INTRODUCTION

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Half a century after the beginning of the second wave, feminist legal theorists are still writing about many of the subjects they addressed early in the second wave: money, sex, reproduction, and jobs. What has changed is the way that they talk about these subjects. Specifically, these theorists now posit a more complex and nuanced conception of power. And as conceptions of power have changed, so have conceptions of the role of law in achieving sex equality.

When feminist legal theory first began to pick up steam in the 1970s and 1980s, the reigning account of power put forth by the liberal feminists who dominated that era was fairly straightforward. These feminists borrowed from a widely held view of power at the time, in which power was conceived largely as a restrictive force, which operated on women externally to restrict them from doing what they would otherwise choose (Taub & Schneider, 1998; Williams, 1982). These theorists paid little attention to the way in which power affected women's interior wants and desires. Liberal feminists were thus drawing on a classic conception of power. As articulated by Max Weber: "we understand by 'power' the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action" (1968, p. 926). Applying this idea, feminist legal theorists conceptualized sex inequality as a problem largely produced through women's unequal treatment by the law. Women's best shot at equality, in this view, was to eradicate these

legal barriers, often by exposing and challenging the underlying gender stereotypes (Ginsburg, 2000; Taub & Schneider, 1998; Taub & Williams, 1985). These feminists therefore called for sex-blind decisions in the workplace, having women serve on juries, and so forth.

This liberal account of the role of power in women's inequality was soundly contested at the end of the 1980s by what came to be called "dominance feminism." This position, developed most forcefully by Catharine MacKinnon, challenged the notion that power acts only externally on women. In the dominance model, male power is seen as univocal and completely totalizing, creating the world, including women's sexuality, according to its will. This power constructs the wants, needs, and even the very identities of the women in its ambit. According to MacKinnon, "in feminist terms, the fact that male power has power means that the interests of male sexuality construct what sexuality as such means, including the standard way it is allowed to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones" (MacKinnon, 1989, p. 129). Despite this very different conception of power, dominance feminism, too, turned to the law for remedies. What dominance feminists called for, though, was not the equal treatment of the law sought by liberal feminists. Instead, they largely sought to restrict men imposing their will on women. These feminists thus advocated for the prohibition of pornography because of its link to violence against women and sexual harassment laws that reined in men's behavior in the workplace. Dominance feminists did not posit a theory of agency for women, largely because agency was inconceivable under this totalizing theory of power.

The dominance model made considerable gains for feminist theory by responding to serious deficiencies in earlier feminists' view of power. In holding that power operated externally on individuals, those earlier feminists had failed to consider the way that power can shape women's identity, aims, and desires. Their accounts therefore allowed opponents of feminism to argue that women's differences from men justified their unequal treatment. The dominance model of power effectively countered these arguments. In a critical step forward for feminist legal theory, gender hierarchy could no longer be justified by women's differences or desires because, in Susan Bordo's words, "female obedience to the dictates of [dominant gender norms] is better conceptualized as bondage than choice" (Bordo, 1993, p. 22). Additionally, with their myopic focus on equal treatment under the law, earlier feminists did not recognize the ways that formal equality would not fully address their concerns. By contrast, the dominance model of power

highlighted the limitations of equal treatment and posited a more skeptical view of law's ability to liberate.

With this said, the dominance model also had considerable flaws when it came to analyzing sex inequality. As a number of feminist legal theorists pointed out, it conceptualized all women as oppressed in the same totalizing manner, without regard to differences in sexual orientation, race, class, and a host of other factors (Crenshaw, 1991; Mahoney, 1993). As we now well appreciate, gender is only one of a number of cross-cutting axes of power, but the dominance model lacked the tools to think through the complexity of these axes.

Furthermore, the dominance view of power was so totalizing that it could not conceptualize resistance to dominant norms. If women are truly the passive victims MacKinnon theorized, they could never depart from such norms. Dominance theory, thus, could not identify the conditions that would foster or retard resistance. In MacKinnon's world, everything is relentlessly bleak, and even partial escape from the negative forces of power becomes impossible. This monolithic view of power caused MacKinnon to miss the myriad ways in which women, in actual fact, fail to comport with conceptions of identity grounded in gender hierarchy.

The dominance model also overstated men's power, even while it ignored women's. MacKinnon's account ignored the way in which men are themselves constructed within the system of gender hierarchy rather than its conscious creators for their own interests. It also elided the differences among men, erasing the power differential that accompanies race, class, sexual orientation, and other salient factors. By the same token, this theory could not conceptualize the extent to which men resist unequal norms of sexual citizenship or the conditions that would promote this resistance.

Finally, the dominance account of power could not adequately conceptualize the complexity of contemporary gender norms. While MacKinnon posited particular, totalizing norms that governed women's lives, the force of many such norms has diminished over time. As Nancy Fraser states, "we live in a time of intense contestation concerning gender, sexuality, and sexual difference. Far from being monolithically patriarchal, the interpretation of these terms is at every point subject to dispute" (Fraser, 1997, p. 234). The dominance view gave no assistance in analyzing the complexity of these forces.

While liberal feminism was shifting toward dominance feminism, post-structuralists, most prominently Michel Foucault, were making significant contributions to the conceptualization of power. For Foucault, power in

modern society operates primarily as a productive force that shapes all humans by molding their desires and self-concepts. As such, power operates in everyday interactions, where it "reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives" (Foucault & Gordon, 1980, p. 39). Some feminist theorists such as Judith Butler fruitfully used the Foucauldian conception of power (Butler, 1990), but Foucault himself did not develop a robust account of power and gender inequality.

Similarly, Foucault did not develop an adequate account of agency or resistance to dominant norms. His early work left little room for subjectivity, socially constructed or not. In this early work, when subjects exercise power, they do so to accomplish power's intentions, rather than their own (Foucault, 1970). Foucault's later work theorized a subject capable of resistance and subjectivity; in this later construction, subjects could resist precisely because they were positioned within power relations. According to this later Foucault, the very fact that subjects are constituted within a field of power relations positions them to exercise some subjectivity in how they enact their roles (Foucault & Gordon, 1980). Yet this later Foucault never adequately considered the complex ways in which identity, agency, and choice are related to power and inequality nor the conditions under which agency can be increased and inequality reduced.

This brief review of some trends in feminist thought necessarily elides numerous nuances and strains, but it highlights the contribution of more recent scholarship that recognizes the complexities of power in contemporary society, the ways in which these complexities entrench sex inequality and the role that law can play in reducing inequality and increasing agency. The feminist legal theorists in this volume are emblematic of this effort. They carefully examine the relationship among gender, equality, and power across an array of realms – sex, reproduction, pleasure, work, money. In doing so, they identify social, political, economic, developmental, and psychological and somatic forces, operating both internally and externally, that complicate the expression and constraint of power. Finally, they give sophisticated thought to the possibilities for legal interventions in light of these more complex notions of power.

Consider the paper "Going Wild: Law and Literature and Sex," by Susan Frelich Appleton and Susan Ekberg Stiritz, a law professor and a social work lecturer on sexuality, respectively. This paper describes a seminar they co-teach to law students and other graduate students about literature, sex-positivism, and the legal regulation of sexuality. As they construct

it, sexuality is neither part of some pre-discursive, natural realm whose expression brings liberation nor is it both cause and effect of women's inequality. Instead it is a complex realm shaped by power, interwoven with narrative, and offering possibilities for both pleasure and peril. Within this realm, the authors seek to make more space for subjectivity and more room for pleasure through inviting their students and readers to explore the "wild zone," an area where those at the margins of society conceptualize experiences unrecognized by the dominant culture (Ardener, 1975; Showalter, 1981). Through literary texts, Appleton and Stiritz help students and readers recognize, for example, the many ways the law privileges penile-vaginal penetration and fails to acknowledge the clitoris as a critical source of women's pleasure. The authors use this study of marginalized experiences to attune students and readers to the broader dynamics of social injustice and to possibilities for change. Consistent with the complicated relationship between power, sexuality, law, and broader social forces, especially class dynamics, Appleton and Stiritz do not tell a unidirectional story of oppression and reclamation. Instead, the authors acknowledge the limits of sex positivism in a deeply patriarchal society, while affirming usually unrecognized opportunities for improvement. They also locate their own ambivalence and uncertainty about how to address the intersection of sex positivism and their students' experiences of sexual violence.

Continuing the theme of sexual agency, Katharine K. Baker and Michelle Oberman, in their paper "Women's Sexual Agency and the Law of Rape in the 21st Century," explore many of the issues identified by Appleton and Stiritz, most notably agency and the boundary between sexual violence and sexual pleasure. Baker and Oberman analyze the non-consent baseline in rape law in light of the rich body of sex-positive literature that has arisen since this law's instantiation. They ask how these sex-positive narratives, which portray women as having significant sexual agency, map onto young women's experience of sex. To answer this question, they draw on empirical work documenting the subjective experiences of young women's sexual encounters. They find that although many of these experiences could be classified as rape, the young women, invoking their belief in their own sexual agency, do not perceive the encounters as sexual violence. Baker and Oberman observe that these readily available narratives of sexual agency lead women to perceive themselves as sexual agents, but in practice they rarely exercise that agency during sexual encounters. Thus, the dominance feminist account of sex as something that is routinely done to women remains fairly accurate. What is new and challenging for the law is the growing body of research suggesting that

women's embrace of their own agency leads them to reject the characterization of nonconsensual sex as rape, even as they continue to act according to persistently gendered scripts. The relationship between gender, identity, and power, the Baker and Oberman analysis demonstrates, is far more complex, and the recuperative tendencies of power significantly stronger, than much sex-positive literature would suggest.

If these four authors explore the complexities of power with respect to sexuality, Angela P. Harris does so with respect to the relationship between gender and therapy culture in her paper "Care and Danger: Feminism and Therapy Culture." As Harris explains, the difference feminism of the 1980s and 1990s (Gilligan, 1982; West, 1999) has found a contemporary expression in the therapy culture that permeates multiple institutions. Under the banner of emotional literacy, both men and women from the board room to the court room embrace the values associated with difference feminism – caring, emotional attunement, empathy, and so on. Harris finds much that is positive in this move, noting that therapy culture helps dismantle the gender binary of public man and private woman and that it does so without essentializing women. Harris also notes that an appreciation of interdependency facilitates a reconceptualization of liberal theory to accommodate caregiving and human dependency. And yet Harris recognizes the tendencies of postmodern power to co-opt counternarratives in ways that entrench existing inequalities. Harris demonstrates, for example, that therapy culture can be understood as a deeply political effort to deepen the privatization of dependency and risk, with market and state failings recast as personal failings. This depoliticization affects both the construction of problems and the framing of solutions, leading decision-makers to place individualism at the center. Workers may feel connected with one another, but they do so in an increasingly brutal workplace that undermines families and fails to recognize broader causes of inequality. Therapy culture's response to these deeper issues is to help workers develop empathy, not restructure the workplace. For Harris, then, therapy culture while potentially resistant to dominant gender narratives, ultimately has the possibility of reinforcing inequality.

In "Market-Cautious Feminism," Maxine Eichner explores the intersections among power, capitalism, and gender in critiquing U.S. feminism's celebration of women's entry into the paid workplace. Absent significant regulation of free-market forces, she contends, women's participation in the paid workplace cannot achieve sex equality. Further, Eichner argues, feminists who treat women's increased workforce participation as a victory fail to appreciate the complex ways in which capitalism constrains women's

lives. She explores the interaction between the material and discursive forces of capitalism, in which long hours in the workplace become obligatory not simply through financial need, but also because insecurity and inequality create a culture focused on work and obsessed with success and its material trappings. Ultimately, she calls for legal reform, not just to regulate the market in ways that expand women's and men's agency but also to increase the availability of counternarratives to the current pro-work messages loudly sounded in U.S. culture.

June Carbone and Naomi Cahn continue the exploration of the complexities of postmodern power in their paper "Unequal Terms: Gender, Power and the Recreation of Hierarchy." The authors argue that despite feminism's commitment to identifying and deconstructing power, feminism has been slow to respond to the growing inequality in America. Carbone and Cahn contend that the valorization of attributes traditionally associated with men – competition, hierarchy, and individualism – benefits elite men, who increasingly control both capital and political influence. But women, non-elite men, families, and vulnerable populations bear the costs. Carbone and Cahn call for increased feminist engagement with the structural aspects and gendered effects of inequality. The authors thus challenge the construction of power as male over female. Instead, they demonstrate the many ways men and traditionally male characteristics benefit a small segment of men, at the expense of other men and most women.

Finally, showing feminism's wide net, Jennifer S. Hendricks explores philosophical and legal questions about the regulation of reproductive decisions in her paper "Schrodinger's Child: Non-Identity and Probabilities in Reproductive Decision-Making." Hendricks engages with Derek Parfit's "non-identity" argument that state action regulating reproductive decisions cannot be justified by reference to the best interests of the resulting children because the regulation itself will affect which children are born, and there-fore there is no particular child who will be benefitted (Parfit, 1984). Hendricks first explores the dangers of this line of thought, demonstrating that the non-identity argument can be used to limit women's autonomy rather than the state's reach into reproductive decision-making. Hendricks then offers potential solutions to the problem, drawing on the work of Melinda Roberts, who argues that legal regulation can be justified by expanding the time frame so that the chance any particular child is born is highly speculative and thus decisions are made for any child that may be born (Roberts, 2007).

Together, these articles engage with power as a multi-faceted phenomenon. The authors identify both the internal conditions needed for agency

as well as the external conditions needed for freedom. Sexual agency, for example, is not simply about a felt experience. Rather, it requires a broader societal context in which young women have multiple opportunities for development and self-expression. For those at the margins – those in the wild zone identified by Appleton and Stiritz – sexual agency comes from both the formulation of experience and the introduction of that experience to the broader society. Similarly, women's non-materialist fulfillment requires both the internal and external space for reflection. In short, these articles embrace and reflect the best of what feminism has to offer, as a pedagogy, history, analytical tool, and vision.

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