

Gendered Law in American History

Gendered Law in American History

Richard Chused

PROFESSOR
NEW YORK LAW SCHOOL

Wendy Williams

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I dedicate this book to my mother-in-law, Nikki Langer, an early feminist musician, educator, and role model to her daughter—my wife Elizabeth Langer—a second-generation feminist attorney, painter, mother, and muse-in-life.

Richard Chused

I dedicate this book to my mother, Jean Webster, who put this note under my pillow: “Girls can grow up to be anything they want to be.”

Wendy Williams

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Introduction

During the spring semester of 1980 we were chatting in Wendy’s office at Georgetown University Law Center about *Reed v. Reed*, the 1971 case that marked the turning point in the Supreme Court’s Constitutional approach to government-sponsored sex discrimination.¹ At that time, Wendy was teaching courses about contemporary issues in gender and law and Richard was teaching property. We both used *Reed* in our courses. The case involved the constitutionality of an Idaho statute creating a mandatory preference for male administrators of intestate estates.² Sally and Cecil Reed, separated spouses, each sought to be appointed by the state probate court to manage the small estate of their deceased teenage son. Because of the statute, the probate judge declared himself bound to choose Cecil over Sally. The dispute over the appointment wound its way up through the state courts to the United States Supreme Court. In its first case responding to the women’s movement that had emerged in the late 1960s, the Court invalidated Idaho’s male preference under the Equal Protection Clause.

Our discussion in Wendy’s office was not about the well-known outcome of the case but the roots of Idaho’s male preference. Neither of us had any idea where it came from, though we obviously had good reasons to assume that its history was fraught with significant gender-based assumptions and concerns. Nor had either of us ever done any intense legal history work. In a fateful moment, we agreed not only to search for the history of the *Reed* statute, but also to teach a seminar on gender and American legal history a year and a half later. That decision changed the direction of both of our careers. In the spring semester of 1982, we and an amazing group of adventurous students gathered together to read and discuss the primitive teaching materials we managed to pull together, and to work together to produce new scholarly papers on women’s legal history.³ That also was the beginning of this text—one we

1. 404 U.S. 71 (1971).

2. An “intestate estate” is the property left by people who die without a leaving a will. The probate court appoints an administrator or administratrix to manage the process under a set of rules for property distribution established by law. A testate estate is managed by an executor or executrix who sees to a distribution of the estate according to the terms of the deceased’s will.

3. The students in the first seminar were: Waltraut Addy, Karen Armstrong, Ann Becker, Cheryl Bell, Dale Breed, Sherrol Cassedy, Chiao-Hua Ching, Rebecca Cook, Diana Gilpatrick, Cheryl Heeke, Lorri Jean, Betty Jo Jones, Debra Kapsner, Mary Kopitzke, Steven Lim, Lora Liss, Ronald Long, Christina McKenna and Barbara Pawlowski. To this day we are grateful for their willingness to join us in our then new project. Five of the papers they wrote—and many of the papers produced by their successors in the seminar—are available online in the seminar’s database maintained by the Williams Library at Georgetown University Law Center, at <http://www.law.georgetown.edu/library/collections/gender->

have labored on with varying degrees of intensity over the ensuing thirty-five years. In the end, the laboring oar fell mostly to Richard, who gave the manuscript its final shape and size. To see our work finally published is a significant and proud moment for both of us.

When this journey began, the literature on gender and law in American history was scant but rapidly growing.⁴ We quickly realized that we had perched ourselves on a limb unattached to a substantial trunk. Though the history literature about gender was beginning to blossom, the women's legal history literature was very thin. Our research forced us to get our hands dirty in original sources, newspapers and

legal-history/index.cfm (visited May 5, 2015). Their papers are: Dale Pennell Breed, *Conflicts of Interest: The Evolution of Married Women's Property Rights in Nineteenth Century New Hampshire* (1982); Sherrol Cassedy, *The Privileges and Immunities Clause of the Fourteenth Amendment Applied to Women's Rights Issues in the Nineteenth Century* (1982); Rebecca Cook, *The Abortion Provision of the 1837 Draft of the Indian Penal Code* (1982); Cheryl A. Heeke, *Rosie the Riveter: Study of the Conditions and Effects of Female Participation in the World War II Labor Force* (1982); and Lora Liss, *Women's Rights to Property at Divorce in Early Maryland: From Colonial to Modern Times* (1982).

4. Early on we found JULIA CHERRY SPRUILL, *WOMEN'S LIFE AND WORK IN THE SOUTHERN COLONIES* (1938); MARY RITTER BEARD, *WOMEN AS A FORCE IN HISTORY* (1946); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES* (1959); ELIZABETH WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800–1861* (Radcliffe Thesis 1960); WILLIAM L. O'NEILL, *EVERYONE WAS BRAVE* (1969); AILEEN S. KRADITOR, *IDEAS OF THE WOMAN SUFFRAGE MOVEMENT* (1971); WILLIAM H. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC AND POLITICAL ROLE, 1920–1970* (1974); MARY RYAN, *WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (1975); RICHARD W. WERTZ & DOROTHY C. WERTZ, *LYING IN: A HISTORY OF CHILDBIRTH IN AMERICA* (1977); BARBARA J. BERG, *THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM, THE WOMAN & THE CITY 1800–1860* (1978); JAMES MOHR, *ABORTION IN AMERICAN: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* (1979); NANCY COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780–1835* (1979); PEGGY RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATION OF FEMALE EMANCIPATION* (1980); MARY BETH NORTON, *LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800* (1980); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT & IDEOLOGY IN REVOLUTIONARY AMERICA* (1980); RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918* (1982); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* (1982); ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM* (1982); NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982); and PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984). The first two sex discrimination casebooks, DAVIDSON, GINSBURG & KAY, *SEX BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* (1974) and BABCOCK, FREEDMAN, NORTON & ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975), also provided useful clues to the history of our gendered legal system. The Babcock book in particular prefaced its treatment of contemporary issues of gender and law with historical backgrounds in most of its chapters. Last but not least, we relished the work of Blanche Crozier, who produced a quartet of articles, published in the Boston University Law Review in the 1930s—the first when she was a student at Boston University School of Law—and then disappeared from the scene. Most cited in modern times were the first and last of her articles, *A Critique of Muller v. Oregon*, 13 BOSTON U. L. REV. 276 (1933); *The Changing Basis of Women's Nationality*, 14 BOSTON U. L. REV. 129 (1934); *Marital Support*, 15 BOSTON U. L. REV. 28 (1935); and *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U. L. REV. 723 (1935). Crozier's were the only articles with a decidedly feminist bent published in the law reviews of her day and for many years thereafter.

magazines, long lost essays, and old cases, session laws and codifications. The field is now rich with literature—so much so that it is impossible to keep up. But we will be eternally grateful to the pioneer historians who provided an inspiring baseline as we began to understand both the multitude of questions confronting us and the beauty of well-written history. In one case we were actually able to express our gratitude personally. Shortly after we began to teach our seminar, Richard discovered that Elizabeth Warbasse was a member of the faculty at the Community College of Baltimore. We contacted her and she agreed to join one of our Georgetown seminar classes to discuss married women's property legislation. During the session, she expressed shock that anyone knew of her work. Everyone present—faculty and students alike—enthusiastically encouraged her to seek a publisher for her thesis. That occurred in 1987 when Greenwood Press released her work—twenty-seven years after she obtained her PhD.

During the early years of our work, Wendy mostly explored reproduction issues, especially birth control and abortion, as well as the intersection of race and gender; Richard focused on property. As the years wore on, we gradually expanded the scope of our inquiries, eventually developing the materials now within these covers. A series of themes emerged as the materials grew—the ways in which gender has been a subject of legal regulation, the images and discourse used to describe men and women, the dissonance between the supposedly private nature of the family and the variety of ways public law intruded into family spaces, the different ways that the social and legal rules manifested themselves among different races and economic classes, and the difficulty of changing legal norms about gender and family without support from conservative as well as progressive forces. The battle for suffrage epitomizes these themes. Barring voting by women and requiring voters to own property dominated the early regulatory scheme. Rhetorical flourishes about women as virtuous reformers and men as in need of the assistance of women to correct their flawed behavior were common in the suffrage debates after the Civil War. Concern about white women venturing out of the home to the noisy, treacherous arena of politics and polling places was a commonplace among anti-suffragists. And suffrage itself finally arrived only with the assistance of conservative supporters of prohibition and advocates for more virtuous family environments. You will find variations on these themes in all the chapters in the text.

For the most part, the book moves chronologically. It begins with the period around the turn of the nineteenth century with an opening chapter on the gendered construction of citizenship in early America. Materials on married women's property reform, divorce, and child custody follow. We then backtrack in time to look at reproduction issues over the same period—from the early republic through the nineteenth century. The chapter on infanticide, abortion and birth control is the longest and perhaps most interesting in the text. Chapter 6 follows with a look at the ways violence was based on significant cultural structures about gender and race, beginning with marital violence, and moving through the law of slavery, and the post-Civil War construction of Jim Crow laws. The next three chapters cover the major late nineteenth and early twentieth century debates about temperance, suffrage, and protective labor

legislation in the workplace. The workplace chapter moves the text well into the twentieth century with materials on the New Deal and the gendered structure of military service rules. The text concludes with a look at the well-known case of Equal Employment Opportunity Commission v. Sears, Roebuck & Company, a 1980s-era case involving allegations of gender discrimination in which two well-known historians testified. The chapter investigates the ways in which legal and historical inquiries are different and sometimes serve conflicting goals.

As you read, we hope that you will sometimes be shocked, often surprised, regularly moved, and repeatedly inspired, just as we have been. If that happens our long labors will have been worth it.

Richard Chused
New York, N.Y. 2016

Wendy Williams
Washington, D.C., 2016