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## Women Imagining Justice

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# Women Imagining Justice

Katherine M. Franke\*

## I. INTRODUCTION

I'm enormously honored to be here with such an impressive group of women interested in the complex question of Women, Justice, and Authority. Thanks to Judith Resnik and Mary Clark and the students working with them for all their hard work in putting this outstanding weekend together.

The five of us are charged with the unenviable task of "Imagining Justice," a task not significantly less daunting than, say, imagining truth, humor, or community. In preparation for this afternoon, I've been in my office or in the subway trying to imagine justice and after some time, was horrified when I discovered that I was doing it wrong. Our charge was even worse than I had thought: We had to imagine justice *as women*. What could that possibly mean? What posture was I directed to assume in such a project? Given that we were the first panel of the conference, I felt a particular responsibility to at least get the question right.

I say all this not to cleverly resist the question, but rather to frame my comments within the problematics of what it means to consider justice as women and justice for women. Is there such a thing as women's justice, different from an unmarked generic justice? Or worse, different from men's justice? In the end, I have taken this to be a question that demands an epistemic stance: How do I formulate questions of justice given my commitments to critical race feminism?

Assuming this posture at the threshold of a third wave of feminism, I would like to explore two principle issues. The first relates to struggles from the past and the lessons they provide us today about the proper role of rights in struggles for gendered and racial justice. I will draw particularly from the experiences of newly freed African Americans in the 19th Century. Their history teaches us that the granting or winning of rights cannot be the ultimate goal of any theory of justice because the conferral of rights merely inaugurates

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a new regulatory relationship with the State, which provides us with a new place from which to battle structural hierarchy and subordination.

The second issue I wish to discuss is more of a challenge than a lesson, but it derives from the evolution of feminist theory, particularly feminist *legal* theory, over the last twenty years. My challenge to you is this: Heterosexual feminists need to revisit and reinvigorate a feminist politics of the erotic in which the female body is figured not only as a site of danger and a vector of reproductive responsibility, but restored as a source of pleasure, desire and intimacy. At the risk of leaving the mistaken impression that I have joined forces with post-feminists Katie Roiphe, Naomi Wolf, or Camille Paglia—which I most certainly have not—let me share some thoughts with you about the usefulness of rights strategies before I elaborate further on how grim heterosexuality seems to have become for feminist legal theorists.

## II. FIRST, SOME THOUGHTS ABOUT RIGHTS

A robust theory of rights inevitably figures in any modern conception of citizenship and equality. This is certainly the case for theories of justice and authority for women. Whether it's the Equal Rights Amendment, suspect class status or statutory protections against sex discrimination, inevitably we are pulled in the direction of a rights-based formulation of what it means to achieve justice for women. In order to gain a better grip on just what a "rights-centered" approach to justice can get you, I recently spent quite a bit of time in archives in Mississippi and North Carolina, trying to understand what the granting of rights meant to newly emancipated African American people in the Reconstruction era. Their experiences provide important lessons for us today in framing questions of justice in rights-based terms.

As most of you well know, enslaved people were considered morally and legally unfit to marry. Notwithstanding this legal infirmity, many enslaved people lived as husband and wife and enacted their own marriage rituals such as jumping over broomsticks, and reciting vows such as "until death or distance do you part." Upon emancipation, the ability to marry was widely regarded as one of the most fundamental rights attendant to liberty. Newly freed people by the thousands went about legitimizing their previously unrecognized marriages. On the heels of the abolition of slavery most Southern states enacted laws that automatically married freed men and women who had been *living together as* husband and wife. These laws were laudable for the degree to which the law granted retroactive legal recognition of the integrity of enslaved peoples' marriages. Their self-executing nature relieved the freed people of the obligation to buy a marriage license, which often ran more than five dollars and was a prohibitive expense for most people.

The alacrity with which freed men and women exercised the marriage right was fueled in no small part by aggressive nudging from Freedmen's Bureau agents—federal agents charged with the task of easing the transition from enslavement to freedom for African American people. In the eyes of many Freedmen's Bureau agents, marriage was “the great lever by which the freed men and women are to be lifted up and prepared for a state of civilization,” and its obligations of monogamy and support would impose the necessary sexual and moral restraint on a people believed to be quite primitive in their sexual ways.

After emancipation, many freed men and women continued to organize their intimate lives according to an array of acceptable arrangements. The spectrum of intimate relationships enslaved people entered into prior to emancipation were used as evidence of the widely held belief among white people that freed men and women were morally depraved. In addition to more traditionally monogamous long term unions, slave societies entertained an array of acceptable adult relationships from sweethearting to taking up to trial marriages. Some of these relationships included conceiving and raising children and some did not. Many white people found one additional complication to emancipation quite difficult to identify with: As families and couples separated by slavery reunited at the close of the Civil War, many African American people found themselves with more than one spouse. Over the course of one's enslavement, one might be married several consecutive times as husbands and wives were sold away, and thought never to be seen again.

Once reunited, many freed women and men were untroubled by the thought of having more than one spouse, lover, or provider for the children—yet the Freedmen's Bureau thought differently and forced people to choose one and only one spouse. If you refused to choose, they would do it for you, or you were turned over to the local authorities for criminal prosecution.

Thus, this period of African Americans' inauguration into the realm of marital rights was cause for celebration, confusion, and, for many, pain. Freedmen's Bureau records, as well as the original criminal court records in Mississippi and North Carolina, show that with the granting of the right to marry came a rather aggressive campaign of criminal enforcement of bigamy, adultery and unlawful cohabitation laws against African Americans who failed to conform their intimate lives to the strict script that Victorian marriage laws dictated. Mistakenly believing that freedom included the freedom to organize their intimate lives as they wished, some freed men and women affirmatively rejected the legal limitations imposed by marriage. Others were unaware that they had been automatically married by law and that their new legal status required them to use divorce laws to end those marital unions. Instead, they

merely walked away from failed relationships and took up with someone new—an action that left them vulnerable to adultery or bigamy prosecution.

In addition to the belief that robust compliance with marriage laws would civilize the freedmen, state officials had other incentives to aggressively enforce marriage laws against African Americans. First, with marriage came a statutory duty to support dependents, whereby responsibility for the financial support of indigent wives and children was shifted from the state to black men. Second, in states like Mississippi, bigamy was a felony and upon conviction one was automatically disenfranchised—a penalty felt acutely by newly enfranchised African American men. Third, southern planters were badly in need of an inexpensive labor force that could do the agricultural work that enslaved people had previously done for free. A convict leasing system was promptly put into place in the immediate post bellum period, such that planters could lease prisoners very cheaply from the state to plant and pick cotton and other crops. During this period, the aggressive criminal enforcement of marriage and vagrancy laws against African American men served to populate state prisons with black men who could be leased out to their former masters under conditions usually worse than slavery.

There is much more I could say about the complexities of freed men and women's "enjoyment" of the right to marry in the immediate post bellum period. Suffice it to say for now that the granting of marriage rights for African Americans was at best bittersweet. Many people, men in particular, experienced their new status as rights holders as one that enabled a new regulatory relationship with the state that was quite punitive in nature.

This history teaches us that rights-based strategies are not to be abandoned, but must always be regarded as provisional. Their success cannot deliver the demise of structural subordination, but instead provides us with a new place from which to negotiate power, domination, and hierarchy with new tools.

### III. SEX

My study of the experiences of African Americans in the immediate post bellum period taught me something else as well. Both enslaved and newly emancipated African American women were quite creative in organizing their lives in such a way as to find pleasure, companionship and assistance in raising children from various sources. An African American woman's lovers were not necessarily the persons with whom she chose to live, and she may or may not have chosen to raise her children with their biological father. The most desirable lover was not always the best provider, and many women preferred pooling of resources among various groupings of adults and children as the best way to meet these complex needs. Thus, these women found sweethearting, taking up, trial marriages, and non-monogamy to be preferable in many cases to

conforming to Victorian expectations that all needs be satisfied in one family form. For a short time, these women actively explored a different kind of intimate and sexual citizenship than that which we imagine today.

Today we celebrate victories that were unimaginable to women in the 19th century or even twenty years ago. Feminists can boast having achieved a kind of hegemony over the terms of the debate regarding a set of social practices identified as central to women's subordination. Sexual harassment in the workplace is uniformly regarded as a form of sex-based discrimination, and the deeply gendered nature of domestic violence is now so broadly accepted that Congress enacted the Violence Against Women Act. The cultural debate over whether these practices are sex out of control or gender-based power seem to have been won by the power side of the argument.

When feminists, particularly legal feminists, talk about sex and the female body these days, the conversation inevitably arcs in one of two directions: sex as danger—(domestic violence, sexual harassment, rape) or sex as reproduction (leading to problems that arise from having and rearing children). I do not want to deny the importance of these issues to women; rather I prefer to highlight what they seem to have crowded out in recent years. Curiously, since the end of the so-called "sex wars" in the 1980's, it seems that straight feminists have ceded to queer theorists the job of imagining the body as a site of pleasure, intimacy, and erotic possibility. Indeed, after sitting through so many conferences in which the topic of hetero-sex is so quickly transposed to one of injury, danger, and responsibility, I feel like I have encountered the most persuasive argument in favor of a biological explanation for sexual orientation: What straight woman would actually choose to be heterosexual if it weren't hard wired?

In 1982, Gayle Rubin wondered whether feminism was *best* equipped to analyze and address gender-based subordination, and mused that it may *not* be an adequate or appropriate discourse to analyze sexuality. Yet, I do not think we should give up on feminism so easily. I think it is time that feminists reclaim the body as a site of erotic pleasure and intimacy and move these issues back into the center of our theories of sexual citizenship. Martha Fineman has done an outstanding job of decoupling relationships grounded in dependency from those that have an erotic connection, provoking a radical rethinking of motherhood. But too few of us, as feminists, have stepped in to retheorize the erotic and other intimate adult relationships that end up as the residue of Fineman's work.

Welfare reform, demands for childcare, restructuring of the relationship between work and leisure, and reform of the institution of marriage, including adultery and, yes, monogamy could all be opportunities for feminists to argue for the fundamental importance of intimate and erotic attachments that defy the

traditional dyad of spouse and child as the primary, if not exclusive, objects of women's hedonic lives.

Intimacies across race, between women, or with men that may or may not contain an erotic element, or be consciously experienced as such, hold out the possibility of radical connections, trust, and transformation. We don't have much of a feminist theory of any of this. It's time we did.

So for me, imagining a just society entails a rather radical reworking of family, partnering, intimacy and the erotic than is currently structured by law and social norms. The creativity in this regard that I saw in 19th century African American communities is an inspiration to all of us to imagine justice in our hedonic lives more expansively.