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Foundations for Feminist Legal Theory

Working Paper No. 46

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Prepared for Professor John Hall.

Abstract: This inquiry seeks to establish the foundations for Feminist Legal Theory through considering its three important dimensions. These dimensions are: a) a distinct and unique historical background; b) an ongoing legacy of occupational segregation; and c) a persistence of gender inequality. This inquiry relies heavily upon *Feminist Legal Theory: A Primer* (2016) authored by Nancy Levit, et al. Since the emergence of the area of inquiry known as “critical race feminism,” feminist legal theory has been moving away from the principle of formal equality and towards intersectional equity. Feminist legal theorists like Angela Harris (1990), in her work *Race and Essentialism in Feminist Legal Theory*, have driven the push away from gender essentialism and towards true political, social, and economic equity—the ultimate feminist goal.

***Journal of Economic Literature* Classification Codes:** J78, K00, P51

Key Words: Critical Race Feminism, Feminist Legal Theory, Legal Systems,
Nancy Levit, Occupational Segregation

This inquiry seeks to establish that feminist legal theory can be viewed as displaying at least three important dimensions. First, feminist legal theory displays a unique historical background. Second, feminist legal theory offers insights into the legacy and continued effects of occupational segregation. Third, feminist legal theory focuses on the persistence of gender inequality.

In *Feminist Legal Theory: A Primer* (2016, 12), Nancy Levit, et al. express that feminist legal theory seeks ultimately to incite change. As such, this inquiry is written in the spirit of normative sociology. This means that apart from considering “what is” to provide historical context, we shall aspire in the direction of “what ought to be”.

As a field for inquiry, feminist legal theory considers the economic, political, and social subordination of women through an extant legal system. Critical of this history of subordination, feminist legal theory aims towards altering the status quo.

Levit, et al. (2016, 9) describe four major categories of feminist legal theory. These are equal treatment theory, cultural feminism, dominance theory, and critical race feminism. Each of these theories are interconnected. Feminist legal theorists often reject being categorized into a single, unified

theoretical approach. The common thread within each of these four theories includes the repudiation of patriarchy and patriarchal institutions.

Part I. Historical Background

In *Feminist Legal Theory: Foundations (Vol I)*, author Kelly Weisberg (1993, 399) offers two definitions for patriarchy. The first suggests that *patriarchy* refers to a socially constructed system sustained by capitalism, and which creates gender norms. In this version of patriarchy, every member of society subscribes unconsciously. Cultural revolution is the only escape. The second definition of patriarchy is a process of learning in which women are subordinate to men, and the young are subordinate to the old. Indoctrination begins with the family and eventually graduates to all patriarchal institutions, like the economy. For the purposes of this paper, patriarchy is understood as a combination of these definitions: a socially constructed system in which women are subordinate to men.

Equal Treatment Theory

Levit, et al. (2016, 12) propose that, in the 1960s, feminist legal theory was founded upon the understanding of equality which incited the suffrage movement. This understanding of equality is referred to by feminist legal theorists as *formal equality*. The essence of formal equality is well described by the first type of feminist legal theory: equal treatment theory. Under equal treatment theory, women sought to gain the exact same rights as men. Early

efforts focused on gaining equal wages, employment, and access to government benefits. Equal treatment theory saw monumental gains in access to education and employment for women throughout the 1960s. Many feminists, though, took issue with the principle of formal equality. Levit, et al. (2016, 15) point out that formal equality regards the male experience as the norm and seeks to give women access to that experience. This view fails to acknowledge the differences between the male and female experience. Therefore, in arenas like bodily autonomy and divorce where men and women have profoundly different experiences, women are disadvantaged.

Cultural Feminism

Out of the critique of equal treatment theory, cultural feminism rose. Levit, et al. (2016, 15) emphasize that cultural feminism recognizes that formal equality does not equal equity. Situations in which there is equal access, equal opportunity, and equal law application do not always beget equitable outcomes. This can be understood in economic terms as unequal distribution. Cultural feminists call for laws and systems to account for the biological and cultural differences between men and women. For this, it is often called difference theory. This difference is most often viewed in the landscape of sexual violence and childrearing. The childrearing component

most directly impacts economic outcomes for women. Throughout the early 1970s, cultural feminism became the predominant feminist legal theory. Although many regarded cultural feminism's attempt to move in a progressive direction as an improvement over equal treatment theory, cultural feminism is flawed, too. Levit, et al. (2016, 18) identify cultural feminism's major flaw as placing women in the stereotypical, domestic societal station in the differences cultural feminism recognizes between men and women. This puts the responsibility for economic disparity partially on the shoulders of women by assuming that women tend to take lower wage professions that better allow for time off to take care of family responsibilities.

Dominance Theory

Levit, et al. (2016, 20) propose that dominance theory was the response to this issue with cultural feminism. Dominance theory argues that cultural feminists, like equal treatment theorists, use the male experience as the benchmark for normative analyses. Dominance theory takes a departure from both prior theories to focus on social institutions and cultural beliefs contributing to the patriarchy. The power differential between men and women supports sex discrimination in political, economic, and societal systems. In a patriarchal system like a capitalist economy, Levit, et al. (2016,

20) posit that male domination leads to the exploitation of women.

Exploitation and subordination thwarts women from reaching positions of power, thus furthering the patriarchal agenda. Dominance theory, like its feminist legal theory predecessors, describes womankind's experience with patriarchy as a shared consciousness that all women experience in the same way. This phenomenon is referred to by Levit, et al. (2016, 23) as *gender essentialism*. While seemingly benign, gender essentialism, becomes dangerous when faced with intersectionality.

Critical Race Feminism

Intersectionality recognizes that many women have multiple identities beyond being women. There are women of all race, socioeconomic class, sexuality, et cetera. Levit, et al. (2016, 23) acknowledge that gender essentialism universalizes the experience of white, wealthy, cis-gender, heterosexual women. Dating back to the suffrage movement, white women fought for white women's rights, while neglecting or even denouncing rights for women of color. This trend continued through early renditions of feminist legal theory, leading to the marginalization of minority women. In the late 1980s, women of color and lesbian women spoke out about their omission from feminist legal theory, pioneering the current predominant feminist legal

theory: critical race feminism. Anti-essentialists criticize gender essentialism. Levit, et al. (2016, 24) state that discrimination is not best understood from “the center of an oppressed group’s membership, but from the margins”. In order to truly dismantle patriarchal institutions and further the feminist agenda in the economic, social, and political realms, it is necessary to recognize the intersectionality of women’s identities and ensure that women’s equality is being considered through this lens. Further, Levit, et al. (2016, 27) stress that critical race feminism rejects race as biological, instead regarding it as a social construct. Any negativity attached to race is an invention within this construct. Recognition of race as a biological categorization would, based on economic indicators, support the idea that people of different races have different innate levels of intelligence and capability, which is emphatically untrue.

Part II. Legacy of Occupational Segregation

In the 1970s and 1980s, the Supreme Court of the United States heard a series of lawsuits that led to greater economic equality for women. These cases were argued by organizations like the American Civil Liberties Union (ACLU), the National Organization for Women, and the League of Women Voters. Despite these victories, women are still being blocked from total economic equality. This is a result of societal patriarchy causing occupational segregation. Occupational segregation is supported by economic patriarchy, which is difficult to fix because political patriarchy causes women to be underrepresented. Patriarchal institutions feed each other to continually inhibit gender equality, particularly in the economy.

Three-Pronged Cycle of Patriarchy

Weisberg (1993, 425) shares Levit, et al.'s perspective in emphasizing that patriarchy benefits from keeping women economically dependent. Patriarchy makes a distinction between the workplace and home life. Within this distinction, it enforces the notion that women are suited to home life, while men are suited to the workplace. This traditional set of values in which patriarchy finds its roots defines workplace policy. Consideration of the workplace as male leads workplace policy to be better suited to male needs

and experiences. This male-centric policy further pushes women out of the workplace and toward home life.

Cultural feminism presents many examples of workplace policies driven by male experience. Voluntary quit and disability policies are two common examples of male centered policies. Many organizations do not offer benefits to employees that cease working due to work-family conflicts. The strong majority (as a result of societal norms) of people who leave work for this reason are women. In addition, Weisberg (1993, 190) points out that in the case of disability policy, workplaces rarely cover for pregnancy-related disabilities. This is because cis-gender males have no need for that kind of insurance.

As a more blatant example of inequality in policy relating to employment, damages are discounted for women in tort cases. This is because damages are calculated as anticipated loss on future earnings. Levit, et al. (2016, 16) explain that it is assumed that women will have large work absences during childrearing years, and therefore will have lower future earnings. This assumption is solely a function of the societal aspect of patriarchy.

Lack of need for particular amenities, types of insurance, and types of benefits in the male experience means that workplaces will not offer them. Thus, when women are in the workplace, a patriarchally recognized male domain, they do not have access to necessary accommodations. Patriarchy sets the societal expectations for women. Then, the economic policy favoring male norms in patriarchal society severely disadvantages and discourages women's success in the economy.

Occupational segregation comes as a direct result of this inequitable policy. Patriarchal society mainly places the responsibility for childrearing and caring for elders on women. As Levit, et al. (2016, 21) detail, in response to this forced responsibility women are pushed toward jobs which have benefits matching these needs. These benefits might include generous maternity leave, or favorable voluntary quit policies. Often these jobs are lower paying and lower status. In *Women in the Legal Academy: A Brief History of Feminist Legal Theory* (2018, 984), Robin West adds that this expected responsibility placed on women also frequently leads to early departure from the workforce and little opportunity for career growth upon reentry. Beyond this, West (2018, 983) continues, even when men and women hold the same jobs, women are statistically paid less despite Title VII and the Equal Pay Act.

The societal facet of patriarchy drives occupational segregation, and this is backed by economic disincentives to work particular jobs. Even in the political realm, women are underrepresented. West (2018, 984) stresses that this underrepresentation makes it difficult for women to change these economic circumstances. These societal, economic, and political barriers work together to continue occupational segregation and a three-pronged cycle of patriarchy.

Combatting Economic Patriarchy

Weisberg (1993, 191) credits cultural feminism for proposing the idea that creating economic accommodations to pregnancy and parenting needs could be a viable place to begin improving economic equality. Equal treatment theorists would disagree, as this does not conform to the male centered idea of equality. Unfortunately, this adherence to formal equality in equal treatment theory is economically detrimental to women. For example, the shift away from maternal preference in custody disputes has, in the opinion of Weisberg (1993, 226), contributed heavily to the impoverishment of divorced women and their dependents. In order to maintain custody without preference, women have to be willing to agree to less financial support from their former partners. As women are already economically disadvantaged, this

can be extremely harmful to their wellbeing and the wellbeing of their children.

Without first revolutionizing the economic and social patriarchal structures, just changing the law to reflect formal equality is not effective. What patriarchy recognizes as culturally female responsibility (like childrearing and homemaking) has to transform to be accepted as non-gender-attached responsibility. Weisberg (1993, 249) emphasizes that the rewards reaped from this responsibility need to be equally shared, as well. Feminist legal theory regards gender as a social construct, within which equality itself is constructed. Complete equity in the economic realm cannot come to fruition without the dismantling and restructuring of these concepts.

Part III. Persistence of Gender Inequality

Critical race feminism leads the charge toward the future of feminist legal theory. While anti-essentialists reject gender essentialism, Angela Harris (1990, 586), in *Race and Essentialism in Feminist Legal Theory*, recognizes that at least some level of abstraction is necessary in order to incite real change. With that said, categorizations need to have fluid boundaries and be recognized as intersectional. Gender essentialism has, in feminist legal theory's history, led to diseases like racism and homophobia within the movement. Truly reaching the roots of gender inequality necessitates recognition of all women as intersectional beings with multiple identities. Harris (1990, 590) cites storytelling as the most effective way of creating a multivocal movement.

Storytelling allows the unique experiences of women with their unique combinations of identities to better define the feminist movement. Gender inequality is exogenous and endogenous to the movement. Feminist legal theory's transition to a critical race perspective aims to elucidate univocal aggressions both internally and externally. These univocal aggressions hinder gender equality because they discount a huge portion of women. This flattens the true nature of female experience. Without a well-rounded picture of

female experience, it is impossible to work toward true gender equality. The way in which patriarchy creates, feeds, and furthers gender inequality for wealthy, cis-gender, white women is already widely recognized. Now is the time to search for a complete picture of what stands in the way of the feminist agenda for all women, not just a specific subset of women.

Intersectional Inequity

Common measures of success and capability like standardized tests and employment credentials are heavily reliant on opportunity. Therefore, they not only favor men, but also favor wealthier, white people. This means that a poor woman of color faces three times more barriers to economic equality than a white woman does. It is impossible, then, to describe and pursue economic equality without intersectionality. Workplace policies also fail to account for intersectionality. Levit, et al. (2016, 24) give the example that in employment discrimination cases, only one form of discrimination is allowed to be claimed. Therefore, a woman of color could only claim sex discrimination or race discrimination, not both.

The stories of women at the margin of the movement are essential to understanding these policy failures and approaching remediation of these policies. In a movement driven by white women, as in earlier iterations of

feminist legal theory, these major issues would go unaddressed and unaccounted for. Making space for women of intersectional identities to bring needed depth and understanding to the feminist movement is vital to the progression of feminist legal theory.

The Future of Feminist Legal Theory

Critical legal theory aims to correct structures of the past. The first step in correction is recognition and observation of the structures. From 1960 to present day, feminist legal theory has transformed. Unfortunately, current societal, economic, and political systems were built upon patriarchal values. These centuries old institutions will be extremely difficult to overturn and revolutionize. But, with the current critical race feminism and intersectionality approach, feminist legal theory aims to do just that.

Education, in large part through multivocal storytelling, is the greatest weapon feminist legal theorists have against patriarchy. As feminist legal theory becomes more widely understood, it can be continually improved upon to beget real change. Right now, that change looks for equal distribution through equitable policy. This policy needs to address where the male and female experience coincides, and where it diverges. In some circumstances, equitable policy may take the form of formal equality, and in others, it may

insistently reject formal equality. A mixture of equal treatment theory and cultural feminism, with dominance theory's departure from male experience norms must come together to create an equitable map to gender equality.

Those served by patriarchy may be afraid of this change, misguided by the belief that more rights and opportunities for women, women of color, non-cis-gender women, non-heterosexual women, and everyone in between means less rights or opportunities for people who are not part of those groups. On the contrary, feminist legal theory does not seek to take away rights or opportunity. Feminist legal theory calls for ultimate equality. This equality, though, need be put in the context of the female experience and all the intersectional identities within the female experience.

Gender inequality's deep roots allow it to persist and thrive today. Despite this, the continued purveyance of feminist legal theory, championed by multivocal storytelling, drives toward gender equality, and threatens to revolutionize patriarchy.

Conclusion

This inquiry has sought to establish that feminist legal theory displays at least three important components. These components include a distinct historical background, a legacy of occupational segregation, and a persistence of gender inequality. Feminist legal theory has moved through many phases; from equal treatment theory to cultural feminism, to dominance theory, to modern day critical race feminism. Each perspective contributes something unique to the study of feminist legal theory, and many feminist legal theorists consider their philosophy to be a mixture of multiple of these theories.

Contemporary culture remains founded upon patriarchal institutions. In particular, societal patriarchy has caused occupational segregation that is reinforced by economic patriarchy. This system has contributed profoundly towards the feminization of poverty and a seemingly embedded disparity between the economic standing of men and women. There is obvious gender discrimination in the economy, as seen by the wage gap. Beyond this, though, we can observe an even more insidious contributor to economic gender inequality: namely, male experience centered workplace policies. Failures of policies to appropriately and effectively support women in the workplace prove less visible, but equally as detrimental to the economic wellbeing of

women. In addition, a lack of political representation makes it difficult for women to change such policies to account for their experience.

In order to move forward towards gender equality, feminist legal theory is transitioning into a multivocal movement. Its focus on intersectionality has broadened and deepened the understanding of what gender equality signifies. Storytelling from the margins of the movement could assist in shaping feminist legal theory in the future, while paving a way for a meaningful experience of equality, not just equality for the center.

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