

RIGHTS AND WRONGS

Women's Struggle for Legal Equality
2nd Edition



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SECOND EDITION

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WOMEN'S LAW PROJECT / PHILADELPHIA

Revised and updated by Alice M. Price

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Rights and Wrongs

Publisher's Acknowledgments

EARLY IN 1973, Mariam Chamberlain and Terry Saario of the Ford Foundation spent one day visiting The Feminist Press on the campus of the State University of New York / College at Old Westbury. They heard staff members describe the early history of The Feminist Press and its goal—to change the sexist education of girls and boys, women and men, through publishing and other projects. They also heard about those books and projects then in progress; they felt our sense of frustration about how little we were able to do directly for the classroom teacher. Advising us about funding, Terry Saario was provocative. “You need to think of yourselves,” she said, “in the manner of language labs, testing and developing new texts for students and new instructional materials for teachers.” Our “language” was feminism, our intent to provide alternatives to the sexist texts used in schools. The conception was, in fact, precisely the one on which the Press had been founded.

Out of that 1973 meeting came the idea for the *Women's Lives / Women's Work* project. This project, which would not officially begin for more than two years, has allowed us to extend the original concept of The Feminist Press to a broader audience.

In the summer of 1975, the final proposal—to produce for copublication a series of twelve supplementary books and their accompanying teaching guides—was funded by the Ford Foundation and the Carnegie Corporation. Project officers Terry Saario and Vivien Stewart were supportive and helpful throughout the life of the project.

Once funding was obtained, The Feminist Press began its search for additional staff to work on the project. The small nucleus of existing staff working on the project was expanded as The Feminist Press hired new employees. The *Women's Lives / Women's Work* project staff ultimately included eight people who remained for the duration of the project: Sue Davidson, Shirley Frank, Merle Froschl, Florence Howe, Mary Mulrooney, Elizabeth Phillips, Susan Trowbridge, and Sandy Weinbaum. Two other people, Dora Janeway Odarenko and Michele Russell, were on the staff through 1977, and we wish to acknowledge their contributions. Helen Schrader, a Feminist Press staff member, participated on the project during its first year and kept financial records and wrote financial reports throughout the duration of the project.

The *Women's Lives / Women's Work* project staff adopted the methods of work and the decision-making structure developed by The

Feminist Press staff as a whole. As a Press "work committee," the project met weekly to make decisions, review progress, discuss problems. The project staff refined the editorial direction of the project, conceptualized and devised guidelines for the books, and identified prospective authors. When proposals came in, the project staff read and evaluated the submissions, and made decisions regarding them. Similarly, when manuscripts arrived, the project staff read and commented on them. Project staff members took turns drafting memoranda, reports, and other documents. And the design of the series grew out of the discussions and the ideas generated at the project meetings. The books, teaching guides, and other informational materials had the advantage, at significant stages of development, of the committee's collective direction.

The process of evaluation by teachers and students before final publication was as important as the process for developing ideas into books. To this end, we produced testing editions of the books. Field-testing networks were set up throughout the United States in a variety of schools—public, private, inner-city, small town, suburban, and rural—to reach as diverse a student population as possible. We field tested in the following cities, regions, and states: Boston, Massachusetts; Tucson, Arizona; Seattle, Washington; Los Angeles, California; Tampa, Florida; Greensboro, North Carolina; Eugene, Oregon; Martha's Vineyard, Massachusetts; New York City; Long Island, New Jersey; Rhode Island. We also had an extensive network of educators—350 teachers across the country—who reviewed the books in the series, often using sections of books in classrooms. From teachers' comments, from students' questionnaires, and from tapes of teachers' discussions, we gained valuable information both for revising the books and for developing the teaching guides.

We would like to thank the following people with whom we consulted about *Rights and Wrongs: Women's Struggle for Legal Equality*. David J. Danelski, Department of Government, Cornell University; Elizabeth F. Defeis, School of Law, Seton Hall University; Judith R. Gething, Department of American Studies, University of Hawaii / Manoa; Ruth Bader Ginsburg, School of Law, Columbia University; James W. Hauser, Bellevue High School, Bellevue, Washington; Bertha R. S. Houser, Attorney at Law, Seattle, Washington; Kate A. Hunter, Seattle, Washington; Deborah P. Kelly, Department of Political Science, Johns Hopkins University; Merle Levine, Wheatley High School, East Williston, New York; Mary McAulay, John F. Kennedy High School, Bronx, New York; Eleanor Newirth, John F. Kennedy

High School, Plainview, New York; Janice B. Snook, Department of Political Science, University of South Florida / Tampa; Lawrence Tannenbaum, Hewlett High School, Lynbrook, New York.

Three times during the life of the *Women's Lives / Women's Work* project, an Advisory Board composed of feminist educators and scholars met for a full day to discuss the books and teaching guides. The valuable criticisms and suggestions of the following people who participated in these meetings were essential to the project: Millie Alpern, Rosalyn Baxandall, Peggy Brick, Ellen Cantarow, Elizabeth Ewen, Barbara Gates, Clarisse Gillcrist, Elaine Hedges, Nancy Hoffman, Susan Klaw, Alice Kessler-Harris, Roberta Kronberger, Merle Levine, Eleanor Newirth, Judith Oksner, Naomi Rosenthal, Judith Schwartz, Judy Scott, Carroll Smith-Rosenberg, Adria Steinberg, Barbara Sussman, Amy Swerdlow. We also want to express our gratitude to Shirley McCune and Nida Thomas, who acted in a general advisory capacity and made many useful suggestions; and to Kathryn Girard and Kathy Salisbury who helped to develop the teacher and student field-testing questionnaires.

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Authors' Acknowledgments

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Publisher's Preface to the Second Edition

WRITTEN IN 1976 AND 1977 by one of the first feminist law collectives, the first edition of *Rights and Wrongs* reached readers in October 1978. It represented an early attempt to tell the story of the current feminist battles for legal rights to a large school, college, and general audience eager for the news. The eagerness, moreover, included a new appreciation—growing out of women's studies—for the history of these legal battles. Thus, the context of each chapter in the volume was historical, and even the arrangement of chapters, from Constitutional rights to the newest—the rights of women with regard to their own bodies—was historical. This first edition went through several printings by 1982, when the demise of the Equal Rights Amendment led to the decision to revise the volume rather than reprint it.

In the decade since work was first begun on *Rights and Wrongs*, the consciousness of both women and men has grown clearer about the urgency and necessity for these legal questions to be understood in a world in which they will continue to be debated. In the past decade, the changing political atmosphere and the continual testing and interpreting of the Constitution in the courts have brought both advances and setbacks to the legal status of women. The most radical loss was the Equal Rights Amendment. The new text includes the failure of passage in 1982 and the subsequent re-introduction of the amendment into Congress.

Perhaps the most remarkable difference in women's condition over the past decade reflected in this new edition is the alarming rise in reported incidents of sexual harassment and domestic violence. The term "sexual harassment" was not even in common use until after 1980. New in this volume is a discussion of the growing problem of domestic violence and the responses of both the legal system and women's support networks to the needs of victims.

Other key areas have been affected by the developments of the past decade. The Supreme Court's stance regarding sex-based discrimination, analyzed here through cases heard in 1981 and 1984, has been that the Court is willing to uphold sex-based discrimination in some cases (for example, in draft registration),

though not in others. In divorce law, the courts are deciding in favor of joint custody more often than before, and paying more attention thus to the needs of children in such cases.

The area of employment has continued to be the scene of women's legal battles. Affirmative action has been both helped and hindered by Court decisions in various cases since 1977. Two major trends have emerged regarding women and work. First, the feminization of poverty—especially for women of color—has brought sharpened attention to the continuing, shocking disparity between the incomes of men and women. Second, this sharpened apprehension, coupled with the intransigence of the sexual division of the labor force, has led to a new effort to gain, not "equal pay for equal work," but rather, equal pay for work of "comparable worth." The concept of pay equity has begun a new series of legal battles reported on here.

Further, legal gains have been made for women in some areas in insurance benefits, pensions, and for pregnancy-related conditions. Finally, with regard to the areas affecting women's bodies, controversies continue to rage over legalized abortion and contraception, as well as the newer area of pornography.

As we go to press in the mid-eighties, we are conscious that this new edition will serve not only thousands of readers in the United States, many of whom were children a decade ago, but also an increasingly sharp feminist consciousness around the world. Indian, Japanese, Latin American, Caribbean, African, and European feminists are curious about the legal battles of women in the United States. How and why have some of women's legal problems worsened? Why is it that both Canada and India can boast of an ERA, while the United States cannot? This edition takes these questions to the current moment.

Introduction

THIS IS A BOOK about a movement as old as our nation, the ongoing battle of women to gain the right to participate in and contribute to society as full and equal citizens. Four major areas of concern to women—constitutional law, the family, employment, and the right to control over their bodies—will be covered. In looking at each, we will examine some of the many ways in which women have been excluded from the mainstream of our culture, how their lives have been limited, and how, through continuing efforts, they have advanced step by step toward the goal of equality.

In each chapter we will be looking at the world from the special perspective of the law. To many readers, this perspective may be unfamiliar, since most of us tend to believe that the law is for lawyers only and does not concern either our daily lives or the course of history. Yet the law has always been a focal point of the movement for women's rights. As you will see in reading the following chapters, it has often been a conservative force, perpetuating the subordinate status of women. At other times in our history, the law has played a progressive part in creating new rights for women.

At the Nation's Founding

As early as 1776, Abigail Adams accurately perceived the crucial importance of the law in governing the lives of women. In a letter to her husband, John Adams, she attempted to impress upon him the necessity of correcting historical injustices toward women while the new government was being formed:

... in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.¹

Unfortunately, the founding fathers did not take Abigail Adams's warning seriously. The Constitution they eventually adopted left the old legal injustices intact, and by the middle of the nineteenth century, Abigail Adams's prediction of rebellion was becoming less fanciful. In 1848, the first women's rights convention, called by Lucretia Mott and Elizabeth Cady Stanton, took place in Seneca Falls, New York. Designed to discuss "the social, civil, and religious rights of women," the convention was attended by approximately three hundred women and men. Seneca Falls marked the beginning of a long, difficult, often bitter struggle to win equal rights for women.

The Declaration of Sentiments

Like Abigail Adams seventy-two years before, the women and men at Seneca Falls understood the ways in which the law oppressed women. The convention's Declaration of Sentiments, patterned after the Declaration of Independence, focused on the legal inequities faced by women at that time:

DECLARATION OF SENTIMENTS. When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they were accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such

government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon the false supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known.

He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.

He allows her in Church, as well as State, but a subordinate position, claiming Apostolic authority for her exclusion from the ministry, and, with some exceptions, from any public participation in the affairs of the Church.

He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man.

He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.

He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.²

Obviously, many of the repressive laws of 1848 no longer exist, but there remain innumerable ways in which the legal system affects women and the movement for equality. We hope in this book to develop an awareness of the impact of the law on our daily lives: to show how it regulates matters as personal as our names and our marriages; how it shapes and is shaped by societal attitudes; and how it can be used, by those who understand it, to forward or to impede social change.

A System of Federalism

In order to use the law effectively, it is important to understand in general terms how the legal system operates. Like our government as a whole, the law is a system of federalism. Certain powers are given to the federal government, with the remainder being left for the individual states to handle. In the area of law commonly called "civil rights," the federal government has traditionally carried the bulk of the responsibility for setting policy and seeing that the law is enforced. Thus, women's legal rights are frequently established first at the federal level, through decisions of the United States Supreme Court or acts of Congress prohibiting discrimination. In this way a national standard is developed which, over time, filters down to the local level of enforcement.

On the other hand, some areas of law are generally governed by the individual states. One of the most important of these for

women concerns laws relating to the family, marriage, and divorce. These laws often vary from state to state. For example, the answer to a woman's question about whether she would be given half the family assets in the event of divorce differs depending on whether she lives in Pennsylvania or Texas. By contrast, a woman's right to be free of sex discrimination in employment remains constant, regardless of where she happens to live, because equal employment opportunity is largely a matter of federal law.

What Is the "Law"?

Both the state and federal legal systems embody a complex hierarchy of different kinds of law, emanating from different sources. In order to know what the "law" is, one must go beyond the statute books and become familiar with the ways in which the laws are applied by the courts, and, to a lesser extent, by government agencies. Legislation, regulations, and court opinions together create a particular legal status for women at each stage in our history; the "law" is by necessity a combination of all these sources of policy.

The highest authority within this hierarchy of law is the United States Constitution. Every other kind of state or federal law must be in accord with this fundamental charter of our government. The Constitution establishes the structure of our government, consisting of the executive, the legislative, and the judicial branches. These three branches are designed to be equal, and the Constitution sets out an intricate mechanism of checks and balances in order to preserve this equality. It also governs the relationship between the state and federal systems. In this book we will be most concerned with the relationship between the legislative and judicial branches of government: how the legislature and the courts act together to form the laws which govern us.

In addition to setting forth the structure of government, the Constitution enumerates certain basic rights of all persons, such as the right to free speech and the right to equal protection of the law. As you will read in the chapter on constitutional law, the right to equal protection has become extremely important in the development of women's legal rights.

The legislative branch of government, represented by Congress on the federal level, is invested with the basic lawmaking power of passing statutes setting out the public policy of the country. An example of a congressional enactment of importance to women is the Equal Pay Act, requiring employers to afford equal pay for equal work, regardless of the sex of the employee.

The judicial branch—the United States Supreme Court and the lower federal courts—has the responsibility for interpreting legislative enactments and applying them to the facts of individual cases. Thus, a female employee, believing herself to be receiving lower wages than men for doing the same job, would seek relief in the federal courts under the Equal Pay Act. In deciding her case, the court would analyze all the relevant data about her situation, including her job description, that of men doing equivalent work, and the company's pay scale. Based on this evidence, the court would then decide whether Congress intended the Equal Pay Act to prohibit the kind of behavior practiced by her employer.

As well as resolving individual disputes, court decisions become precedent which lower courts are required to follow in considering similar cases. In this way, a body of law known as "case law" is slowly built up which gives more definite meaning to the general language of statutes. A similar process takes place in areas of the law where no statutes have been enacted. Here the gradual accumulation of case law is known as the "common law," and consists of court-made doctrines, handed down sometimes from as early as medieval times. Many legal rules concerning the law of the family are derived from common law sources.

Among their interpretive functions, the courts have the special duty to decide when the legislature has passed a law which goes beyond the acceptable bounds articulated in the Constitution. In most instances, as we have seen, courts are bound by the will of the legislature; their duty is to decide what the legislature intended, not to substitute their own judgments about public policy. However, when a statute violates the Constitution, the court must override the legislature and invalidate

that statute. During the last decade, the courts have decided that many statutes treating men and women differently conflict with the Constitution, and have invalidated the sex classification.

In recent times, governmental agencies have assumed increasing importance within our legal system. Almost every governmental agency, from the Social Security Administration to the Passport Office, has regulations which can significantly affect women's legal status. As the bodies responsible for implementing public policy on a day-to-day basis, agencies are the most visible source of law, with the most continuous impact on our daily lives. In fact, many citizens during their lives never come into contact with any source of law other than governmental agencies.

Most agencies are established under the auspices of either the executive or the legislative branch for the purpose of administering complicated governmental functions. For example, each state has a sizable department to regulate the operation and registration of motor vehicles. Sometimes governmental agencies act in a legislative manner by publishing regulations which explain and carry out legislative enactments. The federal Department of Education, for example, has been mandated by Congress to adopt regulations governing sex discrimination in schools. In addition, Congress has empowered this department to exercise a "quasi-judicial" function by granting it authority to receive complaints and decide on a case-by-case basis whether a particular situation violated Congress's prohibition against sex discrimination. However, since government agencies rank below both the courts and the legislature in the legal hierarchy, agency regulations and decisions are subject to review by the courts to determine whether they accurately reflect congressional intention and whether they comport with the Constitution.

A Dynamic System

As this brief discussion indicates, courts, legislatures, and governmental agencies intersect one another and build upon one another in a process of continual growth. It is this com-

bination of—and often tension among—the various sources of the law which results in a legal system that is a dynamic, ever-changing institution, rather than the fixed, static documents many of us imagine when we hear the word “law.”

The law is dynamic also in the sense that it reflects the values of society—or at least those of a majority of the people—as expressed through elected and appointed representatives. Sometimes, however, the law lags behind changes that have taken place in social attitudes, because the process of legal evolution is cumbersome and slow. Many of our laws relating to the family, for example, seem both out-of-date and contrary to the interests of women. At other times, the law moves far ahead of public opinion and actually helps to shape and change societal attitudes, as with federal law prohibiting sex discrimination in employment. Occasionally, the law may even create social or political backlash through its advances, as may have been the case with the Supreme Court’s early abortion decision.

While public opinion can vitally affect laws relating to women, public opinion alone does not shape the laws. An effective understanding of the legal status of women requires the knowledge that legal systems, like other governmental functions, are responsive primarily to those who hold positions of power. The women at Seneca Falls realized that the laws oppressing women would never really change until women had a chance to participate in the lawmaking process. It was for this reason that the feminist movement of the nineteenth and early twentieth centuries concentrated most of its energy on gaining the right to vote.

Voting Is Not Enough

Today, however, women know that voting, by itself, will not change their condition. Recent dramatic changes in the legal status of women have come about only because of intense, sustained pressure by feminists on the legal system—through court challenges to antiquated laws and through constant demands for legislative reform. To effect these changes, women have had to educate themselves about how the legal system