FEMINIST LEGAL HISTORY

Essays on Women and Law

Edited by Tracy A. Thomas and Tracey Jean Boisseau

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Feminist Legal History

Foreword

REVA SIEGEL

The impressive body of work collected in *Feminist Legal History* demonstrates that a new field is emerging in history and in law that speaks, at one and the same time, to audiences in the academy and beyond.

This is a book that alters our vision of American life and law. It revisits familiar terrain, and recovers long lost interactions between men and women at the root of this nation's defining commitments and institutions. We come better to understand how gender relations have defined spheres we have long recognized as gendered, such as suffrage, marriage, the military, sexual harassment, and reproductive rights law. And we encounter gender relations shaping spheres we do not conventionally conceive of as gendered, such as accident or poverty law. We learn of micro-choices that cumulatively produced and made reasonable a world in which men have power women lack. And we learn of micro-resistances, of how women's phenomenal agency and creativity have given defining shape to family, community, politics, and law.

The work collected in *Feminist Legal History* matters, both as it intervenes in particular institutions and policy choices, and as it demonstrates, again and again, why it pays to ask how gender matters. Narratives about the past illuminate not only past choices but future ones. They help us see more clearly who we are and how we live together—and to consider what is fixed, what is contingent, and what is open to re-imagining.

Preface

TRACEY JEAN BOISSEAU

The extent to which history is literally embedded in legal decision making even when dramatic departures from recent norms are being contemplated is revealed in the decision rendered by the U.S. Supreme Court in *Roe v. Wade*. Before addressing the claims made by legal counsel, Justice Harry Blackmun asserted in the 1973 majority opinion how desirable he felt it was to "survey, in several aspects, the history of abortion, for such insight as that history may afford us." Opening himself up to what would prove fairly devastating critiques of his representation and use of history, and the relative relevance of these particular traditions to present-day reproductive politics, the Justice cited ancient Greek law as well as historical common law practices as the foundation for the Court's decision establishing a new constitutional right for women to choose abortion. However flawed by an apparently idiosyncratic use of history, Blackmun's reasoning amply demonstrates the degree to which practitioners of the law inevitably use, misuse, invoke, and write their own versions of history—especially when women are centrally involved. This iconic moment in legal decision making, public history making, and women's history demonstrates a central precept animating this collection of essays: that the law comprises at once an engine of change and a buttressing of tradition, a view onto the past and a lesson in the significance and power afforded to history as it is conceived to shape the future.

Foundational to the thinking of the editors and contributors to *Feminist Legal History* is the idea that history—how it is imagined, who writes it, and how it is used—plays an integral role in the making and transformation of the law. No law is made or challenged or applied without reference, explicit or implicit, to an assumed past. Indeed, it could be said that the strategy of referring to a seemingly transparent (and deceptively so) past is perhaps most powerfully enacted by legal practitioners. What is considered reasonable or conventional is always determined so in light of a historical view of past practice. The more naturalized the categories and ideas at stake, the more this is true. Thus no arena of legal practice and lawmaking is

more dependent upon references to the past than those legal decisions which explicitly center, or implicitly hinge upon, ideas about gender and women. As feminists we believe that the assumptions that animate such decisions are not natural; they come from somewhere. Our mission as feminists interested in legal change is to expose the way that legal practice constructs a history within which women and men emerge as distinct realities. History is being done—either poorly, without reflection, or carefully with great attention to the consequences of one's conclusions about the past—but, either way, in the assertion of legal practice and legal decision making, history is being produced through legal discourse all the time.

This volume is centrally concerned with not only how the law has changed but also how legal as well as extra-judicial discourse have—in the words of Reva Siegel, the keynote speaker for the October 2007 symposium held at the University of Akron that inspired this volume—"structured conversations between the public and the bench." Much the same way that the efforts of the lay lawyers, justices, and activists who are examined in this volume have influenced the legal decisions and decision makers in previous eras, writing our own feminist legal history is a strategy we employ to reshape our world.

The contribution of the professional feminist historian of law to our understanding of present legal practice lies in the confluence between the two classifications. What professional legal historians set out to do is to redirect our gaze in ways that serve to question widespread assumptions about the past—rather than reiterate them or blindly support their fortification as one might do lacking the historical perspective of a trained scholar. For *feminist* scholars of legal history, this mission to think counter-intuitively about the past takes on added significance. In addition to producing insights as to how, under what conditions, and through what mechanisms the law has been transformed, the interventions of professional feminist legal historians comprise a direct and purposeful assault on conventional thinking about the relationship between law, gender relations, and women's lives that is often directly undercutting what our legal system, stuck in a blind present, generally imagines to be natural or to have always been true.

Feminist Legal History is dedicated to just such illumination. This volume brings together those scholars of the law with distinct insights into historical ways that women have influenced and been shaped by law with those historians whose broad appreciation for the past brings new perspectives on what the law has meant to women within a larger context. By bringing the two disciplines together, we seek to contribute to the project of institutionalizing feminist history, feminist views of history, and feminist ideas of

women's legal roles and rights. In these ways we hope to contribute not only to a reconsideration of the past but also to the imagining of a more liberatory legal system and decidedly feminist future.

Contents

Introduction

Law, History, and Feminism

TRACY A. THOMAS AND TRACEY JEAN BOISSEAU

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: "Things we thought we knew 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 reexaminations 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.

This introduction provides the context necessary to appreciate the essays in the 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, though 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 up to the 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 her influential book, *The Feminine 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, even obligated, the husband 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 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 in general 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, embodied in the law of coverture, began with the Married Women's Property Acts in the 1840s. These acts 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 husbands' creditors 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 by 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 eighteen 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 Woman Suffrage Association and Lucy Stone's American Woman Suffrage Association. 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 (the American allowed) and on support for the Fifteenth Amendment mandating suffrage for black men but not women (the 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 and 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 such as the Wom-

an'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 be the caretakers of 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. Applying the logic of "true womanhood" to promote women as "social housekeepers" was a powerful and effective new strategy of female reformers producing new roles, even professions, for women; nonetheless, it 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. At that point 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 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—such as 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, however, 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 Joseph P. 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 that 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 David Josiah 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