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# Gender and Justice

Mary I. Coombs

*University of Miami School of Law*

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## Foreword: Gender and Justice

MARY I. COOMBS\*

This issue of the *University of Miami Law Review* is another milestone in the continuing tradition of symposia sponsored by the *Law Review* and the Law School. Consistent with that tradition, it brought together scholars from a variety of disciplines, as well as *Law Review* students, to present papers and to participate in the collective search for meaning that symposia embody.<sup>1</sup> This year, the symposium topic was "Gender and Law." The topic clearly has its roots in the burgeoning literature of feminist jurisprudence.<sup>2</sup> This symposium, however, is not about "women," but about "gender."

Gender is a characteristic descriptive of every human being,<sup>3</sup> whose meaning is socially constructed, yet central to our understanding of ourselves and of others. Issues of gender have been examined most thoroughly by feminists, because the construction of femininity and the demands that women conform to its meaning have been highly constrictive of women's possibilities. Some of the participants in this symposium focus on the ways in which men, too, have been constructed as gendered and the effects that images of masculinity have had on the lives of men and women.<sup>4</sup>

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\* Professor of Law, University of Miami School of Law.

1. See Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy*, 63 U. COLO. L. REV. (forthcoming June 1992).

2. For recent descriptions and surveys of feminist legal scholarship, see Christina Brooks Whitman, Review Essay: *Feminist Jurisprudence*, 17 FEMINIST STUD. 493 (1991), and Patricia Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. (forthcoming Spring 1992).

3. A striking example of the false attribution of gender only to women, and race only to blacks, can be found in *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975), in which a black female judge rejected a motion for recusal that claimed that her sex and race rendered her biased in a Title VII action. As Judge Motley noted, all judges and attorneys are of some sex and some race.

4. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Michael Kimmel, *Issues for Men in the 1990s*, 46 U. MIAMI L. REV. 671 (1992); Judith

Gender is not synonymous with biological sex. It is, rather, a set of cultural meanings built upon sex. Its particular meanings vary widely over time and place; in each culture, "one is not born but rather one becomes a woman."<sup>5</sup> One must also become a man, though this role limitation is generally less severe, since the construction within modern culture of the ideal man often seems surprisingly similar to the construction of the ideal person, while those characteristics defined as feminine and those roles defined as appropriate to women are devalued.<sup>6</sup>

Feminist legal theorists have examined the myriad ways in which law has intersected with the socially constructed, gendered lives of men and women. They have shown how law has participated in the devaluation and oppression of women, both by limiting women's opportunities to participate on the same terms offered to men,<sup>7</sup> and by perpetuating rules that rewarded male biology<sup>8</sup> and typical male life patterns.<sup>9</sup> Uncovering the gendered assumptions built into law and legal discourse is a necessary first step toward ending the power of gender to restrict and to oppress. In her recent book,<sup>10</sup> Martha Minow focuses on showing how differences such as gender are constructed, and how the fact of difference is linked to devaluation and discrimination only because the social world has been designed in particular ways. Being in a wheelchair is less of a handicap when ramps and wide doors become standard architectural features;<sup>11</sup> on-site day care and flex-time may radically change the "handicap" of being both

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H. Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992).

5. SIMONE DE BEAUVIOR, *THE SECOND SEX* xiii (1953).

6. See Inge K. Broverman et al., *Sex-Role Stereotypes and Clinical Judgments of Mental Health*, 34 J. CONSULTING & CLINICAL PSYCHOL. 1 (1970); Inge K. Broverman, et al., *Sex-Role Stereotypes: A Current Appraisal*, 28 J. SOC. ISSUES 59 (1972).

7. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (finding unconstitutional a rule limiting enrollment in the nursing school to women); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (allowing Alabama to deny women jobs as prison guards); *Reed v. Reed* 404 U.S. 71 (1971) (overturning an automatic preference for men as estate administrators).

8. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (denying that discrimination on the basis of pregnancy equals sex discrimination); cf. *International Union, UAW v. Johnson Controls*, 111 S. Ct. 1196 (1991) (overturning fetal protection policy that excluded women from certain high-paying jobs).

9. See Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1988) (discussing rules in world of work that presume male biography); Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (discussing family law rules and patterns of decisionmaking that disadvantage mothers).

10. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

11. *Id.* at 377.

a worker and a mother/primary parent.<sup>12</sup>

Catherine MacKinnon also seeks to expose the social meaning of gender. However, she describes it in terms of a hierarchy of dominance and subordination, stressing the pattern of consistent disadvantage to women and finding the roots of that pattern in a sexuality that "eroticizes dominance."<sup>13</sup>

Under either perspective, exposing the gendered presuppositions of the law is necessary. In some situations, uncovering these gendered patterns, as Martha Minow proposes, may make claims of equality and of rights relatively unproblematic. However, the demand for true and total gender equality—for the uprooting of patriarchy—is radical and unlikely to be achieved in our lifetimes. Particular claims may succeed, such as the increased recognition of domestic violence as a legally cognizable problem or the elimination of most formal barriers to access to jobs or professional education. Those successes are worth celebrating. Nonetheless, demands for particular legal reforms always run the risk of requiring reformulation through legal language that limits their political significance<sup>14</sup> or diverting energy into battles that turn out to have accomplished little.<sup>15</sup>

Real transformation would substantially disrupt the world as it is. The dominant and powerful, unsurprisingly, are comfortable with that world. They *may* be induced to permit change by a discourse that leads them to understand the ways in which gendered expectations harm them as well, compared to a freer, less gendered alternative. To the extent that they believe in justice and fairness, they *may* be induced to change by a discourse that shows vividly the limitations and oppressions stemming from gender and that convinces them that gender is neither natural nor necessary. Transformation may also

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12. Cf. Williams, *supra* note 9; Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 791-92 (1990) (discussing effects of workplace-family conflicts on women workers).

13. See CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127-31 (1989).

14. See generally Elizabeth Schneider, *The Dialectics of Rights and Politics*, 61 N.Y.U. L. REV. 589 (1986).

15. For example, there is doubt that the fight for domestic violence legislation has significantly changed the level of actual protection for battered women. Policies of mandatory arrest, once considered key to success, no longer appear to be fruitful. See Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); J. David Hirshel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7 (1992). Similar doubts have emerged over whether statutory rape reform has had any substantial effect on conviction rates, let alone occurrence rates. See, e.g., JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 101 (1982); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1980).

require, however, a shift in power relationships or actions that make the continuation of gender oppression politically or economically costly to those in power. Legal discourse can play a variety of roles in the struggle for social change. Part of what it must do is to keep reminding us that law, like gender itself, is a central element of the social world. Yet simultaneously, the significance of law, like that of gender, is contingent and thus a focus for discourse and disputation.

The various contributions to this symposium both reflect and reflect upon the significance of gender in law, and the significance of law in defining the meaning of gender. Several contribute to the ongoing process of uncovering the ways in which legal doctrines that are neutral on their face perpetuate harm both to those who fit gendered stereotypes and to those who violate and threaten gendered roles.

Martha Fineman's article, *The Neutered Mother*, warns of the risk of a too facile degenderization of law in a manner that harms those women who lead the lives that our gendered culture has encouraged. Motherhood remains central to the lives of many women and mothering central to the lives of children. The rush to formal equality which characterizes much modern family law devalues these women's lives and the families defined by their relationship with their children. Professor Fineman decries the unholy alliance of liberal feminism and men's rights advocates that has ignored the concerns of most women and children in pursuit of a mythical gender-neutral world, and the erasure of the maternal that is both cause and consequence of the new legal-cultural regime.

The significance of women's relationships with children and the harms of a legal regime oblivious to the gendered aspects of women's lives also inform two of the student contributions to this symposium. Mario Trespalacios, in *Frozen Embryos: Toward an Equitable Solution*, calls for a contract-law derived solution to the dilemma posed by disputes over frozen embryos when the two possible parents change their relationship prior to implantation. His proposal, unlike those put forward by courts and prior commentators, takes account of the interests of the "more vulnerable party," recognizing the different biological realities of men and women in the context of the situations giving rise to frozen embryos.

Elizabeth Thompson's *Unemployment Compensation: Women and Children—The Denials* is a detailed study of the structure of state unemployment law and its effect on working mothers. She analyzes the ways in which doctrines embedded in many state statutes and cases have denied unemployment compensation to women who have had to leave a job or have been unable to accept a subsequent job offer

because of conflicts with their child-care responsibilities. The law's embedded vision of workers as being gendered male, without primary responsibility for children, has devalued and marginalized women workers and harmed them and their children. Ms. Thompson calls for the more widespread adoption of the unemployment law structures of California and Vermont, which recognize child-care responsibilities as part of the ordinary life of some workers.

Academic and popular writing about gender has focused primarily on the construction of the feminine. One of the contributors to this symposium, Michael Kimmel, has instead examined the construction of masculinity. In his article, *Issues for Men in the 1990s*, he considers a number of ways in which dominant visions of "manliness" evoke behaviors that are inconsistent with other demands of contemporary society, including the changing expectations women have for themselves and for men as a result of feminism. Professor Kimmel describes the dilemma created by the demands of masculine ideology for strength, success, and risk-taking in a world in which many men can respond to these demands only through socially dysfunctional behavior. This dilemma is acted out through sexual aggressiveness, the violence of street drug cultures, and "hypermasculine" AIDS-risking behavior, such as frequent unsafe sex and intravenous drug use. Professor Kimmel sees education and the development of alternative visions and rituals of masculinity, rather than inevitably ineffective legal structures, as the best response to male gender roles gone awry.

The conflicts between law and the social construction of gender can also operate to the disadvantage of those who break gender stereotypes, as illustrated by J. Cindy Eson in *In Praise of Macho Women: Price Waterhouse v. Hopkins*. She criticizes the Supreme Court in that case for not recognizing fully the implications of gender stereotyping on employment opportunities for women caught in the double bind: as women they are expected to be feminine, while as workers in jobs traditionally held by men, they are expected to exhibit masculine behavior. She notes that the Court properly saw this double bind applied to Ann Hopkins when she was criticized as "macho" and advised to walk more femininely. Gender-role stereotypes were likely also operating, Ms. Eson argues, when Hopkins was criticized for an "abrasive personality." She calls for a legal rule that would require employers in cases such as this to show that the criticism expressed in such purportedly gender-neutral language is, in fact, applied in a gender-neutral fashion.

Several of the contributors to the symposium deal with legal

issues involving gays and lesbians. With varying degrees of explicitness, they discuss the ways in which discrimination based on sexual orientation is a response to issues of perceived gender-role violations. David Pollack's comment, *Forced out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing,"* sensitively explores an important legal issue for the gay and lesbian community: whether there should be a cause of action for invasion of privacy for publishing the fact of someone else's sexual orientation. He notes the ways in which arguments on both sides of the issue are simultaneously legal, ethical, and political. "Outing" is the public exposure of an arguably private fact; it is also typically an act of substantial social significance, for it forces the non-gay public to recognize the paradox in, for example, the existence of Oliver Sipple, a man both gay and arguably a hero.<sup>16</sup>

Judith Stiehm explores this perceived role paradox in her article, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*. She describes the shifting, complex, but always formally restrictive policy of the military towards lesbians and gay men. She examines the asserted policy justifications for their exclusion from military service and cogently exposes each in turn. She suggests that the real concern may be that the admission that homosexuality is entirely compatible with military service is, given the societal images of gay men, inconsistent with the "ideology of masculinity," which is the military's reward to its service personnel for the hardships and risks of being in the military service.

Marc Fajer's pathbreaking article, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, explores in both breadth and detail the effect of gender-role stereotypes on the social and legal treatment of gay people. He notes that three interrelated sets of stereotypes about gay people serve to set them apart from the non-gay population and thus to justify discrimination and exclusion. First, gayness is defined as a lifestyle revolving around raw sexuality, untouched by romance or family. Second, expression by gays of their emotional or erotic lives is seen as "flaunting it" and condemned, while precisely parallel heterosexual speech is so "normal" as to be invisible. Finally, gay men and lesbians are perceived as exhibiting cross-gender behaviors and personality structures: gay men are effem-

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16. As Pollack notes, it was claimed that President Ford, whose life may have been saved by Sipple, refused to honor him because the category "gay hero" was politically unacceptable. David Pollack, Comment, *Forced out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing,"* 46 U. MIAMI L. REV. 711, 741-43 (1992).

inate while lesbians are mannish. In profuse detail, Professor Fajer describes the images and "pre-understandings" of the dominant community in which these beliefs are embedded. He then uses both data and a wide range of narratives to provide counter-stories to each belief, stressing the significant similarities between gays and non-gays.

In considering the subjects, styles, and conclusions of the articles and comments in this symposium, one is struck by a sociological pattern in the scholarship. Two of the contributors come from non-legal disciplines. Each draws on the subject matter of her or his own discipline in the policy conclusions reached. Professor Kimmel, a sociologist, considers law primarily as part of his data and recommends education and the development of new rituals of manhood as a corrective to the dysfunctionality of current gender-role expectations. Professor Stiehm, a political scientist, illustrates that courts have been consistently unwilling to use law to force a change in the military's policy against gays and lesbians. Instead, she sees the hope for change in classic political pressures—in the military changing its calculation of the net benefits of its exclusionary policy in response to "the guerrilla warfare that gay and lesbian advocacy groups are now conducting."<sup>17</sup>

The four student authors, all third-year law students, seem to believe in the power of legal scholarship to evoke doctrinal change and of doctrinal change, in turn, to make a difference in people's lives. Each of their notes includes a call for legal decisionmakers to change legal doctrine consistent with the author's normative vision. Such normative scholarship is typical of student writing (though it also describes a substantial portion of law review writing by legal academics).

The two experienced legal scholars in this symposium, however, are more skeptical of the relevance of reform of legal doctrine to progressive agendas. Both focus on law primarily as a system of rhetoric and images, rather than as a set of rules and doctrines. Professor Fineman takes on the role of an Old Testament prophet, exposing with righteous fury the way in which the material reality of motherhood has been erased from the law and the role that liberal feminists, with their focus on heterosexual bonding as the central meaning of family, have participated in that erasure: "It is the legal discourse, not society, that is now formally Mother-purged."<sup>18</sup>

Professor Fajer is equally insistent upon the power of discourse rather than rules. He briefly indicates the limited success of various

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17. Stiehm, *supra* note 4, at 686.

18. Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 660 (1992).



legal theories for battling discrimination against gays. Professor Fajer does sketch out a new theory, in which discrimination against gender-role violating homosexuals is a form of gender discrimination, much in the way that anti-miscegenation laws reflected and perpetuated discrimination against behavior that violated racial categories. The theory is presented almost off-handedly, however, without the abiding faith in legal theory one finds in classical normative legal scholarship. The heart of Professor Fajer's article is its presentation of narrative and its recognition of the centrality of stories to law's rules and beliefs. Unlike Professor Fineman, however, Professor Fajer radiates optimism. The piece is premised on the belief that new narratives *can* work to promote legal and social change. If Professor Fajer is right, then, his article—and the others in this symposium—may help transform the unnecessary restrictions and oppressions of law and of gender on all our lives.