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Introduction to Symposium on Toward a Feminist Theory of the State

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Introduction to Symposium on *Toward a Feminist Theory of the State*

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The day after the presidential election of 2016, many more Americans than ever had before woke up to the world my work has inhabited for the past 40-some years—*Toward a Feminist Theory of the State*[1] having largely been written in the early 1970s. It is the world in which sexual harassment, including rape, is normal and normalized by power, and men are the boys in the "boys will be boys" dismissing it. Here, the more power a man has, the more sexual abuse he can get away with. Women, regardless of qualifications, are not taken seriously, our policy ideas simply not heard; serious women (the un-fun kind[2]) become "nasty" when we call male power out. In this world, the more competent and accomplished a woman is, the more she can be resented and hated. "I don't like her" becomes an accepted reason not to vote for her; I never heard "I don't like him" as a reason not to vote for him. As if she ran for most popular.

Women in the millions do not value themselves in this world, not enough to think that misogyny matters enough to affect their actions, including their votes, even when the flagrant anti-woman attitudes admittedly bothered them, and they could oppose it in secret. During this election cycle, misogyny suddenly became a word people learned to use—newly dubbed "internalized misogyny" so women can have it too although it is not new that women have internalized it—as in women saying "yeah, it bothered me, but it's just personal," the personal as political memo

†. The participants in this Symposium have my heartfelt gratitude, admiration, and respect for engaging my work with such brilliance and courage. These introductory remarks are dedicated to Bob Stein, who as dean of the University of Minnesota Law School gave me a listen and—crucial to my survival—a job, at a time when no one else would or did. The speech I gave in 1980, "To Change the World for Women," which initiated our connection, is published for the first time at CATHARINE A. MACKINNON, BUTTERFLY POLITICS 11 (2017).

1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

2. *See* ANDREA DWORKIN, ICE & FIRE: A NOVEL 90 (Weidenfeld & Nicholson, 1st Am. ed. 1987) (1986) (placing "I'm a feminist, not the fun kind," in mouth of character in novel).

apparently not having been received. In this world, even when a woman gets the most votes, she doesn't win the election because of a system that women had no voice in designing. As with the Violence Against Women Act,[3] she was defeated by a stacked feature of federalism, an organization of "states" men designed to keep their distribution of power among themselves in a certain balance.

The 2016 presidential election further confirmed the view underlying the quotation of and reference to work by women of color in *Toward a Feminist Theory of the State* that they are exemplary of women. Instead of abstracting away attributes regarded as other-than-sex from women's social existence, *Toward* began methodologically with all women's social particulars, including race, without purporting to have fully developed the place of race in gender (or in class) before its full theoretical development had been further undertaken by its leading practitioners.[4] Contrary to the phony citations and essentialism

3. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down the civil remedy provision of the Violence Against Women Act as exceeding congressional authority under the Constitution).

4. For discussion and citations bringing thinking on the question relatively up to date, see Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 SIGNS 1019 (2013).

Although it is far from the most urgent question we face, and not precisely a question of intersectionality, racism on one level remains largely unexplained not only here but anywhere. Sexuality as a social construct is argued to be the animating dynamic in gender hierarchy in *Toward*: what gender hierarchy is about. What is racism about? It could be about power in all its forms, but so is gender, without thereby explaining it. Certainly, the consequences of racism are enough to bring about its end, and it can be attacked through descriptions of it of which there is no lack. But that is also the case with gender, without satisfying the explanatory question. Can something be ended without knowing what it is really about? It seems that people imagine there has to be something valid and essential under women's second class status, and that it cannot be ended without knowing what it is driven by. Could it be that people in general have gotten to the point, this election notwithstanding, where they do not think that about race anymore? Whatever the reason, there is a lack of urgency in explaining racial hierarchy: white supremacy, mainly. Maybe not having to ask what white supremacy is centrally about, what centrally drives it, means having gotten past the need to justify the humanity of the groups it subordinates, a point to which women as such have yet to arrive. Maybe nothing is learned from the lack of parallelism. But despite some explanatory attempts, people are not breaking their heads over this question regarding race as they have, and are, over gender. Race is extensively investigated without answering this question. Perhaps I am looking in the wrong places, but see, e.g., JOHN SOLOMOS & KARIM MURJI, THEORIES OF RACE AND ETHNICITY: CONTEMPORARY DEBATES AND PERSPECTIVES (Cambridge Univ. Press 2014). For quick overviews from various disciplines, surprisingly useful as entry points are the essays and bibliographies in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (2d ed., Amsterdam 2015) (see essays by authors Moses ("Race and Racism in the Twenty-First Century"); Fredrickson

lie of some critics,[5] *Toward* practiced an incipient intersectionality. It realized that women of color are the hardest to fool. The 2016 presidential election confirmed that it apparently takes White women four years of college to even begin to learn what women of color, regardless of educational level, already know.[6] The election also confirmed the simple point (seemingly it needed confirmation) that sexism has not been solved.

All this apparently being more out in the open than ever, now is as good a time as any, and better than some, to reflect on how class, and class consciousness or lack of it, shapes gender, and gender consciousness or lack of it: a relation between sex and class. In the present moment, White working class men ("White" having become maybe even a little bit marked?) who resent their economic situation brought their racial and gendered resentments with them, blaming the wrong people for their class position. In reality, they were resenting the effects of capitalism working as it is designed to work, such that someone—they in this case—will be in the situation they are in and resent being in. Their lack of class consciousness of this fact, with their gendered and raced attitudes, produced identification with the aggressor. In this light, it is no surprise that White working class women, who have never been middle class and are likely never to be—making middle class the latest euphemism for working class will not achieve this—do not identify with or as women, but with the men of the class they are with. As pointed out in *Toward*, women's class status is vicarious,

("Introduction to Racism"; "History of Racism"); Clair & Denis ("Sociology of Racism"); Augoustinos & Every ("Racism: Social Psychological Perspectives"); and Hervik ("Xenophobia and Nativism")); THE ENCYCLOPEDIA OF POLITICAL THOUGHT (Michael T. Gibbons ed., Wiley-Blackwell 2014) (see essay by Alexander-Floyd); ENCYCLOPEDIA OF POLITICAL SCIENCE 1417–20 (George Thomas Kurian ed., CQ Press 2011). *See also* LES BLACK & JOHN SOLOMOS, THEORIES OF RACE AND RACISM: A READER (Taylor & Francis 2002). Illuminating on historical dynamics is GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY (Princeton Univ. Press 2002).

5. I respond to these criticisms in general (not confined to *Toward*) in Catharine A. MacKinnon, *Keeping it Real: On Anti-"Essentialism"*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, 71–83 (Francisco Valdes, Jerome Culp & Angela Harris eds., 2002).

6. Data sets on the votes of these demographic groups from sources such as the Federal Election Commission and the Pew Research Center are not yet publicly available. Most major news outlets used the same exit polling data from Edison Research, which found that 43% of White women voted for Hillary Clinton, 52% for Donald Trump. White women with college degrees voted 51% for Hillary, 44% for Trump; White women without college degrees voted 34% for Hillary, 61% for Trump. Latinas voted 69% for Hillary, 25% for Trump. Black women voted 94% for Hillary, 4% for Trump. See *Exit Polls*, CNN, http://www.cnn.com/election/results/exit-polls/national/president (last visited May 9, 2017) and *2016 National President Exit Poll*, FOX NEWS, http://www.foxnews.com/politics/elections/2016/exit-polls (last visited May 9, 2017) to view and sort the data.

which does not mean it is not real. Compare the class status of Melania Trump now with her likely class status had she not married him. Class partly shapes gender for both women and men, including consciousness, and lack of consciousness, of it.

In this context, Katharine Bartlett rightly asked for a full theory of income inequality: how a system of economic subordination creates and maintains itself.[7] As she largely recognized, Marx has substantially already provided it. Combining my approach with his—as *Toward* began to do, the basics of which Max Waltman's Article explains clearly and accessibly, lucidly connecting *Toward*'s epistemological analysis with its critique of the state and its specific laws,[8] which Katharine Bartlett also recapitulates with focus on the class context[9]—the legal theory of substantive equality (as absent for race as for sex) addresses race and/or sex-based income inequality. Under it, the legal claim for comparable worth would be recognized, the lack of which is largely responsible for much income inequality, given that formal equality theory considers structurally unequal work (resulting in less income) to be a "difference" that permits treating it "differently."[10] Once structural sex- and race-based income inequality is addressed, the question becomes: how much of class-based income inequality is left? Some, surely; but for some reason the question has not been asked in this way. White men's income inequality is real, but it is the least of the income inequality problem.

Many more cross-cutting themes and observations connect these Articles, and are connected in these Articles—each a contribution to scholarship in itself—with *Toward a Feminist Theory of the State* and the ongoing realities we are experiencing. The sexualized animus that animates male dominance from the intimate to the institutional to the structural, analyzed as central to sex inequality in *Toward*, might also be termed misogyny. Its implementation is tellingly exposed in Joan Meier and Sean

7. Katharine T. Bartlett, *Feminism and Economic Inequality*, 35 LAW & INEQ. 265, 276 (2017).

8. Max Waltman, *Appraising the Impact of* Toward a Feminist Theory of the State: *Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws*, 35 LAW & INEQ. 353 (2017)

9. Bartlett, *supra* note 7, at 280–84.

10. See CATHARINE A. MACKINNON, SEX EQUALITY 247, 253–70 (Foundation Press, 3d ed. 2016), and Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, first published at 37 HARVARD J. GENDER & LAW 569 (2014), collected in CATHARINE A. MACKINNON, BUTTERFLY POLITICS 299–301 (Harvard Univ. Press, 2017) (discussing comparable worth).

Dickson's Article, confirming what has long been observed with anguish by mothers of sexually abused children, their lawyers, and support communities.[11] Accusing a father of sexually abusing his children often precipitates the granting of legal custody to him, the mother being deemed the "unfriendly parent" because she accused him. Knowledge of this regularity has been mainly experiential. The Meier and Dickson research shows preliminarily that, perversely, fathers accused of sexually abusing their children are more likely to be given custody of them than fathers not so accused.[12] It also shows that battering, which often includes rape, and can produce pregnancy, is still not a barrier to men's access to children.[13] Both of these situations scream out for a substantive sex equality approach in family law that grasps the place of state-supported sexual abuse. These realities regrettably support the critique in *Toward* that sexual abuse by men is a state-protected activity.

At the risk of repetition, since such sexual abuse is a major part of the substance of substantive equality, it seems worth clarifying the distinction between formal and substantive equality one more time. Sexism principally envisions a symmetrical system enforced by stereotypes in which the sexes are equally stereotyped. It is true that men as well as women are equally, even viciously, stereotyped, but that does not make the stereotypes equal. Male dominance and female subordination, masculinity over femininity, is not a symmetrical system. It is a hierarchical one, as explained with admirable lucidity and comprehensiveness by Max Waltman[14] and brilliantly extended by Shannon Gilreath.[15] Gender hierarchy defines the unequal, even lethal, content of the stereotypes as well as many other modes of enforcement that interact with them, such as physical force and money. Formal equality addresses sexism, or, as Katharine Bartlett clarifies, its illusions.[16]

Now look at the substantive sex inequalities underneath the formal sex inequalities the law recognizes as sex discriminatory. The substantive inequality underlying the statute in *Reed v.*

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11. Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311 (2017).

12. *Id.* at 326–30.

13. *Id.* at 327–28.

14. Waltman, *supra* note 8, at 359–63.

15. *See* Shannon Gilreath, *A Feminist Agenda for Gay Men (Or: Catharine MacKinnon and the Invention of a Sex-Based Hope)*, 35 LAW & INEQ. 289 (2017).

16. Bartlett, *supra* note 7.

Reed[17] was women's exclusion from the business world. In *Craig v. Boren*,[18] recognizing middle tier scrutiny where we are all moored, it was boys' cowboy drinking with dangerous driving. In *Frontiero v. Richardson*,[19] where women got the holy grail of strict scrutiny for a few plurality moments (the fact it is race discrimination's standard shows just how unholy it actually is), it was women's economic dependency on men. But notice, these underlying substantive sex inequalities were the reasons the authorities gave for their sex-based distinctions; they were the *defense* against recognizing that these laws discriminate based on sex. Those who argued that the laws were sex-discriminatory said women are not so illiterate and innumerate anymore even if they were before, boys do not in such huge proportions drink to excess and drive dangerously even though they do so far more than girls, and women are less dependent on men economically than they used to be. In other words, it was only by *denying* realities of the substantive inequality that is gender—women's continued disproportionate exclusion from the business world (and constituting the majority of the world's illiterate population), men's greater tendency to do the driving as well as to drink to excess and drive, and the economy's continued discrimination against women's economic self-sufficiency—or by pointing out that women had already partially overcome these problems all by themselves with no help from the law, that these facially sex-based statutes were struck down as sex discriminatory. The question is not what this approach did in these cases, but what it will do when faced with the underlying realities—some of the real terrain of sex inequality—that had to be denied to win them. Formal equality deals with sex-based illusions just fine. What about its realities?

What this means is that the more the underlying substantive inequality is real and persists in damaging women, the less the formal equality approach is designed to be able to stop it: you can't get there from here. Which is why we haven't. When courts find gender hierarchy, they think they have found the sex difference, so in treating unlikes unalike, discrimination is justified. Reflecting difference in law is equality, not inequality. This is highlighted most in the question of affirmative action, which is easier to justify for sex than for race because doctrinally race is a discriminatory illusion, not a discriminatory reality, so solving racism means race

17. 404 U.S. 71 (1971).
18. 429 U.S. 190 (1976).
19. 411 U.S. 677 (1973).

cannot be taken into account. The more clear the law is that something needs to be done about a real problem, the more difficult it becomes to justify doing anything about it under the formal equality approach. Recognizing the unequal reality of sex inequality, as the substantive equality does, has precisely the opposite result that the formal equality approach has to that same reality.

Once gender is grasped as a social hierarchy, not a sameness or a difference, it becomes obvious why substantive sex equality analysis has promoted gay rights[20] as Shannon Gilreath shows, and transgender rights[21] as sex equality rights, even if the substantive foundation is not expressly legally recognized.[22] Shannon Gilreath illustrates here, offering an inspiring unvarnished look at the realities of male power, uncompromised and incisive insights into the lethality of male dominant sexuality—so pure and exposed in the male-on-male context—with an intimate look at male desire free of the usual exoneration, converging on a cogent critique of much queer theory.[23]

These authors pursue, gyroscopically, the same sense of direction as substantive equality theory: the real issue of inequality is superiority and inferiority, valued over less valuable, richer and justifiably poorer, powerful over rightly powerless. The understanding accordingly that pervades these Articles that equality is not a morality, highlighted by Professor Bartlett,[24] may be the hardest point to get across in a liberal environment.[25] The Articles in this Symposium valuably treat sex inequality not as an issue of good and bad, but of power and harm. When substantive inequality is recognized as hierarchy of superior over inferior, sex equality is revealed not as a value but as a fact denied realization in social orderings and law, because women as a group are not, in fact, men's human inferiors. These Articles proceed on the assumption that once sex equality is a legal guarantee, the moral

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20. *See* Baldwin v. Foxx, EEOC Appeal No. 0120133080 (July 15, 2015); Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (en banc) (citing Oncale v. Sundowner Offshore, Servs., 523 U.S. 75 (1998) and *Baldwin v. Foxx*).

21. *See* Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that the revocation of a job offer from a transgender women violated Title VII's prohibition on sex discrimination).

22. Former students have produced legal results that I have urged for forty years.

23. Gilreath, *supra* note 15, at 295–307.

24. Bartlett, *supra* note 7, at 272–73.

25. Many call such environments "neoliberal." I mean classically liberal and have yet to see anything "neo" about those so labeled.

discussion over whether it is a positive value, a nice idea, a good thing to do, is over. The remaining question is whether a given practice (say, one challenged in a case) is an integral part of substantive inequality. With the issues faced in this Symposium—rape, pornography, homophobia, prostitution, sexual abuse of children, battering, income inequality—this question is not difficult.

On rape, the existing system is better at incarcerating people who did not sexually assault someone than those who did. This is in substantial part because it does not focus the definition of the crime on the people who have the most power to do it. Instead, it obsesses over the "consent" of the victim—typically the one who has the least power in the situation—ignoring the inequalities that produce the forms of force that give the people who rape the drop on the person they assault.[26] An inequality definition of the crime of rape would not focus enforcement efforts most on the people who have the least access to the forms of force that inequalities provide. With all respect to Stephen Schulhofer's lifetime dedication to creating a world in which only sex that women want happens, requiring that a rape defendant be aware that a sex partner is not consenting denies the well-documented effects of pornography consumption. Consuming pornography eroticizes power in the consumer. It makes the consumer believe not only sincerely, but the more pornography there is, the more the belief will look reasonable, that whatever someone is or is not saying or doing, they want to have sex. Max Waltman reports this research accurately and up to date; [27] Shannon Gilreath powerfully analyzes some of its consequences. [28] Unfortunately, it is not the case, as Professor Schulhofer mentions, that consent has been eliminated from Michigan's rape law, or that the redefinition of coercion operates for adult trafficking victims.[29] Given his lucid

26. *See* Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431 (2016).

27. Waltman, *supra* note 8, at 365–73; *see also* Max Waltman, The Politics of Legal Challenges to Pornography: Canada, Sweden, and the United States (2014) (unpublished Ph.D. dissertation, Stockholm University) (on file with Stockholm University).

28. Gilreath, *supra* note 16, at 297–99.

29. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335 (2017). As Professor Schulhofer says, in 1975, Michigan removed the element of lack of consent and refocused on "force or coercion," MICH. COMP. LAWS § 750.520a (2014), nor does "against her will" appear after that as an element of the crime. *See* People v. Nelson, 261 N.W.2d 299, 307 (Mich. Ct. App. 1977). Originally courts divided on whether consent as a defense existed. *Compare* Nelson, 261 N.W.2d at 307 (holding that consent is not a defense), *with* People v. Khan, 264 N.W.2d 360,

comprehension of my work on rape, and his accurate application of it to many issues in the law of rape, his omission of my principal critique—the *inequality* of its "many faces of force"[30]—is puzzling. What happened to that word?

In the dialogue at this symposium, one audience question invited consideration of women's involvement in peace by asking about the relation between *Toward* and my international work. Peace is not just men not fighting other men, although that appears to be its ruling international definition. At least, the definition of absence of peace has expanded internationally to encompass before men started fighting each other and after men stopped fighting each other—termed pre-conflict and post-conflict. Although international law has made more progress in this respect than has been made elsewhere, there is no square understanding that violence against women *is* a conflict in the sense the United Nations was created to stop. The conflict is gender-based and typically combines many inequalities in its execution. Violence against women is very unpeaceful and very insecure, yet is at best recognized as a threat to international peace and security, not as a violation of it. So violence against women persists every day in what is called peacetime.

Now that inequality as hierarchy is more exposed than ever, in which the good ol' boys bond to keep women second class, substantive equality is needed more than ever. A formally-framed Equal Rights Amendment (ERA) having been proposed before, an

366 n.5 (Mich. Ct. App. 1978) (holding that consent is a defense). Later decisions held that the defense of consent exists in some circumstances, e.g., "to negate the elements of force or coercion," People v. Waltonen, 728 N.W. 2d 881, 887 (Mich. Ct. App. 2006), or if it is a defense to another underlying felony, People v. Wilkens, 705 N.W.2d 728, 735–36 (Mich. Ct. App. 2005). The fact that no defense of consent lies in Michigan for those who cannot legally give consent, such as children, People v. Starks, 701 N.W.2d 136, 141 (Mich. 2005), the case for some time, see People v. Cash, 351 N.W.2d 822, 829 (Mich. 1984), suggests its presence otherwise. Consent has not truly been removed. Nor has force been redefined in inequality terms there, in Pennsylvania, or anywhere else in domestic law.

Confirming Professor Schulhofer's suspicion, I was deeply involved with others in creating 18 U.S.C § 1591 et seq. (2000). However (unsuccessfully opposed by many of us) no punishment is provided for coercion as so defined unless its victim is under age eighteen. In other words, the legislative override in practical terms applied only to children, its fix of United States v. Kozminski, 487 U.S. 931 (1988) at best partial. That the United States has ratified the Palermo Protocol, with its recognition that "abuse of power or a position of vulnerability," is a circumstance like force, fraud, or coercion that produces sexual exploitation in the sex trafficking context, has not been domestically implemented in this connection. *See* G.A. Res. A/55/383, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 2, 2000)

30. Schulhofer, *supra* note 29, at 340.

extended substantive ERA is now being formulated.[31] Having theorized feminism, we are now theorizing reality and practicing changing it. Having failed to shatter a ceiling few women get anywhere near, before many of us go back to sleep, these Articles forward the insistence in *Toward* that we raise the floor.

31. Follow The ERA Coalition at ERA COALITION, www.eracoalition.org (last visited May 9, 2017).