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FOREWORD

POLLYANNA, ALICE AND OTHER WOMEN IN THE LAW

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As I begin this Foreword to the Journal's Symposium on Women and the Law, I feel obliged to answer some threshold questions: Why a special issue dealing with women and the law? What special relationship do women have with the law that justifies this particular focus? Aren't women persons, after all, just like men, and isn't the law the law, applying the same to all persons?

The questions are not trivial, nor are the answers necessarily self-evident. The answers require a special sensitivity to the history surrounding the male-dominated American legal system and its treatment of women. Moreover, those concerned with these questions must take a serious look at women's lives and be especially attentive to the stories women tell about themselves.

American law has historically either ignored women's existence or "protected" them into invisibility. The first American legal documents, the Declaration of Independence and the original Constitution, fail to mention women.¹ Nor were

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1. Furthermore, nothing in the records of the constitutional debates or the *Federalist Papers* suggests that the founders considered women. See Sylvia Law, *The Founders on Families*, 39 FLA. L. REV. 583, 586 (1987). In March of 1776, Abigail Adams wrote to her husband and advised that he and his colleagues "Remember the Ladies" during the process of formulating the legal system of the nascent United States. John Adams wrote to his wife in response,

As to . . . [the legal system which you suggest], I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient—that schools and Colledges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerful than all the rest were grown

women subsumed into the "generic" word "men," as some would have us believe, for women were not, in American law, created equal. In fact, the misconception that women were included in the word men had an ironic reality for many women. Not only were women disenfranchised and thus kept from enjoying the same rights as men—when they married, their legal identities faded and merged into that of their husbands. Borrowing from the English law of coverture,² American law held that upon marriage a woman became, for all legal purposes, as one with her husband. At the time of the founding, then, the notion of "Women and the Law" would have been met with astonishment. What need had women for the law as long as they had men?

Nearly a century after the founding, women began to achieve some rights independent of men. After the sore disappointment of the Civil War amendments, for which nineteenth-century feminists had fought long and hard,³ inroads were made as states began to adopt married women's property acts—some states even allowed women to vote. But there were major setbacks as the Supreme Court interpreted the Privileges and Immunities Clause of the Fourteenth Amendment as not encompassing the right to vote or the right to enter a profession such as law. Although women had begun to use the legal system and the Constitution in their battle against discrimination on the basis of sex, these avenues seemed largely blocked. Moreover, the Court used the occasions of these challenges to engrave its perception of Woman on the American legal psyche. When Myra Bradwell was denied admission to the Illinois bar because she was a woman, she sued under the Privileges and Immunities Clause of the Fourteenth Amendment. The Court denied her claim and described its conception of

discontented.—This is rather too coarse a Compliment but you are so saucy, I wont blot it out.

Letter from John Adams to Abigail Adams (Apr. 14, 1776), *reprinted in THE FEMINIST PAPERS* 10-11 (Alice S. Rossi ed., 1973). This flippant response aptly signifies the founders' attitude toward women's legal rights.

2. Blackstone defines coverture in this way: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing. . . ." 1 WILLIAM BLACKSTONE, *Commentaries* 430.

3. Many abolitionists were also feminists and thus suffered greatly when the Fourteenth and Fifteenth Amendments not only failed to mention women's rights, but also explicitly, for the first time, imprinted the word "male" into the Constitution.

Woman: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."⁴ And three decades later, the Court echoed this description when, just after allowing men to contract at will in *Lochner*,⁵ it allowed a state to limit the number of hours a woman could work:

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved.⁶

Nearly a century elapsed after the Civil War amendments before the nation's attitudes toward women changed. The nature of the transformation was monumental. In 1963, Congress passed the Equal Pay Act.⁷ Shortly thereafter, Title VII of the Civil Rights Act of 1964⁸ was enacted and became an additional tool for combatting sex discrimination in the workplace. And in 1971, confronting the issue of whether a state statute could automatically prefer men to women as executors of estates, the Court first recognized sex as coming under the Equal Protection Clause.⁹ Women's rights could no longer be circumscribed by stereotypic notions about the nature of Woman, and the Court recanted its earlier perceptions: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put woman, not on a

4. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

7. 29 U.S.C. § 206(d) (1988). The Act states, in relevant part, that "No employer . . . shall discriminate . . . between employees on the basis of sex [by paying unequal wages] for equal work on jobs . . . which require equal skill, effort, and responsibility. . . ." *Id.*

8. 42 U.S.C. §§ 2000e-1 to 17 (1988). Although denied by the sponsor of the amendment, it appears that the inclusion of "sex" in Title VII was the result of an eleventh-hour effort to stop the legislation. See Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967). Regardless of the motivation behind the inclusion of "sex," Title VII was passed by Congress and became law containing the prohibition against sex discrimination.

9. *Reed v. Reed*, 404 U.S. 71 (1971).

pedestal, but in a cage."¹⁰ Statute after statute that differentiated on the basis of sex fell. The Court redefined women as equal to and, for all legal purposes, the same as men.

I have come to think of this approach in a not unkindly or ungrateful way, as the Pollyanna version of women's relationship to the law: As long as we are treated equal to men, everything will be all right—we can make the best of the world as it is. The legal successes of the 1970s, as well as the remarkable inroads that women made in the professions, indeed gave us a Pollyanna-ish optimism about women's futures.

The victories of the 1970s and early 1980s, however, also caused us to realize that equal rights alone might not be enough to achieve real equality for women because these newly-won rights only gave us the right to be just like men. When Pollyanna went to work or school, she discovered that things did not go so well for her if she became pregnant or if she had children to nurture. Enter Alice in Wonderland and the realization that the world in which we live is one designed for and by men. It was Alice who heard the Supreme Court declare that pregnancy is not a gender-related condition.¹¹ Alice learned that the reasonable person is a man; that the ideal worker does not get pregnant or breast-feed children; and that the Bill of Rights, wondrous as it is, protects men from the dangers of state harms, but not women from the private harms that

10. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

11. In *Geduldig v. Aiello*, Justice Stewart wrote the infamous footnote that said:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. 484, 496-97 n.20 (1974).

most often befall them.¹² The rights that women had achieved got them down the rabbit-hole into a world that treats women like men in skirts. Is this really what women wanted? Formal equality with men as the "neutral" standard? Women and the law took on a new twist. The issues became more complex and focused not only on the need for equality but also on the essential differences between men and women.

The discipline we call "Women and the Law," then, is really a study of the struggle for sex equality through history and in all facets of life. It is an analysis of how legal, societal, and religious conceptions of Woman have controlled women's legal rights, and in doing so have ignored the rights and needs of real women. As a discipline, it focuses sharply on issues that confront women, not allowing these issues to be absorbed into generic notions of humankind— notions that have historically served only to debilitate women's claims. It often compels us to break down our traditional public/private distinctions as issues concerning women encompass both the workplace and the home. As the twentieth century draws to a close, the thorniest issues surrounding women and the law are those dealing with the fact, not the stereotype, that many women become mothers.

This issue of the Journal contains diverse articles discussing the relationship of women to the law and the legal system. Despite dissimilar approaches, four articles analyze legal problems that arise because women are mothers. Two articles, Donna Marie Eansor's *To Bespeak the Obvious: A Substantive Equality Analysis of Reproduction and Equal Employment*¹³ and Mary Ann Mason's *Beyond Equal Opportunity: A New Vision for Women Workers*,¹⁴ confront the "Alice" problem, the male-centered workplace, directly. Mason offers a critique of the equal opportunity approach in dealing with the problems of working women. "A new vision," she argues, "must . . . include the central reality of family responsibilities in the everyday life of working women."¹⁵ She puts forth a "woman's rights strategy" that can "recognize and promote the role of motherhood and the family

12. See Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. (forthcoming 1992).

13. Donna Marie Eansor, *To Bespeak the Obvious: A Substantive Equality Analysis of Reproduction and Equal Employment*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 417 (1992).

14. Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393 (1992).

15. *Id.* at 414.

in the lives of women."¹⁶ She demonstrates that attempts to achieve equality at work through Title VII lawsuits have largely failed, in the instance of comparable worth for example, because the arguments in these cases conflict with the concept of individualistic liberty inherent in Title VII. Rather than trying to achieve equality at work via the courts, then, women should resort to collective action to change the very structure of the workplace.

Eansor similarly argues for substantive rather than formal equality for women, in that substantive equality works to level the playing field by taking gender differences into account. She uses a recent Supreme Court case,¹⁷ in which all fertile women had been denied jobs because of toxic workplace conditions which might endanger their potential fetuses to illustrate her point: substantive equality analysis produces more equitable results than does formalistic equality analysis in cases that involve reproductive issues.

Both writers enter into the current equal or special treatment debate that has divided feminist legal scholars. Recognizing that special treatment for women, because of their reproductive capabilities, risks reinforcing the stereotypes of women as only mothers and caregivers, both Mason and Eansor seek to develop a new analytical structure that circumvents that pitfall.

Taking a very different tack, Lorraine Schmall, in *Women and Children First, But Only If the Men Are Union Members: Hiring Halls and Delinquent Child-Supporters*,¹⁸ identifies women, like union members, as oppressed members of society. Acknowledging that divorced women with children are among the most disempowered, she nonetheless argues against asking unions to help the state collect child-support payments from their members who are delinquent in these payments. Unions and women, she posits, are similarly powerless and should not be pitted against each other in ways that undermine their commonalities. Instead, the state should remedy the widespread problem of failure to pay child support by other means.

In *Rusty Pipes: The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment*,¹⁹ Phillip J. Cooper advances a harsh critique of the recent Supreme Court decision that allows

16. *Id.*

17. *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

18. Lorraine Schmall, *Women and Children First, But Only if the Men Are Union Members: Hiring Halls and Delinquent Child-Supporters*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449 (1992).

19. Phillip J. Cooper, *Rusty Pipes: The Rust Decision and the Supreme Court's*

the government to regulate the kind of advice a pregnant woman can receive from a government-supported family planning clinic. Cooper uses traditional free speech arguments, rather than women's rights arguments, to advance his contention that these regulations, which specifically prohibited clinics from talking about abortion, are unconstitutional: "Congress may choose not to fund clinics at all but, if it elects to fund the clinics, it may not do so in a way that violates the Constitution" by circumscribing the kinds of pregnancy counseling that may take place.²⁰

In addition to the "pregnancy problem," women in the public world of work and education encounter other problems related to their biological differences from men. Barbara A. Gutek's article offers interesting information on one of the hottest of these issues—sexual harassment. As claims under Title VII of the Civil Rights Act began to open the workplace to women, it became clear that merely eliminating the overt discrimination that barred women's entry into many jobs would not be enough to achieve true equality. If women were to succeed and be equal to men in the workplace, other harms had to be abolished: all gender-based exclusions, even if they appeared in the guise of "job necessities," had to be eliminated; affirmative action programs that actively encouraged and facilitated women's entry into male dominated fields had to be established; wage disparities between traditional "men's" and "women's" jobs had to be equalized; and women had to be protected in the workplace from conditions that had, in the past, forced them to leave. One widespread harmful condition that had driven women from jobs was the invisible, unnamed harm of sexual harassment.

Gutek's article delineates the results of social science research on the attitudes toward sexual harassment taken by various kinds of people. The research demonstrates, not surprisingly, that men and women define and react to sexual harassment differently and also shows just how widespread sexual harassment is. Most tellingly, the research reveals that women frequently lose their jobs after reporting harassment and, if they manage to keep their jobs, still undergo unseen injuries, including "lower productivity, less job satisfaction, reduced self-confidence, and a loss of motivation and commitment to their work and their employer. They may also avoid men who

Free Flow Theory of the First Amendment, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359 (1992).

20. *Id.* at 386.

are known harassers, even though contact with those men is important for their work."²¹

But the discipline of "Women and the Law" does not regard only the public sphere. The private world of home and family, a world in which the law has infrequently and uneasily entered, is also in need of scrutiny and reform. Lenore Walker, in *Battered Women Syndrome and Self-Defense*,²² takes up a controversial aspect of the special or equal treatment debate. Should we allow battered women who kill their abusers a special kind of self-defense plea that takes their circumstances as a victim of battering into account? Walker, herself a frequent expert witness on the battered woman syndrome, argues that the reasonableness standard used in self-defense pleas is based upon a man's perceptions of danger, not an abused woman's. Such a woman, Walker explains, may reasonably and justifiably perceive herself to be in mortal danger even if her abuser is not, at that time, attacking her. And the only way for the jury to understand her perceptions is to hear expert testimony about the psychological make-up of women who have been battered over a long period of time. Equal justice, argues Walker, can only result when the self-defense standard, developed by and for men, is changed to reflect an abused woman's perception of danger.

The particular feminist critiques of the law exemplified in some of the symposium articles underscore the dilemma that Gregory Bassham bravely engages in his article *Feminist Legal Theory: A Critical Introduction*.²³ Although women's causes have generally been seen as part of the liberal agenda, the more recent feminist approaches that insist on different or special treatment for women explicitly reject liberalism. Bassham puts forth a critique of three radical strains present in feminist theory that directly challenge liberal principles: the subordination-domination approach (most frequently identified with the work of Catharine MacKinnon), the "different voice" approach (most frequently identified with the work of Carol Gilligan), and the specific issue that pornography is sex discrimination against women (primarily the work of MacKinnon and Andrea Dworkin). Displaying great sensitivity to the less radical feminist claims that the legal system has done far too little to foster

21. Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (1992).

22. Lenore Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992).

23. Gregory Bassham, *Feminist Legal Theory: A Critical Introduction*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293 (1992).

gender equality, that it has blindly adhered to a "neutral" standard that is essentially male, that it has emphasized rules and rights over community and relationships, and that it has too long ignored substantial harms to women, Bassham sees none of these claims as inconsistent with traditional liberalism. The more radical feminist positions he describes as "indefensible extensions of basically sound critiques" that fail to go "to the heart of liberal jurisprudence . . . , to show that the core principles of liberal legal thought are fatally flawed."²⁴

The wide breadth of articles included in this Symposium on Women and the Law amply confirms that the discipline "Women and the Law" no longer meets with astonishment or skepticism. They also make clear that Pollyanna and Alice, though crucial components of the multifaceted voice of women, no longer speak or work alone. Women need not pretend that everything is solved once they have achieved formal equality; they need not try to live and compete in a world inexorably designed for men. They may raise their various and sometimes contradictory voices and be heard and taken seriously. They may belong to a community of legal scholars, exemplified by this Symposium, where issues are raised and answers sought.

24. *Id.* at 319.

