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THE NEW FACE OF WOMEN'S LEGAL HISTORY: INTRODUCTION TO THE SYMPOSIUM

*Tracy A. Thomas**

Women's legal history is developing as a new and exciting field that provides alternative perspectives on legal issues both past and present. Feminist legal history seeks to examine the ways in which law historically has informed women's rights and how feminist discourse has shaped the law. The active scholars come from a variety of academic traditions including law, history, and women's studies. The University of Akron School of Law organized a conference in October 2007 entitled "The New Face of Women's Legal History" to showcase many of the seasoned and emerging scholars in the field. The joining together of law and history scholars including eleven presenters, four moderators, one keynote, and one-hundred participants, provided a welcomed opportunity to trigger new scholarly and professional synergies. This meeting of an exceptional group of feminist scholars was described by legal historian and law professor, Alfred Brophy, as "sure to become legendary" for its inaugural attempt to bring together feminist scholars from law and history working on divergent projects in order to set the course for the next generation.[1] The conference was sponsored by Akron's Constitutional Law Center, one of only four such national centers established by Congress to promote scholarship and public education on the U.S. Constitution, and sought to explore feminist, historical ways of assessing gender "equality" as constitutionally provided.

It was fitting that such a conference was held in Akron, Ohio. For Akron was the site of Sojourner Truth's famous speech "Ain't I A Woman" (or "Ar'nt I A Woman") that put a new face on the antebellum civil rights movement by demanding recognition of sex, race, and class

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1. E-mail from Alfred L. Brophy, Professor of Law, University of Alabama, to Tracy A. Thomas, Professor of Law, University of Akron (Sept. 2007).

within that movement. At the Ohio Woman's Rights Convention of 1851, Truth joined the chorus of voices newly raised in support of women's right to vote to declare that women of color and freed slaves were unified in spirit with the movement.[2] The site of this famous speech stands just a few blocks away from the law school at what once was the Universalist Old Stone Church and where now stands a modern glass and concrete building that houses the Summit County Board of Job and Family Services.[3] The Truth legend, while providing an appropriate historical foundation for the conference, also serves as an illustration of the critical importance of modern historical scholarship. Recent historical efforts have suggested that the history we all think we know may not be true. Princeton historian Nell Painter challenged the historical myth of Truth and argues that the Truth story is more useful as symbolism than historical fact.[4] Contemporaneous newspaper accounts describe a more straightforward, less confrontational, and less dialectic speech by Truth at the convention than that portrayed in the familiar modern story.[5] The myth we know was instead created twelve years after the event by Frances Dana Gage, the chair of the Akron convention, who invented the phrase "Ar'nt I A Woman" as she sought to create heroines for the women's movement.[6] The investigation of history thus allows us to set the record straight in order to make more informed policy choices for the future.

Women's legal history started in the 1970s as an interest in recovering the famous heroines of the past. Scholars sought to unearth the forgotten stories of important women in politics, law, and society. This rich biographical tradition continues today, for example, in Professor Barbara Babcock's Women's Legal History Biography Project at Stanford Law School, and its related course, that collects and produces the stories of the first women lawyers across the United States.[7] Other interdisciplinary courses have emerged in law schools as courses on "Gender and Constitutional History" or "Women's Legal History" to supplement the more traditional thematic "Women and the Law" courses on modern equality cases or "Feminist Jurisprudence"

2. *Sojourner Truth's Defense of the Rights of Women*, ANTI-SLAVERY BUGLE (Salem, OH) (June 21, 1851), *reprinted in* WOMEN'S AMERICA: REFOCUSING THE PAST 218-19 (Linda K. Kerber & Jane Sherron De Hart eds., 6th ed. 2004).

3. Sandra Jackson-Opoku, *In the Footsteps of Sojourner Truth*, MS. (Sept. 2003).

4. NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL 121-31, 164-78 (1996).

5. *Id.*

6. 1 HISTORY OF WOMAN SUFFRAGE 116 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, eds., 1887).

7. *See* Women's Legal History Biography Project, http://womenslegalhistory.stanford.edu/.

classes focusing on theory.[8] The teaching and scholarship of women's legal history has expanded beyond a "great woman" focus to adopt methodology which uses women's experience and feminist translation as a foundation for sophisticated analysis of ongoing issues of law and gender. One of the pioneers in these efforts was Yale law professor Reva Siegel, the keynote speaker at the Akron conference, whose early work traced the historical origins of abortion, marital rights, and constitutional equality and then applied those insights to recommendations for modern legal change.[9]

Thus, the study of feminist legal history presently embraces an emphasis on rethinking "the dominant narratives of legal history and the role of law in producing and reflecting cultural and social norms" as Felice Batlan, one of the contributors to this symposium, wrote in a previous essay *Engendering Legal History*.[10] As Batlan explains, "[e]ngendering legal history means more than just writing women into the dominant history of law. Rather, it produces a new history, creating possibilities of re-narrations and the potential for fresh interpretations."[11] The feminist legal historians provide a transformative type of "applied legal history" that seeks a deeper understanding of what happened in the past to make a difference with policy today.[12] For feminism, as

8. For example, at the University of Akron School of Law, I have offered the course "Women's Legal History," and co-taught an interdisciplinary class of law and history students designed by Akron history Professor Tracey Jean Boisseau entitled "Gender, Authority and the Politics of Law in U.S. History." Law professor Patricia Cain and historian Linda Kerber detail their experience jointly teaching a law/history course entitled "Gender and Constitutional History" in their article, *Subversive Moments: Challenging the Traditions of Constitutional History*, 13 TEX. J. WOMEN & L. 91 (2003).

9. Reva B. Siegel, Keynote Address at The University of Akron School of Law Women's Legal History Symposium: Movement/Counter-Movement: Abortion and the De Facto ERA (Oct. 19, 2007). *See, e.g.*, Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

10. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823, 823 (2005) (reviewing five books and articles in the field of gender and legal history).

11. *Id.*

12. Professor Alfred Brophy has coined the term "applied legal history" to explain a type of historical scholarship that seeks to make history directly relevant to modern legal discourse.

> In essence, what we need is a useable past–an understanding of the past. And this is what one might call "applied legal history." That is, a history of law – of court decisions, statutes, and the practices of law enforcement – that is both accurate and relevant to understanding questions we have today, giving rise to optimism that once people have facts they will think the same.

Alfred L. Brophy, *Considering Reparations in the* Dred Scott *Case*, *in* DRED SCOTT (Christopher Bracey, David Konig & Paul Finkelman, eds. forthcoming).

Catharine MacKinnon describes, "entails a multifaceted approach to society and law as a whole, a methodology of engagement with a diverse reality that includes empirical and analytic dimensions, explanatory as well as descriptive aspirations, practical as well as theoretical ambitions."[13]

The articles included in this symposium edition of the *Akron Law Review* provide an excellent sampling of the promising work underway in this nascent field. They each explore women's historical use of the law to advance feminist discourse. True to the theme of the conference, the papers evidence the new ways in which feminist scholarship is developing to integrate issues of race, gender, and historical analysis into the legal scholarship. Additional research from the symposium will also be published as part of a planned book collection, *Feminist Legal History*.[14] Contributing authors to the book employ the core theme of women's use of the law for feminist discourse in a variety of historical contexts to reframe and illuminate such topics as women's rights in the family, women's participation in the military, women's legal activism in social justice movements, women's roles in the judiciary, and women's status in constitutional law. The papers published here in this symposium edition provide a foray into this expanding field.

In the article, *The Ladies' Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, Professor Felice Batlan applies a gendered lens to explore the origins of nuisance law and social cause lawyering. She tells the stories of public nuisances in the streets and neighborhoods of New York City that entered the legal system due to the efforts of the de facto lawyering of a women's community association. Often disparagingly called "clubwomen," Batlan argues that these women functioned like lawyers in a political system that ignored the public health issues surrounding the nuisance. From these examples of women's legal agency, Professor Batlan suggests that women and the structures of gender profoundly influenced the development of public cause lawyering. The use of strategies such as decentralized litigation, grassroots organizing, legislative lobbying, and public education by the Ladies' Health Protective Association mirror the ideals of cause

13. Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 200 (2003).

14. FEMINIST LEGAL HISTORY: RECOVERING THE PAST, RECLAIMING THE FUTURE (Tracey Jean Boisseau & Tracy A. Thomas, eds.) (in submission) (including contributions from historians Tracey Jean Boisseau, Eileen Boris, Jennifer Klein, Jean Quataert, and Leigh Ann Wheeler, and legal scholars Felice Batlan, Mary Clark, Jill Hasday, Gwen Jordan, Mae Quinn, and Tracy Thomas).

lawyering today. Batlan argues that the gendered vision of the women and their commitment to the public interest challenged the political sphere and brought public law issues and lawyering within the mainstream of the legal system.

Professor Mae Quinn's article, *Anna Moscowitz Kross and the Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, explores the feminization of the New York criminal court of the mid-twentieth century and its problem-solving approach to domestic violence cases. Kross, one of the first female law graduates and female judges in New York, utilized social science innovations to create a conciliation process by which criminal claims of domestic violence were processed. She held hearings in an apartment-like family room rather than the court, utilized lay volunteers to provide family social services, and integrated psychiatrists in developing resolutions. Quinn suggests that this multi-layered, interdisciplinary approach may offer some alternative models to the domestic violence courts of today, which in her view are too narrowly focused on defendant retribution. However, Quinn cautions against the potential dangers of this conciliatory model that can further entrench gendered norms. Kross's court operated upon stereotypical notions of submissive women, nagging wives, and put-upon husbands. Kross's domestic violence court thus provides one historic example of how conciliation, problem-solving, and other alternative processes to formal adjudication can reflect and further entrench gender bias.

In the article, *Southern Free Women of Color in the Antebellum North: Race, Class, and a "New Women's Legal History,"* Professor Bernie Jones builds upon the "new women's legal history" by exploring the intersections of race, gender and class as experienced by Southern slave women newly freed in the antebellum North. Her thesis is that critical race feminism offers instrumental insights to shape the contours of the new face of women's legal history. Jones contextualizes the experiences of two Southern slave women assisted by Cincinnati abolitionist lawyer John Jolliffe in seeking manumission (a legal grant of freedom from slavery). Jones explains how the use of trust and estates law, and the bequests of white slaveholding fathers and partners, facilitated freedom for women previously enslaved. The article demonstrates the importance of legal institutions in northern states like Ohio that enabled women of color to obtain freedom and inheritances. Jones uses this context to highlight the intersectionality of race, gender, and class in American legal thought and the way in which such indicators of status were modulated through politics and law.

Professor Taunya Banks continues the historical exploration of the interplay of race and gender in the courts by analyzing the legal case of Elizabeth Key's freedom suit in her article, *Dangerous Women: Elizabeth Key's Freedom Suit – Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*. Key, an illegitimate child, drew on the English ancestry of her father, rather than the African heritage of her mother, and a written agreement about the termination of her servitude to ultimately win her freedom. The *Key* case demonstrates for Professor Banks how mixed-race women were forced to assert the white aspects of their ancestry by "covering" in order to claim full community membership. Key's success, however, triggered a legal reaction in the form of a subsequent Virginia statute that provided that the slave status of a child would be determined by the status of the mother. This statute, along with another law increasing the tax burden for a man of any race married to a woman of African descent, emphasized the excluded status of black women in the community and created further barriers to their full participation. Professor Banks uses the Key freedom suit to explore the nuance that gender adds to the historical interplay of race and power.

Together, these articles suggest the possibilities of feminist legal historical scholarship going forward. "The serious engagement with gender and the legal order reflected in women's history scholarship has done more than simply shine a different light on the [historical] conditions . . . it has raised a series of fundamental challenges to the task of fully understanding law in society."[15]

15. Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 LAW & HIST. REV. 197, 202 (2000).