A Continuous Body: Ongoing Conversations About Women and Legal Education

Judith Resnik

I. Meeting, Again

How has the conversation changed? That was a central question animating a conference—Taking Stock: Women of All Colors in Legal Education—convened in June 2003 by the American Association of Law Schools and by the Section of Legal Education and the Commission on Women of the American Bar Association. In a room of about 150 people, mostly (as usual) women, the discussion felt deeply familiar. Speakers detailed the ways in which women of all colors working in the legal academy did not yet enjoy the status, authority, and opportunity equal to that of white men working in the legal academy. At some moments, one wondered whether the conceit of the Senate as a “continuous body” applied as well to conferences on the inequality of women.

Indeed, the same institutions—the AALS and the ABA—had convened a similar conference, The Voices of Women, more than a decade earlier in New York City. And before that, in 1971, a group of women law professors and

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1. Eleanor M. Fox & Norman Redlich, Introduction to The Voices of Women: A Symposium on Women in Legal Education, 77 Iowa L. Rev. 1 (1991). Much credit for that event is owed to the leadership of Norman Redlich, who was then the dean of the NYU law school and also an active participant in the ABA.

students came together at Yale Law School to focus on women in law. Around the same time, law students organized the National Conference of Women and Law, which met annually for many years. In addition, at multiple sites and with a diverse set of sponsors and participants, dozens of other meetings have addressed the issues.

In short, we are not at the beginning of a project. Rather, as George Eliot put it when opening her novel, *Daniel Deronda*, we are in medias res—in the middle. Significant changes had occurred between the 2003 conference and its predecessors. Take, as one example, its sponsorship: when such conferences were held in the early 1970s, the ABA had no Commission on Women, no Commission on the Minorities, nor any women in senior leadership positions. In the early 1970s, women constituted less than 15 percent of the law student population and less than 5 percent of the professoriate, and they were barely present in law firms and on the bench. Law students had no casebooks about women and law, and few classes on women in law. Women themselves lacked legal recognition of their entitlement to participate, equally, in civic life. By 2003, through the efforts of women and men of all colors,

4. For example, for more than fifteen years Ann Shaleck of American University has held a session called Women’s Rights and the Law School Curriculum at the AALS to discuss teaching, women, and legal education. For many years Martha Fineman has invited papers on specified topics related to feminism and legal theory; her workshop traveled with her as she moved from Wisconsin to Columbia to Cornell. Within just the last few years, dozens of specially focused conferences have been held, such as one about women and work convened under the guidance of Colleen Khoary and Jennifer Wiggins at the law school at the University of Maine; another focused on women, families, and law, convened by Linda MacClain at Hofstra; another at Harvard, prompted by Deborah Rhode and Martha Barnett and cosponsored by the Commission on Women of the ABA and the Kennedy School on Women in Leadership; another at Yale Law School entitled Women, Justice, and Authority. In addition, under the guidance of Paula Monopoli, Karen Czapanski, Jana Singer, and others, the University of Maryland has recently established the Women, Leadership, and Equality Program at its law school. See generally The Difference “Difference” Makes: Women and Leadership, ed. Deborah Rhode (Palo Alto, 2002); Symposium, Women, Justice, and Authority, 14 Yale J.L. & Feminism 217 (2002).
7. As of 1960 only two women had served as Article III judges on the federal bench. By the early 1970s the number of women working as federal life-tenured judges was about seven. Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 Am. U. J. Gender Soc. Pol’y & Law 1131, 1132 (2003).
substantial and real progress had altered the fabric of law, the legal profession, and legal education. Dozens of markers could be used, from women sitting on the highest courts in legal systems, both domestic and international, to a host of decisions and statutes recognizing women as rights holders at work, in schools, and within families.

One measure of change comes from within law school classrooms. The percentage of women students now ranges from 40 to 60 percent. But as Marina Angel, Deborah Merritt, and Barbara Reskin have documented, the gender, race, and ethnicity of those who stand at the front of the classroom has shifted less substantially. Women are some 20 percent of law school faculties. In terms of what is discussed within the classroom, course offerings now include sex discrimination and feminist theory, with several casebooks devoted to gender, race, ethnicity, and the law.

8. As of 2001, 18 percent of the federal judiciary were women. Of the nine justices on the Supreme Court, two (22%) were women. Id.

9. In the fall of 2001 the entering law class was 62 percent women at Berkeley and 53 percent at Yale. The New York Times ran a front-page story: Jonathan Glater, Women Are Close to Being Majority of Law Students, N.Y. Times, Mar. 26, 2001, at A1. Nationwide, the number was 49.4. Id. In 2002 Berkeley’s entering class was 60 percent women, and Yale’s was 42.4 percent women. Entering J.D. Class Profile, University of California, Berkeley, Law School <http://www.law.berkeley.edu/prospectives/welcome/profile.html> (last visited Jan. 8, 2004); interview with Yale Law School admissions office staff (July 17, 2003).


Law students are themselves an important source of such materials and continue to propel such work forward. In 1971 the Women’s Rights Reporter was first published and became connected to Rutgers Law School, where Ruth Bader Ginsburg was then teaching. In the following decades law students created more than two dozen journals that take as central the ideas of gender, race, ethnicity, and sexual orientation. Further, students on many campuses have undertaken original research about the effects of gender on law school life. These empirical studies join a rich body of work documenting problems stemming from bias in courts, in the legal profession, and in the academy.

12. See, e.g., Kerber, supra note 2, at 444.


15. The ABA Commission on Women, joining with the ABA Commission on Minorities, other sections of the ABA, and other organizations such as the National Judicial Education Program of NOW’s Legal Defense and Education Fund and the National Association of Women Judges, have helped to produce more than 60 reports on women in the profession, on people of color in the profession, on women of color in the profession, on gender, race, and ethnicity in courts, and now a fledgling few on sexual orientation and the law. See generally Lynn Hecht Schafran, Women Shaping the Legal Process: Judicial Gender Bias as Grounds for Reversal, 84 Ky. L.J. 1153 (1995/1996); Vicki C. Jackson, What Judges Can Learn from Gender Bias Task Force Studies, 81 Judicature 15 (1997); Judith Resnik, Asking About Gender in Courts, 21 Signs, J. Women in Culture & Soc’y 952 (1996).

II. Why, Then, Another Conference?

Some commentators see the successes achieved as the basis for an argument to stop. The claim is that the principle of equal treatment is now widely established, and therefore it is time to “move on” to other topics. Friendly skeptics, slightly bored, comment: “Another program on equal treatment for women—didn’t we do one last year?” Less friendly comments not only accuse us of “whining” but go further, arguing that, by calling attention to problems of inequality and by acting affirmatively to remedy them, we create inequality.

Why should the topic of the roles of women of all colors in legal education still be an organizing principle of discussion? Were gender, race, and ethnicity only “a politics,” questing after equality, the answer would be that equality has not yet come into being. As I detail below, gender, race, and ethnicity remain empirical variables important to understanding the contemporary dynamics of the legal academy. But gender, race, and ethnicity are more than variables: they are ideas—concepts that organize societies. Therefore, they pose central questions for thinking about law. The legal academy has to address how assumptions about gender, race, and ethnicity shape the law and, in turn, about what role law plays, has played, and should play in making those concepts meaningful.

Below, I sketch some of what has been learned about the effects of gender, race, and ethnicity on legal education. I then turn to the challenges of having the same conversation while also appreciating how much that conversation has changed.

A. The Teachers

First, as many have documented, while the percentage of women as law professors has grown, that number has not kept pace with the pool, as measured by white men of comparable age and academic achievement entering jobs enjoying comparable prestige under traditional formulations.17 Indeed, the number of women hired as new teachers in 1998, at 40 percent, represented a decline from 1992, when women were half of the new-entry hires.18 Further, as the status of a job within a law faculty goes down, the percentage of women holding that position goes up; women “disproportionately fill non-tenure-track positions.”19 While the joys of some of these jobs (including clinical work and legal writing, both of which I know firsthand) are

19. Deborah Merritt, Are Women Stuck on the Academic Ladder? An Empirical Perspective, 10 UCLA Women’s L.J. 249, 250 (2000). One example comes from within the field of legal writing: of the more than 500 teachers, about 70 percent are women, but men have almost half of the tenured positions. The situation is similar for law librarians. Out of 930, 65 percent are women. Of the 90 who hold teaching and tenure-track positions in law schools (as compared to tenure in a law library), more than half (55%) are by men. Angel, supra note 10, at 2–3, 5. See also Richard K. Neumann Jr., Women in Legal Education: What the Statistics Show, 50 J. Legal Educ. 315 (2000).
great, the benefits of such jobs—as measured by security of tenure, pay, other forms of compensation, and authority within law faculties—are not.

These concerns track familiar discussions about the structures of workplaces. Law schools are not alone in noticing disparate statuses and seeking to address these problems. Studies of inequalities in the treatment of women scientists in the academy have garnered headlines (the MIT study\(^20\)) and have prompted senior officials at several major universities to meet regularly to explore ways to generate change.\(^21\) Looking to university teaching more generally, a recent nationwide study of Ph.D.s found that twelve to fourteen years after receiving a Ph.D. tenured women are less likely to have children or to be married than tenured men.\(^22\)

Moreover, as Marina Angel has pressed us to understand, the university is a dynamic institution, which today is turning increasingly toward “outsourcing” by using short-term-contract employees as teachers to lower the costs of providing education. Comparing the numbers of women and men in those positions, Professor Angel found women disproportionately represented in the ranks of the outsourced.\(^23\) Thus a first response to the question about the persistence of the discussion of gender, race, and ethnicity in law schools is that, as variables predicting the status of law teachers, gender, race, and ethnicity remain all too relevant to ignore.\(^24\)

But we don’t yet know enough about their effects. Much of the current data relies on the categories “men” and “women” and not—as we might have hoped—on the intersections of categories of gender, race, ethnicity, age, and sexual orientation. Sometimes a further delineation, “people of color,” has been made—oftentimes, however, without distinguishing experiences of women and of men or without attending to differences among those whose families came from various locales in Asia or Latin America or Central America or whose families were forced to the United States by slavery, and without focusing on experiences of sexual identity and class.

The paucity of such data does not stem from ignorance of the issue.\(^25\) Rather, because of small sample sizes of people of color as students and teachers in law schools, many researchers (committed to providing respondents with anonymity and limited by resources to a single site) do not differentiate the many dimensions of identity. As a partial response, the ABA’s Com-

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\(^{23}\) Angel, supra note 10, at 2.

\(^{24}\) The status and methods of teachers in turn can affect the status of their students, within and beyond the academy. Cf. Elizabeth Chambliss & Christopher Uggen, Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy, 25 Law & Soc. Inquiry 41 (2002).

mission on Women in the Profession has just launched an effort to augment
the quantitative research on women of color in the legal profession.

B. The Students

The second response to the question Why, again, a women’s conference? is that
students continue to report that gender, race, and ethnicity affect their daily
experiences of law school and their career paths thereafter. Here, the contin-
uity of data over two decades is both powerful and disheartening. In the late
1980s a group of about twenty women at Yale Law School found themselves
“alienated”—feeling that their experiences (at least in that law school) were
distinct from (and worse than) those of their male colleagues. These women
undertook a small project to try to understand what they described as their
relative “powerlessness.” Keeping track of which students were called on and
with what response, they found that women were called on less frequently
than men. Further, when women did speak, teachers greeted their comments
with less than full attention, and sometimes ignored the women’s comments.

In 1994 Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow, and Deborah
Lee Stachel published parallel findings about the University of Pennsylvania
Law School, which first admitted women in 1881. With the help of that law
school’s dean, the researchers examined the undergraduate records and
LSAT scores of women and men entering Penn. The undergraduate academic
profiles were equally well credentialed; gender did not distinguish them. But
despite the same predictors of success at law school, women did not do as well
once admitted. By the end of the first year, men were almost three times more
likely than women to be in the top 10 percent of their law school class. This
study also found that women in their first year were more critical of the
experience at law school, but by their third year women had become less
critical than were the men.

In addition to case studies of a particular law school, other researchers look
across different law schools in an effort to control for individual variations.
For example, in the late 1980s Taunya Lovell Banks did surveys at fourteen
law schools—confined neither to the East Coast nor to Ivy League universities—
and gathered almost 2,000 responses from law students. She found that
more women than men perceived law school classrooms to be “alienating
and hostile.”


27. Becoming Gentlemen: Women’s Experiences at One Ivy League Law School, 143 U. Pa. L.
Rev. 1, 26 (1994). See also Lani Guinier, Michelle Fine & Jane Balin, Becoming Gentlemen:
Women, Law School, and Institutional Change (Boston, 1997).

ance and Law School Experiences of Women and Men (Newtown, 1996); Commission on
Women in the Profession, American Bar Association, Don’t Just Hear It Through the
Grapevine: Studying Gender Questions at Your Law School (Chicago, 1998; principal
researcher, Mary Becker); Commission on Women in the Profession, American Bar Associ-
ation, Elusive Equality: The Experiences of Women in Legal Education (Chicago, 1996)
[hereinafter Elusive Equality]. Richard Sander, professor of law at UCLA, is working on an
analysis of a data set from a nationwide survey on law students. See Richard Sander, Kristine
Knaphund & Kit Winter, Through the Gender Gap (forthcoming 2004).

Classroom dynamics are also illuminated by the work of Christine Haight Farley, who reviewed teaching evaluations from a top-ten law school where women numbered 44 percent of the student body and about 15 percent of the full-time tenure-track faculty.\textsuperscript{30} Her data set included 2,270 course evaluations of eight women and thirty-two men. Happily (for those of us who teach), both women and men generally received positive evaluations. But men’s evaluations were more positive than women’s. The criticisms leveled at women included that they failed to control the class, were insufficiently demanding and tough, and were “unprofessional.”\textsuperscript{31} At the same time, women professors were four times more likely than men to be called too harsh and unsupportive.\textsuperscript{32} Men were reported four times more often than women to have a good sense of humor.\textsuperscript{33} Women gained praise for being approachable, accessible, congenial, while men were appreciated for their knowledge as “masters of their subject matter.”\textsuperscript{34}

Those studies looked at classrooms in which women were not yet 50 percent of the students. But more recent work suggests that the changes in the number of women students have made fewer inroads into classroom dynamics than one might assume. In 2001–02 students at Yale Law School undertook an ambitious study to assess dynamics in dozens of classes and to learn how the benefits of mentorship were distributed. As Sari Bashi and Maryana Iskander report, the manner in which law school classes are conducted continues to invite less than full participation from women students.\textsuperscript{35}

Such information has prompted institutions both within and beyond the legal academy to ask law schools to rethink their role in creating patterns of difference for women and men in law. After hearings and data collected in 1996, the Commission on Women of the ABA concluded that “many women still experience debilitating instances of gender bias and discrimination in law schools.”\textsuperscript{36} That report called on law schools to undertake self-evaluations. A survey a few years later found that about 15 percent had done so.\textsuperscript{37} The Texas Supreme Court has since asked law schools again to focus on whether gender affects the academic achievements and experiences of their students.

The data on the structure of law schools as employers and as educators demonstrate that law schools play a role in the \textit{production} of gender as a category of analysis. For students and teachers, gender remains an organizing principle of their experiences and sometimes of success. Women, particularly

\begin{itemize}
  \item \textsuperscript{30} Confronting Expectations: Women in the Legal Academy, 8 Yale J.L. & Feminism 333, 337 n.19 (1996).
  \item \textit{Id.} at 337–39.
  \item \textit{Id.} at 339 n.30.
  \item \textit{Id.} at 339 n.32.
  \item \textit{Id.} at 339–40.
  \item Bashi & Iskander, \textit{supra} note 14.
  \item Elusive Equality, \textit{supra} note 28.
\end{itemize}
white women, have made it into law schools but have not yet “made it” in the deeper sense of full participation.\textsuperscript{38}

\textbf{C. The Subject Matter}

A third response to the question of why to continue the discussion about gender, race, and ethnicity stems from the content of the curriculum. The intellectual integration of the concepts of gender, race, and ethnicity into the legal academy remains far from complete. Empirical analysis of the AALS directories indicates a growing number of offerings with titles focusing on gender, race, and ethnicity.\textsuperscript{39} And, as noted, market demand for these perspectives is reflected in the availability of several casebooks that now bear such labels. But teachers of classes that are “about” gender, race, and ethnicity report that the students enrolled are disproportionately women of all colors and men of color. Teachers of classes historically within the core of legal education have been slower to incorporate gender and race as tools of analysis in standard offerings.

One term that captures these concerns is \textit{mainstreaming}—used by the European Union and the United Nations to denote a commitment to addressing questions of gender in all arenas of policymaking.\textsuperscript{40} The Section of Women in Legal Education did its own version of mainstreaming in the 1980s and 1990s when, at the annual meetings of the AALS, the WLE section joined with the sections on contracts, property, procedure, torts, and others to hold

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\textsuperscript{38} At the Taking Stock conference Lani Guinier, Susan Sturm, and others spoke of revising “standard” teaching methods to respond to some of these concerns. Race Talks Introduction \textlangle http://www.racetalks.org/about/index.html\textrangle (last visited July 16, 2003); Workshop on Taking Stock: Women of All Colors in Law School \textlangle http://www.aals.org/profdev/women/material.html\textrangle (last visited July 17, 2003).

\textsuperscript{39} Information on the number of people describing themselves as teaching courses comes from AALS directories. In 1972, the first year the AALS listed “Women and Law” as a category, 29 people were listed as teachers of such a class. In 1989–90 the number was 100; in 2002–03, 269 people were listed. The first year in which “Civil Rights” offerings were listed was 1973; 63 people were listed. In 1989–90 the number was 335; it was 515 in 2002–03. In 1980–81, when the AALS first included a category then called “American Indian Law” and now called “Native American Law,” 35 people were listed as teachers of that topic. The number was 58 in 1989–90, and 118 in 2002–03. To provide some context for these data, more than 9,000 full-time teachers were at 184 accredited law schools in 2000. Many thanks to Kirby Smith for thoughtful research on these issues.


joint programs about how the content of these classes ought to change once gender, sexuality, race, and ethnicity were taken into account.\textsuperscript{41}

How much impact these projects have had is a question. Casual empiricism does not give me confidence that such efforts have been transformative. For example, take Procedure and Federal Courts, classes that I teach. I have long thought that jurisdictional rules need to be understood in terms of gender and that the divide between state and federal courts is gender coded—infused with associations that identify women with families, define women’s legal issues as problems of families and violence, and locate disputes about such issues within the jurisdiction of state courts.\textsuperscript{42} Indeed, questions of jurisdiction have a good deal of affinity with understandings of gender, for at its core the sex/gender system is a system of boundaries. Many of the successes that have advanced women’s equality have come by reframing understandings of the range of possibilities of both women and men, by redrawing some boundaries and erasing others. To do so has required detaching assumptions of the naturalness of differences between women and men and replacing those assumptions with appreciation for the breadth of capacities that all persons possess.

Similarly, the divide between state and federal authority in law stems from decisions allocating authority and making certain kinds of questions national while relegating others to local authority. One such example is the Supreme Court decision of United States v. Morrison, invalidating a provision—the “civil rights remedy”—of the Violence Against Women Act, which had authorized victims of violence motivated by and “due, at least in part, to an animus based on the victim’s gender” to bring federal damage actions against assailants.\textsuperscript{43} The five-person majority opinion by the chief justice explained its ruling in part by the claim that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”\textsuperscript{44}

The relationship between gender and federalism has now become a topic of intense concern for many (women) law professors, but it is not clear how much those ideas are being used in classroom discussions.\textsuperscript{45} Likewise, because


\textsuperscript{43} See 42 U.S.C. § 13981(d)(1). Critics of this provision shaped their attack on jurisdictional grounds, that Congress had wrongly invaded the province of the states in violation of principles of federalism.

\textsuperscript{44} United States v. Morrison, 529 U.S. 598, 617–18 (2000).

the challenges of multiple and shared sovereignty are central to a Federal Courts class, decisions and statutes related to Indian tribes' rights of self-governance are both illuminating and relevant. In 2004 the Section on Federal Courts of the AALS devoted a session to this topic, but most casebooks on the federal courts do not directly use gender, race, and political affiliation as central elements of their analyses.

The relatively limited impact of efforts to revamp may in part reflect the degree to which law school curricula resist change more generally. The phrase intellectual segregation captures the concern that certain arenas of legal thought and certain courses are dominated by men whose color is white and who have not considered how new understandings of personal and political rights holders have reshaped core doctrinal concepts in United States law. A next step in research on law teaching would be to look closely at law school offerings to learn which courses are taught by faculty of what colors and gender, to learn about what readings are assigned, and to learn about the demographics of the students enrolled.

III. But Not the Same Conference

To confer (again) about gender, race, ethnicity, and law is not to say the same things again. Neither the law and the legal academy nor the world that surrounds them is static. Three facts distinguish contemporary conferences from their predecessors: first, the social commitment to inclusion of more persons as rights holders has broadened; second, American legal education is losing its parochialism; and third, the work of promoting equality is now widely shared among people of different ages.

Over the past three decades, affirmative action and diversity had become forms of response to patent inequality. But in June 2003, when the conference Taking Stock was held, all educators were awaiting the Supreme Court’s response to affirmative action in higher education and to discrimination against gay men and lesbians. Only days thereafter, the Court reaffirmed that race could be taken into account when state schools admitted students to universities and graduate schools. In Grutter v. Bollinger Justice O'Connor's opinion, written for a majority of five, was restrictive in many respects. It permitted affirmative action for race and ethnicity only when a school could show it made a "highly individualized, holistic" assessment. Cost-saving mea-

sures, such as assigning points for race as a factor, were prohibited. Moreover, the majority used twenty-five years, the interval between its earlier ruling in *Bakke* and its decision in 2003, as the time frame by which such measures would become presumptively unnecessary. Justice Scalia’s angry objections (arguing that affirmative action was a “sham” justified by “mystical” concern for critical masses of minorities that ought to be clear to “even the most gullible mind”) proposed a list of lawsuits for opponents to file to limit the majority’s ruling, again adding costs to any university seeking to use affirmative action. But the central analytic point of the majority’s decision confirmed a central analytic point of conferences such as Taking Stock: that race and ethnicity remain too significant to ignore.

The affirmative action decisions, when read against a background of ongoing conversations styled as about “gender, race, and ethnicity,” also reveal the complexity of the issues. First, Justice Ginsburg’s concurrence addressed the concept of “implicit bias” that patterns of negative stereotyping occur despite consciously expressed goals not to be biased. At the Taking Stock conference Mahzarin Banaji, a cognitive psychologist, enabled participants to have a direct experience (through computer exercises) of their own implicit biases—for example, finding it easier to associate women with families and men with science than our conscious intentions would predict. As researchers understand the speed at which such associations are made, they document that remedies for discrimination cannot be pinned only to historical practices but must address ongoing patterns of knowledge formation.

Second, neither gender nor the intersectionality of race and gender were categories of analysis in the majority’s decisions. The degree to which white women (such as myself) have benefited from affirmative action was not used by the Court as an example of just how valuable it can be. The absence of a discussion about gender and affirmative action signals a disquietude in confronting all the dimensions of the problems to which affirmative action responds. The terms *minority* and *majority* do not capture a multiracial, multiethnic population, let alone the multiple identities of any individual. Barriers to “leadership”—as the majority decision in *Grutter* properly put it—have a remarkable resiliency. Responses keyed only to group membership do not suffice to reorganize social practices.

But the possibility that law could try to help was made clear just a few days after *Grutter*, when a legal triumph of another aspect emerged. In *Lawrence v. Texas* the Court held that adults have a constitutional right to decide their own private sexual conduct with other consenting adults. As Justice Kennedy

49. See Gratz, 123 S.Ct. at 2415–16.
50. *Grutter*, 123 S.Ct. at 2330. Justice Ginsburg’s concurrence, joined by Justice Breyer, disassociated itself with this proposed cutoff. *Id.* at 2548.
51. *Id.* at 2348 (Scalia, J., concurring in part and dissenting in part) (joined by Thomas, J.).
52. *Id.* at 2349–50. The chief justice filed a dissent joined by Justices Scalia, Kennedy, and Thomas. *Id.* at 2365. Justice Kennedy filed a separate dissent. *Id.* at 2370.
53. *Id.* at 2347–48.
54. *Id.* at 2329, 2341.
explained for the Court, gay men and lesbians are “entitled to respect for their private lives.” Moreover, as “the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” In the same week the Court also insisted that the right to counsel owed to criminal defendants requires that, when one is faced with the death penalty, a modicum of investigative lawyering is necessary. And a few weeks before, the Court had concluded that the Family and Medical Leave Act, a statute recognizing that workers are often caregivers, is a constitutional means to respond to discrimination based on sex in the workplace. In short, aspirations that law respond to discrimination and appreciate the variety of forms of injuries inflicted were met, in some respects, by a Court often identified with a narrow strand of American politics.

Both Grutter and Lawrence stand for another dimension of changes over the last decades—the relevance of international law and transnational norms to American law. In Grutter, Justice Ginsburg’s concurrence (joined by Justice Breyer) noted that the majority opinion’s desire to impose time limits to race-conscious programs resembled “the international understanding of . . . affirmative action”—citing concepts such as “temporary measures” in the Convention on the Elimination of All Forms of Discrimination Against Women as well as provisions from the International Convention to Eliminate All Forms of Racial Discrimination. In Lawrence, Justice Kennedy’s majority decision also invoked international law, used in that context to rebut the claim made in Bowers v. Hardwick that Western civilization supported homophobia. Just as non-U.S. law is making its way expressly into Supreme Court discussions, the globe and women’s legal status in all parts of it are becoming routine parts of discussions in the United States about women and the law. That shift was much in evidence at the 2003 Taking Stock conference, which focused on women outside the U.S. borders as well as on those within.

A third difference is the degree to which work in 2003 is intergenerational. Not only were dozens of women in attendance at Taking Stock, there were

61. The Court’s jurisprudence has, in fact, long been affected by other countries’ experiences, although citations to them were not always made. See Judith Resnik & Julie Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 Stan. L. Rev. 1921 (2003).
62. Justice Ginsburg is here, again, a pioneer. See Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4) at 34, 54–55.
dozens of women of different ages, with no one age cohort dominating. Rather than a competitive, ladder-climbing image of professionalism, with sons slaying their intellectual fathers, the activity of making equality is a visibly collective multigenerational project.

The cohort effect was also felt differently among participants. When the category is “women,” “we” are no longer solo actors. But when that category intersects with race, ethnicity, sexual orientation, and class—as it did repeatedly and purposefully in the 2003 conference—“we” are differently situated, for the cohort of white women has thickened more than that of women of other colors.

IV. Back to the Middle

Thus, the 2003 meeting Taking Stock marks a moment somewhere in the middle of a saga about women and rights. But unlike Justice O’Connor in the Grutter decision, I do not assume that only a quarter century lies ahead. Nor are all the plot lines clear, for two stories need to be intertwined and told simultaneously. One narrative speaks of delight and accomplishment, epitomized by conferences now populated by more individuals able to speak on any given topic than a podium can permit. The other story not only details the disappointments (that there is more to do) but also the outrage at the physical fear and poverty of many women’s lives. Yet the successful narrative that produces new participants may make it more difficult to understand how many remain at risk. Law has simultaneously enabled, responded, and failed, and we who represent its successes must devise new means to explain and respond to its failures. 64

63. Clare Dalton made this point several years ago. Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkley Women’s L.J. 1, 12 (1987–88).

64. For as Eleanor M. Fox and Norman Redlich put it more than a decade ago, when introducing the 1991 conference The Voices of Women, “it is a work in progress.” Fox & Redlich, supra note 1, at 4.