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Winter 2014

Legal History and the Politics of Inclusion

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Journal of Women's History, Volume 26, Number 4, Winter 2014, pp.
155-163 (Review)

Published by The Johns Hopkins University Press
DOI: 10.1353/jowh.2014.0059



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BOOK REVIEWS

Legal History and the Politics of Inclusion

Barbara Young Welke. *Law and the Borders of Belonging in the Long Nineteenth Century United States*. Cambridge: Cambridge University Press, 2010. 239 pp.; ISBN 978-0-521-76188-8 (hd); ISBN 978-0-521-15225-9 (pb).

Kenneth W. Mack. *Representing the Race: The Creation of the Civil Rights Lawyer*. Cambridge, MA: Harvard University Press, 2011. 330 pp.; ISBN 978-0-674-04687-0 (cl).

Jill Norgren. *Rebels at the Bar: The Fascinating, Forgotten Stories of America's First Women Lawyers*. New York: New York University Press, 2013. 267 pp.; ill. ISBN 978-0-8147-5862-5 (cl).

Serena Mayeri. *Reasoning from Race: Feminism, Law and the Civil Rights Revolution*. Cambridge, MA: Harvard University Press, 2011. 369 pp.; ISBN 978-0-674-04759-4 (cl).

Felice Batlan

It was long acceptable to write legal history, even excellent legal history, without including women or gender. Legal historians rationalized that because women did not participate in the ostensibly most significant events of legal history—the drafting of the Constitution, canonical Supreme Court decisions, the passage of the Reconstruction Amendments, and the jurisprudence that created modern legal thought—they were irrelevant when writing “serious” legal history. While women might play a role in a social history of the law or in discussions of domestic relations law, on the whole, women and gender stood at the periphery of legal history. There is a temporal lag, moreover, between the fields of women’s history and legal history. What appears new in legal history, for example examining the intertwined nature of race, class, and gender, is already well accepted in gender and women’s history. Much of this is changing, however, as legal historians make conscious efforts to rethink what constitutes legal history and its actors. This review considers four very different books that explore how gender and race have structured law and the legal profession. Each interrogates the legitimacy of law by demonstrating how it has produced multiple injustices, thereby challenging the myth that law is about equity or fairness, and that the Constitution and the Bill of Rights produced a set of inalienable rights and liberties that applied to all.

Barbara Welke's *Law and the Borders of Belonging* is concise, assignable, and packed with insights. She calls her reading across disciplines a "border crossing," as it synthesizes material from extensive historical subfields and explores how law has produced and structured inequality (160). Only an experienced scholar like Welke, who has been central in reshaping the paradigmatic narratives of legal history to include gender and race, could produce such a work. Her highly regarded *Recasting American Liberty* demonstrated how the law's treatment of accidents stemming from railroads and streets cars was gendered and racialized.¹ *Borders of Belonging* is directed at a more general readership. It does not produce entirely new knowledge on gender and women's history, but it engages in an indictment of the prevailing myths of American legal history and American pluralism: for those who were not able-bodied white men, law produced inequality and injustice, often leaving women and people of color without legal protection.

Borders narrates a history of legal personhood, pulling no punches as it argues that the framing and adoption of the U.S. Constitution created white men as legally recognized individuals while women and people of color were excluded from such status. Slavery and the common law concept of coverture, in which married women's legal identity was merged into that of their husbands, preventing them from owning property, contracting, or suing in their own name, were not unfortunate historical accidents. Instead, as the primary legal structures for such exclusions, they were central to shaping who possessed the bundle of rights and obligations that constituted citizenship.

During the long nineteenth century, white men across classes consolidated their power through women's dependence and property ownership, including slaves. The formal roles that white men played as lawyers, judges, jurors, legislators, voters, and law enforcers created a shared identity among white men and gave them the power to produce law, whether through constitutions, legislation, rule-making, interpretations of the common law, jury verdicts, or how officials chose to apply laws. Having structured and sustained inequality, the law then demanded that redress be sought through such legal institutions as the courts, which white men controlled. Violence was also sanctioned and legitimized by law, for example the beating and maiming of slaves, wife-beating, the murder of Native Americans, immunity for those who lynched people of color, or the incarceration of non-whites.

Crisscrossing time periods and an array of legal topics, *Borders* creates a narrative of historical continuity, demonstrating how legal inequality was produced, sustained, and reproduced. Even the Reconstruction Amendments, which could have expanded citizenship and legal personhood to white women and people of color, failed to produce such results. Instead, federal courts narrowly interpreted the meaning of the Amendments, find-

ing that the Fourteenth Amendment did not apply to sex and that racial segregation did not violate it. The post-Civil War administrative state further bureaucratized and normalized exclusions from full legal personhood; the Bureau of Indian Affairs created laws, rules, and procedures to dispossess Native Americans of land, and the Bureau of Immigration oversaw increasingly strict immigration policy intended to prevent non-whites from entering the country. In *Borders*, law often appears as raw power cloaked in legitimacy and “mask[ing] the breadth and depth of able-bodied white male privilege” (96). Exclusions were fundamental to the structure and substance of law in the United States and only in the twentieth century would this falter under the massive pressure of social movements, whether it be women’s suffrage, the civil rights movement, or second-wave feminism.

The other books reviewed here examine how white female and African American male and female lawyers sought to dismantle white privilege, often functioning as path breakers. Jill Norgren’s *Rebels at the Bar* uses the biographies of nine white women lawyers to explore the battles that women waged from the post-Civil War period through the turn of the century to become lawyers and to be accepted by the male bar. It illustrates a number of Welke’s points in a specific context. Part of what made women’s entry into the legal profession so difficult was the diffuse nature of the barriers to becoming lawyers: they had to fight separately to be admitted to law schools, take individual state bar examinations, be allowed to appear in local courts, and be admitted to practice in a variety of federal courts. A woman might be admitted to one state’s bar but not another’s, or be allowed to appear in certain courts but refused elsewhere. State and federal courts found that the Fourteenth Amendment did not require states to admit women to the bar, just as it did not give them the right of suffrage. Male lawyers, judges, and legislators used arguments based on coverture to keep women from becoming attorneys, even in states where coverture had been abolished by statute: if a married woman was without legal personhood, how could she represent a client? White men who policed the boundaries of the profession clearly understood that women becoming lawyers was a step towards becoming legally visible. If a woman lawyer could represent others, why could she not represent herself and, therefore, vote, be a juror, or hold public office?

Legal knowledge and fluency in the idiom of law also provided women lawyers with tools for dismantling laws that denied them full legal personhood with regard to voting rights, entry into the professions, or maintaining one’s property after marriage. Some women attorneys came to law already committed to women’s equality; other women found themselves drawn to first-wave feminism’s agenda as they confronted obstacles to practicing their profession. Although *Rebels* is intended to be inspirational, it also

demonstrates how early women lawyers had enormous difficulty earning a living and how demoralizing this could be. A miniscule number of practices were willing to hire women, and, as sole practitioners, they had tremendous difficulty attracting clients. Even with formal admission to the bar, women did not belong to the larger community of male lawyers.

Rebels uncovers how, in the absence of paying clients, women invented alternative ways of using their legal knowledge, earning a living, and directing their ambition. Some wrote books to teach women the basics of law and business; others taught law classes to women in an array of educational settings; still others served as counsel to a variety of women's reform organizations. A number were suffrage leaders, ran for public office, and founded organizations for women attorneys. Along with other scholarship on early women lawyers, *Rebels* points to a separate sphere of women's legal activity with its own institutions and norms. Future scholarship must further elucidate what this sphere looked like, who participated in it, and how it differed from the male bar. Norgren, however, makes clear that even while participating in this separate sphere, women lawyers sought integration into the male bar.

While *Rebels* excels at recovering early white women lawyers' lives and careers, it does not include the biographies of any African American women lawyers or substantively discuss race. Ida Platt, for example, would have been an ideal case study. It is crucial, moreover, to understand how the whiteness of early women lawyers influenced their identity, politics, opportunities, and the institutions that they created. The need to analyze race and gender together becomes clear after reading Kenneth Mack's *Representing the Race*, which examines how primarily male African American lawyers from the post-Civil War era through the 1960s were able to represent the African American community while simultaneously belonging, at least contingently, to an overwhelmingly white male legal community.

A handful of African American men gained admission to Northern state bars in the decades after the Civil War without confronting the legal barriers that women lawyers encountered. Once members of the bar, however, African American men faced many of the same difficulties as white women: while they might be formal members of the profession, it did not guarantee them a livelihood or provide them access to white professional organizations. African American lawyers, most of whom were in solo or small firm practices, relied upon attracting African American clients, but these clients often turned to white lawyers. With the Great Migration in the 1920s, this changed as some African American lawyers attracted clients from the growing middle-class African American community.

Mack emphasizes the importance of the courtroom to the careers of African American male lawyers, which he argues was "open to the crossing

of racial boundaries in a way that most other public places were not" (62). At least some African American male lawyers established their reputation by representing African American defendants charged with crimes against whites, and some of these cases took place in the South. Such lawyers' public courtroom performances and victories earned them widespread respect, and their presence challenged the whiteness of the Jim Crow courtroom filled with white male judges, jurors, and lawyers. Mack astutely observes that white and African American lawyers had shared interests regarding the projection of the law's legitimacy and its capacity to provide justice to African Americans. African American lawyers assured the African American community that trials were fair, that the rule of law existed, and that such lawyers were acting as racial representatives. They simultaneously pushed judges, attorneys, and court personnel to provide at least procedurally fair trials and this in part required treating African American lawyers with dignity and respect. Mack emphasizes that within the courtroom, a "cross-racial" professionalism prevailed (98).

Although gender hums in the background, Mack does not explore fully how masculinity allowed for such cross-racial bonding. The women lawyers that Norgren examines, moreover, engaged in many of the same strategies as the men in Mack's book, but that did not lead to acceptance or success. Clara Foltz and Belva Lockwood did not shy away from the courtroom and often won their cases; they understood the importance of publicity as they planted stories in newspapers and engaged on the lecture circuit. Their acceptance by the bar did not occur, however, and lawyers, judges, court personnel, and newspapers viewed their courtroom appearances more as spectacle than displays of legal acumen. As Mack explains with regard to a later generation of African American women lawyers, their presence in the courtroom produced ire and competitiveness from white and black male lawyers. Well into the 1960s, the courtesy offered to African American male attorneys by lawyers and judges was not extended to women, who were primarily confined to office practice, or to juvenile, family, or probate court, which did not allow them the experience of lawyering in front of juries.

Mack provides an in-depth examination of the lives of two women, Sadie Alexander and Pauli Murray, making clear that they faced the double bind of race and sex discrimination. Mack's earlier work on Sadie Alexander demonstrated the connections between her public and private life by exposing the everyday office practice of a woman lawyer who was also a leader in the African American community, thereby deemphasizing the courtroom as the consummate site of legal practice.² In contrast, *Representing the Race* highlights how courtroom jury practice was crucial to the success of male civil rights lawyers, and perhaps even lawyers more generally. Mack's framing of success, however, contains gendered assumptions about

what constitutes a civil rights case, who is a civil rights lawyer, and what success even means. Why was representing a client charged with murder more lawyer-like than procuring a divorce for an abused woman in domestic relations court, or fighting for parental rights in juvenile court? When we recognize a separate sphere of women's legal work, we see that many women reformers believed the adversarial process failed to create substantive justice. Women reformers, African American and white, worked during the first decades of the twentieth century to create family and juvenile courts which were not strictly adversarial. Moreover, women lawyers were employed by and litigated in such courts and became respected judges. In many women's eyes, working in these courts was not a mark of engaging in an inferior legal practice but was part of creating new and superior methods of solving disputes and social problems.

Even with enormous obstacles facing them, some African American women lawyers had fulfilling careers with national and even international exposure. Sadie Alexander grew her divorce and probate practice to include cases involving significant assets, and after being tapped by President Truman, she served upon numerous civil rights commissions. Although largely missing from *Representing the Race*, Constance Baker Motley, an attorney with the NAACP who litigated groundbreaking civil rights cases and later served as a federal district court judge, probably came closest to having a career similar to male civil rights attorneys, but we still await a scholarly biography of this complicated figure.

Over the past decade, Pauli Murray has attracted historians' attention as one of the legal architects of second-wave feminism and as a crucial bridge between the women's movement and the civil rights movement. Mack presents Murray as a woman who aspired to represent her race as some male civil rights lawyers did, although this never quite happened during her lifetime. A biracial person who identified herself as a sex "invert," she did not perceive herself as having a singular identity (215). She was already a civil rights activist when she attended law school and began thinking about "Jane Crow"—how sex discrimination also denied women "personal autonomy" and basic human rights (233). Mack writes that Murray's theory of Jane Crow was built upon her rejection of "conventional binaries of identity—black and white, and heterosexual and homosexual [which] could not capture her unique experience of moving through the world" (215). Murray held a series of unsatisfying jobs, including teaching constitutional law in the newly independent Ghana, and working for the prestigious Jewish New York law firm of Paul Weiss, an unheard of position for an African American woman. Yet in each of these locations, she felt hemmed in and alienated. She even scolded her beloved NAACP for its failure to include women in top leadership positions. Murray briefly

found a home, however, when she was invited to sit on a subcommittee of President Kennedy's Commission on the Status of Women.

In Serena Mayeri's *Reasoning from Race*, Murray plays an integral part in feminist legal advocacy and Mayeri writes "no one did more than Murray to make race-sex analogies the legal currency of feminism" (14). By the 1960s, as an experienced elder stateswoman, lawyer, and activist, Murray brought together an older generation of feminists who favored protective labor legislation for women, and younger feminists, white and of color, who had pinned their hopes on the Equal Rights Amendment. Mayeri posits that Murray's strategy of using the Fourteenth Amendment to attack sex discrimination, which courts had long refused to recognize, allowed for a functional analysis of sex discrimination and served to unify the Women's and Civil Rights Movement.

Like Welke, Mayeri starts from the premise that patriarchy and white supremacy were intertwined. She explores the connections between the Civil Rights Movement and the Women's Movement, an important contribution because much of the legal history on the Civil Rights Movement does not incorporate gender, and the legal history of the Women's Rights Movement is still being written. *Reasoning from Race* further explores what it meant for feminist legal advocates to use race analogies in arguing that sex, like race, was a suspect classification under the Fourteenth Amendment, and how the construction of such arguments and their deployment in litigation was "a fluid, historically variable practice" (5). In the 1960s, feminist lawyers saw the analogy between race and sex discrimination as key to convincing courts that sex discrimination caused serious harm. Some states, for example, excluded women from jury service with the rationale that it was burdensome to women. Courts viewed this as non-actionable benign discrimination. As cases challenged African American men's exclusion from jury service, however, courts became more aware of the damage that such a practice generated and feminist lawyers used this in the context of women's jury service. Feminist lawyers also used the organizational and strategic model of the NAACP Legal Defense Fund by litigating highly publicized test cases. Legal feminists very much wanted their own *Brown v. Board of Education* which in the context of sex would declare that separate was not equal and which would require courts to apply the highest level of scrutiny to laws which distinguished between men and women.

While the other works discussed here are not particularly concerned with legal doctrine, Mayeri plays close attention to how courts responded to feminists' arguments and how they failed to recognize the intertwined nature of sex and race discrimination. For example, *Andrews v. Petty* involved an African American woman who challenged a Mississippi school board's refusal to hire unmarried parents to work in its schools, raising

issues of race, sexuality, gender, and reproduction. The school board's policy was one more way in which school districts and other employers attempted to fight integration. According to Mayeri, "Southern states had long used morals regulations as a weapon in defense of white supremacy," the burden of which fell mainly on African American women (146). While "young white women who became pregnant out of wedlock were sent to homes for unwed mothers and relinquished their children for adoption," no such escape existed for African American women who kept and raised their children (147). Civil rights and feminist lawyers rallied to represent women subjected to such policies, arguing that they constituted sex and race discrimination as well as a violation of women's reproductive rights.

Although feminist lawyers hoped that the court would recognize the intersection between sex and race discrimination, it decided *Andrews v. Petty* as a simple sex discrimination claim. Other courts would follow this pattern, with significant consequences for the evolution of discrimination law. Although a woman of color could bring a claim based on race or sex discrimination, she could not claim discrimination as a woman of color, thereby synthesizing conventional claims of racial and sexual discrimination. Courts, moreover, continued to apply different legal standards of scrutiny for race and sex discrimination. As cases involving women of color became part of the jurisprudence of sex discrimination, appellate judges focused on the plaintiff's sex while failing to address the cases' racial dimensions. One would never know from reading such opinions that an African American plaintiff had brought the case to court, that she had made a claim of both race and sex discrimination, or that the case had "its roots in the racial justice movements" (167). Mayeri posits that if courts had valued such connections, they would have fostered the emergence of a more honest jurisprudence addressing the compound discrimination that women of color actually faced. This did not happen, however, and as the conservative movement grew in the 1980s, many unfairly blamed feminist legal advocates for focusing narrowly on white privileged women and advocating the most limited kind of legal equality. As Mayeri argues, this was the fault of the courts and not of legal feminists who continually attempted to create a robust jurisprudence melding sex and race equality.

These four works complement each other beautifully. Welke provides us with a dramatic overview of how law reflected white male able-bodied privilege from the founding of the American republic into the twentieth century. Primarily through biography, Norgren and Mack allow us to see how African American men and women and white women slowly entered the legal profession, envisioning not only an integrated bar but also an integrated and just society. Mayeri takes us through the women's movement and demonstrates the potentially radical ways in which feminist

lawyers attacked sex and race discrimination, the various coalitions they formed, and the legal roadblocks that they faced. Throughout these works, we see repeatedly how white men policed the borders of belonging to full citizenship and equality. In the end, one is equally struck by how at times legal change was dramatic, but at other times it could make inroads only in ameliorating the most blatant kinds of legal discrimination. Yet lawyers believed that law mattered intensely, that it was something other than raw power, and that the master's tools could dismantle white supremacy and patriarchy.

NOTES

¹Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001).

²Kenneth Mack, "A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of African-American Women Into the American Legal Profession, 1925–1960," 87 (2002): 1405–75.