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# Law, History, and Feminism

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# *Law, History, and Feminism*

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FEMINIST LEGAL HISTORY:
ESSAYS ON WOMEN AND LAW (NYU PRESS 2011)

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INTRODUCTION

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*Feminist Legal History* offers new visions of American legal history that reveal women's engagement with the law over the past two centuries. The essays in this book look at women's status in society over time through the lens of the law. The conventional story portrays law as a barrier or constraint upon women's rights. While law has and continues to operate as a restraint upon women's full participation in society, law has also worked as a facilitating structure. The overall picture gleaned from the snapshots in time offered in this book shows the actualizing power of the law for women. Women have used the law historically as a vehicle to obtain personal and societal change. Even more, women have used feminist theory to transform the law itself to incorporate an appreciation of gendered realities.

The essays here locate women at the center of a historical understanding of the past. In what has been called "engendering legal history," the works integrate the stories of women into the dominant history of the law and then seek to reconstruct the assumed contours of history.[1] The authors recover the women and their contributions that have been omitted from history, enabling a rewriting of the traditional historical narratives. The research fills in some of the missing pieces of legal history, and goes further to offer alternative interpretations of the general discourse of law: "[t]hings we thought we new about American history turn out to be more complex than we had suspected."[2] The essays test familiar generalizations and challenge the social construction of gender. Using historical inquiry, the authors focus on the details and social

context, rather than the legal rules, to better understand the meaning and impact of the law. The details are important to avoid overgeneralizations and superficial descriptions of how and why events occurred in the past. Such re-examinations of American legal history contribute to discussions of the law and policy decisions of today in ways that promote women's rights, women's interests, and women's empowerment.

The introduction provides the context necessary to appreciate the essays in this book. It starts with an overview of the existing state of women's legal history, tracing the core events over the past two hundred years. This history, while sparse, provides the common foundation for the authors, and establishes the launching point for the deeper and more detailed inquiries offered here. Following this history is an exploration of the key themes advanced in the book. In Part I, *Contradictions in Legalizing Gender*, the essays develop analyses of the law's contradictory response to women's petitions. The essays in this section provide evidence of how law operated as a barrier to limit women's power, and challenge the assumptions that such barriers have been eliminated today. Yet the essays in part I also present a more nuanced historical picture. They show the law's facilitation of women's agency and power, often based on the same gendered norms that elsewhere produced limitations. Part II of the book, *Women's Transformation of the Law*, shows women's impact upon the law and illustrates how women changed the law to incorporate their own, gendered, perspectives. By "feminizing" the legal process and altering the substantive law to respond to women's needs, women were able to shape the law in their own image.

The introduction concludes with an overview of feminist legal thought. An appreciation of such theory and methodology is important to understanding the lens through which the authors and advocates over time approached the problems presented. *Feminist Legal History* is not just a

collection of stories about women. Instead, it is a feminist inquiry of the historical record, in which feminist theory illuminates the positions and motivating beliefs of women over time.

*Women's Legal History Thus Far*

The history of women in the law is still a work in progress. The existing narrative of women's legal history is somewhat skeletal, which is not surprising given that the field is relatively new.[3] The research, however, shares a common foundation, even as that history is being re-imagined by ongoing scholarship. The conventional story in law tells of women's linear progress from oppression under the law to equal opportunity in modern times. History is viewed as a series of small steps, as women slowly eradicate the legal barriers to their full empowerment. This collection shows that such incrementalism did not prevail in the law and that existing historical accounts of women's legal rights are one dimensional.

The popular notion of women's history is often expressed as first wave and second wave feminism. The first wave spans the seventy-five years when demands for suffrage were prominent, beginning with Elizabeth Cady Stanton's *Declaration of Sentiments* in 1848 to adoption of the Nineteenth Amendment to the Constitution and women's right to vote in 1920. "Second wave feminism" refers to the women's liberation movement of the 1960s and 1970s often symbolized in mass media representations by Gloria Steinem—the quintessential liberated "career woman"—and Betty Friedan, the iconic middle-class housewife who documented the dehumanizing effect of her experience in the influential book, *The Feminist Mystique* (1963). The feminism that emerged in the 1960s and 1970s, however, was composed of a more complex and diverse set of political, social, and cultural challenges to a patriarchal order than could be

adequately represented by either Steinem or Friedan. And, the nineteenth century campaigns for the rights of "woman" were rent with racial and class tensions that remain hidden when recounted only from the point of view of Cady Stanton. Despite significant focus on these contentious issues in the scholarship produced by historians of women's social history, official histories of law and women often continue to put white, middle-class, women with professional ambitions and economic privilege—whether living in the nineteenth or twentieth century—at the center of their analysis. Yet, it is important to recognize the intricacies of the way that race and class tempers and shapes gender inequities as well as hinders cross-race and class alliances among women in order to appreciate the complexities of women's activism and legal situations over time.

Conventional legal histories of women tend to begin in the period before the first feminist wave with studies of coverture and women's legal invisibility inherited from English common law. From the earliest times of American law, married women were "protected" by the law of coverture which provided that a woman was covered legally by her husband and thus "relieved" of rights to property, wages, child custody, or suffrage. The English treatise writer, William Blackstone, summarized the existing common law. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing."[4] In practice this meant that a married woman could not own or control her own property or earnings, devise property by will, enter into contracts, have custody of her children, be liable for her own debts, or sue or be sued in court. A husband was permitted to provide physical correction or "domestic chastisement." The law allowed and even obligated him to control his wife since he was liable both for her civil debts

and criminal misdemeanors. Blackstone explained that the legal disabilities of coverture were "for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England." Historians, however, have found some evidence of women's autonomy during these early times. As Mary Beth Norton demonstrated in her book, *Founding Mothers and Fathers*, women exercised social and legal power in colonial America as midwives and on women's juries constituted for paternity determinations.

The dominant gender ideology of the late eighteenth and early nineteenth centuries evolved into one of separate spheres for men and women. The law embraced the popular cultural notion that women were relegated to the private sphere of home and family, while men dominated the public spheres of work and politics. Women's political role as a citizen of the new republic was cast in terms of domestic responsibility. Under this view of republican motherhood, women were entrusted to educate their sons as virtuous republican citizens. Linda Kerber in her classic book, *Women of the Republic: Intellect and Ideology in Revolutionary America* (1980), wrote of the ways women took advantage of their duty to raise civically responsible children by learning to read and taking seriously their role as educators of the young. This domestic role was intensified and sentimentalized in the first half of the nineteenth century by the promotion of a "cult" of domesticity. "True women," according to the "cult" focused all their efforts on the home and were protected from public responsibilities. In Barbara Welter's often cited delineation, in addition to domesticity they evinced piety, purity, and submission to the men of their family and community. This ideology of course was neither an accurate description of women generally speaking nor was it an attainable ideal for any but the small strata of white middle-class women in this rapidly industrializing period. It was an aspiration applicable only to those women who did not have to labor at farm work, enter into commercial relations at market,

work as servants in other family's homes, or work for remuneration outside their homes—for example, in the burgeoning textile industry. Though the ideology was full of contradictions, it was widely remarked upon and worked to justify and endorse the lack of political rights for women in the public sphere by presumably elevating them as the treasured "angels" of the private sphere.[5]

Challenges to this idea of women's need for protection the law of coverture began with the Married Women's Property Acts in the 1840s. They changed some of the express legal restrictions on women's rights to property and limited husband's prerogatives over that property. The first series of enactments barred the creditors of husbands from seizing the property of married women. Later acts allowed married women to retain their personal property and earnings, sign contracts, and sue and be sued. The acts were motivated as much by the credit crises and wealthy fathers protecting their daughters as from feminist motivations to reform the law. The new statutes were also part of the larger codification movement which sought to restrict the discretion of judges by reducing common law rules and equitable practices to express statutory terms. Most of this legislation was limited in scope. It did not, for example, provide wives with joint ownership of all property accumulated during marriage. Nonetheless, the reforms were the first steps toward recognizing women's economic and familial status.[6]

Women's demands for equality in the family sometimes extended to claims for political rights. On July 19 and 20, 1848, in Seneca Falls, New York, Elizabeth Cady Stanton presented her *Declaration of Sentiments* which contained 18 demands for social, political, and legal equality. The first demand on the list of claims for equal property, custody of children, and employment, was the right to vote. The movement for women's equal political and public rights became part of the nation's social discourse, led by Stanton and Susan B. Anthony's National

Association for Woman's Suffrage and Lucy Stone's American Association for Woman's Suffrage. The organizations differed on the legal tactics for suffrage—the American pursuing a state-by-state approach and the National seeking federal action. They also disagreed about the involvement of men as officers (American allowed) and on support for the Fifteenth Amendment mandating suffrage for black men, but not women (National opposed).

In 1873 in Rochester, New York, Susan B. Anthony tried to vote, arguing that the newly-enacted Fourteenth Amendment granted women this right in federal elections. She was jailed, yet her sentence was stayed thus prohibiting her from challenging the law on appeal. The following year, in *Minor v. Happersett*, Virginia Minor pursued the legal argument in the courts arguing that the Fourteenth Amendment's protection for the "privileges and immunities of citizenship" guaranteed women the right to vote. The Supreme Court rejected her claim, narrowly interpreting the new amendment to hold that voting was not a privilege of citizenship and blocking women's juridical strategies to secure suffrage.[7] A suffrage amendment was introduced into Congress in 1878, and endlessly reintroduced, until it emerged from committee in 1914 and was quickly and easily defeated. A few states like Wyoming and Utah granted women the right to vote by the end of the century but, in the absence of a federal mandate, most continued to deny women this right until 1920.

In the late nineteenth century, the suffrage movement gained new traction with the additional support of socially conservative groups like the Women's Christian Temperance Union. These organizations, originally established to oppose the sale and consumption of alcohol, endorsed the ideology of "true womanhood" by reiterating women's purity and relative insulation from the amorality of the marketplace. They sought the vote for women on grounds that they were morally and spiritually superior to men and thus better suited to caretake society.

They specifically argued that female leadership was best able to attend to social problems sparked by the increasing pace of immigration and urbanization, such as a rise in alcohol consumption which threatened the home as a protected haven for women and children. This application of "true womanhood" logic to promote women as "social housekeepers" was a powerful and effective new strategy of female reformers producing new roles and even professions for women, but nonetheless did not produce widespread acceptance of putting the vote in the hands of women.

The final impetus for women's suffrage would not come until after the turn of the new century when more radical logic demanding women's political equality to men pushed aside conservative "true woman" ideology, and more subversive measures demanding women's right to vote finally won the day. In 1917 while Carrie Chapman Catt, as representative of the merged National-American Woman's Suffrage Association, engaged President Woodrow Wilson in discussion, Alice Paul, Lucy Burns, and other members of the National Woman's Party led silent pickets and protests in front of the White House. They continued these protests for six months until they were jailed on the charge of obstructing the sidewalk. In prison Paul led hunger strikes and endured forced feedings and inhumane treatment. The events triggered a public and political outcry sufficient to push the dormant suffrage amendment to the forefront. Meanwhile, additional congressional alliances were secured by recourse to racially divisive strategies that garnered the support of conservative southern congressmen happy to swell the ranks of white voters by adding white women to the rolls. In the immediate aftermath of the First World War, a combination of powerful rhetorics invoking modernity, democracy, and national and racial superiority tipped the scales in favor of woman suffrage.[8] The Nineteenth Amendment to the Constitution guaranteeing women's right to vote was finally passed in 1920.[9]

During this time women also sought access to other levels of power such as the right to practice law. A few women were benevolently granted admission to the bar and thus licensed to practice as lawyers. These included Arabella Mansfield in Iowa in 1870, and Charlotte Ray, the first African American female lawyer, licensed in D.C. in 1872.[10] Other women--like Phoebe Couzins, Emma Barkelo, and African American Mary Ann Shadd Cary–succeeded in part when they were allowed to attend some of the newly-emerging law schools. Most women though were refused access to the legal profession based on their sex. Myra Bradwell, a Chicago woman who worked in her husband's law office and published the *Chicago Legal Times*, sought admittance to the bar in 1869 after passing the state bar examination with honors. The Illinois Supreme Court refused to license her because she was a woman. In 1873 the U.S. Supreme Court in *Bradwell v. Illinois* affirmed that decision and denied women the right to practice law. In a concurring opinion that has become a classic reading in American history courses, Justice Bradley, with pointed reliance on "true woman" logic, wrote that women should be confined to their separate domestic sphere.

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.[11]

Bradwell eventually worked to change the law in Illinois, and was licensed to practice in 1890. Similarly, Belva Lockwood was denied the right to practice in the U.S. Supreme Court–until she successfully petitioned Congress to change the law. The Supreme Court,

however, subsequently denied her right to practice in the state courts of Virginia, citing states' rights and *Bradwell*.[12]

Despite the disempowering nature of protectionist ideology underlying much of nineteenth-century law, female labor reformers utilized the same theory to secure rights for women in the workplace. Progressive labor activists like Florence Kelley, head of the National Consumers League, believed all workers needed protective legislation mandating minimum wages and maximum hours of labor. Kelley began with protections for women workers to gain a toehold for more general reforms. She strategized correctly that courts and legislatures would be more amenable to protecting "helpless" women than men.[13] The U.S. Supreme Court took this approach in the 1908 case of *Muller v. Oregon* to uphold protective legislation limiting working hours for women to ten a day. In view of women's disadvantage in the struggle for subsistence because of "physical structure and a proper discharge of her maternal function,"[14] Justice Brewer wrote, Oregon was allowed to adopt such a rule. The Court was aided in its decision by the first "Brandeis Brief" presenting social science evidence of women's weakened status and need for protection. The brief, written and researched by Josephine Goldmark and Brandeis with Kelley's influence, included medical evidence that women's blood and muscles had more water content than men's and noted that children of working women were injured by inevitable neglect. The brief explained women's need for more time than men outside of work: "[F]ree time is not resting time, as it is for a man. . . . For the working-girl on her return from the factory, there is a variety of work waiting. She has her room to keep clean and in order, her laundry work to do, clothes to repair and clean, and, besides this, she should be learning to keep house if her future household is not to be disorderly and a failure."[15] While this evidence accepted by the Supreme Court seemed limited to support for a gender-specific ruling, the Court subsequently extended its

decision to men in *Bunting v. Oregon* by supporting hours restrictions for all "persons."[16] The Court backed away from these decisions in 1923 by invalidating a minimum wage law for women in *Adkins v. Children's Hospital* on freedom of contract grounds said to be applicable to both men and women.[17] Protective labor legislation returned to favor during the New Deal in *West Coast Hotel v. Parrish* (1937) when the Court upheld a law nearly identical to that in *Adkins*.[18]

After the passage of women's suffrage, disagreements resurfaced between Progressive activists focusing on women's differences and liberal feminists seeking equal treatment of women under the law. In 1923 Alice Paul first proposed the Equal Rights Amendment to change the U.S. Constitution to provide that "equality of rights shall not be denied or abridged on account of sex." Though introduced into Congress it was not passed by Congress and sent to the states for approval until 1972. The Amendment was defeated when it failed to obtain the necessary ratification by two-thirds of the states though many states amended their own state constitutions to include an ERA. The debate against the ERA was led by Phyllis Schlafly and the conservative organization of which she was head, Eagle Forum. Schlafly, a mother of six children and a fulltime working lawyer and activist, demanded that women had the right to be treated like "ladies" and that social differences such as motherhood must be kept sacred. Schlafly claimed that the ERA would mandate abortion, require women to serve in the military, release men from obligations to support their wives and children, and require unisex bathrooms—issues that became hot button points of debate in the media to the obscuring of other issues that were more widely accepted in the public mind such as equal pay for equal work.

As the ERA debate unfolded, abortion became a lynchpin issue for the women's rights debate. Women's right to choose and control their own bodies emerged as a central concern for

many feminists. The twentieth-century feminist argument for abortion built upon arguments of earlier feminists. In the mid-nineteenth century abortion under the common law was available from midwives and was legal prior to quickening (usually late in the fourth month of pregnancy), until an aggressive public campaign to criminalize abortions led by doctors rendered the practice risky and illicit. Between 1850 and 1880 most states outlawed abortions and restricted contraception, thereby reinforcing traditional power roles between men and women and emphasizing women's social duty to bear children. The federal Comstock Act enacted in 1873 classified information concerning contraception and abortion as obscene-and prohibited selling or distributing contraception or abortion devices.[19] Nineteenth-century women's rights advocates did not often publicly endorse abortion or contraception—indeed, most stridently avoided any association with the advocates of such. Nonetheless, many were outspoken about customs enshrined in law that denied women the right to control their own body and sexuality. These advocates supported "voluntary motherhood" by which they meant the right of married women to determine when and how many children they would bear by asserting their right to refuse their husband's demands for sex. Others, sometimes known as 'free lovers," insisted on the right and obligation of wives (as well as husbands) to dissolve their marriages if love no longer motivated them to engage in intimate sexual acts. Though the idea that women ought to be free to choose motherhood as well as to indulge their sexuality (within marriage at least) at their own discretion and in accordance with their own personal feelings remained controversial until well into the twentieth century, it was clear that the precepts of "true womanhood" was undergoing radical review even before the end of the nineteenth.

After the turn of the century, radical ideas about women's sexual freedom and right to birth control exploded onto the public consciousness. Women like Emma Goldman—the "free

lover" and anarchist—and Margaret Sanger—the progressive reformer, eugenicist, and nurse—helped expand the idea of voluntary motherhood by focusing their efforts on legalizing contraception. Goldman publicly flaunted local ordinances that reinforced the idea that women should present themselves as non-sexual beings. Sanger started the birth control movement by opening the first birth control clinic in New York in 1916. She was arrested for distributing birth control, though in affirming her conviction, the New York Court of Appeals interpreted the law to allow doctors to prescribe contraception to prevent "disease." Sanger's clinic, renamed "Planned Parenthood" in 1942, went on to challenge the Comstock Act and other laws prohibiting contraception. In a series of cases culminating in the U.S. Supreme Court's decision in *Griswold v. Connecticut* in 1965, the Court recognized a constitutional right of privacy for contraception.[20]

Many early birth control advocates including Goldman and Sanger had personally favored a woman's freedom to choose abortion--but expediently suppressed that issue in the campaign for contraception laws. Though they may have agreed upon this tactic, the two women approached the broader issue of birth control from widely differing perspectives particularly when it came to immigrant and poor women. Goldman, an immigrant herself, championed the rights of laboring women and embraced radical political critiques of capitalism. Sanger's eugenic outlook colored her appeals for birth control as well as sterilization as mechanisms which might succeed in inhibiting poor, disabled, and criminalized women from reproducing—as if poverty, disability, or criminality were signs of racial degeneration. Half a century later, demands to legalize abortion would no longer be motivated by such eugenic visions. By the early 1970s large numbers of women and doctors allied together to advocate for the availability of medically safe

abortions for all women. This alliance grew to encompass a majority of voters, many of whom would embrace a new "pro-choice" movement in the 1980s.

Yet it was not at the ballot box but in the courts where abortion first gained traction as the primary feminist issue. In 1973, in *Roe v. Wade*, the Supreme Court held that a woman had the right to choose an abortion in the first trimester of a pregnancy.[21] Using historical information on the permissiveness of abortions prior to quickening, the Court relied upon the constitutional right to privacy, rather than the right to equality, as a basis for affirming women's reproductive rights. Thirty-four years later, in 2007, the Court restricted this right to abortion in its decision in *Gonzales v. Carhart,* upholding bans on late term or "partial-birth" abortions. In that decision the court referenced an idea reminiscent of the nineteenth century protectionist ideology that surrounded court decisions concerning women—only this time the state sought to protect women against themselves citing the unintended emotional consequences the court believed abortion produced in women such as sadness and remorse.[22]

Throughout this period the equality movement gained momentum in the courts and legislatures in ways that went beyond the issue of reproductive rights for women. One of the first successes was Title VII of the 1964 Civil Rights Act prohibiting race and sex discrimination in employment. The sex classification has sometimes been believed to have been added to the bill in an attempt to defeat its passage.[23] In theory it worked to expand the legislation to include key issues that specifically impinged upon women's lives. Enforcement of the new law, however, was weak. The Equal Employment Opportunity Commission (EEOC) focused its attention on enforcement of race claims. It showed a lack of serious concern about sex discrimination in employment by deciding in 1965 that sex segregation in job advertising through use of male only help wanted ads was permissible. This outraged Betty Friedan and other women who, in 1966,

responded by founding the National Organization of Women (NOW). NOW quickly organized to support women's equality by challenging the EEOC to take forceful actions against workplace sex discrimination under Title VII.

The employment cases were most successful when stereotypes of women's lack of equal ability to perform certain types of work was debunked. Equality theory, however, sometimes floundered in pregnancy cases where the courts confronted physical differences between men and women. Different treatment because of pregnancy, the Supreme Court held, was not discrimination "because of sex."[24] Congress reversed this result by passing the Pregnancy Discrimination Act of 1978. The act relied on an equality theory requiring employers to treat pregnant employees similarly to other temporarily disabled employees. The sameness/difference debate continued over the issue of parental leave. When California passed legislation granting pregnant employees, but not all parents, four months of unpaid leave and a guaranteed return to work, the Supreme Court upheld the legislation on grounds of women's difference and their need for special protection. The Family Medical Leave Act of 1993 rejected this theory by guaranteeing 12 weeks of (unpaid) medical and childcare leave equally to both men and women.

One of the leading figures for sex equality in the courts in the 1970s was Ruth Bader Ginsburg who directed the Women's Rights Project at the American Civil Liberties Union while a professor at Columbia Law School. She later became the second woman to serve as a Justice of the United States Supreme Court. Ginsburg was the chief architect of the strategy that built the foundation for contemporary sex discrimination law. The strategy of the Women's Rights Project was designed to attack gender stereotypes across the board. As Ginsburg explained it, they set out to attack separate spheres assumptions built into the law. "[T]he objective was to obtain thoughtful consideration of the assumptions underlying, and the purposes served by, sex-based

classifications."[25] She attacked the fundamental premise of the law's differential treatment of men and women—typically rationalized as reflecting "natural" differences between the sexes—that had historically contributed to women's subordination and their confined "place" in a man's world.

In challenging sex-based classifications across the board, Ginsburg attacked laws on many different subjects including those like alimony or survivor benefits that appeared to favor women. She opposed laws barring women from working as bartenders or serving on juries as well as those preventing men from receiving alimony. As historian Linda Kerber demonstrated in her work *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998), the law denied women equality not only where they sought equal benefits but also where they sought equal obligations like jury service. The Supreme Court first recognized women's right to equal treatment under the Fourteenth Amendment in *Reed v. Reed* (1971) when it struck down a state law that created a preference for men to serve as administrators of estates. The Court refused to accept the gender stereotype that women were not capable of financial management. Using *Reed* as a baseline, Ginsburg then encouraged the Court to adopt a heightened level of scrutiny for reviewing distinctions on the basis of sex. In *Craig v. Boren* (1976) the Justices adopted a form of intensive review though not as rigorous as that used for distinctions on the basis of race. Twenty years later, when Ginsburg herself was on the Court, she wrote an opinion for the majority in the case of *United States v. Virginia* (1996) that seemed to apply an even stricter standard of scrutiny in striking down Virginia Military Institute's male-only admission policy.

The essays in *Feminist Legal History* both build upon and challenge this basic history to expand our understanding of women and the law. The authors pick up where the classic story of

women's legal history leaves off, adding new events, providing new details, and suggesting alternative explanations for the traditional historical narrative. The stories told here are detailed and contextualized. By patiently fleshing out the specifics of legal events, the essays avoid oversimplification and provide opportunities to challenge existing generalizations about women, their treatment under the law, and traditional narratives of legal history.

*Contradictions in Legalizing Gender*

Part I of *Feminist Legal History* focuses on the law's effect on women. It begins with an examination of the uneven ways in which the law has responded to women's assertions of social power and demands for control over their own lives. The chapters in this section display the complex ways in which law recognized women's rights and the contradictory responses to women's claims to autonomy and power. This ebb and flow of women's empowerment contrasts with the conventional understanding of incremental, but linear, progress toward the eradication of barriers to women's empowerment. The historical inquiries offered in this book disclose a more complex and variegated relationship between women, law, and society—marked not by steady progress, but by a variety of contradictions, inconsistencies, and tensions.

The opening chapters of this section show women using the law to achieve agency and control of their circumstances. These chapters show that during times when it was assumed that women did not have access to the courts, women were in fact able to achieve limited power and recognition of their legal rights. This came at a time when it was procedurally difficult for women to access the courts because laws of coverture denied women standing to sue as a plaintiff, prohibited women on juries, and often denied women the opportunity to testify as

witnesses. The research here suggests that early judicial recognition of women's autonomy was based upon an assertion of gender difference. Difference and women's need for special protection was a basis for awarding privileges and benefits. Chapters by Professors Chused and Schlanger illustrate how women's perceived difference was the basis for granting legal rights or control over their circumstances. The view of women as different underlies Richard Chused's essay on the women's temperance movement in Ohio in 1873. Women considered themselves morally distinctive when they sat in bars calling for an end to consumption of alcohol and expressed reluctance to enter the male-defined sphere of the courts. Chused's work shows, however, that when women were forced into the courts after injunctions seeking the end of their demonstrations were sought they organized to use the forums to their advantage and achieved a measure of social change. Margo Schlanger reveals how late nineteenth-century cultural assumptions about the fragile and emotional nature of women enhanced their tort recoveries for personal injuries in transportation accidents. In contrast to much of the conventional wisdom holding that women were erased from the standards of tort law by being subsumed into the male category of "reasonable man," Schlanger's work shows that courts treated gender as an important factor in assessing appropriate standards of care. They took women's experiences and capabilities into account in a way that was frequently, though not uniformly, friendly to women and their needs.

These advances for women were unparallel with other developments in the law. While obtaining benefits in some areas, women were denied rights in others. While courts empowered women through grants of agency in tort cases as Schlanger discusses, they also denied women's claims to equal employment as lawyers in *Bradwell*. Leti Volpp's chapter shows the inconsistent application of gendered power when race was a dominant force. She explores the intersection of

race and gender in marriage by narrating stories of the way immigration laws functioned through the first third of the twentieth century to exile women citizens from the United States upon their marriage to non-citizens. The history of dependent citizenship and marital exile shows how notions of incapacity were foundational to racial and gendered disenfranchisement from formal citizenship. Such notions of incapacity, reflected in laws of coverture and race-based exclusion, were deeply connected to "true womanhood" ideals which were assumed to be unattainable by Asian women. In exploring the historical practices of exclusion from the nation, Volpp offers some broader lessons about the gendered and racialized nature of American citizenship.

This inconsistent response to the needs of women continued through the second half of the twentieth century and into the present moment. Cases still arise in which gender serves as a legally significant basis upon which to deny women rights and autonomy. The remaining chapters of part I take up themes about difference as subordination by focusing on stories about the military and abortion. During the 1970s the staunch conservative advocate Phyllis Schlafly infused these two issues into the debate over constitutional sex equality during the battle to obtain ratification of the Equal Rights Amendment. Schlafly turned the debate over constitutionally-guaranteed equality into emotionally-charged arguments about abortion and mandated military service. Jill Hasday and Melissa Murray take up the issue of women and the military. Hasday explores how military service by women has been a lightening rod in the debate over gender equality. Women are still excluded from military registration, draft eligibility, and some combat positions. This record of women's legal status in the military, Hasday asserts, provides important counterevidence of the prevalent assumption of formal sex equality in the law. Yet she shows how many how extrajudicial actors—such as Congress, the executive branch, the public, and the military itself—have changed their views to be more supportive of women's

role in the military. Extrajudicial transformations have shifted the norms that shape the constitutional equal protection and rendered the Supreme Court's constitutional interpretations denying equality in the military less plausible over time.

One consequence of women's exclusion from equal opportunity in the military is explored by Melissa Murray in her chapter on the GI Bill after World War II. The bill is often seen as one of the most successful laws of the modern age that offered returning World War II veterans an unprecedented array of educational and economic opportunities. Murray complicates this inherited narrative by showing the gendered impact of the bill. She argues that the bill was part of the New Deal's gendered legacy that was explicitly structured to facilitate the wage-earning capabilities of returning male veterans. This structure further entrenched the understanding of men as wage-earners and women as their home-bound dependents. The resurrection of the GI Bill following the Iraqi War renews the concern over the gendered consequences of these laws.

Maya Manian takes the discussion about using difference theory to deny rights to women up to the present day by focusing attention on the Supreme Court's decision on abortion in *Gonzales v. Carhart* (2007). In *Carhart* the Court upheld restrictions on partial birth abortions citing women's emotional frailty and inability to appreciate the future emotional harm they might suffer from as a result of abortion. Viewing women as in need of protection, the Court denied women access to medical procedures. The Court used perceptions about gender differences and the weakness of women to deviate from the usual rule supporting a patient's right to make informed health care decisions. In these cases of abortion and the military, the court resurrected coverture-like assumptions about women's inherent inferiority and need for

protection without reference to the intervening cases affirming gender equality or the historical examples of difference as a basis for empowerment.

Taken together the chapters in this part show the spotty legal pattern affirming women's agency sprinkled throughout the case law over two hundred years. The early women's history was not as constrained as the conventional narrative suggests. Glimmers of empowerment shine through in areas like marriage, tort, and temperance. Nor is the recent past as empowering as many suppose with continued restraints on women's right to control key aspects of their personhood such as medical care and employment. In these cases we see the law operating as a barrier working to block women's access to social and legal rights.

*Women's Transformation of the Law*

The second part of the book explores how feminists were sometimes able to remake existing legal norms and transform the law itself. The careful examinations of women's engagement with the law show how women used their own experience to transform gendered legal norms. At times they marshaled feminist theory to remake the law. Women's legal activism altered traditional legal concepts and re-conceptualized basic notions of fairness and justice. This transformation shows that feminists understood law as more than just a fence to knock down. Law was not just a barrier to equality but also a tool that could be remade to incorporate the reality of gender.

The section begins with an essay by Tracy Thomas on Elizabeth Cady Stanton and her use of the law to develop the notion of a legal class of gender. The notion of an identifiable social group of *women* was a categorization that became crucial to the establishment of modern

notions of equality jurisprudence under the law. Stanton used the law of coverture and domestic relations to illustrate the commonalities among women due to sex despite their different classes, races, and religions. The establishment of a concept of group identity provided a baseline for her subsequent work on legal reform and forged a critical component of modern sex discrimination law.

Essays that follow, by Gwen Jordan, Felice Batlan, and Mae Quinn, reveal how women changed the legal process itself in order to accommodate their visions of legal norms. Women at the turn of the twentieth century expanded legal advocacy into work for social causes using lawyers to represent the concerns of communities and advocate for social change. This new type of lawyering based upon women's experiences in the community expanded the types of problems redressed by the courts beyond the private law economic concerns of contract and property. Gwen Jordan traces the development of legal aid in Chicago. She focuses on the efforts of the Protective Agency for Women and Children, founded in 1886 to assist working women with their legal harms. She shows how the daily practice of the agency radicalized the activists and quickly transformed their core mission into an effort to force the legal system to recognize and redress the gendered harms suffered by women and girls. These efforts to use the law to secure justice for the gendered crimes against women endured constant and often overwhelming opposition.

Felice Batlan adds a new and important gloss to the history of legal aid bureaus. She challenges the existing narrative of male-dominated societies by making the radical claim that the concept of organized free legal aid for the poor grew out of women's work. Batlan shows how the sphere of legal aid was deeply feminized from the 1860s through 1910 in organizations in New York City, Chicago, and Philadelphia. The claims of women clients against employers

and husbands dominated the legal aid work handled primarily by elite and middle-class women. Like Jordan, Batlan concludes that the women's strategic activities were broadly embraced and established a paradigm for cause lawyering and the proliferation of legal aid societies in the twentieth century.

The need to alter the legal process to match social realities also was seen in the courts as Mae Quinn explores in her essay on Judge Anna Moscowitz Kross and the auxiliary case workers she helped to train and organize. Quinn examines how Kross sought to rethink the role and goals of criminal courts expanding their boundaries to permit community involvement in their operations in part through the use of female volunteer case workers and probation officers. She suggests that today's criminal justice reformers might take notice of Kross's judicial innovations that relied on private funding and citizen involvement in criminal court operations while also noting the potential dangers of such an approach.

The remaining essays in part II show how women continued this transformative effect to change the law itself. Essays by Professors Dodd, Baker, and Boris document three instances in which women altered the terms and abstract rights embodied in the law. Women advocates reconceptualized the actionable harms to include injuries more common to women. Guided by feminist understandings of women's experience, advocates worked to alter the very terms of the law itself to force it to include the gendered realities of women.

Lynda Dodd details the petitioning efforts of Alice Paul and the National Woman's Party in early twentieth-century efforts to pass the Nineteenth Amendment guaranteeing women the right to vote. Dodd explores how Paul's passionate political leadership style utilized more aggressive demonstrations and media measures outside standard judicial and legislative avenues in order to more effectively achieve legal reform. These efforts were the crucial steps that pushed

a fifty-year-old idea to completion and enshrined a concept of gender equality in the U.S. Constitution. Carrie Baker's essay on the establishment of sexual harassment as an actionable claim also portrays the external and internal processes required to achieve legal change. Baker details the diverse group of plaintiffs, political groups, lawyers, and law professors who helped codify a common employment experience of women into a new cause of action. Creating law where previously there was none, women infused feminist theory and practical gendered experience into legal action. Eileen Boris's essay takes the recognition of women's transformative power of the law up to the present day. She details the evolution of women's equal pay claims and the Supreme Court's use of procedure to limit their impact. The transformation came with the first legislative act of Barak Obama's presidency when he signed into law the Fair Pay Act giving women sufficient time to bring pay discrimination claims. However Boris illustrates the limitations of this change which fails to take account of class and race issues intertwined with equal pay that impact homecare workers and other women in traditionally female jobs.

Together the chapters in Part II demonstrate the way in which women have changed the law. Their efforts to "feminize" the law were important to incorporating gendered experiences into the legal norms. Women, often acting intentionally and reliant upon feminist theorizing of women's experience under the law, worked to transform the law to make it more responsive to their realities.

*Feminist Legal Thought*

An appreciation for feminist legal theorizing is vital to the historical analyses featured in this collection of essays. The authors in this book adopt a feminist lens through which to interpret and analyze past events. They are particularly attuned to the ways in which women have been denied power, equality, and self-determination. Before delving into the historical details contained in the following chapters, it is important to get a sense of the feminist legal theory driving these writings and the women advocates of the past.

There is significant disagreement among feminists as to what "feminism" is or what it should be. The term "feminist" itself first appeared in common parlance in the United States around 1913 and was used to describe an emerging women's social movement expanding beyond the contours of the suffrage issue.[26] The precepts of feminism, however, existed well before this time as evidenced by the philosophies and approaches of the earlier "woman's movement." Modern definitions include dry explanations of feminism as a "theory of political, economic, and social equality of the sexes," as well as more activist and transformative definitions of feminism as "sharing an impulse to increase the power, equality, and autonomy of women in their families, communities, and/or society."[27] At its core, feminism is based upon a concern for women combined with an opposition to their subordinate status in society.

Feminist legal theory, as an intellectual movement, emerged in law schools in the 1970s at a time when women began entering the academy in significant numbers. Feminist theorists share a core belief in the subjugation of women and the need for change. Feminist legal theory is premised upon the belief that the law has been instrumental in women's subordination in society. Feminist legal scholars start with the assumption that law's treatment of women has not been fair or equal, and they are suspicious of legal standards. Feminist jurisprudence seeks first to explain the ways in which the law has played a role in creating discrimination against women. The

inquiry describes the nature and extent of discrimination and then asks how and why women continue to occupy a subordinate position. Feminist theory then moves pragmatically to seek effective strategies to change women's status by reconceptualizing the law. Within this broader umbrella of feminist legal theorizing, legal scholars have commonly identified four distinct schools of thought: liberal, difference, dominance, and post-modern [28] Each of these types of feminist thinking differs in its identification of the legal mechanism that causes women's subordination and in the type of legal change needed to eradicate gender discrimination.

Liberal or equality feminist thinking tends to emphasize the sameness of women to men. Equality theory is based on the premise that there are no legally relevant differences between men and women. Equality theory views the individual woman as a rational, responsible agent, who is able to control and maintain equality through her own actions and choices, if permitted. Liberal legal theorists are thus committed to allowing individuals to be free to choose their own style of life in the economic, political, and personal spheres. Liberal feminism seeks the removal of barriers and laws that treat women differently than men and demand equal access to public and private rights. Drawing from Aristotle's theory of justice, equality is defined as the equal treatment of women who are similarly situated to men. Liberal equality theory has dominated the law, both in advocacy and reasoned support of judicial decisions, by providing a seemingly objective and easy equation by which courts evaluate claims of gender inequality. For example the Supreme Court's test for assessing equal protection violations under the Fourteenth Amendment is whether women are "similarly situated" to men. This theory of liberal feminism was advanced by nineteenth-century suffrage advocates like Elizabeth Cady Stanton and Susan B. Anthony who sought the removal of legal barriers that denied women the right to vote based on the natural equality of men and women. Many second-wave feminists of the 1970s echoed

these liberal equality theories in their renewed demand for an Equal Rights Amendment, which would have enshrined in the U.S. Constitution the guarantee against denial or abridgment of rights on account of sex.

In contrast to liberal feminism's focus on gender similarities, difference feminism tends to highlight the fundamental cultural—and sometimes biological—differences between women's and men's experiences of their bodies and their relations with others. Difference feminism underscore the limitations of equality analysis and its inability to "to take into account real sex differences between women and men, to recognize that gender is a social construct, to acknowledge differences among women, particularly with regard to race, and to take into account the gendered dimensions of legal and social institutions."[29] Legally relevant differences include those that are biological, such as pregnancy, or those that are socially constructed, such as primary childcare responsibilities. Difference feminism argues for legal accommodation of the realities of women's gendered lives in a way that does not reinforce women's unequal and inferior status.[30] Feminists operating under these precepts might seek special legal treatment for women's differences or they might critique facially neutral laws that affect women and men disparately. Difference theorists tend to recommend laws that ease the burdens that gendered expectations place on people, usually to the detriment of women. They also criticize the legal culture's failure to adequately recognize or compensate women's gender-specific injuries, such as domestic violence, sexual harassment, or date rape.[31]

Cultural feminism, sometimes affiliated with difference feminism, elevates the identifiable gender differences of relation and maternity to a level of celebration. Feminists who lean in this direction often focus on how "women's 'different voice'--with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could

find greater expression in the law."[32] Modern cultural feminist theory as articulated in the mid-1980s based its belief in women's relational nature on findings found in scholarly texts such as Carol Gilligan's *In a Different Voice* (1982). Gilligan draws on her psychological research of stages of moral development experienced by boys and girls to argue against the notion that women should be encouraged to act and think more like men. She opposed undervaluing girls' relational approach to resolving moral dilemmas utilizing an ethic of care as compared to boys' approach to resolving dilemmas based on the abstract logic of rules. Cultural feminists see in Gilligan's work support for their elevation and idealization of women's culture. Cultural feminism refuses to concede to male standards of behavior and values by seeking out and valuing women's own voices and experiences. To promote and enhance women's cultural difference from men, they often celebrate women's maternal role and other traditional activities associated with women. Cultural feminism's celebration of women's separate culture and values has been well integrated into American popular culture and taken up by many contemporary women as a way to resolve essential dilemmas in their personal lives in ways that liberal feminism often seems to evade rather than resolve. Most scholars as well as non-scholarly activists appear to combine aspects of both cultural and liberal feminism into their general outlook on women. But clashes between the two somewhat opposing ideas have led to complex legal scenarios.

The tension between the sameness/difference debate is illustrated in the classic women's legal history case of *Equal Employment Opportunity Commission v. Sears*.[33] In *Sears*, the government challenged the absence of women in high paying commission sales jobs at the chain of stores. Sears argued that female employees lacked interest in these commission sales because they involved products they did not like, required weekend work hours, and involved aggressive

sales tactics. The court accepted expert evidence that women were differently situated with respect to job preferences and thus could be treated unequally by Sears' commission and promotion policies. The company's expert, feminist historian Dr. Rosalind Rosenberg, testified that women dislike high pressure sales, prefer working regular hours during the day when children are in school, and seek personal identification through relationships rather than employment.[34] The judge rejected contrary evidence offered by plaintiff's expert, another feminist historian, Dr. Alice Kessler-Harris. She opined that when given the opportunity women, like the symbolic "Rosie the Riveter" of World War II, embraced high-volume, hard work requiring assertive behavior.[35] Feminists watched with dismay while two seemingly "pro-woman" perspectives pitted feminist historians and legal practitioners against one another.

While liberal and difference feminism dueled in the *Sears* case, legal feminists scholars from the dominance school of thought opted out of this conundrum altogether by relocating the problem away from women or the law's treatment of them and toward challenges to basic notions of power as historically enshrined in the law itself. Dominance theorists view the legal system as a mechanism for the perpetuation of male dominance. This systemic dominance denies women their agency and autonomy, and deprives them of their ability to actively control their own lives and circumstances. Dominance theory depicts women as victims of patriarchal oppression and, therefore, in need of systemic change in legal norms. The most notable proponent of the dominance theory for the last twenty-five years has been law professor Catharine MacKinnon. Sexuality is central to MacKinnon's dominance account.[36] She argues that women's sexuality is socially constructed by male dominance and that women's subordination results primarily from the sexual dominance of women by men. Dominance theorists recommend retreating from scrutiny of individual laws and social constraints, moving toward reform of the entirety of the

law and its use as a mechanism for women's dominance and subordination. MacKinnon applied her theory to advocate legal change in areas highlighted by sexual dominance—rape, sexual harassment, and pornography. MacKinnon's work with Andrea Dworkin on anti-pornography laws attacked one of the causes of male dominance—men's social construction of women's sexuality.[37] They initially met with some success at the local government level, helping to enacted anti-pornography ordinances in Indianapolis and Minneapolis, but the laws were subsequently overturned by the courts as unconstitutional restraints on protected free speech.[38]

A crucial insight that dominance theorists contributed to feminist considerations of the law is the lack of objectivity and inherent maleness of the law. Feminists identified legal norms as definitionally male, infused with male bias, and historically created by and for men. As Catharine MacKinnon asserted in her 1984 essay, *Difference and Dominance: On Sex Discrimination*, the law uses men as the measure of all legal rights.

> Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.

The intellectual roots of dominance theory came principally from discourses outside of the law, including the fields of women's studies, women's history, social history, and feminist

scholarship in sociology, anthropology, psychology, and literary criticism. Another major influence was the Critical Legal Theory movement of the 1980s. Theorists associated with this school expanded upon the radical critique of the indeterminacy of the law. They demonstrated the ability of the law to vary based on the distinguishing facts of each case called into question the objective abstraction of the rule of law. And they revealed the extent to which social and political bias and context rather than rules are the determinative factors in judicial decisionmaking. Given these inherent problems with the law itself, some feminist critical legal scholars began to view legal reform itself as futile. They opted out of efforts to use the law as an avenue of feminist change and instead focused on social and political action. Other feminist law practitioners, activists, and scholars continued in their efforts to change the law, armed with a greater understanding of the extent of the hurdles in their path as a consequence of the work produced by critical legal theorists.

Alongside and fueling the rise of critical legal studies, postmodern feminist theory emerged in the mid-1980s as a vibrant new academic school of thought that would prove influential to many disciplines key to the study of women and gender—though its reception among feminist legal scholars has been uneven. Like dominance theorists, postmodern legal feminists radically challenge the idea of an objective rule of law by revealing its underlying political functions. But unlike dominance theory whose focus remains on the experiences of women set in opposition to men as a class of oppressors, postmodern theory questions the very classifications of "women" and "men." Postmodernists tend to question not only gender norms that aim to dictate women's role in society but the foundational idea that gender is a natural expression of an authentically and inherently sexed body. Rejecting a focus on women's experiences per se, these theorists aim to analyze and call attention to a seemingly infinite

spectrum of ways of performing and embodying gender. For Judith Butler, a key theorist in this field, there is no essential truth to women's experience or to gender as a social reality. Rather there are many complex, inter-related, and internally contradictory performances of gender emerging from political power struggles that are ongoing and unavoidable. Following Michel Foucault, many postmodern feminists view power as rooted in *discourse* (politicized systems of meaning which include the law). According to this notion of power, the gendered self is neither an agent nor a victim of power but a product of a field of gendered power relations which are, at times, expressed and produced juridically. Postmodern feminist theorists attempt to intervene strategically in the field of power by exploiting and exposing the inevitable contradictions in gendered (as in all) discourse.[39]

There has been significant opposition to postmodern feminist theory from all quarters of social science but particularly as it applies in law. The concern is that a disbelief in foundational truths about women, gender relations, and the nature of justice undermines the stark realities of advocacy to end the discrimination and subordination that women experience. Many feminists working within and outside of the academy to achieve political and legal justice for women feel strongly that, in the absence of an acceptance of women as more than merely an illusory product of discourse, political change to improve women's status, particularly legal change, becomes more difficult to conceptualize and work toward.[40]

Despite these pragmatic concerns about postmodern feminist legal theorizing of gender, the anti-essentialist critique that lies at the heart of this theory has been taken up by many different kinds of feminist scholars with profound implications for feminist theorizing of law. Honed most effectively within the body of work produced by womanists, feminists of color, and queer theorists publishing in the 1980s and 1990s—and bracketing some of the more abstract

postmodern concerns regarding gender as an effect of power—anti-essentialist feminist theorizing of women's experience dismisses the claims of any one set of theories to explain or describe patriarchal oppression as much as it objects to the tendencies of liberal theories to reduce all women to one image of womanhood. Anti-essentialist feminist writings have mounted powerful challenges to an assumption embedded in much of liberal feminist theorizing that there is one universal or essential woman's voice and reject theories that reduce all women to one uniform group. These scholars like Kimberlé Crenshaw, Angela Harris, and Patricia Cain criticized the work of previous feminist scholars and activists for basing their conclusions on the experiences of white, middle class, heterosexual women. Their premise is that the lived experiences of women differ depending upon such factors as race, class, ethnicity, and sexual orientation—none of which can be separated out from women's experience of gender. Given this complexity, they reject the goal of devising one overarching feminist strategy and instead recommend considering legal policies from the perspective of multiple groups of women with multiple allegiances and identities. Like postmodern theorists more generally, and lending complexity to feminist legal analysis, anti-essentialist theorizing of women's experience rejects the idea that gender issues as expressed by and experienced in the law can or should be considered in isolation from other axes of identity within which all women actually experience discrimination and oppression.

This summary of feminist legal thought attempts to outline the major trends in feminist theorizing that currently thrive and hold particular salience for present-day scholarship on women and the law. But it does not account for the specificity of historical social movements within feminist activism. The "second-wave" alone boasted myriad forms of feminist organizing including Marxist-feminist (having a great deal of influence on the rising ranks of academic

feminists and social historians of women in particular) and radical feminist (the Redstockings, for instance, bringing a new emphasis on consciousness-raising among women and attention to women's personal experiences under patriarchy as a political condition) who were active and vocal during the 1970s. Nor does it detail the intense conversations among womanists, feminists of color, third-world feminists, lesbian feminists and queer feminists whose scholarship and activism came to the fore in the 1980s.

Even within the more dominant current strains of feminist theorizing, there is much contention and confusion existing between these various forms of feminist thinking about the law and about women's historical status. Yet this book maintains that although the debates among feminist legal theorists, women's historians, and legal historians are grounded in sharp differences over how to conceptualize power, gender identity, and women's experience under the law, there is a core methodology that feminists employ to analyze social and legal problems. "Thinking like a feminist" means thinking in a gender conscious way.[41] It is relevant to the analysis whether the actors are male or female. Feminist legal theory "proceeds from the assumption that gender is important in our everyday lives and recognizes that being a man or a woman is a central feature of our lives."[42] To paraphrase a feminist adage popular since the 1970s, "the personal is *still* political." Feminists validate women's individual personal experiences as important political and legal issues and this context is critical to their legal reasoning. The storytelling of personal narratives allows for the consciousness-raising by which individuals derive collective significance or meaning from their experiences. Feminists working in the field of law commonly use the legal method of *deconstruction* to take apart the law as it appears on its face to look beyond the seeming objective legal rules in order to consider the deeper structures and values underlying those rules. Through deconstruction feminists can reveal

gendered assumptions and biases that contribute to the formulation of the rules of law. Feminists see that the underlying assumptions are infused with male bias. They work to "unmask the patriarchy." Laws have historically been made by and for men. The law has been, and in many cases continues to be, based upon male norms, with legal rights being defined in male terms. Feminists see how male privilege and assumptions that fed the development of the law have been reinforced by the patriarchal structure of religion and society. A basic agreement on these underlying precepts permits us to engage each other in the analysis of women's real-life and historic experiences with the law. Rather than bemoaning the differences among us, these differences can been seen as providing a productive and creative space for expansive thinking about the law and women.

The full spectrum of feminist legal theory is evident within the chapters of this book. The authors and the women in their stories adopt differing strands of feminist legal theory to advance their claims. As Elizabeth Cady Stanton remarked in 1869: "[I]t matters not whether women and men are like or unlike, woman has the same right as man has to choose her own place." She explained: "We started on [the equality] ground twenty years ago, because we thought, from that standpoint, we could draw the strongest arguments for woman's enfranchisement. And there we stood, firmly entrenched until we saw that stronger arguments could be drawn from a difference in sex, in mind as well as body."[43] As Stanton's frank admission reveals, a strong strain of pragmatism has long run through feminist legal advocacy as has an awareness of the need to utilize a wide range of feminist theories in order to persuade a policymaker or court of the merits of a claim. If there is any common link uniting the contributors and editors of this volume it is a commitment to what might be called pragmatic feminism. Pragmatic feminism claims that "rather than looking to one approach to solve all problems in all circumstances, we should regard

the variety of approaches available today as a set of tools to be used when appropriate."[44] It may also be true that feminist legal theory is more holistic and integrated than the compartmentalization of thought suggests. The essays in this book support such a conclusion that feminism is more nuanced and complex than any one theory, and that each theory advances part of the larger reform of women's rights.

* * *

The essays collected in *Feminist Legal History* explore the interaction between women and the law and offer a kind of applied legal history of feminist legal studies. Like other feminist legal theory projects the works contained here are concerned with the personal, private experiences of women, and are "born of the world, responding to real lives and needs, reflecting the law and society tradition of reasoning from the world to law."[45] This kind of applied legal scholarship seeks to make history directly relevant to modern legal discourse. "In essence, what we need is a useable past," as Professor Alfred Brophy has suggested, calling for "a history of law—of court decisions, statutes, and the practices of law enforcement—that is both accurate and relevant to understanding questions we have today, giving rise to optimism that once people have facts they will think the same."[46] *Feminist Legal History* attempts to provide this type of useable past with the hope it will impact future changes in the law that are responsive to the lived realities of women.

NOTES

1. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQ. 823 (2005).

2. Linda K. Kerber & Jane Sherron De Hart, *Gender and the New Women's History*, WOMEN'S AMERICA: REFOCUSING THE PAST 2-3 (6th ed. 2004) (adopting framework of GERDA LERNER, THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY 145-59 (1979)).

3. See JOAN HOFF, LAW, GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (2d ed. 1994); KERMIT HALL, PAUL FINKELMAN & JAMES W. ELY, JR., EDS., AMERICAN LEGAL HISTORY (3d ed. 2005); KERBER & DE HART, *supra;* see also MARY BECKER, CYNTHIA GRANT BOWMAN, MORRISON TORREY, EDS., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 1-51 (2d ed. 2001).

4. William Blackstone, *Commentaries*, Book 1, chp. 15, Of Husband and Wife (1765).

5. NANCY COTT, THE BONDS OF WOMANHOOD (1982); LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966).

6. The work on coverture and the MWPAs provided some of the first work in the field of women's legal history. See ELIZABETH B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861 (1987); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, 1860-1930, 82 GEO. L.J. 2127 (1995); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 1850-1880, 103 YALE L.J. 1073 (1994); Richard Chused, *Married Women's Property Law*, 1800-1850, 71 GEO. L.J. 1359 (1983); Peggy A. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts*, 24 BUFF. L. REV. 683 (1975).

7. 88 U.S. 162 (1874).

8. ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920 (1998); MARJORIE SPRUILL WHEELER, NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES (1993); AILEEN KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920 (1981).

9. ELLEN CAROL DUBOIS, FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869 (1978); ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE:

THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959); Tracy A. Thomas, "Women's Suffrage," 5 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 251(David S. Tanehaus, ed. 2008).

10. See VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 37, 45 (1998); Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580 (2009); J. Women's Legal History Biography Project, http://www.law.stanford.edu/library/womenslegalhistory/profiles.html (last accessed January 8, 2010).

11. 83 U.S. (16 Wall.) 130 (1873).

12. JILL NORGREN, BELVA LOCKWOOD: THE WOMAN WHO WOULD BE PRESIDENT (2007); Ex Parte Lockwood, 154 U.S. 116 (1984); Jordan, 619-20.

13. NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS (1996); Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, in TRANSFORMATION OF THE LAW II (forthcoming).

14. 208 U.S. 412 (1908).

15. The Brandeis Brief in full is available at The University of Louisville Law Library, http://www.law.louisville.edu/library/collections/brandeis/node/235; See also Justice Ruth Bader Ginsburg, Muller v. Oregon: *One Hundred Years Later*, 45 WILLAMETTE L. REV. 359 (2009).

16. 243 U.S. 426 (1917).

17. 261 U.S. 525 (1923).

18. 300 U.S. 379 (1931).

19. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 55-71 (2002); LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1967-1973 (1997); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 308-14 (1992).

20. 381 U.S. 479 (1965); see People v. Sanger, 118 N.E. 637 (N.Y. 1918); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law In The Twentieth Century*, 100 MICH. L. REV. 2062, 2122 (2002); ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 88, 231 (1992).

21. 410 U.S. 113 (1973).

22. 550 U.S. 124, 127 S.Ct. 1610 (2007).

23. The "sex" amendment was introduced to laughter by Howard Smith, a conservative Virginia representative who was a known opponent of the civil rights legislation, and thought by many accounts to be a means of obstructing the bill's passage. Smith, however, was a staunch supporter of the Equal Rights Amendment. See CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (1988); Cindy Deitch, *Gender, Race, and Class Politics and the Inclusion of Women in Title VII of the 1964 Civil Rights Act,* 7 GENDER & SOCIETY 183 (1993); Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1991).

24. General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII); Gedulig v. Aiello, 417 U.S. 484 (1974) (14th Amendment).

25. Justice Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s,* 1989 U. CHI. LEGAL. F. 16.

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