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Foreword - InterSEXionality and the Strategy Question

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FOREWORD

INTERSEXIONALITY AND THE STRATEGY QUESTION

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This issue of the *Denver University Law Review* is the culmination of the University of Denver College of Law's annual symposium process. One of our most distinctive activities at the College of Law is the Denver symposium. Each year a group of Denver faculty, in collaboration with the *Law Review*, selects a symposium topic which we think raises newly identified or persistently difficult issues throughout law and society. Members of the Denver faculty then meet weekly to discuss readings on the topic along with our "regulars" who have included law review editors[1] and several dedicated interdisciplinary local scholars who schlep to the law school each Friday afternoon.[2] Along the way, we organize a round-table conference to which we invite both new and established interdisciplinary scholars who study the topic. We have been extremely fortunate in past symposia to have enjoyed participation by superb scholars on Unconstitutional Conditions (1995),[3] The New Private Law (1996),[4] and Coercion and Exploitation (1997).[5] This year our good fortune multiplied for our 1998 symposium on InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory. We enjoyed stimulating presentations and engaging exchanges among our local faculty and our guests, Professors Nan Alamilla Boyd, Patricia Cain, Mary Anne Case, David Cruz, Karen Engle, Katherine Franke, Jean Love, Ana Teresa Ortiz, Jane Schacter, Kendall Thomas, and Francisco Valdes. The contributions collected in this issue represent the written part of this in-

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1. The Denver model owes much to the students who helped create it, with a particularly high standard set by the editors of our first collaborative faculty-student symposium issues. Lisa Banks, 1995 Symposium Editor, first approached me about her idea of a faculty-student collaboration. For our 1996 issue, Sue Chrisman, Editor-in-Chief, and Tracy Craige, Symposium Editor, regularly attended our reading group. They each provided editorial service above and beyond the call of duty, editing months after they graduated. This year their shoes were ably filled by Symposium Editor Karla Robertson, who expanded our tradition by being the first student selected to contribute a Note on the symposium topic.

2. We are extremely fortunate to enjoy the regular participation of Professor Susan Sterett who teaches political science at the University of Denver and Professor Catherine Kemp who teaches philosophy at the University of Colorado at Denver.

3. Symposium, *The Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 857 (1995).

4. Symposium, *The New Private Law*, 73 DENV. U. L. REV. 991 (1996).

5. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

terdisciplinary dialogue, which focuses primarily on the regulation of sexuality and the intersecting relationships between sexuality and sex, gender, sexual orientation, race, and class.

One broad question emerges from this year's dialogue on Inter-SEXionality,[6] namely, what strategies will best serve to end subordination, whether based on sexuality or other classifications, such as gender, race, or class. The common mission assumed by this question, that of ending subordination, may be subject to challenge. While each of the commentators here might describe his or her interests differently,[7] their perspectives share substantial agreement with that purpose. Considerable disagreement emerged, nonetheless, about the desirability of various strategies aimed at achieving this end. Let me hasten to add that this disagreement was unfailingly friendly. But the persistence of disagreement over strategy calls for further analysis, both to make the best selections of strategy for ending subordination and to create awareness of the method-based fault lines which could fracture the anti-subordination community of scholars. Anti-subordination communities have learned these lessons before. We do not want to leave any stone unturned in our search for the best strategies for ending subordination. Nor do we want to throw sticks or stones at one another when we disagree about those strategies. In these regards, this symposium serves as an excellent model for respectful but challenging probing of fundamental disagreements and their implications for future anti-subordination strategy.

Each contribution proposes or critiques various strategies for countering subordination based on sexuality. I will briefly summarize the articles, which follow in the order they were presented at the symposium.

Leading off, Katherine Franke's article critiques the characterization of particular conduct as sexual.[8] In exploring the concern she shares with

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6. As the Denver reading group planned this symposium, we identified several questions which emerged from literature on the regulation of sexuality: Who is included (and excluded) in constructions of sex, gender, and sexual orientation? If gender is a residual category, as some scholars suggest, what are its boundaries? Can law recognize a queer identity based on a belief system rather than on status or conduct? Do minority sexual orientation and gender identities undermine or buttress the compulsory construction of heterosexuality? Can legal doctrine accommodate the insights of queer theory, which generally eschews essentialism, or are concrete identity categories essential to legal approaches to civil rights and personhood? Can Queer Theory and Critical Race Theory inform each other? How does capitalism inform the creation of gay, lesbian, bisexual, and transgendered communities? The papers collected here address all these questions, and many more.

7. Mary Anne Case, for example, argues convincingly that "[t]he constitutional principle that '[t]here is no caste here' is not cashed out by '[t]here is no subordination' here." Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1315 (1998). Case urges something more than an end to subordination. She offers a reminder that "the Constitution guarantees liberty as well as equality; indeed, the constitutional equality norm itself has regularly been interpreted to guarantee equal liberty." *Id.* at 1316.

8. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998).

Michel Foucault that sex not be "legally inscribed on the body,"[9] Franke provides three gripping accounts of "putting sex to work," principally concerning herself with how each practice is marked as sexual and the ways in which this demarcation masks the deployment of sex "as an instrumentality of multiple relations of power."[10] First, she contends that a ritual traditionally practiced by a tribe in Papua New Guinea requiring boys to fellate men so as to ingest semen for masculinization is really not homosexual, but rather a homosocial custom. Second, she argues that the anal penetration of a Haitian immigrant with a toilet plunger by two New York City police officers, if sexual at all, primarily served the interests of race and gender-based torture. Third, she describes the horrific and systematic sexual violence waged against Muslim and Croatian men and women by Serbian soldiers as another example of sex put to work for racial, ethnic, religious, gender-based, and political persecution. Franke endorses the United Nations' prosecutorial model which both recognizes the specifically sexual elements of the assaults without deploying that demarcation to limit recognition of the broader torturous and genocidal natures of these violent acts. With this contribution, Franke moves us beyond the characterization of conduct as sexual toward understanding sex as an instrumentality of other power relations. One wonders whether sex is ever free of such instrumental manipulation.

In her contribution, political scientist Susan Sterett explores the emergence of pension benefits in the late nineteenth and early twentieth centuries, using history to reveal the difficulty of anticipating the effects of any particular strategy.[11] Sterett explains how the development and expansion of pensions for civil war veterans, firemen, and policemen turned on judicial justifications which favored rewarding men who undertook dangerous service to the state and providing charity for their dependent wives and children. While such benefits might be applauded for providing greater financial security for many women, Sterett argues that they reinforced both traditional gender roles for men and women and normative heterosexuality. Through analysis of appellate opinions deciding the constitutionality of government pension spending, Sterett suggests that pension law structured what it meant to be a proper (courageous/masculine) husband and proper (dependent/feminine) wife, and also what it meant to be a proper (heterosexual) family. Like other commentators, Sterett never asserts that either gender roles or heterosexual norms would have been destabilized if the events she studied, the development of pension benefits, had not occurred as they did.

Martha Ertman endorses the use of a traditionally conservative set of tools—market constructs and commercial law—to serve progressive

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9. *Id.* at 1179.

10. *Id.* at 1143.

11. Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998).

ends.[12] In her article, Ertman expands on her strategy of employing commercial law tools as a means to reconstruct marriage. Ertman argues that traditional marriage is a credit relationship in which a primary homemaker extends credit to a primary wage earner in the form of homemaking services and lost opportunity costs. If the marriage endures, the primary wage-earner will discharge the debt by sharing his ideal worker wages with the primary homemaker. If not, Ertman's proposed premarital security agreement will govern, allowing the homemaker/creditor to collect on her loan by using the designated collateral to satisfy the debt. Ertman anticipates how queer legal theory will receive her proposal to commercialize marriage, arguing that commercializing marriage with premarital security agreements will serve the interests of queer theory by revealing the constructed nature of heterosexual marriage, allowing for gender performativity, intervening in conflations of sex, gender, and sexual orientation, and creating space for same-sex marriage. Who can know for sure whether Ertman's commercial tools will reconstruct traditional marriage, or merely ratify it?

Jane Schacter offers commentary on both Martha Ertman's proposal for premarital security agreements and Susan Sterett's historical analysis of pension benefits.[13] Schacter reminds us that particular strategies may, or may not, have their intended effects once they are "received, understood, and shaped in the diffuse, collective social processes that give meanings to these strategies over time."[14] Schacter argues that legal change without cultural change is not likely to alter underlying inequalities, and thus fears that Ertman's proposed premarital security agreements may be more likely to reinforce the gendered status quo of heterosexual marriage given the dominant cultural context that makes marriage nearly compulsory. Schacter notes that Sterett's historical analysis of pension benefits shows how those financial incentives reinforced the gendered status quo. Rather than risk reinforcement of marriage and all that it entails, Schacter urges us to think more deliberately about how best to achieve "a genuine pluralism of affiliative structures."[15] While Schacter carefully articulates her well grounded fears, she claims no easy method for determining when a strategy is likely to do more good than harm.

Karen Engle focuses directly on strategy, criticizing that used by gay rights proponents to counter their opponents' charge that gay rights are special rights.[16] Engle first differentiates the meanings of special

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12. Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998).

13. Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255 (1998).

14. *Id.* at 1256.

15. *Id.* at 1259; *see also id.* at 1264.

16. Karen Engle, *What's So Special About Special Rights?*, 75 DENV. U. L. REV. 1265 (1998).

rights as used by gay rights opponents, noting their general conflation of civil rights and special rights. She then criticizes gay rights proponents generally for not adequately responding to special rights critics, and specifically for perpetuating a negative view of civil and special rights. Engle relies on Holmes's definition of special rights as those legal consequences attached to a group based on the special facts which uniquely make up the group. Calling for gay rights advocates to argue for special rights because the "facts" call for them,[17] Engle thus provocatively employs a formalist distinction between fact and law to argue against gay rights proponents' "very liberal (read conservative) understanding of civil rights."[18] The question remains whether this formalist tool can serve Engle's progressive ends.

Mary Anne Case continues to defy queer theory fashions by openly wearing the liberal label and urging strategies aimed at achieving "liberal individualism and universalism."[19] Her article responds to Frank Valdes's use of the berdache as a model of successful disaggregation of sex from gender.[20] Case makes the point that, although the berdache depart from norms requiring alignment of male sex and gender by being biologically sexed male and socially gendered feminine, they still occupy a separate sphere in Native American culture. Even if their separate sphere enjoys a purportedly equal status, she argues that the berdache still reify the separate categories of masculinity and femininity and enforce a gendered package, albeit a different one. Case compares the separate sphere enjoyed by the berdache to that afforded their counterparts in the documentary movie *Paris is Burning*, the novel and movie *Midnight in the Garden of Good and Evil*, and the play and movie *Tea and Sympathy*. Because creating separate spheres based on any distinctions between sex and gender perpetuates the dangers of castes, Case urges discarding any distinction between sex and gender, much as the distinction between "noble" and "base" was discarded. As she urges unpacking all package deals, Case leaves you wondering whether any ties bind traits within a person or among people.

Patricia Cain explicitly employs the feminist consciousness raising method to better understand transsexual people, sharing some of her own experiences as a lesbian and retelling the stories of several female-to-male (FTM) individuals as well as those of people who are intersexed (meaning that they combine both male and female biological traits) or are intergendered (meaning that they combine both feminine and mascu-

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17. *Id.* at 1266–67, 1302–03.

18. *Id.* at 1302.

19. Case, *supra* note 7, at 1319.

20. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

line traits).[21] Cain's stories bridge the gap of understanding between lesbian women and FTM individuals, serving as a model for continuing exploration of the experiences of people who are sex or gender minorities. On a doctrinal level, Cain suggests a strategy for incorporating sex and gender minorities into existing legal protections by reconceptualizing anti-discrimination jurisprudence. No doubt, telling the little known stories of marginalized sex and gender minorities is an important first step.

In her paper, historian Nan Alamilla Boyd explores the queer community's focus on visibility politics as its primary means of achieving civil rights.[22] Boyd "challenges the liberal equation that visibility realized through mainstream marketplace accommodation equals or reflects enhanced political strength for queers."[23] She cites the recent rise of advertising targeting gay and lesbian consumers as enhancing mainstream visibility, but suggests that this neither reflects nor creates increased hope of legitimacy or civic recognition. She then juxtaposes the experiences of the Tavern Guild of San Francisco in the 1950s and 1960s, showing how a marketplace activity successfully transformed one gay bar subculture into a social movement for the primary purpose of protecting the bars from police harassment, though never becoming mainstream. After exploring both disadvantages of mainstream visibility and alternatives to visibility politics, Boyd concludes that some queer marketplace activity holds the presumably greater promise of encouraging queers to be subversive rather than to assimilate. Boyd does not predict that more subversive activity will lead to enhanced civil rights for queer people. Somehow one doubts that is her only goal.

Karla Robertson's Note focuses on deconstructing marriage by using bisexual orientation as the lens through which to view the legal regulation of marriage.[24] Because Congress and the courts allow people of bisexual orientation to legally marry opposite sex spouses, Robertson argues that neither heterosexual orientation nor even love or companionship is necessary, or even very relevant, to be eligible to legally marry. Through her analysis of cases and statutes, Robertson instead reveals that family law treats the spouses' capacities for penis-vagina penetration as the determinative criterion for validation of marriage. In doing so, Robertson reveals that the many legal, financial, and social benefits attached to marriage are conditioned on the capacity to engage in this specific sexual conduct. While Robertson exposes an enormous gap between the romanticized rhetoric surrounding marriage and the actual sexual test for

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21. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998).

22. Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361 (1998).

23. *Id.* at 1362.

24. Karla C. Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375 (1998).

marital fitness imposed by family law, she leaves open the question of the best strategy for closing the marital gap.

As these papers demonstrate, the strategy question is open to debate among scholars who study the regulation of sexuality. At the broadest level, the pieces address how we can best reconstruct law and society so that they honor both equality and liberty, sexual and otherwise. More specifically, they engage a number of elements of the strategy question. For example, should we seek to mark sexuality, as well as sex, gender, sexual orientation, race, class, and the like? While many scholars are busily marking previously unmarked sexuality, Franke urges caution, particularly when the sexual label masks enforcement of other oppressive norms, such as those based on race, ethnicity, gender, or religion. Yet Cain forges ahead with the marking project, telling and seeking to understand the stories of sex and gender minorities as instances of sex discrimination.

What models should we follow to transcend the limitations of norms related to sexuality, sex, gender, sexual orientation, race, class, and the like? Valdes previously offered a model of the berdache for our study and emulation. Case argues that such a package model of different sex and gender combinations will perpetuate existing categories and castes.

What about the sameness/difference debate? Are civil rights for gay people special or not? Proponents argued that gay rights are not special, but Engle thinks they erred and should argue instead that the special facts of anti-gay discrimination justify special rights.

Can traditionally conservative tools be used for progressive ends? Case urges adoption of liberal means and ends, while Engle refers to one liberal conception of civil rights as conservative. Yet Engle also employs a formalist distinction between fact and law to justify special rights for gay people. Also, Ertman employs tools of the commercial market to reconstruct marriage. Yet Sterett's pension example and Schacter's analysis urge caution, both about whether these tools are likely to reconstruct marriage, and whether marriage perhaps should be deconstructed instead of reconstructed. On the market question, Boyd weighs in somewhat ambivalently, endorsing market activity, but only for purposes of subversion, not assimilation. On the marriage question, Robertson focuses on deconstruction, but leaves open the possibility of reconstruction.

Should scholars concern themselves with the strategy question? For an impassioned answer to this question, read Frank Valdes's Afterword.[25] Valdes offers a tour of the history and contemporary challenges of queer legal theory, exhorting social justice scholars to a multidimensional dis-

25. Francisco Valdes, *Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998).

course that leaves out no experience in constructing both the details and the larger mosaic of human sexuality.

In addition to providing insights on the strategy question, the participants in this Denver symposium employ a variety of tools for deconstructing or reconstructing sexuality and its legal regulation. While some focus on understanding the experiences of a particular *class* of people, such as Engle on gays and lesbians and Cain on transsexuals, others emphasize *classifications*, such as Case's ongoing deconstruction of gender. Various commentators explore the *intersectional* relationships between one classification and others, such as Franke's exploration of sex and gender, race, etc. Whereas some follow an *inter-doctrinal* approach, such as Ertman's incorporation of commercial law into family law, others use *interdisciplinary* approaches, especially Boyd's and Sterett's uses of history. These examples do not exhaust the approaches used by any of the contributors, most of whom wield multiple tools to challenge or subvert the legal status quo. By contesting fundamental presumptions about classes of people, classifications of traits, and intersections among these classes and classifications, as well as by questioning the validity of any categorization, all of these approaches "queer" legal theory.[26]

Sexuality is a rich and complex part of the human experience. As our symposium participants discovered, its study certainly provides for a lively discourse. The contributions collected here offer a little of everything for the scholarly connoisseur, from Boyd's bar culture, Cain's transsexual stories, Case's movies, Engle's legal texts, Ertman's interdoctrinal borrowing, Franke's globe-trotting, Robertson's sexual descriptions, Schacter's caution, Sterett's history, to Valdes's passion. Our hope is that you will read them with a mind both open to understanding new ideas and eager to challenge them in the dialogue that moves forward in this fourth annual Denver symposium.

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26. For a further discussion of queering legal theory, see Ertman, *supra* note 12, at 1240–42.