

REVISING THE CANON: FEMINIST HELP IN TEACHING PROCEDURE

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Anything may happen when womanhood has ceased to be a protected profession, I thought, opening the door.

VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 41 (1929).

In the first decades after women gained access to studying and teaching law, the understanding of "women's issues" was that these issues arose under discrete topics of inquiry—such as family law and sex discrimination.¹ Over the past decade, however, feminists within the legal academy have thought about the relationship between feminism and the first year law school curriculum.² In 1992, I was the chair of the Section on Procedure of the American Association of Law Schools (AALS), and in conjunction with the Section on Women in Legal Education, we hosted a program, Feminist Procedure, at the annual meeting of the AALS. This symposium is the result. All of us who participated joined in thinking about the relationships and cross-currents between feminism and procedure. As is plain from the other essays from the symposium published here, there is a wealth of material from which to draw.

Both subjects, feminism and procedure, make the work of this symposium complex. Feminist theories are multiple, as women of all colors, classes, and sexual identities learn not to equate their own experiences with those of all women.³ Similarly, to talk about pro-

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1. Thus, as a beginning teacher, I was counseled against teaching such courses, for were I to do so, I would be viewed as something of a "lightweight." See Judith Resnik, *Visible on Women's Issues*, 77 IOWA L. REV. 44 (1991).

2. The American Association of Law School's (AALS) Section on Women in Legal Education—often in conjunction with other sections of the AALS—has sponsored programs and workshops on feminism and contracts, feminism and criminal law, feminism and property, and feminism and torts. For an overview of the breadth of feminist legal scholarship, see Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991).

3. See, e.g., PATRICIA H. COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 201-20 (1991); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Linda Gordon, *On "Difference,"* 10 GENDERS 91 (1991).

cedure as if it were a single topic is impossible. However, rather than limit the conversation by insisting on a specific focus within either subject, the essays here relate to a myriad of issues that affect litigants, jurors, witnesses, lawyers, judges, as well as questions of representational obligations and rights, remedies, jurisdiction, sovereignty, and courts—all in the feminist context.

In my role of “introducer,” I focus on three issues: the jurisdiction of the federal courts, the institutional identities of those courts, and federal rulemaking, all of which are understood as central to procedure but are not so readily understood as relevant to feminist theory—or feminist theory relevant to them. As one of my procedure colleagues put it, “what possible relevance does feminism have to the topic of jurisdiction?” My task, in this brief overview,⁴ is to respond to this question by sketching some of the intersections. I begin with the subject matter jurisdiction of the federal courts.

At the very end of 1991, William Rehnquist, Chief Justice of the United States Supreme Court, gave his annual Year-End Report on the Federal Judiciary;⁵ in that speech, he raised the question of what position the United States judiciary should take toward then pending⁶ (and—as of this writing—still pending⁷) legislation: The Violence Against Women Act. As described by its sponsors, the Act is drafted in response to the “national tragedy” that makes women the victims of violence in their homes, workplaces, and on the streets.⁸ The Act has many provisions, including the establishment of a National Commission on Violent Crime Against Women,⁹ funding for state programs on violence,¹⁰ promoting safer college campuses,¹¹ and the funding of circuit-by-circuit studies of the effects of gender on the federal system.¹²

4. For development of these issues, see Judith Resnik, *Ambivalence: The Resiliency of United States Legal Culture*, 45 STAN. L. REV. (forthcoming 1993) [hereinafter *Ambivalence*]; Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) [hereinafter *Housekeeping*]; Judith Resnik, *Naturally Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991) [hereinafter *Naturally Without Gender*].

5. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH 1 (1992).

6. S. 15, 102d Cong., 1st Sess. (1991) (“Violence Against Women Act of 1991”).

7. S. 11, 103d Cong., 1st Sess. (1993) (“Violence Against Women Act of 1993”).

8. For discussion of street harassment, see also Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993).

9. S. 11 Title I, § 141; S. 15 Title I, § 141.

10. S. 11 Title I, § 121; S. 15 Title I, § 121.

11. S. 11 Title IV; S. 15 Title IV.

12. S. 11 Title V; S. 15 Title V.

But what caught the eye of the federal judiciary were the two jurisdictional provisions of the Violence Against Women Act. One would provide a federal civil rights remedy to a person who is the victim of a "crime of violence, motivated by gender."¹³ The second would create a federal crime when a person travels across state lines for the purpose of "harassing, intimidating or injuring a spouse or intimate partner. . . ."¹⁴ In the fall of 1991, the Judicial Conference of the United States reviewed a report of a special ad hoc committee that had been appointed to study the legislation. That report concluded that, while the Judicial Conference believed the federal judiciary should play a "constructive role in offering its assistance to Congress in an effort to fashion an appropriate response to the violence directed against women," litigation arising from that violence was "better handled in the state courts."¹⁵ Providing federal jurisdiction would, according to the 1991 report, "embroil the federal courts in domestic relations disputes" and "flood [the federal courts] with cases that have been traditionally in the province of the states."¹⁶ Relying in his 1991 year end report on the conclusions of this Committee, Chief Justice Rehnquist in turn urged Congress to attend to the views of the Judicial Conference, opposing the legislation.¹⁷

A central issue for all proceduralists is jurisdiction. The Violence Against Women Act straightforwardly links jurisdictional boundaries and gender. The proposed statute provides federal jurisdiction for gender-based offenses; it would enhance women's access to

13. S. 11 Title III, § 301; S. 15 Title III, § 301. The congressional discussion in support of the section noted that, while federal remedies currently exist for gender-based discrimination in the work place, there are none for gender crimes on the streets or in the home. See 136 CONG. REC. S 8263 (June 11, 1990), S 16090 (Oct. 19, 1990) (statements of Senator Joseph Biden introducing the legislation).

14. S. 11 Title II, § 2261; S. 15 Title II, § 2261.

15. REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 6 (Sept. 1991) (on file with the author) [hereinafter 1991 REPORT ON GENDER-BASED VIOLENCE].

16. *Id.* at 1, 7. In March of 1993, the Judicial Conference of the United States changed its position, based on new work of the Ad Hoc Committee on Gender-Based Violence, now chaired by the Honorable Stanley Marcus of the United States District Court for the Southern District of Florida. In light of "the dialogue" that the Committee had begun with the bill's sponsors, the Conference voted to take "no position on specific provisions" of the act. In other words, while the Conference "reiterate[d] its concern . . . about the trend toward federalization of state law crimes and courses of action," the Conference no longer specifically opposes Title III's jurisdictional provisions. See Judicial Conference Resolution on Violence Against Women (March 1993) (on file with the author). Further, the Conference endorsed Title V of the legislation, which encourages "circuit judicial councils to conduct studies with respect to gender bias in their respective tribunals." *Id.*

17. Rehnquist, *supra* note 5, at 1-2.

courts to claim injuries suffered on account of gender.¹⁸ The opponents of the bill discuss their objections in terms that are also gendered: that certain kinds of cases (involving families in general and women subject to violence occurring within the family in particular) are not those that fall within the preserve of the federal courts, whose scarce judicial resources must (according to the Chief Justice) be reserved for "issues where important national interests predominate."¹⁹

The Violence Against Women Act is not the only example that links gender with jurisdiction. In fact, the topic is familiar to readers of women's history, but unfortunately less familiar to students of procedure. The historical antecedents are that married women were, until relatively recently, without the capacity to litigate in federal or state courts. In fact, the juridical capacity of women to be litigants was a topic that used to appear, as such, in early hornbooks on the federal courts and procedure.²⁰ Further, married women still suffer some juridical disabilities; the jurisdictions that retain the "marital rape exception" treat married women differently from single women for purposes of litigation.²¹

It is not only the history and contemporary issues about women's access to courts that demonstrate the relevance of feminism to jurisdiction; the Violence Against Women Act also exemplifies the idea that differential access to federal and state courts can be seen

18. While the text is "gender-neutral"—that is, both women and men could file claims under the proposed legislation—the drafters explain that they are writing to respond to the injuries suffered by women, who are disproportionately the victims of violence. See 137 CONG. REC. S 597-98 (Jan. 14, 1991) (statement of Senator Joseph Biden).

19. Rehnquist, *supra* note 5, at 2.

20. See, e.g., ROGER FOSTER, FEDERAL PRACTICE IN CIVIL CASES 91-92 (1892) ("In the courts of the United States . . . the rule [in equity] was early laid down as follows: 'Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in suit. This is a matter of practice within the discretion of the court.'") (quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 240 (1848)).

21. Until 1992, federal military law retained this exception. Members of the Committee on Armed Services voted to "remov[e] . . . limitations relating to gender and marital relationship." 138 CONG. REC. No. 138-Part II H10266, H10337-38 (Oct. 1, 1992); see Pub. L. No. 102-484, 1066(c), 106 Stat. 2506 (1992). The former law, 10 U.S.C. § 920(a) (1988), provided that "Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. . . ." See also *United States v. Wilhite*, 28 M.J. 884, 885 (A.F.C.M.R. 1989) ("Carnal knowledge under [this section] requires, as an essential element, proof that the victim is not the accused's wife."); VA. CODE ANN. § 18.2-61 (Michie 1988) (subheading IX details when and how a wife might "unilaterally revoke her implied consent to marital sex").

through the lens of gender. The 1991 Ad Hoc Judicial Conference Committee argued that "domestic relations disputes" belonged to the state courts. Since women are identified with the "domestic sphere," such an argument has particular import for women, whose work and life are understood as bound up with that world. The unspoken assumption was that the federal courts do not and should not handle issues relating to family life, while the state courts both do and should have such jurisdiction.

The same unspoken assumption is evident from other voices within the federal judicial community. As is familiar to proceduralists, in 1988, Congress chartered the Federal Courts Study Committee (FCSC) and charged that group with thinking about the federal courts in the coming century.²² In the spring of 1990, the FCSC issued its report. One chapter of that report was entitled "Discrimination in the Courts."²³ In that chapter, the FCSC Report noted that there have been many studies of gender bias in the state system, and that those studies have, in fact, found gender bias to be a problem in judicial proceedings. The federal report then commented:

Although we have confidence that the quality of the federal bench and the *nature* of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from instances of this general social problem.²⁴

The FCSC concluded that a study of such problems in the federal system was not needed, but that awareness and education would be appropriate.

As Justice Shirley Abrahamson discusses in her essay,²⁵ since the 1980s, some thirty jurisdictions have put gender, ethnic, and racial bias in the courts on their agendas; more than twenty have issued reports about gender bias in the courts.²⁶ While the generic phrase for the discussion is "gender bias," the focus has been on the problems of women, who disproportionately suffer the burdens of

22. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 101-109, 102 Stat. 4642, 4644-46 (codified temporarily at 28 U.S.C. § 331 note (1988)).

23. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990) [hereinafter *FCSC Report*].

24. *Id.* at 169 (emphasis added).

25. Shirley S. Abrahamson, *Feminist Jurisprudence and Procedure*, 61 U. CIN. L. REV. 1209 (1993).

26. For further discussion, see Resnik, *Ambivalence*, *supra* note 4. See also Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. (forthcoming 1993). For a list of task force reports available as of this writing, see the Appendix to this article. The National Center for State Courts (NCSC) is a clearinghouse for information and reports on these issues. See generally NATIONAL CENTER FOR STATE COURTS, PROCEEDINGS OF THE NATIONAL CONFERENCE ON GENDER BIAS IN THE COURTS (1990).

harms predicated on gender. New York State's task force's conclusion is exemplary of what these reports have documented:

[G]ender bias against women . . . is a pervasive problem with grave consequences Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.²⁷

Given the powerful and distressing findings by state courts, it is intriguing to consider the difference in the approaches of the state and federal systems. During the 1980s, many states began to study the issue; in 1988, the Chief Justices of all the state courts adopted a resolution calling for study of gender, racial, and ethnic bias.²⁸ In contrast, until the 1990s, national bodies speaking on behalf of the federal courts have appeared disinterested in the issues.²⁹ In 1988 (the same year that all of the state Chief Justices were calling for study of gender, racial, and ethnic bias in their courts), the FCSC Report wrote that the "quality of the federal bench and the nature of federal law" keep these problems minimal, and study of the issues in the federal system was therefore not necessary. Not until 1993 did the Judicial Conference of the United States vote to endorse the provisions of the Violence Against Women Act that would fund gender bias studies circuit by circuit.³⁰

What is it about the "nature" of the federal courts that makes such a view supportable? The FCSC Report's language captured a widely held sentiment, expressed again by the Chief Justice of the United States in his 1991 year-end speech, and shared by many federal judges and scholars—that intrinsic and essential to the very subjects of federal law and the jurisdiction of the national courts is work that has not much to do with women and the problems we face. The obvious questions are: Why? What in the nature of the

27. *Report of the New York Task Force on Women in the Courts*, 15 *FORDHAM URB. L.J.* 11, 17-18 (1986-87).

28. Conference of Chief Justices Resolution XVIII, Task Force on Gender Bias and Minority Concerns, 26 *CT. REV.* 5 (Fall 1989). In 1993, the Conference of Chief Justices reaffirmed this position and called for implementation of reforms. In 1993, the Chief Justices of the State Courts renewed their commitment to this effort and called for implementation of reforms. Conference of Chief Justices, Resolution Urging Further Efforts for Equal Treatment of All Persons (adopted Jan. 28, 1993) (on file with author).

29. In 1990, two circuits committed themselves to such inquiry. The Ninth Circuit authorized a task force (of which I am a member), and that body reported to the 1992 Annual Judicial Conference of the Ninth Circuit. See *The Ninth Circuit Gender Bias Task Force, Preliminary Report, Executive Summary*, *STAN. L. REV.* (forthcoming 1993) [hereinafter *Ninth Circuit Executive Summary*]. The full preliminary report of the Circuit is available from that Circuit's Executive's office. The Court of Appeals for the District of Columbia has also commissioned work, now underway, on gender and racial bias in that Circuit's courts.

30. See *supra* note 16.

workplace, ideology, or jurisdiction of the federal courts might support such a conclusion? In my view,³¹ women are both materially present and important in the federal courts, but absent in the ideology of federal courts jurisprudence. We are present in law as litigants, in the working spaces as employees, but conceptually absent and not paid much attention to. But there is nothing "natural" about either our presence or our absence. Both are constructed out of the decisions of legislators, presidents, judges, lawyers, and litigants.

With feminist concerns in mind, we who are proceduralists should ask about the history of the distinctions drawn between federal and state jurisdiction. One relevant source for the delineation between court systems is the development over the nineteenth and twentieth centuries of the ideology that women and men inhabit "separate spheres." The effort to situate women in the domestic, allegedly private sphere of the home, and to place men in the economic marketplace influences the discussion today of the boundaries of federal jurisdiction and of what constitutes a "national interest." The separate spheres ideology also obscures understanding of the relevance of federal litigation to the lives of women.

I will not here catalogue the breadth of federal laws that bring women in as federal litigants, but let me note a few. It is not only the high visibility so-called "women's cases," such as litigation about reproductive freedom, Title VII, and equal protection, but also a host of other kinds of cases, ranging from immigration law to the \$2 billion Dalkon Shield case (emerging out of the injuries done to women's bodies) to consumer bankruptcies in which, according to one study, women are seventy-five percent of the claimants, filing either singly or jointly.³²

Women are in the federal courts, and the fact of family status does not define us as litigants. Moreover, in fact the federal courts do have a lot to do with family life. Mary Becker, Sylvia Law, and others have written about the constitutionalization of family law.³³ I want to underscore that it is not only constitutional issues that draw the federal courts into family life; a host of federal statutory laws define and structure economic relations among family members. We do not typically call these "family law" but rather tax law, pen-

31. Explained in detail in *Naturally Without Gender*, *supra* note 4, at 1730-50.

32. TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY L. WESTERBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 146-65 (1989).

33. See, e.g., Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Sylvia A. Law, *Rethinking Sex and the Constitution*, 131 U. PA. L. REV. 955 (1984).

sion law, and federal benefits law. All, however, have direct and specific effects on family life.³⁴ Federal immigration law judges sometimes have to decide whether wives have been battered; federal bankruptcy judges deal with community property and ownership of assets of divorcing spouses. Moreover, federal courts have authority over members of the military and claim power over members of Indian tribes. It is time for us to understand and to name the wealth of "federal laws of the family."³⁵

Why should proceduralists care about federal laws of the family and when might we teach these topics? In discussing federal and state court jurisdiction, we may well tell our students about something called the "domestic relations exception" to diversity jurisdiction.³⁶ We might recount that many federal judges and commentators have claimed that issues of family law are the province of the state courts; federal courts should not intrude. We might examine the relationship between the "domestic relations exception" and other doctrines of abstention, in which federal courts decline to hear the merits of claims on the grounds that state courts (or Indian tribunals) are better situated to decide them. We might question the assumptions that locate family issues as "naturally" within the work of state courts, and the assumptions that locate women as primarily within families. We might discuss the special burdens that family status has placed on women as litigants. We could note that women lost their juridical voice by gaining the status of being married, and thus this fact is not of historical interest alone. Not only do some jurisdictions continue to place disabilities on married women, but an argument mounted against the Violence Against Women Act has been that married women seeking divorce will be overly aggressive litigants, retaliating against spouses by dragging them into federal court under the proposed new jurisdictional provisions.³⁷

34. See, e.g., *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (analyzing effects of state property regimes on federal marital property rules under ERISA).

35. See *Naturally Without Gender*, *supra* note 4, at 1721-30.

36. See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2212-15 (1992) (holding that the exception is a court-implied, statutorily based limitation on federal court diversity jurisdiction and applies only to cases involving divorce, child custody, and alimony).

37. In heated exchanges, some judges argued to Senator Biden that a federal civil rights cause of action based on violence motivated by gender would "add a new count to many if not most divorce and other domestic relations cases." Letter from Vincent L. McKusick, President of the Conference of Chief Justices, to Sen. Biden (Feb. 22, 1991) (on file with author). In the course of the exchanges, Senator Biden responded: "Not only have you improperly read the statute, your comments verge dangerously close to the kind of stereotypes we condemn. To put the collective force of the federal judiciary behind the assumption that women—unlike other groups—will file false and vindictive

Moreover, we who teach procedure can talk about the data developed from the gender, ethnic, and race bias task forces, of the problems that women of all colors have as litigants in courtrooms across the nation. More than twenty reports document that women as witnesses face special hurdles; their credibility is readily questioned, their claims of injury undervalued.³⁸ In the fall of 1991, during the televised proceedings on the nomination of Clarence Thomas to be a Supreme Court Justice, gender and racial stereotyping abounded;³⁹ if Clarence Thomas and Anita Hill could not escape such stereotypes, it is not surprising that few ordinary litigants do.⁴⁰

In short, to understand and teach about federal jurisdiction, the doctrine and case law of abstention, the divisions between the federal and state judiciaries, and the interactions among judges, litigants, lawyers, and jurors within the courtroom, one needs to know about the history of exclusion of women from legal life and about the contemporary literature of feminism. The image of women's ab-

civil rights claims suggests the very gender-biased stereotypes that my legislation was intended, in part, to dispel." Letter from Sen. Biden to Hon. Thomas M. Reavely, then Chair of the Ad Hoc Committee on Gender-Biased Violence of the Judicial Conference (Sept. 20, 1991) (footnote omitted) (on file with author).

38. Twenty-two of 23 jurisdictions that have published gender bias task force reports have addressed questions of credibility, as parts of discussions of domestic violence, sexual assault, courtroom interaction, and rights sought by women litigants under employment and federal benefits law. Many of the reports detail the specific problems faced by women testifying about sexual aggression. Illustrative is the finding of the District of Columbia that "cross-examination of victims tends to be more hostile in sexual assault cases than in other assault cases." TASK FORCE ON GENDER BIAS REPORT, in THE FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND OF THE TASK FORCE REPORT ON GENDER BIAS IN THE COURTS 119 (District of Columbia, 1992); see also COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER & JUSTICE IN THE COLORADO COURTS 92 (1990); GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM 93-94 (1991); REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 107-08 (Mass. 1989); THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 106 (1990). For the Ninth Circuit Gender Bias Task Force, credibility of women as witnesses emerged as a serious concern from inquiries in several areas, including federal benefits, immigration, and employment law. The Task Force learned that women's testimony may simply be thought to be complaints about life, rather than as legally cognizable harms, and that, even when believed, women's injuries may be trivialized or viewed as not "worth much" in monetary terms. NINTH CIRCUIT GENDER BIAS TASK FORCE PRELIMINARY REPORT 70-71, 97-103, 110-11 (1992) [hereinafter NINTH CIRCUIT GENDER BIAS PRELIMINARY REPORT]; see also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

39. See Toni Morrison, *Introduction in RACE-ING JUSTICE, EN-GENDERING POWER* (Toni Morrison ed., 1992).

40. See Judith Resnik, *Who Cares? The Burdens of Thinking About Injuries Done to Women*, in *RACE, GENDER AND POWER IN AMERICA* (Anita Hill & Emma C. Jordan eds., forthcoming 1994).

sence from the federal courts is fueled by nineteenth century assumptions that continue to affect twentieth century doctrine on federal court jurisdiction. The point to be made is not that federal law governs or should govern all issues of family life. The point is that there is nothing "natural" about the division of work between federal and state courts on family law issues.⁴¹ Indeed, as Martha Field has written in an essay on comparative federalism, in Canada, the national courts have jurisdiction over marriage law.⁴²

Further, feminism informs procedure classes not only by explaining the assumptions that animate the public/private, national/domestic distinctions drawn in jurisdictional discussions. Feminism is deeply concerned with issues of "essentialism"—claims about the nature of woman herself.⁴³ The notion (commonplace in discussion of federal jurisdiction) that the federal and state court have "intrinsic" or "essential" jurisdictional boundaries is a familiar one, but one that engenders deep skepticism among feminists, acutely aware of how wrong claims about the nature of women have been.⁴⁴ Trained to criticize the construction of women's nature, feminists can hear words like the "essential attributes of judicial power"⁴⁵ and the "essential attributes of sovereignty"⁴⁶ and respond that these are not essential but man-made attributes. Feminists can then seek a conversation about what the boundaries of state/federal jurisdiction have been and what—such as the "national

41. Of course, to say that family law is not naturally or empirically the exclusive domain of state courts and to recognize the breadth of concurrent jurisdiction between the federal and state courts is not to provide answers to the question about how the federal and states courts should share this jurisdiction. That is another talk.

42. Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 *LAW & CONTEMP. PROBS.* 107 (1992).

43. The concern is with the use of "woman" as a universal category. One aspect is that the category "woman" is used by men to essentialize women's nature and then to oppress. A second problem is that the category "woman" is used by white women, claiming to speak on behalf of women of other colors, and/or by straight women, claiming to speak on behalf of lesbians, or by middle class women, claiming to speak for lower class women, or by younger women, claiming to speak for older women. The criticism is that first men and then women of relative power have used their platforms to explain and therefore appropriate, negate, or erase the experiences of women unlike themselves. See Resnik, *Ambivalence*, *supra* note 4.

44. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (upholding an Illinois statute prohibiting women from practicing law, and stating, "The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the creator.").

45. *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (discussing the powers of a non-Article III tribunal).

46. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (analyzing questions of federalism); *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976) (referring to "undoubted attribute of state sovereignty").

tragedy of violence against women"—might prompt reframing of those boundaries. Finally, whatever the jurisdictional allocations that are created, feminist proceduralists must consider how women actually fare as litigants, and whether rules of evidence and procedure respond to the documented disabilities that women still face.

In addition to examining the ideology of the jurisdictional divisions between state and federal courts and how women litigants are treated in courtroom interactions, feminist proceduralists also can consider the relationship between courts, as workplaces, and women as judges, staff, and lawyers within those institutions. The demographic data available provide additional insight into the roles women play within the courts. As of June, 1991, four of the thirteen federal appellate circuits had no women judges.⁴⁷ As of that date, sixty of the ninety-four federal trial courts had no life tenured women judges.⁴⁸ Four federal districts have no women in any judicial position, including bankruptcy and magistrate judges.⁴⁹ While women were a bit better represented in the ranks of bankruptcy judges and magistrate judges (constituting thirteen and sixteen percent, respectively, as compared with under seven percent of the Article III judges),⁵⁰ one cannot conclude that the lower the judicial position, the more the women. Of the roughly 1100 administrative law judges in 1991, women were just five percent.⁵¹ (The reliance on a "veteran's preference" operates to provide affirmative action for men seeking to become ALJs.)

Before one too quickly concludes that the absence of consciousness about gender-related issues stems from an actual physical absence of women from federal courthouses, let me add there are many women who work in those federal courthouses, but not as judges. Ninety-nine percent of all legal secretaries in the federal judiciary system are women. I must also add that, were I creating rather than compiling these data, I would not have offered them in the form that I did; women of color are invisible. However, the Equal Employment Office of the United States Courts, which is my primary resource, has categories that include women and men, and then "White, Black, Hispanic, American Indian, [and] handi-

47. THE UNITED STATES COURT DIRECTORY 5, 13, 23-27 (1992). The Directory, published by the Administrative Office of the United States Courts, provides information on Article III active and senior judges, judges in Article I and Article III specialized courts, bankruptcy judges, and magistrate judges. *See id.*

48. *Id.* at 56-338.

49. *Id.* at 138-39, 170-71, 220-21, 323.

50. *Id.* at 56-338.

51. John C. Holmes, *ALJ Update, A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. B. NEWS & J. 202, 203 (1991).

capped." So, I can provide nothing about intersectionalities of race, gender, and other aspects of individuals' identities.⁵²

But I can provide an overview: The federal work forces are excellent examples of women's exclusion and of invisibility. It is not accidental or natural that there are few of us as judges in the federal judiciary; it is willful selection.⁵³ Given the absence of change in the percentage of women as Article III judges over the last ten years, one is also reminded that time is not the critical variable.

Further, female litigants and employees are not the only women affected by the federal courts. Women as jurors and lawyers also have special burdens in the federal courts. Barbara Babcock's essay details rules of exclusion of women from juries.⁵⁴ The Ninth Circuit Gender Bias Task Force learned about women as lawyers in the federal bar: Women are sixteen percent of that bar, as contrasted with twenty-five percent of major law firms and of the bars of some states.⁵⁵ Women lawyers who responded to the Ninth Circuit survey also reported their experience of the federal courts as a "club"—and not one much welcoming of them.⁵⁶ The Task Force heard repeatedly of what one woman called an "infra-structure of sexism."⁵⁷ Once again, the allocation of women lawyers between state and federal courts is not a "natural" fact but rather the result of a host of decisions, from law school admissions to law firms' practices.

Lawyers are sometimes also selected by judges to sit on special committees or to work as special masters. One example is the use, by the United States Supreme Court, of special masters. Over the last sixty years, the Court has made such appointments more than eighty times; none have been women.⁵⁸ A second example comes

52. See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE JUDICIARY EQUAL OPPORTUNITY PROGRAM FOR THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 1990 (Preliminary Report) 8, Table 1 (1990). Linda Greene's presentation at the AALS Panel on Feminist Procedure analyzed the importance of intersectionality for proceduralists. See also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

53. For a further discussion on the appointment of women to the federal bench see Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237 (1993).

54. Barbara A. Babcock, *A Place in the Palladium: Women's Rights And Jury Service*, 61 U. CIN. L. REV. 1139 (1993).

55. NINTH CIRCUIT GENDER BIAS PRELIMINARY REPORT, *supra* note 38, at 13; see also Claudia Maclachlan & Rita H. Jensen, *Progress Glacial for Women, Minorities*, NAT'L L.J., Jan. 27, 1992, at 31 (reporting that a national study found that women attorneys comprised 26% of all attorneys at the 250 largest law firms in the country).

56. See NINTH CIRCUIT GENDER BIAS PRELIMINARY REPORT, *supra* note 38, at 7-88.

57. *Ninth Circuit Executive Summary*, *supra* note 29, at 5.

58. Lee Seltman, *Appointments of Special Masters to the Supreme Court and the Ninth Circuit* (Feb. 1992) (on file with author).

from court committees also of specific interest to proceduralists—those created pursuant to the Civil Justice Reform Act of 1990.⁵⁹ This act requires that each of the chief justices in the ninety-four federal district courts appoint groups to advise those courts about how to draft plans to address delay and costs in civil cases. In 1992, there were roughly 1700 people on those committees, of whom under 300 were women. As of 1991, women were sixteen percent of the members.⁶⁰ In four districts, no women sat at all.⁶¹ The district with the highest percentage of women, forty percent, was a district in which a woman was the chief judge and thus in charge of appointments.⁶²

Thus far, I have flagged gender issues in the jurisdictional divide between state and federal courts, in the appointment of judges and in the selection of lawyers to serve on judicial committees, in the courts' roles as employers, and in the courtroom interactions that define litigants' rights. Yet another place for proceduralists to look, when understanding the relationships between our subject matter and feminism, is in the governing rules that structure litigation—in the federal context, in the Civil and Criminal Rules of Procedure, the Rules of Evidence, and in the rules that govern bankruptcy and appellate practice. Both Harold Koh⁶³ and Elizabeth Schneider⁶⁴ address these issues; again let me offer a few introductory comments.

Notice how the Federal Rules of Civil Procedure themselves help contribute to the ideology that women are absent from the federal courts. The Federal Rules and the practice thereunder often make litigants, both women and men, invisible. The Federal Rules of Civil Procedure rarely require or incorporate the participation of litigants in the pretrial process that dominates federal adjudication and procedure. Many judges manage in federal cases by talking to lawyers, not to litigants. Since feminist method is to begin with the experiences of women,⁶⁵ feminism could be one source from which to raise questions about the distance at which those whose interests are at stake—litigants—are placed by the process.

59. 28 U.S.C. §§ 471-82 (1990).

60. Veronica Gentilli, Civil Justice Reform Act Advisory Groups (Feb. 10, 1992) (prepared for the Ninth Circuit Gender Bias Task Force) (on file with author).

61. *Id.*

62. *Id.* In the five districts in which women were chief judges, women constituted 27% of those selected to be committee members. *Id.*

63. Harold H. Koh, *Two Cheers for Feminist Procedure*, 61 U. CIN. L. REV. 1201 (1993).

64. Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993).

65. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

An important issue is whether to change such rules in response to information developed by gender, race, and ethnic bias task forces. As noted above, women's credibility is often challenged, especially when claims of sexual harassment or rape are made.⁶⁶ Indeed, imbedded in some of the doctrine in these areas of law are implicit challenges to women's credibility.⁶⁷ The question is how the rules of procedure and/or evidence take account of these problems. The short answer is that thus far, few rules do, but there are pressures for change—coming not initially from within the judiciary but from Congress.

This point about process—the source of proposed changes to federal rules—is in turn a hot topic for proceduralists, today very concerned about the question of what the respective roles of the Congress, the Judiciary, and the Executive should be in rulemaking.⁶⁸ In my view, procedure teachers have often understated the role of Congress in rulemaking and ignored the impact of the Department of Justice. The 1938 Enabling Act did authorize federal court rule development, but Congress never really ceded all its authority. Congress has upon occasion intervened to change either civil⁶⁹ or criminal rules.⁷⁰ The most vivid example is the 1990 Civil Justice Reform Act, in which Congress profoundly altered the rulemaking framework by authorizing local district courts to develop their own civil justice plans, which may include variations on the national civil rules.⁷¹ (In some ways, there are now ninety-four amateur “advisory committees on the civil rules.”) In 1991, we also saw the Executive attempting, by what has come to be known as the “Quayle Commission” (the President's Council on Competitiveness, chaired by the then-Vice President), to frame a civil justice “reform agenda.” In the fall of 1991, President Bush issued an

66. When discussing “domestic” violence, several reports describe how victims are blamed, are accused of provoking attacks, are treated as though their experiences are trivial, and are disbelieved. See, e.g., REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 3-5 (Md. 1989); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts*, 15 WM. MITCHELL L. REV. 825, 875-77 (1989); see *supra* note 38.

67. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 813-16 (1991) (discussing how the law of sexual harassment follows the pattern of rape law, placing extra burdens on women's credibility).

68. See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) (arguing Congress has usurped the judiciary's power in its Civil Justice Reform Act rules).

69. See, e.g. FED. R. CIV. P. 35 (rule revised by Congress to permit psychologists to conduct exams of litigants); Pub. L. 100-690, § 7047, 102 Stat. 4101 (1988).

70. See, e.g., FED. R. CRIM. P. 6(e), Notes of Committee on the Judiciary, Sen. Rep. No. 95-354 (Congress modified a judicial revision of Rule 6(e), governing disclosure of grand jury proceedings); see Pub. L. No. 95-78, 91 Stat. 319 (1977).

71. 28 U.S.C. § 473 (1988 & Supp. 1991).

Executive Order, requiring the lawyers within the Department of Justice to adopt particular stances to various of the federal rules.⁷²

The questions proceduralists must ask are about what to make of the politics of rulemaking. Which branch should take the lead or should the tasks always be shared? Should the answers depend on the context? One way to explore these issues is to identify when Congress has become involved and what has sparked its interest. A current example comes (again) from sections of the Violence Against Women Act, which would amend civil and criminal evidentiary rules and change the availability of interlocutory appellate review on certain evidentiary issues.⁷³ The federal judiciary's reluctance to pay attention to women's issues in litigation may prompt congressional action.

Women and jurisdiction, women in courtrooms and in the courts as institutions of public employment, women in the Federal Rules — all provide material for proceduralists to explore. We have a growing understanding of the ways in which women, as users of procedure and as participants, sometimes have unique experiences. Work by the National Association of Women Judges, the National Judicial Education Program of the National Organization of Women, and gender bias task forces across the country has led the way for those of us who teach procedure to have thick, detailed reports on courts as places in which gender is all too relevant.

But those of us who teach procedure know that courts are but a piece of the story we have to tell our students. The world of adjudication is much broader, some might say fragmenting. The American Association of Law Schools has a section on Litigation, another on Federal Courts, another on Alternative Dispute Resolution, in addition to the Section on Procedure with its subcommittee, devoted to "complex litigation." Feminist proceduralists should well ask how these sections interrelate. Are we creating a hierarchy in which "complex litigation" is perceived as the more sophisticated material, and the litigation that is one-on-one (like cases that might be filed, were the Violence Against Women Act ever to become law) perceived as "simple litigation"? I would rather we talk about large scale and small scale litigation, and thereby leave open the possibility that "complexity" may come in all kinds of cases.⁷⁴

Feminist issues abound not only in how we name the phenomenon, but where decisionmaking power, both visible and invisible

72. Exec. Order No. 12778, 3 C.F.R. 359 (1991).

73. S. 11, 103d Cong., 1st Sess. Title I, §§ 151-54 (1993); S. 15, 102d Cong., 1st Sess. Title I, §§ 151-54 (1991).

74. See *Housekeeping*, *supra* note 4.

reside. The so-called "small" cases are increasingly sent to administrative adjudication, as well as to arbitration and other alternative dispute resolution mechanisms. We must ask: How does gender operate in the world of administrative adjudication and in alternative dispute resolution? Feminists remind us not to celebrate adjudication;⁷⁵ and feminists also remind us to worry about alternative dispute resolution.⁷⁶ What feminism also teaches is to be suspicious of constructions of the "other"—here of either adjudication or alternative dispute resolution as so radically different from each other. My own sense is that these processes share more than they diverge, and the gender bias problems will affect them similarly.⁷⁷

As we teach about procedure, rules, doctrine, courts, judges, and processes of all kinds, we need to infuse our discussion with a consciousness that the litigants are not relatively anonymous actors who only have last names in captions of cases, but rather are women and men in need of our attention. We who teach about procedure need to teach about the effects of gender on procedure and about the effects of procedure on the construction of gender.

75. See Carrie M. Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); White, *supra* note 38.

76. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

77. For example, demographic study of women as professional mediators indicates that, like women judges, women mediators tend to be in the lower echelons of their profession. See CHRISTINE HARRINGTON & JANET RIFKIN, *THE GENDER ORGANIZATION OF MEDIATION: IMPLICATIONS FOR THE FEMINIZATION OF LEGAL PRACTICE* (Wis. 1989) (series 4-2) (also detailing that of program directors, women are concentrated in family and consumer disputes and not in large environmental or commercial cases).

APPENDIX: REPORTS ON GENDER, RACIAL, AND ETHNIC BIAS IN THE
COURTS (AS OF APRIL, 1993)

I. RACE AND ETHNIC BIAS TASK FORCE REPORTS

FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS
AND TASK FORCE ON GENDER BIAS IN THE COURTS (D.C. 1992).

REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT
RACIAL AND ETHNIC BIAS STUDY COMMISSION, "WHERE THE INJURED
FLY FOR JUSTICE" Vol. 1 (Fla. 1990).

REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT
RACIAL AND ETHNIC BIAS STUDY COMMISSION, "WHERE THE INJURED
FLY FOR JUSTICE," Vol. 2 (Fla. 1991).

FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON
RACIAL/ETHNIC ISSUES IN THE COURT (Mich. 1989).

NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CON-
CERNS, INTERIM REPORT (N.J. 1989).

NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CON-
CERNS, FINAL REPORT (N.J. 1992).

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINOR-
ITIES (N.Y. 1991):

Volume One: Executive Summary

Volume Two: The Public and The Courts

Volume Three: Legal Education

Volume Four: Legal Profession, Nonjudicial Officers, Employees
and Minority Contractors

Volume Five: Appendix: Staff Reports and Working Papers

MINORITY AND JUSTICE TASK FORCE, STATE OF WASHINGTON: FINAL
REPORT (Wash. 1990).

II. GENDER BIAS TASK FORCE REPORTS

A. Federal Reports

NINTH CIRCUIT GENDER BIAS TASK FORCE, PRELIMINARY REPORT:
DISCUSSION DRAFT AND EXECUTIVE SUMMARY (1992).

B. State Reports

ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS,
THE DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE
ON GENDER BIAS IN THE COURTS (Cal. 1990).

GENDER & JUSTICE IN THE COLORADO COURTS, COLORADO SUPREME
COURT TASK FORCE ON GENDER BIAS IN THE COURTS, (Colo. 1990).

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

FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS (D.C. 1992).

REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION (Fla. 1990).

GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (Ga. 1991).

ACHIEVING GENDER FAIRNESS: DESIGNING A PLAN TO ADDRESS GENDER BIAS IN HAWAII'S LEGAL SYSTEM, REPORT OF THE AD HOC COMMITTEE ON GENDER BIAS (Haw. 1989).

REPORT OF THE FAIRNESS AND EQUALITY COMMITTEE OF THE SUPREME COURT OF IDAHO (Idaho 1992).

THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS (Ill. 1990).

REPORT OF THE INDIANA STATE BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION (Ind. 1990).

REPORT OF THE KANSAS BAR ASSOCIATION TASK FORCE ON THE STATUS OF WOMEN IN THE PROFESSION (Kan. 1992).

KENTUCKY TASK FORCE ON GENDER FAIRNESS AND THE COURTS, EQUAL JUSTICE FOR WOMEN AND MEN (Ky. 1992).

LOUISIANA TASK FORCE ON WOMEN IN THE COURTS: FINAL REPORT (La. 1992).

MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS (Md. 1989).

REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (Mass. 1989).

FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS (Mich. 1989).

REPORT OF THE MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS (Minn. 1989).

JUSTICE FOR WOMEN: FIRST REPORT OF NEVADA SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS (Nev. 1989).

REPORT OF THE NEW HAMPSHIRE BAR ASSOCIATION TASK FORCE ON WOMEN IN THE BAR (N.H. 1988).

THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (N.J. 1984).

THE SECOND REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (N.J. 1986).

FINAL REPORT OF THE NEW MEXICO STATE BAR TASK FORCE ON WOMEN AND THE LEGAL PROFESSION (N.M. 1990).

REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (N.Y. 1986).

FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS: FINAL REPORT ON GENDER BIAS (R.I. 1987).

UTAH TASK FORCE ON GENDER AND JUSTICE, REPORT TO THE UTAH JUDICIAL COUNCIL (Utah 1990).

GENDER AND JUSTICE, REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM (Vt. 1991).

FINAL REPORT OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS (Wash. 1989).

WISCONSIN EQUAL JUSTICE TASK FORCE: FINAL REPORT (Wis. 1991).

