At the Crossroads of Theory and Practice

Greta LaFleur†

This special issue fittingly concludes with mediations from a diverse group of advocates and practitioners on what relationship exists—or should exist—between feminist legal theory, on the one hand, and the practice of legal advocacy, on the other. Focusing on how feminist prerogatives guide how movements make use of, or eschew, the law, the writers whose advocacy is showcased in this section explore how and to what degree feminist legal theory has taken up the actual practice of law and advocacy as a site for intervention or the advancement of gender justice. Conversely, these four practitioners—two attorneys, one sex work policy advocate, one self-identified “non-attorney legal advocate,” and none of them law professors—also reflect on their own experiences of feminist lawyering and advocacy, considering to what degree their own praxis reflects, engages, or refuses the myriad insights and political priorities emphasized in feminist legal theory, as a body of thought. Across the three pieces, there are multiple points of convergence and divergence, but where these writers and advocates agree is around the fact that process, in movement lawyering work, is every bit as important as product. In other words, as authors BeKura Shabazz and Lisa Sangoi write, the question of “how social change is achieved is just as important as the social change that is achieved.”

This collective emphasis on process also highlights a set of critical differences that distinguish these advocates’ perspectives from one another: while each discussion of the author’s advocacy practice seems to endorse or espouse a range of feminist priorities, each piece understands the feminism that guides or informs their work differently. For Shabazz and Sangoi, it is Black feminist theory that fuels their efforts to intervene in the family regulation system; for Yoshida, too, U.S. American legal theories of intersectionality have informed their advocacy work in international human rights law; and for D’Adamo, it is critiques of feminist theory, inclusive of feminist legal theory, that offer the most incisive insights into the minimization of the rights of sex workers in legal fora. While each of these writers shares the belief that feminist legal scholarship can be a useful dialectical framework for advocacy, together they point to the importance of

† Associate Professor of American Studies and the Program in the History of Science and Medicine, Yale University, and an attorney practicing in southern and central CT. Thanks to Jelani Hayes and the other editors of The Yale Journal of Law & Feminism for their feedback and editorial insight.
acknowledging that there are many forms of feminist legal thought, some of which are more closely in step with the kinds of process-based advocacy work that these writers endorse than others. Together, these reflections emphasize that there is no singular story, no unique consensus, around what priorities, objectives, or goals unite feminist legal theory and scholarship. As a result, any process that engages or is informed by feminist legal thought is also an articulation of what feminist lawyers understand feminism to be—whether or not that understanding bears any relationship to the feminist legal theory of our own moment or of previous decades. What these pieces ultimately reveal is that by moving away from the notion that there is some singular entity that could be called feminist legal thought, we are able to ask more nuanced questions about what different approaches to feminist lawyering enable us to do and what these same approaches foreclose.

Keina Yoshida’s reflection explores how creative lawyering can be put to use to impact and expand women’s rights, even (or especially) when litigating issues that would seem, on their face, to have little to do with protections or enfranchisements for women or gender justice at all. Working at the intersections of women’s rights and international human rights law, Yoshida elaborates on what they understand to be the value of feminist legal theory, explaining how, for example, Kimberlé Crenshaw’s landmark theorization of intersectionality as a means of describing the law’s inability to see, and thus redress, compounded forms of discrimination (for example, how racism and sexism both simultaneously impact women of color) has shaped their advocacy for clients who find themselves multiply disadvantaged in the eyes of the law due to immigration status, racial and ethnic background, and criminalization. Yet while Yoshida identifies feminist legal theory as useful in identifying and naming problems that they and their organization have sought to address through advocacy, they locate the gap between feminist legal theory and feminist lawyering in the realities of praxis itself: no matter what an individual attorney’s political or intellectual commitments may be, an advocate has a duty to put their client’s priorities first. In other words, Yoshida argues pithily, “[p]utting the person before any feminist theory, ideology, or concept is important,” and “[t]his is, in my experience, a major difference between feminist legal theory and practice.” That it is not necessarily academic does not, of course, mean that it is not informed by feminist theory; indeed, one of the things that Yoshida suggests in their reflection is that feminist legal theory may neglect or ignore the practice of advocacy as itself a site for feminist political and legal theorizing.

If Yoshida’s reflection suggests that the practice of advocacy may be something of a lacuna for feminist legal theorizing, Kate D’Adamo’s essay voices a much more trenchant indictment of not the failings or neglect but the actual affirmative harms wrought by some branches of feminist legal theory. Indeed, Yoshida is careful to acknowledge that “[f]eminism is not a monolith. Within feminism lies a multiplicity of feminist perspectives with
divergent views on issues, such as prostitution/sex work.” For D’Adamo—a policy advocate for people who work in the sex trade—the goal is not to close the gap between feminist legal theory and feminist advocacy, but in fact to widen it, for the history of both feminist legislative efforts as well as feminist legal theory has been a history of efforts to eliminate sex work, and also, implicitly, sex workers. D’Adamo’s essay thus explores the history of the harmful relationship between theory and practice in the realm of feminist lawyering and quite explicitly “reject[s] the idea that these are two separate spheres that should interact,” citing the history of feminist legal theory’s reliance on the criminal law and the implicit exclusions built into its visions of justice as evidence for how feminist legal theorization has done significantly more harm than good in the laws and politics surrounding sex work as a form of labor and worker status in the United States. Indeed, this powerful reflection on their own experience as an advocate for people working in the sex trade reveals how feminist legal theory has not only excluded sex workers from the realm of legal protections for women, but in fact excluded sex workers from the legal definition of woman entirely. Instead, feminist legal theory in general (although there are certainly exceptions) has identified the eradication of the sex trade as a whole as one of its legal and policy goals, which leaves it not only at odds but in direct opposition to the needs and rights of sex workers.

D’Adamo’s essay explores two oft-discussed problems with feminist legal theory, elaborating how each of these problems directly impacts both women who work in the sex trade and intensifies the law’s inability to address structures of gendered violence, including violence against sex workers of all genders. The first is what sociologist Elizabeth Bernstein and others have termed carceral feminism, or a vision of how feminist politics might make use of the law that relies on the expansion of unjust systems of criminalization and incarceration.¹ Locating the contemporary legal architecture of laws that criminalize sex work and collapse all sex work into “human trafficking” frameworks within the longue durée history of feminist legal movements in the United States, D’Adamo details how entrenched anti-sex-work policies are within American feminist organizing, which has had an enormous influence on feminist legal theory. This is due, in part, to the fact that the most influential feminist legal theorists—Catharine MacKinnon being perhaps the most immediate example—have tended to see the sex trade as inherently harmful to women, inimical to feminist progress, and thus as a target for legal intervention and eradication. The harms to sex workers attendant to this type of feminist legal theory—sometimes colloquially referred to as SWERF (sex-worker-exclusionary radical feminism) politics—are, according to D’Adamo, neither incidental nor collateral to the advancement of these politics, but rather, intentional, offering a vision of who

feminism serves in which sex workers are disposable. Indeed, D’Adamo cites a range of different ways that feminist legal theory has at best, ignored, or at worst, actively targeted sex workers, including the “erasure of sex workers from the dialogue on the impacts of the Nordic Model, forced rehabilitation through court-mandated reform efforts, the silencing of sex workers after the closure of Backpage and other advertising sites,” and more. Put differently, D’Adamo argues, “You cannot construct a legal theory about women while erasing the existence of the women whose lives will be tangibly impacted unless you consider those women disposable to your cause or not women at all.” D’Adamo furthermore insists that “[t]he feminist advocates behind these pushes have not merely ignored the gap between theory and practice, but they have silenced what happens in practice to continue to promote flawed theory.”

D’Adamo’s piece also points to another underexamined aspect of carceral feminism: the fact of its increasing imbrication with forensic psychiatry, “forced rehabilitation,” and civil continued confinement schemes. Under a carceral feminist model, they argue, “sex workers are either deserving of criminal punishment—which is exemplified by their arrest, incarceration, and deportation, and the violence they experience at the hands of the police—or are in need of forced rehabilitation.” This latter genre of legal consequences can take a number of forms and has resulted in putatively progressive feminist enforcement structures such as the expansion of prostitution diversion courts that require that people charged with sex trade crimes undergo court-ordered counseling in lieu of prison time. Coupled with the incredibly well-funded (and, as some have argued, overfunded) expansion of federal and international anti-trafficking legislation and enforcement, sex worker rehabilitation schemes in the criminal law voice a disturbing conceit: that “someone who trades sex must reject their status as a sex worker” in order to be considered a legitimate claimant of the legal protections available to women. Otherwise, D’Adamo elaborates, “you’re just another criminal.” Of course, not all sex workers are women, but, as D’Adamo also points out, feminist legal theory as a whole has expressed such animus toward sex work that it is only women who trade in sex—and cisgender women at that—who are understood to possibly fall under the penumbra of feminist theory’s protections—and even then, only if they reject sex work as a legitimate occupation and engage in mental health treatment to rehabilitate themselves accordingly. Building compulsory “rehabilitation” into the legal penalties that attend the criminalization of sex work voices an equally insidious ideology: that women who work in the sex trade would only ever do so as a result of a) coercion or b) false consciousness. This ideology simultaneously further delegitimizes and stigmatizes sex work while also entrenching a powerfully paternalistic legal framework through which women’s sexual choices are understood. None of this, as D’Adamo makes clear, supports the rights or needs of sex workers, and furthermore, none of it advances the legal rights or protections available to women.
One final point that this rich piece offers pertains to the law’s understanding of the constituency termed women as a whole. Because much of the most well-known scholarship in feminist legal theory has argued that various forms of sex work (prostitution, pornography, camming, dancing, etc.) represent a direct affront or attack on something called “women,” both transgender and cisgender women who labor in the sex trade are implicitly—and sometimes quite explicitly—relegated to the margins of legal womanhood as a whole. Indeed, D’Adamo states flatly, feminist legal theory and feminist legislative efforts to eradicate sex work both suffer from the “inability to see sex workers as women,” as thus as constituents whose needs and priorities might also be articulated by feminist legal advocacy. While mainstream feminism (inclusive of legislative-based feminist activisms and feminist legal theory that has sought to shape policy) in the United States has a long history of endorsing the categorical rejection of certain groups of people as legitimate claimants of feminism’s protections—this will be a familiar story to Black, brown, and Indigenous women in particular, not to mention transgender women of all racial and ethnic backgrounds—any efforts to redress these historical and ongoing harms are made less meaningful and less effective if the prevailing political and policy exclusions are simply reorganized to target different populations of women. Confronting the reality of historical and ongoing animus toward sex work and sex workers in feminist legal theory thus requires feminist scholars and thinkers to “consider [their] . . . impact on the lived realities of women on the ground.”

Accountability also arrives as a central concern of BeKura Shabazz and Lisa Sangoi’s essay, which focuses on the family regulation system (sometimes also inappropriately referred to as the “child welfare” system) and each of their efforts as advocates to intervene in its widespread systemic harms. While Shabazz and Sangoi share some of D’Adamo’s critique of the harms and shortcomings of feminist legal theory, they nonetheless find instruction and inspiration in a distinct, if at times overlapping, body of feminist theory: Black feminist thought. While there is, of course, a great deal of Black feminist thought within the broader field of feminist legal theory—scholarship by thinkers such as Kimberlé Crenshaw, Cheryl Harris, Adrienne Davis, Angela Harris, Evelyn Brooks Higginbotham, and Dorothy Roberts being only a handful of the many contributors to the field—Black feminist theory is itself an intellectual genealogy that cuts across numerous disciplines and interdisciplines, far in excess of studies of the law or legal academe. In Black feminist theory Shabazz and Sangoi find a model of intellectual accountability that is not only portable but in fact instructive for advocacy in both legal and social movement contexts. Whereas many feminist legal theorists identify greater access to the halls of power as a primary goal for their thinking, for Shabazz and Sangoi, Black feminist theory constitutes an intellectual tradition that grows out of the need for strategic political thinking that is by definition accountable to Black women and women of color. This is not incidental: in the context of the family
regulation system, Black women and women of color have had to become theorists of the architectures of state violence directed at families and communities of color, and Black and Indigenous families in particular. Black feminist theory, for these writers and advocates, is an especially handy theoretical tool for political organizing because it has sought to be responsive to the collective conditions of Black people. In this sense, Shabazz and Sangoi depart from D’Adamo’s critique of feminist legal theory because for them, feminist legal theory is also the work that is done by those who are theorizing the life of the law “outside courtrooms, law schools, and law journals.” Shabazz, for example, describes herself as a “non-attorney legal advocate” and “non-degreed, self-taught legal feminist theorist and self-proclaimed legal scholar”; her efforts to work against the predations of the criminal legal and family regulation systems are equally contributions to feminist legal theory.

The insights that Shabazz and Sangoi find in Black feminist theory, furthermore, pertain as much to their understanding of the importance of righteous process as it does to their understanding of the broader substance of the work. Together, they articulate three process-based principles that guide their advocacy:

1. We believe that how social change is achieved is just as important as the social change that is achieved. That is to say, we believe how a policy change happens and who makes it happen is just as important as whether it happens. We believe that the people and communities most impacted by injustice are best positioned to lead us towards justice and liberation.

2. We believe we have to be in this work for the long haul, for generations to come.

3. We believe solution generation is just as important as problem analysis, and that time and space must be given for evolutionary change.

While these principles are not necessarily immediately identifiable as tenets of any particular strain of Black feminist thought, a closer look reveals these three tenets to walk precisely in step with what Shabazz and Sangoi outline as the unique orientation of Black feminist theory toward accountability to Black women and women of color. First, of course, the idea that “the people and communities most impacted by injustice are best positioned to lead us towards justice and liberation” is another way of saying that Black women and women of color must be the center and the leaders of any movement for justice; this is not a vision of movement work that seeks to elevate a representative few but rather one that seeks to harness the broad lateral political power of the people. The last two principles speak to the importance of the reality that liberation work is frequently slow. It is neither an easy nor a quick task to undo systems of oppression that have fueled white supremacist and state power for, in the case of many state systems, more than two centuries. Furthermore, the thinking, strategizing, and sheer labor that
this undoing requires, as Shabazz and Sangoi elaborate, “has always been challenged and deemed inferior to that of our white counterparts. It is rarely given oxygen.” Honoring the need for time, and demanding the respect for the fact that solutions “may take centuries to build” is not only a reflection of the ethos of Black feminism at the heart of this work; in its deference to slowness, it is also implicitly, but importantly, anti-capitalist, and elevating the fruits of good process as on par with the payoffs of achieving the desired change more broadly.

These short reflections on praxis are ultimately as much meditations on how feminist political principles have been instructive in the everyday practice of advocacy as they are reflections of how feminist politics have shaped these practitioners’ long-term political goals. What each piece highlights is that there are multiple, thriving bodies of feminist legal thought that do not necessarily appear in law journals or other scholarly fora but that nonetheless are fueled by deep reserves of community power and that importantly shape how law is done. Taken together, these essays may also gesture toward a problematic gap in the field of feminist legal theory: a lack of attention to how legal advocates may best serve the communities they represent, an undertheorization or neglect of the actual practice of lawyering. In many ways, this is to be expected given who contributes to and produces the bulk of feminist legal theory that appears in law journals and scholarly monographs: law students, who typically do not yet have significant experience with advocacy, and legal scholars, who are not often practitioners, at least not in the lion’s share of cases. This forum thus indexes the critical importance of soliciting practitioners’ perspectives in conversations on contemporary feminist lawyering and legal strategy. The fruits of this kind of political dialecticism, as the reader will find in what follows, are many.