

# Postmodern Perspectives And Shifting Legal Paradigms: Searching For A Critical Theory Of Juvenile Justice

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## **Abstract**

The tension between law's rationality, objectivity, abstraction and principle, and feminism's irrationality, subjectivity, contextualisation and personal nature is at the core of attempts by critical legal theorists to define a legal system that seeks justice by giving voice and credibility to heretofore silenced members of groups historically excluded or penalised for their outsider status.

Outsider and feminist legal scholars have tackled the difficult issues of exclusion embedded in the law. Outsider legal scholars contend that the sameness/difference debate perpetuates racial stereotypes that justify the law's impact on members of racial groups by ignoring the impact varying contexts have on giving meaning to an event.

Similarly, feminist legal scholars have advocated for a more conscientious legal system that considers community and multiple perspectives as a means of overcoming the bias women experience when they negotiate their way through the judicial system.

Both of these perspectives provide a starting point for a less mechanistic, more personal and contextualised approach to juvenile justice. But unlike women and minorities, juveniles will never have the political power to force changes in the juvenile justice system. Therefore, the author proposes that a new critical theory of juvenile justice, based on elements of both feminist and outsider legal theories, is necessary to ensure that juveniles are treated fairly and appropriately based on their unique characteristics coupled with the particular context within which the legal issue to be resolved by the justice system arose.

## **Introduction**

This paper<sup>i</sup> represents the current status of my thinking about the constitutional and federal statutory rights of American public school students. It encompasses the struggle I have as I seek to reconcile established judicial approaches outside the school context with the judicial approaches applied to issues involving public school students. At the core of this struggle is the relationship between the courts and school officials. That relationship has led to a dramatic increase in the authority of American school officials to control and punish students in the last two decades based on an unsubstantiated perception that students and schools have become violently, uncontrolled thereby jeopardising the safety of other students as well as virtually destroying the educational environment<sup>ii</sup>. I will argue for an analytical model of juvenile justice fashioned after the relational/cultural feminist jurisprudence emphasising an ethic of care and elements of critical race theory<sup>iii</sup>. I have called this new model the Critical Juvenile Justice Theory which has as an underlying assumption that juveniles,<sup>iv</sup> especially when they are in the school setting, require a

special analytical framework to ensure that their interests as individuals and as members of an historically under-represented group are respected and protected. My interest in this area has evolved over a period of time during which I have studied virtually every search and seizure case involving a public school student as well as cases involving the sexual abuse of students by public school teachers<sup>v</sup>. The results in those two sets of cases can only be described as bizarre from a critical perspective despite wide acceptance of those decisions as rational and objective applications of the law.

While studying the history of American school search and seizure within the context of the adult criminal law, it became clear to me that courts at all levels were applying a hybrid version of fourth amendment doctrine to the school search cases. If the adult standards, requiring probable cause<sup>vi</sup> rather than reasonable suspicion,<sup>vii</sup> were applied to searches of students by school officials, there would have been a greater likelihood that the search in question would be unconstitutional under the adult standard. What happens in virtually all American school search cases, with very few exceptions, is that the adult standard is discussed, but rarely applied to searches of students. The end result is that students invariably lose these cases when the courts distort the adult standard and create a justification for absolving school officials from any responsibility which cannot be constructed from the existing' adult rules.

In an effort to understand how courts could blatantly ignore existing precedents when deciding issues involving juveniles, I searched for patterns in the decisions to determine if there was something unique about the search situations arising in the school setting which would require such a drastic deviation from existing adult legal standards. What I discovered were conscious decisions by judges to ignore particular issues such as the issue of consent to search in all but a few of the school search cases. By ignoring the issue of consent, courts were able to create a justification for the search which otherwise would not have been possible because the methods used by school administrators to initiate the search in the first place clearly ignored the fact that the suspected students frequently denied possessing the alleged contraband and further, refused to give permission for the administrator to search the student's person or possessions. Hence, the search that followed was conducted without consent - a clear fourth amendment<sup>viii</sup> violation in the adult context.

My work then moved into the area of child abuse, particularly the sexual abuse of students by public school teachers during the school day. Once again, it was readily apparent that courts were creating justifications for absolving school districts and administrators of any liability under Section 1983<sup>ix</sup> or the substantive due process clause of the fourteenth amendment<sup>x</sup>, for the harm suffered by students at the hands of their teachers. In this area, courts repeatedly have expressed an unwillingness to decide these cases any other way because the controlling Supreme Court case, *DeShaney v. Winnebago Dept. of Social Services*,<sup>xi</sup> held that a State will not be held responsible for child abuse that is not caused or made worse by some action of the State. There the Supreme Court established that the state has no duty to protect children from harm unless the child is incarcerated or committed to a mental institution thereby creating a custodial relationship between the child and the state.

The fact that American courts have subsequently ignored is that the abuse in *DeShaney* was inflicted by the child's father, a private citizen. While the State is responsible for injuries to individuals in the State's care, the State has no responsibility to protect the child from abuse inflicted by a private actor. Despite the difficulty with that conclusion, it is not too difficult to see

that the *DeShaney* holding does not foreclose a court from holding a school district or its employees responsible for the abuse inflicted by a school employee (a teacher). After all, a teacher cannot claim to be a private citizen when (s)he is hired and certified by the State. In studying both areas, my intuitive response always has been that the decisions do not seem to make sense. The courts offer rationalisations to explain why a different result simply is not possible because the judges are tied to existing precedents. The rules and standards from other cases are offered to the reader to demonstrate that the judges' hands are tied in cases such as searches of students and the sexual misconduct of teachers. Unfortunately, while results based on existing precedents increase predictability, they frequently ignore the human costs.

Yet throughout, there is a nagging suspicion that there must be a different way of looking at these cases so that a different result would be within the realm of possibility. Such an approach was suggested in an article by Laurence Tribe. An explanation was offered in Tribe's article, for the decisions I believed intuitively were decided wrongly. Tribe's article has led me to a body of literature which deals with precisely the types of questions I had been unable to resolve in my own study of the law. I discovered that writers in an ever-widening range of fields have been experimenting with the traditional ways of viewing the world and trying out new ideas of how the world could look from a different perspective<sup>xii</sup>. This different approach also has been introduced into the legal literature<sup>xiii</sup> and has led to the creation of several movements<sup>xiv</sup> within legal scholarship devoted to addressing issues of exclusion of particular groups from a legal perspective designed and perpetuated primarily by a powerful and well-protected, albeit well-intentioned, group of white, male judges.

I will present examples of how this critical approach has been emerging in the legal literature. The traditional legal approach will be explained using Laurence Tribe's constitutional physics approach which compares the evolution of modern physics theories to the traditional (Newtonian) legal theories prevalent throughout the American legal system. Examination of the traditional legal system from the perspective of feminist legal theorists<sup>xv</sup> and critical race theorists<sup>xvi</sup> will be interwoven throughout the introduction of the critical juvenile justice theory to illustrate how feminist legal theory and critical race theory can contribute to a critical theory of juvenile justice.

### **Tribe's Proposed Postmodern Legal Paradigm**

In his article, *The curvature of constitutional space: What lawyers can learn from modern physics*,<sup>xvii</sup> Laurence Tribe set out a new, postmodern analytical framework to be used for analysing current American constitutional issues. This framework is based on the developmental path modern physics theories have followed. Tribe maintains that legal language and legal reasoning have not progressed with the same speed as our changing perceptions of 'the relationship among law, the state, and society'.<sup>xviii</sup> Although our intuitive understanding about the relationship among the law, the state, and society has evolved, our vocabulary has lagged behind our institutions: the language in which we still tend to ask legal questions and express legal doctrine has yet to reflect the shift in our perceptions. The result has been to make it easier for courts and lawyers to couch their analyses of many conflicts in terms that are 'deeply out of sync with that shift in underlying perceptions'.<sup>xix</sup>

In tracing the evolution of the theories of physics from Newton to Hawking, Tribe proposed an alternative legal analytical model which, if applied to cases involving individuals who

are typically under-represented in the legal system, would provide greater protection to those individuals because the questions posed to the courts for resolution would more accurately address the needs of the individuals and the responsibilities of our postmodern society.

### **Pre-modern (Newtonian) Legal Paradigm**

The pre-modern or Newtonian legal paradigm viewed the State as a detached, machine-like entity whose actions were directed at a 'natural' social order. This view reflects the pre-modern scientific paradigm based on Newton's view of the universe which characterised discoveries about the structure of space using the metaphor of a machine.<sup>xx</sup> Courts operating from the Newtonian perspective view state power or judicial power as 'stand[ing] apart from the neutral 'natural' order of things'.<sup>xxi</sup> Whereas courts operating from the Einsteinian perspective consider the law to be inextricably interwoven in the fabric of the social setting<sup>xxii</sup> which gave rise to the conflict.<sup>xxiii</sup> Therefore, judges cannot behave in a detached manner when deciding cases because observation of and intervention into a social situation from the superstructure permanently alters or warps the existing social reality.<sup>xxiv</sup> Failure by the Newtonian judges to recognise the permanent effect legal decisions have on the social terrain has allowed those judges to frame legal issues and results in such a way that the effect of the decision is viewed as logical, correct and unavoidable.<sup>xxv</sup> Completely ignored by Newtonian judges is the fact that the act of observation (or more accurately the act of decision making) may be, in fact, directly responsible for 'shaping the world it observes'.<sup>xxvi</sup>

The unfortunate outcome of having Newtonian judges deciding legal issues in a postmodern world is that Newtonian judges view themselves as part of the background. They are removed from social reality and, therefore, they are in a position to view issues from an objective and neutral point which is external to the system in which the legal conflict arose.<sup>xxvii</sup> By viewing themselves as external to the space in which events occur, judges viewing legal issues from a Newtonian perspective have no difficulty concluding that the State has no responsibility toward under-represented groups such as students.<sup>xxviii</sup> Therefore, Newtonian judges construct a rationale justifying the State's failure to protect children because the State has not acted overtly causing harm to the children.<sup>xxix</sup>

In contrast, a judge, working from a postmodern conceptual base or philosophy, acknowledges that legal decisions occur within a social context. The postmodern judge understands that legal principles interact and shape society and, conversely, the social context shapes legal rules and principles.<sup>xxx</sup> As a result, the postmodern judge viewing him/herself as part of the relevant social space is less likely to conclude that the state plays no role in perpetuating the structure of a society that keeps children helpless and vulnerable.<sup>xxxi</sup>

A Newtonian legal system that operates from basic premises of detached, neutrality and objectivity, analogous to pre-modern theories of physics, leads to legal decisions which are difficult to reconcile in a postmodern society that seeks to incorporate all individuals into a society that values and protects them. Postmodern legal theorists, encourage the adoption of the underlying concepts of modern physics theories to transform our Newtonian legal system into a postmodern legal system. A legal system reflecting the modern physics paradigm would yield legal rules and principles which would more accurately reflect the evolving postmodern philosophy of interdependence.<sup>xxxii</sup>

To accomplish this shift from a Newtonian legal paradigm to a postmodern legal paradigm<sup>xxxiii</sup> requires a shift in our view of the court from that of a neutral observer whose actions have no effect on society to a view of the court as an entity that is interdependent and interactive with society.<sup>xxxiv, xxxv</sup> Such a paradigm-shift requires lawyers to frame legal questions differently and judges to resolve issues in ways which account for this change in perspective. As Tribe noted,<sup>xxxvi</sup> a change in the way legal questions are posed does not ensure a particular result. Rather, it simply encourages judges to consider the impact legal decisions will have on the structure of society.

A Newtonian court,<sup>xxxvii</sup> concerned with predictability, rationality and certainty,<sup>xxxviii</sup> traditionally frames issues in ways that ‘tend to keep power from the powerless, and preserve political power in the hands of the few’.<sup>xxxix</sup> A postmodern court views issues differently.<sup>xl</sup> By acknowledging the interrelatedness between individuals and institutions, with particular attention to the impact court decisions have on the ‘social landscape’,<sup>xli</sup> postmodern courts seek to protect the powerless.

## **Justifying a New legal Paradigm**

### **Contributions from Feminist Jurisprudence**

Both the feminist legal theories and the critical race theories help to define a paradigm shift within the law. The purpose of these critical theories is to correct the existing imbalance in the legal structure. As such, each theory offers a philosophy that can be instructive in creating a more caring and effective juvenile justice system.

The existing legal structure makes sense of the decisions judges make because it focuses on ‘the individual rather than the relationship as primary’.<sup>xlii</sup> When viewed from that perspective, judicial decisions are consistent with the patriarchal structure of the legal system. If judicial decisions are viewed from the perspective of connection and responsibility, it becomes readily apparent that the decisions unfairly burden certain groups of people - those who have few defences, money or power or the decisions ignore altogether those groups that are perceived as not legitimate.

Feminist legal theories, also known as feminist jurisprudence, help to frame a new way of posing legal questions that leads judges to view legal issues in new ways, from new perspectives. Feminist jurisprudence proposes a new legal framework by focusing on postmodern concepts such as deconstructing existing dichotomies (dualisms) invoked to justify legal decisions that perpetuate the status quo while ignoring the reality of the lives of women.<sup>xliii</sup> Feminist legal theorists encourage a shift in focus from individualism (essentialism) to a focus on community and narratives to give context to the legal issues before the court.<sup>xliiv</sup> This is a positive approach that can and should be used in cases involving juveniles to ensure that the stories behind a juvenile perpetrator’s behavior can be considered in reaching a just decision in specific cases.

Postmodern feminist legal theories can be used to highlight the inequities children have suffered in the legal system. For example, dualisms, (rational/irrational, active/inactive, thought/feeling, reason/emotion, power/sensitivity, objective/subjective<sup>xliiv</sup> are challenged by various subgroups within the feminist jurisprudence field (radical feminists, relational or cultural feminists, outsider scholars [critical race theorists] on three fundamental grounds. First, the radical feminist legal theorists object to dualisms because they are sexualised.<sup>xlivi</sup> That is, the first trait of

each pair is considered to be a trait normally possessed by men while the second trait of each pair is typically characterised as a female trait.

Cultural or relational feminists believe that the 'terms of the dualism are not equal'<sup>xlvii</sup> but rather exist in a hierarchical relationship where the first trait in each pair is considered to be a male trait which is superior, or more highly valued than the second 'feminine' trait. The second, or feminine trait, is 'considered negative, corrupt or inferior'.<sup>xlviii</sup>

The status of juveniles can be equated with that of females when assigning traits within pairs of dualisms because of their inferior position in law and society. Like women, juveniles have been placed at the bottom of the hierarchy of power. In the legal system, juveniles have been acted upon by a legal system, ill-equipped philosophically or experientially, to adequately address the unique needs of children. Therefore, the focus has been on maintaining the status quo in terms of behavioral expectations and punishments for transgressions of laws without regard for the vulnerabilities inherent in the status of children with no political clout or protection.<sup>xlix</sup>

Feminist legal theorists have advocated throughout their brief history, a jurisprudence which encompasses 'multiple consciousness' and multiple communities'.<sup>1</sup> In a feminist jurisprudence, connection with others and the creation of community for the purpose of 'expand[ing] one's own perspective by recognising the perspectives of others'<sup>li</sup> are essential to an ethic of care.

An ethic of care, using the metaphor of a web, describes individuals and relationships as 'connected and interdependent'<sup>lii</sup> with a focus on responsibilities. An ethic of care differs from an ethic of justice, for which the metaphor of a ladder describes the self as 'separate and autonomous'<sup>liii</sup> with a focus on individual rights.<sup>liv</sup> The existing legal structure is based on an ethic of justice which promotes rationality, objectivity, abstraction and principle<sup>lv</sup> over irrationality, subjectivity, contextualisation or personalisation. It is the structure of the legal system itself, with its entrenched beliefs about 'politics, economics, hierarchy, work, leisure, and the nature of reality, which are profoundly paralysis-inducing because they make it so hard for people (including the ruling classes themselves) even to imagine that life could be different and better'.<sup>lvi</sup> What the critical feminist legal theorists have attempted to do is to describe a new structure of law that seeks to include those whose access to the legal system historically has been limited or nonexistent.<sup>lvii</sup> Therefore, feminist legal theory provides a powerful, politically strong, foundation upon which a new theory of juvenile justice could be based.

### **Critical Race Theorists (Outsider Scholars)**

Critical race theorists, likewise, argue that the patriarchal legal system has unfairly burdened a group of individuals based on some immutable trait (race) thereby foreclosing that group from full participation in society as well as denying them adequate protection within the legal system.

Critical race theorists, while sharing many of the feminist legal theorists' views, write separately because they believe that feminist jurisprudence does not adequately encompass the issues confronted by members of racial groups. One of the primary foci of the critical race theorists is the notion of difference.

Essentialists, seeking to discover the essential characteristics of members of a particular group (i.e. based on race, gender, or class), attempt to define characteristics in absolute terms. That is, individual members of a 'different' group would be assumed to have 'uniform characteristics'.<sup>lviii</sup>

Difference, for the essentialists, becomes a justification for treating members of the different group in ways that keep the structural disadvantages in the legal system that act against members of non-dominant groups firmly in place. The postmodern approach to difference, proposed by critical race theorists, suggests that the significance of difference will vary with the context thereby destroying the essentialist concept that one definition of difference will determine the outcome in every context.<sup>lix</sup>

As applied to juveniles, the notion of difference allows the judicial system to identify the essential, or uniform, characteristics of members of the group of juveniles. That is, all juveniles have the same characteristics by virtue of their membership in the group of juveniles. Further, identification and application of the essential characteristics of being a juvenile permits adults to treat all juveniles the same, that is, differently than adults are treated. Identifying juvenile difference justifies treating juveniles differently, thereby maintaining the structural disadvantages against juveniles inherent in the legal system.

Missing from the judicial application of the concept of difference is recognition that difference varies with the context. As critical race theorists, such as Joan C. Williams, explain:

Claims of difference simply mean that in some context gender or race may shape (or even determine) one's outlook. This reformulation of difference, avoids essentialism because it refuses to concede that race, gender - or, indeed, any given category - will always be determinative.<sup>lx</sup>

Under the critical race theory of difference, the significance of an individual's difference diminishes when the focus shifts to the context. Social and psychological factors interact differently in different contexts reducing the impact of the essential characteristics of members of particular groups.<sup>lxi</sup>

In other words, sometimes difference doesn't make a difference. Sometimes it is the context that is primary. As applied by post modernists to juveniles, difference would emphasize the context of an event as primary in creating a solution to juvenile justice issues rather than ending the inquiry once the essential characteristics of the juvenile are defined. Under such an approach, juvenile courts would have more flexibility in creating solutions to juveniles' misbehavior that could focus on designing a solution that effectively incorporates the juvenile offender back into mainstream society. Flexibility, based on context, over right/wrong solutions should be the goal of a post modern juvenile justice system.

Rather than viewing legal conflicts from the modern perspective which emphasizes neutrality, objectivity and detachment from the conflict as the only proper way of resolving conflict, thus reducing all conflicts to either/or propositions, postmodernists advocate connection and interdependence among all members of a system. Both extremes tend to exclude the other's point of view by characterising it as wrong. In so doing, both sides lose sight of the fact that neither perspective is correct all of the time. To illustrate, let me recount an exchange I had recently with a student in one of my classes. The discussion that day centred on analysing the right of public employees (in this instance teachers) to speak freely outside of their employment. After presenting the analytical framework established in four United States Supreme Court cases to determine if a school district could terminate a teacher for publicly expressing ideas that may create controversy, a student presented a hypothetical situation to help the class discuss the assigned cases and apply the proper analysis for this type of legal issue.

In the hypothetical, a teacher, who is a member of the Ku Klux Klan, attended a rally sponsored by the hate group over the weekend and was interviewed by a newscaster. The interview was aired on the TV news over the weekend so many of the students and the teacher's colleagues were aware of the teacher's comments prior to arriving at school on Monday. The hypothetical stated that there was a high minority population at the teacher's school who were understandably upset that a teacher at their school was an active Klan member. They expressed their anger by organising a sit-in that disrupted classes for most of the school day.

In applying the four tests to this situation, students in my class agreed that a teacher, as a public employee, has a first amendment right to express ideas that others find repugnant. In the abstract, my students believed that the first amendment was designed to protect exactly the type of speech presented in the hypothetical.

In my class was one African-American male who became quite angry when we began to apply the six factors used to determine whether or not the teacher's termination was justified. Quickly, the African-American male personalised the scenario stating that if the hypothetical teacher were employed at his school he would 'make it my life's work to get that teacher fired because I would find his mere presence in my building offensive'.

The other students immediately withdrew from the discussion leaving me to redirect the discussion back to the analytical framework I had set out on the chalk board. The more I tried to redirect the student back to the 'appropriate' speech tests, the more agitated he became. The student adamantly insisted that the mere presence of a Klan member on the school faculty, no matter how distant the working relationship was between the Klan member and the African-American student, would make it impossible for the African-American student to teach.

I found myself saying to the African-American student that he could not ignore the legal tests developed to resolve this issue. His response was that the law didn't matter because the reality was that the two teachers could not co-exist once the Klan member's views became known. As the discussion progressed (or disintegrated), the African-American student grew more and more agitated and ultimately looked at me and said, 'You couldn't possibly understand what I'm talking about because you never walked in my shoes!'

I recall thinking, as he negated and dismissed so readily my experiences as a female, that I knew exactly how he felt. The depth of his anger and frustration were not foreign emotions to me - but he didn't know that. He would not accept the possibility, at that moment, that we had more in common than a quick glance at our outer selves could reveal. In that instant, I felt his anger and frustration as keenly as if it were my own and I knew that there was no language I could use to make him see that I was not his enemy.

I spent the week before the next class reflecting on our heated exchange. I was amazed at my attempts to make this student view the hypothetical in a rational and objective manner. During the class I repeatedly tried to get the student to calm down, to stop being so emotional, to objectively apply the tests I had put on the board. After all, we were discussing the law and everyone knows that lawyers must dispassionately apply the appropriate legal tests to reach logical, consistent, rational decisions.

What struck me about my role in the exchange was that I had been working on this article at the time so I was submerged in feminist legal theory and critical race literature. As I reflected further, I realised that my student's anger was the same anger that oppressed groups express in similar situations where the majority group insists that the problem can be resolved calmly by



removing the emotion from the dialogue. But as my student informed me, the law doesn't matter when it ignores the realities of at least one of the parties in the conflict.

The following week I began class by first telling the African-American student that I hoped that he had not felt attacked and that there were issues that are near and dear to my heart that I simply cannot discuss in a rational, objective, neutrally detached and unemotional manner. In those instances, it is better not to try to be detached and rational because in so doing, the pain and emotion felt by the participants is reality. To adequately resolve such issues it is necessary not only to acknowledge the pain, anger, emotion and tears, but to fashion a remedy so the aggrieved parties as well as members of society at large can feel that the rule includes acknowledgment of their unique perspectives.

In so doing, we would be functioning in the way Heisenberg described as the uncertainty principle. That is, we are all participant observers. Therefore, we, at times, use the neutral and detached perspective when approaching situations and we need to acknowledge that we do. But, by the same token, we also need to acknowledge that we need to connect with others and acknowledge our interdependence in order to allow ourselves to be open to the discrimination and suffering of others.

Postmodern philosophy, feminist jurisprudence, critical race theory and critical legal studies offer elements of change to the existing legal structure by focusing on relationships, interconnectedness and context as a means of viewing situations and groups of individuals in a new way. This new approach encourages decision makers, lawyers, judges and society in general to consider the responsibility we all have to those who have been excluded or hardest hit by a legal structure designed to promote an atomistic view of the world and society.

The postmodern theories of philosophy and the critical legal theories, including feminist jurisprudence and critical race theories, provide one approach that is useful in considering the historical treatment of juveniles in the courts and in public schools. While the postmodern theories of philosophy and feminist jurisprudence open the door to a postmodern legal structure, those theories do not address the absolute exclusion juveniles suffer as a result of their infancy. For instance, juveniles have no legal remedy unless it is exercised by an adult on behalf of the juvenile. Juveniles have no political power absent an adult advocate acting on behalf of juveniles. Even then, the interests of juveniles are not truly protected because the adult advocate, operating in the current legal system, frequently is constrained by rules, biases and presumptions which favor adult society, and is based on white male power structures.

It is therefore necessary to create a new legal theory specific to juveniles because their problems transcend race. Critical race theory alone is not sufficient to resolve the issues juveniles face. Feminist jurisprudence, likewise, is incomplete in that juvenile justice problems/issues transcend gender.

A new, critical juvenile justice theory must include elements of critical race theory, critical legal theory and feminist jurisprudence plus something new: - something that addresses the needs of individuals who historically have had virtually no power to protect themselves or to protest and challenge the existing legal structure and who continue to suffer the same oppressive suppression similar to the oppression suffered by racial minorities and women.

### **Proposed Critical Juvenile Justice Theory**

Feminist legal theory may be helpful in the development of a critical juvenile justice theory in that 'Feminism brings law back to its purpose - to decide the moral crux of the matter in real human situations'.<sup>lxii</sup> That is, to equate morality with justice by creating a legal system that strives to do the right thing for all those who seek justice regardless of race, gender or age.

Feminist legal theories have helped to frame a new way of looking at oppressed women by applying postmodern concepts to gender issues. The feminist approach incorporates such postmodern concepts as community and individualism, ecology and storytelling to give context to women's issues. The traditional legal system, unaccustomed at many levels to being forced to deal with the human trauma involved in legal disputes, is uncomfortable when it is forced to examine the real impact legal decisions have on the lives of women (battered women and violent crimes against women are two examples of women's issues which, framed from the woman's perspective, are difficult to reconcile with the lenient punishment many abusers receive).

The story is the same for critical race theorists. These theories help to define a shifting framework which strives to correct the existing imbalance in the legal structure. These theories are instructive, but limited when applied to juveniles.

The experience of children as an oppressed groups shares similarities with both racially identifiable and gender identified groups, with the additional burden that our perception of children, regardless of race or gender, is one of incapacity not equality. Due to the child's incapacity, courts and other adults assume the role of protector because an assumption of need based on the child's age and limited life experience. This notion of protection frequently gives way, though, when society and the legal system seek to control children's behavior or to protect adults from blame or responsibility when adults ignore their duty to protect children.

The treatment of juveniles searched by public school officials provides a very distinct picture of the way the justice system oppressively burdens students in ways similar to the burdens it places on women and minorities. Juveniles, suspected of illegal activity in public schools are subjected to some of the most intrusive searches on little more than rumors and speculation. Take, for example, the use of dogs to identify students who were in possession of drugs during the school day as illustrated in *Doe v. Renfrow*.<sup>lxiii</sup> Students identified by a dog trained to alert to the smell of drugs on humans were taken to the principal's office where female students were sent off to the nurse's office to be strip searched by the nurse and male students were strip searched by male administrators. The girl who brought the law suit was identified by the dog and strip searched by the nurse. No drugs were found in her possession. After further investigation, it was learned that her dog alerted because the girl's dog at home was in season.

In that 1981 case, the Seventh Circuit decried the use of dogs in the public school setting to sniff for drugs. The court further denounced the use of strip searches of public school students. And so it was until the summer of 1993. Strip searches were considered to be too intrusive for use in the public school.

In June of 1993, the Seventh Circuit once again had the opportunity to revisit strip searches of students as a means of ferreting out drugs on school property. In *Cornfield v. Consolidated High School Dist. No. 230*,<sup>lxiv</sup> the Seventh Circuit ignored key facts in order to justify the search of a student suspected of possessing drugs on the day before the search. The virtual ban on strip searches that existed prior to June 1993 has been replaced with an overly permissive view of school searches that should give us all pause. If we can treat our children in

ways that ignore their most basic rights, what protection do any of us have from governing bodies composed of similar looking, like-minded individuals who want to ensure the status quo?

What draws me to this subject is a desire to live in a world/society where justice is a priority and individual rights are afforded the respect the framers of the Constitution intended. The difficulty in a proposal for justice that is invoked primarily by troublemakers and criminals is that we tend not to sympathise with those types of individuals. In fact, constitutional rights, especially the fourth amendment, are circumvented when society pursues a goal such as the elimination or at least the reduction of violence and crime. When the violence and crime occur in public schools, school officials are faced with a very difficult theoretical dilemma. They are charged with the duty to protect the educational environment as well as the health, safety and welfare of the students and employees. But that duty must be balanced against the school official's duty to protect the constitutional rights of individual students. In practice, the rights of the individual student frequently give way to the rights of everyone else without so much as a reflective thought.

Furthermore, in protecting the rights of the innocent and seeking a more ethical jurisprudence, particularly for non-dominant groups in society (minors, women, racial minorities), I am in no way advocating for troublemakers and criminals. I simply point out the need for a more ethical and humane paradigm to guide decision making that until now has been based on the interests and needs of the most powerful.

### **Summary**

Critical race theorists and radical feminists have generated an argument against imposing the difference/sameness dualism when judges attempt to deal fairly with individuals who are dissimilar from the male model.<sup>lxv</sup> Critical race theories and feminist jurisprudence break down as theories for explaining decisions in the juvenile justice system because after the problem with the existing system is identified, we must move to the next step of proposing a new construction of reality, taking into consideration the unique perspective of the juvenile.

The problem for the juvenile is one of political power. Both racial minorities and women have increased their political power by increasing their numbers in both the political arena and the legal profession. This infiltration of previously excluded individuals into the political and legal processes has no equivalent where juveniles are concerned.

The interests of juveniles are protected by a child's parents, guardians or legal representatives frequently appointed by the court. Any political gain for children's causes comes from adults who advocate for children's rights. But as adults, how can we truly know the world from the perspective of the juvenile? We are far removed in time and experience to remember the reality of life as a juvenile. And, in many instances, we cannot possibly know the juvenile's experience because the world has changed so dramatically in the past decade that our experiences as juveniles have lost all relevance.

As a result, juveniles who most need a representative who understands life as a juvenile and also understands the prevailing political and judicial systems end up with a parent or court appointed guardian who is motivated by concerns for protecting a variety of interests which happen to include the interests of the juvenile. Therefore, juveniles find that their rights must give way to other considerations and the juvenile is expected to accept the outcome or punishment without regard for the real impact on his or her life. After all, who better to represent the interests of the juvenile than an adult familiar with the child and/or the legal system. This approach to

representing juveniles precludes the juvenile's participation in the process. The juvenile also is foreclosed from helping to reshape the juvenile justice system so that it could become more responsive to the needs of juveniles subjected to the system.

Given the examples examined here, it is clear that there remains a need for justice, and that need demands a theory of justice that acknowledges and takes into account the unique perspectives of juveniles, and that also addresses rights from the perspective of who is being hurt and why - an ethic of care - not simply one of so-called rationality and rights. The philosophy of science has shown us that all knowledge, and decisions based on that knowledge, is value-laden. Here I have examined some of the biases and power politics involved in the judicial system. I invite further research and discussion of the juvenile justice system with particular attention directed at the plight of public school students who are introduced to the legal system as a result of incidents occurring in the public school. I also invite school officials to consider seriously the reasons which first drew them to public school service - helping kids to become productive citizens.

## Endnotes

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- i AN EARLIER VERSION OF THIS PAPER WAS PRESENTED AT THE AUSTRALIAN COUNCIL FOR EDUCATIONAL ADMINISTRATION, SYDNEY, AUSTRALIA, JULY 4, 1995.
  - ii For a contradictory conclusion see Males, M. 1996, *Scapegoat generation: America's war against adolescents*. Monroe, Maine: Common Courage Press. Males states that children are being scapegoated to ensure that adults and institutions can treat children with impunity based on an erroneous assumption that children are the cause of all of society's ills.
  - iii See *infra* notes 30 through 46.
  - iv As used here, juvenile is defined as an individual under the age of 18. The age of majority in the United States is 18. However, there is a grey area where an individual 18 or over is a public school student. By virtue of the fact that an individual is a public school student may cause law enforcement officials to rely on the individual's student status to circumvent the adult procedures required if law enforcement officials confront an 18 year old outside the school setting.
  - v The following is a partial list of cases in the areas of search and seizure and teacher sexual misconduct. Examples of search and seizure cases include: *State v. Marola*, 1998 Wisc. App. LEXIS 768, (Wis. Ct. App. 1998); *Commonwealth v. Cass*, 709 A.2d 350, (Pa. 1998); *In re ADAM*, 1997 Ohio App. LEXIS 2825 (Ohio Ct. App. 1997); *Kennedy v. Dexter Consol. Schs*, 955 P.2d 693 (N. M. Ct. App. 1998); *In re Angelia D.B.*, 211 Wis. 2d 140; 564 N.W.2d 682, (Wis. 1997); *State v. Guenterberg*, 202 Wis. 2d 648; 551 N.W.2d 63, (Wis. Ct. App, 1996); *Commonwealth v. Cass*, 446 Pa. Super. 66; 666 A.2d 313, (Pa. Super Ct. 1996); *In re Finch*, 144 Ore. App. 42; 925 P.2d 913; 1996 Ore. App. LEXIS 1460, (Ct. App. 1996); *State v. J.A.*, 679 So. 2d 316; 1996 Fla. App. LEXIS 8846 (Fla. Dist. Ct. App. 1996); *In re F.B.*, 442 Pa. Super. 216; 658 A.2d 1378, (Pa. Super Ct. 1995); *People v. Mckinney*, 274 Ill. App. 3d 880; 655 N.E.2d 40; ( Ill. App. Ct. 1995); *S.A. v. State*, 654 N.E.2d 791; 1995 Ind. App. LEXIS 965, ( Ind. Ct. App. 1995); *In re Richard A.*, 215 A.D.2d 475; 627 N.Y.S.2d 576; 1995 N.Y. App. Div. LEXIS 4857, (N. Y. 1995); *Singleton v. Board Of Educ. USD 500*, 894 F. Supp. 386; 1995 U.S. Dist. LEXIS 9507, (D. C. Kan. 1995); *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316; 1993 U.S. App. LEXIS 9114, (7th Cir.1993); *Coronado v. State*, 835 S.W.2d 636; 1992 Tex. Crim. App. LEXIS 164, (Tex. Crim. App. 1992); *Williams v. Ellington*, 936 F.2d 881; 1991 U.S. App. LEXIS 13080, (6th Cir. 1991);

*Kuehn v. Renton Sch. Dist. No. 403*, 103 Wash. 2d 594; 694 P.2d 1078, (Wa. 1985); *Martens v. District No. 220, Bd. Of Educ.*, 620 F. Supp. 29; 1985 U.S. Dist. LEXIS 15796, (N. D. Ill. 1985); *Tarter v. Raybuck*, 742 F.2d 977; 1984 U.S. App. LEXIS 19004, (6th Cir. 1984); *Tarter v. Raybuck*, 556 F. Supp. 625; 1983 U.S. Dist. LEXIS 19465, (N. D. Ohio 1983); *People v. Brooks*, 88 A.D.2d 451; 453 N.Y.S.2d 740(N. Y. 1982); *Stern v. New Haven Community Schs.*, 529 F. Supp. 31; 1981 U.S. Dist. LEXIS 18437, (E. D. Mich. 1981); *Zamora v. Pomeroy*, 639 F.2d 662; 1981 U.S. App. LEXIS 20726 (10th Cir. 1981); *People v. Haskins*, 48 A.D.2d 480; 369 N.Y.S.2d 869, (N. Y. 1975); *People v. Jackson*, 65 Misc. 2d 909; 319 N.Y.S.2d 731, (N. Y. 1971). Examples of teacher sexual misconduct cases include: *Doe v. University Of Illinois*, 138 F.3d 653; (7th Cir. 1998); *Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014; (7th Cir. 1997); *Becerra v. Asher*, 105 F.3d 1042; (5th Cir. 1997); *Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co.*, 99 F.3d 695; (5th Cir. 1996); *Cromley v. Board Of Educ. Of Lockport Twp. High Sch. Dist. 205*, 17 F.3d 1059; (7th Cir. 1994); *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993); *Gates v. Unified Sch. Dist. No. 449 Of Leavenworth Cty.*, 996 F.2d 1035 (10th Cir. 1993); *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (3rd Cir. 1992); *D. T. v. Independent Sch. Dist. No. 16 of Pawnee Cty.*, 894 F.2d 1176 (10th Cir. 1990); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3rd Cir. 1989); *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594 (3rd Cir. 1988); *Brandt v. Board of Coop. Educ. Servs.*, 845 F.2d 416 (2d Cir. 1988); *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789 (7th Cir. 1987); *Brandt v. Board of Coop. Educ. Servs.*, 820 F.2d 41 (2d Cir. 1987); *Austin v. Board Of Educ. Of Georgetown Community Unit Sch. Dist. No. 3 Of Vermillion Cty.*, 562 F.2d 446 (7th Cir. 1977).

- vi Probable cause is defined as: ‘An apparent state of facts found to exist upon reasonable inquiry ... which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed’. *Black’s Law Dictionary* (5th ed.) (1979). (pg. 1081). West Publishing Co.: St. Paul, MN.
- vii ‘... quantum of knowledge sufficient to induce ordinarily and prudent man under circumstances to believe criminal activity is at hand’. See also *Commonwealth v. Cass*, 446 Pa. Super 66, 666 A.2d 313 (Pa. Super. 1995). ‘Reasonable suspicion is an elusive concept. It has to do with the quantum of available evidence’. *Black’s Law Dictionary* (5th ed.) (1979). (pg. 1138). West Publishing Co.: St. Paul, MN.
- viii The fourth amendment states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized’. Amendment IV United States Constitution (1791).
- ix Section 1983 is United States federal statute that creates a cause of action for individuals whose federal statutory or constitutional rights have been violated. This statute has become a popular avenue for recovery because the prevailing party may then seek attorneys fees.
- x As applied in sexual abuse/harassment cases, it refers to an individual’s liberty interest in bodily integrity. In other words, it protects an individual’s right to be free of bodily intrusions.
- xi *DeShaney v. Winnebago Dept. of Social Services*, 489 U. S. 189, 109 S. Ct. 998 (1989).
- xii Friere, P. (1995). *Pedagogy of the oppressed*. N. Y. N. Y.: Continuum Publ.; Gilligan, C. (1982). *In a different voice: Psychological theory and women’s development*. Cambridge, Mass.: Harvard University Press; Linda McClain, ‘Atomistic Man’ Revisited: *Liberalism, Connection and Feminist Jurisprudence*, 64 CAL. L. REV. 1171 \*1187-1188 (1992); Deborah Rhode, *Feminist Critical Theories*, 42 Stan. L. Rev. 617 (1990); Ross. T. (1996). *Just Stories: How the law embodies racism and bias*. Boston, MA: Beacon Press.

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- xiii See Kairys, D. (Ed.) (1990). *The politics of law: A progressive critique*. NY, NY: Pantheon Books.
- xiv Critical race theory, feminist legal theory, and critical legal theory.
- xv Such as the work of Catherine MacKinnon, Ann Scales, Patricia Williams, Linda McClain, Joan C. Williams.
- xvi Such as the work of Richard Delgado, Mari Matsuda, Francisco Valdez.
- xvii L. Tribe, The curvature of constitutional space: What lawyers can learn from modern physics, 103 *Harv. L. Rev.* 1 (1989).
- xviii Id. at 3; ‘Although our intuitive understanding about the relationships among law, the state, and society has evolved, our vocabulary has lagged behind our institutions: the language in which we shall tend to ask legal questions and express legal doctrine has yet to reflect the shift in our perceptions. the result has been to make it easier for courts and lawyers to couch their analyses of many areas in terms that are deeply out of sync with that shift in underlying perceptions’.
- xix Id. at 2.
- xx The Supreme Court has a ‘quite primitive vision of the State of Wisconsin as some sort of distinct object, a kind if machine that must be understood to act upon a prepolitical, natural order of private life.’ (Id. at 9 quoting dissent in *DeShaney*).
- xxi Id. at 2.
- xxii Judges cannot remove themselves from the situation in order to ‘establish an Archemedean reference point of detached neutrality and selectively reach in as though from the outside, to make fine-tuned adjustments to highly particularised conflicts’ (Id. at 7).
- xxiii ‘When the system breaks down and conflicts arise, a legal case comes into being. This is the ‘moment’ of legal ideology, the moment at which lawyers and judges in *their* narrow, functional roles seek to justify the normal functioning of the system by resolving the conflict through an idealised way of thinking about it.’ Feinman, J. & Gabel, P. (1990). ‘Contract law as ideology’. In D. Kairys (Ed.) *The politics of law: A progressive critique*. NY, NY: Pantheon Books. (pp. 373-386 at 384).
- xxiv ‘Each legal decision restructures the law itself, as well as the social setting in which law operates, because like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.’ L. Tribe, *supra* note 17, at 8.
- xxv Courts, as passive and detached observers, may reach in to offer a helping hand only when another arm of the state has reached out and shattered this natural, pre-political order by itself ...’ L. Tribe, *supra* note 17, at 10. See also Kairys, D. (1990). *The politics of law; A progressive critique*, NY, NY: Pantheon Books. David Kairys, (1993). *The ‘Purpose’ Doctrine And Conservative Judicial Activism: With Liberty and Justice for Some*.
- xxvi ‘Within the majority’s stilted pre-modern paradigm, there is no hint that the hand of the observing state may itself have played a major role in shaping the world it observes’. L. Tribe, *supra* note 17, at 10.
- xxvii The Newtonian view ‘is one that regards the state as a kind of ‘thing’ which the Constitution both confines within its public political sphere, and fences out of certain pre-political private spheres of personal property or individual liberty’ Id. at 17.
- xxviii ‘Given the typical rhetoric of those who would reify the state, it is both sad and ironic that it is precisely this objectification which leaves personal freedom at its most vulnerable.’ Id. at 17
- xxix ‘For it is the most vulnerable, the most forgotten, whose perspective is least akin to that of the lawmaker or judge or bureaucrat and whose fate is most forcefully determined by the law’s overall design - by its least visible, most deeply embedded gaps and deflections’ Id. at 14.
- xxx See *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705 (1973); cf. *Webster v. Reproductive Health Services*,

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- 492 U.S. 490, 524,106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989); Weissbourd, R. (1996). *The vulnerable child: What really hurts America's children and what we can do about it*. Reading, MA: Addison-Wesley Publ.
- xxxi A post Newtonian judge 'viewing the perspectives of those whom her ruling affects as no less legitimate than her own, and asking what social space the body of legal rules helps to define may find it more difficult to distance the state from the helplessness of the most vulnerable.' Id. at 14.
- xxxii 'If we are to conduct constitutional discourse through conversation truer to contemporary sensibilities - abandoning the prism of Newtonian physics and its legal analogies - then we must consistently speak of the state not as a thing but as a set of rules, principles, and conceptions that interact with a background which is part of a product of prior political actions', Id. at 25.
- xxxiii 'Thus it is the picture of the court as a largely passive observer and of the state as a subject exerting force from a safe distance upon a natural world regarded as an external and prepolitical object, that, for most of us, is false to our sense of reality and it is this picture that I think can be usefully dissolved, and then helpfully refocused from the perspective of twentieth-century physics'. Id. at 23.
- xxxiv 'A court not only chooses *how* to achieve preexisting ends, but also affects *what* those ends are to be and *who* we are to become' Tribe, 98 *Harv. L. Rev.* 592, 595 (1985).
- xxxv 'The paradigm-shift toward a mode of thought that stresses both the geometry of the legal landscape and the interaction between the legal observer and the phenomenon observed thus has deep roots in existing practices and ways of thinking about law'. Tribe, *supra* note 17, at 26.
- xxxvi 'A post-Newtonian heuristic does not force answers upon us; rather, it pushes us to more probing questions. It is not a cry for 'all power to the judges,' but rather a plea for circumspection and questioning in assessing how the distribution and direction of all public powers - including those of judges - define the legal space through which we all move, and in whose recesses some of us are lost'. Id. at 14.
- xxxvii 'Most scholarship in law is rather like the 'old math': static, stable, formal - rationalism walled against chaos'. Williams, P. (1991). *The alchemy of race and rights*. Cambridge, MA: Harvard University Press at p. 7.
- xxxviii 'That life is complicated is a fact of great analytical importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful truths'. Id. at 9.
- xxxix Jack Beerman, 'Administrative failure and local democracy: The politics of DeShaney'. (1990) *Duke L. J.* 1078.
- xl 'The advantage of this approach is that it highlights factors that would otherwise go unremarked.' P. Williams, *supra* note 37 at 7.
- xli L. Tribe, *supra* note 17, at p. 23
- xlii Gilligan, C. (1982). *In a different voice: Psychological theory and women's development*. Cambridge, MA: Harvard University Press.
- xliii 'The more serious side of this essentialised world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextualised (socially constructed), or nonuniversal (specific) as 'emotional', 'literary', 'personal', or just Not True.' P. Williams, *supra* note 37, at 9.
- xliv 'And there is increasing emphasis on recognising and affirming differences and diversity in women's (and all humans') experience and on a jurisprudence based on 'multiple consciousness' and multiple communities. rather than regarding connection with others as something effortlessly attained by women, either by virtue of their biological or social experience, such theorists urge that connection and community require effort and determination to expand one's own perspective of others.' Linda McClain, 'Atomistic Man' Revisited: Liberalism, Connection And Feminist

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- Jurisprudence’, 64 *Cal. L. Rev.* 1171 \*1187-1188 (1992).
- xliv Olsen, F, (1990). The sex of law. In Kairys, D. (Ed.). *The politics of law.* (pp. 453-467).
- xlvi Id. at 453.
- xlvii Id. at 453
- xlviii Id. at 453.
- xlix See Males, M. (1996). *The Scapegoat Generation: America’s was on adolescents.* Monroe, Maine: Common Courage Press.
- l McClain, L. *supra* note 45, at \*1187.
- li Id. at \*1188.
- lii Id. at \*1189.
- liii Id. at \*1189.
- liv ‘the goal is often expressed as supplementary or replacing an ‘ethic of justice’ based on conceptions of rights and rules with an ‘ethic of care’, based on notions of responsibility and relationships’ Id. at \*1174.
- lv ‘Law is supposed to be rational, objective, abstract, and principled, as men claim they are; it is not supposed to be irrational, subjective, contextualised, or personalised as men claim women are’. Olsen, F. in Kairys, D. (Ed.) *The politics of law.* *supra* note 46, at 454.
- lvi Gordon, R. (1990). ‘New developments in legal theory’. In D. Kairys, (Ed.). *The politics of law.*
- lvii ‘A central theme of feminist jurisprudence has been to advocate legal reform that includes the traditionally excluded and allows into the dialogue those voices previously silent or silenced.’ McClain, *supra* note 45, at \*1199.
- lviii Joan C. Williams, (1991). ‘Dissolving The Sameness/Difference Debate: A Post Modern Path Beyond Essentialism And Critical Race Theory’. (1992) *Duke L. J.* 296 at 318.
- lix ‘It allows us to argue that, although race and gender may prove determinative in some particular context, this is a far cry from a reified ‘minority perspective’ or women’s voice’ that determines how a given individual will react in every situation.’ J. Williams, Id. at 307.
- lx Joan C. Williams, ‘Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminist and Critical Race Theory’, (1992) *Duke L. J.* 296 at 307.
- lxi ‘Essentialism dissolves before the notion of a shifting, constantly reconfigured self, shaped but not determined by membership in sets of social categories that crystallise power relations in America.’ Joan C. Williams 1992 *Duke L. J.* 296, at 307-308.
- lxii Ann Scales, ‘The Emergence Of Feminist Jurisprudence: An Essay’. 95 *Yale L. J.* 1373 (1986).
- lxiii *Doe v. Renfrow*, 451 U. S. 1022 (1981).
- lxiv 991 F.2d 1316 (7th Cir. 1993).
- lxv ‘Identical assumptions about women’s special virtues or vulnerabilities have served as arguments for both favored and disfavored legal treatment in criminal and family law, and for both including and excluding her from public roles such as professional occupations and jury service.’ Deborah Rhode (1990). ‘Feminist Critical Theories’ , 42 *Stan. L. Rev.* 617 at 630