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Women and the Law: Gender Discrimination in the American Legal System

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Spring 2005

## **Women and the Law—Gender Discrimination in the American Legal System**

The common understanding of gender includes distinct biological differences which specifically differentiate males from females. However, gender can also be analyzed as a social construction—male and female stereotypes are reinforced from the time of birth and throughout childhood and adulthood. These stereotypes emphasize the differences between men and women to the point where the two genders are dichotomized into two distinct categories. Whether men and women are different because of hormones and anatomy as psychology and biology would suggest, or different because of socially constructed stereotypes and gender expectations as sociology would suggest, the fact remains that society, throughout history, has treated men and women differently. Although some would argue that this divergent treatment is necessary and functional for society, others would maintain that applying different standards to each gender can have negative consequences. Gender discrimination under the law can be classified as one of these harmful consequences. Unequal treatment of males and females has manifested quite saliently in the American legal system, particularly in relation to marriage and family issues. The legal status of women has experienced numerous changes, many the result of changing societal perspectives on women and women's understood role in society and the domestic family sphere. The following is a comparative analysis of the courts' approach to women and gender discrimination in the American legal system in the early 1900's suffrage movement and the 1960's second wave feminist movement.

Inequality between males and females has often been justified as biologically created—men and women are different because nature made them that way. This school of thought is referred to as biological determinism, or the “nature” argument. By this

definition, women are best suited to be the family caretaker because of biological characteristics which make them effective wives and mothers. Another school of thought justifies gender inequality as a product of society, or differential socialization—the “nurture” argument (Kimmel 2). Differential socialization contends that men and women are different because they are taught gender-specific behaviors and sanctioned by societal expectations. Proponents of differential socialization argue that a woman’s perceived obligatory role in the household is simply a manifestation of tradition-bound customs and socially created notions of gender roles. Regardless of whatever the source of gender differences may be, inequality exists and has apparent consequences for men and women. The consequences for women, however, are often viewed more pejoratively because gender discrimination more frequently leaves women at a disadvantage.

The American legal system has historically reflected the various ideologies and stereotypes of gender, and trends in the courts have undoubtedly affected the status of women under the law. Legislators and judges have undoubtedly taken gender-based approaches in law and decision-making, resulting in profound effects on women. Two particular eras in American history emerged which served as catalysts for women’s rights, allowing women to more effectively challenge these legal restrictions. The decades-long suffrage movement of the late 19<sup>th</sup> and early 20<sup>th</sup> century and the second-wave feminist movement of the 1960’s and 1970’s brought unprecedented attention to women’s status under the law.

By the late 1800’s, women were experiencing advancements in divorce and child custody laws, property rights, and educational opportunities, as well as increased social freedoms (Rochester.edu). This atmosphere of reform encouraged women to seek more

profound freedoms, including the right to vote. During the 1848 Seneca Falls Convention, convened by Elizabeth Cady Stanton and Lucretia Mott, participants challenged the current legal status of women and set an agenda for equality in their Declaration of Principles (Flexner 77). Stanton stressed the most controversial of the Convention's propositions, emphasizing that women have an obligation to "secure to themselves their sacred right to elective franchise" (77). Over 75 years later, pushed by events of World War I, the United States passed the 19<sup>th</sup> Amendment which granted suffrage to women.

The process leading to woman's suffrage included many changes to the traditional legal system that allowed for and encouraged gender discrimination. The general approach to women in American law is rooted in English common law. The common law doctrine that had the most serious economic and legal consequences for women was the doctrine of "femme couverte" (Shaw & Lee 469) or coverture. Under this doctrine, a woman's legal status was essentially suspended upon marriage and she virtually became her husband's possession, with a relationship analogous to "something better than his dog, a little dearer than his horse" (Kay 2). Man and woman became one upon marriage, with "one" meaning the husband, "effectively [keeping] women in a state of civil invisibility" (Hazou 51). This notion of absolute unity upon marriage was exemplified in early American law by the fact that husbands and wives were prohibited from testifying in court against each other because of the 5<sup>th</sup> Amendment protection against self-incrimination.

These common laws of England which served as the structure for the formation of laws in the United States justified a woman's loss of identity upon marriage as

necessary for her protection. As English scholar William Blackstone summarizes in his 1765 *Commentaries on the Law of England*, “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” (Kay 163). In Blackstone’s time, a married woman surrendered all of her legal rights to her husband (165) as a way to ensure her own protection. Although this convention has since been greatly relaxed in severity, the tradition of a woman taking her husband’s name upon marriage is still prevalent, and stereotypes still remain that a woman marries for a provider and guardian.

The creation and application of laws in the United States, as rooted in English common law and Blackstone’s theories, was based primarily on a few underlying assumptions. Under the legal system, women were considered to be “incompetent and childlike” (Hazou 56), and thus worthy of protection, males assumed the duty of protector and financial provider, and the double standard for gender was justified by and based on the biological determinism argument (56). These assumptions, along with deference to long-standing legal tradition, worked to create and maintain numerous legal disadvantages for women.

Emerging ideas about women’s role in the family in early Colonial America helped to transform, momentarily, this traditional approach to women and the law. Changes in morality that swept across Europe and the American colonies in the mid-18<sup>th</sup> century encouraged greater individualism and led to “an ideal of warmer and more intimate relationships between husbands and wives” (Kimmel 113). Although males

still served as the authority figure, men and women were encouraged to marry on the basis of mutual affection rather than for financial gain or convenience. Compared to the European common law that served as a parallel for American law, women were allowed more freedoms. Dowries were not the norm, women had the right to own property in their own names after marriage by rule of the 1848 Property Act (Shaw & Lee 469), and obtaining divorces was relatively easier (Kimmel 113). Pre-industrial society allowed for men and women to work together in the home, with less emphasis on separate spheres or distinguishing the husband as the “bread-winner.” Men and women participated somewhat equally in the maintenance and finances of the household.

By the turn of the 19<sup>th</sup> century, however, industrialization compelled husbands into factories, creating for the first time a notion of separate spheres for men and women. The gap between work and home grew dramatically, with men quickly becoming dominant in the public realm while women became individually responsible for the maintenance of the home and family. Many historians argue that this shift resulted in women’s exclusion “from the new democracy” (Kimmel 114). The vast social, political, and economic shifts in society during the Industrial Revolution included a prominent void of women’s participation. The Supreme Court decided in the case of *Minor v. Happersett* in 1875 that voting was not among one of the privileged guarantees for citizens under the 14<sup>th</sup> Amendment, and thus a state was acting within constitutional bounds by disallowing women’s participation in the voting process. This void of women’s involvement and their subsequent dissatisfaction with their powerless domestic role set the stage for changes in the law that would eventually lead to the granting of women’s suffrage.

After the Industrial Revolution, women were expected to maintain the household while men engaged in the “harsher” duties of politics and civic life. The notion that men and women should be treated differently before the law was often justified because of women’s obligatory role as wife and mother. Women were excluded from politics during this time because of the fear that allowing women into the public realm of men would result in, as Thomas Jefferson reasoned, a “depravation of morals and ambiguity of issues” (Kay 1). The United States Supreme Court, serving as the ultimate means to resolve controversies over the law, first examined a woman’s claim to full participation in society in *Bradwell v. Illinois* (1873). Justice Bradley reasoned that civil law “has always recognized a wide difference in the respective spheres and destinies of man and woman” (Kay 3) and the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupation of civil life” (3). In this case, the court ruled that Illinois was not in violation of Myra Bradwell’s Constitutional privileges and immunities by disallowing her to practice law. The idea quickly emerges that the understood femininity and delicacy of women was to be protected from corruption by disallowing women to participate in the public realm of society. It became evident that a woman’s rightful sphere existed within the secure, private walls of the household, and granting suffrage seemed highly unlikely.

Protective legislation in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries further accentuated the idea that women were worthy of shielding from the harsher aspects of the public sphere because of her familial obligations. This type of state legislation, first passed by Wisconsin in 1867, limited the number of hours a woman could work—a rationale justified by the fear that the chronic fatigue of long hours in the factories would be

detrimental to a woman's health (loc.gov). The case of *Muller v. Oregon* in 1908 upheld the constitutionality of protective legislation, defining the separate spheres occupied by men and women in society as necessary. Justice Brandeis reasoned that "women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . especially true when the burdens of motherhood are placed upon her" (Kay 7). The rigorous activities of factory work posed a threat to the health of women, and their health was essential to the vitality of the family. Brandeis continued by stating that "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race" (7).

A dramatic shift occurred, however, in the structure of the family which would eventually compel Congress to draft the 19<sup>th</sup> Amendment granting women's suffrage. World War I drew men out of their factory jobs to fight overseas, and women were left to fill the void to sustain the family. During this time, an unprecedented number of women entered the workforce and experienced the public sphere previously dominated by men. Suffragists gained decisive fire power in that the country required the support of women to succeed in the war to maintain daily life within the borders. Congress was forced to consider allowing women into the political realm as active voters.

Many argue that suffrage was simply granted to quell women at home to focus on the war abroad, rather than out of a turning point in the legal system to recognize women as equal to men. The 1920 suffrage Amendment included harsh disapproval from many men as well as women and certainly did not symbolize an end to their unequal treatment in the law, or the stereotypes that often justified discrimination. The

stereotype of women's delicate nature which justified the protective legislation of the time was exhausted, ironically, on both sides of the debate for suffrage. Suffrage opponents argued that women's biological and emotional differences deemed them "unfit for the rigors of politics" (Dinkin 62). Additionally, the assumption of women's delicate nature was utilized by many suffragists in slogans which emphasized women's ability to "clean up politics." Suffrage propaganda included the notion that women would be better able to elect more sensitive candidates and prevent the mud-slinging that frequently punctuated election campaigns. Regardless of the divergent and controversial opinions on the issue, the women's suffrage amendment was submitted to Congress when the U.S. entered the war in 1917, passing 3 years later.

The legal framework during the suffrage movement, shaped by the ideology of women's obligation in the home and women's subsequent need for protection, took a somewhat dramatic shift upon the rise of the second-wave feminist movement. Although the courts in many ways still viewed women as worthy of protection, women began to experience new treatment under the law. Feminists proposed extraordinary approaches to gender and the law and set out an explosive campaign to change the legal system. The courts began to restructure their approach to gender, attempting to allow for the complete equality of men and women, as opposed to simply including women into the current system.

Several types of equal rights legislation emerged after the 1960's, each framed by various theoretical perspectives about gender and the law. Various approaches were used to draft unprecedented laws, ultimately aimed at ending gender discrimination in the legal system. The notion prevalent during the suffrage movement that women

should be treated differently because of their domestic obligations began to erode as a spirit of feminism erupted in the mid-1960s. As in the suffrage movement, a changing economy helped to ignite change. Jobs in the service industry were more prevalent, which meant that the protective legislation of women's grueling factory labor was no longer necessary or justified. Various organizations emerged, such as the National Organization for Women and the National Women's Political Caucus, which served to mobilize women and bring attention to women's rights, much like the Seneca Falls Convention of 1848. Other social movements emerging at the time, such as the Civil Rights and Anti-War movements, allowed for an atmosphere of revolution that posed as an ideal setting for another feminist movement.

The approach to women and the law in the second-wave feminist movement included a distinct emphasis on equality for women, whereas the legal approach during the suffrage movement emphasized protection of women. Women's role in the family was once again emerged as a concern when the idea of equality under the law. The Equal Pay Act of 1963 represented the first piece of legislation which specifically recognized gender as an invalid reason for discrimination. Under this act, men and women who perform substantially equal work in the same establishment must be paid equal wages. However, concerns emerged as to whether women were truly deserving of equal pay when familial obligations often required women to have a lesser dedication to work than their male counterparts.

The passing of Title VII of the Civil Rights Act of 1964 also included significant controversy over gender equality. The Act as originally drafted was directed at "racial, ethnic, and religious discrimination" (Landrine & Klonoff 177) in employment rather

than gender discrimination specifically, and many argue that gender was added as a category worthy of protection under Title VII merely as a means to have the legislation struck down by opponents. Despite this attempt, the Civil Rights Act passed overwhelmingly in 1964 (177). By way of an amendment to the original Act in 1978, Title VII now includes pregnancy, childbirth, and related medical conditions as worthy of protection against discrimination in the workplace (178). Other examples of noteworthy equality-based legislation during the second-wave feminist movement include Title IX of the Education Amendments of 1972 which disallows sex-based biases in educational institutions that receive federal funding ([de.psu.edu](http://de.psu.edu)) and the Equal Credit Act of 1975 which prevents lenders from considering gender or marital status among applicants for credit ([uic.edu](http://uic.edu)).

The Equal Pay Act and Title VII of the Civil Rights Act represent two of a number of considerable legislative acts aimed at achieving equality for women. The means by which to achieve this equality became a highly disputed issue during the second wave feminist movement. The “equality-versus-difference” debate emerged as one of the more hotly contested issues in the attempt for legal restructuring (Hirsch & Keller 135). Those who argued on the “equality” side of the issue maintained that gender should be an irrelevant category in the law; biological sex should not play a role in the structure and application of the laws. Those on the “difference” side of the debate argue that women should receive differential treatment on the basis of their needs, interests, and characteristics unique to the female sex ultimately to ensure an equal footing with men (138). The difference supporters argue that sex-neutral laws, as the equality school emphasizes, can in effect “reinforce women’s inequalities” (Frug 36) by

not taking into account distinct female characteristics. “Equality” focuses on implementation of law as gender neutral, aimed at theoretical equal treatment of men and women, while “difference” focuses on outcomes—equality can be achieved by recognizing gender differences and shaping the law accordingly.

One of the more substantial equality-type legislations causing significant controversy at the time was the Equal Rights Amendment (ERA). Almost 50 years after its original introduction by suffragist Alice Paul in 1923, the ERA came to Congressional attention in 1972 (Boles 1). The proposition specified that “equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex” (1). The intention of the amendment was to eliminate the forms of legal sex discrimination which specifically radiate from “administrative, statutory, and constitutional law, governmental action, and those private sector actions that are subject to public regulation” (1). Although the ERA received overwhelming support in both the House and the Senate, its momentum sharply began to decrease shortly after its submission to states for ratification (3). Numerous supporters and opponents of the ERA hashed out its benefits and flaws, resulting in a distinct conflict among individual states. Many of the opponents felt that the ERA would require a female draft, prevent sex segregation in private schools and prisons, and prevent a ban on homosexual marriages (33-35). The ERA was viewed as too rigid, by some, “to allow for the special needs of women as workers and mothers” (Stetson 23). Proponents advocated that a universal standard for gender equality, mandated by a Constitutional Amendment, would be the only means by which to achieve ultimate equality. Nevertheless, the ERA was not ratified by the necessary 38 states before the 1982 deadline.

The atmosphere of equality for women dominant in the 1960's and 1970's carried over into the decisions of the U. S. Supreme Court. Its decisions in *Muller v. Oregon* *Bradwell v. Illinois* in the early part of the century emphasizing the need for protection of the female gender vastly contrasted the series of cases decided in the second wave feminist movement. *Reed v. Reed* in 1971 represented the first time the Court invalidated a statute on grounds of sex discrimination (Kay 26), arguing that sex discrimination was in violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment. The Justices declared unconstitutional an Idaho statute that gave men preference over women in administering deceased persons' estates (26). Chief Justice Burger reasoned that allowing sex as a valid reason to discriminate constitutes "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" (Stetson 34). Six months previously, the California Supreme Court invalidated a statute prohibiting females from tending bar in *Sail'er Inn Inc. v. Kirby* (Kay 26). Through the decisions in these profound cases, gender discrimination was found to be in conflict with the equal protection clause of the 14<sup>th</sup> Amendment. The government could no longer, in theory, "deny any person within its jurisdiction the equal protection of the laws" (law.cornel.edu). For the first time in history, the courts viewed the Constitutional phrase "any person" to include women.

The Supreme Court's shift toward demanding equality under the law for women continued with their decision in *Frontiero v. Richardson* (1973). A female Air Force lieutenant contended that the federal statute allowing different qualification criteria for male and female spousal dependency violated her 5<sup>th</sup> Amendment due process rights. The court held that the "dissimilar treatment for men and women who are similarly

situated” (oyez.org) indeed classified as gender discrimination under the definition outlined in the *Reed* case, acknowledging that historical discrimination practices “caged, more than idolized” women (4lawschool.com). The *Frontiero* decision stands as the general standard applied today in cases concerning unequal legal treatment of the sexes. Using the strict scrutiny technique applied in *Frontiero*, the Court requires that the State carry the burden of proof in legitimizing sex-based classifications in their laws.

Despite the emphasis on equality echoed during the 1960’s and 1970’s and the tremendous steps toward reshaping the legal approach to women, the notion of women as worthy of protection prevalent during the suffrage movement remained quite salient in the second wave feminist movement. Although various Supreme Court decisions and significant legislations acknowledged the unequal treatment of women as unconstitutional, other contradictory notions in the legal system remained. Before the *Roe v. Wade* (1973) decision which struck down anti-abortion law, deeming it a constitutional violation of a woman’s right of privacy, laws existed to punish abortionists. Doctors, if convicted, were jailed for varying lengths of time (abortionfacts.com), dependent on various state statutes, for their role in the abortion. No evidence suggests that women were ever prosecuted for their role in abortions (abortionfacts.com), emphasizing the view of women as victims. Abortion law was rationalized, to some degree, as necessary for the protection of unborn children, as well as mothers, from the hands of unscrupulous physicians.

Additional legal remnants of the notion that women’s delicate nature deemed them worthy of protection were exemplified by particular exceptions to Title VII of the Civil Rights Act. Although, in general, Title VII requires that employers cannot

discriminate on the basis of sex, a job applicant's sex can serve as a legitimate reason to not hire them if gender constitutes a bona fide occupational qualification (Landrine & Klonoff 183). In the case of *Dothard v. Rawlinson* (1977), the Supreme Court upheld the gender requirements of prison guards in an Alabama prison system. The male prisoners were deemed to be "exceptionally disorganized and therefore dangerous" (183), and the Court ruled that a female guard would be especially at risk.

Additionally, judgments in cases involving rape during the end of the second-wave feminist movement paralleled the legal approach prominent during the suffrage movement in which women were viewed as vulnerable and worthy of protection. The Supreme Court ruled in *Michael M. v. Superior Court of Sonoma County California* (1981) that only males could be found criminally liable for violating a California statutory rape law which forbade sexual intercourse with a female less than 18 years of age. Although Justice Rehnquist argued that this decision, based on a recognition of the "reproductive and biological differences" (Stetson 42) of males and females, was ultimately aimed at preventing teenage pregnancy, this case represents another example of the centuries-old idea that women deserve protection under the law.

The history of gender discrimination in the U.S. legal system can be adequately defined and examined through themes and changes in the law during the first-wave suffrage movement of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and the second-wave feminist movement of the 1960's and 1970's. Particular stereotypes of women as delicate and weak justified gender-biased laws and legislation and resulted in women's relative exclusion from the political sphere in the decades leading to the eventual granting of suffrage in 1920. Notions of these particular female stereotypes carried over into

controversies of the second-wave movement as women began to more specifically demand equality within the legal system. Although the debate continues today as to whether one's biological sex should play a role in law-making, women are beginning to experience notions of equality due, in large part, to the efforts of early suffragists and feminists in American history.

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