Feminism in relation

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Why does a gender hierarchy persist in the face of declarations of gender equality before the law? This is the question with which the Interdisciplinary Feminism Project began in organizing Feminist Theories of Relation in the Shadow of the Law: An Interdisciplinary Critical Dialogue on Theory. The day-long event brought together feminist scholars from law and other disciplines. We asked participants to consider whether feminist theory might answer this confounding problem by focusing on a relational, as opposed to an individual or group, conception of law. The wide-ranging and evocative dialogue that ensued was organized under the sponsorship of The Institute for Legal Studies at the University of Wisconsin Law School and the Wisconsin Women's Law Journal. The dialogue produced the papers that follow in this volume.

LAW AND FEMINISM AT THE UNIVERSITY OF WISCONSIN

In Fall 2000, a group of female law faculty at the University of Wisconsin created the Interdisciplinary Feminism Project (“Project”) to encourage and support the interdisciplinary study of law and feminism. The Project brings together a community of feminist scholars from diverse fields, including history, law, political science, sociology, and women’s studies. We work collaboratively with our friends and colleagues at the University of Wisconsin, and outside of this univer-
sity, to create a vibrant intellectual space within the academy for both junior and established scholars to explore feminist legal issues.

The Interdisciplinary Feminism Project has an important historical legacy at the University of Wisconsin Law School. The law school made major contributions to feminist jurisprudence through its early support of Professor Martha Fineman’s influential Feminism and Legal Theory Project. Professor Fineman began her teaching career at Wisconsin in 1976. While here, she produced groundbreaking feminist legal scholarship of her own, and through her project, nurtured the academic careers of a host of feminist legal scholars. Through annual workshops and conferences, the Feminism and Legal Theory Project brought together scores of scholars to present papers and exchange ideas related to feminist jurisprudence, and also helped to build a supportive intellectual and social network for feminists.

Embracing this important historical legacy, members of the current law faculty formed the Interdisciplinary Feminism Project in 2000. We are fortunate to have on the Wisconsin law faculty many scholars concerned about, teaching about, and writing about the place of women in law and in society. The Wisconsin faculty includes established and rising feminist theorists, but also scholars who frequently apply a feminist lens when teaching and writing in their own distinct areas of law, whether it be criminal law, clinical practice, family law, employment law, legal education, poverty law, and constitutional law. The study of women and gender is central to Wisconsin’s “law in action” approach to legal education.

THE RELATIONAL TURN

Our turn to a relational perspective as a potentially productive theoretical path for feminism grows out of the pioneering work in legal sociology of another of our Wisconsin colleagues, Stewart Macaulay. Macaulay argues that it is social context and relationships, and not formal rules, that explain how law actually orders the social world. Macaulay’s insight holds promise for feminist theory because, as he teaches us, differences in social power can become invisible when courts (and scholars) refuse to engage in relational and contextual analysis.

1. Professor Fineman is now the Dorothea Clarke Professor of Feminist Jurisprudence at Cornell Law School, where her endowed chair is the first in the United States devoted to the study of feminist jurisprudence.

2. Papers presented at several of the Feminism and Legal Theory Project’s workshops have been published in edited volumes. See, e.g., Mothers In Law (Martha Fineman & Isabel Karpin eds., 1995).


From the law and society tradition long associated with Wisconsin,\(^5\) we also took the invocation of the idea that law regulates as much by its "shadow" as by direct governance.\(^6\) Even when no one invokes the law directly, law nonetheless sets the background distributions of power and the default rules against which people define their social relations, whether through force, coercion, bargaining, exchange, duty, reliance, or gift. Law works by imposition of rules and punishments, but also importantly by constructing authoritative images of social relations.

[L]aw matters . . . because it is a resource. . . . It is a source of support that people may draw on in the same way they draw on other resources in their environment such as savings accounts, accumulated human capital, and the availability of others to help them achieve their goals. Law may be an intangible resource, as when one invokes the law's authority to order another's behavior, or a tangible one, as when one calls the police to achieve the same end.\(^7\)

Awareness of what the law says is just or unjust, justified or unjustified, influences all interactions between people, ultimately shaping their identities as well as their goals.

The papers from this conference explore how law interprets and constructs social life in ways that validate and recreate gendered patterns of power and inequality. To do so, the papers develop an approach that we call "relational feminism."\(^8\) That is, the work presented here exposes the unarticulated assumptions and invisible mechanisms through which relational presumptions enter the law. A common theme among the papers in this symposium volume is the reciprocal relationship between law and social context, including social norms and cultural constructions of gender.

The starting point for exploring this theme is the tension between the power of law to construct the social world and the claim of liberalism not to do so. Liberalism portrays law as preserving liberty


\(^6\) The phrase was first used by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 950 (1979) to explain that law provides a framework within which disputants construct settlements.


\(^8\) The term "relational feminism" is already used by feminist theorists who are perhaps more familiarly known as "hedonic feminists" or "cultural feminists." See generally Mary Becker, *Patriarchy and Inequality, Towards a Substantive Feminism*, 1999 U. Chi. Legal F. 21 (coining the phrase "relational feminism") [hereinafter Substantive Feminism]. See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L.J. 81 (1987) ("hedonic feminism"). One aspect of this symposium volume is that it poses an expanded understanding of "relational feminism."
and protecting autonomy by keeping the state out of the day-to-day living of social life. From the liberal perspective, law is about individuals and not relationships. Liberty rather than connection is the highest value, and law should be agnostic about the substantive value of particular social relationships.

When liberal law does regulate social life, it claims to do so by referencing the natural and normal categories of non-legal life. That is, law references what appear to be “found” objects in the world – parent, spouse, child – with clear and obvious meanings. Law thus claims to regulate a social reality separate and apart from itself, and not to (re)create the social world that it references. The work presented in this symposium volume shows, however, that by referencing the “found” objects of the social world, legal reasoning implicitly incorporates taken-for-granted understandings of the meaning and structure of that social world. Embodied within categories such as “mother,” “wife,” and “date,” are a host of expectations about the roles of women within those relations. But those relational assumptions are never examined, questioned, or even recognized. They just are. They define the social world, both in legal reasoning, and afterward through legal reasoning. They drive the logic of judicial decisions that have a real impact upon women’s lives, and they often validate and enforce agendered structure of relationships.

Relational feminism is an analytical tool to reveal this hidden contradiction – how law appears to act upon an external social world, even as it is part of that world. Law has a particular capacity to create social reality by creating rights, defining relationships, and interpreting the meaning of social events. But it names and constructs this social world while appearing to remain separate and apart from it. To reveal this contradiction is a challenge. The relational assumptions in the found categories of the natural world are taken for granted; they are ordinary and normal. They seem to be simply the way things are, not a judgment about the way things should be. But as this symposium volume shows, the abstract categories of law and the found objects of the natural world are portals through which relational assumptions enter the law.

What is the mechanism of this incorporation? One means is through the power of discourse and language. In an article exploring this process, Wendy Parmet makes a compelling argument that textualist interpretations of law will always reproduce the cultural status quo because they rely on the plain, and thus already culturally established, meaning of words. Textualism, she asserts, is not merely a neutral tool of interpretation, but instead is an implicit choice in favor of the status quo. Her insight reveals one mechanism through which


law imports meanings from culture – by drawing on taken-for-granted understandings of social life. Those meanings in turn implicitly incorporate existing relations of power and inequality based on gender, so that the “plain meaning” of language validates and enforces the relational status quo.

The meaning of language matters not only because culture influences law, but also because law influences culture. That is, law is a powerful discourse that can be constitutive of social life, so that the meaning of relationships in law can change and shape the meaning of relationships in social life. Although the word “constitutive” can be understood in many ways, here we mean that law is one of the cultural systems that helps create the categories and structure of social life. Law can give meaning to social events and provide a framework within which social life is organized. Law can also help make the categories of social life seem natural and normal, just the way things are, so that it seems unimaginable that social life could be structured differently. This is not to say, however, that by “constitutive” we mean that law is determinative. Rather, law is one of many cultural symbols or discourses through which people make sense of the social world.

Law is, however, an influential discourse because of its legitimacy and authority. These characteristics flow in part from law’s claim to neutrality and equal treatment. Consequently, revealing the ways in which law reproduces and reinforces power differences and gender inequality is crucial to a movement, like feminism, seeking to transform the status quo.

**RELATING TO RELATIONALISM**

Invoking the term “relational” amongst feminist scholars invites plural understandings. Feminist Theories of Relation in the Shadow of the

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12. It is important to emphasize that law is only one of many cultural or normative systems through which social life can be ordered, and variations in specific social contexts may undermine law’s ability to make certain social arrangements seem normal, or even salient. Law interacts with, and in many instances is displaced or transformed by these other cultural systems. See Macaulay, *supra* note 3; e.g., Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497 (1993); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

Law thus begins with a trio of papers from Victoria Nourse, Mary Becker, and Berta Hernández-Truyol offering multiple interpretations of the relational, and how it helps feminists explain law's role in the persistence of gender hierarchy.

For Mary Becker, in Feminists and Care, the relational provides substantive content to the feminist project in law. This is perhaps the most familiar use of the term "relational feminism." Becker urges feminism to move past the limited strategies that the sameness/difference or discrimination analyses have permitted in order to examine directly the justice of particular relationships. Feminism must commit itself to the moral project of defining value in relationships, specifying and justifying criteria for judgment, honoring good relationships over lesser or bad ones, and pressing law to recognize and support those moral differentiations.

For Victoria Nourse, in Law's Constitution: A Relational Critique, the relational is a critical perspective. Nourse observes that individuals present themselves to the law embedded in relationships. Inequity persists in law, she argues, not because women are impermissibly judged as women (discrimination analysis), or because women are different from men (sameness/difference analysis). Instead, law judges women as good or bad mothers, as emotionally weak or resilient victims, as respectable or disreputable sexual creatures, as domestic partners who resist or invite battering. It is the contextual relationship—mother, victim, sexual creature, domestic partner—that supplies the narrative and the social norms through which the law makes its judgments.

Berta Hernández-Truyol develops the idea of the relational as a way of transforming legal process towards plural inclusion in Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal. A relational perspective asks new questions about the legitimacy of the processes by which law is created. Hernández-Truyol draws on the experience of crafting human rights norms over the past half century. From that international arena, she develops new models for inclusion of excluded voices in domestic lawmaking processes.

Through relation, Nourse writes in Law's Constitution: A Relational Critique, law apprehends and represents the problems it is asked to resolve; crucially, too, through relation, law resolves those problems. This is true not simply in those areas of law where law admits a relationship is on the table, such as family, sex, or contract. And it is not

14. Mary Becker, Feminists and Care, 17 Wis. WOMEN'S L.J. 57 (2002) [hereinafter Feminists and Care].
15. See Becker, Substantive Feminism, supra note 8.
true simply of private law either, but also of the core domains of public regulation, the criminal and constitutional law.\textsuperscript{18}

If legal scholars recognize this relational move, Nourse writes, it becomes possible "to disaggregate the social from the natural in law."\textsuperscript{19} Prevailing modes of legal reasoning, she argues, masks in natural description what law really accomplishes by social imagination. Chief among these obscuring analytic moves are "factual analogues of textual/pedigreed descriptions."\textsuperscript{20} Exemplary of the familiar "this is like that" analogical move in legal reasoning are claims that "a family is a little government, and each must have its ruler,"\textsuperscript{21} or that sexual jealousy is a form of insanity, diminishing or excusing any intimate violence that ensues.\textsuperscript{22}

Nourse's critique reveals what is, in the first instance, a justice problem: if law hides rather than reveals what is determining its outcomes, accountability is lost, and the state distributes power in ways not easily known or challenged. In the midst of formal doctrines of equal respect and dignity, what harms women cannot easily be grasped. As other feminists have observed, the rule of law, with its legitimate claim on all of us because it supposedly offers equal respect for persons, is dangerous to feminist politics. "Better to recognize the struggle, the politics, that this rule of law seems to make invisible."\textsuperscript{23}

Nourse helps us understand that even if law no longer treats women in discriminatory ways, this does not mean law is not still free to continue to discriminate amongst persons based on other, non-suspect, characteristics. These are characteristics derived from relationships—the folly of the woman who does not leave her batterer, for example, or the culpability of the seduced woman who doesn't guard her own interests, or the shamefulfulness of the mother who fails to protect her children from a father's violence. Identifying the relationship being implicitly judged shifts attention away from the individual woman and her attributes; instead, it is the relationship that supplies the narrative and the social norms within which her folly, ineffectuality, or shamefulfulness is to be judged. It is not always (and maybe not even much of the time, anymore) a woman's sex that is being judged, but rather her relational failure or success.

The problem is not just one of masking. For Nourse, the focus on relation also brings to light law's constitutive power to generate the facts of the world that, using naturalistic modes of inquiry, law then purports to discover, investigate, and judge. Her example is of the woman who leaves and gets a divorce, only to find that her former

\textsuperscript{18} Nourse, \textit{supra} note 9, at 30-33.
\textsuperscript{19} \textit{Id.} at 29.
\textsuperscript{20} \textit{Id.} at 30.
\textsuperscript{22} Nourse, \textit{supra} note 9, at 42.
spouse follows her, sees her dating, and kills her. The killer can avail himself of a reasonable passion defense to the charge of murder. Although the law says the wife has the right to cut off the relation, "the law of passion may demand that [it] follow her." Overlaid atop the modern regime of divorce, Nourse demonstrates, are traces of the lifelong marriage and forced relations that made up the older regime of marital unity.

If the relational is a powerful critical tool, can it also lead to different substantive standards of justice? Nourse argues finally for this transformative potential in an affecting re-reading of Justice Douglas' majority opinion in *Skinner v. Oklahoma*. *Skinner* is the anomalous case in equal protection jurisprudence: the analysis is strained, but virtually everyone agrees the outcome is just. Nourse contends that it was Justice Douglas' implicit grasp of the underlying relational pattern and operative social norms of Oklahoma's criminal sterilization program that led the Court to this just result. Where doctrine does not reach, her reading of *Skinner* suggests the morality of the relation at hand may nonetheless seize the conscience.

Yet Nourse's argument for a relational justice presents a familiar quandary in legal theory captured in the "rights debate," as carried on between critical legal scholars and critical race theorists. Critical legal theorists oppose the formalism of rule of law/rights talk because it reinforces the legitimacy of rights and the illegitimate hierarchies on which rights are based. Critical race theorists defend rights because they protect against abuses by the state, particularly for marginalized groups who do not control the state. Translated to the questions raised in *Feminist Theories of Relation in the Shadow of the Law*, can feminists trust that if we reveal the morality of the relations within which women live and are being judged, judges will reliably value good and just relations, and reject oppressive, coercive, and inequitable relations? Rule-based systems intend — whether they achieve the end more than just occasionally — to restrain the savage oppressions of political domination, carried out through law, and private domination in those realms left outside the law, such as sex, culture, or family.

24. Nourse, supra note 9, at 43.
25. Id.
27. See authorities cited in Nourse, supra note 9, at 45.
28. Id. at 47-48.
Mary Becker in *Feminists and Care* insists that whatever the risk, the productive path for feminist legal theory is to engage the political fight for good and valuable relations. "Part of the problem is the failure of feminists, particularly feminists working for legal change, to look at the big picture," she asserts, which includes the consequences for women's equality from their disproportionate investment in care relationships. Without a commitment to value "love's labors and love's laborers," Becker predicts feminism cannot attain full personhood for women.

Becker thus urges feminism to commit itself to the moral project of defining substantive value in relationships. From within the limited strategies that the sameness/difference or discrimination analysis have permitted, feminism cannot address the justice and morality of relationships. To speak of justice and morality requires specifying and justifying feminism's criteria for judgment, honoring good relationships over lesser or bad ones, and pressing law to recognize and support those moral differentiations.

Becker's argument in turn rests on a relational idea of the political community that must deliberate on these choices. Becker urges us to think about a just family policy, for example, in light of the multiple interdependencies between generations, between citizens and those who raise children, between parents in different social locations, and between mothers and non-mothers.

But Becker's embrace of the political struggle brings us to the same quandary we identified in considering Nourse's notions of a relational justice in the hands of judges: is there reason to think feminists can trust politics any more than law? Will voters and lawmakers reliably value good and just relations, and reject oppressive, coercive, and inequitable relations, especially if the moral value of alternatives is explicitly joined in the debate? Historically, the move to the classic liberal definition of the state, with its commitments to rule of law and moral skepticism, were efforts to mute and contain the conflicts of ethnically- and religiously-motivated moral dispute over such questions.

Berta Hernández-Truyol offers a direction for constructing new political processes and behaviors that could be more reliable fora for a feminist engagement with such foundational questions of human well-being. In *Out of the Shadows*, Hernández-Truyol helpfully foregrounds the procedural, recognizing that law is more than aspiration and theory; law is, in fact, a concrete social technology for establishing norms,

32. *Id.* at 60 (describing goal of relational feminism as society in which all human beings, women as well as men, can find human fulfillment and happiness).
33. *Id.* at 58-59.
34. *Id.* at 63, 105-09.
mobilizing power, and distributing resources. Hernández-Truyol argues for an explicitly policy-focused legal analysis that openly brings to the debate the moral or normative grounds of its substantive values, and the legitimacy of the processes by which these values are adopted.\textsuperscript{35} Her model is the processes by which the politically contesting and culturally pluralistic nations of the world have come to reach agreement on international human rights norms.\textsuperscript{36}

As in the human rights context, the feminist goal in domestic law should be full personhood for all persons. Thus, Hernández-Truyol observes, the project is feminist, but also more broadly humane.\textsuperscript{37} Human rights instruments guarantee a flourishing life and personhood directly to the human being, without need to compare groups for the likeness or difference; its instruments speak instead of capacity, liberty, community, sustenance. Human rights discourse understands rights to be indivisible and interdependent, encompassing not only the liberal right to be let alone as an individual, but the right to enjoy just relations with others that Becker emphasizes.

What creates flourishing human lives and just relations between persons is plural, interwoven, and contextual, Hernández-Truyol acknowledges, indeed embraces. In defining new norms for human flourishing, she urges feminists to seek complex and contested, rather than simple and consensus terms, what she describes as a complex inquiry and a textured system of principles.\textsuperscript{38} Yet Hernández-Truyol insists on ultimate determinacy in new norms so that they have the power to bind, as law necessarily must.\textsuperscript{39}

The success of the human rights process, Hernández-Truyol urges, is evidence that eventual agreement, even on contested moral questions, and even for a pluralistic polity, is possible.\textsuperscript{40} Consider the course of human history, and then consider that in three generations the nations of the world have made marked progress towards agreement on what human beings need for full personhood and flourishing lives. The human rights context, she observes, is a promising parallel to a more politically inclusive legal process.

\textbf{The Germinal Relationship: Mothers and Children}

A second trio of symposium papers uses empirical methods to explore the feminist relational aspects of contemporary motherhood. Naomi Cahn uses a historical methodology to explain a shift in the social significance of the relationship between birth mother and child in the context of adoption.\textsuperscript{41} Nina Camic’s work is a qualitative case

\begin{itemize}
  \item \textsuperscript{35} See Hernández-Truyol, \textit{supra} note 17, at 147-61.
  \item \textsuperscript{36} \textit{Id.} at 147.
  \item \textsuperscript{37} \textit{Id.} at 146.
  \item \textsuperscript{38} \textit{Id.} at 159.
  \item \textsuperscript{39} \textit{Id.} at 152-54.
  \item \textsuperscript{40} \textit{Id.} at 146-47.
  \item \textsuperscript{41} Naomi Cahn, \textit{Birthing Relationships}, 17 Wis. Women’s L.J. 163, 164 (2002).
\end{itemize}
study analysis of the legal treatment of child abuse and neglect cases. Camic challenges how the legal system imposes an unattainable vision of motherhood in these cases, and reinterprets the problem of “bad mothering” from a relational feminist perspective. Michelle Oberman employs a multi-method approach – quantitative empirical analysis coupled with the case study method – to explain the difficult area of maternal infanticide, and argue in favor of diminished culpability in law.

In her insightful commentary on the Cahn, Camic, and Oberman papers, social scientist Laura Beth Nielsen praised these projects for using empirical methods and data to theorize from the bottom up. Nielsen urges feminists to use such a critical empirical approach to the study of law, and asserts that feminists are called to use empirical evidence in order to understand the life experiences of women. Application of empirical methodology to relational feminist inquiries, she offers, enables us to understand not only the experiences of individual women, but how they are embedded in the multiple relationships in which women exist.

Naomi Cahn argues that relational feminism helps us understand “legal and cultural approaches to the continuing connection between birth mothers and their relinquished children.” Cahn traces the history of adoption law’s representation, or more accurately erasure, of the birth mother’s relationship to her child. She contends that cultural and social forces defining the family shape legal conceptions of birth mothers and their appropriate relationships with their children after adoption.

Cahn’s analysis of the relations among birth mothers, adoptive families, and children makes visible the connection between birth mother and child that adoption law historically has erased. She notes that early child welfare organizations focused on family preservation and encouraged birth mothers to maintain connections with their children, even when they were sometimes unable to care for them. After World War II, however, attitudes shifted toward the view that permanent separation from their birth mothers was more desirable when those mothers could not care for their children. During this era, commentators increasingly emphasized the importance of traditional families for the strength of society, which undermined single motherhood as a socially accepted family form.

43. Professor Michelle Oberman, Remarks at the Symposium on Feminist Theories of Relation in the Shadow of the Law at the University of Wisconsin Law School (Oct. 5, 2001) (videotape is on file with the Wisconsin Women’s Law Journal).
44. Professor Laura Beth Nielsen, Remarks at the Symposium on Feminist Theories of Relation in the Shadow of the Law at the University of Wisconsin Law School (Oct. 5, 2001) (videotape is on file with the Wisconsin Women’s Law Journal).
Adoption laws came to reflect this preference for permanent separation of birth mothers and their children. By terminating birth parents' parental rights and concealing the identity of birth parents from their relinquished children, adoption laws helped erase birth mothers and construct adoptive families as exactly and only two parents. Indeed, until recently the legal boundaries of adoptive families did not include birth mothers, and did not account for open adoptions or ongoing relationships among birth mothers and their children. Thus, adoption laws represented birth mothers in a way that enforced particular relational roles; the law defined "family" as the traditional two-parent family structure, providing no legal recognition for continuing relationships between adopted children and their birth parents.

Cultural conceptions of family are changing once again and may create space for a more expansive role for birth mothers. Even now, however, Cahn notes a continuing fear that birth mothers will "disrupt" families, a fear that incorporates the implicit relational judgment that children should be raised by two and only two parents, a judgment historically enforced by law. Cahn describes birth parents who struggle against this traditional ideal to envision "birthing relationships" as a relational role between parents and children outside the narrow vision embodied in adoption law. But to establish such a relationship, Cahn argues, birth mothers must struggle against a double stigma, first of conceiving a child outside of marriage, and then of surrendering that child. Again, this stigma comes from implicit and contradictory relational judgments about the appropriate roles of women—that one should be married before having a child, and that no "good" mother would give up her child.

Cahn suggests that relational feminism could re-envision the adoptive family by encouraging law to support the relationship between birth mothers and their children without requiring that bond to match traditional ideals of motherhood. Birthing relationships offer an alternative and expanded notion of family that recognizes the survival of the relational bond between birth mothers beyond adoption. In fact, Cahn notes that adoption laws are beginning to allow a middle range of connection between birth mothers and their children, a link that is more than invisibility, but less than the cult of true womanhood.

Nina Camic finds law playing a similar role in the different context of abuse and neglect cases. Camic finds that through the legal "best interest of the child" standard, parents accused of abuse and neglect are both defined and judged by a particular cultural understanding of their relation to their child, a cultural understanding that reinforces gender inequality. Legal conceptions of what constitutes

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adequate parenting, she observes, do not reflect gender equity in parenting. Although the law requires formal neutrality and equal treatment of parents, in practice mothers are held to an ideal of self-sacrifice and superior care. Legal interpretations of “good motherhood” leave little room for self-fulfillment or autonomy, so that the mother who leaves the state to find more satisfying work or establishes new bonds of affection veers toward neglect. For mothers, the price of maintaining the bond with their children becomes self-sacrifice and subordination to the directives, even to the extent of being told what emotions to express by the judge. Legal standards for “good fatherhood,” on the other hand, reference an entirely different relational norm, one that allows for periodic disengagement, disinterest, and even occasional violence.

Camic also finds that the law helps reinforce and recreate a conception of family in which non-biological relations of care are irrelevant, and traditional gender roles over and above connection with the child are the measure of good parenting. Where mothers rely on caregivers outside the boundaries of traditional family relationships, this is interpreted as a sign of neglect and abandonment. At the same time, the maternal grandparents of fathers are treated as equivalent caregivers to mothers, even when they are also strangers to the child. In both instances, the child is cared for by a stranger; only the relational context differs.

What Camic’s case studies show is that despite the formal neutrality of law, law in practice embodies and recreates gendered relations of inequality. Formally, the “best interests” standard puts the child at the center, focusing on the relation between the child and each parent, and explicitly requiring that the parents be treated equally. In practice, however, what is enforced is an ideal conception of the relationship between parents in a traditional family, in which the mother is nurturing and self-sacrificing, and the father is distant and autonomous. Legally, good parenting does not depend upon the relationship with the child, but instead upon the parent’s ability to live up to this relational ideal. Camic argues that law instead should evaluate parenting in context, and recognize the multiplicity of relationships that parents can play in their children’s lives rather than focus on a narrow definition of parenting grounded in idealized family norms.

47. See, e.g., Camic, supra note 42, at 202.

48. See id. at 201-02. Implicit judgments about class relations also enter the law through the “best interests” standard. One can imagine that the choice to leave children with a stranger for a period of time would look much different if that stranger were a paid nanny, or a boarding school. Camic also notes that in one instance, the court determined that it was better for the child to live with a previously uninvolved father than with an engaged mother who was temporarily living in a homeless shelter, despite the fact that her living arrangements resulted from the court refusing to permit her to move the children to her apartment in another state. Id.
In her presentation, Michelle Oberman proposes that infanticide—cases where mothers kill their children—can be interpreted as a mothering decision. She has assembled a database of about 200 such cases dating from 1990 to 2000. Based on this empirical ground, Oberman identifies five patterns in the cases that describe why mothers kill their children: (1) denial of pregnancy; (2) neglect; (3) abuse; (4) assisted coerced infanticide and (5) purposeful infanticide cases. It is this fifth category of cases, cases where mothers deliberately kill their children, on which Oberman focuses in her presentation.

The “purposeful infanticide” label is somewhat misleading, Oberman asserts, because her findings reveal that these cases involve a range of mothers who kill while suffering from a variety of mental health vulnerabilities, including postpartum psychosis, depression, and chronic mental disorders such as schizophrenia. Significantly, the homicides all occurred against a backdrop that is shaped by the contemporary structure of motherhood, including maternal isolation, cultural or religious factors, and/or socioeconomic factors. Because none of these mothers possessed the mental health capacity to parent under the prevailing structure of motherhood, legal standards of culpability and criminal mens rea are difficult to apply.

Oberman’s relational analysis of her empirical study of purposeful infanticide highlights two themes: maternal isolation and the maternal altruistic double bind. In her presentation, Oberman offered three richly detailed case studies of mothers who killed their children to embody these two themes. The examples will be familiar to many readers—Andrea Yates drowned her five children; Guinevere Garcia smothered her daughter; and Susan Smith strapped her two young boys into their car seats and then forced the car into a South Carolina lake.

The discussion here highlights Oberman’s analysis of the relational aspects of the Yates case. Oberman contends that the maternal isolation was profound in the Yates case. Yates suffered from severe

49. Oberman, supra note 43.
50. Id.
51. In neglect cases, the children died as a result of the mother’s neglect. For example, a child who dies because her mother leaves her in a car on a hot day. Id.
52. In abuse cases, the mothers did not intend to kill her child but the child dies as a result of the mother’s escalating abuse of the child. Id.
53. Assisted coerced infanticide involves situations where the mother’s boyfriend or the father of the child kills the child. The mother assists in or is coerced into participating in the death of the child. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
postpartum psychosis and had been hospitalized on numerous occasions following failed suicide attempts. Each time, she was deemed healthy enough to go home, although the isolated setting to which she was returned was one in which she simply could not cope: Yates was alone at home all day with five children, she had no outside adult contact other than intermittent visits from her mother-in-law, the family home was a bus, and Yates had taken on the responsibility of homeschooling her children. The norm of maternal isolation prevented the health care system from recognizing that this supposedly now-healthy mom needed additional supports.

The maternal altruism double bind also strikingly plays out in the Yates case. As Oberman explained, Yates had many other options besides drowning her five children—she might have opted for longer hospital stays to secure additional treatment for her mental illness, she might have insisted that her husband provide her with outside support to help care for the children and their home, or she might have refused to home school the kids. Oberman contends, however, that these options were not conceivable to Yates because they interfered with her mothering relationship. For example, if she had stayed in the hospital, Yates would have had to abandon her husband and children. When choosing between healing herself and caring for her family, she chose caring for her family. If Yates had insisted on outside help or refused to home school, she would have been conceding that she could not fulfill her role as mother as defined by her and her husband and society. For Yates, to pursue these better alternatives would be to rewrite motherhood in an impermissible manner.

Oberman argues that the United States legal system needs to change the inconsistent and punitive manner in which it responds to cases of purposeful infanticide. A relational analysis of these cases shows that they are preventable. In Oberman's view, widespread maternal isolation is a relatively new social phenomenon. In the past, new mothers did not parent alone in isolation; they were surrounded by family, neighbors and other community members. Oberman urges the law to take an approach that acknowledges both the patterned nature of maternal infanticide and how the structure of contemporary motherhood contributes to that pattern.
Adoption law and the "best interests" standard, these seem logical places to find law's embeddedness in cultural understandings of relationships. But what of insurance law? Or securities law? Theresa Gabaldon correctly notes that feminists have paid scant attention to corporate and securities laws topics. This failure is understandable, Gabaldon allows, because these legal contexts do not (unlike family law or pornography) appear to have obvious significance to women. Feminism's neglect of complex regulatory schemes is matched, Gabaldon observes, by commercial law's neglect of the relational aspect. In Assumptions About Relationships Reflected in the Federal Securities Laws, Gabaldon addresses this gap in the literature by exploring the relational in the unchartered area of complex, commercial regulatory schemes.

Drawing on examples from the Securities Act of 1933 and the Securities Exchange Act of 1934, Gabaldon's inquiry into the federal securities laws' treatment of relationships demonstrates that the relational dwells within the interstices of this regulatory scheme. The goals of the federal securities law are purely market-based — protection of the investing public, improvement of investor confidence, and promotion of efficiency, competition and capital formation. The regulatory scheme applies both to arms-length and affinity transactions. It is this latter category of affinity transaction, in which the law treats securities transactions involving family members, lovers, and close friends, that most concerns Gabaldon. Through her critical appraisal of how law regulates these transactions, Gabaldon exposes implicit normative assumptions about the conduct of family and friends towards each other, and towards outsiders, and she questions the merit and utility of these assumptions.

As Nourse does in the criminal law field, Gabaldon applies theories of relational feminism to interpret how affinity relationships interact with the securities laws and, more importantly, how securities laws embed assumptions about relationships. In Gabaldon's view, the federal securities laws utilize two primary methods of dealing with transactions involving affinity relationships. In one subset of securities transactions, which Gabaldon characterizes as "in group versus out group," the law assumes that traditional family members (the "in" group) are acting in opposition to an "out" group consisting of the rest of the world. The other subset, characterized as "in group," re-

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67. Id.
68. Id. at 222-23.
69. Id. at 235.
70. Id.
INTRODUCTION

reflects the law’s neglect of the special aspects of transactions between individuals in intimate family and personal relationships.\(^\text{71}\) Essentially, the law reflects the stereotypical (and somewhat simplistic) judgment that family members act in a unified and self-interested manner when involved in securities transactions with the outside world and, conversely, that intra-family transactions will be shaped by generosity, trust, and protectiveness. Gabaldon persuasively supports her contentions with numerous examples of the application of securities laws, such as reporting requirements and anti-fraud provisions, to affinity transactions.

Feminist scholars also discover the relational in insurance laws. Jennifer Wriggins shows how interspousal immunity clauses in insurance policies perpetuate the idea that domestic violence (violence within a legally-defined intimate relationship) is a noncompensable harm.\(^\text{72}\) Feared collusion is the justification for these clauses, but implicit in this justification is the idea that claims of injury and violence within marriage are presumptively not to be believed. Wriggins notes that many states require insurance but allow interspousal immunity clauses, which are standard in almost every insurance agreement. Consequently, state insurance regulation actively maintains the persistence of interspousal immunity. Law thus defines and constructs the relationship that shelters the harm (“marriage”), and also legitimates the contractual agreement that excludes that harm by constructing it as the result of “free will.” So law appears neutral, enforcing only the “will of the parties,” even as it makes real harms to women noncompensable because of their relational context.

These examples from securities and insurance regulation are further evidence that assumptions about relationships are implicitly incorporated into legal standards, reified as reality, and turned back to act on society. In this way, seemingly neutral legal standards not only validate often gendered relational norms, but re-create them; they enforce gendered relationships anew, reconstructing the social world of which these norms are a part. But because these judgments are implicit, taken-for-granted, and invisible, they are also hard to challenge. Relational feminism offers one way to make those judgments explicit, and thus open them to question and to change.

RELATING THE THEORIES

This essay has highlighted the agreement among contributing scholars that feminist theory can obtain a renewed analytic grip on the confounding persistence of gender inequality by focusing on a rela-

\(^{71}\) Id.

tional conception of law. Along the way, however, we also discovered a number of tensions in the analytical endeavor.

In her concluding remarks,73 Myra Marx Ferree identified an ambiguity that threads throughout the papers collected in this symposium volume about the meaning of "feminism in relation." One understanding is to see it as an attempt to develop a relational theory of law. Such a theory would focus not on the categories of legal reasoning, but instead on the relational processes that give rise to those categories, as well as the interactional process that produces these categories. Such a theory would, for example, describe "wife" not as a static and natural category, but as a description of a particular culturally and legally constructed relationship.

A second understanding sees "feminism in relation" as an attempt to develop a theory of law that talks about gender as relational. Relational feminism, already an established theoretical voice, sees women as assigned the relational sign and men as assigned the individual sign, and then traces the echoes of this distinction in other legal concepts and legal reasoning. The relational feminism approach might focus, for example, on how and why it is that the relational and caregiving values of particular concern to women, are devalued or invisible within the law.

Thus, as Professor Ferree notes, there remains ambiguity about whether the project is about how women relate to what law is and what law does, or about how law relates to what women are and what women do. Is "feminism in relation" about social context and actual social relations, particularly the role of power in those social relations? Or does the emphasis on social context mean relational feminism is about recognizing and valuing caring relationships important to women that are otherwise invisible in the law? In the closing session of Feminist Theories of Relation in the Shadow of the Law, the consensus of dialogue participants was that these conceptions of relational feminism are not necessarily mutually exclusive. The objective is to avoid making assumptions about relations and social context, and instead to use the relational move as an analytical strategy that can broaden and destabilize law's existing categories and prevailing understandings.

This insight led to discussion of a second tension identified by Professor Ferree – one between categorical and process-oriented approaches to feminist analysis. Feminism in relation suggests a way to avoid static, categorical approaches to gender and feminist analysis. Instead, the project is to understand the social processes that generate gender itself as a relation of inequality, as well as to understand how these social processes through which power operates give meaning to the abstract and formal categories of the law. To do so, Professor Fer-

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73. Professor Myra Marx Ferree, Remarks at the Symposium on Feminist Theories of Relation in the Shadow of the Law at the University of Wisconsin Law School (Oct. 5, 2001) (videotape is on file with the Wisconsin Women's Law Journal).
INTRODUCTION

ree suggests, we must ask how law is both a power and captive to power in making the categories of social life. Thus feminism in relation might be understood as an analytical move to focus on process in order to reveal and to undermine the relational assumptions imported into the categories of the law.

So what advantages does a relational turn in feminist theory offer? First, feminism in relation makes the relational assumptions of law explicit; in the open, these assumptions can be challenged. Second, feminism in relation helps reveal the mechanisms through which law both incorporates and creates existing social meanings. By focusing on process, feminism in relation not only can examine the way in which law draws in meaning from culture, but also examine how meaning pours out through the discourse of law. And finally, feminism in relation creates the potential for law to generate new relational moves, and thus offers the opportunity to critically examine where changes in law might lead.

As Mary Becker notes, some feminists might object to laws that make explicit judgments about relationships by, for example, supporting care-giving relationships, because they threaten to undermine women's liberty to choose the types of relationships they wish. This is a real danger. Liberalism's justification and virtue is in restraining the state and the political forces that would use law to enforce a particular vision of social life. Nevertheless, calls to liberal autonomy envisioned as if it were neutral and non-contextual can also be a means of enforcing the existing relations of power and inequality, and the structure of social life that arises from those relations. The liberal objection presumes that law does not already construct and regulate social life in ways that reinforce some relational choices over others. By showing that the law is embedded in and actively constructs relationships, relational feminism challenges liberalism's claim that law simply preserves autonomy for individual choice, and enforces no particular set of choices about social life.

There is still a danger that relational judgments will cement certain ways of relating to the exclusion of all others. And, as Professor Ferree cautions, comparative perspectives on feminism show that there are many ways in which patriarchy can be represented in the law, with liberalism being only one of them. State support for relations of care on the theory that children are a public good can also promote relations of inequality based on gender. For example, Ferree notes that East German women once enjoyed state-sponsored child care, but lacked meaningful participation and control in how those child care arrangements are structured and run. Pro-natalist policies in this instance, although they provide significant benefits to women, are not about women's self-determination, but about treating

74. Becker, Feminists and Care, supra note 14, at 68, 91-92.
women as mothers and as a vehicle for producing children, and femi-
nists who struggled against that state saw it as deeply patriarchal.75

This caution is well-taken, and suggests that feminism in relation
must be not only critical, but also proactive in imagining feminist ways
of ordering social life. Yet if the relational assumptions are at least
explicit, they become to some extent negotiable, and not invisible. By
making relational assumptions explicit, feminist legal theory opens
them to contest, to challenge and to change.

RE-ENVISIONING THE RELATIONAL

Are relational conceptions only critical, or can they offer new
ways of thinking, of conceptualizing the legal subject? To conclude,
let us offer an example of how relational perspectives might en-
courage progressive and feminist visions of social life. A relatively new
law, the Family and Medical Leave Act ("FMLA"), prohibits firing
workers who need time off because they are needed to care for ill
parents, children or spouses, among other reasons.76 This new law
raises questions about what relationships count as "parents, children
or spouses" and what it means to be "needed to care for" someone in
your family.

A recent FMLA case, Mora v. Chem-Tronics,77 took on the defini-
tion of these questions. In that case, the plaintiff was the father of a
teen-age boy dying of AIDS.78 The father missed ten and one-half
days of work over the course of a year in order to care for his dying
son.79 Caring for his son included staying up at night with him when
he was sick, and spending time with him in the hospital. The em-
ployer fired the father for missing too much work, even though as a
parent he was entitled to twelve weeks of job-protected leave under
the FMLA.80

In its summary judgment motion, the employer argued that the
father was not eligible to take FMLA leave for his terminally ill son
because the boy's stepmother was available to provide care for him.81
The employer's argument implicitly referenced a host of relational
assumptions: that women and not men care for ill children, that the
employment relation takes precedence over the family relation even
in extraordinary circumstances, and that care is a one-way relation in
which fungible care-givers simply meet physical needs, rather than

77. 16 F. Supp. 2d 1192 (S.D. Cal. 1998).
78. Id. at 1199.
79. Id.
80. Id.
81. Id. at 1206.
care being a bond or connection between care-giver and care-receiver, here father and son.

The court rejected the employer's argument, noting that the FMLA regulations gave the father the right to care for his son based on his relationship, regardless of whether other caretakers were available to meet his care needs. Although Mr. Mora's son died before the court ruled in his father's favor, his case helped establish the right of other parents, both fathers and mothers, to care for their children when their children need them. The court noted:

The term "needed to care for" is statutorily defined and does not require an employee to demonstrate that no other caretakers be available before obtaining leave. Under the FMLA an eligible employee "shall be entitled to . . . leave . . . in order to care for . . . a son [who] has a serious health condition." 29 U.S.C. § 2612(a)(1). One of the progressive aspects of this law is that it permits either parent to take FMLA leave to care for a sick child and thus recognizes and validates the importance of both fathers and mothers to the lives of children.

In this instance, law takes a positive role in reinterpreting the meaning of care, particularly in relation to the meaning of employment, and thus opens up new opportunities of relating. Mora v. Chem-Tronics suggests how relational theories of law can lead to progressive uses of law to open up more expansive, more humane, and more feminist understandings of social relationships.

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82. Id. at 1206-07; see also 29 C.F.R. § 825.116 ("What does it mean that an employee is 'needed to care for' a family member?").
83. Id. at 1206.