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Introduction: Symposium on Exploring Power, Agency & Action in a World of Moving Frontiers

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INTRODUCTION: SYMPOSIUM ON EXPLORING POWER, AGENCY & ACTION IN A WORLD OF MOVING FRONTIERS

By Bryant G. Garth*

I am pleased to introduce this symposium on "Exploring Power, Agency & Action in a World of Moving Frontiers." The symposium represents a new take on issues that have haunted legal scholars and lawyers, especially those activists who moved into the legal field in order to be in a position to champion a progressive agenda. Legal institutions and indeed legal training lead such social change advocacy to proceed through efforts to create, extend, and support legal rights. To be sure, many historical accounts of social change in the United States draw on the purported successes of various "rights revolutions." For many reasons, however, as the authors point out, this legalized process of change waters down and puts limits on a social change agenda and constricts the social movements that idealistic legal scholars seek to champion. The symposium examines ways to confront and perhaps avoid this dilemma.

As background for the Law and Society panel on which this symposium is based, the organizers offered the following set of questions: "What effects do the demands for legal equality emerging from many resistance movements have and what are their dangers? How might they reinscribe/mediate/contest categories like "citizen," "human," "rights," "family," "eligible beneficiary," "woman," "criminal," etc.? Alternatively,

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what would a commitment to radical justice (that engaged the politics of social identities) that did not take recourse to rights or equality paradigms look like? Most concretely, what kind of claims, demands, categories and practices (legal and otherwise) would we/could we take up/use to pursue the collective work of justice in light of and in lieu of the critiques of liberalism, citizenship, and rights? That is, do we have a sense of alternatives within contemporary discourses?"

The disillusionment of legal scholars with the rights strategy is not new. The rise of Critical Legal Studies in the late 1970s and early 1980s, in particular, was largely a scholarly reflection on the limits of the liberal legalism identified with the civil rights movement. The questions raised above, in fact, could have been the subject of a CLS panel. But there is a freshness of the responses in this symposium. Each author grapples with the promise and the limits of the rights strategy with a different perspective. The articles therefore merit a careful reading, and I cannot pretend to summarize them in this brief introduction.

Professor Hart begins the symposium with the issue of the limits of legal language. The terms that are used to signify social change such as same-sex marriage or equal opportunity, she points out, also connote relatively narrow and conservative agendas. Only an understanding of the context for the use can tell what is meant in a particular situation, and often the user of the terms fails to take into account how narrowly it will be construed. Professor Hart recognizes that the problem cannot be solved simply, but suggests that we all need to be very careful about which terms we use and which meanings we assign to them. Our own agency – even if embedded in the legal structures – then has more of a chance to be exercised.

Professor Ramachandran takes up and reiterates the critique of rights and formal legal equality. Recognizing that the language of rights must be reckoned with, she seeks to find a way external to law to ground particular legal policies. She looks to science as one way to constrain and perhaps even enliven legal policies. It is a bold initiative, and lawyers and judges may be loath to cede their power to scientists; but she makes a strong case that social policy has moved so far in the direction of pure ideology that science might provide one way out. The case is all the more compelling as our social policies endanger the planet.

Professor Bloom wants to keep the agenda focused on rights, but her innovation is to promote tort lawyering that will confront what she and others term biopower. She wants to move away from dominant narratives of idealized bodily truths proffered by medical elites. In contrast to Professor

Ramachandran, she favors a more personal narrative to resist what she sees as entrapment in the dominant narratives sustained by elite science.

Professor Rasmussen examines the area of animal rights as a kind of test case. She explores the possibilities of rights-based language as a way to improve the situation for animals more generally. She carefully argues that what appears to be progress through a legal- and rights-based strategy rationalizes violence against animals, reinforces a hierarchy that puts humans at the top and makes humans the measure of other creatures, and avoids issues of power and inequity. She does not provide a solution to this problem, but she makes the situation very clear.

Professor Kandaswamy pushes the critique further, seeking to "sever the hold" of law on the political imagination. She uses the example of the emancipation of slaves after the Civil War to show that legalized freedom meant only "freedom to the rubrics of liberal individualism and contract." She seeks therefore to avoid the limitations of legal categories by, in particular, focusing struggles "around specific harms." Her approach comes close to rejecting the rights strategy.

Finally, Professor Reddy focuses not so much on rights but on related processes of reinforcing the status quo through the enactment of social norms. His example is the issue of grieving for suicides committed by gay teens. The public mourning of such suicides is part of the process of reinforcing categories that promote stereotypes and limit progressive change. The only way to transcend the pre-figured categories, he suggests, is to "engage with ungrievable life" – to somehow step out of the categories.

None of the articles provides a simple answer. From my more sociological perspective, the paradox is that what attracts people to the law is what limits their possibilities. Law in the United States contains the structures of power – in two senses. First, the power of law comes not from the law as such but from the power that is embedded in it over time. Absent some major social crisis, playing to the law in the United States is a way to craft a potentially winning strategy. It is hard to move ahead by severing the hold of law or stepping out of conventional categories (or rejecting conventional medical understandings). Second, law contains the structures by providing rules that limit the freedom of the powerful to do whatever they want but at the same time ensure that the powerful will not lose their position. Activists in the United States inside the law confront this dilemma, and activists from outside the law are also drawn to law (and the same dilemma) because they seek to gain the support of law (and what is embedded in it) to advance their agendas. The history of the rise and fall of

welfare rights is a perfect example of this situation.[1] In the absence of major crises that shake up the system and change the power structure, change is managed in this way.

At the risk of overdoing the sociological analysis, one might say also that the attraction of idealists into the legal field serves to perpetuate this. Each generation of scholars makes the law more relevant to actors seeking social change by denouncing efforts to make social change narrowly through law. In this way, social movements and activists will be more likely to ally with legal actors who recognize the limits of the law – but still cannot avoid them. Movements in this way are channeled more effectively into law than they would if legal scholars pretended that rights solved all problems.

This account may appear to be an expression of cynicism about social change through law. I do not think that is the case. In fact, the constant criticism of the limits of law moves the law to absorb the criticism and in the process change – even if much more slowly than activists want. The suggestions of critical scholars are not wasted efforts. They provide fresh avenues to challenge, occasionally subvert, and gain some strength through the knowledge of what the pull of law and rights will do. More importantly from my perspective, they renew the pressure on law and legal institutions to at least take into account what is being argued, and that pressure may bring some needed change. The change may be quite incremental, and it may not threaten the holders of power, but it still counts. Further, in times of crisis, bolder arguments may gain more traction even if – which may be a positive – they are still somewhat domesticated through the law.

1. *See generally*, FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007).