Ostrom, Elinor. 1999. "Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework." In *Theories of the Policy Process*, ed. Paul Sabatier. Boulder, CO: Westview, 35–72.
———. 1986. "An Agenda for the Study of Institutions." *Public Choice* 48, 3–25.
Peters, B. Guy. 1999. *Institutional Theory in Political Science: The "New Institutionalism."* London: Pinter.
Rothstein, Bo 1996. "Political Institutions: An Overview." In *A New Handbook of Political Science*, ed. Robert Goodin and Hans-Dieter Klingemann. Oxford: Oxford University Press, 133–66.
Schmidt, Vivien. 2010. "Taking Ideas *and* Discourse Seriously: Explaining Change Through Discursive Institutionalism as the Fourth 'New Institutionalism.'" *European Political Science Review* 2: 1–25.
Scott, Richard. 2001. *Institutions and Organizations*, 2nd ed. Thousand Oaks, CA: Sage.

Feminist Legal Method and the Study of Institutions

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Consistent with feminist scholarship more broadly, feminist legal methodology is more clearly unified by a common objective — revealing and challenging the role of law in exacerbating women's inequality — than specific methods per se. Nevertheless, common methods and approaches to the feminist legal study of institutions can be discerned. This brief intervention will focus on describing these common methods and approaches, explaining how they differ from feminist political science, and conclude with some reflections on how feminist legal studies might enrich feminist political science study of institutions in order to inform strategies for change.

HOW DO FEMINIST LEGAL SCHOLARS UNDERSTAND INSTITUTIONS AND RULES?

Broadly speaking, feminist legal theory has been less concerned than feminist political science with the analysis of institutions per se and is much clearer in its understanding of rules than in its understanding of institutions. "Rules" refer, in their most basic sense, to the laws that have been codified and amended through constitutions, statutes, and regulations and developed through judicial interpretation in courts.

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Institutions are that which are subject to particular categories of rules. The nature of the rules in turn defines the nature of the institutions — for example, whether institutions are public or private, domestic or international, legal or nonlegal. Feminist legal theory has, therefore, been less interested in the definition of institutions per se than the delineations between particular types of institutions.

Law has a privileged role in defining institutions, especially in determining their status as either public or private institutions. In a legal sense, "public" institutions refer to "bodies exercising power analogous to those of government bodies" (Barnett 2013, 566), and public law (constitutional, administrative, and criminal law) regulates relationships between these public institutions and individuals. Private law (such as tort, property, or contract law), by contrast, regulates relationships among individuals and private institutions. The distinction is chiefly pertinent in the regulation of public power and the scope for judicial review. Because public institutions are subjected to a much greater range of equality and human rights obligations (in the UK context, the statutory equality duty on public institutions is a powerful example), feminist legal method provides important insights into the growing movement of political power away from clearly public institutions toward private or quasi-private ("quango") institutions that can evade judicial review (see, generally, Millns and Whitty 1999).

A second pertinent distinction is that between domestic and international institutions. Contrary to accepted principles of state sovereignty, the vast majority of modern states have acceded to rules (laws) set by supranational institutions to limit a state's treatment of individual citizens and the supranational monitoring of the state's compliance with these rules. International human rights law is the quintessential embodiment of international rules limiting the actions of domestic institutions. The relationship of the international to the domestic has been of substantial interest to feminist legal scholars because of the perceived greater openness of the institutions of international law to feminist activism and feminist demands. In the context of conservative or recalcitrant states, the institutions and rules of international human rights can provide an important bulwark against the retrenchment of women's rights in the domestic sphere.

The third clear thrust of feminist legal scholarship relevant to this discussion is scrutiny of legal institutions — in particular, judicial institutions. This method of identifying where women and men are in legal institutions is certainly familiar to feminist political scientists (see,

for example, Kenney 2013) but is actually highly antithetical to conventional legal reasoning that views law as neutral and judges as neutral arbiters of gender-free legal issues. The study of judicial actors, their gender, socioeconomic and ethnic profile, and how the composition of judicial bodies changes over time has motivated feminist scrutiny (Rackley 2012). Moreover, feminist scrutiny of legal institutions has revealed gender stereotypes within judicial and jury decision making and the engrained gender biases of legal actors (Ellison and Munro 2009).

Through feminist legal study of institutions, we see a paradoxical role and status for informal rules. Feminist legal studies have revealed how strikingly ill-equipped law is in recognizing and challenging the informal gender rules that structure legal institutions. Informal gender rules, such as the intolerance of judges and judicial institutions to the contingencies created by barristers taking maternity leave, mitigate substantially against the professional advancement of female barristers and, in turn, the ultimate appointment of female judges from the ranks of senior barristers (Kennedy 1993). The unspoken (or "informal") rules of professional conduct at the bar mean that discriminatory informal rules remain unchallenged and immune from legal scrutiny.

Conversely, in terms of understanding how *nonlegal* institutions operate, law is arguably especially astute in its attentiveness to informal rules. In its monitoring of the operation of nonlegal institutions, law can have a positive role in identifying and challenging discriminatory informal rules. The concept of "indirect discrimination," in which rules that are facially nondiscriminatory are shown to have a discriminatory impact, is central to laws for the protection of equality and nondiscrimination. Similarly, equality law is attentive not just to the intention of any particular formal rule (which may well be nondiscriminatory), but to the impact of that rule, recognizing the role of unconscious gender bias in guiding how institutions operate in practice. These mainstream legal methods in equality law draw heavily on feminist legal method in the identification of informal gender rules.

A further example of law's efforts to unearth informal rules concerns legal principles such as "legitimate expectation" and judicial "common knowledge." In their decision making, judges have a practice of representing their claims about aspects of society and the social world — as opposed to specific facts of a case or the relevant law — as a matter of "common knowledge" to which they give "judicial notice" (Hunter, McGlynn, and Rackley 2010, 16). As the Northern Irish example in the next section reveals, this judicial "common sense" can be very important

in setting the context for the interpretation and application of legal rules. Further, the public law concept of "legitimate expectation" operates to elevate an established practice of a public authority (even if not formal policy) to create an enforceable right for an individual to benefit from that continued practice. In both of these examples, feminist legal method reveals the gendered patterns of outcomes of the selective conferral of legal status on certain social "facts" and certain public practices.

Finally, it should be noted that feminist legal scholars are not united on their understanding of law as an institution. Rather than viewing law (judgments) as adjudications on the merits or demerits of specific issues, feminist deconstructive legal method reads judgments as narratives that privilege certain forms of masculinity, femininity, and gendered power dynamics while denigrating others. (We will all be familiar with the trope of the "good" rape victim.) Scholars such as Carol Smart (1989) have identified this discursive power of law to denigrate and disqualify the experiences of women as inherently damaging to women.

IN WHAT WAYS DO FEMINIST LEGAL STUDIES DIFFER FROM FEMINIST POLITICAL SCIENCE IN THE STUDY OF INSTITUTIONS? A CASE STUDY OF POSTCONFLICT OR POSTAUTHORITARIAN CONSTITUTIONS

We can highlight the differences in approach between feminist legal studies and feminist political science toward institutions through an examination of postconflict constitutions. Recognizing the importance of constitutional frameworks as "often the first institutionalist choice to be made," Georgina Waylen's (2006, 158–59) work considers the constitutional engineering of new democracies, delineating three key approaches: maintaining the preexisting constitution, reverting to constitutions that predated the nondemocratic regime, or the adoption of a new constitution. Waylen's work is paradigmatic of feminist political science analysis of constitutions, as it focuses principally on two questions: first, the mobilization of women to secure progressive entrenchment of women's rights within constitutions and, secondly, the extent to which constitutional texts give express recognition to women's rights.

Feminist legal analysis of constitutions, by contrast, focuses primarily on judicial interpretation of constitutional provisions in the case law of relevant constitutional courts (Baines and Rubio-Marin 2005). This

points to both a defined universe of rules, which is the relevant constitutional provisions and their subsequent interpretation by senior courts, and a single set of institutions of primary concern, namely constitutional courts. This author has relied on feminist legal method to conduct a comparative study of reform to state institutions in democratization and conflict-to-peace transitions in order to determine the human rights outcomes for women of these processes of institutional reform (O'Rourke 2013). Across the cases (Northern Ireland, Colombia, Chile), constitutional revision underpinned the transition, which formally protected and often advanced human rights and women's rights. These measures ranged from the more minimal, such as the express requirement that state institutions act in compliance with the state's international human rights commitments in an otherwise unchanged constitution (as in Chile), to the adoption of an entirely new constitution with extensive express provision for the protection of human rights and women's rights (as in Colombia), to quite detailed provision for the establishment of new equality and human rights protection and institutions (as in Northern Ireland).

In analyzing the resulting constitutional jurisprudence (the rules and institutions), feminist legal methods were employed. In terms of how informal rules shape the interpretation of new formal rules, the Northern Irish case of *In re White* provides a powerful example (O'Rourke 2013, 225–26). In this case, the Northern Irish High Court was asked to adjudicate on whether the nonappointment of any women to the Northern Ireland Parades Commission amounted to a failure to ensure that the Commission was "representative of the community in Northern Ireland." In its deliberations, the Court gave judicial notice to the "common sense" belief that "the issue of parades engages the sectarian divide in Northern Ireland," and, as such, the term "'the community'... in the context of parades is constantly used to denote the different sectarian blocks." The high levels of women's participation in parades and the persistently low levels of women's participation in politics and formal decision making in the jurisdiction did not form part of the "common sense" context of the judgment.

Feminist legal analysis of constitutional jurisprudence can reveal the interaction of internal institutional rules (judicial reform) and legal rules. For example, senior Chilean courts have consistently relied on the state's international human rights obligation concerning the right to life in order to limit the distribution of emergency contraception. (The American Convention on Human Rights protects the right to life "from

the moment of conception.") Relevant jurisprudence from the major international human rights bodies has consistently rejected this interpretation of the right to life. The Chilean judiciary has invoked the rhetoric of international human rights, without any reference to the substantive legal doctrine. Presented with competing formal rules (parliament's adoption of more liberal laws on the provision of emergency contraception) and the ostensible protection of life from the moment of conception in international human rights law, the Chilean Court of Appeal, Supreme Court, and the Constitutional Court were able to impose their own preferences and values to privilege the erroneous interpretation of international human rights law. In the absence of judicial reform, ostensible changes to formal rules proved to be meaningless (O'Rourke 2013, 216).

HOW MIGHT FEMINIST LEGAL STUDIES ENRICH FEMINIST POLITICAL SCIENCE STUDY OF INSTITUTIONS IN ORDER TO INFORM STRATEGIES FOR CHANGE?

There are two potentially useful insights offered by feminist legal method to feminist study of institutions: The first is empirical, namely the importance of examining the judicial interpretation of the constitution in order to form a comprehensive study of related institutions. The second is theoretical and concerns the understanding of "rules" in feminist institutionalist scholarship, as feminist institutionalism typically looks to internal regulations and informal practice in order to study the gendered operation of legal institutions. However, there may be value in considering also the feminist lawyer's definition of rules — that is, the treaty, constitutional and statutory provisions, and case law, which is, of necessity, the basis of all adjudication by legal actors. Thus, while the internal "rules" that regulate the legal institution may change (for example, the system of judicial appointments), the legal rules in which these institutions are embedded may remain constant (for example, where new constitutional provisions must be interpreted in ways that are compatible with the state's preexisting international legal obligations or must be reconciled with the state's existing laws on family, property, crime, etc.). Equally, while internal rules may remain constant, legal rules may be subject to dramatic revision or reinterpretation. This latter point may usefully inform strategies for change by ensuring that demands — for example, for greater judicial diversity — also attend to the legal rules to be interpreted by those judges.

REFERENCES

Baines Beverly, and Ruth Rubio-Marin, eds. 2005. *The Gender of Constitutional Jurisprudence*. Cambridge: Cambridge University Press.
Barnett, Hilaire. 2013. *Public Law*. Oxford: Oxford University Press.
Ellison, Louise, and Vanessa Munro. 2009. "Reacting to Rape: Exploring Mock Jurors Assessment of Complainant Credibility." *British Journal of Criminology* 49 (2): 202–19.
Hunter, Rosemary, Clare McGlynn, and Erika Rackley. 2010. *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing.
Kennedy, Helena. 1993. *Eve was Framed: Women and British Justice*. London: Vintage.
Kenney, Sally J. 2013. *Gender and Justice: Why Women in the Judiciary Really Matter*. New York: Routledge.
Millns, Susan, and Noel Whitty. 1999. *Feminist Perspectives on Public Law*. London: Cavendish Publishing Limited.
O'Rourke, Catherine. 2013. *Gender Politics in Transitional Justice*. Milton Park: Routledge.
Rackley, Erika. 2012. *Women, Judging and the Judiciary: From Difference to Diversity*. Milton Park: Routledge.
Smart, Carol. 1989. *Feminism and the Power of Law*. London: Routledge.
Waylen, Georgina. 2006. *Engendering Transitions: Women's Mobilization, Institutions and Gender Outcomes*. Oxford and New York: Oxford University Press.