

Aftermaths and Legacies: Critical Legal Studies in Feminist and Queer Legal Theory and Law Reform

Aziza Ahmed¹

Questions of distribution are explicitly in the foreground or lurking in the background of all legal reform projects. Various modes and schools of legal scholarly intervention have shaped how distribution is calibrated in society and how we might uncover the social and economic implications of legal reform projects. The schools of thought are many but they have taken various forms from engaging directly with broad-based questions of economic distribution (e.g. law and economics, critical legal studies, and law and political economy) or those animated by concerns for particular groups (e.g. including critical race theory and feminist legal theory).

The gross inequality of our current political moment suggests the need to interrogate the various modes of engagement with distributive projects. It is with this in mind that Duncan Kennedy, David Trubek, Paulo Barrozo, and I have been designing a workshop on the Jurisprudence of Distribution. The workshop will deal with a few key questions: first, how have past traditions of critical legal thought dealt with distribution? What analytic and normative resources do they offer to explain, critique, and construct the role of law in political economy? Second, what has been the impact of these traditions? What were their failures and successes and why did they remain largely marginal within the worlds of legal thought and practice? Third, what would it take for critical and constructive legal thought to become the prevailing mode of understanding legal orders and our current crisis of inequality? What combination of analytic and normative capabilities might be necessary? What price, if any, should critical constructive legal thought be prepared to pay for intellectual hegemony? The project aims to engage with the histories of movements focused on redistribution, the theoretical orientations of divergent projects, and an exploration of the specific sites and subjects of inequality that legal scholars have focused on.

This short essay considers the way feminist, gender, and queer scholarship has taken on and carried into the present some of the core lessons generated by critical legal studies (CLS). I write it as a contribution to the panel titled the “aftermath and legacies” for the Critical Legal Studies: Intellectual History and History of the Present conference at Princeton University. The contribution will also guide some of our discussion on the Jurisprudence of Distribution later this year.

My scholarship, which includes a forthcoming book tentatively titled *Feminism's Medicine: Law, Science, and Social Movements in the AIDS Epidemic*, draws on feminist/queer legal theory, studies of science and technology, and critical legal studies - including critical theories on race and the law - to understand redistribution through healthcare as an end goal of social movement activism.² The primary argument of the book is that advocates and activists target not only legal rules for redistribution but also scientific settlements to bring about

¹ Professor of Law at Northeastern University School of Law. Thanks to Libby Alder, Janet Halley, Jason Jackson, and Zina Miller for reviewing this draft. This essay was prepared for the conference Critical Legal Studies: Intellectual History and History of the Present taking place at Princeton University February 27-28, 2019.

² For work on social movements drawing on CLS see Lucie E. White and Jeremy Perelman, *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* (2010). For an STS perspective on the relationship between law and science, see, Sheila Jasanoff, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (1995) and Sheila Jasanoff, *STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER* (2004).

redistributive shifts. Feminist activists, for example, sought to change the Centers for Disease Control (CDC) definition of AIDS in order to force the Social Security Administration to provide more benefits for women. This moved women from the margins to the center of the AIDS response and into the governance apparatus of the AIDS epidemic and, over time, moved feminists from the periphery to the center of AIDS prevention efforts both domestically and globally.

I came to this project after many years of activism on issues of gender and race as well as immersion in critical legal theory. My own introduction into the world of CLS began with Janet Halley's *Split Decisions: How and Why to Take a Break from Feminism*.³ It was a break I badly needed after witnessing numerous poor women, particularly women of color (and many men of color), at a range of HIV and AIDS public health programs I visited suffering due to U.S. foreign policy and national laws pushed by a powerful brand of feminism. This mode of feminism – now often called “carceral feminism” in reference to their positions taken in anti-trafficking and anti-prostitution efforts – disenfranchised poor people not only in the United States but around the world.⁴ This is not to say that there wasn't internal feminist disagreement that offered opportunities for a critical project within feminism.⁵ In fact, I was aligned with many of the feminists doing an internal critique of feminism in my own work and activism. Rather, “taking a break” provided the intellectual space to think beyond the particular ideological priors of feminism in legal theory and reform.

Core ideas generated by critical legal studies filled the gap that taking a break created. For me, and many others, Duncan Kennedy's work served a particularly central role in reanimating questions of redistribution and revolutionizing the possibilities of taking on questions of law and inequality both in the productive role of the law in creating and maintaining hierarchy but also the need to examine how legal rules (operating in the foreground and background) impact the ability of people to bargain in a purportedly free market. By centering law and redistribution, Kennedy's work taught us that unexpected costs and benefits of legal reform projects shift and change the type of laws one might support for progressive causes. Offering a technique to understand legal reform meant that advocates could better predict unintended consequences of legal reform projects a guard against potential harms.⁶ (Kennedy's work was also appealing for those of us who witnessed the support that he offered for the students and faculty marginalized in the legal academy.)

Critical legal studies also helped reframe key ideas that travelled between law and economics and feminist scholarship. In my forthcoming book, I highlight how one of these ideas – that sex was a bargain between two people -- put forward by law and economics scholars in a series of books and papers on sex, reason, public health, and AIDS became a point of focus in

³ Janet Halley, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

⁴ Elizabeth Bernstein, *The Sexual Politics of the 'New Abolitionism'*, 18 *Differences: Journal of Feminist Cultural Studies* 128 – 151 (2007).

⁵ Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42(3) *STANFORD LAW REVIEW* 581-616 (1990); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43(6) *STANFORD LAW REVIEW* 1241-1299 (1991); Carol Vance, *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (1985); Martha Albertson Fineman, Introduction: Feminist and Queer Legal Theory in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* (Martha Fineman, Jack E. Jackson, and Adam Romero eds., 2016.); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUMBIA LAW REVIEW* 181-208 (2001).

⁶ Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!* XV *LEGAL STUDIES FORUM* 327-366 (1991); Duncan Kennedy, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993); Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies* in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (Peter Newman ed. 1998)

debates around gender and sex.⁷ The basic claim was that sex (and later risky sex) was a rational decision by parties involved based on a utility calculation of costs and benefits by the individual who would engage in a sexual act. By contrast, feminists built on a sex subordination model to argue that this was not possible because many women were unable to bargain in sex given the power differential between men and women. Kennedy's intervention into this space in *Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity*, argued that legal regulation on sexual abuse, as well as legal discourse, shapes what we think of as abuse, and what types of abuse are both legally condemned and tolerated. These calibrations shift over time and place. And, these legal arrangements have their own productive effects, creating feelings of desire, shame, and eroticism in unexpected ways that do not map onto the structural understanding of power by feminists or the version of cost-benefit analysis offered by mainstream law and economics scholars. Stated differently, Kennedy's long commitment to "left-wing" law and economics complicated and challenged traditional views of how and why we out to intervene in questions deemed to be within economic purview (from property and contract to gender and sex).

The push to better understand the distributive, productive, and emotionally charged consequences of the law was not a purely theoretical exercise as evidenced by Libby Adler's groundbreaking recent book, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform*.⁸ Adler brings together queer theory and core critical legal studies ideas to critique the mainstream the Lesbian, Gay, Bisexual, and Transgender (LGBT) movement. By using the legal realist insights generated by CLS, Adler reimagines the types of legal reform project LGBT advocates should engage in. She draws on core CLS ideas to argue that turning away from anti-discrimination and equal marriage rights focused legal reform projects to what she calls "low-profile" legal rules can bring about a redistribution of resources to the most marginalized in the LGBT community. The turn to low profile laws requires examining the unexpected background rules that shape people's ability to bargain as well as their various identities, as Kennedy argues in his work and Adler describes in new detail.⁹

The ongoing application of CLS in feminist, queer, and gender scholarship also has an international dimension. While this takes many forms one that has had particular influence has been around the role of feminist expertise in global and national governance.¹⁰ From international

⁷ See, for example, Richard Posner, *SEX AND REASON* (1992); Thomas Philipson and Richard Posner, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN ECONOMIC PERSPECTIVE* (1992). See, also, Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUMBIA JOURNAL OF GENDER AND LAW 357 – 428 (2007)(describing the engagement between feminist theorists and law and economics in the context of family and care).

⁸ Libby Adler, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* (2018)

⁹ In another application of core CLS doctrine to real world legal reforms in the context of gender and sex, the work of Karl Klare and Dennis Davis on transformative constitutionalism was central to the recent decriminalization of homosexuality in India. See, Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1; Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 146-188 (1998); Dennis Davis and Karl Klare, *Transformative Constitutionalism and the Common Customary Law* 26 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS (2010)

¹⁰ Janet Halley, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). See, also, David Kennedy, *WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016)

human rights law¹¹ and anti-trafficking programs¹² to national security¹³ and development¹⁴, feminists and feminist ideas have left significant imprint on global and national efforts for social, political, and economic change. The examination of feminist expertise has generated new ways of thinking about power and identity in international institutions.¹⁵ It challenged the idea that feminists are always marginal by showing how feminist ideas become central to governance efforts.

As an example, in my book project I document how feminist expertise took many forms. Feminists were epidemiologists, lawyers, activists, and women living with HIV; they mobilized these expert identities in order to disrupt the status quo of AIDS governance in national and international fora. The feminist critique of science and of health institutions proved to be powerful in revealing the background legal rules and challenging the settled scientific knowledge to bring about redistributive shifts. And, their success resulted in a new description of the epidemic, one now described as “feminized.” Understanding women to be at-risk for HIV was an important feminist victory as it drove resources to women and girls in the epidemic. Yet, as feminist ideas traveled, internal conflicts also emerged and divergent feminist movements became winners and losers in attempts at legal reform. To fully understand the distributional losses and gains of these feminist movements requires switching between different critical methodologies to see how particular people and communities will be impacted by legal reform projects. CLS provides a roadmap for a full picture of the costs and benefits of legal shifts.

Despite ongoing declarations of the death of CLS, the ideas generated by CLS, it turns out, are alive and well in feminist, queer, and gender studies. Scholars are actively engaged in a project of mobilizing, grappling with, and disagreeing with core CLS claims. CLS shapes the way scholars bring a legal realist perspective into the range of scholarly projects that seek to better understand the way gender operates as an axis of redistribution.¹⁶

¹¹ Karen Engle, *THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW* (2020)

¹² Amy Cohen and Aya Gruber, *Governance Feminism in New York’s Human Trafficking Intervention Courts*, in *GOVERNANCE FEMINISM: NOTES FROM THE FIELD* (Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir eds., 2018)

¹³ Vasuki Nesiah, *Feminism as Counter-Terrorism: The Seduction of Power*, *GENDER, NATIONAL SECURITY AND COUNTER-TERRORISM: HUMAN RIGHTS PERSPECTIVES* 127-51 (2013); Vasuki Nesiah, *Uncomfortable Alliances: Women, Peace and Security in Sri Lanka*, *SOUTH ASIAN FEMINISMS* 139-161 (2012).

¹⁴ Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David Trubek & Alvaro Santos eds., 2006)

¹⁵ See, generally, Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir, *GOVERNANCE FEMINISM: AN INTRODUCTION* (2018) and Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir eds., *GOVERNANCE FEMINISM: NOTES FROM THE FIELD* (2018)

¹⁶ The framing of “gender as an axis of redistribution” has been taken from Libby Adler, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* (2018)