior feminist scholars, imposed additional burdens on members of the first generation of feminist scholars, who had to prove their worth in the academy in conventional roles almost as a trade-off. In other words, the pursuit of feminist scholarship was not an automatic right, but a privilege beneficently bestowed after one proved to be a good university citizen.

Inspired by the women’s movement in the early 1970s and a vision of what might be, I chose to attend the University of New South Wales, a new law school started with the express mission of social justice and law reform, particularly for the poor and racialized others. I do not recall that feminism was ever officially on the agenda—the human in human rights was as masculinist there as everywhere else—but the mission of the school provided a critical space, which facilitated the inclusion of feminist research.

The institutions where I spent most of my academic career—the University of New South Wales and Macquarie University Law Schools in Sydney, and La Trobe University School of Law and Legal Studies in Melbourne—were initially committed to alternative visions of the legal academy, legal education, and legal scholarships, crucial for the success of FLT. However, all these institutions succumbed to pressure to alter their orientation in favor of a more orthodox approach, particularly towards curriculum and pedagogy. Each institution experienced the rapid departure of talented and creative legal academics committed to new ways of thinking about law, following a protracted struggle. The majority of students and academics seemed to accept that conformity with the law school norm was the way to ensure acceptance by the legal profession. Paralleling the sameness/difference debate that has bedeviled feminism (e.g. Morgan 1988), alterity was equated with inferiority in the legal labor market (e.g. Morgan 1988), alterity was equated with inferiority in the legal labor market rather than a source of strength.

More recently, the political swing rightwards has led to further turning away from distinctiveness within law schools. Conservatism, the magnetic attraction of sameness, and a desire to keep things as they are raises questions about law’s ability to accommodate difference. Competition within a single market encourages a similarity of product, but it is not easy to proffer a rational explanation as to why difference is considered so threatening within supposedly liberal academic settings. The answer may reside in the psychoanalytic realm: giving voice to the other is perceived to undermine the foundational norm of benchmark masculinity.

I acknowledge the collegiality and solidarity of a group of feminist colleagues at La Trobe University where I was appointed professor of law and legal studies in 1990. The institution was unusual in its significant strengths in FLT, including criminology (e.g. Howe 1987, 1991, 1994) and critical theory (e.g. Grbich 1991, 1996). My own interests in the field were perceived as a strength. A notable
factor boosting feminist scholarship was that the school was originally a school of legal studies within a faculty of social sciences, where faculty members came from a range of disciplinary backgrounds and where the focus was on understanding law as a social phenomenon. Neither the curriculum nor the research agenda was constrained by the presuppositions of professional legal practice, for the relevant undergraduate degree did not satisfy admission requirements. There was more leeway for critique than when the school became first a School of Law and Legal Studies and then a School of Law. The strengths in FLT attracted students at undergraduate, honors, and PhD level, as well as the attainment of research grants and other indicia of excellence. However, I suggest this very success contained the seeds of the undoing of FLT, for it seemed to arouse the envy of male colleagues when the neoliberal backlash came (Thornton 2006). Ressentiment infuses the contemporary populist view of feminism that men are suffering because the women’s movement has “gone too far” in that women have been “too successful.” The emergence of men’s rights groups in the context of family law is a good example of this phenomenon (Genovese 2008: 12; Henderson 2008: 31).

Pedagogical practices

I tend to favor integrating feminist perspectives throughout the curriculum rather than confining FLT to a separate course although, ideally, both approaches are desirable. There are downsides to both: the integrated approach depends on the good graces of colleagues who may not be sympathetic to FLT, while separatism may marginalize and disconnect FLT from mainstream curriculum, thereby sloughing off collective responsibility. I have taught various courses around equality and discrimination from the late 1970s, which allowed the consideration of FLT, as well as race, sexuality, and intersectionality. I have also taught compulsory courses like personal injury (tort/crime), history and philosophy of law, foundation of legal studies, and equity, which provided ample scope for the seamless inclusion of FLT materials.

Rather than “preach to the converted,” acquainting students with feminist perspectives is important, especially as some of them have little idea how to treat stressed clients with dignity, let alone comprehend the disproportionate impact on women of “gender-neutral” laws. For example, in a family law class role play by two students, the female “client” was hysterical due to marriage breakdown and custody problems. The male “lawyer” responded by slapping her face, and the class laughed! Incidents such as these made it essential to offer FLT to all students. Yet, only in specialist courses is it possible to develop a sophisticated theoretical approach. The core subjects of the law degree are generally accepted as a prerequisite for admission to practice in Australia without the need for a separate bar exam; within these courses the focus tends to be doctrinal and applied, while reflexivity and critique receive short shrift. This bias arises because the admitting authorities are primarily concerned with
proficiency in the application of the technical rules of practice, not interrogation of those rules.

A more critical and theoretical approach to legal education was supported by a government inquiry into the law discipline in the 1980s (Pearce et al. 1987). The Pearce Report described the law degree as the new arts degree because law was increasingly regarded as a source of liberal education that would produce good citizens. Accordingly, the Pearce Report emphasized the importance of social context, theory, and critique to legal education. While no particular theoretical approach was singled out, advocating a broad liberal focus enabled the inclusion of feminist perspectives in the curriculum.

After the Pearce Report, there was a 1990s initiative by the Australian government to develop gender awareness within all compulsory subjects of the law curriculum. The gender awareness initiative followed a period of intense scrutiny of gender bias in the judiciary after it was suddenly “discovered” by the media. One of the most notorious instances in the exposé involved a remark by a judge in the course of a marital rape trial that “rougher than usual handling” may be acceptable on the part of a husband whose wife was less than willing to engage in sexual intercourse (R v. Johns 1992). The ensuing public outcry demanded more attention toward the development of appropriate educative measures for prospective lawyers. The attorney-general agreed and allocated a modest sum for preparing teaching materials. For the first time there was an official injunction that gender awareness—if not FLT—should be taught in law schools. Two teams of feminist legal scholars prepared materials on three themes for incorporation into core curriculum: citizenship, work, and violence (Graycar and Morgan 1996). Copies of the materials were sent to all law schools and were made available on the Internet, but it was left to individual academics how to use them. Both the Pearce Report and the gender awareness initiative reveal clearly how the fortunes of FLT and the state are closely imbricated. Notably, both of these initiatives emanated from the federal level and therefore had Australia-wide coverage.

No sooner had these initiatives been acted upon, however, than universities were transformed by the Dawkins Reforms (Dawkins 1988). FLT had received a boost from the state with the recommendations of the Pearce Committee and the gender awareness project, but it suffered a setback with the swing to the right and the commodification of education, underscoring its sensitivity to the prevailing political climate.

The neoliberal turn

Student consumers

Within neoliberalism the market is the measure of all things; everything else is dispensable. Even though FLT really only emerged in the 1980s, the swing to the right began to induce a retreat away from it in less than two decades.
Indeed, the discourse of “post-feminism” emerged the very moment that a modicum of success could be discerned (Smart 1989: 84; Thornton 1991: 454). Henderson (2006) demonstrates how this post-feminist mentality emerged in the early 1990s through the manipulation of cultural memory. Even former conservative Australian Prime Minister, John Howard, observed in 2002 that feminism was passé (Summers 2003).

One year after the Pearce Report recommended a broad contextual approach to law, the Dawkins Reforms changed the face of higher education in Australia by restructuring and corporatizing universities and shifting to a user-pays regime. Higher education had been free since 1974, but the privatization of public goods became a notable dimension of neoliberal policy by the late 1980s (Marginson and Considine 2000). Commodification, in conjunction with the desire to be a competitive player in the global new knowledge economy, changed the arm’s-length approach of the state towards universities. As Lyotard (1984) percieptly recognized, knowledge was replacing land in the struggle for power between nation states. Unsurprisingly, states have set out to harness the production of knowledge with the support of key international bodies (Organization for Economic Co-operation and Development 1996). Academic capitalism favors applied and technocratic knowledge because it has use value in the market. In contrast, there has been a notable contraction of the space afforded reflexive, critical, and theoretical perspectives because such knowledge is believed to afford little opportunity for commercialization.

Law schools have seen a curricular shift in favor of more global business, trade practices, and intellectual property courses. Thus, a decline in feminist offerings occurred. Law schools offered fewer feminist courses, often scheduled at unpopular times. The contraction of feminist perspectives in core courses also occurred. Young women quickly absorbed the neoliberal message and turned away from feminism, believing it had nothing to say to them (Dux and Simic 2008). While “free choice” was a catch cry of the so-called “second wave,” it is central to the “third wave.” Along with generationalism, this consumerist form of feminism has been effectively deployed by neoliberalism within popular discourse. A striking example exists in “girl power”—a form of third-wave feminism in which the lives of young women are shaped by an unrestrained commitment to individualism and free choice, particularly through popular music, cyber-technology, advertising, fashion, and sex, which synchronize with the market (Bulbeck 2006; McRobbie 2007). Within this neoliberal version of “post-feminism,” the word “feminism” itself has become anathema. Interviews which I conducted in Australia, New Zealand, the UK, and Canada showed that law students no longer wanted the word “feminist” on their transcript fearing it would be a liability in the job market.

The user-pays philosophy is consistent with the observation that the more students pay for their law degree, the less tolerant of theory and critique they become. They will prefer to concentrate on the basic requirements and applied knowledge in order to secure the credentials necessary to be certified as
competent practitioners. Vocationalism and consumerism have changed student attitudes towards a liberal legal education, now seen as the preserve of elite law schools.

**The production of neoliberal academic subjects**

The shift to applied research and the encouragement of collaborative grants with industry has been a marked result of the neoliberal embrace. One objective is to shift the cost of research from the public purse to end users, which affects knowledge transfer and facilitates the commercialization of knowledge. The emphasis on applied research also contributes to the erasure of critical and theoretical perspectives (Tombs and Whyte 2003). These new imperatives have made securing funds for feminist research more difficult because it is not deemed to have use value in the market.

Encroachment on academic options has become more pronounced with the pressure to produce research that is functional and comports with a neo-conservative morality. Unprecedented instances of direct government intervention occurred in the 2005 and 2006 rounds of Australian Research Council funding. The Council is in charge of the major government-funded research grants for humanities and social sciences, including law and legal studies. The media reported that nine internationally peer-approved projects were not ratified by the Minister for Education, Science, and Technology and therefore did not receive funding. Significantly these projects were primarily concerned with gender and sexuality, attesting to the increasingly ambivalent status of feminist research within a neoliberal climate (Jackson 2000; Wiegman 2002). While some socio-legal projects were initially targeted, they were ultimately funded. The projects that were viewed with suspicion included feminist legal research.

Political scrutiny of academics has increased globally since 9/11 (Gerstmann and Streb 2006). However, more is at stake than mere censorship. A normalization of surveillance through the emergence of an audit culture now exists; its mechanisms were originally developed for public sector employees through “risk reduction practices” introduced in the belief that employers could not be trusted to exercise independent professional judgment (Power 1997). The audit culture manifests itself in the academy by requiring that faculty provide evidence of their productivity and performance. Regular reports are filed as evidence of performativity relating to publications, competitive grants, students taught, higher degree completions, and so on. These “metrics,” to invoke the voguish language of audit, are designed to render performance calculable. Journal articles, for example, are no longer evaluated according to their individual merits so much as according to the standing of the journal in which the article appears (Sauder and Espeland 2009). The prototype for law journal rankings in the Australian audit scheme, the ERA (Excellence for Research in Australia) was the Washington and Lee rankings in which generalist journals from prestigious institutions invariably received higher rankings than specialist journals. Feminist law journals suffer as
specialist journals and through association with the feminine, which detractors claim to be equated with polemic rather than scholarship.

What is extraordinary about the audit culture is its rapid acceptance by academics. Foucault’s concept of governmentality aptly captures the acceptance of a culture of compliance, which includes the notion of governance of the self (Foucault 1991; Rose 1999: 3). Drawing on Foucault’s work, Sauder and Espeland (2009) show how technologies, such as law school rankings, are both “seductive and coercive.” They are willingly absorbed into an organization at the same time as they are fiercely opposed. Individual academics, including feminist scholars, do not have to be browbeaten or cajoled into complying; they internalize the new norms and agree to self-discipline. Thus, legal scholars accept the corporate message that they should be more deferential towards authority, playing down or erasing the signs of the feminine within their scholarship and reorienting it in more acceptable applied directions. It is particularly difficult for early career researchers to resist the new technologies, attesting to the persuasiveness of the governmentality thesis.

The remasculinization of the academy

The moral conservatism that tends to accompany economic conservatism emerged as a powerful corollary of the neoliberal turn. Not only was FLT of dubious use value, it was perceived to threaten the dominant masculinist norms. FLT could be tolerated only if blanched of its radical edge. Once sufficiently sanitized and domesticated, it might even be held up as a commendable example of “diversity”—the new buzzword that replaced institutional feminism. Mary O’Brien (1984) coined the term “commatisation” to capture the submersion of gender within a list of variables taken into account by an organization: race comma gays comma gender comma class, etc. This discourse of diversity facilitates and legitimizes the erasure of feminism. Indeed, when a gendered tipping point had been reached, as in the case of law school admission, it quickly was argued that feminism was now passé. Mainstream scholars sought to discredit it as personal, political, or polemical. They claimed it lacked the objectivity, neutrality, and detachment of their own scholarship. A formalistic understanding of equality in preference to a substantive approach conveniently occludes the absence of the voice of the Other, thereby insidiously reinstating Benchmark Masculinity as the normative standard, as feminist legal scholars have long pointed out (e.g. Fineman 1991a).

The depersonalized technologies of audit do this very effectively by masking the culpability of male colleagues. Kenway et al. (2006: 42) capture the subtle incarnation of gender that emerges in their description of the academic subject as “technopreneurial,” which refers to the way the favored techno-scientific knowledge is combined with business acumen. The technopreneur works alone, taking risks, and promoting the self, unconcerned about collegiality, cultural memory, or collective good. The intensification of the economic function of knowledge
comes at the expense of its social function (Kenway et al. 2006). While these authors are referring to scientific and biomedical knowledge, their analysis is equally apt in light of the contemporary reversion to the privileging of technocratic legal knowledge with its applied, rather than critical and reflective focus.

More than the functionality of applied knowledge is at issue here in the way critique is depicted as feminized, destabilizing, and dangerous. Giroux suggests that a hatred of democracy and dissent inherent in an authoritarian neoliberal environment has given rise to a politics of “militarized masculinity,” associated particularly with the war in Iraq and the domestic war on terror, which mark the return of the “warrior male”:

whose paranoia is endlessly stoked by the existence of a feminized culture of critical thinking, a gay subculture and a liberal ideology that exhibits a disrespect for top-down order and unquestioned authority and discipline.

(Giroux 2008: 61; cf. Armitage 2005)

Viewed as “militarized knowledge factories,” universities are not involved in producing conventional soldiers but graduates with a uniform habit of mind, such as well-credentialed technocratic lawyers trained to serve corporate capital and the new-knowledge economy.

The denigration of feminism coincided with populist neoconservative attacks on tertiary educated “élites” concerned about social justice, rights for indigenous people, same-sex couples, and welfare rights (Cahill 2004). This populist form of anti-feminism emerged in the United States but also appeared in other Anglophone countries, including Canada and Australia (Sawer 2004). In the attempt to reclaim “authentic manliness” through the new technocratic knowledge, critique as the essence of liberal academic life must be depicted as feminized and dispensable. Technocratic and applied knowledge, delivered as objective and neutral information, does not need to be interpreted, theorized, or critiqued, but speaks for itself. The most effective way of dispensing with critique is to contract the spaces that enable it, which spells doom for critical projects such as FLT. The evisceration of its critical space within the legal academy has enabled anti-feminism to be revived within the new-knowledge academic scripts; terms like patriarchy and sexism have become anachronistic (Lewis 2005: 11).

It is perhaps unsurprising that the gendered subtext of academic life has adapted to new circumstances and new ideologies. New knowledge is the apparatus that produces new forms of gender; it is not de-gendered as its technocratic veneer would have us believe. Thus, while the identity of academic subjects no longer counts as much as their productivity, the gendered subtext of the new-knowledge economy is subtly reified. Competition policy and the logic of the market necessarily produce inequality, not equality. It is notable that there has been a retreat from the language of equality and equality of opportunity in the academy, as well as in the public domain (Brodie 2008; Thornton 2001; 2008).
The legitimation of inequality tilts the scales permanently in favor of the status quo. Promotion of the self has effectively displaced a collective commitment to gender politics in the academy. The top-down, authoritarian, and over-controlled university of today has left little space for feminist voices to be heard.

**Conclusion**

The discourse of “post-feminism,” emerging in the early 1990s and suggesting that feminism’s day was done (Faludi 1991) may have been a ploy to reinstatiate masculine hegemony (McRobbie 2007). Margaret Henderson (2006) shows how post-feminism constructs the past by diluting and revising feminist experiences and their unsettling effects. As I have mentioned, “girl power” is the latest version of post-feminism. Its focus on (hetero)sex, consumerism, and fashion is designed to ensure the subordination of young women in the workplace and the erasure of feminist discourses of equality. The primary message young women lawyers are absorbing from popular culture is that they should not compete with men in ways that jeopardize their sexual desirability. Yet, they also have been imbued with the notion that they are the equals of men in the world of legal practice; feminism is passé. The girl power subtext is that how these young women look and dress is what counts in an undeniably gendered world.

However, FLT is not static, for it captures the conceptualization of the feminine at a particular epistemic moment (Thornton 2004). It may be that just as there has been a rejection of the essentialist category “woman” and a turning away from the word “feminism” itself, a new discourse will emerge. “Gender studies” and “diversity studies” represent examples of new discourses that have sought to occlude the partiality of the feminine in favor of a more neutral guise. These terms risk sloughing off the feminine altogether within a constellation of variables that play into the hands of neoliberal misogyny. The evidence based on the use of such ostensibly neutral terms in popular discourse seems to suggest that the main target of discrimination is now men not women (Henderson 2008: 34).

The dilemma for feminist legal scholars is how to respond to the market metanarrative. Small acts of resistance are inconsequential in the face of seduction by the audit culture. Nevertheless, I do not wish to end on a gloomy note. Feminist legal scholars have always been engaged in a struggle but are also animated by the hope for a better future. A new epistemic moment may well be upon us with the economic crisis of 2008–9 that gave neoliberalism a jolt. Instead of redistributive justice, nation states have paid billions of public dollars to bail out failing multinational corporations. As a result, the public’s faith in neoliberalism and deregulation has been severely shaken. While there is not going to be an instantaneous abandonment of the adulation of the market—as the bail-outs reveal—nation states may be more cautious about permitting the market free rein in the future.
Australian Labor Prime Minister, Kevin Rudd (2009) argues that the neo-liberal experiment has failed; it is no more than personal greed dressed up as economic philosophy. Prime Minister Rudd exhorts a return to recognition of the central role of the state in reducing “the greater inequalities that competitive markets will inevitably generate” (29). His focus is on restraining the excesses of an unregulated market in order to preserve the social fabric of the polity. He is not proposing to decenter the market or to return to free higher education. Nevertheless, since the fortunes of the state and FLT are imbricated, it seems to me that the reclamation of some notion of the social liberal state is a predicate to a robust role for FLT in the legal academy in the future.

While I have shown that legal feminism is exceedingly sensitive to the movement of the political pendulum, the volatility induced by the global financial collapse may be just what is needed to shift the action towards the common good. In light of the depoliticizing effects of neoliberalism, which have substituted consumers for citizens, it is hoped that it is not too late. A depression is not necessary to demonstrate the worth of FLT. While it has always shown resilience and a capacity for revitalization in difficult times, my fear is that the metanarrative of the market and its varied fortunes could carry with it the seeds of feminist amnesia that will sustain the renewed masculinization of the legal academy.