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ROUND TABLE DISCUSSION: SUBVERSIVE LEGAL MOMENTS?

Karen Engle*:

Good morning, and welcome to the first roundtable, which is in many ways a Rorschach test. In your packet, you have a handout that says *Frontiero v. Richardson* on the front. You might want to take it out and have it in front of you during the panel because we are going to focus on the cases included in the packet. We are delighted to have such a multidisciplinary audience here and hope the handout will assist those who might not be particularly familiar with the cases or who, in any event, could use a refresher.

We have before us five eminent legal scholars. I will introduce them in the order they will be speaking this morning: Elizabeth Schneider, Vicki Schultz, Nathaniel Berman, Adrienne Davis, and Janet Halley. All of them have focused on or used theories about gender in their work, some to a greater extent than others, but all quite thoughtfully. We also have five famous legal cases. Most are cases that were brought by women's rights advocates in a deliberate attempt to move the law in a direction that would better attend to women's concerns. I have given you short excerpts from each of these cases in the handout, which are *Frontiero v. Richardson*,[1] *United States v. Virginia*,[2] *State v. Wanrow*,[3] *Meritor Savings v. Vincent*,[4] and *Oncale v. Sundowner Offshore Services*.[5] At the time they were decided, each was considered a victory from the perspective of the women involved and from the advocacy organizations that either brought the cases on the women's behalf or supported them. As the panelists discuss these cases, they will offer five ideas about whether the strategies were subversive of the prevailing legal paradigms at the time and, regardless, whether the decisions have left us with a legacy of subversion either as method or as doctrine. We will also hear on the panel, I imagine, five ideas

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1. Frontiero v. Richardson, 411 U.S. 677 (1973).
2. United States v. Virginia, 518 U.S. 515 (1996).
3. State v. Wanrow, 538 P.2d 849 (Wash. App. 1975), *aff'd* 559 P.2d 548 (Wash. 1977).
4. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
5. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

about the meaning of subversion and five ideas about whether subversion is good and, if so, whom it is good for. Finally, five ideas should emerge about the state of feminism today and its utility in what might be termed the post-feminist struggles of the twenty-first century.

So here are the rules. I am going to give a brief summary of the cases so that the participants can refer to them without having to repeat the facts and basic rulings. Then each participant is going to have seven minutes to give her or his initial take on the cases. After those opening presentations, we will engage in a roundtable discussion.

The five cases span from 1973 to 1998. The earliest of the cases, *Frontiero v. Richardson*, is the first case in which the United States Supreme Court ruled that classifications based on sex are entitled to heightened scrutiny. The case was brought by a servicewoman who wanted to get benefits for her husband, but was denied them because she was unable to demonstrate that he was her dependent. Servicemen were entitled to benefits for their spouses without making a similar showing because there was a presumption of dependency with regard to women. The plaintiff brought an equal protection claim and succeeded. In the plurality opinion, the Court recognized the long history of discrimination against women. Your handout includes a number of quotations in which the plurality opinion compared race discrimination to sex discrimination, stating that classifications based on sex should be subject to the same strict scrutiny as classifications based on race. Although the majority of the Court determined in a later case that classifications based on sex were subject to intermediate rather than strict scrutiny,[6] *Frontiero* was nevertheless seen as a victory.

Twenty-three years after *Frontiero*, Ruth Bader Ginsburg, who represented the plaintiff in *Frontiero*, authored the United States Supreme Court's majority opinion that struck down the Virginia Military Institute's exclusion of women as unconstitutional in *United States v. Virginia* ("VMI"). Originally, in response to a successful equal protection challenge, Virginia set up a separate, but clearly unequal, military school for women. The Court applied intermediate scrutiny to strike down that solution, maintaining that women could not be excluded from the academy. Justice Ginsburg noted that *some* women are capable of and desire to attend a military academy and should not be categorically excluded.

The next case takes us back in time to 1977. *State v. Wanrow* is a Washington Supreme Court opinion. Liz Schneider, with us on the panel today, represented the defendant in this case that has come to be known—somewhat erroneously—as the battered women's self-defense case. The defendant argued that she shot a man who came to her house intoxicated in

6. Craig v. Boren, 429 U.S. 190 (1976).

the middle of the night to defend herself and her children. She was five feet, four inches tall and on crutches. He was six feet, one inch tall, and she suspected him of having earlier sexually molested her child. The Washington Supreme Court ruled that whether a threat against which a defendant claims to have asserted self-defense is legally sufficient to justify self-defense should be determined on an individual, subjective basis. More specifically, the court stated that equal protection required that women's specific experiences and sense of danger be taken into account in the interpretation of self-defense law. Although the case did not involve a battered woman, its potential utility for self-defense claims by battered women is apparent.

The last two cases in the handout, *Meritor Savings v. Vinson* and *Oncale v. Sundowner*, bring us back to the United States Supreme Court to two cases on sexual harassment decided twelve years apart (1986 and 1998). They were both decided 9-0 in favor of the plaintiff. *Meritor* was written by Justice Rehnquist while Justice Scalia authored *Oncale*. These are not necessarily the Justices you would expect to articulate feminist victories. *Meritor* ruled in favor of a plaintiff who, after losing her job, complained that her boss had been harassing her for years by demanding sexual favors and even forcibly raping her. The Court held that a *quid pro quo* demand was not necessary for a claim of sexual harassment. Rather, hostile work environment also constituted sexual harassment in violation of the proscription of sex discrimination under Title VII of the Civil Rights Act, regardless whether the plaintiff suffered economic harm as a result of the harassment. Catharine MacKinnon represented the plaintiff and took it to the Supreme Court with the specific aim of equating what she considered the sexual subordination of women with sex discrimination. She was successful, as illustrated by the Court's statement that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[7]

Twelve years later, the Court decided *Oncale*, a case which raised the question whether Title VII provided a cause of action for same-sex sexual harassment. A man who worked only with other men on an oil rig claimed he was sexually assaulted by coworkers. Justice Scalia, out of a concern for "brevity and dignity,"[8] only described the facts generally, but the Court ruled 9-0 in favor of the plaintiff, holding that male-on-male or female-on-female harassment could constitute sexual harassment.

Now I will turn to our panelists for further discussion of these cases. It may even be that they will disagree with some of the basic summary I have provided. Let's begin with Liz.

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7. *Meritor Sav. Bank*, 477 U.S at 64.
8. *Oncale*, 523 U.S. at 77.

Elizabeth M. Schneider*:

I want to begin with what the conference conveners ask us to address about subversive legacies, the title of this conference. I quote here from the conference description:

> Some representations of gender asymmetry that seem to be simply conventional in their support for patriarchy show themselves to be, on closer reading, deeply and complexly subversive. Some feminist strategies that seem initially subversive may be co-opted by the very institutions and practices they wish to subvert.[9]

This raises wonderful questions which are not easy to answer. One of the aspects of the inquiry that is particularly rich is the historical analysis implicit in the question. In retrospect, a legal decision can be seen as more subversive than it was at the time, and we can also see later on that decisions that seemed very subversive at the time were, indeed, less so. As time goes on, what the case means both in law and culture may take on a different meaning, or evolve in a way that changes our understanding of the nature of the subversion.

This approach of looking critically in retrospect is very important. In a book that I have recently written, *Battered Women and Feminist Lawmaking*,[10] which assesses the last thirty years of feminist legal advocacy concerning domestic violence, it is a method that I try to apply. I examine how strategies that looked subversive at the time or that didn't look subversive at the time take on a different meaning now. So this historical perspective is something that I think is important and rich, and can assist us to think about where we are today.

Karen has asked us to address the subversive legacies of these opinions. Taking off from Karen's introduction, I want to offer thoughts on some of these cases, and then focus on *Wanrow*, which, as Karen mentioned, I litigated in the Washington Supreme Court with my co-counsel, Nancy Stearns, at the Center for Constitutional Rights. Let me start with what I think are the subversive aspects of these cases. *Frontiero* is obviously the first decision of the Supreme Court in which a plurality, not a majority, of the Court sees sex as suspect classification. In that sense, it is obviously an important doctrinal high water mark. As Karen explained, the issues in *Frontiero* are dependency issues, issues that go to

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9. Subversive Legacies: Learning from History/ Constructing the Future (November 22-23, 2002), *available at* http://www.utexas.edu/law/conferences/subversive/index.html.

10. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000). *See also* Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future*, 2 VA. J. SOC. POL'Y & L. 1 (1994).

the question of whether or not the dependency in a heterosexual relationship should go both ways. And to the extent that that case said, yes, it should—that notion of the mutuality of dependence is very important. This is a dimension of that case which I think in retrospect is more subversive than we might have thought at the time. It looks more subversive in historical perspective because we are in the midst of a backlash that, at least in my view, is trying to send women right back to the home and right back to the notion of dependency in those old ways. It could be argued that the true legacy of *Frontiero* is that the law has opened it up for men and women to be genuinely interdependent, despite the fact that it hasn't happened nearly as much in practice and in life as we would have imagined. One example: When I was a law student working at the Center for Constitutional Rights, I was involved in a case in New York City, *Danielson v. Board of Higher Education*,[11] which litigated the question of whether or not there ought to be parental leave for the employees of the New York City Board of Education. Parental leave was won —a great victory. But very few men who work for the New York City Board of Education have, in fact, taken parental leave. So cases open the door but they don't do the job of implementing those changes.

VMI, overt sex segregation, women excluded from VMI and sent instead to Virginia Women's Institute for Leadership (VWIL), important, right?[12] The decision is a triumph in the rejection of a kind of what I would call, crude Gilliganism, the notion that VWIL is a great, cuddly alternative for women, despite the fact that it doesn't have the alumni network, doesn't have the power, doesn't have the resources. Carol Gilligan, by the way, saw this rationale for VWIL as a mischaracterization of her work. She opposed this view in an *amicus* brief in the case.[13] At the same time, as I have written, I find the language in *VMI* troubling.[14] Ruth Bader Ginsburg writes an opinion that emphasizes that the two sexes are not "fungible."[15] "Inherent differences between men and women . . . ," she writes, ". . . remain cause for celebration but not for denigration of the members of either sex, or for artificial constraints on an individual's opportunity."[16] I am concerned by the use of the term "inherent differences," when this is one of the critical issues that we've been litigating and arguing about for so many years.

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11. Danielson v. Bd of Higher Educ., 358 F. Supp. 22 (S.D.N.Y 1972).

12. United States v. Virginia, 518 U.S. 515 (1996).

13. *Opposing All-Male Admission Policy at Virginia Military Institute*: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science and Law, 16 WOMEN'S RTS. L. REP. 1 (1994).

14. Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U. J. GENDER L. 59 (1997).

15. United States v. Virginia, 518 U.S. at 533 (*citing* Ballard v. United States, 329 U.S. 187 (1946)).

16. *Id.* at 533.

I am going to leave *Meritor* and *Oncale* for others on the panel. Let me just say two things very quickly about *Wanrow*, because, as you can imagine, I feel pretty strongly about this case. *Wanrow*, too, opened the door in terms of gender in criminal defenses, raising questions about the way in which gender shapes the need for an individualized standard. But, at the same time, there has been enormous misinterpretation of the case. It has been used in ways that are sometimes very helpful to battered women, particularly in criminal defense situations and to other women criminal defendants, but can also be terribly problematic.

Here is the subversion: We did not imagine when we argued to the Washington Supreme Court that it was possible that a court would agree with us. And the decision on the instruction and standard of self-defense was and still stands, I think, as an affirmative and important statement that gender is a factor in the need for individual perspective, not a separate standard. You have to look at gender because it underscores why you need the individual's perspective. But there is language in the Washington Supreme Court opinion that also suggests the "handicaps" of gender.[17] That was not in our brief. There is the misinterpretation of *Wanrow* that what it means is separate standards for men and women; there is the misinterpretation that if you just switch he and she, if you just use the female instead of the male pronoun, that is doing the job. We have other serious problems in interpretation. Many lawyers that I have worked with, and students in my Women and the Law or Battered Women and the Law classes, misunderstand arguments about the importance of gender as a "battered women's defense." This misinterpretation drives me crazy because of the co-optation and the tilting into the same old frameworks.

A message that I want to emphasize here from *Wanrow* is that one does not ever control even the most subversive possibilities that one helps to develop in the law. With the humility of hindsight, it is important to look back and to see cases in which subversion did occur, when perhaps we may have been too blasé in thinking that, hey, this was just a minor development. *Frontiero* may be an example of that. But it is also important to see the ways in which what seemed to be the breakthrough issues have really not been quite as breakthrough as we have anticipated, both in life and on the ground, because of the distortion of subsequent legal and cultural interpretation. With the hindsight of history, things look different.

17. "Care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps that are the product of sex discrimination." State v. Wanrow, 559 P.2d 548, 557 (Wash. 1977).

Vicki Schultz*:

The first point I want to make is that the formal law itself, in the sense of a Supreme Court decision, cannot be "subversive." Law in this sense cannot be *anything*, really, on its own. But law is an important arena of struggle in our society, one in which the social movements of the twentieth century have invested a great deal of energy. The fact that the Supreme Court decides a case a certain way may reveal that certain structures of power, patterns of social relations, or discourses and habits of thought are breaking down or becoming open to challenge. Subsequently, that legal decision may be used in the service of disrupting certain settled understandings and practices (or of defending them). As Liz has emphasized, a decision may take on different meanings, over time, as it is mobilized in different ways by different constituencies.

My second point is that different groups of feminists have struggled with each other, almost as much as they have struggled with those who place themselves outside the movement altogether, in the service of establishing their own vision and power in the law. The women's movement that came to life in the 1960s was never monolithic, just as the discourses and practices we call "feminism" today are not monolithic. Feminism has long contained—in both the good and bad senses of the word—conflict. These conflicts have played out in the legal arena, as different groups of feminists have sought to consolidate their position through the law. Sometimes, a legal decision represents a clear-cut victory for one feminist position, as opposed to another, at the time it is rendered. Other times, the decision is more ambiguous: It can be read in different ways, and used to promote more than one position, even when it is first decided. And, in almost all cases, a decision that seems like a victory for one position may later be re-read, and claimed, by others.

Early in the 1970s, the legal and cultural contest was between feminists who sought to integrate women into existing institutions—a group often referred to as liberal feminists—and others who sought to remake those institutions and to redistribute resources along gender (and to some extent class and race) lines—a group once called socialist feminists but now perhaps better characterized as redistributivists. To a large extent, the liberals prevailed. Yet, in some ways, these two groups of early feminists had more in common with each other than they did with others

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who later gained prominence. Both the liberals and the redistributivists aspired to a world in which women and men could be freed from the strictures of what they called "sex roles" in all realms of life, including paid work, family, politics, sexuality, religion, and culture. They dreamed of a society in which women and men would stand alongside each other, doing the same kinds of activities, as both collaborators and equals. As the country moved rightward, the redistributivists lost credibility, and the more radical elements of the women's movement began to narrow their critique of existing institutions to the realm of heterosexual sexual relations. These newer radical feminists viewed heterosexuality as *the* important crucible of gender inequality, and many of them sought to reign in male sexuality as the solution to women's problems. By the mid-1980s, the liberals and the radicals, together, had paved the way for the emergence of cultural feminism. In the name of valuing what they viewed as women's unique role in nurturing, these feminists resurrected a version of traditional gender roles in arguing to preserve and value "women's difference" (and, what was subtly hinted, superiority) as a path to female empowerment and human flourishing.

Importantly, the 1980s also saw the rise of a number of feminist traditions that challenged the reigning liberal/radical/cultural feminist orthodoxy by developing sustained critiques of gender essentialism. Deconstructionist feminists took up the project of destabilizing not only existing gender relations, but also the entire notion of stable gender identities—and even identity politics—as they had been practiced. Feminists of color in the United States, along with feminists in the developing world, melded the deconstructionist project to a revised redistributivist one that challenged the authority of white/Western/gender positions in the service of exposing, and ultimately, transforming existing hierarchies of gender, class, race, and nation. Queer feminists refocused attention on compulsory heterosexuality, but they contended that sexuality is more complex and overdetermined than the early radicals had ever imagined; this time, they insisted upon resisting the old imperialist impulse to reduce sexuality to gender, and vice versa.

To a large extent, the Supreme Court decisions we have before us represent the triumphs of liberal feminism, radical feminism, and cultural feminism—the three strands of feminist movement that have achieved the greatest influence within our legal and political system. My own view is that, however important these three traditions were to the development of the early women's movement, they are no longer adequate to the task of creating a just world for men and women around the globe today. Younger people understand this, and they are simply not buying the old feminisms. The future of feminism, if there is one, lies in creating a broad social and intellectual movement that can express people's longings for a world that is

freer of the inequalities and strictures of gender and race and class and nation and normalizing sexuality—rather than a movement that clings to the notion that gender and sexuality are the primary or indeed the *only* categories to be contested. Toward this end, the strands of feminism that need to be cultivated are deconstructionist, redistributivist, queer, and intersectional in character. These feminisms call for a new kind of politics that seeks to destabilize and challenge the hierarchies that underlie what are all too often seen as identity-based "differences" rather than celebrating or championing or competing with each other on the basis of them. By building on these newer feminisms and others yet unimagined, it may be possible to create a new, broadly inclusive politics that is capable of imposing accountability on the new regimes of state power, corporate capital, and private ordering (including family formation) that that are creating so much injustice around the world.

But simply because we need to create a new form of politics does not mean that we must discredit or discard the decisions that once represented victories for the older strands of feminism. Just as the Fourteenth Amendment has no fixed meaning, none of these legal decisions has an inherent meaning that stands apart from the cultural and political understandings shaped by the movements that give the law meaning in everyday life. So, even decisions and lines of reasoning that were crafted by feminists from traditions that now seem antiquated, or inadequate, need not be written off by feminists from newer traditions. It may be possible to re-read these canonical decisions in more promising ways, to further interpretations or projects that deconstructive feminists or queer feminists or feminists concerned with race and nation have brought to light. I would like to believe that we can reshape even some of the most seemingly regressive decisions into a new set of signals that recognizes that gender and race are ongoing, ever-shifting *processes* of privileging certain practices, discourses, and identities—while at the same time reminding legal decisionmakers that these processes are ones for which they must take some responsibility for having fashioned, and for freeing up. On this view, it is the very processes of categorization through which the state and other powerful actors have carved the world into "men" and "women" of certain race, class, sexual, and other social positions, and then defined what those groups are to do and who they are to be, that highlighted and called into question through the law. The goal is to leverage the law to multiply, and thereby democratize, the sites of interpretation and authority and, ultimately, to give people more power to shape their own self-understandings in relation to gender and race by choosing their own work, family, sexual, political, religious, and cultural arrangements.

Let me try to make these points less abstract by discussing a couple of cases. *Frontiero* is widely considered a triumph for liberal feminism

because it established that female members of the armed forces were entitled to benefits for their spouses on the same terms as male servicemen. Liberal feminists viewed the case as especially important because it helped establish women's right to equal participation in what they viewed as the crucially important, citizenship-endowing, historically male realm of the military. A decade or so later, however, many cultural feminists criticized *Fronterio* as reactionary. In their view, the Justices had protected the servicewomen—a group the cultural feminists portrayed as exceptional women who had "assimilated" to male social roles—at the expense of the military wives—the average (or "real") women whose plight as family caregivers and resulting economic dependency cultural feminists claimed the Justices had ignored. In the terms used by cultural feminists, *Frontiero* privileged women who "acted like men" while ignoring the plight of those who "acted like women." By acting like men, we can now see, cultural feminists meant women who engaged in paid work (particularly historically male-dominated forms of work such as military service).

Today, of course, both the liberal and cultural feminist views of *Frontiero* have been discredited, and if they were they only ones possible, I believe the decision would lack any ongoing subversive potential. The liberal feminist romanticization of the military has become difficult to sustain. We have learned, by now, that the presence of women in the U. S. military may be used to justify controversial military engagements around the globe as much as to enhance the citizenship capacities of women here or abroad. Similarly, the cultural feminist equation of women with unpaid care, and men with paid employment, has been discredited as a thoroughly straight, white, upper-middle-class phenomenon. Today, few women of any race have the luxury of staying home; and many men and women—including gays and lesbians—are forging more complex and more equitable gender arrangements. As a normative vision, fewer and fewer people find possible or even appealing the world of separate spheres taken as a fact—and often valorized—by cultural feminists.

It is possible to re-read *Frontiero* to incorporate newer feminist insights. One straightforward reading, as Liz has suggested, is that the Constitution prohibits the state from acting on old heterosexual family-wage assumptions that equate men with breadwinning and women with family caregiving (and in so doing encouraging those roles). Such a reading potentially disaggregates sex, sexuality, and gender, precisely as deconstructive feminists have called for. On this reading, those marked with "female" bodies should be able to assume the formerly hegemonic "masculine" citizen-soldier role, and those marked with "male" bodies should be free to assume the "feminine" family-nurturer role—with no empirical or normative assumptions to the contrary. Permitting, and even encouraging, this kind of gender-boundary crossing not only promotes

individual freedom, but may also help destabilize and even dismantle gender-as-we-now-know-it by severing the association between femaleness/femininity/nurturing, on the one hand, and maleness/masculinity/soldiering, on the other—associations that are intimately bound up with class and race. To push the point even further, we can read the decision as an acknowledgement that the hordes of women who work at jobs (as women of color and immigrant women and less privileged women have always done) are not to be regarded as exceptional, or "assimilated," but in fact the norm.

On a limited version of this reading, the state would still be free to distribute benefits to spouses, but the military could not simply assume that wives are primary family caregivers/secondary earners or that husbands are primary wage-earners/secondary caregivers. Moreover, on an even more expansive interpretation, the *Frontiero* decision could even be used to call into question the legitimacy of distributing benefits to marriage partners alone. If the case stands for the proposition that the state should not be permitted to encourage certain gender practices and identities over others, then why shouldn't individual service members should be free to select their own beneficiaries—rather than having the armed forces limit their choices to spouses or even lovers? Why not allow servicemen or women to name a son or daughter, cousin, close friend, or other household member, if the goal of providing benefits is to recognize and promote intimate bonds among members of the armed forces? Alternatively, one might argue that benefits shouldn't be tied to military participation or to other forms of employment at all, but should simply be awarded to everyone as a right of citizenship.

For some of the same reasons Liz has articulated, I believe the *VMI* decision represents cultural feminism's mainstreaming and its incorporation into the liberal feminist paradigm. It isn't easy to give this aspect of the opinion a subversive reading. But if I were to take a stab at it, I'd read it for the proposition that even groups of people who are regarded (however feebly or falsely) as "different" cannot be excluded from state-operated institutions on the basis of those perceived differences—even when the alleged differences have been celebrated by members of their own group (i.e., conservative women and/or cultural feminists). I'm running out of time, so I won't say anything more about *VMI*.

Now, let me turn to the Supreme Court's sexual harassment cases. If *Frontiero* was a success for liberal feminism, *Vinson* marked a triumph for radical feminism and its incorporation into the basic liberal feminist framework. In *Vinson*, as Karen Engle has explained, the Supreme Court simply held, without explaining its reasoning, that a male supervisor who makes unwelcome sexual advances toward a female subordinate is engaging in a form of workplace sex discrimination. Today, this

proposition has become so widely accepted in our culture that some of you may find it beyond question. But, just what is it about a sexual advance that makes it tantamount to discrimination? There are some answers the Court might have given, but the Justices didn't even feel the need to analyze the issue. They simply took for granted that, in the workplace setting, male-female sexual advances are subordinating to women and inconsistent with gender equality. As I have explained elsewhere, this view, which had been championed by feminist lawyers and accepted by the EEOC and the lower courts, reflected a victory for the radical feminist idea that heterosexual sexual relations are the central mechanism through which gender, and gender inequality, are produced.[23]

Today, the understanding of sexual harassment that equates unwanted sexual advances with sex discrimination has come under challenge by feminists and queer theorists for a variety of reasons. Kathryn Abrams and Katherine Franke have argued, for example, that this view equates maleness with sexual predation and femaleness with sexual victimhood in a way that denies women's sexual agency. Janet Halley has been concerned with the power it places in the hands of homophobes and others who cannot come to terms with their own desires. I have argued that the traditional view of sexual harassment pathologizes all forms of conduct that can be characterized as "sexual"—regardless of the context—while at the same time deflecting attention away from common patterns of sexism and harassment that are not necessarily sexual in nature in content or design. More recently, I have uncovered evidence that the traditional view of sexual harassment has justified sweeping anti-sex policies that arrogate to management the power to prescribe acceptable forms of sexual expression and intimacy, while at the same time subjecting sexual and racial minorities to an increased risk of accusations of sexual misconduct and discipline. Ultimately, I have argued, the reason why companies have been so quick to implement sexual harassment law is that they can read it to confirm the classical management view of sexuality as something that undermines the rational functioning of the workplace and the productivity of people who work there. By imposing bans on sexual conduct, managers can impose an old, neo-Taylorite view of the world, all in the name of protecting women. Managers can claim that they are acting to advance women's interests, while in fact these bans do little or nothing to address the stubborn forms of gender segregation and hierarchy that relegate women to lower-paying, dead-end jobs.

It is challenging to breath new life into the Supreme Court's sexual

23. My comments about *Vinson* and sexual harassment law draw on earlier work. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

harassment jurisprudence, but I hope it will be possible. Plenty of good people are working on it. Drawing on deconstructionist insights, my own inclination is to try to assimilate sex harassment law into the larger body of employment discrimination law. This requires two basic moves. First of all, I believe, harassment law should stop singling out sexual forms of conduct (whatever those are) for special disapproval and instead treat them no better, and no worse, than any other type of conduct that could be used to harass or exclude others. After all, sexual conduct isn't subordinating to anyone or threatening to productivity. Sometimes, sex can actually signal equality and even enhance productivity; often, it is used in the service of more benign ends, such as building solidarity or relieving stress or boredom. Where managers permit sexual conduct or any other form of conduct to be used as a tool of discrimination or exclusion, then harassment law should intervene; but otherwise, it shouldn't. Of course, in order to ensure that no group of employees has the power to mobilize sexual or other conduct in the service of such discrimination or exclusion, it is important to try to ensure background conditions of equality. A large, robust body of social science research shows that where a group of people is significantly underrepresented in any particular job setting, the majority group is likely to close ranks against them, exaggerate their perceived difference, and exclude and harass them. Conversely, studies show that where women and men are both well represented in a particular job, the women do not feel threatened by sexual behavior but instead participate and take pleasure in it. So, the second basic move is to try to bring about less harassment—and more equality—by bringing about more integration. In other words, the law should focus on *desegregating* the workplace, rather than *desexualizing* it. If companies fully integrate women and men of all races into all lines of work and authority, the both women and men should have more power to shape their workplace cultures in ways they find empowering. By achieving more integration, we can also help women and other underrepresented groups obtain access to better jobs—and the superior resources and often more satisfying life experiences that go along with those jobs. Desegregation, in turn, helps break down the old conventions that associate maleness/masculinity of particular race/class formations with certain forms of work (such as white men and firefighting) and femaleness/femininity of certain race/class formations with other forms of work (such as black women and food service). Desegregation also helps put greater earnings and job security in the hands of groups of people who historically have been denied those things.

Put simply, my strategy is to redistribute work across traditional gender/race/sexual orientation lines in order to break down the fixed roles and identities that segregation has fostered and, in so doing, to promote greater sexual pluralism and toleration. It's a strategy that revives the old

redistributivist tradition and ties it to the newer deconstructive and pro-sex feminist positions. It's a position I hope will also be appealing to feminists of color and queer feminists, because it takes seriously the proposition that sexual misconduct is often directed at women of color, while at the same time acknowledging that accusations of sexual misconduct are also frequently used as a means of racial subordination against both women and men of color. Just as we should be concerned that women of color may be disproportionately subjected to sexual harassment, so too should we be concerned that both men and women of color are not disproportionately accused of it.

Of course, there are many other, equally plausible strategies for reshaping sex harassment law and the other areas of law under discussion, and that is all to the good. If we have learned anything, it is that neither feminism nor any other social movement can—or should aspire to—always present a unified front. It is always possible to do multiple subversive readings, and if such readings are accompanied by changes of the heart and mind and spirit, then something new (though not always and forever better) is sure to result.

Nathaniel Berman*:

[T]he voluminous testimony regarding respondent's dress and personal fantasies . . . had no place in this litigation.

- D.C. Circuit Court of Appeals[24]

Like the style of [the anti-pornography campaigners'] rhetoric, the content of their arguments was stirring; it was arousing.

- Mary Joe Frug[25]

Good morning. Our roundtable asks us to address a number of classic cases, often taught in courses on "Women and the Law," but also under other rubrics. In re-reading these cases, one must make a series of decisions about interpretive focus, decisions with serious legal and political consequences. Should we read these cases as primarily concerned with sexuality, or with gender, or perhaps with the tensions between these optics, or with race, or with class, or perhaps with the tensions between all these optics—or perhaps these kinds of cases call on us to elaborate a

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24. Vinson v. Taylor, 753 F.2d 141, 146, n.36 (D.C. Cir. 1985).

25. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1073 (1992).

comprehensive framework capable of addressing sexuality, gender, race, class, ethnicity, colonialism, religion, able-bodiedness, and so on.

The fact that the list of identity-based interpretive optics to be included in any comprehensive framework seems so potentially interminable, that it trails off into an awkward "and so on . . . ,"[26] suggests that the selectivity of our interpretive gaze is both unsettling and unavoidable. It also suggests that, in our roles as readers of these cases, we are situated much like those we are reading about—plaintiffs, defendants, trial courts, appellate courts—each scrutinizing the others, each criticizing the others for the pernicious selectivity of their interpretive optic, each trying to discipline the others into adopting the right interpretive optic, each trying to arrogate the power to decide whose interpretive optic will be socially and legally authoritative.

Take the optic of sexuality. The cases presented to us can all be read as primarily "about sexuality" or as primarily "about" other things—workplace power relations, racial bias in police response, and so on. They thus challenge us to deal with a general interpretive question —is there too much sexuality in "Women and the Law," whether expressed by social actors, judges, or readers of judicial decisions —or is there too little? This is a perennial, seemingly unavoidable, question. If it is true that, at least since Freud, this question must be confronted in all fields concerned with interpretation, it has a specific play here—in which the question of sexualization concerns both the subject matter of legal regulation and the consciousness of regulators and anti-regulators.

For example, more than a decade ago, Mary Joe Frug discussed the MacKinnon/Dworkin anti-pornography ordinance campaign in terms guaranteed to provoke—for she extended the erotic dimension from the subject matter of the debate to the debate itself. "The ordinance campaign," she wrote, "*fascinates* me."[27] Mary Joe Frug was addressing the thrilling quality of the campaign, the magic of the energy on all sides—particularly the rhetoric of the anti-pornographers, rhetoric she found "stirring," indeed, "arousing."[28] And, like many erotic spectacles, the anti-pornography debate evoked deep ambivalence: it was a "dazzling success and an appalling failure,"[29] "fascinat[ing]" and "terrifying"[30]— or, perhaps, a mixture of fascination in the dominant current sense of that word, a synonym for attraction, and of fascination in its original meaning, that of an evil spell. Mary Joe Frug celebrated the campaign as an "electrifyingly

26. *Cf.* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 143 (1990).

27. Frug, *supra* note 25, at 1067.

28. *Id.* at 1073.

29. *Id.*

30. *Id.* at 1074.

controversial"[31] spectacle, despite and because of this ambivalence.

I strongly surmise that, from the perspective of the anti-pornographers, Mary Joe Frug's focus on the "arousing" aspects of the campaign constituted a culpable diversion from its truly serious issues. Mary Joe Frug, from this perspective, saw sexuality where she ought not have—saw too much sexuality, or sexuality in the wrong place. Perhaps the anti-pornographers might even have said that, by improperly eroticizing their actions and words, Mary Joe Frug was repeating the pornographic gesture, the improper eroticization of women. Or, to sum it up in a formula: the pornographer attempts to impose an improper sexual identity on women, the anti-pornographer seeks to restore a proper identity to women beyond sexuality, the anti-anti-pornographer imposes an improper sexual identity on the anti-pornographer.

Yet, things are not so simple. The aspect of the debate highlighted by Mary Joe Frug was the narrow conception of sex and pornography shared both by many pornographers and by most supporters of the ordinance. Viewing this narrow conception of sex with distaste, the anti-pornographers sought to ban it. By contrast, also viewing this narrow conception with distaste, some anti-anti-pornographers advocated a diversification, a proliferation, of pornography, its uses, and its meanings. One might say that the anti-anti-pornographers were criticizing the anti-pornographers for their narrow sexual optic, for their obsessive determination to see only one kind of pornography, with one kind of use and one kind of meaning. From this perspective, the anti-anti-pornographers could return the charge made against them: it was precisely the anti-pornographers who were attempting to impose an improper, because excessively narrow and monolithic, sexual identity on pornography, its consumers, and its interpreters, thus reenacting the gesture with which they charged pornographers—and seeking to enlist the power of law to bolster this imposition. It was precisely the anti-pornographers who were distracted by their sexual obsessions from an ability to clearly see the human beings and social phenomena at issue.

For Mary Joe Frug, "the proliferation and character of the pornography genre is one of the most complicated cultural events of our time, an event whose meanings are still quite indeterminate."[32] The indeterminacy of its meaning made its legal regulation very problematic, for it involved granting power to determine that meaning to those governed

31. *Id.* at 1067.

32. Frug, *supra* note 25, at 1067. Mary Joe made it clear that she "did not want to be understood as a pornography apologist." However, she claimed that "[t]he ordinance advocates falsely simplified user responses to pornography" and asserted that "the advocates overlooked the way in which some works within the genre already thematically challenge the subordination of women by sex."

by their own set of distracting obsessions—such as anti-pornographers, but also those in the law-enforcement system, such as police, prosecutors, and judges, groups with doubtlessly heterogeneous, but not necessarily appealing, predilections.

I am reminded of this structure of the anti-pornography debate when thinking about the cases proposed to our roundtable in light of some recent debates about sexual harassment law. Some of the prominent recent criticism of sexual harassment law, and sex discrimination law generally, focuses on the problem of over-sexualization, or improper sexualization, of legal doctrine and judicial decision-making. This criticism seems to me structured much like the criticism of pornography and I will, in the remainder of this talk, seek to explore this structural similarity. To be sure, my comparison of anti-pornographers and critics of the improper sexualization of sexual harassment and sex discrimination law may seem counterintuitive, even perverse. The two groups, after all, are animated by very different relationships to sex and state power. Anti-pornographers are often (perhaps sometimes unfairly) characterized as "anti-sex," harassment/discrimination law reformers as "pro-sex"; anti-pornographers are optimistic about state power in relation to sex, harassment/ discrimination law reformers highly skeptical.

Nevertheless, I think this comparison —between the attempt by anti-pornographers to limit sexuality in the media and the attempt by harassment/discrimination law reformers to limit it in the courts—can highlight some of the deeper issues about power and sexuality embedded in each debate. In particular, it can allow us to explicate three assumptions about sexuality that are often taken for granted by many of the debates' participants: first, sex-exceptionalism, which may take positive or negative forms; second, the amenability of the sexual gaze to precise discipline; and third, the link between specific positions in the epistemology of sex and specific normative positions about regulating those with putative power over sex.

Like anti-pornographers, who charge pornography with excessively sexualizing society, particularly women, critics of the improper sexualization of law argue that it threatens to impose an improper sexual interpretation of legal rights and wrongs, particularly those of women. For example, it may lead courts to fixate on the question of whether an employer sexualized his or her relationship with an employee, rather than on whether the employee was actually subordinated in the workplace. Such a sexually-obsessed inquiry might be excessively broad, condemning innocuous sexuality, or excessively narrow, ignoring harassment lacking a conventionally sexual character. The improper sexualization of sexual harassment law has also been viewed as posing a risk of contagion to neighboring fields of law—above all, to sex discrimination law generally.

The threat posed by improper sexualization to sex discrimination law generally is that it might blind judges to all discrimination not of a sexual variety—or to sex of the non-subordinating variety. The assertion that sexual harassment is a form of sex discrimination may thus be transformed into the very different assertions that sex discrimination must always involve sexual harassment or that sexuality is always a form of harassment/discrimination. From the perspective of the harassment/discrimination law reformers, judicial focus on sexuality must be substantially restricted in order to prevent such transformations.

The common problem addressed by the anti-pornographers and the sexuality-restrictors among the reformers of harassment/discrimination law relates to the role of sexuality in the scrutinizing gaze of those with power. Both debates wrestle with the problem that those with power (for example, a part of the media in the case of pornography, a part of the judiciary in the case of sexual harassment law) have become fixated on a particular kind of sexuality and have sought to impose their obsessions on others. The remedy proposed by the anti-pornographers and the restrictionist law reformers is to dislodge this fixation by forcing attention away from sexuality and towards other things—human roles other than sexual roles in the media, human harms other than sexual harms in the courts. The sexual optic would be banned, or severely restricted, by anti-pornographers, and substantially subordinated to other concerns by reformers of harassment/discrimination law.

Of course, the structural similarity I am highlighting between anti-pornographers and harassment/discrimination law reformers may be viewed as operating at a merely abstract level. After all, anti-pornographers seek to use state power to restrict the expression of public sexuality, while harassment/discrimination law reformers seek to restrict state regulation of sexuality, presumably in part to free up some expressions of public (and private) sexuality.

Nonetheless, the two groups appear to share a series of ideas. First, they seem to share the notion that the sexual gaze is unique in its distorting epistemological effects. For the anti-pornographers, the sexual gaze uniquely distorts the perception of human beings; for the harassment/discrimination reformers, the perception of legal rights and wrongs. For both groups, sexualizing the social or judicial gaze seems to distort in a way that other optics, such as gender, race, class, and so on, do not. Secondly, and somewhat at odds with this first assumption, the two groups seem to share notion that the sexual gaze is amenable to highly precise discipline, either through censorship laws in relation to pornography or law reform in relation to harassment/discrimination jurisprudence. One may question this notion, for, when it comes to epistemological commands, "Thou shalt not" may easily misfire, or even backfire—let alone "Thou

shalt know only in this way and not that." For example, attempting to regulate the dissemination of sexual images could improperly sexualize the regulatory gaze itself, leading those with power over the dissemination of such images—be they judges or publishers—to spend hours pouring over them, refining their sexual imaginations in order to detect improper sexual content. An entire society could heighten its sexualization precisely by virtue of the disciplinary regime intended to achieve the opposite effect.

The harassment/discrimination law reformers, for their part, also seem to believe that one can set quite precise limits to judicial sexuality. They seem to believe, for example, that one can instruct judges in the discipline of patrolling the proper limits between inquiries into sexuality and inquiries into gender—limits that are highly contested in feminism and social theory generally. They also seem to believe that heightening judicial power over sex is more pernicious than heightening its power over gender roles or other issues. This belief may stem from at least two quite distinct ideas about sexuality vis-à-vis other planes of human interaction: either that sexual interactions are uniquely indeterminate in their meanings and therefore not amenable to legal regulation, or that they are uniquely deserving of law-free expression due to their distinctively sublime (or base) nature. In short, in addition to their very real and deep differences, anti-pornographers and harassment/discrimination law reformers share a set of ideas leading to the conclusion that control over one unique plane of interaction, sex, *must* and *can* be taken away from a certain class of holders of social power.

The group of harassment/discrimination law reformers, as I have just implied, may include those who maintain divergent ideas about sexuality, for example, concerning the explanation of its uniqueness, yet who share the policy goal of restricting judicial scrutiny of sexuality. Conversely, we may identify a group of critics of current harassment/discrimination law who share a common stance on the epistemology of sexuality, yet who may take divergent policy positions on law reform. This group shares much of the epistemological stance taken by Mary Joe Frug in the pornography debate. For this group, the real problem is not excessive sexualization of the judicial gaze, but its narrow sexualization. Judicial sexualization tends to impose a particular kind of sexual optic, usually heterosexual, indeed, unimaginatively heterosexual. This narrow optic renders invisible the multiplicity of sexual desires that circulate in the workplace and society generally. Like the anti-anti-pornographers, this kind of critic urges a gaze that can see the proliferation of sexual desire.

The legal consequences of this sexual proliferationist optic are not obvious, for, I contend, there is no necessary connection between sexual epistemology and normative stance. In the pornography debate, as I have noted, those who direct our attention to the proliferation of sexuality have

generally been anti-regulatory. The anti-regulatory stance of proliferationists may generally be associated with an affirmation of the uniquely indeterminate, multiple, and ambivalent qualities of sexuality. In the context of pornography, this anti-regulatory sex-exceptionalism may also be accompanied by the notion that pornography operates at a level of fantasy with no real-world social consequences—or that sexual practices themselves operate in a domain with relative autonomy from social power dynamics.

Yet, anti-regulatory proliferationism may, on the contrary, accept the anti-pornography argument that media imagery and sexual practices are at least partially constitutive of real-world sexuality and social power dynamics, that freeing the sex-media of legal power does not free sexuality from entanglement in the constitution of social power. Nevertheless, because of their broader conception of the kinds and meanings of pornography and sexuality, proliferationists may believe that sexuality's greatest possible circulation may lead to a more dynamic society, in which many kinds of sexuality coexist and compete—with multiple, countervailing, and unpredictable effects on social power imbalances. Better to trust the destabilizing power of the market and proliferating sexualities than the scrutinizing gaze of narrowly sexualized judges.

One could, however, imagine that the epistemology of sexual proliferation could lead to the opposite normative stance, indeed, a hyper-regulatory stance. Educating judges in the multiple forms of sexuality could well accompany advocacy of new and far-reaching forms of regulation. Judges could be given a mandate to root out pernicious forms of sexuality hitherto undetected and in a variety of forms of media hitherto not subjected to sexualized legal scrutiny. A truly sexually sophisticated judiciary on a regulatory mission would make the Puritans look like amateurs.

In the context of harassment/discrimination law, the proliferationist stance also has regulatory and anti-regulatory variants. Like the anti-anti-pornographers, the proliferationists in harassment/discrimination law may be hostile to regulation for a variety of reasons. Epistemological proliferationists might argue that the fact of diverse sexuality should lead to an anti-regulatory normative stance—again, a sex-exceptionalism based on the uniquely indeterminate, multiple, and ambivalent qualities of sexuality, making it unamenable to legal regulation.

Alternatively, like the strongest proponents of sexual harassment law, they may believe that workplace sexuality is pervasive and deeply intertwined with workplace power dynamics. However, by adopting a radically proliferationist sexual epistemology, they may also believe that sexuality's protean role-shifting and instinctual ambivalences work to counteract any clear connection between it and power imbalances in the

workplace or society. A proliferation of sexual dynamics may be more likely to lead to countervailing and even subversive power dynamics than regulation by narrowly sexualized judges.

One can also, however, imagine a regulatory variant for the proliferationist stance in the harassment/discrimination context. As with pornography, the regulatory variant would encourage judges to diversify their sexual gaze, to detect the multiple sexual desires circulating in the workplace and society generally. This diversified gaze might well detect sexual harms unimagined by more narrow judicial gazes. Sexual harassment may appear not merely widespread, but ubiquitous, once the sexually imaginative judge begins to engage in his or her scrutiny. Perhaps, on the model of workers' compensation law, which is based on notions of the inevitability of workplace physical injury in a modern industrial economy and normalizes/limits its compensation, this stance might even propose that society set up a normalized process to provide compensation for the ubiquitous and inevitable sexual injuries in a modern sexual economy.

Proliferationists may also be pro-regulatory for a deeper reason. Highly attuned to the ambivalences of sexuality—its violence as well as its tenderness, its hatred as well as its love, its desires for submission as well as its desires for domination, its longing for union as well as its longing for isolation, its joy and its despair—proliferationists may be more concerned about its effects than others. Rejecting the generalized stances of sex-phobia and sex-philia, they may seek to intervene in a highly specific manner in the complex dynamics of sexuality. Using the erotics of legal and social power, they may seek to seduce, discipline, recruit, or provoke workers and members of society generally into channeling their sexuality into some directions rather than others. They may, for example, seek to use legal power to repress certain forms of sexuality in order to allow others to proliferate in an unprecedented manner. Indeed, one might say that this form of repressive/proliferatory regulation has been engaged in from time immemorial; the current question is to what extent one can and should wield this power in favor of sexualities and people traditionally disfavored by it. Of course, like all would-be regulators of sexuality, as well as all seducers, those engaged in such regulation can easily find that their efforts misfire, or backfire.

In this talk, through the technique of counter-intuitive comparison, I have tried to reconfigure some of the taken-for-granted associations between a variety of basic ideas in debates about the legal regulation of sexuality. I have tried to offer analytical frameworks other than "pro-sex vs. anti-sex" or "pro-state vs. anti-state." I have tried to identify anti-regulatory stances that are neither libertarian nor oblivious to sexuality's constitutive social consequences. I have also tried to identify pro-

regulatory stances that are not sexually obtuse. At the most general level, I have tried to de-link epistemological and normative stances in relation to sexuality.

Finally, I have tried to highlight the sex-exceptionalism shared by most of the participants in these debates, despite their other fierce epistemological and normative differences. I don't want to take a position here in relation to this exceptionalism. Instead, let me conclude by paraphrasing Mary Joe Frug: these debates *fascinate* me.

Adrienne Davis*:

All right, I guess I want to be a little subversive from the start. I'd like to focus for a moment on cases and litigation that are *not* here to make two brief points. First, I'd like to build on some of Vicki's insights and focus on women's wealth, economic capacity, and class status. My second point follows from this one and considers significant cases over the last thirty years in which gender is inflected by other axes of identity, including class. This approach of focusing on absent cases is not by way of criticizing the Roundtable conveners for their selections, but rather, perhaps, to shed some light on what is here.

The first point I'd like to make is about private law. As I've pointed out in other work, much of women's lives and much of gender generally is shaped through private law.[33] Private law—torts, contracts, and property —allocates economic rights and duties between individuals (as opposed to public law which mediates relationships between individuals and the state). This shapes what I call "economic personality," or the ability to engage in economic relations of production, control, and ownership versus mere consumption.[34] For women, as socialist feminists have long argued, much of economic power, of economic personality, is negotiated in and through intimate relationships. Clearly there are race and class dimensions to this, as I will return to in a moment, yet the central point is that the economics of family life have gender effects that most women in sexual families cannot escape. Yet, in our Roundtable there is a real absence of private law cases. *Frontiero v. Richardson* is peripherally a case about economic rights in the

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33. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STANFORD L. REV. 221 (1999) [hereinafter Davis, *Private Law*]; Adrienne D. Davis & Joan C. Williams, *Foreword, Symposium: Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 AM. U. J. GENDER SOC. POL'Y & L. 1 (2000); Adrienne D. Davis, *Straightening It Out: Joan Williams on* Unbending Gender, 49 AM. U.L. REV. 823 (2000) [hereinafter Davis, *Straightening It Out*].

34. *See* Davis, *Private Law*, *supra* note 33, at 242-45; *see also*, Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUMAN RIGHTS BRIEF 3, 4 (2000), *available at* www.wcl.american.edu/hrbrief/07/3reparation.cfm.

form of government benefits, but at bottom it is a regulatory conflict between an individual and the state, not between a woman and her intimate partner as two individuals. I would like to focus on marriage as private law to consider briefly three lines of cases that did seek to disaggregate the connection between marital status and economic personality.

First, at around the same time that "Second Wave" women's civil rights began to be litigated in earnest, the U.S. Supreme Court began a very important, and I think under-attended, line of cases about non-marital children. This line has yet to be completed fully, but in the 1970s the Court began to recognize that children's economic relationships to their fathers should not be contingent on their parents' marital status.[35] Again, this doctrine remains a work in progress (as we see in both inheritance and welfare entitlement cases).[36]

Second, I want to look quickly at a leading case from California, *Borelli v. Brusseau*, in which a wife wanted to leave her husband.[37] He suffered a stroke, became ill, and induced her to stay by promising that, if she stayed and cared for him, he would leave her specific assets from his estate. She upheld her end of the bargain, but he did not. The court held that their agreement was unenforceable because, in essence, of a failure of consideration. Marriage fixes gender duties and economic capacities such that spouses cannot contract around them. It functions as a sort of uber-contract. Putting it into Hohfeldian terms, because the contracting parties were married, he already had a right to her care work, and she already owed it to him as a duty. Now, even my Trusts & Estates class at the University of Chicago pointed out that this is a ridiculous outcome. If she had *divorced* him, then in theory she would have had the contracting ability—the economic capacity or personality—to go back and become his

35. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (declaring unconstitutional workman's compensation statute classifying unacknowledged children of unmarried parents as "other dependents" rather than "children"); Gomez v. Perez, 409 U.S. 535 (1973) (once state recognizes judicially enforceable right of children to support from fathers, it is unconstitutional to deny right to children whose fathers were not married to their mothers); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (invalidating Social Security Act provision under which non-marital children of disabled wage-earner were not treated as well as marital children on grounds that statutory distinction was not reasonably related to statutory purpose and was both under-inclusive and over-inclusive); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down ban on intestate inheritance from fathers by non-marital children).

36. Even today, paternity is presumed for children of married parents, which is purely a rule of convenience and deference to patriarchal norms. *See, e.g.*, Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991); Mary Louise Fellows, *1998 Sypmposium on Family Laws: Emerging Issues Symposioum Remarks: A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195 (1998).

37. Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993).

highly paid caretaker. But because they were married the court refused to permit her to do this. This is a case I think feminists should see as a major defeat, especially coming out of California, which has been on the cutting edge of many of our gender cases. *Borelli* re-entrenches the public/private split, denying women economic rights based on the fact that much of the work we do is on the so-called "private" side of this putative split.[38]

Finally, a case that I think is a theoretical success and has some potential is *Marvin v. Marvin*, in which a non-married heterosexual couple split and the woman sought to enforce the division of their collected assets.[39] The Supreme Court held that courts should enforce express contracts between partners within sexual families (unless explicitly founded on consideration of meretricious sexual services); that without an express contract courts should inquire as to existence of a contract implied in fact; and finally that equitable remedies might be available (through quantum meruit or constructive trusts). This is a significant analytic victory: legal recognition of the idea that care work could serve as a basis for either contract or equitable economic rights in an intimate, non-marital relationship. While the trial court on remand concluded there was no agreement,[40] I think this case still has a lot of promise. By 1987, eighteen other jurisdictions had adopted the *Marvin* ruling. And this logic has been extended to distribute assets at the dissolution of same-sex relationships without having to re-entrench marriage as the sole allocator of economic rights, powers, and obligation between intimate individuals.

So, wrapping up my first point, I would say that we see that gender is rigorously policed and shaped in the economic sphere and through the allocation of wealth and rights to wealth—in short, through economic personality—as much as it is in the more conventionally studied sexual sphere or the sphere of women's rights vis-à-vis the state. The reasons why women either absent themselves from the sphere of paid work or prioritize their commitment to unpaid care work over their paid market work is a huge topic. But the larger point is that it is women whose economic personality and financial well-being is at stake when we police these boundaries.

In addition, a focus on private law and economic rights and capacity leads to a central insight of feminist theory in recent years, one that also takes us back to the Roundtable cases and to my second point. I would say about these five cases that each constitutes a gender triumph of one form or another. But I am fascinated that, in each case, gender is legally perceived

38. The germinal feminist critique of the public/private distinction was Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

39. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

40. Marvin v. Marvin, 176 Cal. Rptr. 555 (1981).

and rendered as a stand-alone category. These plaintiffs and defendants were not all white nor were they all of elite economic status. At least two of the cases involve non-white women (Yvonne Wanrow and Mechelle Vinson).[41] And most of the litigants appear to be working-class or lower middle-class folks, in three of the cases seeking economic rights or capabilities in the workplace (Sharon Frontiero sought non-discriminatory access to employment benefits;[42] Mechelle Vinson and Joseph Oncale sought the right to work free from sexual subordination by superiors or peers;[43] and the claim to an education in *VMI* likewise can be seen as asserting an economic right to a profession). Yet, the only *legal* category that appears to be in play in these cases is gender. For instance, in *State v. Wanrow*, in rendering what I think is a very good outcome and holding on gender the court continued to uphold the exclusion of any consideration of defendant's Native culture from the trial. Gender is permissible as background and context, but ethnicity is not, forecasting contemporary debates at the crux of these two axes of identity.[44] I would actually really like to hear from Liz more about how she and the other lawyers tried to get the Supreme Court to consider what had been excluded at the trial. Similarly, the United States Supreme Court's holding in Mechelle Vinson's case that sexual harassment in employment constitutes sex discrimination in violation of Title VII relied explicitly on a gendered analysis. Sexual exploitation is a hallmark of all women's experiences in labor markets in the U.S. Yet, it is perhaps a *defining characteristic* of black women's experience as workers, part of the worker identity ascribed to them. It is all the more odd, then, that there is no reference in the opinion to Mechelle Vinson's being a *black* woman worker. Nor is there language in any of these cases about the class or economic dimensions, let alone an exploration of economic rights. These cases achieve good outcomes, but only by suggesting that gender subordination is the only relevant category in need of rectification.

So I'd like to note a couple of pivotal, what Kimberlé Crenshaw would call "intersectional," cases in which class and race have combined with gender for less happy and merry sorts of outcomes, suggesting the limitations of our successes.[45] First, one of the early losses in the modern

41. State v. Wanrow, 538 P.2d 849 (Wash. App. 1975); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

42. Frontiero v. Richardson, 411 U.S. 677, 677-78 (1973).

43. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 77 (1998).

44. Leti Volpp has done fascinating work on the legal uses of culture in gender conflicts. *See, e.g.*, Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Leti Volpp, *Talking "Culture": Gender, Race, Nation and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

45. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A*

era of feminist litigation would be the much-noted abortion funding cases in which courts concluded that women's right to have an abortion is contingent on their economic circumstances.[46] More recently, we have seen the criminalization of mothers addicted to drugs who rely on the public health care system.[47] Significantly, women who have economic access to private health care escape this indignity as neither their doctors nor their hospitals report the effects of their drug use on their babies as a crime. (Like drug use generally among the middle classes, it is treated as a question of public health, not crime.) If abortion has become an economically contingent right, then "transmitting" drugs to a fetus has become a crime that can only be committed by the poor. Taken together, these cases transmute privacy, the right securing women's reproductive autonomy and capabilities, into an economic right. It can only be enforced if a woman can personally, individually afford to buy her way into the private health care system and out of public surveillance. It is important to focus on these lines of cases because they reallocate rights that are arguably gender rights, or were initially conceived by feminist lawyers and activists as gender rights, and they re-inscribe them as class-based rights. Which is not to say that they are less important, but that we should recognize them as at some level failures, legal and feminist failures.

And finally, I would also like to point out a troubling strain of cases that has developed within the sentencing guidelines that threatens to erode the anti-domestic violence work that Liz and others have done. Prosecutors have found great success in targeting women in relationships with drug dealers. These are emblematic of intersectional cases in that many of the women, again, disproportionately non-white and/or poor, are in highly abusive relationships with men who coerce them into working as low-level drug carriers or "mules." These women get ridiculously high sentences because they are subject to the harsh formality of the federal sentencing guidelines but not the leniency the criminal system accords prosecutors to negotiate with defendants who have information about more senior dealers. While male defendants can negotiate and give up people higher on the chain, paradoxically, these women's lack of real involvement in the drug industry leaves them without any information of value to prosecutors. So

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Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

46. *See generally* Beal v. Doe, 432 U.S. 438 (1977) (upholding withdrawal of Medicaid funding for "elective" abortions); Maher v. Roe, 432 U.S. 464 (1977) (same); Harris v. Macrae, 448 U.S. 297 (1980) (limiting federal reimbursement for abortions).

47. Dorothy Roberts's article contains an excellent summary of the early, leading cases on this. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991).

the absurdity and the tragedy is that, without deep involvement in the drug industry, these women are doubly abused, by their sexual partners and the state.[48] (And, as Michelle Jacobs has pointed out, the federal government then has barred these women from domestic violence shelters receiving state funds *because* of their drug convictions, thereby sentencing them back to the same lives of violence that result in their coercion into criminalized acts.[49]) This is a real incursion into all of the excellent domestic violence litigation and activism that we have seen.

This intersectionality point is important from the private law perspective as well. It is true that economic dependency on men is a privilege most women do not have or even seek. Still, I would argue that the determination as to which economic rights and duties accrue in sexual families affects all women and their children, perhaps disproportionately women who are already marginal due to their race or identity. And historically it's been a way of surveilling and policing relationships between subordinated people, whether non-whites or same-sex couples.

In the end my point is rather obvious, but one that can still be missed. We should celebrate the gender triumphs of the last several decades but also keep our eye on the gender failures. The gender failures disproportionately affect women whose claims are intersectional, that is, those claims that also entail legal attention to poverty or economic disfranchisement, sexual orientation, and race. The former two, economic status and sexual orientation, are largely unprotected legal categories, except for some due process and privacy doctrine. Race, of course, receives a great degree of legal protection, but also still remains a source of immense social and legal subordination and repression. The criminal arena is one of the most obvious and scurrilous examples (not only sentencing but also racial profiling, disproportionate sentencing outside the drug context, under-enforcement of crimes committed against Blacks, etc.). As feminist legal scholars and activists, we may all take our grasp of intersectionality,[50] anti-essentialist or strategically essentialist,[51] co-

48. *See, e.g.*, Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN'S STUD. 153 (2001); Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906 (2001).

49. *See generally* Michelle S. Jacobs, *Redefining Violence Against Women Symposium: Prostitutes, Drug Users, and Theives: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. R. L. REV. 459, 471-72 (1999). As increasing numbers of poor and non-white women are caught up in the drug wars, access to shelters threatens to become a class-based right as well.

50. *See* sources cited *supra* note 45.

51. *See, e.g.*, Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, *in* SELECTED SUBALTERN STUDIES 3, 13-15 (Ranajit Guha & Gayatri

synthetic and multi-dimensional[52] metholodogies for granted. We may even at times be a little bit smug about our theoretical sophistication. But we won't be able to achieve gender equality until we can get the courts to embrace what we now analytically take for granted.

In the end, I think by looking at what some the arguable failures have been we might get a little bit more insight into what can be fairly characterized as some of our successes.

Janet Halley*:

These cases record moments, or *are* moments, when feminism and the state merged to wield state power together. I want feminism to be able to acknowledge its own will to power so I am going to read the cases not as subversion of governance by feminism but as elements of Governance Feminism. Perhaps we can then put the following questions on the table: What is our attitude towards subversion when feminism is in charge? Are we still for feminism, or for subversion, possibly, *of* feminism? Can we think of good reasons not only to imagine subverting, but actually to set out to subvert, the Governance Feminism represented by these cases? How good are the reasons, and how do they stack up against the reasons to defend and consolidate Governance Feminism in its hold on state power?

Now, I am going to take it as totally given that these cases have done great things for women. They are feminist victories, and we all celebrate them and many of us are as okay as we are today because of them. I am wondering today what else they might have done.

Frontiero. Under the challenged regulations, male service-members were entitled to spousal benefits (medical and dental benefits for their spouses, increased housing allowances) without proof of their wives' actual dependency; female service-members had to prove their husbands' dependency and would be denied benefits if they could not. The Supreme Court framed the right at stake as being something more than the simple,

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Chakravorty Spivak eds., 1988).

52. *See* Peter Kwan, *Symposium Issue: Intersexions: The Legal & Social Construction of Sexual Orientation, Intersectionsof Race, Ethnicity, Class, Gender & Sexual Orientations: Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280-92 (1997); Peter Kwan, *Symposium: Bridging Divides: A Challenger to Unity Ant-Subordination Theories Article: Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 688 (2000); Darren Lenard Hutchinson, *Out Yet Outseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 644-45 (1997); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFFALO L. REV. 1 (1999).

* Professor of Law, Harvard Law School.

empty, formal right of a female service-member to be treated the same as a male service-member. The majority opinion accepts as a baseline that housing and health insurance benefits would be provided on the basis of spousal status. Even under that assumption, the equal protection violation could have been cured by imposing on husbands the same burdens borne under the statute by wives, that is, requiring all service-members equally to prove the actual dependence of their spouses and to suffer denial of benefits if their proof failed. But the Court ignored this possibility, and its opinion proceeds as though only one equality remedy were possible—extend to military wives the status-based access to benefits enjoyed by military husbands. In the equality world envisioned by the Court, no military spouse could be required to prove dependency; benefits would be provided to all spouses even if they were rich or well paid or fully insured.

Now, who could want to subvert that? Well, let us think about it for a moment from outside feminism. Let's "take a break from feminism;" let's have a thought experiment outside feminism. When we do this, we will come up with alternative assessments, some good, some bad, but they might be illuminating either way. It is interesting to me that, if they seem good, if they are illuminating, most feminists will say that they are therefore *feminist* assessments. But I wouldn't assume with Vicki that the goal would be to always merge everything good into feminism. We can see in this move—the "big tent" or "convergentist feminist" move—a certain commitment to maintaining feminism as a hegemonic power theory and a certain denial of feminism's will to power, its capacity to be *against* some social outcomes not because they are morally bad but because they are outside the scope of feminist concern and even inimical to the achievement of feminist aims. So in the interests of getting clear on those stakes, I am temporarily at least resisting that move.

Okay, well, thinking about it from outside feminism, putting a question mark over the *feminist* status of the idea, you might oppose the *Frontiero* Court's framing of the equal protection violation, and the mandated remedy, if you question the vast social decision to make social welfare turn on marriage and employment. There are alternatives, of course: We could provide Social Security on the basis of actual need or some dilute measure of membership like presence or residence. Gay marriage proponents would note the exclusion of homosexuals from this social welfare system. The not-yet nascent movement of Single People would notice their own exclusion as well. A class based assessment might note the transfer of resources to nondependent spouse. It might describe this transfer as a windfall to the couple, and, depending on where the resources are transferred *from*, possibly also a subsidy of the haves by the have-nots; or it might note more broadly the decision to tie social security to current employment rather than presence, residence, citizenship, or some

other less contingent—possibly less coercive?—attribute. A sexual liberationist approach might ask why social security should be provided only to participants in a highly regulated sexual form in which adult intimacy is most secure if it is in fact, as well as in name, monogamous, long-term, residential, of two adults, etc. All of these objections could be integrated into feminism—the notion of heterosexism does a lot of work here—but they are perhaps most clearly stated and apprehended without this convergentist effort; and perhaps the tensions between them, and between them and feminist assessments, are clearest before this effort is made.

Meritor, Oncale and VMI. In the interests of brevity I'm going to compress these three cases to make two distinct points. *Meritor* and *Oncale* represent a massive success in Governance Feminism. We see a very elaborate governance structure connected to these and related decisions and rules—heavily bureaucratized surveillance and adjudication mechanisms now exist in almost every school, almost every workplace—and this constitutes a victory of feminism. *VMI* may well spell the end of single-sex public education, another feminist victory, though of course many feminisms object. Taken together the cases might well stand for an emerging rule that work and education must be integrated by sex and conducted under sexual surveillance of a very imminent sort.

Now, let us figure out whether we might ever be tempted to subvert this piece of Governance Feminism. Let's take up first the idea of homosexual panic—the terror that besets some people when they want same-sex erotic attention which they prohibit to themselves and that induces them to punish not themselves but the objects of their often unrequited love. What if Joseph Oncale, or plaintiffs suing in the aegis of his holding, are not in fact the victims of outrageous sexual imposition but are rather crazed homophobes seeking to displace their own homoerotic yearnings onto hapless and innocuous alleged perpetrators whom they imagine to be gay? A pro-gay assessment would say this was a very worrisome possibility.[53]

And let's extend the thought experiment to *Meritor*. Let's try *not believing* Mechelle Vinson on the crucial questions of unwantedness and consent. Here are the remaining facts recorded in the Supreme Court's opinion: She worked for four years at a bank. She claimed that she had sex with her boss for the first three of them; that they had intercourse 40 or 50 times; that he fondled her in front of other employees; that he followed her

53. I am not making a claim about the real Joseph Oncale; instead, this is an effort to flesh out a *possibility* in his or subsequent cases which, if realized, would undermine any left sense that the decision in his favor was an unmitigated good. This paragraph summarizes a more expanded treatment that can be found in Janet Halley, *Sexuality Harassment, in* LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002).

into the bathroom; that he bared his penis to her. All of this stopped "when she started going with a steady boyfriend." *She continued then to work for the bank for another year*, and she brought her claim that the sex was unwanted and in fact, in some instances, coerced, after she was fired for excessive use of sick leave and in circumstances involving a "business-related dispute" with the bank. Did Vinson need a boyfriend, or a year of reflection, or a pink slip, or a business dispute, to help her realize that sex with the boss was not what she wanted? Moreover, her boss claimed that he never engaged in any sexual conduct with her *at all*. What if he was telling the truth? Can we imagine a Mechelle Vinson who enjoyed or fantasized an *affair*? Could we say that—like the homosexual-panic Oncale—this Vinson has attacked her fantasy or her ex-lover, using sexual harassment as her weapon, to achieve some kind of absolution, vindication, revenge, or bargaining power? I can readily imagine many feminisms refusing to ally themselves with such a figure and offering a rigorous critique of that aspect of Governance Feminism which reifies it as "women's point of view." I can imagine many women who would benefit, directly and indirectly, if employers, having once fired such a Mechelle Vinson, could avoid her bad-faith heterosexual-panic lawsuit afterwards. And I can imagine that an employed man, especially one who has any sex appeal to women at all, might read this case with genuine anxiety.

So there might be sex-positive feminist reasons, and just simply sex-positive reasons, to subvert *Meritor*. Now let me try a specifically queer move, this time putting *Meritor/Oncale* into conjunction with *VMI*. *Meritor* tells us that a sexual proposition by a man of a woman occurs "because of sex" and, if it is also harassing (that is, unwanted and severe or pervasive), is sex discrimination within the scope of Title VII. That is, *Meritor* assumes that male heterosexual object choice is sex discriminatory. In the course of doing that, it assumes that male heterosexual object choice is a *sexual orientation* that some men just simply *have*. *Oncale* brought much of this latent work to the surface. There the Court held that, in cross-sex sexual harassment cases, the plaintiff's burden of persuasion on the "because of sex" requirement is met by a presumption of the perpetrator's heterosexuality, while in a *same*-sex case involving erotic conduct, the plaintiff can prove the conduct was "because of sex" only by proving the *homo*sexuality of the perpetrator. I have detailed elsewhere many reasons a pro-gay point of view would find the second rule very worrisome.[54] But more subtly perhaps, this whole web of rules installs in doctrine, and mobilizes in litigation, an invocation of heterosexual desire as distinct from homosexual desire, and of both as intrinsic sexual orientations deeply lodged in individual people—as "facts" about them that can be presumed or

54. *Id.*

proven up. This is precisely where much queer thought and politics object.[55]

Justice Ginsburg makes the same invocation in *VMI*, in a way that requires that social actors respond to it not only in litigation but in the way they build and use the very architecture of military education. The Court took up a narrow equality claim: VMI's categorical refusal to consider or admit even qualified women applicants. The "adversative method" of education adopted by VMI was carefully framed *out* of the "sex discrimination" found to violate the Equal Protection Clause.[56] For Justice Ginsburg it was crucial that *some women* could succeed at VMI and that VMI's argument that its educational philosophy and practice could be maintained only in an all-male context evinced not "inherent differences between men and women"[57] but rather "fixed notions concerning the roles and abilities of males and females" and "self-fulfilling prophesies."[58] Justice Ginsburg draws a strong sex/gender distinction here: where (mere) historical and cultural presuppositions about the sexes are at stake, men and women must be treated the same, but at the point where bodily or "inherent" differences between men and women kick in, discrimination between them might be justifiable. And so she invokes approvingly a federal rule allowing deviations from strict equal treatment in military academies only "for those minimal essential adjustments . . . required because of physiological differences between male and female individuals" and draws from it a limit on the plaintiff's remedy. "Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements . . . ."[59] I guess this means that single-sex bathrooms and dormitories are needed to protect "privacy," which in turn is needed because of "physiological differences" between men and women. Of course this cuts deeply into the adversative method, which requires an "absence of privacy" so extreme that "cadets live in spartan barracks where surveillance is constant and *privacy nonexistent.*"[60]

This deep warp in the logic of the case must rest on an unstated assumption that sexual privacy obtains *between* the sexes *and not* within

55. In path-breaking articles, Katherine Franke and Vicki Schultz criticized the pre-*Oncale* state of this rule cluster from fascinatingly distinct feminist perspectives. Katherine Franke, *What's Wrong with Sexual Harassment,* 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 YALE L.J. 1683 (1998). My own effort to articulate a queer-but-not-feminist critique is offered in *Sexuality Harassment*, *supra* note 53.

56. United States v. Virginia, 518 U.S. 515, 540 (1996).

57. *Id.* at 533.

58. *Id.* at 541-43.

59. *Id.* at 551 n.19.

60. *Id.* at 522.

them. In making it, Justice Ginsburg has performed an intense hetero-sexualization of the male/female bodily distinction. And urinary segregation is not only hetero-erotically charged by its association with "privacy" (she must use the term in a sense close to the French *pudeur*)[61]; it is naturalized by being doctrinally parked among those "essential adjustments . . . required because of physiological differences between male and female individuals." You can object to this configuration on behalf of feminism—the rich postmodernist feminist tradition traceable to Judith Butler's *Gender Trouble* does so—but it seems helpful, to me at least, to object to it also on more generic queer grounds.

Wanrow. Though sometimes described as a domestic violence or "battered women's" case, *Wanrow* involves instead the scope of legitimate self-defense for a woman who admittedly killed a neighbor of a friend; the relationship between the principals was not one of intimacy or cohabitation. This detaches it somewhat from the "you go girl" strain in feminism devoted to women who kill their abusers[62]—a detachment that makes it relatively easy to flip the case so that, if we are sex-positive leftists or due process civil libertarians, our sympathies would lie not with the defendant but with the man she killed. The only aspect of the case that is hard to flip is that arising from the Yvonne Wanrow's racial encounter with law enforcement, but that is because it is such a complex of criss-crossing issues that—well, it is basically not flat enough to flip. Instead I will attempt to show that *feminism* is not necessarily where we will find all the tools for untangling the racial complex of the case.

Liz Schneider of course knows the record in *Wanrow*, both docketed and informal, and I welcome anything she offers along the lines of "it just wasn't like that." But the case circulates as a *legally* significant document[63] on the basis of the "facts" retailed in it. I am going to subject those facts to the "rereading protocol" I have already attempted with *Oncale* and *Meritor*, aiming to drive the deepest wedge I can between an admittedly highly generic "domestic violence feminist" construal on one hand,[64] and a "sex-positive leftist" and "due process civil libertarian"

61. I rely here on Michael Warner's brilliant assessment of the possible meanings of "private." MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS (2002) 29-30.

62. Here's a classic note from that amazing repertoire: "This year more women will kill their husbands than will be appointed to the judicial bench. More women will kill their husbands than will sit in the halls of Congress. A baby girl born tomorrow stands a chance of growing up to stick a kitchen knife into an assaultive husband; but her chances of becoming President are too slim to be statistically significant." ANN JONES, WOMEN WHO KILL xvi (Holt, Rinehart and Winston 1980).

63. State v. Wanrow, 538 P.2d 849 (Wash. App. 1975), *aff'd* 559 P.2d 548 (Wash 1977).

64. Of course there is considerable controversy within feminism about the implications of the case. *Compare* Catharine A. MacKinnon, *Toward Feminist Jurisprudience*, 34 STAN.

understanding on the other.

First, though, I'll attempt to summarize the "facts" without spinning them. Yvonne Wanrow's friend Shirley Hooper had two causes for anxiety about her neighbors. Some months before the events that led to Wanrow's arrest, Hooper's seven-year-old daughter had been diagnosed with venereal disease and was refusing to tell who had molested her, and two days earlier someone had attempted to break into her house through a bedroom window. On the afternoon of the killing, Wanrow's young son, who was staying with Hooper, came into Hooper's house and reported that a man had tried to abduct him. Soon Mr. Wesler—the man Wanrow was soon to kill—appeared on the porch and repeated "I didn't touch the kid." Hooper's daughter promptly identified Wesler as the man who had molested her. Hooper's landlord added that Wesler had tried to molest the young son of a prior tenant and had been committed to a state hospital for the mentally ill. There is no mention in either published opinion of an identification by Wanrow's son of Wesler as the man who tried to abduct him. Hooper called the police, who said they couldn't arrest Wesler until she had complained at the police station, which she could not do until Monday morning (this must all be happening on a weekend).

Hooper told Wanrow about all these events and asked her to spend the night at her house. Wanrow arrived, carrying a pistol in her handbag. Wanrow and Hooper then asked Wanrow's sister and brother-in-law, Angie and Chuck Michel, to join them. All told, there were four adults and eight children at the Hooper house. The adults sat up into the night. At five A.M., unbeknownst to the others, Chuck Michel got a baseball bat and went to Wesler's home. He accused Wesler of molesting children, and escorted him back to the Hooper home. Michel stayed outside with a third man, David Kelly, who had somehow joined the group. Wesler went indoors.

Someone told Wesler to leave, and he did not do so. Shouts, confusion; a child woke up crying; and Wesler approached the child saying, "My what a cute little boy." Angie Michel interposed herself between Wesler and the child. Hooper was screaming at Wesler, commanding him to leave. Wanrow went to the front door and shouted to Chuck Michel to come in. When she turned back to the room, Wesler was standing right next to her. He was six feet, two inches tall; she was five feet, four inches tall; he was intoxicated; she was walking with crutches. But one more thing: She was armed with the pistol. She shot Wesler, and

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L. REV. 703, 724-34 (1982) (review of Ann Jones, *Women Who Kill*), *with* Elizabeth Schneider, "Equal Rights to Trial for Women: Sex Bias in the Law of Self- Defense, 15 HARV. C.R.-C.L. L. REV. 623, 641-42 (1980); Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 156-58 (1978). For a taxonomy of feminist positions, see Julieta Lemaitre, *Other Women's Pain*, on file with the author.

fired some additional shots, apparently out of the house as she also injured David Kelley.

Hooper called the police department; the recording of this conversation begins with her statement that "[t]here's a guy broke in, and my girlfriend shot him." When Wanrow took the phone she reported that she had shot two people and said: "We warned you—we told you guys."

Here is one way to understand the case: Wesler was a child molester. Though Hooper had evidence easily sufficient to support Wesler's arrest, she was unable to obtain even a minimal level of protection from the police, so she organized her friends to protect her children and her house. Wanrow's experience as a Native American would have inculcated in her not only a horror at child molestation rising to the level of mental shock, but also a profound sense that law enforcement is so racially biased that it cannot be relied on for protection. As far as the women knew, Wesler invaded their home voluntarily. His appearance there could not possibly be benign. Instead, it was exactly what they most feared and what they had joined together to protect against. He was drunk, he was big, he threatened one of the little boys, and he refused to leave. Reasonably fearful that he was approaching her to attack her, Wanrow shot.

Here is another: Wesler was a mentally disabled man. In their anger about Hooper's daughter's abuse and their anxiety about the attempted break-in, Hooper and Wanrow picked the most vulnerable, least well defended neighbor as their scapegoat. Hooper's daughter's accusation and the landlord's gossip were not "evidence" that he was a molester, and certainly not that he had made an attempt on Wanrow's son, but rather, merely, symptoms of rising panic. As long as Wanrow's son failed to accuse Wesler of his attempted abduction, the police properly refused to arrest him. Hooper and Wesler organized a small posse comitatus, initially to protect themselves and their children, but eventually to do rough justice. The vigilante atmosphere among the adults gathered at Hooper's house reached a peak at five A.M. Chuck Michel went to Wesler's house, and, brandishing a baseball bat, browbeat Wesler into going back to the Hooper house and then stood threateningly on the sidewalk, effectively barring his exit. Agitated by all the commotion and drunk, Wesler walked into the house, haplessly offering to compliment one of the children. He turned. In front of him, Wanrow was standing at the front door calling Michel—remember, he was carrying a baseball bat—to come in. Behind him, Hooper was screaming at him to leave. The vigilante squad had reached the perfect fever pitch of a sex panic. Good thing Wesler wasn't armed—he might reasonably have feared that the group was preparing to attack him. And that's precisely what it did; Wanrow shot him. And for good measure, she also shot out into the street, injuring a person who could not imaginably have been an immediate threat to her.

Wanrow holds that, in the prosecution of a woman who has killed a man, self-defense can be established on subjective evidence alone; the defendant need not also show that she acted objectively reasonably. This is an *equality* rule: Because "[i]n our society women suffer from a conspicuous lack of training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons," women are entitled to a substantive deviation in the self-defense standard. Indeed, it seems to be a separate equal protection violation for the jury instruction to refer exclusively to the reasonable "*man*."[65] The jury must have some indication that the specific history of women in "our nation's 'long and unfortunate history of sex discrimination'"[66] may have contributed to the state of mind of a woman who has killed a man. Much has been said and written about the complexities of this holding in domestic violence cases. But let's think for a short moment about what it might mean for the kind of case *Wanrow* actually is—that of a woman who kills a male neighbor at a friend's house in part because she and her friend suspect he is a child molester. Even if Wesler had molested one or more of the children, due process civil libertarians will object to the authority given women to summarily execute him before he can have his day in court, etc. Moreover, if he was entirely innocent but suspected of child abuse—if this was indeed a unambiguous sex-panic case (and neither court issuing a published opinion in the case manifests the least vigilance against the possibility that it might be)—then perhaps we can construct a distinct sex-positive left understanding of the holding. The historically-grounded, substantively-skewed, equality-based, subjective self-defense accorded to women is an acknowledgment that they are more likely than men to become hysterical and overdo it in the course of a vigilante action in a sex-panic and should be insulated from blame if they do. Put the two objections together and you get something like this: Women get a warrant not extended to men to act as private attorneys general for organizing non-state justice activities to control, and for imposing a summary death penalty on, suspected child molesters. It might be helpful to take a break from feminism at some point while assessing whether this is an outcome we feel unequivocally good about.

Wanrow also holds that trial courts have broad discretion to exclude testimony of an expert witness about the contribution that a defendant's

65. 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, 635 (1980) [hereinafter Schneider, *Equal Rights*]; *see also* Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault,* 4 WOMENS'S RTS. L. REP. 149, 156 (1978).

66. Schneider, *Equal Rights, supra* note 65, at 642 (citing State v. Wanrow, 88 Wash. 2d 221, 240-241 (1977)).

Indian culture might have made to her state of mind. Wanrow's attorneys had sought to show that her cultural background prepared her to be particularly traumatized when faced with "an older person attempting to perform an unnatural sex act on a child."[67] Deeply internalized norms abhorring unnatural sex acts and revering family relations and elders would contribute to particularly "strong feeling[s]."[68] Liz has set out the classic convergentist anti-racist feminist assessment of this kind of holding. Wanrow, a Native American woman whose experience of gender and of tribal norms were inextricably bound together, is split artificially in two by the joint holdings that, in the inquiry into her state of mind, her feminine subjectivity matters and her Indian subjectivity does not. She is not only misrecognized, she may have lost access to a key argument, one that might have exonerated her. But the "private attorney general" view of the case just set forth suggests that exclusion of the Indian cultural defense might contain a logic distinct from that supporting the inclusion of the "women's cultural defense." Whereas the latter presupposed women's culturally indoctrinated disability to fight a dangerous attacker without the aid of deadly weapons, the former basically constitutes a disagreement with the state's legal entities about how bad child sexual abuse is, how summary the procedures for preventing and punishing it should be, how much risk of over-enforcement to run, etc.

An Indian cultural defense that more closely parallels the "women's cultural defense" recognized in the case would focus not on Wanrow's traumatized normative sensibility but on her decision that she could not rely on the State to provide meaningful protection for her and her child. The argument would be that Wanrow and the State agree about the seriousness, etc. of child sexual abuse, but that the State withholds its enforcement powers when the victims are not white, in a specifically racist way. There would have to be a commitment here to the idea that communities of color, suffering this racially skewed criminal law enforcement deficit, occasionally or perhaps more systematically have to take matters into their own hands. *This is a seriously controversial question.*[69] And, though feminism has well-elaborated positions and debates on many of the issues involved, there are at least two dimensions to the question that immediately arise in anti-racist analysis that do not seem

67. *Wanrow*, 538 P.2d 849 at 853 (Wash. App. 1975), *aff'd* 559 P.2d 548 (Wash. 1977).

68. *Id.*

69. In part because we often see the contrary danger, that communities of color face a racist *overprovision* of law enforcement; in part because Governance Antiracism, if I can call it that, is often seen as highly problematic; and in part for reasons sounding in legal theory about how law and social actors are related. For some classics in the controversy, see Regina Austin, *'The Black Community,' Its Lawbreakers, and a Politics of Idenfication*, 65 S. CAL. L. REV. 1769 (1992); Tracey L. Meares & Dan M. Kahan, *Law and the Norms of the Order in the Inner City*, 32 L. & SOC'Y REV. 805 (1998).

to fit completely under a feminist rubric.

First, there are the various interests of *men of color*, at the very least in their various capacities as victims of crime, perpetrators of crime, innocent persons nevertheless accused or suspected of committing crime, and actors in self-defense. And second, there is the question of "the community" and the will to power evinced by those who act in its name—problems of identity, authority, legitimacy, normative dissensus, and so on, abound. Feminism is not likely to be a master discourse for addressing these issues; and intersectional analysis too insistent on finding the crossroads may miss many miles of track beyond it. To travel those miles, feminists committed to antiracism in assessing the Indian cultural defense rejected in *Wanrow* might find it very helpful to take a break from feminism from time to time.

Karen Engle:

Wow! Thank you all for such thoughtful and provocative presentations. We now have half an hour for a roundtable discussion, and we really do have at least five different views on many issues on the table. I would like to share a few observations about some of the issues I saw emerge in the comments, and then attempt to use them to begin a conversation between the panelists, all of whom I am sure already have a response to the others. In doing so, I will try to bring to the surface three questions about the nature of feminism that I heard either implicitly or explicitly in the various presentations. First, who is the subject of feminism? Second, does feminism attend to agency or victimization (or both or neither)? Third, what is the relationship between feminism and the state?

Who is (imagined to be) the subject of feminism? It seems to me that whether one wants to accept, reject, rehabilitate, converge, or take a break from feminism, whether one is likely to see feminism as potentially or already subversive, and whether one wants to revive or murder its mothers is largely dependent upon who one imagines the subject to be. Adrienne and Vicki, in their discussions of class, suggest that the subject in dominant (and successful) strands of feminism often is a straight, white middle- or upper-middle class woman. Even if the actual litigants are poor, working-class, or of color, Adrienne points to how courts and sometimes their lawyers frame their case solely through the issue of gender, offering *Meritor* and *Wanrow* as examples. Catharine MacKinnon has used Mechelle Vinson's race to defend herself against exclusion critiques by early race critics. In an essay entitled *From Practice to Theory or What is a White Woman Anyway*,[70] she argues that early feminist strategy was not

70. Catharine MacKinnon, *From Practice to Theory, or What Is a White Woman*

built on white women as subject. Her evidence is that Mechelle Vinson and another early plaintiff were black.[71] Adrienne counters, if indirectly, by showing how—regardless of the race or sexuality or class status of the actual plaintiff—gender continues to be the focus of inquiry. Janet, in her setting aside of feminism, takes us through an important exercise by offering a couple of scenarios that might result from foregrounding Wanrow's experiences and perceptions as Native American. She seems to be trying to do something different from Liz, Adrienne, and Vicki, who would suggest (as Liz actually did in the litigation) that Wanrow's Native American identity cannot be separated from her gendered identity. For Liz, Adrienne, and Vicki, even if straight upper-middle-class white women *are* the subjects of the at least once-dominant modes of feminism, they *should not be* the subjects of feminism—thus the call for and support of convergence or socialist or critical race or queer feminism. Janet's argument for taking a break from feminism would seem to rest on the understanding that these other forms of feminism are not sufficient to call into question the dominant narratives to the point of seriously focusing on other forms of state power (in I assume a direct as well as Foucauldian understanding of state power) but also that they fail to question or even acknowledge what she calls feminism's will to power. What Liz, Vicki, Adrienne, and Janet all seem to agree on is that women—even if multiple, complex, intersected, raced, sexualized beings—are the subjects of feminism. Their level of comfort with their own understandings of that focus and its ability to subvert their various hegemonic targets is reflected in the extent to which they are willing to use or take a break from its various forms.

I want to add a word about Nathaniel's approach here. Whether self-consciously or not, he never uses the word feminist and only uses the word feminism once—and only then alongside the term "social theory" and in a very generic sense.[72] He immediately acknowledges the unavoidability of the interminable number of interpretive gazes, but then chooses as his optic sexuality, in a way that is not premised on a traditional identity category, but rather on particular assumptions about sexuality shared by activists and scholars with seemingly antithetical aims. Although he is looking at debates that often take place within feminism, there does not seem to be any purchase for him in either claiming or disavowing a feminist analysis. He could presumably apply his method of "counter-intuitive comparison" to any topic, as long as it fascinates him.

Anyway, 4 YALE J.L. & FEMINISM 13 (1991).

71. *Id.* at 18.

72. *See infra,* Nathaniel Berman.

Does/Should Feminism Attend to Agency or Victimization? I would just like to make a short observation here, which is that all the panelists seemed to be rejecting conceptions of women as victims, especially sexual victims, and seemed to be supportive of doctrine, regulation and lack of regulation that would result in greater agency for women in terms of sexual expression and in terms of transgressing gendered and classed and racialized work roles. Some disagreement emerged over *Wanrow*, in particular in the different interpretations Liz and Janet presented of the case. For Liz, the subjective focus of *Wanrow* would provide liberating potential for women by taking account of their individual circumstances and perspectives ("if reasonable"). Even if wrongly interpreted and extended to the battering context, it does permit women a potential way out of physical and sexual victimization, permitting them to mirror the behavior of their perpetrators. Janet suggests that the same end result tends to see women as hysterical victims on one hand and empowered to kill on the other. She would seem to be against the latter type of agency, in part because it is premised on an understanding of helplessness. Vicki and Nathaniel might challenge the focus on sexuality, even while choosing it as the optic for their analyses, while Adrienne really attempts to shift the focus to economic agency. In any event, it seems that—save Nathaniel—the panelists would all read into at least *Meritor* and *Oncale* a victimization approach and would respond to it with a sex-positive, largely anti-regulatory move. Nathaniel, of course, provocatively calls into question the relationship between anti-regulation and sex positivism. Ultimately, disagreement would likely ensue over questions of whose agency should be encouraged, by what state or non-state means, and at what cost.

What is the Relationship Between Feminism and the State? Nathaniel, Adrienne, and Janet all discussed this issue from very different starting points. Nevertheless, I think together they end up offering a number of important insights about the relationship. Nathaniel argues that there is no clear relationship between one's view on sexuality and what regulatory or deregulatory move would be most responsive to it. While both the sex proliferationists and anti-pornographers he discusses generally consider themselves feminists, their positions on sex or feminism for that matter do not necessarily correspond to a position on state regulation. For each group, the state could either be brought in as a regulating ally, or it could be shunned for the governance of private background rules in a sexually deregulated state. Adrienne makes a similar point in a different way by bringing our attention to private law as a site for the constitution of gender and of "economic personality." Private law is, of course, not outside the state. For both Nathaniel and Adrienne, feminists are attempting to use the state—it's a matter of on what side and how explicitly they want the state involved. Janet then follows up by urging feminists to recognize the extent

to which they are already allied with the state in what she terms "governance feminism." For her, each of the cases provides an example of governance feminism, because feminist advocates managed to convince the state, in this instance the courts, to side with them. To the extent that feminists have such power, she argues that they should consider its implications for a variety of actors.

These are just a few of many possible responses to these excellent presentations. Why don't we begin by getting reactions to the first issue about the subject of feminism? Liz, would you like to begin?

Elizabeth M. Schneider:

We are at a time when there are many feminisms. Janet, Vicki and Adrienne have highlighted a range of different feminisms that we are talking about. I agree with the perspective that Vicki and Adrienne developed of what I would call a more material/economic focus of feminism. Nathaniel's invocation of Mary Joe reminds me how Mary Joe's work really emphasized the excitement of dialogue among feminisms. But the material focus is absolutely critical. At the conference honoring Mary Joe last year, Regina Austin and I spoke about how we thought that there are generational issues about these different visions.[73] From my work with students, I think that the issues that have captured their attention have been more cultural feminism and victimization, and that is problematic.

I do not really want to respond in detail here to what Janet said about the facts in *Wanrow*, but I guess I'm going to have to in order to correct some of her characterizations. Let me say first that Yvonne Wanrow had no idea about the other people who brought William Wesler into the house. At the time, she believed that Wesler was breaking in to the house and that she was acting in order to save her own life and the lives of others.

As Janet says, Shirley Hooper had every reason to be anxious about her neighbors. Her daughter had contracted a venereal disease from being molested by a stranger whose identity the 7-year-old had been unwilling to divulge, and someone had attempted on two recent occasions to break into her home. It is not surprising that she was feeling very concerned. Yvonne's young son, who at the time was in her care, told Hooper that a man had tried to force him off his bicycle and drag him into a house in the neighborhood. Wesler's timely appearance on the porch—his saying, "I didn't touch the kid. I didn't touch the kid"—coupled with Hooper's young daughter's indication that Wesler was the man who had caused her

73. Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1 (2001).

rash and had molested her, justified Hooper's alarm. When all this was corroborated by the landlord's telling of Wesler's previous accusation of another molestation attempt of a boy who lived in that very house, Hooper immediately called the police. Janet points out that there was no mention of positive identification by Wanrow's son of Wesler as the man who had tried to abduct them; but there was no negative identification either. One could assume that Wesler would not have appeared on the porch at that time, saying the things he was saying, that the boy would have told Hooper that he was not the perpetrator, etc., had he not been the same man to whom the boy was referring.

The police came to Hooper's home, and the landlord was present during the interview. When the police arrived, Hooper relayed the facts mentioned above and insisted on arrest, but was told that the police could do nothing until Monday (this was happening on a weekend). They recommended her coming to station to "swear a complaint." Janet doesn't mention that in the police's presence, the landlord suggested to Hooper that in the meantime, she get a baseball bat and "'conk him [Wesler] over the head' should Wesler try to enter the house uninvited during the weekend. To this suggestion, the policeman replied, "Yes, but wait until he gets in the house." These important facts are left out of Janet's description.

Janet also downplays the legitimate fear the Hooper is feeling. Her calling Yvonne to come over is a recognition that there is safety in numbers. Wanrow brought a gun with her for protection—she was going to spend the night in a house where there had been two recent attempted burglaries, and she didn't feel safe. Not only were there two women and four children in the house, Wanrow herself had a broken leg and was on crutches. The two decided to call Wanrow's sister and brother-in-law, Angie and Chuck Michel, again because they were afraid, an important fact Janet leaves out. When the two other adults arrive, they do not go to sleep, but stay up all night talking. Nobody knew that Chuck Michel left to go to Wesler's house. Janet suggests that he went to Wesler's house to bring him back to Hooper's house. We don't know why he went, but the opinion reports that it was Wesler's suggestion to "get the whole thing straightened out."[74] For whatever reason, David Kelly and Chuck Michel stay outside while Wesler goes in.

Janet also does not mention that Wesler is intoxicated until the "standoff." As the opinion suggests, Wesler is drunk and large, so he is all the more intimidating (to a petite woman with a broken leg on crutches). Janet's telling of the story suggests that Wanrow, despite her being on crutches, had the upper hand because he was drunk. But Wesler was told to leave, and he didn't. In fact, he even approached a waking child, stating

74. *Wanrow*, 559 P.2d at 551.

"My, what a cute little boy." You could read this as either his being drunk, and completely uninhibited, and therefore all the more dangerous, or, as Janet might read it, a sign that he is mentally ill with no idea of what is going on. Why would a man who has come to straighten out this whole child molestation thing begin by approaching a child?

When Wanrow does shoot him, Janet fails to mention again the fear factor. Her description makes the shooting very deliberate; but the Supreme Court opinion says she testified at trial to being "gravely startled by this situation and having then shot Wesler in what amounted to a reflex action."[75]

And finally, I think Janet misinterprets the substance of the conversation Wanrow had with the police on the phone after the shooting: "We warned you—we told you guys."[76] Janet would have us read this as "Look, this is what we had to do, because you wouldn't help us. We had to take the law into our hands." But you could read this simply as "We told you he was going to come. We wish you had arrested him. But we had to protect ourselves."

It is possible that there may be what Janet calls a "sex-panic" aspect in this case. There probably is in any case that involves allegations of child molestation. And, of course, there are always different readings of cases that are possible, since any case can be looked at through different lenses But the more important issues here are, as Adrienne suggests, gender and race. The reason the police told her to go and take care of it herself—that they would not arrest Wesler—was because she was a Native American woman in an incredibly racist town. In my view, these arguably minor "sex-panic" issues are overwhelmed by the issues of gender and race. This is a longer discussion that we cannot have here. Of course, *Wanrow* is not a battered woman case, but it opened the door to issues of equality in criminal cases of battered women who have killed their assailants, as well as fuller examination of the role that gender plays in all criminal defenses and excuses. The sentencing guideline issues that Adrienne referred to are very much a legacy of *Wanrow* as well.

Vicki Schultz:

A number of panelists have raised questions about how to think about gender in relation to other forms—or, as I have called them, *processes*—such as race or class, that sustain inequality. Some of us have put the question as how to think about the subjects of feminism. These are really tough issues, and ones that are profoundly anxiety-producing. Different

75. *Id.* at 551.
76. *Wanrow*, 538 P.2d at 850.

groups of feminists have defined the subjects of feminism in different ways. In light of the history and the conflicts, it is very hard to come up with a definition of feminism, but if I were to try to do it, it would be something like: Feminist movements seek to subvert existing gender arrangements in order to advance material equality and individual freedom and empowerment for both women and men from all different walks of life. If you define it that way, it doesn't seem possible to achieve those goals without paying attention to the context in which gender appears. Part of the context in which gender appears is always a particular configuration of race, class, nation, sexual practices and norms, and the like. It is this very embeddedness that has historically made women's movements, and feminist movements, so difficult to sustain. The early Second Wave feminists tried to "isolate" gender, but this move subjected them to widespread criticism and has, ultimately, rendered them less relevant and less able to speak to the most oppressive forms of power we face today.

I have this project in my Feminist Theory class in which everyone is going to come to my house and bring 3-D objects and try to model the way they think gender works in relation to race, class, nation, sexuality, and other processes and forms of power. Some people are bringing gears that will run in relation to each other; others think gears are way too static and are seeking other materials. We are going to try to build sculptures or other artifacts to try to theorize the relations in question, but it's an impossible task. One problem is that there is no "it" called gender; what we call gender is a continually-changing process. Part of what that means to me, is that, ethically speaking, feminists cannot simply "isolate" gender and ignore the other things that give it form. You simply cannot undo or even grasp gender without paying attention to the context in which it appears. To think otherwise is to make the liberal/radical/cultural feminist mistake—which is to believe that sex or gender can exist in a vacuum. That is my tentative view on the matter.

Adrienne Davis:

Liz, I find intriguing what you proposed about generational differences driving these very disparate perspectives on sex. Vicki also alluded to this when she said "we're losing the kids." Some part of Janet's point, I think, is to remind us how identity, or methodologies informed by identity, shape perspectives on sexuality. Like Liz, I am struck by the extent to which younger women reject dominance feminism and want to distance themselves from any articulations of women, i.e., themselves, as victims—especially victims of men and male sexual violence. They articulate sexual encounters with men as solely positive, consensual, and joyous. Sometimes I ask students if they walk around whenever they want

wherever they want. Of course very few of them do, but they see restrictions on their movement as questions of "crime," not of sex or sex equality. In contrast, for so many women of my generation, we welcomed these articulations of the darker side of sexuality and of the interactions as breaking a silence. For the women of color with whom I went to college and law school, we especially embraced feminisms as articulated by theorists of color—like bell hooks, Toni Cade Bambara, Cherie Moraga and Gloria Anzaldua, and Maxine Hong Kingston—many of whom spoke truth to male sexual power, men of color, and white men. In particular, legal dominance feminism was being theorized at around the same time that feminist literary artists like Ntozake Shange, Alice Walker, Toni Morrison, Gayle Jones, and Gloria Naylor were contributing to a renaissance in black literature. A hallmark of their work were their brutal, searing depictions of sexual violence against black women and the need to break silence around these so-called unspeakable acts.

Janet Halley:

One way to imagine a conference like this is to put it in the context of the ideas that there is Governance Feminism and that it's good for a social movement like feminism to acknowledge its will to power. I think that the "victim" problem, feminism is not only that feminism frames woman as victim and gives her victimization excessive salience in feminist projects; it is also that feminism as a whole does not acknowledge the amount of power that it has at its disposal. So what is it, feminism? If it has power, maybe it is us talking to each other about what ideas are and are not feminism and what practices are and are not feminism; could feminism be the practice of deciding which ideas and practices are and are not feminism? Can we see it as a very diffuse and complicated social existence that we are in the process of performing this weekend but also more generally in our lives? Seeing it that way might help us pursue more interesting, more responsive, more mobilizing left justice projects.

My point today has been that, in those practices, feminism has argued itself into the idea that all left anti-subordination justice projects must be feminist—and if they are not, feminists have been morally bad. My countermove is to suggest that, we might have stronger feminism, and stronger other left justice projects, if, in this practice that is feminism, we were more willing to let some projects go and to let some things not be feminist. I am offering a critique of a regulatory norm in feminism at its self-definitional level. The reason that, when I sat down, I was out of breath was because I am scared, and the reason I am scared is because of a practice feminism has of saying, "You are not a feminist, and that is morally bad, and you therefore should not think the thing you just thought

or say the thing you just said." I guess I am trying to perform an outside, to say back, "Let us have thought experiments that take a break from feminism." The convergence impulse is not just about a description of reality; rather a practice of thought management in a very diffuse and complicated piece of the governance structure of the United States.

Karen Engle:

Why do you all care so much? Why are you scared, Janet? So here we are at a conference and, in the opening plenary, most of us end up talking about feminism. But actually, I do not even see feminism in the title of the conference, which is "Subversive Legacies: Learning from History/Reconstructing the Future." We are focusing on questions of gender. We might disagree about whether they do or should converge with or displace or be displaced by other focal points. And I gather Nathaniel's suggestion to be that we might think that all of those methods are useful at different times for different reasons, but that we should be self-conscious about which ones we are deploying. Gender is obviously a structure that organizes many parts of our lives. When I walk down the street, I usually imagine myself to be a woman, and I go into the bathroom that is marked as the women's bathroom and not the one that is marked as the men's bathroom. But do I have to be a feminist to acknowledge—and even critique—that gender organizes my life in that way?

I know a lot of people reject the term, but I like the idea of post-feminism. It does not deny the structural operations of gender or the value of many insights and paradigmatic shifts gained from much feminist analysis, but it acknowledges that the frame—as *the* interpretive frame—has lost much of its salience. Nevertheless, we see its influence in various types of analysis that have emerged since then, and some of us might want to attribute some of our analysis to at least some brand of feminism. Yet, I hear Liz, Vicki, and Adrienne saying that it is important to them that they maintain their feminist identities. And Janet wants to "take a break" from hers (in and of itself, I would say, a post-feminist idea) but is afraid that she will not be allowed to participate in the discussion any more. I would like to resist that idea.

Adrienne Davis:

Janet, I have heard you say this before in other contexts, and, as I have told you I think this is a really important point, especially given the exclusionary and purifying dynamics of feminism and the left more generally. But as I have heard you struggle with these conflicts and ideas, I have been trying to figure out why your approach both resonates with and

frustrates me, and I think I have finally begun to figure it out. At some very basic level you are concerned with possibly irreconcilable tensions and differences between feminism and queer theory, struggles for sex equality and sexual liberation. And from everything you have said and written, I am persuaded that these concerns are quite real and need serious theoretical work and engagement.

Yet, I come to the table here, and everywhere, as a black feminist. (And Karen, while I appreciate your methodological point, post-feminist does not resonate with my politics or theoretical approach.) This means that I come on top of over a century of conflict between anti-racist and anti-sexist thought, theory, and struggle, one that burst into theoretical richness in the 1970s and developed nuance and rigor through the 1990s. And black women, or non-white women generally, realized that, yes, anti-racist and anti-sexist struggles are often in tension. Some of us decided that the theoretical tenets and analytics of anti-racism were the more compelling, and those women reject feminism. Others, a decided minority I think, decided that anti-sexist struggle is the priority. But most of us who claim the black feminist label have in doing so committed ourselves to struggling at the cusp, in the breach, to work with and through both communities to develop theoretical and activist strategies. (One example of where I have seen such good work is in Critical Resistance, Angela Davis's organization that opposes the prison industrial complex and which tries to illuminate the real racist and classist effects of pro-incarceration policies while taking seriously the need to combat violence against women.[77])

But I guess this is all to say that I would really like to see queer feminists, or feminist queers, continue to challenge and engage the feminist community, to remain in dialogue, and to hold it to a high and exacting standard of not only opposing homophobia, which most of us do, but taking the next step to embrace sexual liberationist and queer work as well.

Elizabeth M. Schneider:

I think that for most people here, feminist work is the lifeblood of what we do, it is the passion that drives our work in law. At least it is for me. I went to law school thirty years ago to do this work. Feminist work is the most important work I do, and it shapes my thinking in other fields, like civil procedure, in many different ways. While, like Adrienne, the term "post-feminist" doesn't resonate with either my politics or theoretical approach, I also think, along with Janet, that it is appropriate to ask what feminism adds or does not add to the broader picture of whatever you believe in.

77. *See* Critical Resistance *at* http://www.criticalresistance.org.

One of the great ironies of thinking that we are in a post-feminist period, or that we should be "taking a break from feminism," is that I'm sure many of us in the room are in institutions where we are teaching folks who are uncomfortable with the term "feminist." Feminism is, as Mary Dunlap once put it, the "F-Word."[78] Yet I think Vicki raises the importance of multiple perspectives on, and frameworks for, feminisms, and I agree with the need for these perspectives, as well as the substance of what they offer feminism. But I think that the reason why feminism matters is because large numbers of us in this room identify feminist work as the passion that shapes who we are, what we do, and why we do it. It is then scary (and maybe for some, impossible) to say I am going to put this huge piece of myself on hold and look at everything else.

Vicki Schultz:

Well, I just want to react briefly to Nathaniel's talk. Although I do think it is important for feminists to take account of the processes through which inequalities other than gender are formed, I don't view these other processes as static phenomena to be simply "added on" to an underlying "it" called gender. I do not think that it is really even possible to view gender or any of these other things in isolation. What feminists of color and queer feminists have taught us is that even though you think you are viewing something in isolation, you are not. You are, in fact, holding constant a certain account of race or class or sexual orientation or the like, and that is why I actually do not think it is possible to discuss gender or to do feminism without some implicit assumptions about these other processes. It is difficult to find an appropriate metaphor. One might say that all these various processes are like patterns that run through a complicated tapestry of life. Each pattern is made up of many different, overlapping, intersecting threads of varying textures, grades, and colors, and each pattern looks different, both on its own and in relation to the others, depending on the perspective from which the tapestry is viewed. Another metaphor (and one that I would love to build at my little Feminist Theory class party, but I don't know how to construct it) is a kaleidoscope. You look through it and see an almost infinite variety of colors, shapes, patterns, and intensities that constantly shift in relationship to all the other things, and if you turn it this way you can see, yeah, there's a little more red over here, and maybe the red represents, you know, a certain view of sexuality; and if you turn it that way then, amazingly, the red has now blended with a slice of blue and become purple. Of course, people's views

78. *See* Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future*, 2 VA. J. SOC. POL'Y & L. at 8, n.13.

on such matters are partly autobiographical. One of my own impulses—which may be completely wrong or misguided, and I am certainly willing to be questioned about it—is to expose and address the deep historical connections between gender and class that have profoundly shaped my own family history. I see so many law students who consider themselves feminist take for granted a corporatist, management-oriented ideology—without ever questioning the role of the companies they will soon represent in consigning so many women and men around the world to impoverished lives. I would like to argue that feminism implies, ethically, a commitment toward labor, toward caring about the plight of women and men as workers, and toward thinking about the ways in which our practices around work help sustain profound inequalities. These questions were part of the earliest forms of Second Wave feminism, for feminism grew out of the New Left. I believe it is time to return to them. I agree with Janet Halley that it may sometimes be useful to take a break from feminism, but the end, Janet, my impulse is to say, I for one want you to be a feminist. Any feminism that doesn't have room for you isn't a feminism worth being a part of.

Janet Halley:

I agree with Vicki and Adrienne, and thank them—I would like to be a feminist. We will see about that. It is partly up to others. I will just point out in response to Vicki that the tapestry and kaleidoscope analogies maintain a boundary, a frame, and, given that, I am not surprised to hear you suggest that there is a genealogy of feminism in labor struggle that has an ethical weight. But of course, genealogies are not preclusive. You could do a genealogy of feminism back to so many different places and then say that it has an ethical obligation to stay *there* forever. Instead, I would suggest that we see it as a relationship of feminism and labor or a relationship between feminism and distribution or class or social welfare, each extremely complicated and varying over time and capable of different narrations in retrospect. This is to suggest that defining the object of our concern as "labor" is to take a lot of assumptions. I think also that Adrienne's insistence on the economic substrate and private law contexts in which feminist work, and anti-racist feminist work, are done is extremely important—and I would suggest that the feminist dimension of the project might be more vital and energetic if it could be interrupted from time to time by work that's not necessarily "at the cusp." "Taking a break from feminism" is not necessarily anti- or post-feminist. To imagine that it is, is to presuppose too much. Last word—thought experiments.

Karen Engle:

My question about why you care provoked exactly the response I hoped it would provoke. I think the point is that we all want to be in the conversation that we are having right now at this conference, regardless of what we call the conversation or the conference. So this is the beginning of that conversation. Thank you all for joining us in it. I look forward to watching it continue to unfold after the break.