

2012

Forward: "War on Women" in Women and the Law

Tracy Thomas

University of Akron School of Law, thomast@uakron.edu

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/conlawakronpubs>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Thomas, Tracy, "Forward: "War on Women" in Women and the Law" (2012). *Con Law Center Articles and Publications*. 28.

<http://ideaexchange.uakron.edu/conlawakronpubs/28>

This Contribution to Book is brought to you for free and open access by Center for Constitutional Law at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Con Law Center Articles and Publications by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

Women and the Law 2012
Foreword

Overview and Introduction

Organization of the Book

- A. Reproductive Rights
- B. Women in the Workplace
- C. Women's Healthcare
- D. Feminism and Family Law
- E. Violence Against Women
- F. Sex Discrimination Theory

OVERVIEW AND INTRODUCTION

This year has been called “the War on Women.” Despite the continued economic recession and international turmoil, the focus has been on women’s reproductive rights. Women watch incredulously as challenges to their previously-established legal, medical, and social rights become front-page news. The headlines have stirred up the culture wars over women’s role in society. Republican presidential candidate Rick Santorum fueled the debate with his positions against abortion, birth control and prenatal testing, and his disdain for the “role of ‘radical feminism’ in encouraging women to work outside the home.” (Even though women’s market work has sustained families during this “mancession” and time of record unemployment and lay-offs.) The attack on women’s reproductive health included the decision by the Susan G. Komen Breast Cancer organization to stop funding screenings and mammograms at Planned Parenthood locations. This decision triggered a national outcry that went viral, with individual donors to Planned Parenthood quickly replacing the million-dollar funding deficit. Komen’s stellar reputation suffered permanent damage with Hollywood stars, cities, and organizations withdrawing their support.

The war on women was accelerated by the contraception controversy over President Barack Obama’s renewed efforts to make Catholic universities and hospitals comply with healthcare mandates to provide insurance coverage for birth control for their female employees and students. The Catholic Bishops responded with an absolute denial of obligation to comply with the law and specious claims of infringement of religion. A farcical Republican Congressional hearing on the issue allowed the testimony of only five men, dressed all in black—refusing to allow the sole woman, Georgetown law student Sandra Fluke, to testify. The picture of the inquisition of women’s rights painted a thousand words and quickly began to shift attitudes toward support of those rights. Meanwhile the Catholic Bishops attacked their own nuns for their “radical feminism” of focusing on social justice and the poor rather than advocating against abortion and gay marriage.

The *New York Times* tracked the reawakening of women’s rights in response to this war on women.¹ At baby showers, choral groups, and women’s church circles, women of all ages and political persuasions have been outraged at the attack on women’s reproductive rights. “We all agreed that this seemed like a throwback to 40 years ago,” said Ms. Russell, 57, a retired teacher from Iowa City who describes herself as an evangelical Christian and “old school” Republican of the moderate mold. “I didn’t realize I had a strong viewpoint on this until these

¹ Susan Saulny, *Centrist Women Tell of Disenchantment With G.O.P.*, N.Y. TIMES, Mar. 11, 2012, at A15.

conversations.” “If they’re going to decide on women’s reproductive issues, I’m not going to vote for any of them. Women’s reproduction is our own business.” The sudden return of the culture wars over the rights of women and their place in society has made many women despondent, but also reinvigorated.

The Obama presidential campaign was quick to follow this change in the majority of the electorate. The President reminded people of his support of the 2008 *Lilly Ledbetter Act*, saying that “[c]hange is the first bill I signed into law that says women deserve an equal day’s pay for an equal day’s work.”² Meanwhile, the Republican Party opposed reauthorization of the federal Violence Against Women Act and its monetary support of investigations and prosecutions of domestic violence, even though the act has had broad bipartisan support since it was first enacted in 1994.³ Certainly with respect to women’s rights, it feels like, “the times, they are a-changin’.”

Legal issues of women’s rights continue to present new questions and challenges to lawyers practicing in the field. This book collects material from the past year to highlight the variety of trends and issues dominating the courts and academic thinking. *Women and the Law* is not just about feminist theory or sex discrimination claims. It is about women’s full social experience from the private sphere of personal choice and family matters to the public sphere of the workplace. This book surveys the many legal issues confronting women and offers recommendations for advocating judicial and legislative change on their behalf.

ORGANIZATION OF THE BOOK

The 2012 edition of *Women and the Law* contains all new material, organized under general themes of issues effecting women. One section seen in prior editions of *Women and the Law*, Women in Education, is absent this year. Expanded coverage of this topic is expected in the next edition, capitalizing on the flurry of scholarly activity in 2012 triggered by the 40th anniversary of Title IX of the Education Amendments, passed by Congress to prohibit sex discrimination in education and school athletics.

A. Reproductive Rights

The year 2011 saw the advent of more abortion regulations passed than at any time in the last quarter of a century since abortion was legalized in 1973. In what has been called “a year for the record books,” legislatures in all fifty states introduced a total of 1,100 bills resulting in 135 new laws restricting abortion. These laws include fetal pain bans on abortion after 20 weeks, mandatory ultrasound laws, 72-hour waiting periods, detailed disclosures, and heartbeat bills that ban abortion after 8 weeks. A personhood amendment in Mississippi would have constitutionally defined human life as beginning at the moment of conception, jeopardizing women’s right to birth control and reproductive freedoms. These abortion laws represent an unprecedented seismic shift in the law from moderate regulation to overt hostility. The advent of significantly more stringent limits on abortion seems to blatantly defy the holding of *Roe v. Wade* permitting abortion in the first trimester and portends a sure future through the courts.

In *The Abortion Informed Consent Debate: More Light, Less Heat*, Nadia Sawicki explores this expansion of state abortion policies passed under the guise of “informed consent”

² Jackie Calmes, *Obama Campaign Plans Big Effort to Court Women*, N.Y. TIMES, Mar. 11, 2012.

³ Andrew Rosenthal, *Grand, Old and Anti-Woman*, N.Y. TIMES, Mar. 15, 2012.

and the notion of disclosing more medical information to the patient. She details how these disclosure regulations have been challenged by the academic community in law, medicine, and ethics as fundamentally inconsistent with the obligation of doctors to provide sufficient information to allow patients to make autonomous and educated decisions about medical care. However, she argues that the amorphous concept of informed consent does not itself constrain these types of regulations, even while it is cavalierly used to endorse wide-ranging legislative efforts. Sawicki instead recommends that opponents of these laws ground their challenges in constitutional and public policy arguments which are better suited to address the legal defects of these abortion regulations.

As the abortion wars heat up again, scholarly commentators have also reexamined the past in order to shed light on how best to move forward. New York Times journalist Linda Greenhouse and law professor Reva Siegel provide a retrospective of the right to abortion in *Before (and After) Roe v. Wade: New Questions about Backlash*. This essay summarizes points from their book, *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (2010), a documentary history of the genesis of the abortion conflict prior to the Supreme Court's 1973 decision in *Roe v. Wade*. In their essay here, the authors address the backlash narrative that arose post-*Roe* claiming that adjudication should be avoided at all costs. They instead suggest that the conflict surrounding *Roe* was more complicated and set it in the context of the decade before the famous abortion case to a "time when more Republicans than Democrats supported abortion's decriminalization, when Catholics mobilized against abortion reform but evangelical Protestants did not, when feminists were only beginning to claim access to abortion as a right."

Mary Zeigler continues this historical inquiry of the abortion debate by exploring caregiving justifications that have both advanced and limited women's right to abortion. In *The Bonds That Tie: The Politics of Motherhood and the Future of Abortion Rights*, Zeigler traces the caretaking rationales used in the 1970s to advance feminist claims to abortion, federally funded daycare, and family leave. These derived from the fact that women tend overwhelming to raise their own children, and thus the decision to give birth creates a lifetime commitment for most women that affect her career and education. Zeigler shows, however, how these same rationales were subsequently used by the Supreme Court to limit women's liberty based on the inherent psychological bonds between mothers and their biological children and the assumed devastating consequences that would result to women from the loss of this connection. She uses the caretaking rationale as an example of the caution that should be used in selecting legal and policy based justifications for those seeking to advance women's constitutional rights.

B. Women in the Workplace

In this presidential election year and continued time of recession, much of the world's attention is on work. During these desperate times of unemployment and disappearing jobs, women's demands for equality in the workplace are subverted even as the gendered aspects of work are, ironically, highlighted. Joan Williams and Allison Anna Tait write about the gender implications of the "Great Recession," in their article "*ManceSSION*" or "*Momcession*"?: *Good Providers, a Bad Economy, and Gender Discrimination*. The public discourse surrounding the recession took a gendered turn when it was discovered that men were in industries hardest hit by the economic downturn and that as women became the sole and primary family earners, men adopted caregiving roles at home. Dubbed the "manceSSION," this rhetoric challenged the idea of

masculinity and men as “the good provider” even as it entrenched discrimination against women in the workplace. Williams and Tait explore the fallacies of the “good provider” stereotype and expose the continuing hurdles to reconciling the worker stereotype with the normative model of family caretaking.

The focus on jobs continues to include reports of the “stubborn gender gap” where women are paid less than men. Some argue that this is less about women being paid less for doing the same job as men, and more about women taking less demanding or part-time work in order to accommodate family responsibilities. But Deborah Thompson Eisenberg shows that denial of equal pay for women doing similar jobs is still alive and well in America. Her article *Lessons from Wal-Mart Stores v. Dukes About the Legal Quest for Equal Pay* closely analyzes the Supreme Court’s decision in *Wal-Mart Stores v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541 (2011), which held that over one million current and former female Wal-Mart employees could not challenge discriminatory pay and promotions as a national class action because they failed to prove sufficient “commonality” among their claims. Although superficially a procedural ruling about class actions, Eisenberg shows how the case demonstrates the failure of federal law to provide an effective remedy for systemic pay discrimination. The main federal law, Title VII of the Civil Rights Act of 1964, conceptualizes pay discrimination as a civil rights violation and requires a plaintiff to prove that an employer harbored sex-based animus and intentionally paid her less. Plaintiffs in *Wal-Mart* tried to prove their case by showing a pattern and practice of discrimination against women as shown by statistical evidence of stark pay disparities between men and women performing the same jobs, the company’s strong corporate culture of sex stereotyping, and over one hundred anecdotes about supervisors who made explicit sex-based comments about paying women less because men deserved more money as “breadwinners” in their families. Eisenberg shows how the “*Wal-Mart* case highlights the Catch-22 that women face in trying to address unjustified pay disparities in the workplace.” They have difficulty bringing challenges under Title VII because they typically lack direct evidence of intentional discrimination, and after *Wal-Mart*, they will have more difficulty showing that intent by joining with co-workers.

C. Women’s Healthcare

The passage of federal healthcare reform legislation in 2010 brought questions of healthcare front and center in the courts. While the constitutionality of the federal legislation is pending in the Supreme Court, the reality of women’s lives and gendered healthcare experiences has triggered an exploration of these issues by legal scholars.

The first two articles included here focus on the question of when women’s health issues can be legally designated a “disability.” In *A Female Disease: The Unintentional Gendering of Fibromyalgia Social Security Claims*, Dara Purvis explores how the Social Security Administration’s standard for determining a disability that renders a person unable to work and eligible for federal benefits disproportionately disadvantages women who suffer from fibromyalgia. Fibromyalgia is a diffuse syndrome characterized by excessive pain that is overwhelmingly diagnosed in women, but is not easily shown by objective clinical evidence. The legal mechanism, however, for determining social security disability is based on clinical medical evidence, which is skeptical of women’s reports of pain. Purvis discusses how women experience pain differently than men, as more severe, frequent, of longer duration, and cyclical.

She challenges the delegation of legal determinations to physicians, which she finds places doctors in a peculiar and inappropriate decisionmaking role that compromises their patient care.

Jeannette Cox similarly argues that women's healthcare experiences need to be appropriately incorporated within the legal entitlements of "disability." In *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, Cox argues that pregnancy should be considered a disability within the purview of the Americans with Disabilities Act (ADA) making women eligible for workplace accommodations. She argues that the ADA's expansion to include persons with minor temporary physical limitations is comparable to pregnancy's temporary physical effects. She challenges the assumption that a disability must be a "defect" and cannot be the physically healthy condition of pregnancy. Cox draws on the social model of disability that defines disability not as a physical impairment per se, but as an interaction between the individual's body and her social environment.

The gendered impact of the regulation of healthcare is further explored by Roseann Termini and Miranda Lee in their article, *Sex, Politics, and Lessons Learned from Plan B: A Review of the FDA's Actions and Future Direction*. Plan B, an emergency contraceptive pill similar to hormonal birth control pills (called the "morning after pill"), was the first drug in a decade rejected by the Food and Drug Administration (FDA) despite its own panel's recommendation to grant over-the-counter approval. The denial was due to strong political interference and the argument by many conservatives that this pill is an abortive pill because it blocks a fertilized egg from implanting in the uterus. The political rather than medical decision triggered an investigation by the Government Accountability Office and a subsequent lawsuit in which a federal judge ordered the FDA to approve over-the-counter use of the emergency contraceptive pill for women over seventeen. (The pill is available by prescription for those under seventeen). The authors here aim their discussion at exposing the atypical approach to regulating women's medicine. For Plan B, they argue that the best approach is to substitute ideology with education of the accurate scientific facts which properly describes the nature of the pill as birth control. The *New York Times* reached the same conclusion after its own study, finding that the political divisiveness over the emergency contraceptive pill in this presidential election year "is rooted in outdated or incorrect scientific guesses about how the pills work."⁴

D. Feminism and Family Law

Work-life questions have been the focus of many of the feminist writings in the field of family law this past year. Scholars have honed in on questions of caregiving. Women and men have children, and children need care. Who will provide that care, and how it situates against workplace expectations is an issue of particular importance to women, who still provide the overwhelming majority of childcare. The debates have polarized between "equal parenting advocates" who seek an increase in men doing family work and more women doing market work, and "maternalists" who seek valuation of women's work in the home.

Nicole Porter describes this work-life conflict as the "caregiver conundrum" created by all of the workplace norms, rules and practices that make it difficult for working caregivers to successfully balance work and family. In her article, *Embracing Caregiving and Respecting Choice: An Essay on the Debate Over Changing Gender Norms*, Porter avoids picking sides in the existing debate, and instead seeks to maximize options for all caregivers. She appreciates that "choices" about parenting are not always freely-made and are socially constructed, but also

⁴ Pam Belluck, *No Abortion Role Seen for Morning-After Pill*, N.Y. TIMES, June 6, 2012, at A1.

recognizes “the futility of trying to change gender norms that are so engrained in our culture and in who we are.” Porter’s solution is to provide more flexible workplace hour and pay reforms to facilitate individual choice to address a variety of situations, whether a caregiver wants to fight marginalization of pay and opportunity in the workforce or wants to balance with part-time options.

Others however have more explicitly engaged the gender norm debate. Naomi Mezey and Cornelia Pillard explore a shift in the cultural norm towards a celebration of women’s caregiving in their article *Against the New Maternalism*. They identify what they call the “new maternalism,” the revived veneration of the mother as the celebrated, default parent. They discuss groups like MomsRising.org and Sarah Palin’s “Mama Grizzlies” as a “new wave of popular portrayals of happy, sassy, and empowered mothers [that] seems to resonate with many women.” They contrast this with the evolution of the law, which since the advent of the second-wave feminist movement, has become gender neutral with respect to workplace equality and family roles, as for example, in the Family Medical Leave Act. The authors find it “especially surprising that culture is moving in the opposite direction of law toward a maternalism that powerfully reinvigorates the links between women, parenting, and home care.” The authors critique the way that this culture of new maternalism reinforces a “highly gendered, neotraditional approach to parenting and family life that makes it harder for men and women to vary from the dominant cultural scripts.”

Beth Burkstrand-Reid builds upon this gendered parenting construct in *Trophy Husbands and Opt Out Moms*. She explores the phenomena of well-off, educated men and women leaving paid work for unpaid work in the home, caring for children and supporting their spouse’s career advancement. She contrasts the favorable media attention given to men who stay home “to take one for the team” with the negative media coverage of successful women who “drop out” and “give up” on the feminist revolution. Burkstrand-Reid argues that these media depictions obscure greater truths. First, that parents do not leave the work force of free choice, but rather are pushed out by family-hostile policies. Second, she concludes that the laudatory media coverage of at-home-dads may actually harm work-family law reform efforts.

The final article about family law switches perspective to the historic role of coverture under which married women’s legal identity was “covered” by that of her husband. Mary Heen reveals the origins of gender-specific business practices in the context of insurance. In *From Coverture to Contract: Engendering Insurance on Lives*, Heen examines the development of gender-distinct insurance rates during the antebellum period following the alteration of the common law doctrine of coverture by state legislatures to permit life insurance contracts between spouses and protect women’s insurance proceeds from their husbands’ creditors. After this change, insurance companies began pricing life annuities using separate male and female mortality tables to assess the risk of life contingencies. These gender-specific rates were based on “natural” differences between the sexes, in which women were viewed as inferior, as physically and economically dependent on men, and as confined by nature to maternal and domestic roles. The change to a gender-specific rate resulted in higher rates for coverage of female lives and sometimes, in the outright denial of coverage of women. These origins show how legal reforms incorporated dominant gender ideologies to introduce gender as insurance pricing category, casting a shadow of the continuation of that common commercial practice today.

E. Violence Against Women

Every day, women in the U.S. and around the world suffer violence, rape, and abuse from an intimate partner who allegedly loves them. The problem of domestic violence is primarily a woman's problem, as the victims are overwhelmingly female. Much legal scholarship has been written about the problem of domestic violence, highlighting the available legal remedies that came into existence in the 1970s. These legal reforms focused on empowering battered women so they could put their abusive relationships behind them and take charge of their lives. Writers now are focused on domestic violence law as it reaches new levels of maturity and sophistication, looking at new approaches and new challenges.

Cheryl Hanna begins the discussion by tracing the path of domestic violence law in the U.S. Supreme Court in her article, *Supreme Court Advocacy and Domestic Violence: Lessons from Vermont v. Brillon and Other Cases Before the Court*. She illustrates how the issues of domestic violence arise in a surprisingly wide variety of legal contexts, like evidence law, criminal law, firearms regulation, federalism, and international law, to name a few. Hanna concludes that overall the Supreme Court's record on domestic violence law is mixed. She argues that the domestic violence community needs to broaden and expand its advocacy before the Court, namely in the form of amicus briefs. She encourages advocates to join in those cases that implicate domestic violence even when they technically address a distinct legal issue to ensure continued evolution and maturing of the law.

Rethinking domestic violence law continues in Laurie Kohn's article, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*. She critiques the existing formal intervention systems which fail to sufficiently address domestic violence. Kohn notes that the incidence of domestic violence remains "astonishingly high," and numbers of homicides have remained constant. She recommends the controversial approach of restorative justice commonly seen in the juvenile justice system. Restorative justice generally focuses on addressing harms by engaging the community, victims, and offenders themselves in the solution. Kohn argues that the restorative process could be effective in the domestic violence context because of the direct engagement between perpetrator and victim, the informality of the intervention, and interagency and community collaboration.

Finally, Nancy Cantalupo argues for expanding the definition of domestic violence to include peer violence in college in *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*. This Article discusses why two laws designed to prevent and end sexual violence between students on college campuses, Title IX of the Educational Amendments of 1972 and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, are failing to fulfill this goal and how these legal regimes can be improved to reach their objectives. Cantalupo argues that these laws fail to address, and even exacerbate, the problems that cause schools to ignore the issue of peer sexual violence. These information problems include damage to a school's public image from increased reporting, the persistent myth that such violence is committed by strangers, the lack of awareness by school officials about their obligation to prevent such violence, and the prohibitively expensive broad education and training needed to correct such information problems. The Article concludes with a series of recommendations for how the laws could be changed to address the barriers to effective compliance and prevention of peer violence.

F. Sex Discrimination Theory

Underlying the work that women's rights lawyers do is the foundational premise of what gender equality requires. Sex discrimination presents conundrums for courts, who legalistically and formally cannot appreciate that sometimes women are similarly situated to men, and sometimes they are differently situated because of context, social construct, or discrimination.

One existing problem in the theoretical framework of sex equality is the case of pregnancy. Deborah Dinner argues in her article, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, that courts have used an artificially narrow perspective to interpret the Pregnancy Discrimination Act of 1978 (PDA), amending Title VII of the Civil Rights Act of 1964, to prohibit only discriminatory animus. Instead, she argues that shifting the cost of reproduction from the individual woman to the larger society is a critical component of sex equality. Dinner traces the history of activism of feminists in the 1960s and 1970s who pursued formalist equal treatment goals as well as redistributive aims. These advocates argued for classic anti-discrimination mandates, the accommodation of pregnancy in the workplace, and affirmative social-welfare entitlements to caregiving in order to realize women's right to social and economic independence. This corrected historical narrative has powerful implications for the law today, supporting alternative, structural interpretations of the PDA and supporting wider legislative amendments to the Family Medical Leave Act.

In the next article, *Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference*, Lisa Pruitt turns attention to the international treaty governing sex discrimination, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Her focus here, like much of her other research, is on women in rural settings. The CEDAW treaty was adopted by the United Nations' General Assembly in 1979 and ratified by many countries—except the United States. Its mandate is “extraordinarily broad,” calling for member states to eliminate direct or indirect discrimination in both the public and private spheres of life, improve women's de facto position within society, modify cultural patterns based on the assumed inferiority of either sex, and eliminate gender stereotyping. The treaty also designates rural women as a distinct population. Pruitt details how rural women came to be featured in CEDAW and how the treaty differentiates and supports their rights.

Finally, Mae Quinn takes on the sexism of theorists in *Feminist Legal Realism*. Legal realism is the legal movement and theory which identified practical explanations for the operation of the law, looking beyond the formal or mechanical operation of the rules to the interpretation and import of law in the real world. Quinn reveals the male-centered narrative that has developed around the Ivory-tower legal realists. She instead directs our attention to the women who did not just talk about realism, but actually did realism by addressing social problems with interdisciplinary and interactive work. Quinn highlights the work of New York jurist Anna Moscovitz Kross, one of the country's first women law graduates, practicing lawyers, and judges. She uses this example of feminist legal realism to reflect on legal realism's past and feminist theory's future. Quinn acknowledges that many are grappling with the frustrations and limitations of feminist legal theory that has become “increasingly individualistic, inaccessible, and nihilistic.” She offers the precedent of feminist legal realism as one way out, a path that is generally more rooted, communal and practical to achieve meaningful improvement of social realities.