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GENDERING AND ENGENDERING PROCESS

*Elizabeth M. Schneider**

I begin this essay with the admission that I am an unabashed proceduralist. I believe that Civil Procedure is by far the most important course in the first year of law school, indeed, that Civil Procedure may be the most important course in the entire law school curriculum. Civil Procedure is the first course in which law students are presented with issues of dispute resolution, problem-solving, lawyering, ethics, professional responsibility, process, and the value of process that cut across the entire law school curriculum.¹ Civil Procedure is the law school course in which a respect for process and an understanding of the concrete impact of process on human lives must first be engendered.

Almost ten years ago, at an AALS Professional Development Workshop for Women in Legal Education, a group of women law teachers who teach procedure first met. We discovered that many of us were also doing work in the area of women's rights and feminist theory, and were attempting to bring these perspectives to bear in our work in procedure.² In the ensuing years, feminist scholars have begun to explore the implications of these perspectives on procedure.³ It is critically important for us to examine the role of gen-

* Professor of Law, Brooklyn Law School. This essay is a revised version of a speech given at the program, Feminist Procedure, jointly sponsored by the Association of American Law Schools' (AALS) Sections on Civil Procedure and Women in Legal Education at the AALS Annual Meeting, San Antonio, Texas, January 1992. An earlier version of this essay was published in "Feminist Jurisprudence"—*The 1990 Myra Bradwell Day Panel*, 1 COLUM. J. GENDER & L. 6 (1991). I am grateful to Martha Minow for conversations on feminism and civil procedure from which many of the ideas in this essay emerged.

1. I have previously written about the importance of Civil Procedure to the law school curriculum. See Elizabeth M. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987) [hereinafter *Rethinking the Teaching*]; see also Elizabeth M. Schneider, "Feminist Jurisprudence"—*The 1990 Myra Bradwell Day Panel*, 1 COLUM. J. GENDER & L. 6 (1991) [hereinafter *Feminist Jurisprudence*].

2. AALS Workshop on Professional Development for Women in Legal Education, New Orleans, La., Oct. 1984. Women procedure teachers again met at the AALS Workshop on Professional Development for Women in Legal Education in Washington, D.C. in October 1987. After this meeting, Judith Resnik and I developed and circulated a questionnaire for procedure teachers to generate thinking on the intersection of feminism and civil procedure and gather teaching materials. This resulted in a bibliography that included materials on feminism and civil procedure that was distributed as part of the course materials for the AALS Conference on Civil Procedure, Charlottesville, Va., June 1988.

3. See generally Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988); Cynthia Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Judith Resnik, *Housekeeping: The Nature and Allocation of Work in*

der in procedure and to explore the insights that feminist theory may offer to our understanding of procedure, just as we have begun to explore them in connection with many other courses in the curriculum. The publication of this symposium, and the AALS panel which generated it, reflects the burgeoning of feminist thinking on procedure and enhances continuing dialogue on the intersections of feminism and procedure.

Feminist scholarship on procedure underscores the richness and complexity of this exploration of the intersections of feminism and procedure. The range of topics discussed in this symposium, from gender and jury selection to gender-bias in the courts to gender and jurisdiction, highlight the degree to which issues of gender and the social construction of gender affect central issues of procedure, and the degree to which procedure affects issues of gender. Yet, talking about this intersection is particularly complex, because as others in this symposium have observed, neither feminism nor procedure can or should be easily simplified.⁴ There are not only multiple feminisms, and multiple perspectives on feminism,⁵ but as I have just suggested, procedure is an enormously broad-ranging and cross-cutting subject. The essays included in this symposium, and other feminist scholarship on procedure suggest that we have just begun to explore the possible intersections.

My particular interest in the intersection of feminism and procedure has been the way in which fundamental aspects of feminist theory and practice relate to the idea of process and contribute to our theoretical perspectives on procedure, both in deepening our understanding of process and in providing analytic tools for critiquing the procedural system. I have been involved in the women's movement as an activist and academic for many years and much of my scholarly work has focused on feminist theory and practice.⁶ Over

Federal Trial Courts, 24 GA. L. REV. 909 (1990); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Schneider, *Feminist Jurisprudence*, supra note 1; Schneider, *Rethinking the Teaching*, supra note 1; Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 CHI.-KENT L. REV. 409 (1992); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

4. Harold H. Koh, *Two Cheers for Feminist Procedure*, 61 U. CIN. L. REV. 1201, 1205-07 (1993); Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1183 (1993).

5. See KATHARINE T. BARTLETT & ROSANNE KENNEDY, *FEMINIST LEGAL THEORY* (1991), for discussion and presentation of the range of feminist legal theories.

6. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992) [hereinafter *Particularity and Generality*]; Elizabeth M. Schneider, *Violence Against Women and Legal Education: An Essay for Mary Joe Frug*, 26 NEW ENG. L. REV. 843 (1992); Elizabeth M. Schneider

the last ten years that I have been teaching procedure, I realized that my interest in procedure, my love for procedure, and my concern with process was deeply linked to my own feminism, to fundamental aspects of feminist theory, and to my own experience of process in the women's movement.⁷ In other words, I began to see that what I have called my unabashed proceduralism was linked and related to my feminism in ways that I wanted to explore.

This essay explores this link between feminism and procedure. I suggest that basic tenets of feminism and feminist theory reflect a valuing of process, engender a sense of the importance of process, and provide a basis for critical reflection on procedure. In the first section, I offer a preliminary overview of some of the implications of feminist theory for thinking about process. In the second section I briefly discuss some examples of the way in which feminism and procedure have intersected in my own work. Finally, I respond to some concerns that have been raised as to the development of a distinctively "feminist procedure."

I. FEMINIST PROCESS AND PROCEDURE: ENGENDERING PROCESS

Although there is no single feminist theory, but many feminist theories, there are some common underlying themes. As Kate Bartlett has suggested, feminism can be viewed as a "self-consciously critical stance toward the existing order with respect to the ways in which it affects different 'women as women.'"⁸ One of the most exciting recent developments in feminist theory has been the effort to expose feminism's own tendency toward essentialism, namely the implication that there is one essential womanness.⁹ Yet, a crucial aspect of all feminist theories is what I have previously called the

Contradiction and Revision: Progressive Feminist Legal Scholars Respond to Mary Joe Frug, 15 HARV. WOMEN'S L.J. 65 (1992) (with Judi Greenberg and Martha Minow); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) [hereinafter *Violence of Privacy*]; Symposium, *Lesbians, Gays and Feminists at the Bar: Translating Personal Experience Into Effective Legal Argument*, 10 WOMEN'S RTS L. REP. 107 (1988); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) [hereinafter *Dialectic*]; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978).

7. Martha Minow and I first discussed this idea several years ago as part of a joint project on feminism and civil procedure.

8. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833 (1990).

9. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

dialectical relationship between theory and practice based on women's experience.¹⁰ Feminist theories share an emphasis on direct and personal experience as the place that theory begins. Theory is not something which is "out there," but "in here"; it develops from our lived experiences, and grows out of the sharing of personal experience, reflected in the phrase "the personal is political." This phrase reflects the notion that the individual and the group, the personal and political, the private world and the public world, are critically linked. Thus a fundamental aspect of feminist theory and practice is an emphasis on process, the process of connection.

Consciousness-raising, as feminist method, is an example of this dialectical and dynamic process. Consciousness-raising begins with personal experience, experience which is usually conceived of as "private." Through the sharing of personal experience, individuals realize that their own experience is common to other women. This insight moves the understanding of individual experience to the recognition that the commonality of women's experience reflects larger social structures, and then moves back to the personal. Consciousness-raising begins with the lived experiences of women, uses personal experience to understand, create, and inform theory, and then reshapes theory based on the insights gained from exploring personal experience. The richness of this process, the moving back and forth between the personal and the political, the private and the public, exposes the complex, dialectical interrelationship between the social dimension of individual experience and the individual dimension of social experience. Consciousness-raising reveals the profound link between individual and group interest between individual change and social change.¹¹

Feminist theory and feminist practice have valued process in other ways as well. Feminism has valued process in the methods by which women talk, the methods by which we organize meetings and organize organizing. Process has been viewed as important in and of itself, but also because process profoundly affects results and the way in which people experience both process and result.

These perspectives on process that are fundamental to feminism have important implications for procedure. First, there is an emphasis on the dynamic nature of process. Consciousness-raising is a

10. See generally Schneider, *Dialectic*, *supra* note 6. Because I see all feminist theories based on this process-oriented dialectical relationship, I will use the term feminist theory in this discussion.

11. I have recently expanded description of this dialectic in feminist theory and practice to include a move from the particular to the general and back to the particular, Schneider, *Particularity and Generality*, *supra* note 6.

paradigm, the moving back and forth between personal experience and practice—private and public—an example of dynamic process in action. Feminist theory emphasizes the dynamic nature of process: that process is never constant or fixed, but always changing. Attention to this dynamic nature of process has important analogues in procedure. The dynamic nature of our procedural system is evident in the historical evolution of the Federal Rules, particularly today, a time of enormous change and revision of civil procedure. Recent developments such as the Civil Justice Reform Act of 1990¹² that challenge the traditional premise of “transsubstantive” procedure¹³ emphasize the dynamic and evolving nature of the process.

On another level, at the level of individual litigation, procedure is dynamic and constantly unfolding. A complaint is filed, which brings on a response, and yet another response; the process of litigation necessarily involves the emergence and unfolding of issues, strategies, and problems. The very notion of procedure as a fixed set of rules, a static framework, or even a linear unraveling, denies the complexity, richness, and ad hoc nature of the procedural system in action. A view of civil procedure as composed of rules or doctrines that does not pay attention to the textured, chaotic, and dynamic aspects of the process does not accurately reflect the nature of procedure.

Feminist theory also values process because it has a transformative potential beyond the results in a given case or moment. In the process of sharing insight, participating in group discussion or in political activity, consciousness and identity can be transformed. This understanding of process as potentially transformative has implications for our thinking about procedure. The process of litigation, of asserting claims in legal form, can be transformative for individuals and for groups. Asserting a claim in court can impart to a group the power to effect change through legitimization, strength in numbers, and a sense of solidarity.¹⁴ In the process of litigation, individual claims can be transformed into group claims, both through formal procedural mechanisms such as class action¹⁵ and party joinder,¹⁶ and through more subtle processes of legitimization. Of course, process can also be transformative in a negative

12. 28 U.S.C. § 473 (1988 and Supp. 1991).

13. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

14. See, e.g., my discussion of this process in the women's rights movement in Schneider, *Dialectic*, *supra* note 6.

15. FED. R. CIV. P. 23.

16. FED. R. CIV. P. 19, 20, & 22.

sense. The procedural system can also limit efforts for more radical vision or thwart and frustrate activist energy.¹⁷ But feminist theory helps us to understand the potentially transformative dimension of process, and the difference that the type and availability of process have on individual lives and political mobilization.

Feminist theory recognizes the interrelationship between process and result: feminism recognizes that in a deep sense, process and result are linked. Methods of institutional practice and decision-making affect who is silenced and who can speak; the context in which rules are applied affects their meaning. The meaning and impact of an experience includes the way in which it unfolds and is understood. So when we think, for example, about what process is due, or consider the various values of process, we must consider who can speak, the way in which procedural rules allow or deny access to courts and the way in which process is experienced by individuals. But there is also the symbolic meaning of process, the social meaning that processes take on for the larger society and the way in which process is experienced by individuals. Different forms of process take on different meanings then, both symbolically and in fact.

Feminist theory contributes to unearthing hidden voices and identifying rules and practices that have the effect of silencing the views of those with less power. Feminist meetings have traditionally taken account of the problem of silencing by paying close attention to the methods of decisionmaking and access to speech. They have attempted to facilitate greater participation of all individuals in group process through procedural mechanisms such as having everyone speak by going around the room, or having a person who talks call on the next person to talk. Emphasis on the way in which procedural rules can provide vehicles to allow hidden voices to be heard is important. Concepts of intervention¹⁸ come to mind here; as does the idea of giving litigants direct involvement in litigation and paying attention to the way in which the process distorts direct communication between litigants and the court. Feminist theory underscores the importance of access and the need for a critique of procedural rules that impose obstacles to participation, for example, bonds and costs, denial of access to counsel, or those that chill vigorous advocacy or deter unfamiliar arguments, such as Rule 11.¹⁹

17. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

18. FED. R. CIV. P. 24.

19. Federal Rule of Civil Procedure 11 provides for sanctions for attorneys and parties who submit pleading, motions, or other papers in court that are not "well

The valuing of process in feminist theory also provides a critique of rules that measure due process by some kind of economic calculus of the values at stake.²⁰

Another contribution of feminist perspectives on process to our thinking about procedure is the interrelationship between individual and group interests. The very process of consciousness-raising discussed earlier involves a dynamic process of individual discovery and sharing of collective experience, and collective discovery and sharing of individual experiences, in ways that then allow individuals to experience commonality and to imagine their own strengths and identity in a different way. In the formal civil procedural system, we see these concerns reflected in rules on party joinder and class action that address the question of the interrelationship between individual and group interests and define the parameters of when individual claims or group claims are appropriate. A common insight from feminist discussions is that what an individual woman thought was her own problem is widely shared and reflects larger social structures. At the same time, as we recognize multiple feminisms, we understand that all women's experiences are not the same, and that *some* women cannot speak for *all* women. Complex issues of representation, who may speak for whom, who may represent a class, are implicated in the procedural analogue.²¹

Another example of feminist process is the experience of self-reflection and self-criticism. Implicit in the notion of consciousness-raising is the importance of reflection, of reconsideration, that we see in the dialectical notion of consciousness turning in on itself. Feminist process and practice have historically involved feminist groups discussing the methods by which to conduct a meeting, then afterward meeting to reflect on process and decisionmaking and to foster self-criticism. These themes of reconsideration and review are reflected in procedural concepts of post-judgment relief and appellate review. For example, motions for new trial, judgments notwithstanding the verdict,²² and forms of appellate review provide

grounded in fact," "warranted by existing law," or are interposed for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11.

20. See generally Farina, *supra* note 3; White, *supra* note 3, for feminist perspectives on due process.

21. FED. R. CIV. P. 23. For an important discussion of this problem in the context of race and gender discrimination claims made by African American women, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics*, 1989 U. CHI. LEG. FORUM 139. See also Martha L. Minow, *From Class Action to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L. REV. 269 (1991).

22. Now judgments as a matter of law, FED. R. CIV. P. 50.

opportunities to construct more particularized forms of review and reconsideration.

There is, however, an obvious tension between the desire to maximize opportunities for reconsideration and the need for finality and closure. One of the criticisms of feminist methodology and activist practice in the 1960s and 1970s was that there was too great an emphasis on process, and a failure to acknowledge the importance of both final decisionmaking and different tiers of decisionmaking authority. This tension is also present in our procedural system. For instance, the concept of appellate review is based on fundamental notions of the importance of adjudication by different tiers of decision makers, but there is a limit to the amount of review available. Similarly, preclusion cuts off the possibility of reconsideration of issues or claims that have been previously decided. Doctrines of finality and preclusion balance the value of continued process, of reconsideration and reflection, with the need for closure. Feminist theory emphasizes the value of openness but also recognizes the appropriateness of legal boundaries, the notion that at some point there must be an end.

These are a few examples of how a feminist concern with and experience of process can deepen our perspective on procedure. However, I am not simply celebrating the process connection between feminism and civil procedure. Feminist focus on process resonates with many aspects of our procedural system, and has explanatory force. However, feminist theory provides the basis for a self-consciously critical stance towards law. Feminist process offers insights for a critical analysis of procedure.

Feminist theory exposes the norms and values of different models of procedural systems, challenges the notion of neutrality, and questions what is natural. But it must question what is natural beyond simplistic dichotomies of what is "male" or "female." Some have argued that the traditional image of litigation and of the adversary system as "battle" is "male" while the alternative of dialogue and connection has been posited as "female."²³ These dichotomies of warfare versus connection are oversimplified.²⁴ Although the adversarial model of procedure is somewhat alien to the conception of

23. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Carol Gilligan's work has been interpreted, possibly misinterpreted, to support this view.

24. For example, some feminist theorists have expressed concern that Gilligan's articulation of connection as woman's mode of expression is too dichotomized. See, e.g., Schneider, *Dialectic*, *supra* note 6, at 616-17 n. 140; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

feminist process which I have been discussing, recent feminist work has emphasized the danger of suppressing differences and disputes within feminism and has called for attention to conflicting points of view, competition, and other aspects of potential contention.²⁵

There are considerable dangers in positing the formal adjudication system as "male," in contrast with, for example, alternative dispute resolution as "female."²⁶ Sensitivity to issues of power and the problematic dichotomy of public versus private within feminist theory underscores the dangers of this approach. Although in theory alternative dispute resolution can be viewed as a form of more unstructured and potentially dialogic process, this kind of informal process can disadvantage women. Since women are in unequal power relations to begin with, the problems that women face in using alternative dispute resolution mechanisms in battering, divorce, or custody situations are considerable.²⁷ Indeed feminist concern with process suggests that we should be critical of *both* the formal system of adjudication and alternative dispute resolution, but sensitized to power imbalance and the need for both dialogue and advocacy in both contexts. Feminist concern with process can facilitate a more complex and textured analysis of the ways in which different forms of dispute resolution in different settings can both create opportunities for consideration and relief, reflect and correct power imbalance, and affect mobilization.

Feminism can also assist us to rethink the tension between the traditional procedural dichotomies of efficiency and fairness, and the need for closure and the need for reevaluation and revision, and provide a critical perspective on these dichotomies. Preclusion rules, summary judgment, and dismissal reflect lines drawn by the procedural system on all these matters. Feminists may at times prefer more process, more evaluation than the civil rules provide but feminist concern with access, process, and the importance of boundaries can provide a context for reconsideration and resolution.

In sum, feminist concern with process can assist us to explore a richer, more focused, complex and contextual analysis of the role of

25. See generally CONFLICTS IN FEMINISM (Marianne Hirsch & Evelyn F. Keller eds., 1990); Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965 (1990).

26. See generally Carrie J. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 52-53 (1985); Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337 (1990).

27. Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Eleanor H. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 568-74 (1989).

process. Recognition of a link between feminist concern with process and procedure does not mean either simple acceptance or rejection of existing procedural rules and their pattern of application. Feminist theory can deepen our insights on procedure by emphasizing the importance of process, by raising hard questions, and by identifying important areas of reform and challenge to existing procedural rules.

II. INTERSECTIONS: GENDERING PROCESS

I now turn to a brief consideration of some intersections between feminism and procedure in two areas of my work on women's rights—woman-abuse and the Hill-Thomas confirmation hearings. The first raises questions about the gap between the symbolic nature of process, the proliferation of processes and the limits of meaningful process. The second is a teaching story about how gender discrimination contexts can dramatize the importance of process and procedure.

For more than fifteen years, I have been involved in work on woman-abuse. Woman-abuse is the largest cause of death for women in this country, and it is an urgent health problem which has only begun to be recognized.²⁸ But woman-abuse did not exist as a legal problem twenty years ago. The development of legal processes and legal remedies that have been constructed as available, or at least potentially available, for women who are the victims of abuse, were developed in a context in which there were no legal claims, no legal rights.²⁹

An extraordinary proliferation of procedural remedies for woman-abuse have developed over the last twenty years. Now there are orders of protection, injunctive orders that a woman who is battered can get from a court to stop a man from beating her or restrict his activity, although these orders are only "pieces of paper" and likely to be ineffective because of lack of police enforcement.³⁰ There are criminal statutes that provide for arrest of batterers, either for a violation of protective orders or for felonies generally.³¹ There are tort remedies that have developed as a result of the abolition of interspousal immunity.³² There has been a move toward more private and informal processes, notably mediation, which has

28. For fuller discussion of the problem of woman-abuse and the meaning of legal remedies see Schneider, *Violence of Privacy*, *supra* note 6, at 980.

29. *Id.*

30. *Id.* at 990.

31. *Id.* at 989.

32. *Id.*

been criticized by advocates who believe that it hurts battered women who are disadvantaged with respect to power, money, and resources, and signals that battering is the individual woman's private problem.³³ More recently we see violence against women defined as a civil rights violation,³⁴ as an international human rights violation, and as a form of involuntary servitude.³⁵ We also have new anti-stalking laws which expand the definition of the harm from battering by criminalizing threats of violence and harassment.³⁶

These are all forms of process that define battering differently and convey different messages about the social impact. Making battering a crime against the state has a broader social and more public meaning than an individual order of protection. The idea of battering as a civil rights violation also reflects a different set of meanings than an individual order of protection. Defining battering in the more general context of stalking, civil rights, or international human rights, rather than in the particular context of woman-abuse, conveys a less particular and more general social message.³⁷

At the symbolic level, this proliferation of process has been important. The development of legal process can have an important ideological impact in redefining the harm, shaping social consciousness, breaking down the public and private dichotomy and legitimizing the seriousness of the problem. The development of these wide range of legal processes has been critically important for these reasons. However, on the practical level, although some of these remedies have been very useful to individual battered women, none of these remedies are likely to provide real protection for women who are abused, or leverage to change their lives. Some aspects of the legal process may be significant because the experience for a battered woman of being able to state in a public forum what happened, and have the judge take her seriously may be important.³⁸ But none of these processes can deal with really protecting the woman, changing her partner's intimate behavior, or creating life support and alternatives that will enable her to be safe. In addition, because there is an absence of legal representation for women who

33. *Id.* at 988.

34. *Id.* at 989.

35. *Id.* at 989-90.

36. See, e.g., CAL. ANN. PENAL CODE § 646.9 (1993) (defining the crime of stalking as "wilfully, maliciously and repeatedly follow[ing] or harass[ing] another person and mak[ing] a credible threat with the intent to place that person (or his immediate family) in reasonable fear of death or great bodily injury").

37. See Schneider, *Violence of Privacy*, *supra* note 6, at 990.

38. *Id.*

are abused in any of these contexts, meaningful access to these remedies is very limited.

Thus, in the situation of woman-abuse, we have examples of both the symbolic importance of process, and the limits of process to effect change. Looking at process in this concrete gendered context provides a deeper understanding of the gap between the symbolic and the real.

Another example of the intersection of feminism and procedure was my experience during the Anita Hill-Clarence Thomas Senate Judiciary Committee hearings in using the proceeding to teach procedure. Like Harold Koh,³⁹ I taught a class on procedural issues presented by the Judiciary Committee hearings because the procedural issues were so live and so sharply presented to the students.⁴⁰ We discussed many issues including the nature of the proceeding (fact-finding, adjudicative), public versus private forums, questions concerning the nature of the decisionmaking process and the composition of the decisionmakers, the uncertain factual and legal standards involved in what had to be decided, lack of notice of the processes and rules that were to be applied, the burden of proof on the parties, the nature of the evidence that the Committee heard, the decision to exclude evidence such as expert testimony, the nature of lie detector tests and corroborating evidence, the role of race and gender, and problems of credibility. The class was one of the more successful classes that I have taught in tying together so many different strands of procedure, because the situation presented such fundamental questions about the significance of process and underscored the importance of procedure. As one of my students remarked after the class, analysis of the ad hoc and uncertain nature of the procedural context of the hearing could turn anyone into a "process freak." In this context, the gender and race issues, and the significance of what was at stake, heightened the students understanding of the critical role of process and the critical link between process and substance, a theme of the class. This class not only gendered process, but engendered a deeper respect for process.

III. GENDERING AND ENGENDERING PROCESS

Consideration of the multiple intersections of feminism and procedure in this symposium and in this essay suggests the importance of the enterprise. At the same time, it is clear that there are many

39. Koh, *supra* note 4, at 1203.

40. I taught this class at Harvard Law School, where I was visiting during 1991.

different ways in which both feminism and a sensitivity to issues of gender can enrich our teaching and thinking about procedure.

Feminism raises hard questions about procedure, and does not provide simple answers. Feminism challenges dichotomies even those of male versus female.⁴¹ Given the multiple voices of feminism and procedure, there will be lively and continuing debate as to the content of any claim to a distinctively "feminist procedure."⁴² In the meantime, the contributions that gender and feminism can offer to procedure and procedure to gender should be explored. By gendering process, we can engender a greater understanding of, respect for, and deeper critique of process. The challenge is to continue the exploration.

41. Koh, *supra* note 4, at 1205.

42. *Id.* at 1207.

