2003

Two "Colored" Women's Conversation about the Relevance of Feminist Law Journals in the Twenty-first Century

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TWO "COLORED"[+] WOMEN'S CONVERSATION ABOUT THE RELEVANCE OF FEMINIST LAW JOURNALS IN THE TWENTY-FIRST CENTURY[++]

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INTRODUCTION

The invitation to participate in the Columbia Journal of Gender and Law symposium on the relevance of feminist law journals provided an ideal opportunity for us to reassess our collective endeavors as teachers, scholars, and advocates committed to social justice. Feminist methodology and epistemology have been instrumental in shaping our conceptual frameworks. So, too, have other theories of law that seek to unearth the structural impediments, hidden biases, and methodological limitations of the law in redressing injustice.

As black women (one from the United States and the other from South Africa), the concerns of race have been central to our analysis of the world and in our decisions to be lawyers. It is through the prism of racial discrimination that we confronted injustice, and our early endeavors, both academic and practical, used law as an instrument to eliminate injustice. Feminism came into our lives later, but it served to enrich our analysis about overcoming all impediments to equality. This was particularly important as the focus of equality both in the United States and South Africa served to privilege racial equality while ignoring the intersection of race and gender on the status of women. Feminist law journals have been an

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[+] During the Apartheid era in South Africa certain "mixed-race" individuals were classified by the South African government as "colored" as opposed to African, Indian, or white. At various points in United States history, people with known African ancestry either called themselves, or were called, "colored." Thus, we use the term "colored" in the title as both a descriptive and ascriptive term suggesting that sometimes *cultural race*, a voluntary identification, is so intertwined with *externally imposed race*, that separation of the two is impossible. How we see ourselves and how others see us shapes our vision of the world.

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indispensable part of our intellectual journeys—one that we plan to continue on as the nature and forms of discrimination alter.

We embarked on the conversation that follows in an attempt to assess the influence of feminist law journals on our lives and scholarship, and where we would like to see feminist law journals go in the future.

The conversation begins:

Taunya: One of the initial questions posed by the conveners of this symposium was: "What is the historical meaning of feminist law journals? What resonance do they have for law students, professors, and lawyers today and at their inception?" Perhaps one answer is that almost twenty years ago, feminist law journals were established to create *safe spaces* for students and professors interested in gender issues, considered soft scholarship.

Twenty years later many of the subjects embraced in the early years of feminist journals, like reproductive freedom, equal employment opportunities, rape, sexual harassment, and domestic violence, have become mainstream, and are as likely to appear in traditional law journals as they are to appear in feminist law journals.[1] Articles by women legal scholars on a wide variety of legal topics appear with regularity in all types of law journals. So, do you agree with my starting premise about the reason for feminist law journals, or is that premise also contested?

Penny: I agree with your first premise. However, one could argue about whether contemporary feminist legal scholarship, although still treated with some skepticism in traditional legal circles, is no longer regarded as "soft" scholarship. But your premise about the origins of feminist law journals is correct.

Taunya: On second thought, however, our premise that feminist scholarship has been accepted in mainstream law reviews may be illusory since an article by Laura Rosenbury that also appears in this issue of the journal, looking at the content of law journals between 1978 and 2002, found that only 189 out of 1,637 "feminist" articles were published in mainstream law journals.[2] On the other hand, your definition of what constitutes feminist scholarship may differ from Professor Rosenbury's. Thus, the difference between perception and reality may depend on the feminist issue presented and whether the

[1] *See* Laura A. Rosenbury, Feminist Legal Scholarship: Charting Topics and Authors, 1978-2002, 12 Colum. J. Gender & L. 446 (2003) (comparing contents of articles in feminist journals and feminist articles in prestigious law reviews).

[2] *Id.* at 447-48.

argument being advanced in the article is consistent with or at odds with what we call mainstream legal scholarship. Some issues, usually involving formal equality, are clearly mainstream, while other issues are not.[3]

Penny: I do not know if I would accept at face value this clear demarcation between "mainstream" and "other." I am not sure that this binary takes account of the contextualized and fluid nature of these concepts. I think that these definitions need to be problematized somewhat, since what is mainstream is often contingent on a whole host of extra-legal factors, including timing. If one, for example, looks at the development of the law regarding sexual harassment, you notice that the issues moved from the margins to the mainstream fairly rapidly. Most of these developments occur not so much in a linear fashion, but rather as a consequence of extra-legal processes which impact on the perception of the issue, that is, mainstream or other.

Taunya: Perhaps a more accurate statement is that some forms of contemporary feminist legal scholarship have become mainstream, but not others, and then ask whether these "less conventional" feminist theories are more likely to be found in feminist journals than in mainstream journals. Perhaps feminist journals need to exist to help feminists push the envelope to provide a space to discuss "less conventional" feminist subjects and theories and promote more honest intra-feminist critiques. We are in need of a new coherent, all-inclusive vision of feminism to replace the mainstream American model. Thus, the goals of feminist law journals must be reworked to provide a forum for non-white women and less powerful women globally.

Penny: But have feminists succeeded in pushing the envelope? I think, as a general proposition, that one can think of mainstream feminist journals as succeeding on many levels, and possibly even with respect to inclusivity. I want to return to the original point about the *raison d'etre* for feminist law journals, that is, the production of knowledge from a feminist perspective and access to knowledge for women and other scholars committed to principles of gender equality. One can argue that the feminist legal project in this regard has been successful. In other words, feminist law journals have provided an indispensable context for the development of alternative approaches to legal knowledge which place women's concerns at the center.[4]

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[3] Professor Rosenbury found that few journals, feminist or mainstream, contained articles about women and poverty. *Id.* at 458-59.

[4] *See* Feminist Legal Theory: Readings in Law and Gender (Katherine T. Bartlett & Rosanne Kennedy eds., 1991).

What has been essential in the reproduction of a feminist epistemology has been the challenge to concepts such as "objectivity" and "neutrality." Here feminist legal scholars have been fellow travelers with other critical legal scholars (especially those who focus on questions of racial discrimination and wider questions about justice). In other words, the challenge to the "natural order" of racial hierarchies in this country also allowed for the challenge to the "natural order" of gender hierarchies.[5]

If I were exploring these questions in a longer paper, I would go beyond the borders of this country to explore the role of feminist law journals in examining and highlighting the feminist condition rendered by global processes of exclusion and marginalization. My exploration of these issues would raise questions about the relevance of feminist legal scholarship to the lives of less affluent women around the globe and the possibilities for legal and other reforms generated by such scholarship.

Taunya: Your last point about the role of feminist law journals in examining and highlighting the global feminist condition with respect to marginalization and exclusion is important, and seems confirmed by Professor Rosenbury's study.[6] A harder question, however, is how to determine whether an article accomplishes this goal. I am thinking about Isabelle Gunning's critique about Western feminists' condemnation of genital mutilation—without consulting or considering the perspective of the non-Western women whose rights they claimed to protect—the imposition of Western values and perspectives on non-Western cultures.[7]

Penny: More importantly, and distinct from the question of accountability to those whose rights are apparently being protected (the non-Western abused woman), is the very concept of "culture." My impression is that feminist law journals have interrogated quite thoroughly the subordination of women through a variety of cultural

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[5] For a discussion about these issues in the Australian context, see Penelope E. Andrews, Violence Against Aboriginal Women in Australia: Possibilities for Redress from the International Human Rights Framework, 60 Alb. L. Rev. 917 (1997); *see also* Critical Race Feminism: A Reader (Adrien Katherine Wing ed., 1997).

[6] Rosenbury, *supra* note 1.

[7] Isabelle Gunning, Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 Colum. Hum. Rts. L. Rev. 189, 191 (1992). A more recent example is the unintentionally harmful interventions by feminists and human rights groups on behalf of Amina Lawal during ongoing judicial proceedings. Ms. Lawal was sentenced to death by stoning under Nigerian Shari'a Penal Legislation for allegedly having a child out of wedlock.

mechanisms in non-Western societies, or in minority non-Western communities within the United States. Sometimes feminist scholars have accomplished this laudable task with or without the collusion of non-Western feminists who live in the United States, or the country in which the particular culture is located.[8] What is of concern to me, and goes back to your point about "pushing the envelope," is whether this has been done in a theoretically candid manner.

What do I mean by this? The discussion about culture always occurs as if culture is "out there." As some Third World feminists point out, often culture is treated as if it belongs only to the "other."[9] So, the discussion in feminist law journals, even when driven by feminist sensibilities of solidarity and the new feminist universalism, does not take account of the culture *within* the United States.[10]

Let me offer an example: this country is probably one of the more formally equal societies in the world. Yet one of the phenomena of this liberated society is the excessive amount of money that middle-aged and middle-class women spend on cosmetic surgery and products such as botox to reduce the ravages of age. What kind of liberation is this? What kind of culture allows women to engage in a form of physical mutilation to avoid the inevitability of aging? What kind of cultural message is being transmitted to young women; that equality is not so much about changing women's material conditions (wages, conditions of employment, fundamental rights to reproduction, and so on) but more about continuing an image of women that takes us back a few centuries? It is an elitist preoccupation that has enormous cultural and economic consequences for all women in this society.

Taunya: Are you critiquing the hyper-capitalism and materialism of late twentieth-century America, or does the dominance and prominence of Western (predominately United States) culture simply overshadow other types of physical enhancements done by women in other countries—some, but not all, influenced by the Western media? I am thinking of genital circumcision, or the popularity of skin lighteners and hair straighteners in African and Caribbean countries.

Cosmetic surgery also is fairly routine for middle-class and affluent women in Latin American countries like Brazil and Eastern countries

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[8] *See* L. Amede Obiora, Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision, 47 Case W. Res. L. Rev. 275 (1997).

[9] *See, e.g.*, Gunning, *supra* note 7; *see also* Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Global Feminist Legal Politics, 15 Harv. Hum. Rts. J. 1 (2002).

[10] *See* Fedwa Malti-Douglas, As the World (or Dare I Say the Globe) Turns: Feminism and Transnationalism, 4 Ind. J. Global Legal Stud. 137 (1996).

like Japan and South Korea. Women's global concern with physical enhancements simply illustrates how, even in affluent countries where women have more wealth, real power and wealth still lies with men. Perhaps Virginia Woolf was wrong when she said that women need their own money and a room of their own. These things do not seem to solve the problem, and I suggest that Andrea Dworkin might have been on to something in her book Intercourse.[11] Too many affluent heterosexual American women, like other heterosexual women around the world, are still overly concerned with attracting men, whether to provide financial support, as companions, or to gain approval (fathers, employers, etc.).

Penny: I am not sure if I would put genital circumcision alongside skin lighteners and hair straighteners. Even though genital surgeries are culturally mandated, they lack the aspect of voluntariness that is arguably key to the beauty industry. I know that *voluntary* is a loaded term, but genital surgeries are imposed on girls by adults. But this may just be a minor point.

What one has to look at is how the law intervenes in these situations, and particularly how feminist legal theory, and by extension feminist law journals, have played a part in providing either a healthy and rigorous critique of these practices, or whether feminists really have only a muted response to these issues.[12] There have been some interesting analyses by feminist social theorists, anthropologists, and philosophers, but feminist legal theorists have lagged somewhat behind.

If I had to imagine the kind of intervention that feminist law journals could make, it would be an attempt to disentangle the different layers of feminist subordination and discrimination by focusing on outward manifestations of discrimination that the law could more easily address. So, for example, there would be universal consensus about legal equality (the right to vote, equal pay, and so on). I would venture to argue that despite its current controversy in the United States, even reproductive issues, if framed in a privacy argument, would generate sufficient agreement for legal reform. What would be more

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[11] Dworkin's theory is that because of the physical design of women's bodies and the existence of sexual intercourse, women have less bodily privacy then men. Andrea Dworkin, Intercourse (1987). As Linda McClain said, explaining Dworkin's theory, "[T]here is never a real privacy of the body that can co-exist with intercourse." Linda C. McClain, Inviolability and Privacy: The Castle, the Sanctuary, and the Body, 7 Yale J.L. & Human. 195, 222 (1995) (quoting Dworkin, *supra*, at 122-23).

[12] There is a wonderful series of essays dealing with these difficult questions and raising them in contexts of autonomy, responsibility, gender roles, and reproductive capacity. *See* "Nagging" Questions: Feminist Ethics in Everyday Life (Dana E. Bushnell ed., 1995); *see also* Cheryl B. Preston, Baby Spice: Lost Between Feminine and Feminist, 9 Am. U. J. Gender Soc. Pol'y & L. 541 (2001).

controversial, and therefore result in fewer consensuses, would be these different cultural questions involving, for example, beauty competitions, cosmetic surgery, botox injections, and skin lighteners. Law's imperatives may not be appropriate here.

Taunya: I also asked whether feminist law journals have failed to fulfill their promise. There is little discussion in most feminist law journals about working with *all women* as equal partners, or championing issues, like racism, that might work against the economic interests of affluent Western women. Articles about reproduction and child-rearing appear with frequency in feminist and mainstream journals, yet few legal scholars question the unresolved tension within feminism about the value of mothering, non-capital producing labor, compared with capital producing labor outside the home.[13] If mothering is so important to society and to some women, then feminist journals might convene symposiums to address the consequences of twentieth-century feminism that stressed equality outside the home but failed to resolve equality issues inside the home. Feminists generally have failed to address and resolve the issue of unpaid labor in the home and why this labor remains women's work.[14]

Penny: I want to respond here to your particular point about the lack of attention to working with women as equal partners. This raises a question that is central to the legal academy, and goes back to the earlier point about the establishment of feminist law journals. The disconnection between the arcane world of the academy and the "real life" problems of people is apparent. For example, you and I have often lamented the proliferation of law reviews. Not to denigrate the important scholarship being pursued in many journals—which the courts and other actors in the legal system no doubt find useful on occasion—but as long as law reviews serve as vessels for the pursuit of tenure, the relevance of much of the theoretical enquiry will be questioned. Do not get me wrong; I am not making an anti-intellectual argument. I am merely raising an issue that I believe some scholars are grappling with, particularly progressive scholars. There are some

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[13] *See generally* Taunya Lovell Banks, Toward A Global Critical Feminist Vision: Domestic Work and The Nanny Tax Debate, 3 J. Gender Race & Just. 1 (1999); Katharine Silbaugh, Commodification and Women's Household Labor, 9 Yale J.L. & Feminism 81, 100-04 (1997). Ironically, in some ways the nineteenth-century feminists who claimed a property right in their household labor were far ahead of contemporary feminists. *See* Reva B. Siegel, Home as Work: The First Woman's Rights Claim Concerning Wives Household Labor, 1850-1880, 103 Yale L.J. 1073, 1075 (1994); *see also* Mona Charen, Will Feminists Open Their Minds to Motherhood?, Balt. Sun, Oct. 28, 2002, at 9A.

[14] Twila L. Perry, Caretakers, Entitlement, and Diversity, 8 Am. U. J. Gender Soc. Pol'y & L. 153, 156 (1999).

academics whose work has some real life application—I am thinking of William Julius Wilson's work on social welfare[15] and Catharine MacKinnon's on sexual harassment[16] and of course there are many others. Feminist journals were supposed to be different. They were set up, amongst other things, not to mimic mainstream law reviews but to provide a space where women's issues could be dealt with thoughtfully. It is in this regard—the failure to include women who are marginalized—that to some extent feminist law journals have fallen short of one aspect of their mission.

This is particularly the case with racism. Questions of intersectionality have been pursued by a few journals, and they have pursued them with vigor and creativity. I wonder, though, how widespread these theoretical developments are.

Taunya: Perhaps feminist journals were never set up to bridge or address the gap between the academy and the bar, to provide a space to discuss praxis. In fact, I would argue that early feminist writers were very theory-oriented, with people theorizing on issues that came from practice, but with very few so-called feminist scholars proposing anything more radical than treating women the same as men under the law. Thus, you had critical legal feminists advancing arguments on why a formal equality approach would not work, and these scholars fragmented over whether biological versus social versus bio-social reasons explained why formal equality would not work.[17] Arguably, the only thing that was different about these discussions from the discussions in the mainstream journals was that women, not men, were at the center. Of course, the problem was with the universalizing of women as white, heterosexual, middle or upper class, Christian or Jewish, and Western, particularly American.

Penny: It may be opportune here to raise the point about the theoretical connections between the elimination of racial discrimination and gender discrimination, which some feminist law journals have explored.

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[15] *See, e.g.*, William Julius Wilson, The Bridge Over the Racial Divide: Rising Inequality and Coalition Politics (1999); William Julius Wilson, When Work Disappears: The World of the New Urban Poor (1996); William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987); William Julius Wilson, The Declining Significance of Race: Blacks and Changing American Institutions (1978).

[16] *See, e.g.*, Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 103 (1987); Catharine A. MacKinnon, Only Words 43 (1993); Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); Catharine A. MacKinnon, Toward a Feminist State (1989).

[17] *See, e.g.*, Joan C. Williams, DeConstructing Gender, 87 Mich. L. Rev. 797 (1989).

Taunya: But have these journals explored this issue on a consistent basis, or do they do so in a more token fashion—like Black History Month is set aside for an examination of black issues?

Penny: I think that feminist law journals have followed the general trend in law journals, focusing on a particular subject through the symposium method. So a symposium is held on a particular subject area, which also forms the basis for the volume of the journal. My sense is that a significant number of law journals have dedicated particular volumes to the question of the intersectionality of race, gender, ethnicity, and sexuality. I cannot comment on whether these endeavors have been conducted in a tokenistic manner.

Taunya: One area where feminist law journals could do more is by examining and highlighting the global condition of women, by exploring how non-Western women are exploited, marginalized, and even excluded from full participation in their societies, sometimes by other women. The real issues affecting less affluent Western and non-Western women are not likely to get much exposure in fora supported by elite Western law schools. As I wrote several years ago, feminist journals and feminist legal scholars seldom focus on how affluent, usually Western women exploit and oppress other women.[18]

Penny: To go back to the point about the link between the elimination of gender oppression and racial oppression, one example that comes to mind has been the constant tension between national liberation and women's liberation. This was a theme of the civil rights struggle in the United States, and also central to other contexts in which the centrality of racial discrimination almost erased attention to gender discrimination. Here I particularly think of the South African context where feminist legal developments in the United States and elsewhere assisted in shaping an indigenized version suitable for South Africa's hybrid conditions of Western and African, and where competing claims of gender equality and ethnic/national identities are constantly being negotiated.[19]

Taunya: Were South African feminists really successful in getting their issues incorporated into the reformulation of South Africa's

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[18] Banks, *supra* note 13, at 27; *see also* Regina Austin, Of False Teeth and Biting Critiques: Jones v. Fisher in Context, 15 Touro L. Rev. 289, 397 (1999); Donna E. Young, Working Across Borders: Global Restructuring and Women's Work, 2001 Utah L. Rev. 1.

[19] *See* Penelope E. Andrews, Striking the Rock: Confronting Gender Equality in South Africa, 3 Mich. J. Race & L. 307 (1998).

constitution? I find it a bit ironic that gay men, rather than women, have benefited most directly from some of South Africa's constitutional equality provisions. Am I wrong in this regard?

Penny: South African women clearly succeeded in incorporating women's rights in the Constitution and, in fact, rendered equality the primary principle in the Bill of Rights. The South African Constitution contains the most comprehensive listing of rights for women (and other groups). Gay men, and a host of other groups, have clearly benefited from the new constitutional dispensation, and have successfully challenged a host of discriminatory laws in South Africa.[20] But this question of access to the courts is a large issue that we do not have time to pursue here. Suffice it to say that despite the fact that black women, the most disadvantaged group of people in South Africa, have not had access to the South African Constitutional Court in the same way that other more privileged groups have, black women will benefit directly from the equality jurisprudence emanating from the Constitutional Court.[21]

Taunya: Maybe I am expecting too much of feminist law journals. Journal membership and publication still are closely tied to traditional male-defined notions of success. For students, journal membership or publication leads to prestigious clerkships, associate positions in white shoe law firms, and even law professorships. After law school, publication in a legal journal increasingly is a prerequisite for being hired as a law teacher. Further, for law teachers, scholarship, whether published in a feminist or mainstream journal, is linked to promotion and tenure in the academy.

One last question raising perhaps a thornier issue is what if we are wrong? What if the articles in these journals are much broader and more representative than the articles in mainstream journals? Does this mean that feminist journals are doing their job? Why would we think that they are not? Is it because some feminist journals have themselves become mainstream, and those feminist journals that are more representative are less "prestigious" and less read?

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[20] *See, e.g.*, National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC); *see also* Satchwell v. President of Republic of South Africa 2002 (6) SA 1 (CC).

[21] *See* President of the Republic of South Africa v. Hugo CCT 11/96; *see also* S v. Baloyi CCT 29/99; Carmichele v. Minister of Safety and Security CCT 48/00 (2001 SACLR LEXIS 64). All of these cases provide a comprehensive definition of equality, one that eschews a version of narrow formal equality and embraces substantive equality.

Penny: I do not know how to answer this question, except to say that we all operate in the mainstream, even as feminists. The tools of our trade are mechanisms to engage with the law. Law reform is our most fundamental endeavor. That makes us very mainstream. There is, of course, a wider debate in the law and society movement, the critical legal studies and critical race theory approaches, feminist legal theory, and post-colonial and postmodern schools about the possibilities for progressive lawyering. But as long as we have *law* as part of the description of our work products, we are confined to a mainstream paradigm.

Taunya: So you are saying that some feminists may have initially seen feminist law journals as safe spaces for feminist scholars—women and men—who want to air feminist issues while seeking tenure. But instead of creating a new type of journal, feminist law journals tend to replicate the traditional law journal model, only the focus is different. In 1938, Virginia Woolf warned us that as women gain equal status and power in society, they tend not to favor substantive change of that society.[22] Therefore, it is unsurprising that today feminist law journals, like most scholarly journals, have little resonance for feminist lawyers because the articles tend, like most journals, to be too theoretical or esoteric.[23]

CONCLUSION

Our conversation is more a critique of the past than a recipe for the future, but we need more open and honest conversation among and between feminists and non-feminist women. These conversations will be difficult, often *uncomfortable and incomplete.* Not only do race and sexuality separate us, but increasingly, careerism as well.

The seeds for some of these conversations are found in the writings of second- and third-generation legal feminists and non-feminists. Some feminists question what they see as a feminist orthodoxy or canon in which they are not included. In a similar vein, other feminists argue for writing outside of feminism as a way to address issues affecting some women who do not seem part of the late twentieth-century feminist canon. A few established feminist scholars are troubled by these discussions. Despite the seeming acceptance of feminist legal theory within the academy, these feminist scholars still feel insecure and vulnerable inside their institutions, especially when younger feminists challenge their scholarship. Too many

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[22] Virginia Woolf, Three Guineas (1938).

[23] *See, e.g.*, Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 41-42 (1992); Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 Mich. L. Rev. 2191, 2198 (1993).

feminist legal scholars do not trust each other enough to have the kind of open and probing conversations needed to move feminist legal theory forward. In the final analysis, in a society in which divisions along race, class, sexual orientation, ideology, and other lines still persist, trust may be a casualty.

Before meaningful conversations can occur among feminist legal scholars, we need to find a basis of commonality and trust. In the meantime, there are multiple feminist legal projects, some complementary, which show great promise. Thus, as we enter the twenty-first century, feminist legal scholars must be willing to engage feminist legal scholars as well as women scholars and activists who do not identify themselves as feminists. Feminist law journals may be able to provide both the public and private space to pursue these conversations.