Santa Clara University
School of Law

Santa Clara Law Review

Volume 33 | Number 3 Article 9

1-1-1993

Books Received

Santa Clara Law Review

BOOKS RECEIVED

Lawyers and the American Dream. By Stuart M. Speiser. New York: M. Evans and Company, Inc. 1993. Pp. 423. Paperback. $16.95.

Lawyers and the American Dream explores the American dream and the role of lawyers who represent underdogs in making that dream a reality. Ralph Nader applauds the book for its examination of the way lawyers for the "wrongfully harmed have nourished the American common law to hold powerful perpetrators of injury accountable for their recklessness." Speiser recounts the development of "the Equalizers," or lawyers who represent underdogs in civil lawsuits, through stories of landmark cases, many of which he participated in himself. He makes this book accessible to the nonlawyer by beginning with a lexicon of legal terms and a simplified description of negligence, intentional torts, and product liability. He also captures the popular imagination with his analysis of the television show *L.A. Law* as a metaphor for the American dream and as a distorted vision of reality.

In Chapter One, Speiser examines the American dream. He begins aptly by stating that the American Dream eludes definition; it is like trying to catch a moonbeam in a jar. He explores the dream in movies and television and concludes that every episode of *L.A. Law* contains a healthy selection from the Dream smorgasbord: material success, love, self-made excellence, empowerment of the weak and the underdog, melting pot, happy ending, and sometimes, even justice. In Chapter Two, Speiser discusses the firm of McKenzie Brackman in *L.A. Law*. Although *L.A. Law* appears to embody some of the elements of the American Dream, Speiser concludes that the underdog, self-reliant, and entrepreneurial aspects are missing. According to Speiser, *L.A. Law* has presented a distorted role of the tort specialist as an obnoxious ambulance chaser when the tort lawyer is the real hero of the American dream.

Chapter Three leaves the make-believe office of McKenzie Brackman and examines equalizers such as the civil rights lawyer and Supreme Court Justice Thurgood Marshall, criminal lawyers who help underdogs, lawyers who represent shareholders and bond-

holders in suits against financial manipulators, and pro bono lawyers. The focus of this chapter, however, and of the book, is on the tort lawyer. Speiser states that tort lawyers simply have no choice; if they want to do well, they must help the underdog at the same time.

In Chapters Three through Nine, the author describes the emergence of the Equalizers during the 1950's by focusing on *Jane Froman v. Pan American Airways*, a case which arose out of the crash of the Pan Am flying boat *Yankee Clipper*. His discussion of the strategy and tactics of the plaintiff's lawyers and his excerpts from the trial bring the case to life. The reader can feel Speiser's frustration and shame at the failure of "the Equalizers" to vindicate the rights of the underdog. Plaintiff Froman only received $9,050, an amount that represented less than three percent of her medical bills.

In Chapter Ten the author assesses the weaknesses of plaintiff's lawyers through the early twentieth century. He states that American tort practice began in the second half of the nineteenth century, a time which coincided with the high point of laissez-faire, little concern for social justice, and the credo of "survival of the fittest." He argues that, in the name of free enterprise, railroads and industry were permitted to deal brutally with injury claimants. However, Speiser credits two evolutionary changes with helping plaintiffs. One is that airliners are now equipped with flight recorders ("black boxes" and cockpit voice records. In addition, most jurors have some experience as airline passengers; airlines no longer command the status of demigods they did in the 1940's and 1950's. However, Speiser also credits the development of tort lawyers as equalizers because they began to make use of broad discovery and convince the courts to follow the established definitions of wilful misconduct in Warsaw Convention cases. In *Jane Froman v. Pan American Airways*, the Judge instructed the jury that the pilot had to intend the result (i.e. the crash) as well as the act. The definition of wilful misconduct became flexible enough to support a jury verdict against Korean Air Lines in the trial arising out of the shooting down of its Flight 007 by a Soviet fighter plane which occurred over the Sea of Japan in 1983. Speiser feels confident that today Pan Am would feel fortunate to settle the case for $10 million dollars. In this chapter, Speiser also examines *Nader v. General Motors*, a case that furnished a winning model for David-Goliath confrontations between individuals and corporate giants like GM. In this case Nader sued GM for invasion of privacy after he was followed by investigators and spied on by GM. Nader used the $425,000 settlement proceeds to launch the consumer movement.

In Chapter Eleven Speiser describes cases where he represented plaintiffs against the tycoons Aristotle Onassis and Aldo Gucci.

Chapter Twelve focuses on Melvin M. Belli, a tort lawyer in San Francisco, a man who Speiser extols for his struggle on behalf of millions of underdogs. He chronicles the development of the Association of Trial Lawyers of America, an organization with more than 60,000 lawyers and 75 litigation groups, each one dedicated to a particular field of litigation such as Asbestos in Schools, Breast Implants, Dalkon Shield IUD devices, Formaldehyde, Nursing Homes, Tire/Rim Mismatches, and Yugo Automobiles. Speiser argues that ATLA has become a great Equalizer and serves as the command post in the continuing battle to achieve justice for the underdog. In this chapter Speiser also discusses the development of strict liability for defective products through case law. He states that Prosser's restatement gave plaintiff's lawyers strong scholarly authority for spreading strict product liability to states that still cling to the "privity" rule, the rule that prohibited suit for negligence or strict liability by those who had not bought the defective product directly from the manufacturer. Without "the Equalizers," Speiser states that privity would still bar the door to real consumer protection and that your children's children would be forced to inhale asbestos in their school rooms because there would never have been enough pressure from government agencies to force removal of asbestos or withdrawal of thousands of other dangerous products.

Chapter Thirteen explores wrongful death cases and what Speiser perceives as the cheapening of human life beginning in the nineteenth century. Speiser's book *Recovery for Wrongful Death*, published in 1965, was instrumental in making wrongful death awards more equitable. The theme of his book was that use of economic data and the testimony of economists as expert witnesses were commonplace in commercial litigation and should be used in wrongful death cases. Today it is common for plaintiff's lawyers to use economists as appraisers in death cases, and also in personal injury cases involving loss of future earnings. The book was cited by the Supreme Court of Texas and the Oregon Supreme Court and Prosser called it an excellent text.

Chapter Fourteen explores the case of the shooting down of KAL 007, a Korean civilian airliners, by the Soviets and of the deterrent effect of punitive damages. In this chapter, Speiser also discusses the importance of the contingent fee and its application in an industry with performance-based pay, that is, pay that is gauged to the quality of performance. He assails American manufacturers for

failing to emphasize quality. He cites a 1985 survey of institutional investors who listed the quality of a company's products last as a factor in stock selection. He argues that "the Equalizers" play an important role in the free-market approach to defective products.

In the final chapters of the book, Speiser advocates the development of Equalizers in other nations, because democratic market-oriented societies require empowerment of the individual and equal access to justice. He argues that eventually the empowerment of the underdog through the American Equalizers, as seen on television and films, will create a demand for similar access to justice throughout the world.

Stuart M. Speiser has written a passionate book in support of the tort lawyer as champion of the underdog. He presents a kaleidoscopic picture of some of the landmark cases of the century from the point of view of a partisan who experienced the agony of defeat and the exhilaration of victory. Speiser's past legal writings have been influential in sweeping away nineteenth-century barriers to equal justice. *Lawyers and the American Dream* presents a vision of the American tort system as an inspiration for justice-seekers everywhere in the world.

Feminist Legal Theory: Readings in Law & Gender. By Katharine T. Bartlett and Rosanne Kennedy. Boulder: Westview Press. 1991. Pp. 446. Hardcover. $66.00. Paperback. $18.95.

Feminist legal theory offers an analysis of the relationship between law and gender. This theory is important because it challenges fundamental assumptions of traditional legal doctrine and method. *Feminist Legal Theory: Readings in Law and Gender* presents some of the most thought-provoking and diverse scholarship in this field. The book is aimed at students of the law, at anyone interested in women's issues, at legal scholars, and at newcomers to the field. As an introduction for nonlawyers, the authors provide an overview of the relationship between law and feminism and outline some of the ways in which law limits, as well as assists, political and social reform.

Part One of the book explores sexual difference and equality theory; part two questions the fundamental assumptions of legal doctrines. Part three of the book examines feminism and critical theory, and part four focuses on feminist self-criticism.

In the introduction, the editors discuss the ways law limits political and social reform. One constraint they identify is the law's

insistence on precedent. Feminists often find that precedent reinforces a status quo that is more favorable to male interests. They find that arguments that deviate significantly from precedent are often considered extreme and less likely to be successful. The editors claim that law's respect for precedent often creates a tension between the immediate interests of clients and the broader interests of women generally. They give the example of the "battered woman's syndrome." Although evidence of the "battered woman's syndrome" to prove self-defense in a homicide case may educate the public about domestic violence, in many jurisdictions such a defense will have little chance of success and may contradict the safer "diminished-capacity" defense that the client may be able to establish. In addition, the editors argue that feminists find law constraining because it insists upon arguments that are rational and coherent rather than ambiguous or contradictory. They point out that standards of what is rational often reflect the interests of those who currently hold power. They argue that an insistence on "rational" explanations can hurt women because women are sometimes forced to articulate claims and explanations in court that appear contradictory. For example, women in predominantly female occupations seeking to establish claims for comparable worth must reconcile the argument that they are underpaid with the admission that they have freely chosen these jobs. The editors also point out that courts prefer clear dichotomous legal categories to overlapping ones; therefore, a black woman claiming discrimination because of the combination of her race and sex may be unable to fit her claim into the law's narrow requirements of either race or sex discrimination. Despite the difficulties of seeking change through law, the editors state that feminist legal scholars recognize that law is power. They indicate that there is a tension between feminists who argue that legal theory can produce meaningful legal change and those who are skeptical of theory and believe that women's lives can only be achieved by using law pragmatically as a tool for reform.

Part One focuses on sexual difference and equality theory and includes Wendy Williams' article, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism." In this article, Williams explores the stereotypes of masculinity and femininity embedded in rules and statutes. She focuses on the male-only draft, statutory rape laws, and pregnancy and argues that women must recognize that choosing to emphasize differences provides the basis for treating women worse as well as better than men.

Williams has been criticized by feminists who argue that an

equal treatment approach benefits women who meet male norms but not women in traditional female activities. Christine Littleton in "Reconstructing Sexual Equality" suggests as a feminist goal that all sexual differences be made "costless." She proposes that the cost for engaging in a female identified activity or trait shall be no higher than engaging in a "male" identified activity or trait. For example, a mother should receive honor, compensation, and reentry job preferences comparable to a military veteran.

Part One also includes essays by feminists who have opposed mainstream feminist theory. In "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," Kimberle Crenshaw argues that antidiscrimination law constitutes a "top-down" structure whereby victims of discrimimation must establish their claims according to categories that fail to recognize the relationship between race and sex. Crenshaw criticizes feminist theory because it has ignored the intersection of race and sex by basing its analysis on the experiences of white women.

Catharine MacKinnon also rejects the equality versus difference debate. In "Difference and Dominance: On Sex Discrimination," MacKinnon argues that equality doctrine is flawed because it permits differences between women and men to legitimate unequal and abusive conditions for women. She argues that feminists should concentrate on identifying dominance, the ways in which male domination and female subordination have been created and perpetuated, rather than differences between men and women.

In "Deconstructing Gender," Joan Williams rejects the terms of the equality debate. She argues that gender should not be ignored nor misrepresented but "deinstitutionalized." Finally, Vicki Schultz's article, "Telling Stories About Women and Work," rejects the conventional explanations for sex segregation in the workplace and develops an alternative explanation based on organizational structures and cultures in the workplace. She argues that the legal system has perpetuated the status quo of sex segregation by refusing to acknowledge its own power to dismantle it.

The articles in Part Two critique the Anglo-American legal system. In "On Being the Object of Property," Patricia Williams attacks the laws assumptions about subjectivity. In the essay, Williams explores her own roots in a search for her total identity and critiques the role played by the law in fragmenting and "partializing" identity. In "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," Catharine MacKinnon argues that

female attributes and values are social constructs. She contends that female sexuality, the key component of gender identity, is constructed for men's benefit through the process of objectification and that the male viewpoint is considered the neutral and objective one. She analyzes the law of rape as illustrative of the way the focus is on the male rather than the female subject, and she argues that the definition of "normal" protects male interests.

In "Jurisprudence and Gender" Robin West contends that modern legal theory is male because it assumes that individuals are essentially separate from one another. West contends that women are connected to other human beings through such activities as breastfeeding and pregnancy. She urges a feminist jurisprudence that criticizes the failure of male jurisprudence to reflect the fundamental connectedness of women and reconstructs new legal concepts to take into account the complicated realities of women's experience.

In "Race and Essentialism in Feminist Legal Theory," Angela Harris argues that feminists like West and MacKinnon describe the essential core identity of women in terms reflective of white, middle-class women and ignore differences of race and class. Harris contends that women of color contribute to feminist theory by focusing on the role played by differences and the necessity of creating commonality among women despite the differences. In "Feminist Jurisprudence; Grounding the Theories," Patricia Cain discusses the development of feminist thought and the way in which feminist scholars have excluded the experiences of lesbians.

In Part Three the editors selected essays that focus on contemporary developments within the law, particularly the critical legal studies movement (CLS). One of the methods used by critical scholars is deconstruction, a process of examining allegedly neutral universal concepts and principles to expose the power relations that lie beneath them. In "Deconstructing Contract Law," Clare Dalton applies deconstruction to cohabitation contracts and demonstrates how the legal concepts of consent, objective intent, and consideration rest upon unstated notions about gender roles and sexuality that reinforce male power and female powerlessness in the family law setting. In "Statutory Rape: A Feminist Critique of Rights Analysis," Frances Olsen argues that women should not confine their discussions to what can be presented through traditional legal doctrine and that feminist legal scholars should reconstruct sexuality by calling for "what we really want." In "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," Elizabeth Schneider rejects critical legal theorists' contention that rights are opposed to

politics. She emphasizes the interrelationship between rights and political struggle and argues that the language of rights has enabled women to form coalitions and assert a collective identity.

In "Feminist Critical Theories" Deborah Rhode argues that deconstruction has limitations. She concedes that deconstruction has been useful in exposing the way that Western philosophy has excluded the feminine; however, she argues that feminist legal scholars must not stop at critiquing and must take positive steps to transform institutional and social practices.

The articles in Part Four engage in self-criticism. In "Feminist Reason: Getting It and Losing It," Martha Minow argues that feminists perpetuate exclusions by failing to apply insights from their own experience to forms of subordination based upon other factors besides gender. She argues that feminists must look beyond gender discrimination and challenge other discriminatory practices.

In "Feminist Legal Methods," Katharine T. Bartlett examines empiricism, standpoint epistemology and postmodernism and argues in favor of "positionality," an analysis that is based upon experience as well as self-criticism. In "Subordination, Rhetorical Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," Lucie White analyzes her role as lawyer in her representation of a black welfare recipient at a welfare fraud hearing. She examines the historical, social, and bureaucratic barriers Mrs. G must face and her own complicity, and by implication, the complicity of all lawyers in the hierarchies and social barriers faced by the disadvantaged.

Feminist Legal Theory reflects the development of feminist legal theory and the rich mosaic of feminist jurisprudence. The editors have organized the articles thematically and have made careful selections that illustrate the ideological and philosophical breadth of the movement. This book contains the work of the major feminist theoreticians in the field and should be required reading for anyone interested in feminist legal scholarship.