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The Winding Path Toward Gender Equality and the Advocates and Scholars Who Forged It

Joanna L. Grossman[†]

Introduction

At its broadest, “feminist legal thought” describes the effort across generations to secure equality for women through law. The ideas that have emerged from this work can be loosely typed as “equality theories,” and the statutes, constitutional interpretations, and doctrines they inform can be tied together under the heading of “gender law.”

Three features of gender law are noteworthy. First, while other areas of study might not be premised on any underlying commitments—for example, a labor law scholar might be passionately for or against unions—the term “feminist legal theory” implies a commitment to women’s equality. Second, the founders of the field had to persuade legal and other actors of the underlying premise—that women are entitled to equality—before helping construct the law’s response to existing inequality. Most areas of law are built on a series of unstated and largely uncontroversial premises: that the law should impose liability for conduct that injures others. But gender law only exists if legal actors believe that gender inequality is wrong—and for most of history that was not a popular view. Third, by its very nature, gender law combines theory and practice. The theory provides the justification necessary to persuade courts, lawmakers, or institutions to adopt rules and practices that will lead to greater equality for women; the practice is what (potentially) delivers on the theory of equality. The praxis *is* the field.

This essay will explore the development of feminist legal theory, showcasing the multi-faceted ability of feminist legal theorists to identify forms of disadvantage, theorize about their harm, construct the proper responses, and persuade decisionmakers to act.

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The Push for Formal Equality

At the core of gender law, both chronologically and conceptually, is the theory of formal equality. This is the familiar principle that people who are alike should be treated alike, and likeness should be a function of their actual characteristics rather than stereotyped assumptions. Yet the American social, political, and legal system was premised on the assumption that men and women were dissimilar across several dimensions. Women were perceived to be different physically, emotionally, and intellectually. Moreover, the belief that men and women occupied different and incomparable roles in society was a feature—not a bug—of the system. Against a backdrop of two hundred years of contrary social and political thought, statutory and constitutional lawmaking, and court rulings, feminist legal theorists set out to convince those in power that women were just like men in most salient respects.

This conception of equality undergirds the Declaration of Sentiments issued by women’s rights advocates at the Seneca Falls Convention in 1848, the “first forum in which women gathered together to publicly air their own grievances, not those of the needy, the enslaved, orphans or widows.”¹ The document proceeded from the premise that “all men and women are created equal”² and ended with a list of practical demands for equality in voting, employment, education, religion, and in the family.³ Although no concrete legal changes resulted from this gathering, suffragists renewed the call for formal equality in the early twentieth century, which led to ratification of the Nineteenth Amendment in 1920.⁴ The right to vote reflected a commitment to formal equality rooted in citizenship: women who were citizens were entitled to vote because men who were citizens were entitled to vote. In the immediate aftermath of ratification, advocates argued that the Nineteenth Amendment guaranteed equality in matters other than voting. Although some courts held that it also guaranteed women the right to serve on juries, many courts held that it protected only the right to vote.⁵ The women’s suffrage movement largely disbanded, but a coalition led by Alice Paul began to focus on an equal rights amendment to the federal constitution, which embraced formal sex equality and sought to eliminate sex-based distinctions from the

¹ Gerda Lerner, *The Meaning of Seneca Falls: 1848-1998*, DISSENT 35, 39 (1998) (emphasis omitted). The Declaration, along with other historical documents related to women’s rights, can be found in a multivolume collection, HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., reprint ed. 1985).

² Stanton et al., *supra* note 1, at 70.

³ *Id.* at 72-73.

⁴ U.S. CONST. amend. XIX.

⁵ See PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT 4, 89-113 (2020). On the possibility of a more robust reading of the Nineteenth Amendment, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

law.⁶ An amended version of the Equal Rights Amendment (ERA) drafted by Paul in 1923 finally gained the support of Congress in 1972.⁷ The ERA expired in 1982 without ratification by a sufficient number of states (thirty-eight) to become part of the Constitution, though there is a current controversy over whether ratifications decades after the deadline can be counted.⁸

Women gained very little in the first four decades after suffrage. One advancement was that states continued to adopt laws known collectively as the Married Women's Property Acts, which lifted the civil and legal impediments of coverture, a system that had denied married women many basic rights on the fiction that a woman's legal identity was subsumed by her husband's during marriage.⁹ But there was no broad-based shift toward rules or norms that treated men and women as equals. The tides began to turn with the renewed energy of the women's movement in the 1960s and 1970s. Responding to a variety of social, economic, and political trends, women's rights advocates challenged the many ways in which women were disadvantaged in American society relative to men.

The Birth of the Field of Gender Law

The field of gender law dates to the 1970s and the emergence of so-called "second wave" feminism. It was born of activism, theory, and people who combined them to create a subject that fueled the law's development. In the early 1970s, Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay wrote the first sex discrimination casebook.¹⁰ The second was produced by Barbara Babcock, Ann Freedman, Eleanor Holmes Norton, and Susan Deller Ross.¹¹ These books were transformative.¹² The authors were much

⁶ See Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2651-54 (2021); see also Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 762 (2004) (describing the division of feminists between the camp led by Alice Paul, which insisted on formal sex equality, and another faction that fought for protective labor legislation for women).

⁷ See generally Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 423-27 (2008) (recounting the history surrounding the passage and failure to ratify the ERA in the 1970s).

⁸ See Julie C. Suk, *Justice Ginsburg's Cautious Legacy for the Equal Rights Amendment*, 110 GEO. L.J. 1391 (2022). On the history of the ERA, see JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (2020).

⁹ JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 377-82 (1991).

¹⁰ KENNETH DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* (1974). The seventh and final edition of this book was published in 2012, almost forty years after the first one. See HERMA HILL KAY & TRISTIN GREEN, *SEX-BASED DISCRIMINATION, TEXT, CASES AND MATERIALS* (7th ed. 2012).

¹¹ BARBARA ALLEN BABCOCK, ANNE E. FREEDMAN, ELEANOR HOLMES NORTON & SUSAN DELLER ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975); see also Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J. L. & FEMINISM 429, 430-32 (2002). The Babcock book was an outgrowth of a "conference packet" that the authors had compiled and circulated at a 1971 conference at Yale on "Women and the Law."

¹² Some of these authors had taught the first "women and law" courses in American law schools, and, as a group, they helped create the field of study. Kerber, *supra* note 11, at 430-31.

more integrated in legal practice than was typical for legal scholars, and the casebooks also reflected their personal commitments to women's equality.¹³ These facts undoubtedly shaped both the nature of the work and its urgency.

Feminist legal theorists in the 1970s coalesced around a uniform goal: to dismantle the laws that systematically classified people by sex and thereby maintained an unmistakable hierarchy. Legislators and judges (including the Supreme Court) relied on separate spheres ideology as the defining natural order. As Justice Bradley wrote in his infamous concurrence in *Bradwell v. Illinois*, in which the Court upheld the state's decision to deny a law license to a female applicant, the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."¹⁴ This ideology was used to explain (and uphold) prohibitions on women serving on juries, practicing law, working long hours, and working in certain jobs.¹⁵ Women's rights advocates were told repeatedly that legislatures were entitled to treat men and women differently because they *were* different. The response was to urge legal decisionmakers to recognize their sameness. This began to bear fruit in the 1970s, when advocates succeeded in obtaining statutory and constitutional guarantees of equality.

Recognition of Constitutional and Statutory Rights to Sex Equality

Beginning in 1971, the Supreme Court recognized that sex-based classifications in state and federal laws were suspicious because they likely reflected the stereotypes and assumptions about women that had led to their inferior treatment by the government throughout history.¹⁶ The Court held that courts must subject sex-based classifications challenged under the Equal Protection Clause to intermediate scrutiny.¹⁷ Under this exacting standard, state and federal codes were slowly purged of the sex-based distinctions and rules that pervaded them.¹⁸ These cases represented the Supreme Court's endorsement of the theory of formal equality that had been articulated at Seneca Falls without success and embraced in a more limited context through the Nineteenth Amendment. But now, it was solidified as the baseline. To

¹³ *Id.* at 431-34.

¹⁴ 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

¹⁵ *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding Florida statute according women automatic exemption from jury service); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan law restricting women from working as bartenders); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding Oregon statute limiting the hours per day women could work in a factory or laundry); *Bradwell*, 83 U.S. (16 Wall.) 130 (affirming state's authority to prohibit women from practicing law).

¹⁶ *See Reed v. Reed*, 404 U.S. 71 (1971) (applying heightened scrutiny to a sex-based classification for the first time).

¹⁷ *See Craig v. Boren*, 429 U.S. 190 (1976) (settling on intermediate scrutiny for sex-based classifications).

¹⁸ *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that married servicewomen are entitled to same dependency benefits as married servicemen); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down gender-based statutory scheme under which alimony could only be paid by men); *Craig*, 429 U.S. 190 (finding unconstitutional state statute setting different drinking ages for boys and girls).

the extent women could prove they were similarly situated to men, individually or as a group, they were entitled to be treated equally by the government. As a litigator, Ruth Bader Ginsburg was the chief architect of this legal theory; as a Supreme Court justice, she applied it to strike down the male-only admissions policy of the Virginia Military Institute, noting that “[n]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”¹⁹

Alongside the constitutional developments, women’s rights advocates secured several key legislative victories during the same period. The Equal Pay Act of 1963 required employers to pay women the same as men for doing equal work for the same employer.²⁰ Title VII of the Civil Rights Act of 1964 prohibited discrimination based on a variety of identity traits, including sex.²¹ These two cornerstone laws would be later supplemented by the important protections of Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions receiving any federal financial assistance; the Pregnancy Discrimination Act of 1978, which amends Title VII to prohibit pregnancy discrimination; and the Family and Medical Leave Act of 1993, which guarantees employees of bigger employers the right to twelve weeks of unpaid leave per year as needed for pregnancy, childbirth, or new parenting.²²

Moving Beyond Formal Equality

The law’s embrace of formal equality upended longstanding norms and practices throughout the institutions of civil society. It opened up workplaces and educational institutions and jury boxes—and contributed to growing awareness about the pervasiveness and harms of gender

¹⁹ *United States v. Virginia*, 518 U.S. 515, 532 (1996). For discussion of Ginsburg’s role and strategy, see Wendy Webster Williams, *Ruth Bader Ginsburg’s Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41 (2013), and Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 34 (1975).

²⁰ 29 U.S.C. § 206(d) (2018).

²¹ 42 U.S.C. § 2000e-1–17 (2018). Although passed in 1964, this law was not applied in significant sex discrimination cases until the 1970s, when the Supreme Court began to grapple with the meaning of a law that prohibited employers from setting the terms and conditions of employment based on sex. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that employer policy prohibiting the hiring of women, but not men, with preschool age children violated Title VII); *Dothard v. Rawlins*, 433 U.S. 321 (1977) (invalidating height and weight requirements for correctional officer positions due to disparate impact on women); *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978) (invalidating public employer’s rule that female employees had to make larger contributions to pension fund than male employees due to group differences in life expectancy); *see also* GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* (2016).

²² Title IX, Pub. L. No. 92-318, 86 Stat. 235 (1972); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Family and Medical Leave Act, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612-2654 (2018)).

stereotyping. Doctrinally, the new statutory and constitutional protections required courts to examine the factual assumptions that underlay classifications by sex, to expose the pervasive reliance on stereotypes, and to remove the barriers to free choice. However, though necessary to open long-closed doors, formal equality had little to offer in contexts where differential treatment was based on sex-linked characteristics, such as pregnancy. This gave rise to a variety of alternative theories of equality that, variously, better accounted for gender differences (substantive equality), exposed practices resulting in the systematic disadvantage of women (antisubordination), questioned the supremacy of male perspectives and values (difference), and weighed values complementary to equality (autonomy).²³ Although these alternative theories have influenced the development of gender law, none has taken hold as crisply as formal equality did in the 1970s. However, the field of gender law owes a great deal to the scholars who have worked to develop these different theories,²⁴ and the potential for future advances depends on a more complex understanding of equality.

Beyond the formal equality baseline, feminist legal theorists do not always agree about how best to promote gender equality. A well-known example is the split developed among feminist legal theorists about whether the Pregnancy Discrimination Act (PDA) should be interpreted to require employers to offer identical benefits to those disabled by pregnancy or childbirth and those temporarily disabled due to other causes (the “equal treatment” approach)—or whether employers and governments should be free to accommodate the physical effects of pregnancy even if they did not do so for other types of temporary disability (the “special treatment” approach).²⁵ The so-called East Coast Feminists, a group that included Wendy Williams and Susan Deller Ross, championed the former approach, on the theory that equal treatment enables women to benefit from a rising tide of worker benefits without risking the harm from stereotypes about women’s special needs. The West Coast Feminists, including Herma Hill Kay, advocated for the latter approach, on the theory that women’s unique role in the reproductive process would be a perpetual source of disadvantage for women in the workplace unless employers were forced to accommodate pregnancy. The split turned on different understandings of “sex equality” and the best means to achieve it. The Supreme Court sided with the “special treatment” argument of the West Coast advocates as a matter of statutory

²³ See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1 (1994) (explaining the contours of different theories of equality and their doctrinal influence).

²⁴ Katharine Bartlett published a gender law casebook in 1993, in which she organized the field around theories of equality rather than around areas of law. The ninth edition of this book, of which I am now the lead author, was published in 2023. See KATHARINE T. BARTLETT, DEBORAH RHODE, JOANNA L. GROSSMAN, DEBORAH BRAKE & FRANK RUDY COOPER, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (9th ed. 2023). Bartlett deserves tremendous credit for helping to shape the field of gender law.

²⁵ See Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 602-05 (2010) (describing this split).

interpretation, holding that the PDA is “a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”²⁶

Feminist legal theory branched out in a variety of directions as the decades passed. In addition to grappling with biological difference, scholars and advocates had to fashion and apply equality theories to tackle problems where the government is not the primary source of the discrimination (for example, domestic violence and sexual harassment); where women suffer disproportionately but not exclusively (poverty, discrimination against caregivers, and neutral employment practices with disparate impact); and where gender bias is likely in play but difficult to prove or complicated to redress (dress codes, subjective decision-making, and athletics). Countless scholars have contributed to the development of the law in these areas, and the influence of legal academia is more pronounced in gender law than in many other fields. The law of sexual harassment, for example, owes its existence and content to Catharine MacKinnon, whose pathbreaking 1979 book, *Sexual Harassment of Working Women*, lay the groundwork for the law’s recognition that sexual harassment is a form of intentional discrimination for which employers can be held responsible.²⁷

In more recent years, feminist legal theory has been both supplemented and challenged by adjacent critical theories. Kimberlé Crenshaw introduced the concept of intersectionality in a 1989 article to explain how race and sex work in tandem to change (and worsen) the experience of discrimination.²⁸ She raised questions about feminist legal theory’s tendency toward essentialism that scholars have only begun to tackle. From the outset, feminist legal theory has been racially exclusionary—Black women were not invited to the Seneca Falls Convention, for example—and centered around the needs and circumstances of white women. Queer theorists have similarly questioned the interrelation of sex, gender, sexuality, and gender identity and been critical of the heteronormative assumptions that underlie feminist legal theory; many have proposed more complex ways of categorizing and understanding gender.²⁹

²⁶ See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (upholding the validity of a California statute requiring employers to provide job-protected disability leave for pregnancy but not for comparable disabilities).

²⁷ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). See Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1032-36 (2015) (describing the origins of sexual harassment law).

²⁸ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140-43; see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581 (1990).

²⁹ See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); see also Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3 (1995).

More recently, scholars have developed “masculinities theory” to better understand the effects of gender norms on men.³⁰

Feminist legal theory remains a vital field of scholarship and activism because gender norms remain complex and contested. As Deborah Rhode once observed, women’s equality is often stymied by our collective comfort with sex-based disparities, which strike many as “natural, functional, and, in large measure, unalterable.”³¹ She also rightfully complained of the tendency toward complacency, or a sense that sexism is a thing of the past.³² This leaves modern feminist legal theorists with yet another task: to convince decision-makers that sex discrimination is *still* a problem. First- and second-wave feminism contributed enormously to women’s equality by breaking down barriers to participation in political life and the workplace, among other places. But American women remain unequal in a variety of important respects, even more so for women of color.³³ At work, women continue to experience pay inequity, pregnancy discrimination, sexual harassment, occupational segregation, and intractable barriers to advancement. At home, they continue to perform the bulk of childrearing tasks, even when both parents are engaged in paid work outside the home, and they face higher levels of poverty than men. In their bodies, they face life-and-death legal constraints, which were exacerbated by the Supreme Court’s decision in 2022 to eliminate constitutional protection for abortion.³⁴ That decision has set back the quest for equality by decades. And in all contexts, they face explicit and implicit bias, misogyny, and a normalized level of comfort with gender hierarchy. The ability of feminist legal theorists to expose, explain, reconstruct, and persuade has never been more important.

³⁰ See, e.g., Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J. L. & GENDER 415 (2010); Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, Terry Stops, and Police Training, 18 COLUM. J. GENDER & LAW 671 (2009).

³¹ Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1734 (1991).

³² *Id.* at 1735.

³³ For a comprehensive analysis of gender and the modern workplace, see JOANNA L. GROSSMAN, *NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE* (2016).

³⁴ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).