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Equality's Future: An Introduction

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EQUALITY'S FUTURE: AN INTRODUCTION

Victoria F. Nourse

We stand at an extraordinary moment: never before have so many powerful men wished to be women. For the first time in history, a massive number of male and female voters—18 million in fact—cast their ballots to nominate a woman, Senator Hillary Clinton, to be President of the United States. Disappointed at Senator Clinton's failure to win the Democratic Party's nomination, many women threatened to bolt the party. Sensing opportunity, the Republican Presidential candidate, Senator John McCain, promptly named as his vice-presidential running mate the first woman ever nominated by the Republican Party to a Presidential ticket. And, not to be outdone, the other vice-presidential candidate, Senator Joe Biden, with characteristic candor, openly wondered whether his running mate might have been better off choosing a woman.

I am old enough to know that, just a generation ago, this political scenario was unthinkable. On the first day that I saw my mother don pants (yes, I do remember that day in the late 1970s), if I had told her that, one day, her daughter would be a lawyer, much less teach law, she might have joked (nervously) of her embarrassingly precocious daughter. If I had told her that a woman would run, and almost win, the nomination for the Presidency of the free world during her lifetime, I am quite sure she would have fallen over her ironing board. (I still ask myself why such an educated woman ironed sheets, but she did). Of course, there is more: for a woman of my mother's generation to hear me predict that the Democratic party would nominate the first African-American candidate, a man named Barack Obama, would have seemed outlandish if not slightly insane or even sadly dangerous. As has so often been the case in the history of feminism, issues of race and gender have intersected

at this moment of history, each raising the potential to blind us to the implications of the other.

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At such a moment, it is particularly appropriate that we celebrate the dawn of the twenty-fifth anniversary of the *Feminism and Legal Theory Project* and, in particular, its attention to sex equality, race, and other identity categories. Under the direction of Professor Martha Fineman, the *Feminism and Legal Theory Project* has helped, for over two decades, to bring questions of sex equality to the forefront of the legal academy. The Project has not only focused on the legal theories necessary to attain sex equality, but also theoretical difficulties raised by the “intersection” of race, sex and sexuality—questions first inaugurated by pioneer theorists such as Kimberlé Crenshaw and Patricia Williams, whose early work was supported by the *Feminism and Legal Theory Project*.

Born of a single mind, the *Feminism and Legal Theory Project* would come to embrace hundreds of scholars. The project’s original aim was not only to produce high level scholarship on equality and feminism but also, as its author Martha Fineman once wrote, to provide “feminist scholars a critical sounding board upon which to evaluate existing work while simultaneously cultivating the development of new theory.” It was an attempt to support a new field of inquiry and to provide a safe space for otherwise isolated scholars.

Intellectual integrity was never sacrificed, however, for the sake of collectivity. The *Feminism and Legal Theory Project* has always been about feminism and legal theory. Fineman herself has taken on the most basic concepts in legal theory, from the idea of equality, to the construction of the family, and to the nature of autonomy. She continues to do so, as we can see below. Feminist theory is, for Fineman, critical theory; it analyzes the “assumptions and beliefs” underlying a social order. That mission has taken the Project far and wide from topics that, on the surface, engage with women’s rights (such as law and economics), to theory that builds off feminism to spawn groups of committed scholars with their own projects. The *Feminism and Legal Theory Project* has to date produced seven books, five law review symposia, and countless law review articles from literally hundreds of scholars, male and female alike.

This symposium marks the return of the *Feminism and Legal Theory Project* to the University of Wisconsin to begin a year of celebration for its accomplishments over the past two and a half decades—a celebration which will conclude at Emory University, its present home, in November of 2008. In keeping with the Project’s commitment to the institutions that have supported it, the conference brought together, for the first time, many alumna of the University of Wisconsin, including Martha Fineman, Patricia Williams, Vicki Schultz, and Jane Schacter, as well as senior and junior faculty at the University of Wisconsin, Linda Greene, Elizabeth Mertz, Louise Trubek, Tonya Brito, Lisa Alexander, Alexandra Huneus, Asifa Quraishi, and Mitra Sharafi, and visiting and affiliated research scholars Michael Likosky and Nina Camic. The Dean, Kenneth Davis, introduced the conference; David Trubek

told of its history, and Howard Erlanger, the Director of the Institute for Legal Studies, welcomed the participants on behalf of the Institute and its associate director, Pam Hollenhorst.

Patricia Williams, now the Dohr Professor of Law at Columbia University, and the "poet laureate" of the legal academy, delivered the conference's Keynote address. She spoke eloquently of the symbols of race and gender emanating from the Presidential campaign, opening with the arresting image of a nineteenth-century "twinning doll," a two-headed figure, one head of which was a white male, the other a black female, which when tipped vertically, its skirt dripping downward, would obscure the other head: "the races are joined head to toe . . . continuously revealing and concealing one another." This, Williams claimed, was an important metaphor for the state of the union in a world where race and gender were joined in political combat at the highest of levels.

* * *

The first panel of the conference, moderated by Linda Greene, the Evjue-Bascom Professor of Law at Wisconsin Law School, addressed the future of equality theory. Martha Fineman, now Woodruff Professor of Law at Emory University School of Law, proposed a post-identity vision of inequality premised on "the vulnerable subject," a direct attack on the centuries-old notion of the Lockean liberal subject, typically defined as autonomous and bearing inherent individual rights. As Fineman has put it elsewhere, "vulnerability is—and should be understood to be—universal and constant, inherent in the human condition." The vulnerable subject, she urges, "should be at the center of our political and theoretical endeavors" to build a "more equal society than currently exists in the United States."

Vicki Schultz, Ford Foundation Professor of Law at Yale, and Mary Anne Case, Shure Professor of Law at the University of Chicago, offered different, but equally provocative, challenges to conventional concepts of equality. Professor Schultz urged that feminists follow a new strategy of "disruption." Social scientific studies have shown that individuals are easily primed to see themselves as inadequate because of their gender or race. According to Schultz, it should be feminism's aim to actively "disrupt" the discourse and symbols of sex inequality. Professor Case argued for a new "feminist fundamentalism" which would return feminists to underlying commitments to equality in the face of challenges from fundamentalist religion. As she explained, "feminist fundamentalism" is "a commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles."

Last, but not least, Elizabeth Mertz, Bosshard Professor of Law at the University of Wisconsin Law School and a Senior Research Fellow at the American Bar Foundation, concluded by addressing methodology. Sex equality, she argued, was a project born of the world, responding to real lives and needs, reflecting the law and society tradition, but intensifying it in new forms. She urged that equality's future must be based on empiricism, pragmatism, and most insistently, studies from the bottom up that she has dubbed "a new legal realism."

The second panel, moderated by Nina Camic, Faculty Associate at the University of Wisconsin Law School, focused on new “sites” of feminist inquiry. Cynthia Bowman, Dorothea S. Clarke Professor of Law at Cornell University Law School, presented her work on “*Social Science and Legal Policy: The Case of Heterosexual Cohabitation*.” Bridget Crawford, Professor of Law and Associate Dean for Research and Faculty Development at Pace University School of Law, spoke of “*Third Wave Feminism: Motherhood and the Future of Feminist Legal Theory*.” Laura Kessler, Professor of Law at the S.J. Quinney College of Law at the University of Utah, presented “*Transgressive Caregiving*,” the final version of which appears in this symposium volume.

The third panel addressed international feminism and was moderated by Alexandra Huneus, Assistant Professor of Law at the University of Wisconsin Law School. Lucie White, Horvitz Professor of Law at Harvard Law School, presented “*Making Rights Real: Reclaiming Human Rights to Challenge Global Poverty*.” Asifa Quraishi, Assistant Professor of Law at the University of Wisconsin Law School, offered her insights on sex equality in Muslim countries in “*Western Advocacy for Muslim Women: Its Not Just the Thought That Counts*.” Catherine O’Rourke from the University of Ulster and a Visiting Research Fellow at American University spoke about “*The Shifting of Community and Justice in Transitional Northern Ireland*,” a paper that appears in this symposium volume.

The fourth panel considered geography and feminist challenges in the new century, and was moderated by Professor Louise Trubek of the University of Wisconsin Law School. Lisa Pruitt, Professor of Law at the University of California Davis School of Law, a scholar of rurality, presented “*Place Matters: Intimate Abuse as a Case Study for Rural Difference*.” Guadalupe Luna, Interim Associate Dean and Professor of Law at Northern Illinois University College of Law, discussed the intersection of farming, race, and gender in “*Chicanas and Agricultural Law Intersections: Connecting the Past with Contemporary Geographic Transformations*.” Michael Likosky from the University of London and a Visiting Professor of Law at the University of Wisconsin Law School offered a new perspective on global markets and the fashion industry in his paper “*Gender Arbitrage: Law, Luxury, and Labor*.”

The fifth and final panel addressed race, gender, and intersectional history, a panel moderated by Tonya Brito, Professor of Law at the University of Wisconsin Law School. Jane Schacter, the William Nelson Cromwell Professor of Law at Stanford University Law School, presented “*The Backlash That Wasn’t*,” which addressed the history of the intersection of marriage and race in the context of the 1949 *Perez* decision by the California Supreme Court, which ruled that anti-miscegenation laws were unconstitutional, decades before the United States Supreme Court made a similar ruling. Mitra Sharafi, Assistant Professor of Law at the University of Wisconsin Law School, presented “*Parsing Miscegenation: Litigating Racial Purity in Zoroastrian South Asia*.” While most histories of the intersection of marriage and race focus on Euro-Americans, Sharafi’s paper considered the issue in an entirely different context, recounting a history of the intersection of race and religion in trials involving

the Parsis, a Zoroastrian sect who fled to India and became an Anglicized elite under British rule. Finally, in a *Brief History of Racial Formation*, I closed the panel with the history of the idea of race, emphasizing the ways in which Americans have used race to describe a variety of seemingly unrelated categories, including nationalities (the “Irish race”) and religions (the “Jewish race”) and even gender (the “female race”), linked not by color, but by the deployment of a naturalized version of repetitive cultural tropes of animality, gender, sexualization, and criminality.

* * *

From this wealth of material, the symposium editors have chosen seven articles prepared for this symposium—some from participants and others from those who could not appear in person—each of which, in its own way, both reflects and challenges contemporary approaches to sex equality and intersectionality theory, some by moving beyond the “female subject,” others by considering intersectionality outside of categories of identity, in social institutions, or geographies, or even in the construction of legal theory itself.

In “*Transgressive Caregiving*,” Laura Kessler, Professor of Law at the S.J. Quinney College of Law at the University of Utah, argues that caregiving has been caricatured by feminists as oppression when it can be a practice of political resistance. She locates this centrally—although not exclusively—in the work of ethnic and racial minorities, gays and lesbians, and heterosexual men. In the process, she takes the seemingly contrarian position that feminist maternalists (those who emphasize care-giving) are actually anti-essentialist in their “disruption of the heterosexual family,” while feminist “nonmaternalists” have essentialized the very nature of care as oppressive. Kessler writes: “To critique maternalism as uniformly gender-reinforcing is to miss the important lesson of antiessentialism that race, gender, and class are complex, interdependent systems of subordination.”

In *Masculinities and Feminist Legal Theory*, Nancy Dowd, Chesterfield Smith Professor of Law at the University of Florida, Levin College of Law, invites scholars to ask the “man question.” Her aim is to use men’s scholarship about men (“masculinities theory”) to replace the “presumed universality” of male identity with the reality of “multiple masculinities,” and, further, to show how men are disadvantaged by the existing gendered system. Masculinities scholarship, she explains, shows how “men constantly struggle to be men, that individually they often feel powerless, even when the group is in power.” Manhood is “something constantly to be achieved, not something simply attained and lived.” The “two most common defining elements of masculinity are imperative negatives: not to be a woman and not to be gay.” Dowd concludes by asking how this should inform feminist analysis (largely absent from masculinities studies itself) and offers a number of suggestions for future inquiry.

In *Intersectionality & Posthumanist Visions of Equality*, Maneesha Deckha, from the law faculty at the University of Victoria in Canada, argues that feminists should ask the “species” question. As she explains, “[c]ritiques of intersectionality today center not so much on resisting calls for inclusion of a multiplicity of differences to understand experience and identity, but on

exploring possible limitations of the theory to fully understand differences and their operation.” Her aim in the paper is to bring to the “fore a difference that is still only marginally discussed in critical theory:” the difference of species. Professor Deckha writes: “our identities and the experiences we have are not just gendered or racialized but are also determined by our species status and the fact that we are human . . . experiences of gender, race, sexuality, ability, etc., are often based on and take shape through ideas of humanness vis-à-vis animality.” To fail to appreciate this line of difference, argues Deckha, is to perpetuate the very kinds of discourses of animality that have been used over time to demean a variety of groups, including women and African Americans.

* * *

Articles in this symposium not only focus on legal theory beyond “female identity,” but also toward what I call the “constitutive question”—the question of how old identities are maintained (quite literally constituted and reconstituted) through institutions, public or private, the market or the state, or even geography. In a series of pieces, symposium participants considered how sex inequality emerges in a wide variety of contexts—from farming to fashion.

In “*The Shifting Signifier of ‘Community’ in Transitional Justice: A Feminist Analysis*,” Catherine O’Rourke focuses on the nation-state in transition. She argues that transitional justice has primarily focused on sexual violence and this has “unduly narrowed the terrain for feminist interventions into transitional justice.” As O’Rourke writes, in theory, transitional justice offers reasons to be hopeful of women’s inclusion as agents and stakeholders in a new non-violent society. In practice, however, this may not be the case. Focusing on the experience of Northern Ireland with community-based restorative justice projects, O’Rourke critiques the turn of transitional justice advocates to the concept of community, arguing that the Northern Ireland experience shows how such an idea can “locate women outside of ‘community,’” effectively denying them a stake in *constituting* state legitimacy.

In “*Gender Arbitrage: Law, Luxury and Labor*,” Professor Michael Likosky looks at globalizing markets and the fashion industry. He emphasizes how public power has structured globalized markets to create “gendered luxury labor,” a phenomenon that involves both the selling of gendered labor (the woman seamstress) and the consumption of gender (the fashion industry’s “designer” handbag). He writes:

Over the last twenty or so years, the manufacturing of luxury has been outsourced. What was once the province of many century old seamstress guilds with their hard fought union-like rights was now the grind of women in China, Romania, Saudi Arabia, and elsewhere. These new workers are at times paid substandard wages with some forced to endure slave labor * * * This outsourcing has been driven by finances, facilitated by law, inconceivable without decades—in fact centuries—of exercises of public power.

Professor Likosky introduces the term “gender arbitrage” to explain the exploitation of gendered labor markets in the fashion industry: “Like international tax planners, luxury attorneys map the various transnational labor

jurisdictions. They then make strategic use of these differential gendered regimes," not only to take advantage of low cost labor but to link this with high-class destinations such as "Made in Italy." He then argues that all of this has been facilitated by the use of a variety of public mechanisms include enterprise "free zones."

Last, but certainly not least, are pieces by Professors Guadalupe Luna and Lisa Pruitt on the question of geography and feminism. Luna focuses on farming, Pruitt on rural life itself. Both aim to show how occupation and geography institutionalizes forms of gender and, in Luna's case, race as well.

In "*Women in Blue Jeans: Connecting the Past with Agricultural Transformations in the Present*," Professor Guadalupe Luna "examines the intersection of the nation's farm bills with women owner farming enterprises." She writes:

In operating farming enterprises women are not commonly credited with participating in the public sphere. Popular characterizations of rural women in farming for example relate them to the status of passive participants in agriculture.

Luna traces farming policy from the colonial period and the influences of race and gender on that policy. She connects this history with contemporary lawsuits and efforts by the "new women in blue jeans" to challenge contemporary industrial farming policy and to introduce "alternative forms of agricultural enterprises." She argues that various institutional mechanisms, like federally mandated "farm committees" exclude women and people of color in decisions about credit and lending practices. As she explains, "[w]hile a few gains have surfaced for women in agriculture they have yet to define the nation's farm bills or actively participate in the formulation of rural policies," which have "structurally created a concrete 'social order' that subordinates nutritional and health alternatives for consumers and women and children directly."

In *Place Matters: Domestic Violence and the Rural-Urban Axis*, Professor Lisa Pruitt argues that the "rural," typically associated with peaceful idyllic settings, is in fact a place that helps to construct and perpetuate domestic violence. The article "investigates the difference that space and place make regarding the incidence, investigation, arrest, and prosecution of intimate abuse in the United States." In particular, Pruitt considers these issues in light of the rural-urban axis, examining how rurality fosters an incidence and ferocity of domestic violence—as well as legal outcomes to it—that are different to those in urban and suburban locales. Pruitt shows how urban life has become an unstated baseline or norm implicit not only in legal scholarship on domestic violence but also police solutions, making rurality itself a "difference" worthy of attention.