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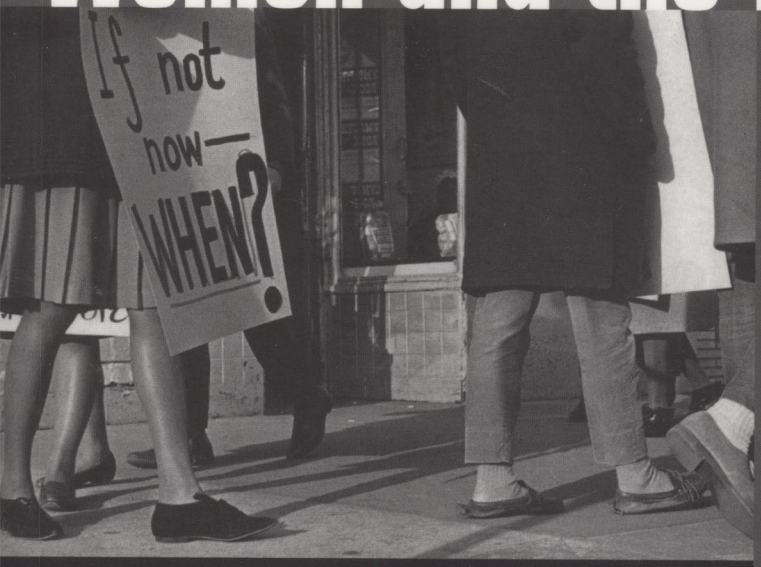
Elizabeth M. Schneider &
Stephanie M. Wildman
Editors

Women and the Law STORIES



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Contributors

Katharine T. Bartlett
Cynthia Grant Bowman
Patricia A. Cain
Martha Chamallas
Rhonda Copelon
Zanita E. Fenton
Rebecca Hall
Angela P. Harris
Tanya Kateri Hernández
Lisa C. Ikemoto
Sylvia A. Law
Stacy L. Leeds
Jean C. Love
Serena Mayeri
Martha Minow
Elizabeth M. Schneider
Stephanie M. Wildman

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Edited By

ELIZABETH M. SCHNEIDER

Rose L. Hoffer Professor of Law
Brooklyn Law School

STEPHANIE M. WILDMAN

Professor of Law and Director
Center for Social Justice and Public Service
Santa Clara University

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for additional resources and teaching aids.

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WOMEN AND THE LAW STORIES

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Introduction

Elizabeth M. Schneider and Stephanie M. Wildman

Telling Stories to Courts: Women Claim Their Legal Rights

Many commentators have remarked on the connection between law and storytelling. "Law is fundamentally about storytelling," asserts Liza Featherstone.[1] "Everyone has been writing stories these days," comments law professor Richard Delgado.[2] Delgado emphasizes the special value of stories to "outgroup" members. By telling stories, disenfranchised groups create a "counter-story" of their own reality, challenging dominant cultural views.

Women are no strangers to stories. Consciousness-raising, the feminist method of the 1960s women's movement, involved women talking about their lived reality.[3] Through the thread of these stories women came to understand that the personal was indeed political. Women's stories and women's experiences have shaped the development of the field of women and law.

This volume continues this storytelling tradition. This book features the tales of landmark cases establishing women's legal rights. Most of the case names are well-known to anyone familiar with the field of anti-discrimination law. However, the stories of the litigants in these cases are often less well-known and deserve wider recognition. The book also includes some cases that are less famous but nonetheless present impor-

1. Liza Featherstone, *Foreword, Telling Stories Out of Court: Narratives about Women and Workplace Discrimination* ix (Ruth O'Brien ed., 2008) (explaining the vindication that employment discrimination plaintiffs feel when they can finally tell their side of a case).

2. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2411 (1989).

3. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 86 (1989); *see also* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 NYU. L. Rev. 589 (1986).

tant dimensions of the struggle by women for equality and inclusion in all aspects of society. Together, these cases, and the litigants whose stories these chapters report, highlight the range of women's experiences with law in courts as varying as the United States Supreme Court, lower federal courts, state courts, and even tribal courts.

It is important to remember how recently the field of Women and the Law developed. Law schools introduced the first courses in Women and Law in the early 1970s. Cynthia Bowman credits Eleanor Holmes Norton with teaching one of the first such courses at NYU Law School where she was an adjunct professor.[4] Two early texts emerged in this budding field: Kenneth M Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, *Text, Cases, and Materials on Sex-Based Discrimination* (1974) and Barbara Babcock, Ann Freedman, Eleanor Holmes Norton, and Susan Ross, *Sex Discrimination and the Law: Causes and Remedies* (1975). The Kay text continues currently along with four other major texts, and additional casebooks reflect the growth in related fields like domestic violence and sexual orientation.[5] Today law schools offer courses in all of these fields as well as in feminist jurisprudence.[6]

Courses and texts seeking to describe the varied dimensions of women's experiences must first grapple with a wide variety of factors. Other aspects of identity like race, economic class, ethnicity, nationality, religion, sexual orientation, disability, and age cross-cut the commonality

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4. *See infra* ch. 12. At the time she taught the course, Eleanor Holmes Norton served as Commissioner of the New York Commission on Human Rights. She currently serves as Congresswoman for the District of Columbia. Fred Strebeigh credits Susan Ross with originating the course at NYU in the fall of 1969. Fred Strebeigh, *Equal: Women Reshape American Law* 230 (2009). *See also* Aleta Wallach, *Genesis of a "Women and the Law" Course: The Dawn of Consciousness at UCLA Law School*, 24 J. Legal Educ. 309 (1972).

5. For casebooks on women and the law, see Katharine T. Bartlett & Deborah L. Rhode, *Gender and Law, Theory, Doctrine, Commentary* (Aspen, 5th ed. 2010); Mary Becker, Cynthia Grant Bowman, Victoria F. Nourse & Kimberly A. Yuracko, *Feminist Jurisprudence: Taking Women Seriously* (West Pub. Co., 3d ed. 2007); Herma Hill Kay & Martha S. West, *Sex-Based Discrimination* (West, 6th ed. 2006); Catharine A. MacKinnon, *Sex Equality* (Foundation Press, 2d ed. 2007); for casebooks on domestic violence, see Elizabeth M. Schneider, Cheryl Hanna, Judith G. Greenberg & Clare Dalton, *Domestic Violence and the Law: Theory and Practice* (Foundation Press, 2d ed. 2008); Nancy K.D. Lemon, *Domestic Violence Law* (West Pub. Co., 3d ed. 2009); Diane Kiesel, *Domestic Violence: Law, Policy and Practice* (LexisNexis 2007); Mary Louise Fellows & Beverly Balos, *Law and Violence Against Women: Cases and Materials on Systems of Oppression* (Carolina Academic Press 1994); for casebooks on sexual orientation, see William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender and the Law* (Foundation Press, 3d ed. 2003 & Supp. 2009); Arthur S. Leonard & Patricia A. Cain, *Sexuality Law* (Carolina Academic Press, 2d ed. 2009); William B. Rubenstein, Carlos A. Ball & Jane S. Schacter, *Cases and Materials on Sexual Orientation and the Law* (West Pub. Co. 3d ed. 2007).

6. *See also* Martha Chamallas, *Introduction to Feminist Legal Theory* (2d ed. 2003); *Feminist Legal Theory: Readings in Law and Gender* (Katharine T. Bartlett & Rosanne Kennedy eds. 1991).

of gender. Any study of women and the law must address these issues. The field encompasses legal subjects as varied as work, mothering, marriage, domestic violence, education, autonomy, and sexual roles. The role of women in the legal profession itself has also been part of the history of women and law. This book tells only some possible stories, while trying to reflect the complexity of women's experiences.

Women of all races, ethnicities, sexual orientations, and different degrees of wealth have used law to battle for their liberation and recognition of their equality under law. The women whose stories appear in this book represent that diversity. The names of some of these women, like the woman who challenged sex-segregation at VMI or the Indian woman contesting domestic violence in tribal court are unrecorded. Their legal struggles are their legacy. Some women, like Lillian Garland, the Relf sisters, Ann Hopkins and Jessica Gonzales, whose stories appear in this book, consciously chose to contest the legal treatment of their status, perhaps aware they were making legal history. For some, like Diane Blank, whose story is also told here, the effort involved organizing with other women to raise awareness of discrimination and to sue as the named plaintiff as part of a class action.

Women faced many practices historically which marked them as different and inferior. Slave women were held as property and married women were regarded as property of their husbands. Women lost their property and contract rights upon marriage; they lost their legal identity and physical autonomy. Women were controlled through sexual norms, the separation of the so-called public and private spheres, and the denial of suffrage. After the civil war the women's movement split into the American Woman's Suffrage Association, which sought the vote state by state, and the National Woman's Suffrage Association, founded by Susan B. Anthony and Cady Stanton, which took a national strategy and had opposed the Fifteenth Amendment because it excluded women.

In spite of women's activism, the U.S. Supreme Court heard few gender cases in these early years. The plaintiffs in *Minor v. Happersett*[7] argued that women should have the right to vote under the Fourteenth Amendment privileges and immunities clause; the case sought to establish voting as a privilege of citizenship. The Court held that the Fourteenth Amendment intended no such change and that the constitutional amendment did not confer suffrage. That decision also made the privileges and immunities clause essentially dead letter.[8] During this time,

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

8. *See, e.g.*, Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 Wash. U. J.L. & Pol'y 45, 57 (2008) (noting that "[i]n the post-Reconstruction Era, restrictive judicial interpretations undercut some of the promises of the Fourteenth Amendment and distorted Fourteenth Amendment jurisprudence . . ."). Some think *Saenz*

equal protection arguments under the Fourteenth Amendment were simply not made. As recently as the 1930s, Justice Holmes described the equal protection clause as the "last resort of constitutional argument."[9]

In *Hoyt v. Florida*, a 1961 case, the defendant, a woman convicted of murdering her husband, argued she had a right to women on her jury. The Court held that a reasonable basis existed for classifying men and women differently. "Woman is still regarded as the center of home and family life."[10] This reasoning echoed the famous passage in *Bradwell v. Illinois* from 1872, when a concurring opinion in the United States Supreme Court case cited the law of the creator for the proposition that "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."[11] The Court denied Myra Bradwell's suit to be admitted to the Illinois bar as an attorney.

The validity of minimum wage and maximum hour laws were also litigated in this early era. Maximum hour laws directed at women were upheld in *Muller v. Oregon*. That litigation included the famous Brandeis brief citing social science reasons for women's "differences"[12] and need for special protection from long work days. As several chapters of the book explain, courts have continued to use this argument to justify unequal treatment of female workers, in essence "protecting" them out of jobs, as well as in a host of other circumstances. In this vein, *Goesart v. Cleary* in 1948 upheld a statute precluding women from the occupation of bartending, unless they were related to the male bar owner.[13]

In light of this legal background, it is easier to understand the strategic push for formal equality that characterized the early years of women's rights litigation. Spearheaded by then-lawyer and law professor Ruth Bader Ginsburg, the ACLU Women's Rights Project brought a

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v. Roe, 526 U.S. 489, 506 (1999), holding "unequivocally impermissible," under the Fourteenth Amendment's Privileges and Immunities Clause, "a purpose to deter welfare applicants from migrating to [a state]" might change that jurisprudential landscape. *See, e.g.*, Kevin Maher, *Like a Phoenix from the Ashes: Saenz v. Roe, The Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 Tex. Tech L. Rev. 105 (2001) (discussing the resuscitation of the Privileges or Immunities Clause in *Saenz v. Roe* and its modern application as a means for plaintiffs to challenge the constitutionality of state legislation).

9. Buck v. Bell, 274 U.S. 200, 208 (1927). *See also* Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 Ore. L. Rev. 265 (1984) (examining the early evolution of equal protection doctrine relating to sex-based classifications and faulting the comparison mode on which it is based).

10. 368 U.S. 57 (1961).

11. 83 U.S. 130, 141 (1872).

12. 208 U.S. 412 (1908). *See, e.g., infra* chapters 2 and 7 discussing *Muller*.

13. 335 U.S. 464 (1948).

series of cases to establish the theory of legal equality for women.[14] Even though today some criticize formal equality as not going far enough, in 1971, when *Reed v. Reed*[15] was litigated, formal equality was a strategy used to leverage change in laws that had excluded women from occupations and public service based on stereotyped roles. Sex discrimination claims were simply not taken seriously by the U.S. Supreme Court before 1970. The rational basis standard of equal protection review had been used to uphold facial sex-based classifications. And not many sex discrimination cases even reached the Supreme Court prior to 1970. Those that did, like *Goesart v. Cleary* and *Hoyt v. Florida*, emphasized women's "differences" from men and upheld discrimination against women. *Reed v. Reed* was the landmark case that ushered in the judicial recognition that differential treatment based on gender was open to challenge on constitutional grounds.

The struggle for gender equality has also involved the stories of men, seeking to combat discrimination in a wide range of fields. For example, taxpayer Charles Moritz, a single man who never married, claimed a tax deduction in 1968 for expenses related to the care of his dependent, invalid mother. The tax court ruled him ineligible under the tax code provision that granted deductions to a "woman, widower, or [a] husband whose wife is incapacitated or institutionalized for the care of one or more dependents."[16] Moritz appealed to the Tenth Circuit arguing that the expenses paid for his mother's care were necessary to enable him to be gainfully employed and that denying him this deduction was arbitrary, irrational, and a denial of due process. The Tenth Circuit found the challenged provision to be invalid and sex discriminatory. Thus even in the field of tax, an area of law not usually first thought of in relation to gender inequality, women and men seeking equality have brought their stories to court.[17] Revealing hidden histories of sex discrimination and gender exploitation has been a central theme in the evolution of the struggle for equality.

Part of women's battle in law has been against blatant facial discrimination that explicitly stated that "no women were allowed" or "women are different." Sharron Frontiero faced this kind of discrimination, which prevented her from caring for her family in the same way that military men could.[18] Women have also struggled against the sys-

14. Many chapters in the book discuss Ruth Bader Ginsburg's work at the ACLU Women's Rights Project. *See, e.g., infra* chapters 2, 3, and 4.

15. 404 U.S. 71 (1971).

16. 26 U.S.C. § 214(a) (1967).

17. *Moritz v. Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973).

18. *See infra* chapter 2.

temic privileging of male traits, attributes, and way of life. The struggle of unnamed cadets against the gendered norms and practices at Virginia Military Institute suggests one such example;[19] Mechelle Vinson's successful naming of her workplace experience as sexual harassment is another.[20] Thus the simple phrase "sex discrimination" fails to capture the breadth and depth of women's challenges, using law, to become equal members of society.

This book provides stories that are central to major issues about women and law and will enrich any course. The book can also stand alone as a text for a course on women's legal rights, gender and law, feminist jurisprudence, women's studies, or other courses, as it provides detailed stories of the litigants, their legal struggles, the strategic dimensions of their battles, and the implications of their cases for contemporary feminism. This volume groups the stories utilizing subject areas that coincide with the organization of the field common to many legal casebooks: history, constitutional law, reproductive freedom, the workplace, the family, and women in the legal profession. Several chapters explore issues of domestic violence[21] and rape.[22] Here are brief summaries of the subject areas of the book and the included cases:

Hidden Histories: The Role of Gender

The book begins with a historical piece, reminding the reader that women's struggles did not begin in the modern era. *U.S. v. Cruikshank* is best known as a race discrimination case that arose in the context of terrorism directed at black men. However, women's role in the conflict and in the struggle against the many incidents of racial oppression in the era that preceded the case has not been well-known. This chapter underlines the fact that women's stories may be present in legal struggles even when gender issues are not visible or the case is decided on other grounds or understood to stand for other legal principles.

United States v. Cruikshank, 92 U.S. 542 (1875).

Cruikshank involved the criminal conspiracy section of the Enforcement Act of 1870, which provided criminal penalties for conspiracies to deprive citizens of their constitutional rights. The decision reversed convictions for the lynching of two African American men, Levi Nelson and Alexander Tillman, which had been secured based on the argument that the murders had interfered with the victims' right to peaceful assembly. The untold story of the case centers on the Congressional testimony of African–American women, detailing not only the campaign

19. *See infra* chapter 4.

20. *See infra* chapter 8.

21. *See infra* chapters 11 and 13.

22. *See infra* chapters 1, 5, and 8.

of murdering Black men, but also the White supremacist campaign of sexualized terrorism against Black women. This history of Black women's testimony that led to the legislation at issue in the case provides a key illustration of the hidden role of gender.

Authors Rebecca Hall and Angela Harris tell the stories of Black women's efforts to resist violence based on both gender and race subordination. They explain that understanding "racialized gender," which they define as "the interplay of race and gender subordination," is central to comprehending the path of legal reform during Reconstruction and after. The concept of racialized gender has continuing significance for constitutional law, legal theory, and feminist legal history. This case is the first chapter in the volume because of the historical importance of the Cruikshank case, the crucial element of racialized gender that underlies many women's legal cases, and the need to look underneath the surface for stories of women and law when it appears, at first blush, that the case is about a different subject.

Developing a Constitutional Jurisprudence to Combat Sex Discrimination and to Promote Equality

Developing constitutional jurisprudence to combat sex discrimination and to promote equality has presented a challenge to the modern U.S. Supreme Court. Prior to *Reed v. Reed,* the U.S. Supreme Court had never found a sex-based classification to be unconstitutional. Beginning in the 1970s with *Reed v. Reed* and *Frontiero v. Richardson*, the Court for the first time changed course. The ACLU Women's Rights Project, spearheaded by Ruth Bader Ginsburg, litigated these cases as part of a national strategy, designed to help the Court establish a standard for review of equal protection challenges based on gender.

Frontiero v. Richardson, 411 U.S. 677 (1973).

In *Frontiero v. Richardson*, Sharron Frontiero, a lieutenant in the Air Force in Alabama, sought the allowance and benefits granted to military spouses for her husband, Joseph Frontiero. Her application was initially denied and the military required that she prove that her husband was dependent on her for "more than one-half of his support."[23] No such requirement existed for male members of the military seeking benefits for their spouses.

The Supreme Court found for the appellant on Due Process grounds asserting: "We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they

23. 411 U.S. at 680.

require a female member to prove the dependency of her husband."[24] Four justices voted to apply strict scrutiny as a standard of equal protection review. With *Reed*, this case marked the beginning of an equal protection jurisprudence that took women seriously.

Serena Mayeri explores *Frontiero*'s rich and complex role in American constitutional law and social movement history. She examines the *Frontiero* litigation through many lenses: cooperation and conflict among civil rights lawyers; the legal strategy of Ruth Bader Ginsburg and other feminist lawyers; and the internal debates among lower court judges and Supreme Court justices about the nature of sex discrimination and constitutional change. She analyzes the many legacies of this case: the development of a standard of review in equal protection jurisprudence; allocation of government benefits; equality for those in military service; gay rights; reproductive freedom; and the relationship between advocacy for the Equal Rights Amendment and judicial interpretation of the constitution.

Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd* 430 U.S. 703 (1977).

In *Vorchheimer v. Sch. Dist. of Philadelphia*, Susan Vorcheimer was denied admission to Philadelphia's all-male elite college-preparatory public high school and sued the school district on Equal Protection grounds. The 3rd Circuit found (and the Supreme Court affirmed *per curiam*) in favor of the District, finding that "Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship [to an important state objective]."[25] The Court's opinion emphasized the voluntary nature of attending single-sex educational institutions and held that the quality of both all-male and all-female institutions was equal in all senses except the sex of the student bodies.

Martha Minow's chapter explores the contradictions of single-sex public education, particularly the differences between integration of girls into more academically challenging boys' schools and the integration of boys into all-girls' schools. She links these issues to *Brown v. Board of Education* and the idea that schools could be separate but equal. She examines the tensions for feminist litigation on this issue, contemporary facets of all-girls' schools, the complexity of single-sex schools in the current public educational landscape, and the rationales for maintaining those schools that exist today.

United States v. Virginia, 518 U.S. 515 (1996).

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24. *Id.* at 690–691.

25. *Id.* at 888.

United States v. Virginia challenged the exclusion of women from the Virginia Military Institute (VMI) a state supported single-sex school. The Supreme Court held that policy unconstitutional in an opinion written by now Justice Ruth Bader Ginsburg. It marks the Supreme Court's most definitive pronouncement on the constitutional standard of review for gender discrimination. The case was initiated by a complaint made by a young woman to the U.S. Department of Justice, and the Department of Justice brought the lawsuit on behalf of the government.

Katharine Bartlett explores the history of this important case in which an entirely separate institution, Virginia Women's Institute for Leadership (VWIL) was established. She closely examines the versions of equality that were utilized by lawyers, including arguments based on excluding women based on their difference from men; creating separate but equal institutions; assimilating women into the all-male institutions based on their similarities to men; and accommodating women's "differences." Bartlett argues that the government lawyers failed to see another significant legal argument, that gender norms embedded in the institutional structure and culture of VMI promoted subordination of women. She explores how this more nuanced approach to equality, seeking to recognize and to end subordination, would have important consequences for women's legal rights, as it could challenge more directly male-defined institutions and "glass ceilings."

Reproductive Freedom

Reproductive freedom, including issues of forced sterilization and access to abortion, is central to women's lives. Without access to reproductive control, women cannot go to school, work, choose whether or not to become a mother, or actively participate as citizens. Women's freedom to choose abortion remains much contested in the political realm today. Two chapters in this book address these issues.

Relf v. Weinberger, 565 F.2d 722 (D.C. Cir. 1977).

Lisa Ikemoto relates the story of the Relf sisters. A doctor sterilized Mary Alice, age 12, and Minnie, age 14. Sixteen year old Katie escaped by locking herself in her bedroom. The younger sisters had been taken from their home by an Office of Economic Opportunity family planning nurse and sterilized without their own or their parents' knowledge and consent. The Relf sisters were among hundreds of women and girls whom providers forcibly sterilized during the 1970s. The ensuing litigation, *Relf v.Weinberger*, highlighted the epidemic of federal involvement in involuntary sterilizations among minority, low-income, and immigrant women, often living with disabilities. As Ikemoto explains, exerting social control over minority and poor women and girls of childbearing age had a long history that preceded eugenics as a movement to

manipulate the human gene pool. But the case was also a product of its era, the 1970s period of retrenchment against the demonstrations and struggle for social change of the 1960s.

Reproductive freedom advocates had sought federal funding for sterilizations as part of a family planning package. But the *Relf* plaintiffs argued that the government had "failed to implement protections to ensure that providers performed only sterilizations that were, in fact, voluntary." Ikemoto positions the Relf sisters' story within the context of other assaults on women's reproductive freedom from forced sterilization to coercive use of birth control. She emphasizes the common thread in these cases that targets women for medical intervention, even though sterilization is an easier procedure for men. The chapter examines the *Relf* case through a number of lenses, including race, class, reproductive justice, and medical ethics.

Harris v. McRae, 448 U.S. 297 (1980).

Roe v. Wade established a right of privacy for women in consultation with their physician to decide whether to terminate a pregnancy.[26] *Harris v. McRae* raised the issue of whether that constitutional right would extend to poor women, who would fund their abortion through Medicaid. Title XIX of the Social Security Act established the Medicaid program in 1965 to provide federal financial assistance to States that reimbursed costs of medical treatment for needy persons. After 1976, versions of the Hyde Amendment severely limited the use of any federal funds to reimburse the cost of abortions under the Medicaid program.

In *Harris v. McRae,* the Supreme Court upheld the denial of funding for medically necessary abortions, excepting only those procedures which threatened the mother's life. The Court reasoned that the Hyde Amendment placed no governmental obstacle in the path of a woman who wished to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encouraged alternate activity. A woman's reproductive freedom carried with it no constitutional entitlement to the financial resources necessary to avail herself of the full range of protected choices. The funding restrictions of the Hyde Amendment did not impinge on the "liberty" protected by the Due Process Clause of the Fifth Amendment.

Authors Rhonda Copelon and Sylvia Law were members of the team of lawyers who litigated *McRae* and have long worked for reproductive freedom. They relate the history of the case. The trial in federal district court in Brooklyn explored the consequences to the lives and health of poor women of excluding insurance coverage for "medically necessary" abortions, as well as the role of religious belief and institutional mobili-

26. 410 U.S. 113 (1973).