

Writing Our Own Rare Books

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This conference has its own historical memories, its own historical predecessor and its own historical artifacts. The memories are in the minds of people in this room and thousands more who could not be here with us, women and men who were part of the transformations of ideas and practices that recast what we thought we knew at the turn of the 1970s.

Its direct predecessor was the conference on “Women and the Law,” funded in part by the Carnegie Corporation, that brought together students and law teachers here in New Haven in the spring of 1971. Young, feisty and marginal, the attendance list named participants in alphabetical order and therefore without hierarchy (there were those who would have described such a list as “promiscuous” in its nineteenth-century meaning, of an indiscriminating mixture, even though students’ names were marked by the letter “S”). The names on the list now dazzle: Ruth Bader Ginsburg, Eleanor Holmes Norton, Herma Hill Kay, Janet Benshoof, Carol Bellamy. Five men were there in solidarity and out of shared interests: among them Jack Getman, who would have a distinguished career in labor law, and Leo Kanowitz, who had already written the only monograph on the subject: *Women and the Law: The Unfinished Revolution*.¹ The artifacts are the first two casebooks on sex discrimination and the law, almost all of whose authors are here with us tonight, and their predecessor: a fragile 34-page mimeographed packet that was circulated at the conference. Its title was “Women and the Law: A Collection

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1. LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969). It is not certain that everyone on the list actually attended the conference. Other conferences on Women and the Law were held in the early 1970s; for an account of the National Conference on Women and the Law, which was organized at New York University Law School in 1970, and persisted until 1992, see Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future*, VA. J. SOC. POL’Y & L. 1 (1994). One thousand people attended the 20th conference in 1989. See also Herma Hill Kay & Christine A. Littleton, *Text Note: Feminist Jurisprudence: What Is It? When Did It Start? Who Does It?*, in HERMA HILL KAY & MARTHA S. WEST, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* 1087 (5th ed. 2002). The essay was originally prepared for the Third Edition, 1988.

of Reading Lists”; its improvisational spirit is suggested by the confession on the table of contents that “due to a page numbering mistake” there is no page 32.²

The circulation of reading lists was a strategy of feminist scholars in the early 1970s. As we engaged in the invention of a subject that our seniors were certain did not exist, we needed to know that we were not alone, and we needed each other’s advice. Syllabi circulated in samizdat.³ They represented not merely bureaucratic paper but intellectual struggle. The phrase “women and the law” is actually a placeholder, implying that women might have a different relationship to the law than do men, but unclear about what that relationship might be. What are the components of “sex discrimination”? Where should one look to find it? Drafts of reading lists were a way of maintaining the conversation. The compilers of this packet—Barbara Bowman (who later would use Barbara A. Babcock as her professional name), Ann Freedman, Eleanor Norton (as she then signed herself), Susan Ross, “and friends”—did more than staple things together. They clarified the landscape, sorting the generic “women and the law” into sites: constitutional law, criminal law, employment law, public accommodations, abortion, education. Family law, where (if they thought about it at all) most scholars placed all “women’s law,” was only one of many categories, way down on the list.

Casebooks, by contrast, are not fragile; they are notoriously thick and heavy. They are the workhorses of the legal profession. Practitioners want the latest work, the current state of the argument. When new editions appear, old volumes are pulled off office shelves and replaced by new ones. (My own library contains the second edition of one of these casebooks because a colleague donated what she regarded as redundant.) Even major libraries are known to deaccession. The assumption is that the old volumes are outdated and no longer interesting. But the casebooks that emerged from the flyaway paper of the conference still breathe the energy with which they were written.⁴ The compilers of the conference packet reappear as the editors of *Sex Discrimination and the Law: Causes and Remedies*, published by Little, Brown in 1975—and funded in part by the same Carnegie Corporation grant that had made the “Women and the Law” conference possible.⁵ Next to it on the shelves sits *Text, Cases, and Materials on Sex-Based Discrimination*,

2. I am grateful to Mary Clark and Ann Freedman for providing a copy of this ephemeral document.

3. This circulation was characteristic of other fields as well—history, English, psychology. In the early 1970s, a short-lived company, KNOW, Inc., published the most widely circulated syllabi, giving them more exposure.

4. They can now be bought through rare book lists like www.abebooks.com and www.bibliofind.com.

5. BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR NORTON, & SUSAN DELLER ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975) (hereinafter *SEX DISCRIMINATION*).

constructed by three other conference participants (Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay) and published by West Publishing Company a year earlier.⁶

Although their bindings were no different from casebooks on Torts, on Property, on Contracts by the same publishers, the sex discrimination casebooks breathe a distinctive spirit from their opening pages. The authors did not need a historian to tell them that their relationship to the reader was freshly invented. Their excitement, their gutsiness, their desire to challenge established practices rings through their pages. This is especially true of *Sex Discrimination and the Law*, which begins with the words: "This is not a usual law school text. It did not grow out of the scholarly interests of law professors, but rather had its genesis in student-generated courses in Women and the Law." Then it goes on, as some people in this room know, to tell us that "the first such course was taught in the fall of 1969 at New York University Law School, and Susan Ross was one of its initiators." That's just the "right" time: uptown at Barnard, Annette Baxter had initiated one of the very first courses in U.S. women's history in 1966; thereafter courses in women's studies proliferated throughout the liberal arts curriculum.⁷ "Women students at Yale, including Ann Freedman, learned about the NYU course, taught it themselves at Yale in the spring of 1970 and, for the spring of 1971, prevailed upon the faculty to hire Barbara Babcock, who had been teaching the course at Georgetown"⁸ to teach it with Ann Freedman. Once a week, Babcock left her public defender's job in Washington D.C. to fly to New Haven; "the switch in cities," she recalled years later, "seemed minor compared to the shift in causes."⁹

Meanwhile, Eleanor Holmes Norton was teaching the course at NYU Law School. Soon after, a Women and the Law Clinic was taught at NYU by Kristen Booth Glen and Ann Garfinkle.¹⁰ Gladys Kessler—now known for her challenging decisions as a judge on the U.S. District Court for the District of Columbia¹¹—took time from private practice to teach a seminar at George Washington Law School with Susan Ross; Kenneth Davidson was hedging the question of where the course belonged in the curriculum by teaching a course at

6. KENNETH DAVIDSON, RUTH BADER GINSBURG, & HERMA HILL KAY, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* (1st ed. 1974) (subsequent editions by Herma Hill Kay: 2d ed. 1981, 3d ed. 1988; and by Herma Hill Kay & Martha S. West: 4th ed. 1996, 5th ed. 2002) (hereinafter *SEX-BASED DISCRIMINATION*).

7. In 1969 Leo Kanowitz taught "Women and the Law" at the University of New Mexico. The expansion of these courses, from 100 in 1969 to 4,658 in 1974 (counting only those in accredited colleges and universities, including many law schools but not including thousands more in continuing education programs, alternative feminist educational institutions and women's centers) can be traced in another rare book: TAMAR BERKOWITZ, JEAN MANGI, & JANE WILLIAMSON, *WHO'S WHO AND WHERE IN WOMEN'S STUDIES* (1974).

8. *SEX DISCRIMINATION*, *supra* note 5.

9. Barbara Allen Babcock, *Clara Shortridge Foltz, Constitution-Maker*, 66 *IND. L.J.* 849 (1991).

10. This information from Elizabeth Schneider to author (Dec. 2002).

11. *See, e.g.,* *Ctr. For Nat'l Sec. Studies v. United States Dep't. of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (ordering government to release names of post-9/11 detainees).

SUNY Buffalo to a class that was half undergraduates, half law students. At the urging of Boalt Hall women students, some of whom had attended the Yale conference, Colquitt Meacham Walker, who was working at the Legal Aid Society of Alameda County, came to Boalt Hall to teach Women and the Law. Herma Hill Kay sat in on the course and later taught it herself as she worked on the casebook. Among the students who had urged that the course be offered were Mary Dunlap, Nancy Davis, and the recently graduated Wendy Webster Williams, who were peers at Boalt Hall but had not known each other well before the Yale conference. While attending it, they conceived the idea of a women's law firm, and when Nancy Davis graduated the three formed Equal Rights Advocates, Inc., a pioneering women's rights firm in San Francisco, that will celebrate its 30th anniversary in 2004.¹² Shortly after founding ERA, Inc, Wendy Webster Williams recalls, "we—the three of us, supplemented by Barbara Babcock at Stanford—took the Yale materials on the law school circuit, teaching women and law seminars at Stanford, Santa Clara, the University of San Francisco and Golden Gate University Schools of Law."¹³ The feistiness of these courses—responsive to student demands, often with a clear sense of connection not only to undergraduate but high school and "non-school" (i.e., continuing adult education) courses—bound teachers and their students together as they enacted the grassroots collective dynamics of 1970s feminism.

Sex Discrimination and the Law was unlike most casebooks in that its authors were not full-time academics. While she was writing, Eleanor Holmes Norton was also chairing the New York City Human Rights Commission. Though she was only in her early 30s, she had unusually hard-earned political experience, dating back to risky work in Mississippi ten years before; she brought a great deal of political skill to the complicated political job in an exposed political position. As Chair of the Commission, Norton developed a language of claims that could be brought against the state by all people, including but not limited to women and minorities, who felt themselves denied equal treatment of the laws. Norton refused to permit people to play identity politics, or to use the language of comparative oppressions. Hers was a major *intellectual* as well as legal contribution that has yet to be fully appreciated. Susan Deller Ross was an attorney at the Equal Employment Opportunity

12. A fourth founding member, Joan Messing Graff, is now president of the Legal Aid Society of San Francisco. See the ERA website: www.equalrights.org. In 2002, ERA Inc was concentrating its attention on its Tradeswomen [in construction] Legal Advocacy Project, High-Tech [electronics] Sweatshop Project, Restaurant Discrimination Project, Higher Education Legal Advocacy Project, and its Retail Discrimination Project, notably representing plaintiffs in the class action suit *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252 MJJ (N.D. Cal. 2002). Mary Dunlap was appointed Director of the Office of Citizen Complaints, San Francisco's independent police watchdog agency, in 1996; it was a controversial appointment, putting an outspoken civil liberties lawyer in a position traditionally held by men associated with law enforcement agencies. Mary Dunlap died, age 54, in January 2003. A few days later, Nancy Davis was sworn in as San Francisco Superior Court Judge.

13. E-mail from Wendy Webster Williams to author (Dec. 13, 2002) (on file with author).

Commission, which had recently committed itself to vigorous pursuit of sex discrimination cases. Barbara Babcock had the emotionally intense job of Director of the Public Defender Service in the District of Columbia; toward the end of the period she left to be the first woman on the regular faculty at Stanford Law School. Ann Freedman was busy founding a feminist law firm in Philadelphia. Thus the field was claimed, surveyed and designed by students and marginally employed young lawyers; the making of the courses, the pamphlets and then the casebooks forced the specialty into existence. Years later, when Ruth Bader Ginsburg reflected on her own experiences developing the other “first” casebook—*Sex-Based Discrimination*—while she was simultaneously inventing the ACLU’s Women’s Rights Project, teaching first at Rutgers and then at Columbia Law School, litigating cases, and raising small children—she observed, “it was wonderful, it was invigorating, and we were always tired.”¹⁴

It is unusual for a casebook to warn readers, as did the authors of *Sex Discrimination*, that they will encounter “explicit bias.” The authors wrote as members of the first substantial cohort of women lawyers to seek professional identities collectively. Their predecessors had emerged from law schools into the 1920s in pairs and triplets, into a political context already in retreat from the feminist claims of the pre-World War I era. They had their own now-forgotten hard-fought battles that laid the foundation for much that was done in the 1970s. For example, women attorneys were not admitted to the New York Bar Association until 1937, some 17 years after suffrage and even more since women had been able to earn law degrees in New York City. Women attorneys took the lead in demanding that women have both the right and the obligation to serve on juries. The Second Wave feminist cohort built on these foundations. These women entered a landscape already reframed by the civil rights and anti-war movements; from these movements they learned argument, rhetoric and strategy. Still, it was not easy. Against an intellectual context that decried identity politics, against an academy that decried identity-driven research subjects and held that the woman who wished to succeed ought to keep her distance from women’s subjects, the casebook authors wrote frankly out of their own need to understand the grounding of feminism and to challenge the rules that made their own employment problematic, their entry into clubs and bars embarrassing, their presence in the courtroom a matter for finger-pointing and marginalizing comments. The issues they addressed in the casebooks were simultaneously abstract and personal: “We believe that women suffer inequality, reinforced and at times created by laws, and that law can also be used to remedy many of these inequities. . . . We have presented a feminist

14. See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 204 (1998).

view of most of the issues raised in the chapters which follow.”¹⁵ The authors of *Sex-Based Discrimination* took the unusual step of inserting in the midst of the text a section headed “a personal note” detailing the reasons for their own support of the Equal Rights Amendment (ERA). The ERA, they maintained, would eliminate the historical impediment to unqualified judicial recognition of equal rights and responsibilities for men and women as constitutional principle; it would end legislative inertia that keeps discriminatory laws on the books . . . and it would serve as a clear statement of the nation’s moral and legal commitment to a system in which women and men stand as full and equal individuals before the law.¹⁶

Unlike other casebooks to that time—although the practice is now quite common—these books included not only briefs and opinions, but also popular magazine articles and other historical, economic and sociological materials. Even before the text proper began, right after the standard table of cases, *Sex-Based Discrimination* offered a page of “Selected References” that placed the volume in an intellectual context that began with John Stuart Mill’s *Subjection of Women* (1869) and went on to Margaret Mead’s *Sex and Temperament* (1935), Simone de Beauvoir’s *The Second Sex* (1949), Eleanor Flexner’s *Century of Struggle* (1959), Betty Friedan’s *The Feminine Mystique* (1963) and *Woman in Sexist Society*, a feisty collection of women’s liberation essays.¹⁷ It also drew on articles in *Science* and *Notes from the Third Year*, as well as a speech by Olof Palme, the Prime Minister of Sweden. *Sex Discrimination and the Law* included recently published selections from *Business Week*, *Saturday Review*, and *The New Republic*. Both included selections from the recently invented *Ms.* Even as the editors worked, things were changing around them; one gets the sense that they would have been more comfortable had the binding been loose-leaf from the beginning.

Among the many practices these feminists sought to destabilize, exclusion from public places was one that hit close to home. The authors of *Sex-Based Discrimination* embedded it into the section on employment, emphasizing that many places marked “private” were in fact locations where business was conducted or relationships forged that would be useful in economic terms. The Yale authors of *Sex Discrimination and the Law*—themselves excluded from Mory’s (the private club that still continues to serve as Yale’s primary social spot for faculty)—made exclusion from public places their culminating topic. The authors emphasize that although sex discrimination was included as a category in Title VII of the Civil Rights Act of 1964, it was not included in Title II, which barred discrimination in public accommodations. In the 1960s the exclusion of women was widely understood to be a protective tactic,

15. SEX DISCRIMINATION, *supra* note 5, at v-vi.

16. SEX-BASED DISCRIMINATION, *supra* note 6, at 116.

17. *Id.* at xxxv.

intended to protect “good” women from “bad” prostitutes, or from crude men who were gambling or drinking, or in other ways serving “good” women’s interests. That the exclusion of women preserved male space and marked women who moved into it as sexually promiscuous, inviting what we would now call harassment, was less well understood.

Second wave feminists were more imaginative than they often have been given credit for; they challenged physical exclusion on a combination of personal and economic grounds. White feminists had been instructed by the civil rights movement to name segregation when they saw it. To take the position that segregation on the basis of sex had something in common with segregation on the basis of race was a disruptive argument. Brenda Feigen’s memoir of the transition from all-female Vassar to Harvard Law School is soaked with her resentment—still smoldering—of the places from which she was excluded by her own school: the squash courts, secret clubs like Lincoln’s Inn, even some rooms of the Harvard Club in New York City on her wedding day.¹⁸ In New York City, Faith Seidenberg and her colleagues in NOW brought suit against McSorley’s Old Ale House—which had not served women clients, whether or not escorted by a man, for 115 years. McSorley, Inc. claimed it was a private place; since it needed a retail beer license, Judge Walter Mansfield emphasized, they could not make that claim. Rather, he wrote in his decision sustaining NOW’s view of the matter, McSorley’s—which was, as the title of the case conveyed, a corporation, not a private home—was “a commercial enterprise engaged in voluntarily serving the public except for women.”¹⁹ Mansfield went on:

Although the difference between the sexes has been the source of more poetry and prose than almost any other phenomenon of life, discrimination based on sex will be tolerated under the Equal Protection Clause only if it bears a rational relation to a permissible purpose of the classification. . . . Without suggesting that chivalry is dead, we no longer hold to Shakespeare’s immortal phrase “Frailty, thy name is woman.” Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism.²⁰

“Outdated” was gentle; such language glossed over the more pernicious aspects of a “gentlemen’s agreement” to exclude people unlike themselves.

Carol Greitzer introduced into the New York City Council a bill banning discrimination in public accommodations on the basis of sex; when it was passed in 1970, it provided that exemptions might be granted on the bases of

18. BRENDA FEIGEN, *NOT ONE OF THE BOYS: LIVING LIFE AS A FEMINIST* 3-24 (2000).

19. *Seidenberg v. McSorley’s Old Ale House, Inc.*, 317 F. Supp. 593 (S.D. N.Y. 1970).

20. *SEX DISCRIMINATION*, *supra* note 5, at 1045-46. Compare that Davidson and his colleagues put *McSorley’s* in the section on Labor Force Participation, emphasizing that the conversations that go on in restricted places often concern business relationships.

“bona fide considerations of public policy.”²¹ As chair of the New York City Commission on Human Rights, Eleanor Holmes Norton—barely six years out of Yale Law School—had the responsibility of mediating numerous claims that specific instances of discrimination were indeed reflections of such “bona fide considerations.”

The most delicious of these claims came from the New York Yankees. For a century, the Yankees had sustained the practice of “Ladies’ Day”—ten or eleven times a season offering cheap tickets for women. Those who were skeptical of the practice complained that Ladies’ Day was an occasion to encourage women to act in a silly way and to encourage men to treat women as though they were silly. In the end, Eleanor Holmes Norton and the Commission denied the Yankees and all other groups exemptions to equal access law, except in places where patrons normally disrobe. And that is why there hasn’t been a Ladies’ Day at a baseball game for a generation, and why the whole concept will seem bizarre and arcane to anyone born after 1960, especially all the female high school and college athletes now empowered by Title IX.²²

So if you have a copy of either original casebook, treasure it as the imaginative intellectual departure it was in the early 1970s, and keep it around so that you can, from time to time, measure its distance from its successors.

Some of these successors are direct. When Kenneth Davidson moved into government service and Ruth Bader Ginsburg was appointed to the U.S. Court of Appeals for the District of Columbia, Herma Hill Kay took over responsibility for *Sex-Based Discrimination*, publishing a second edition in 1981 and another in 1988; for the fourth and fifth editions, in 1996 and 2002, she has been joined by Martha S. West of the University of California, Davis.²³ Barbara Babcock, Ann Freedman and Susan Deller Ross were joined in 1996 by Wendy Webster Williams, Rhonda Copelon, Deborah Rhode, and Nadine Taub as authors of a full-scale successor volume to *Sex Discrimination and the Law*. (Eleanor Holmes Norton was by then a delegate to Congress for the District of Columbia.) A quarter-century after they had begun their first book, the original authors now had extensive litigating experience of their own: Susan Deller Ross and Wendy Webster Williams were instrumental in shaping the theory and language of the Pregnancy Discrimination Act and the Family and Medical Leave Act. Nadine Taub had been extensively involved in the development of laws regulating new reproductive technologies and reproductive choice, and Rhonda Copelon’s international work is reflected in her section on reproductive and sexual rights. The authors’ claims were now

21. *Id.* at 1057-59.

22. See *Abosh v. New York Yankees, Inc.*, No CPS-25284, Appeal No. 1194 (New York State Human Rights Appeal Board, July 19, 1972), quoted in *SEX DISCRIMINATION*, *supra* note 5, at 1069-1070.

23. *SEX-BASED DISCRIMINATION*, *supra* note 6.

confident; they could speak not only of “causes and remedies” of a harm that many of their readers were not sure existed, but rather of the “history, practice and theory” of a recognized and respected field. They were certain that there remained “many manifestations of female disadvantage in our society.”²⁴

I have not attempted a content analysis of the differences between the subsequent editions and the original casebooks; the authors themselves no doubt could do this much more easily than I. But to browse the subsequent editions is to watch the editing of a story and the gradual development of a canon, as authors struggle to absorb new litigation, new decisions, and to shape the ways the next generation of law students would engage the subject of sex discrimination.

How is a canon made? It’s helpful to watch what happens to *Sail’er Inn v. Kirby*,²⁵ the first major holding that excluding women from employment (in this case, from tending bar) could be a denial of rights under the Equal Protection Clause of the Fourteenth Amendment, and under the California Constitution, which had provided, back in 1879, that “No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession.” As law clerk for California Supreme Court Associate Justice Raymond Peters, Wendy Webster Williams, then in her mid-20s, helped interpret what had transpired in the courtroom. Barbara Babcock read the “bold new case” on one of her flights from Washington, D.C. to New Haven; years later Babcock would remember being thrilled but also “that the presence of the old clause in the new case irritated me because it made the ground-breaking equal protection discussion largely superfluous. And, as I told my class, the clause itself was no doubt a sport, not likely to be replicated in other state constitutions.”²⁶ Early in the 1990s, Babcock would search out the origins of that clause, and would establish that it was not at all “a sport,” but rather the result of an intensely waged campaign by California suffragists, led by Clara Shortridge Foltz, the first woman to be admitted to the California Bar. Foltz’s own suit for admission to the University of California’s new school of law in 1879 was buttressed by a major lobbying campaign to persuade the California Constitutional Convention, sitting at the same time, to approve clauses in the state constitution that opened all departments of the state university to women, and, it followed logically, opened to them the practice of all lawful professions.²⁷

Sail’er Inn was carefully covered in the first editions of *Sex Discrimination and the Law* and *Sex-Based Discrimination*. But despite Wendy Williams’

24. BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHONDA CÔPELON, DEBORAH L. RHODE, & NADINE TAUB, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* xliii-xlvi (1996) (hereinafter *SEX DISCRIMINATION 2D*).

25. 485 P.2d 529 (1971).

26. Babcock, *supra* note 9, at 850.

27. *Id.* at 852-54.

involvement, *Sail'er Inn* was reduced to a bare notice in the edition whose editorial group she had joined.²⁸ *Seidenberg v. McSorley* slid out of the index. Herma Hill Kay kept *Sail'er Inn* as a significant entry in the 1981 edition; by the 1988 edition, however, it had slid to a mention. *Seidenberg* went even faster: reduced to a mention in 1981, gone by 1988. The case books testify, I suspect, that anger at denial of access to public accommodation was eroding as battles were won; Ladies' Day had been erased in practice, so *Abosh v. New York Yankees* was less important for new lawyers to learn. Women now went to lunch at Mory's (although the photographs on the wall remained largely male).

Twenty years of experience necessarily meant that fresh choices about inclusion would have to be made; twenty years of argument meant much more complexity attached to each topic addressed by a casebook. Sometimes the differences between the two editions reflect simply the passage of time. *Roe v. Wade*²⁹ and *Doe v. Bolton*³⁰ had only recently been handed down when the first editions of *Sex-Based Discrimination* and *Sex Discrimination* went to press; the editors at first could do little more than include lengthy extracts from the decisions. But the differences could also mean alternate conceptualizations. By 1996, the second edition of *Sex Discrimination and the Law* devoted nearly 200 pages to tracing argument about reproductive rights understood generally and to the "Gender Implications of Reproductive Modes and Technologies," including sterilization, *in vitro* fertilization and surrogacy. In the early 1970s, the agenda for those who would challenge discrimination on the basis of sex had seemed relatively straightforward; indeed, it is now widely appreciated that many of the plaintiffs for landmark arguments were men who complained of being treated differently from women. Whatever the outcome, the claim for the same treatment and equal benefits were at issue in *Sail'er Inn*, *Reed v. Reed*,³¹ *Frontiero v. Richardson*,³² *Weinberger v. Wiesenfeld*,³³ *Kahn v. Shevin*,³⁴ and *Rostker v. Goldberg*.³⁵ By the mid-1990s the easy questions had largely been answered; questions of equity remained. What is fairness as between the treatment of a pregnant woman and a man? What counts as sexual harassment? Reflecting on the "nearly thirty years of analysis, aspirations and activism directed toward achieving equality between women and men before the law" that had passed since beginning work on the first edition, the authors of *Sex-Based Discrimination* were sobered by how few of the obstacles to equality

28. SEX DISCRIMINATION 2D, *supra* note 24, at 146-47, 167.

29. 410 U.S. 113 (1973).

30. 410 U.S. 179 (1973).

31. 404 U.S. 71 (1971).

32. 411 U.S. 677 (1973).

33. 420 U.S. 636 (1975).

34. 416 U.S. 351 (1974).

35. 453 U.S. 57 (1981).

“have been overcome in ways that will endure, and by enduring, permit the channeling of energies into new initiatives.”³⁶

For the authors of *Sex-Based Discrimination*, the sections into which the book had originally been divided remained a reasonable conceptual structure thirty years later, expandable enough to embrace new complexities. Indeed, by their persistence the five chapters may suggest a skepticism about the depth of change and a judgment about the endurance of discrimination. The cautious chapter title of the first edition: “A Glance at Normative Aspects of the Criminal Law in Delineating Sex Roles” shifted by the second edition to simply “Women and Crime,” a topic capacious enough to absorb crimes against women and women as agents of the criminal justice system. The chapter on “Sexual Interaction Within the Family” gradually expanded to include same-sex marriage and “Family Life without Marriage.”

The authors of *Sex Discrimination and the Law* took a different tack. Responding to the national struggle that was engaged in the 1980s and 1990s over what counts as sex discrimination, the casebook was reorganized along sharply different lines, with new sections, among them “Beyond Traditional Concepts of Facial Sex Discrimination,” “Affirmative Action—Reverse Facial Sex Discrimination,” and “Disparate Impact—Discriminatory Effects on Women.” New categories account for several hundred additional pages. Arguments about and efforts to clarify cloudy understandings of what counts as discrimination appear in many other chapters; there are nearly 100 pages of testimony by Anita Hill and Clarence Thomas and supplementary material from Justice Thomas’s confirmation hearings in 1991. “A rule,” Nadine Taub and Wendy Williams observed in 1985, can be “sex neutral on its face but not at all neutral in the way it affects male and female employees.”³⁷ The volume begins with a 160-page narrative legal history of women in the United States from the era of the American Revolution until the Supreme Court’s 1961 decision in *Hoyt v. Florida*, upholding the state’s exemption of women from jury service unless they themselves chose to register to place their names in the jury pool.³⁸ Although the appellant (a woman charged with murdering her husband) argued that the law denied her a chance to be judged by a jury drawn from an authentically random selection from the entire community, the U.S. Supreme Court considered such a distinction benign.

A decade later such distinctions would be regarded as invidious; starting with *Reed v. Reed* in 1971, the Burger Court would decide more than twenty sex discrimination cases in rapid succession. The second edition of *Sex Discrimination and the Law* conveyed to students even as they began their work that conceptions of equality between men and women had been

36. SEX-BASED DISCRIMINATION (5th ed.), *supra* note 6, at v.

37. SEX DISCRIMINATION 2D, *supra* note 24, at 920.

38. 368 U.S. 57 (1961).

problematic from the foundation of the republic. As the sex discrimination casebooks were revised, they were joined on the shelves by others, which claimed to have more theoretical perspectives: *Feminist Jurisprudence, Gender and the Law, Sex Equality*.³⁹ Martha Chamallas has suggested that the turn toward theory was forced by Supreme Court decisions in *Geduldig v. Aiello*,⁴⁰ *General Electric Company v. Gilbert*⁴¹ and finally, *California Federal Savings and Loan v. Guerra*,⁴² all of which required feminist litigators to struggle with questions of sameness and difference between pregnant and “non-pregnant persons,” or, to put it in more familiar legal terms, between equality and equity. To seek equity as well as equality required a delicately nuanced analysis of the meanings of gender that did not always sit comfortably within traditional sex-discrimination conceptualizations. Mary Joe Frug’s casebook included in its “Table of Authorities” works like philosopher Judith Butler’s *Gender Trouble*, French feminist Christine Delphy’s *Profeminism and Antifeminism*, and Rosalyn Petchesky’s *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*. Frug began not with interpretative constitutional history but with the place of women in the legal profession; her readers would start by seeking to understand how they themselves embodied the contradictions of gender that would be analyzed. This generation of casebooks were developed as a new cohort of theorists were treating the very concept of “woman” as itself unstable, the sexed body a less reliable foundation than it had once seemed for agreements of what counts as equality. “Gender,” writes Judith Butler, “is an identity tenuously constituted in time, instituted in an exterior space through a stylized repetition of acts.”⁴³ The more the identity of “woman” was understood to lie in performance as well as in biology, the harder equality questions became.

But just those sort of equality questions were unavoidable when the Court held that excluding pregnancy leave from employees’ disability coverage was not “sex discrimination.” When Congress responded to *Geduldig* by requiring pregnancy to be treated like any other disability, conceptual problems remained, among them whether pregnancy is indeed a “disability” and whether the new statute had any meaning in a work environment in which fringe benefits did not include any sort of disability leave. These questions were resolved temporarily by Justice Thurgood Marshall’s memorable opinion

39. Among them: MARY JOE FRUG, *WOMEN AND THE LAW* (1992; 2d ed. Judith G. Greenberg, Martha L. Minow, & Dorothy E. Roberts 1999); KATHARINE T. T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (1993; 2d ed. Katharine T. T. Bartlett and Angela Harris, 1998; 3d ed. Katharine T. T. Bartlett, Angela Harris, & Deborah Rhode, 2002); MARY BECKER, CYNTHIA GRANT BOWMAN, & MORRISON TORREY, *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994, 2d ed. 2001). A notable recent addition to this group is CATHARINE A. MACKINNON, *SEX EQUALITY* (2001).

40. 417 U.S. 484 (1974).

41. 429 U.S. 125 (1976).

42. 479 U.S. 272 (1987).

43. See FRUG, *supra* note 39, at 79.

sustaining a “statute that allows women, as well as men, to have families without losing their jobs.”⁴⁴ But the struggle between what counted as sameness and what counted as difference continued, and the new casebooks organized their materials to make this struggle transparent.⁴⁵

As this second generation of casebooks now undergo their second and third revisions, yet another generation of casebooks has emerged. Their focus is simultaneously broader and more narrow; specific to an issue, but simultaneously expanding understandings of the boundaries of civil rights and tort claims, naming new harms. Thus a subject like domestic violence, which even in casebooks that devote entire chapters to sexual coercion and woman abuse, cannot be fully covered, now claims its own casebooks.⁴⁶ In *Battered Women and the Law*, Clare Dalton and Elizabeth M. Schneider can explore at length the dimensions of a practice, domestic violence, that was not recognized by decisions of the U.S. Supreme Court until 1992⁴⁷ or the subject of major federal legislation until 1994⁴⁸ but which has long been embedded in American social practice—indeed, in the practices of virtually all societies of which we know. Key cases, like *State v. Wanrow*⁴⁹ which are treated in historical notes or in brief selections in general sex discrimination cases, get full attention here—Dalton and Schneider devote eight pages to the decision and comment on it. They also have space for reflection on the role of social context, like welfare and medical systems, and to spell out the conceptualizing of violence against women as a violation of international human rights, devoting an entire chapter to the work of United Nations, NGOs like Human Rights Watch, and the ways in which claims for asylum are being reshaped.⁵⁰

Lesbian and sometimes gay sexuality was a subject in sex discrimination casebooks, especially when litigators made sameness/difference arguments that were not unlike those that feminist litigators struggled with. Indeed, as Patricia A. Cain has observed, “Gay and lesbian activists have learned from earlier civil rights movements that the most workable legal arguments, especially in litigation, are sameness arguments.” Although sameness arguments are limited by their implicit denial of all that is distinctive in gay and lesbian sexuality, they have been, Cain writes, a crucial first stage:

44. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 47-52 (1999).

45. See, e.g., MACKINNON, *supra* note 39; WILLIAM B. RUBENSTEIN, LESBIANS, GAY MEN AND THE LAW (1993); WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW (1997); WILLIAM N. ESKRIDGE, JR., & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW (1997).

46. BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (1994); and the expansive CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (2001).

47. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

48. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

49. 559 P.2d 548 (Wash. 1977).

50. DALTON & SCHNEIDER, *supra* note 46, at 992-1060.

Once the sameness arguments established that, at the core, women and men are equally able, a new starting point was established for discussing difference. The proper treatment of pregnant workers, for example, was not a serious topic of discussion until sameness arguments had transformed the workplace into a place where women and men were viewed as equal workers. . . .⁵¹

But the litigation strategies of sameness can play out differently when sexuality is at issue; increasingly the subject demanded forthright attention of its own. Indeed, as Katherine M. Franke has argued, the disaggregation of sex from gender may well have been “the central mistake” of sex discrimination law, limiting it at least at first to crude stereotyped distinctions between the sexes and largely ignoring “the social processes that construct and make coherent the categories male and female.”⁵² One result was the need to develop a jurisprudence attentive to sexuality, related to but distinct from the rapidly developing body of thought on sex discrimination. In the 1980s Mary C. Dunlap (who as a member of Equal Rights Advocates had pioneered feminist litigation in the 1970s) began teaching courses on sexuality and gay rights; Tom Stoddard and Arthur Leonard did the same. A conference on sexual orientation in the law school classroom held at Harvard Law School in 1989 seems to have played a role not very different from the women and the law conferences of the early 1970s in creating an activist scholarly community. Out of these courses, William Rubenstein developed the first casebook on the subject⁵³: that book is now in its second edition.⁵⁴ It has been joined by William N. Eskridge Jr. and Nan Hunter’s *Sexuality, Gender, and the Law*;⁵⁵ others are likely to appear in the near future.⁵⁶

Although they reflect social history, casebooks cannot themselves *be* social histories. Their authors have a quite different agenda—they need to construct an intellectual argument that imposes order on the confusion of hundreds, thousands of episodes of litigation in any given year: choosing what to emphasize, what is worthy of students’ limited attention, where underlying integrating themes are to be found. They exclude lived experience and the contextual setting in favor of the logic of the developing argument. Even though Ruth Bader Ginsburg was an author, one would never know from the first edition of *Sex-Based Discrimination*’s treatment of *Reed* the fascinating story of how the case came before the Supreme Court, or know anything of the

51. PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000).

52. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1-3 (1995).

53. *LESBIANS, GAY MEN AND THE LAW* (1993).

54. Its title is now *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (1997).

55. *Supra* note 45.

56. For example, Art Leonard and Patricia A. Cain are preparing a casebook to be published by Carolina Academic Press.

role played by the ACLU's Women's Rights Project or of Ginsburg's role as its director.⁵⁷ Other authors also litigated some of the cases they report; in the interests of both modesty and dispassion, their own roles are muted or invisible. Organizing a book to emphasize themes damages chronology from the outset. That there was *collective* work as well as individual complaint is masked; only by implication—in what they select to print, in the study questions they prepare, in their brief prefaces—do the authors offer glimpses of their own personal engagement with the subject. The abstract tone is underscored by the practice—still largely in place, but loosening—of identifying the attorneys on both sides of the argument and the judges, even when authors of judicial opinions, only by last name. Still, we can try to read underneath the rhetorical scrim of timelessness and abstraction, and understand these books as the artifacts of the social history of which they are a part.

Litigators, though, can't wait for casebooks. The breathless pace of litigation and statutory change in the 1970s meant that more flexibility was needed. New publications emerged to meet that need. One of them still flourishes. The *Women's Rights Law Reporter* is somewhere between the flimsy mimeographed handouts and the "permanent" casebooks. Making its first appearance in the summer of 1971, the *Reporter* offered itself as "a new weapon for women's lawyers" and promised to "cover developments in areas of law which especially affect women as women," among them "education, employment, health care, child care, domestic relations, abortion, sexual freedom, prostitution, and the special problems of being female and poor or female and a member of some other disfavored group, criminal law, and constitutional law." The editors sought

the help of those actually working in the law. We need to know what you are doing so others can learn from it. We are interested in strategy and tactics for attacking specific legal problems. We are interested in direct actions related to law, in books and articles, conferences and caucuses. We are interested in theoretical writing and practical work. We are interested in women's law courses and women's groups which work through the law. We are interested in the women who work in law: law students, law librarians, legal secretaries, lawyers, and all other legal workers.⁵⁸

The *Reporter's* advisory board was a dance card of lawyers long committed to progressive feminist causes, who were at that moment engaged in expansive litigation. Many were also developing the casebooks: Eleanor Holmes Norton, Pauli Murray, Ruth Bader Ginsburg, Ann Freedman, Bernice Sandler of the

57. I have discussed this at length in Linda K. Kerber, *Sally Reed Demands Equal Treatment*, in *DAYS OF DESTINY* 441-451 (Alan Brinkley and James MacPherson eds., 2001).

58. Back cover, *WOMEN'S RTS. L. REP.*, Fall/Winter 1971. [NB: The *Women's Rights Law Reporter* did not begin consecutive pagination until Volume 3 (1975-77).]

Women's Equity Action League, Faith A. Seidenberg of NOW, Nancy Stearns of the National Lawyers Guild, and Arthur Kinoy of the Center for Constitutional Rights. By the second issue, a year later, they could report the triumph of *Reed* but also had to acknowledge the "financial realities" that "forced us to abandon the idea of a self-sustaining journal and to become essentially a volunteer organization," located at Rutgers Law School (where Ruth Bader Ginsburg, Nancy Stearns and Nadine Taub were teaching) and staffed by law students.⁵⁹

The Reporter, especially in its early issues, warms the heart of a historian. The very first article in the first issue is a selection from the decision in *Bradwell v. Illinois*⁶⁰ and a biographical sketch of Myra Bradwell, thus instructing readers that their own marginalization from the profession was explicit and a century old. No one would mistake the *Reporter* for a traditional law review: its two column layout was illustrated with photographs, cartoons and sketches.⁶¹ In the pages of the *Reporter*, feminist lawyers placed their early reflections on issues that they engaged in their lives and in the courtroom: Ruth Bader Ginsburg on *Reed* and then on *Frontiero*;⁶² Leigh Bienen, Alicia Ostriker and J. P. Ostriker on sex discrimination in universities;⁶³ Lynn Schafran on educating the judiciary about gender bias.⁶⁴ Eighty-seven-year-old Mary G. Siegel contributed a lively account of her career as a lawyer, beginning with taking night classes at New York University Law School in 1915 and 1916. She had arrived in the U.S. at the age of 15 in 1911, speaking only Yiddish; she worked in sweatshops during the day and studied law at night, eating her supper—a banana and a hard roll—en route from the sweatshop to the school.⁶⁵ Explicitly historical and literary essays gradually became rare, perhaps because the need for reassurance abated.⁶⁶ Reflective essays that would develop lives of their own appeared as working papers in the *Reporter*: Leigh Bienen's series of essays and reports on national developments

59. The *Reporter* survived its first year thanks to a grant of \$1,800 from the Wallace Eljabar Foundation in New Jersey. Email from Leigh Bienen to Linda Kerber (Dec. 5, 2002) (on file with author).

60. 83 U.S. (1 Wall.) 130 (1873) (holding that denying Myra Bradwell license to practice law because she was a woman did not violate the Fourteenth Amendment).

61. Leigh Bienen recalls the struggle to persuade the *Index to Legal Periodicals* to list the *Reporter*. Email from Leigh Bienen to Linda Kerber (Dec. 5, 2002) (on file with author).

62. Ruth Bader Ginsburg, *Comment on Reed v. Reed*, WOMEN'S RTS. L. REP., Spring 1972, at 7; Ruth Bader Ginsburg, *Comment: Frontiero v. Richardson*, WOMEN'S RTS. L. REP., Summer 1973, at 2.

63. Leigh Bienen, Alicia Ostriker, & J.P. Ostriker, *Sex Discrimination in the Universities: Faculty Problems and No Solution*, WOMEN'S RTS. L. REP., March 1975, at 3.

64. Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 109 (1986).

65. Mary G. Siegel, "Crossing the Bar": A "She" Lawyer in 1917, 7 WOMEN'S RTS. L. REP. 357 (1982).

66. *But see* Lenora Ledwon, *Maternity as a Legal Fiction: Infanticide and Sir Walter Scott's The Heart of Midlothian*, 18 WOMEN'S RTS. L. REP. 1 (1996); Megan E. Abbott, *The Servant's Gaze: Nelly Dean's Rise to Power in Wuthering Heights*, 18 WOMEN'S RTS. L. REP. 108 (1997).

in rape law reform;⁶⁷ Wendy Webster Williams' "The Equality Crisis" in 1982;⁶⁸ Elizabeth M. Schneider's "Describing and Changing: Women's Self Defense Work and the Problem of Expert Testimony on Battering" in 1986.⁶⁹ Occasionally the *Reporter* printed instructive amicus briefs;⁷⁰ it devoted an entire issue to those filed in *Webster v. Reproductive Health Services*.⁷¹

The *Women's Rights Law Reporter* has recently celebrated its thirtieth anniversary. It is still being published by Rutgers Law School, still a lively student journal seeking "to challenge the traditional legal framework." The page size and design remain the same; it still includes illustrations and the occasional literary essay or memoir. Leigh Bienen, who was on the first staff of students when it shifted to law school volunteers, and who now teaches at Northwestern University Law School, serves on the advisory board; Ann Freedman, Arthur Kinoy, and Eleanor Holmes Norton never left. The *Reporter* still publishes a mix of reflective essays, along with texts of speeches; book reviews are now a regular part of the mix. Subscriptions cost \$20 instead of \$12; in constant dollars that is probably a *decrease*. The *Reporter* now rests on a comfortable financial foundation with a paid circulation of over 500, mostly institutions.⁷² Back issues of these rare documents, that proudly preface each issue with the assertion that "The Women's Rights Law Reporter is a Feminist Legal Journal . . . Founded in 1970," can be ordered from William S. Hein & Co., 1285 Main Street, Buffalo, NY 14209.

The *Women's Rights Law Reporter* would be the first—and remains the least bound by convention—of a new genre of feminist law reviews housed in law schools. Some six years later, in 1977, the *Harvard Women's Law Journal* was established, followed, in close succession, by *Women and Law* (founded at Hofstra University in 1978); *Women's Law Forum of the Golden Gate Law Review* (1979); *Berkeley Women's Law Journal* (1983); and *Wisconsin Women's Law Journal* (1985).⁷³

67. Leigh Bienen, *Rape I*, 3 WOMEN'S RTS. L. REP. 45 (1976); *Rape II*, 3 WOMEN'S RTS. L. REP. 90 (1977); *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980); *Rape IV*, 6 WOMEN'S RTS. L. REP. supp. (1980).

68. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

69. Elizabeth Schneider, *Describing and Changing: Women's Self Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

70. See, e.g., Nadine Taub, *Amicus Brief: In the Matter of Baby M*, 10 WOMEN'S RTS. L. REP. 7 (1987).

71. See 11 WOMEN'S RTS. L. REP. (1989).

72. Email from *Women's Rights Law Reporter* editors to Linda K. Kerber (Dec. 9, 2002) (on file with author).

73. Women's law journals continued to be founded throughout the 1980s and 1990s, including this very publication—*Yale Journal of Law and Feminism* published its first issue in 1987. Other titles could be added, but perhaps these are enough to convey the lively activity in the field. I am grateful to Judith Resnik, Cori Van Noy, and Daphna Renan for creating a chronological list of women's and gender law journals (on file with the Yale Journal of Law and Feminism).

Feminists of the early 1970s invented yet another art form: the report of the gender bias task force for the courts. A new generation of feminist litigators quickly found that the usual courtesies of the bar often were not extended to them; indeed they found a startling absence of civility in precisely the settings that took pride in justice, fairness, and civility. They found that judges routinely deployed cliché and stereotype, refusing to treat women litigators as authentic colleagues or to evaluate their clients' complaints on their merits. Incivility undermined women's own ability to work professionally and undermined their clients' rights to fair treatment. Lynn Hecht Schafran, who still directs the National Judicial Education Program, begins the story of its origins this way:

One of the first Title VII cases to challenge discrimination based on sex was *Weeks v. Southern Bell*. [408 F.2d 228 (5th Cir. 1969).] The plaintiff, Lorena Weeks, was a clerical worker who wanted a job as a switchman. . . [When Weeks lost at the district court she appealed to the Fifth Circuit, which reversed and remanded.] Her lawyer found the judge "clearly uncomfortable with the notion of a woman doing a man's job. The judge made comments like, 'well, in this job you have to know a lot about electricity and I can't even fix my own air conditioner,' as if the inability of one man to deal with electrical appliances meant that no woman could possibly handle them."⁷⁴

Frustrations like these—and many worse—had long been part of the experience of feminist attorneys and women clients. By 1970, a critical mass of feminists had emerged from law schools. Thanks to Title VII, this was the same time that a substantial number of discrimination cases were brought, all vulnerable to dismissive attacks, and, as Schafran maintains, carrying "an additional burden of proof for women." Among the most common burdens was that victims needed to persuade judges and juries that sexual assault and sexual harassment counted as aggression and violence, not as seduction. When the NOW Legal Defense and Education Fund was established, its lawyers knew that if they were to have any success at all they required a level playing field and impartial judges. Individual episodes of patronizing judges were vulnerable to easy excuses: it was an accident, insult was unintended, or an edgy feminist had misinterpreted as patronizing what had been meant as courtesy or joke. Episodes reported in one locality had little generalizable impact; other judges simply thought "It couldn't happen in *my* state, *my* city, *my* courtroom." It took ten years of experience before the breakthrough decision to treat unfairness as a matter of misunderstanding and judges as persons in need of education. As Schafran tells it, women judges in California—only recently organized into the National Association of Women Judges—took the lead in demonstrating that unfairness was widespread and that continuing education could be a useful

74. Lynn Hecht Schafran, *California: First as Usual*, 20 WOMEN'S RTS L. REP. 159-60 (2001).

intervention; the first was a 1981 pilot course in California, "Judicial Discretion: Does Sex Make a Difference?"⁷⁵

Thus when feminist lawyers, led by Norma Wikler and Lynn Hecht Schafran, urged courts to establish their own research teams, coining the phrase "the gender bias task force," it was an important analytical as well as political move.⁷⁶ When Chief Justice Robert N. Wilentz of the New Jersey Supreme Court created the first gender bias task force in 1982 he established an important precedent. It was now much easier for dozens of other courts to agree that *if* there was a problem of unfairness in their courtrooms it was their responsibility to identify and deal with it. And what they identified was shocking. "From their entrance into the courthouse and throughout their participation in the business of the courts," concluded the Gender Bias Study of the Supreme Judicial Court of Massachusetts, "female litigants, witnesses, employees and attorneys are faced with unnecessary and unacceptable obstacles that can be explained only in terms of their gender."⁷⁷

As Judith Resnik has insightfully argued, the strategies of the gender bias task forces have been themselves novel rhetorical devices. Instead of the model of the "white paper," a report prepared by "blue ribbon commissions," made up of "a few senior professionals with name recognition and pre-existing authority," gender bias task forces have been composed of a wide range of participants, bringing together judges, lawyers, academics and, sometimes, non-professional citizens. Their reports, says Resnik, "claim authority by capturing hundreds and thousands of voices, the stories of individual women and men in courts."⁷⁸ Their strategies are multiple: social science methods for gathering and analyzing aggregate data, anonymously authored thick description of courtroom experiences, first person narratives. Direct quotation of nasty comments made clear that women attorneys often could not count on male attorneys as colleagues or that female judges could not count on respect from court officials.⁷⁹ The results of these studies have been presented not only in the form of traditionally published reports, but in performance—plays, songs, dramatizations, even a film. The "melange of literary genres," Resnik observes, "succeeded in . . . bringing forbidden questions of fairness into the halls of justice."⁸⁰ We have, Lynn Hecht Schafran concludes, "created a legal

75. *Id.* at 161.

76. Judith Resnik, *Singular and Aggregate Voices: Audiences and Authority in Law & Literature and in Law & Feminism*, in II LAW AND LITERATURE: CURRENT LEGAL ISSUES 698 (Michael Freeman and Andrew D. E. Lewis eds., 1999); *see also* Judith Resnik, "Naturally" *Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

77. Reprinted in FRUG, *supra* note 39, at 4.

78. Resnik, *Singular and Aggregate Voices*, *supra* note 76, at 700.

79. *See, e.g.*, FRUG, *supra* note 39, at 5-11, 326-27.

80. Resnik, *Singular and Aggregate Voices*, *supra* note 76, at 702-04, 709.

concept called 'gender bias in the courts' and it is institutionalized in the law."⁸¹

But bringing the questions of fairness in does not necessarily mean that questions of fairness are resolved. The gender bias task force reports have their own critics. The 2002 report of the New York State Judicial Committee on Women in the Courts found dramatic improvement over the past fifteen years, but also found that "women who divorce still fail to fare equitably by reason of unrealistic expectations about women's earning power. . . . [V]ictims of domestic violence all face higher standards for establishing credibility than their abusers and women are not well represented on the State Supreme Court. . . ."⁸² It is likely that the klieg lights of the gender bias task force will have to be kept on, focused on the courtroom stage, and with even more difficulty, on the judges' chambers where so much of consequence is bargained for.⁸³

In the year 2000, historians were frequently asked how the year 2000 differed from the year 1000. I confess that I was generally impatient with the question; "How should I know?" I'd growl. "Better talk to a medievalist!" But eventually I found a millennial comparison which I could offer. In the year 1000, wherever one looked on the globe, whatever form of social organization we know, men generally monopolized positions of power and authority over women, the family and the state. If we look at the year 1900, the same generalization roughly held true. There was Queen Victoria, there were voting women in Wyoming and elsewhere, but the only *nation* in which women could vote was New Zealand. Positions of authority in the home and in the state were still virtually monopolized by men.

In that context, the 1970s can be seen as a constitutional moment of enormous significance—a time of major change in understandings of equality in the U.S. and, indeed, of significant change internationally. In those years women citizens framed their demands for social equality as legal demands; journalists and popular writers responded with shelves full of legal advice. Part of the social movement was a vast educational project, not only in women's studies but also in women and the law. The popular press responded to the occasion; books about the law aimed at non-professional audiences abounded.⁸⁴

81. Schafran, *supra* note 74, at 167: "Judges have sanctioned lawyers who exhibit this behavior, judicial conduct commissions have sanctioned judges, codes of judicial conduct now prohibit it expressly for judges, lawyers and court personnel, and most important, appellate judges have reversed trial court judges when gender bias undermines due process."

82. Press Release, New York State Unified Court System (July 22, 2002) (*available at* http://www.courts.state.ny.us/pr2002_13.html).

83. On judges' chambers as performative spaces, see Resnik, *Singular and Aggregate Voices*, *supra* note 76, at 720.

84. Shana Alexander, for example, prepared a STATE-BY-STATE GUIDE TO WOMEN'S LEGAL RIGHTS (1975); Ellen Switzer wrote THE LAW FOR A WOMAN: REAL CASES AND WHAT HAPPENED (1975). Portions of this book were originally published in GLAMOUR, WOMAN'S DAY, and MCCALL'S.

The first substantial cohort of women to experience law school without ritualized humiliation matriculated in the late 1960s and early 1970s. The first substantial cohort of feminists to enter state legislatures was elected in the early 1970s. The first substantial cohort of women judges was appointed in the mid- and late 1970s.

As many dozens of feminist legislators rewrote the statutes on evidence in rape trials, on inheritance, on the composition of state agencies; as many hundreds of feminist law students challenged the curricula they inherited; and as dozens of feminist lawyers and judges criticized the daily practices of the courtrooms in which they worked, all of them also participated in the development of a feminist legal literature. It is finally possible to appreciate the originality of these literary forms. Read with skepticism and in a comparative spirit, we can see them not as abstractions (although they often deal with abstract ideas) but as living evidence of the historical context in which they were made.

The next generation of casebooks will, in their turn, reflect the time in which they are made. I think it is not difficult to predict that the expansive international conversations in which feminists have been engaged in the last decade, intensified by the crisis of 9/11, will soon reshape the existing casebooks or prompt new categories and new casebooks of their own. The final chapter of the first edition of *Sex-Based Discrimination* dealt with comparative international law. Hesitantly titled "Comparative Side-Glances," the chapter called upon readers to turn to "foreign approaches and experience as a means of gaining perspective," publicized "foreign solutions" notably in Sweden, and called attention to the United Nations Charter and the Convention on the Elimination of Discrimination Against Women.⁸⁵ This section slid out of subsequent editions; other casebooks, even those on feminist theory, offered only rare international comparisons. That elision was probably in large part the result of the explosion of fresh issues and new litigation that the texts had to cover. But an international dimension to Americans' understanding of women and citizenship can no longer reasonably be postponed. We can see this from the signal moments of the 1990s, when feminists were presented with evidence of the atrocities being carried out in the Balkans and raised an international demand that rape be understood as a war crime,⁸⁶ and through the preparation for the International Women's Year 1995, when some 35,000 women gathered in Beijing to claim an agenda for change that was generally common across national and cultural boundaries, and where Hillary Clinton's rallying call "Women's Rights are Human Rights" resonated easily. Indeed, the intensity of attentiveness has heightened: in the late 1990s efforts for the establishment of

85. SEX-BASED DISCRIMINATION, *supra* note 6, at 927-954.

86. UNICEF, *Sexual Violence as a Weapon of War*, in THE STATE OF THE WORLD'S CHILDREN (1996), available at <http://www.unicef.org/sowc96pk/sexviol.htm>.

an international criminal court, in struggles over the meanings of globalization, and now, amid the frightening aftermath of 9/11.

Akira Iriye has recently argued that the entire field of diplomatic history is about to undergo a major transformation, adding to the traditional international history of nation-states a new transnational history of NGOs, the non-national state actors that take transnational phenomena as their own agenda. We will be writing about “refugees, poverty, hunger”—that is, women will be to a great extent our subjects.⁸⁷ My informal impression, using law journals and the newer casebooks as a guide to work in progress, is that focus on women’s treatment under international and comparative law has grown intensively in recent years.⁸⁸ Appeals for political asylum to escape genital mutilation or sexual slavery have forced comparative consideration of what counts as fair in U.S. law and what counts as fair in the law of other states. Sex trade that serves U.S. tourists in South Asia and tricks women into prostitution near U.S. military bases or in exchange for immigration, means that trafficking in women is a crime to which U.S. policies must pay attention; indeed, a section of the Violence Against Women Act addresses just this.⁸⁹ Subjects like the law of marriage or domestic violence, that traditionally have been treated in the context of U.S. domestic law and policy, are increasingly opened to analysis in an international context.⁹⁰ 9/11 drew attention to women in Afghanistan, Saudi Arabia, Iran and Iraq—what the results of this attention may be is far from clear. The work of the 1970s can now be understood also as, among other things, part of the expansion of Americans’ understanding of the meaning of

87. Akira Iriye, *Where in the World is America? The History of the United States in a Global Age*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* 53 (Thomas Bender ed., 2002).

88. Rhonda Copelon has been an especially strong voice in these developments. See, e.g., *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 297 (1994), *Bringing Beijing Home*, 21 BROOK. J. INT’L L. 599 (1996), *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 220-229 (2000). See also Hilary Charlesworth & Christine Chinkin, *Sex, Gender and September 11*, 96 AM. J. INT’L L. 600 (2002); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379 (1999); and Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000).

89. A useful recent NGO report is JANICE G. RAYMOND, JEAN D’CUNHA, SITI RUHAINI DZUHAYATIN, H. PATRICIA HYNES, ZORAIDA RAMIREZ RODRIGUEZ, & AIDA SANTOS, COALITION AGAINST TRAFFICKING IN WOMEN, A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS (March, 2002), available at www.catwinternational.org/index.php. See also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (containing reauthorization of the Violence Against Women Act).

90. See, e.g., Elizabeth M. Schneider, *International Human Rights as a Domestic Resource: Thoughts on the Case of Women’s Rights*, NEW ENG. L. REV. (forthcoming); Ann Laquer Estin, *Human Rights, Pluralism, and Family Law*, paper presented at International Society of Family Law, 11th World Conference (August 2002) (on file with author). For casebooks, see especially MACKINNON, *supra* note 39, at 24-42 (“Comparative Legal Equality Approaches”); 43-56 (“Sex Equality Under International Law”); 452-82 (“Sex and Nation in Conflict”); 897-908 (“Rape Under International Law”); and at “Trafficking Women,” *passim*. For the recognition of these matters in the newest casebooks, see, e.g., DALTON & SCHNEIDER, *supra* note 46, at chap. 14 (discussing domestic violence as a violation of international human rights); and ESKRIDGE & HUNTER, *supra* note 45, at chap. 8, part 3 (“Sexuality and Citizenship in an International Setting”).

human rights. The history of the expansion of international human rights, if it occurs at all, will be central to the history of our own time.

As we work to sustain and expand visions of justice, we can be buoyed by the dreams of our predecessors for the reconfigurations of social relations and of working life, of the very concepts of justice and equality. Among the testimony to these dreams are feminists' case files and depositions (many of them not fully useable by historians because of considerations of privacy), papers formal and informal, photographs, newsletters, diaries, journals, and other ephemera. And also serving as testimony to these dreams are the new sorts of publications that feminists developed to fit their needs—as students, as teachers, as litigators, as jurists. These new publications may be, from a practitioner's point of view, outdated. But from the long perspective of those who have lived through this great constitutional moment, these publications are rare documents, and to be cherished.

For we need knowledge of our history to shape our work in the present. We know that the work of feminists can be undone if we do not protect it. Casebooks, reporters, law reviews, task force reports are all evidence of what that work has been. And the agenda for the future is as wide-ranging as our imaginations can stretch.

