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Foreword: The Waning of the Middle Ages: Foreword

Linda R. Hirshman

FOREWORD: THE WANING OF THE MIDDLE AGES*

LINDA R. HIRSHMAN**

My mail today included volume 1, number 1, of *The Defender*, a publication of the Individual Rights Foundation[1] devoted to articles on the threat to free speech from feminists and other suspicious political groups. To my puzzlement, since none of the writers[2] is described as an historian, several of the pieces employed images from a bygone era: feminists promote "orthodoxy,"[3] suggest burnings at the stake,[4] engage in holy wars,[5] and finally, disguise their "Old Feudalism" as "New Liberalism"[6]—this last accusation explicitly tarring the critics of the existing order with the dirtiest word in American politics: medieval.

In the minds of most Americans, the awful, scary Middle Ages (remember "Dark Ages"??!) were thankfully replaced by enlightened liberal individualism, which has its happiest and purest home in the United States. According to this picture, the Middle Ages had orthodoxy in truth and knowledge, hierarchy in politics, and stasis in social relations. Liberalism has freedom of inquiry, democracy in politics, and openness in social relations.

* With apologies to Johan Huizinga

** Professor of Law and Director, Women's Legal Studies Institute, Chicago-Kent College of Law. Professor Hirshman was the moderator of the program "Is The Law Male?" put on by the American Bar Association Commission on Women in the Profession, August, 1994. This Essay and this Symposium are dedicated to Justice Judith Kaye, whose continued commitment to the life of the mind and the project of gender justice built a bridge between academy and profession over which the rest of us are merely passing.

1. A division of the Center for the Study of Popular Culture, a nonprofit organization with a special nonprofit organization tax break from the United States government in the form of a third-class mail U.S. Postage permit.

2. Volume 1, number 1, included articles by *The Defender* editors John Howard, Erik Gunderson, Bill Cerveny, Douglas A. Jeffrey, and Henry Mark Holzer. In case you're interested, circulation management and art are entrusted to females, none of whom contributed any opinion of any sort to issue 1, volume 1.

3. John Howard, *Suing Private Institutions*, THE DEFENDER, Mar. 1994, at 1.

4. Bill Cerveny, *Counter Coup: Rolling Back the Attack on Free Speech*, THE DEFENDER, Mar. 1994 at 4 ("Through campus speech codes and sensitivity training seminars, some university administrators—working hand in hand with radical feminists, gay activists and radical multiculturalists—have operated an *auto da fe* on many campuses to establish a regimen of thought control and suppress free speech.").

5. Id. ("[M]embers of ATO [a college fraternity] suddenly found themselves the target of a *jihad* by radical feminists. . . .").

6. Douglas A. Jeffrey, *The Old Liberalism and The New*, THE DEFENDER, Mar. 1994, at 10.

What this leaves out, of course, is that any dominant system can perpetuate itself and become, in the bad sense of the word, "medieval." In the pages of *The Defender*, as in the American legal system, and, as I will describe below, the American law schools, liberalism—that most promising of political and legal orders—has often been turned to orthodoxy and become everything it was supposed to have replaced. "Is the Law Male?" the participants in this Symposium asked at a standing room only program of the ABA Commission on Women in the Profession last August. If we had had more room on the marquee, we would have asked, "Is the Law Male and Therefore Medieval in the Bad Sense of Orthodox in Making Only Male Experience Count, Hierarchical in Perpetuating Existing Relationships of Domination, and Static in Enshrining Existing Social Practices?"

In her introduction to this Symposium, Chief Justice of the New York Court of Appeals Judith S. Kaye tells us "there is a difference" between men and women, in law and out, in power and out.[7] As the title of the Symposium, "Is The Law Male?" suggests so graphically, if the liberal/legal order cannot provide the basic human goods of security and reasonable prosperity to people of "different" genders and races than the white men who thought liberalism up, it is entitled to no more respect than the admittedly orthodox, hierarchical, static and exclusive medieval order it replaced. Worst of all, when liberal concepts are used to defend medieval outcomes, liberalism needs to be not only defended, but rescued, from its so-called "defenders."

As the articles from our contributors reflect, although no one said it directly, feminist legal thought and action considers feminism as entitled to the mantle of the best part of the American liberal/legal tradition. Lynn Hecht Schafran, Director of the National Judicial Education Program of the NOW Legal Defense and Education Fund and the National Association of Women Judges, tells us that we should not bill ourselves as feminists when teaching judges and lawyers about women's lives and concerns, but teach proper attention to women's concerns as a natural part of liberal justice.[8] Mary Becker, Professor of Law at the University of Chicago Law School, describes beautifully the way in which concepts of equality and nonsubordination, deeply embedded in the best American liberal tradition, proved amazingly flexible and capacious in the hands of the brilliant theo-

7. Judith S. Kaye, *Is the Law Male?*, 69 CHI.-KENT L. REV. 301, 301 (1993) (emphasis omitted).

8. Lynn H. Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397, 410-11 (1993).

rists—Catharine MacKinnon, Robin West, Carol Gilligan, Peggy Radin—who have engendered theories of legitimate female claims.[9] Lynn Hecht Schafran read those theories and found she "had been speaking feminist theory" all along.[10]

Leslie Bender, Professor of Law, Syracuse University College of Law, and her student Perette Lawrence, trace the structure of *Doe v. Linder Construction Company*,[11] a decision refusing to find a tort when a landowner's negligent act resulted in a householder's rape.[12] With her usual painstaking care, Bender shows how traditional concepts of liberal justice—negligence, foreseeability, etc.—are ample to provide women with bodily security, which is the foundation of the liberal state. All the judges needed to do was to see the foreseeability of gender violence in the lives of women—as the great liberal theorists Thomas Hobbes and John Locke foresaw the religious violence in the lives of men and produced liberalism in an effort to cabin the killing.

Dorothy Roberts, Associate Professor, Rutgers University School of Law-Newark, cautions us that theories that seek to reclassify some rapes as violations of female sexual autonomy, like all other efforts to encompass women within liberalism, will require relentless scrutiny of our unexamined assumptions of who is entitled to autonomy, with special attention to race and poverty.[13] So sexual assault on a passed-out black woman in a fraternity house[14] carries vastly different meaning in the real American justice system than unconsented knee surgery on an anesthetized white athlete does.[15] Roberts makes the hardest criticism of feminism's liberalism, because she reminds us that all sexual exchanges take place against a background of a medieval hierarchy of race and gender that makes any liberal consent standard very fragile.[16] Yet she does not give up on the project. After all, Rob-

9. Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993).

10. Schafran, *supra* note 8, at 399.

11. Leslie Bender & Perette Lawrence, *Is the Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

12. Justice Martha Craig Daughtrey of the Tennessee Supreme Court participated in the discussion of *Doe*, from which she dissented, at the program. On November 30, 1993, Justice Daughtrey was confirmed as a judge of the United States Court of Appeals for the Sixth Circuit. Is the law male? Not always.

13. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993).

14. *Id.* at 368.

15. *Id.* at 384-86.

16. *Id.* at 374-81.

erts' touchstone—freedom from subordination[17]—was one of the critical issues of original liberalism.[18]

Freedom from inappropriate particularism was also a critical issue in the transition from medieval to modern liberal justice.[19] As most lawyers learned at some point in their legal education, juries went from being people who saw and had an opinion of the event to their polar opposite—people who had no opinion about the matter.[20] Thus New York University Professor Sylvia Law and matrimonial lawyer Patricia Hennessey produce the news that strict, objective and general standards for child custody at divorce actually help women more than relational, contextual standards do.[21] This is so, because judges are often so biased and often unconsciously biased against the value of female lives. Containing the judges' static and hierarchical world view with traditional liberal rule of law standards is often women's only hope for justice.

The problem is worse, of course, when the so-called standards are themselves manifestations of the preference for male norms. Then liberal concepts of fixed standards simply enshrine in the law medieval orthodoxy about how people act. New York University Professor Sarah Burns tells us of how standards for credibility of witnesses incorporate a male norm of contemporaneity and consistency and of her efforts to use experts to explain the deviance of female victims of sexual abuse from this orthodox standard of where truth lies.[22] Yet Burns's work, addressing some of the most difficult of problems before the legal system, still works well within the liberal tradition of occurrence witnesses and objective standards for truth. Credibility still matters; only its manifestations must be changed to accommodate women's experiences.

This Symposium then is living refutation of the Defenders' effort to banish from the liberal tradition those who would seek to enhance and protect women's lives. What is revealed again and again is not the failure of institutions of tort, civil rights, and rules of evidence, but the curious survival into the liberal regime of medieval holdovers: orthodoxies about whose work has value in custody fights, hierarchies

17. *Id.* at 387.
18. DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 39-46 (1989).
19. *Id.* at 171.
20. *Id.* at 111-47.
21. Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 354-58 (1993).
22. Sarah E. Burns, *Is the Law Male?: The Role of Experts*, 69 CHI.-KENT L. REV. 389 (1993).

of race and gender in rape cases, static visions of a bucolic world where rape is endemic. As I have written elsewhere, I do not believe that liberalism, particularly in its late twentieth century rigid insistence on individual rights as the solution to all social problems, can answer all the questions of a complex and dynamic legal order.[23] But if liberalism were drunk neat, rather than perverted into a cover story for an orthodox, hierarchical and static social order, it would certainly go a long way.

This is true in every area of the law our participants have addressed. This is also true about the subject of my contribution to the Symposium: legal education. Many law schools, especially the elite private law schools, which pride themselves on their fidelity to liberal merit-based individualism, are in fact medieval institutions. Protected by huge endowments from both the purse of the market[24] and the sword of the polity, they exist remote from accountability to modern life. No existing structure of accreditation dares to touch their institutional behavior.

Where the checks and balances of liberalism are weak, medieval practices thrive. Thus, in the Socratic pedagogical method that is uniquely characteristic of legal teaching, liberal concepts of free expression are often used to mask a medieval orthodoxy about what counts as knowledge. Science, surveys, facts from opinions count. Emotions, stories, facts left out of legal opinions do not. Economic theories count; feminist theories do not.[25] Sometimes the teachers call on and reward with praise opinions that emulate their beliefs. Worst of all, students themselves are turned, consciously or not into the enforcers of the orthodox. As numerous reports reflect, student obscenity and mockery construct in the classroom the static social hierarchy of the archaic world. Brandishing a medieval privilege from public power—academic freedom from the state—law school can enshrine a

23. Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 STAN. L. REV. 1905 (1993) [hereinafter Hirshman, *Nobody in Here But Us Chickens*]; Linda R. Hirshman, *The Book of "A,"* 70 TEX. L. REV. 971 (1992); Linda R. Hirshman, *The Rape of the Locke: Race, Gender, and the Loss of Liberal Virtue*, 44 STAN. L. REV. 1133 (1992); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990) (reviewing WILLIAM A. GALSTON, LIBERAL PURPOSE: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991) and THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991)).

24. Discussion, 45 STAN. L. REV. 1671, 1689-90 (1993); Hirshman, *Nobody in Here But Us Chickens*, *supra* note 23, at 1934.

25. Years of teaching memories on file in brain of author.

private order of male dominance that is truly medieval in its hierarchy.[26]

On the faculty level, studies of the doctrine of a particular kind of legal order is often the knowledge orthodoxy,[27] with only limited exception for subjects, like economics or empirical research, that are considered "scientific" or preservative of the social status quo. The orthodoxy of knowledge is enforced by appointments procedures. Unlike many other disciplines, law school jobs are not posted or described. Rather, existing faculty propose people they know. No written criteria for performance exist. Such oral criteria as exist are perpetuated without any proof of job-relatedness. Appointment is subject everywhere to the black ball of a small number of votes, and voting is often secret.[28]

The legal profession is almost one quarter female; law classes about half female. The faculty at many prestigious law schools in the American academy, Harvard and Yale, the University of Chicago and Northwestern, are around ninety percent white and male.[29] Why not? What would be the composition of the work force in the Birmingham, Alabama, steel mills if any four or five workers on the shop floor could black ball any one who applied to be a steelworker?[30] How many anchor women would be on TV if there were no ratings and no FCC? What race or gender would the average Chicago cop be if the openings were never posted and the job test were who knows the alderman with the most clout?[31]

26. Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or The Case of the Disappearing Women*, 61 TEMPLE L. REV. 799 (1988); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Symposium, *The Voices of Women: A Symposium on Women in Legal Education*, 77 IOWA L. REV. 1 (1991); Carl W. Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143 (1990); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

27. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

28. Chris Black, *Harvard Law Sees Setbacks in Bid to Diversify its Faculty*, BOSTON GLOBE, Mar. 18, 1993, at 44.

29. In 1992-1993, Harvard academic faculty (excluding clinic, writing and emeritus faculty) was about 89% male; Yale the same; Chicago 87% male, Northwestern a stunning 90% male. AMERICAN ASSOCIATION OF LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 1992-93, at 52-53, 108-09, 36, 75-76 (1992).

30. *See, e.g.*, United States v. H. K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968).

31. Some students and administrators at Chicago-Kent tried to bring some scientific, objective data gathering to law school appointments—a truly liberal undertaking. Just a little of their incredibly rich research into faculty scholarly productivity is given below. It shows that there are 33 women among the top 151 most prolific scholars; any one of them would raise the average productivity at Harvard or Yale or Chicago or Northwestern by a lot. I believe that only four of the top 33 women worked at these four schools at the conclusion of the survey in 1993 (Harvard employed two of the top 33 producing females, Yale and Chicago one each, and Northwestern none).

Besides the impact on the lives of the individual women scholars and teachers, the orthodoxy, hierarchy and stasis of these schools of law mean that the true harvest of the liberalism latent in the law will be retarded until at least another whole generation of women have

THE MOST PROLIFIC WOMEN FACULTY PUBLISHERS IN THE MOST-CITED LAW REVIEWS
(Volumes beginning in 1990, 1991, and 1992)

Overall Rank	Scholar	School
12	Wendy Gordon	Rutgers-Newark (now at Boston University)
30	Robin West	Georgetown, Maryland
36	Linda Hirshman	Chicago-Kent
41	Carol Rose	Yale
42	Martha Nussbaum	Brown University (Classics)
43	Judith Resnik	Southern California
57	Kathleen Sullivan	Harvard
58	Lea Brilmayer	NYU, Yale
62	Martha Minow	Harvard
64	Ruth Colker	Tulane
65	Suzanna Sherry	Minnesota
76	Heidi Hurd	Pennsylvania
77	Lani Guinier	Pennsylvania
84	Anne-Marie Burley	Chicago
98	Joan Williams	American
102	Elizabeth Thornburg	Southern Methodist
106	Naomi Cahn	Georgetown (now George Washington)
106	Barbara Woodhouse	Pennsylvania
111	Susan Estrich	Southern California
115	Ann Althouse	Wisconsin
116	Mary Jo Frug	New England (now deceased)
119	Laura Underkuffler	Duke
124	Patricia Wald	D.C. Court of Appeals
129	Pamela Karlan	Virginia
131	Nadine Strossen	New York L.S.
134	Frances Ansley	Tennessee
140	Cynthia Estlund	Texas
141	Vicki Been	NYU
144	Janet Alexander	Stanford
144	Lisa Bernstein	Boston University
144	Martha Mahoney	Miami
150	Marion Crain	Toledo, West Virginia
150	Elizabeth Scott	Virginia

This preliminary data was provided by Daniel Seltzer, a student, from his forthcoming study of faculty productivity. The ranks are based on the average number of publications (of 10 pages or more) published in the three volumes beginning in 1990, 1991, and 1992 in four categories: (1) the ten most-cited law reviews (excluding the home review); (2) the 10 most-cited law reviews (including the home review); (3) the twenty most-cited reviews (excluding the home review); and (4) the twenty most-cited reviews (including the home review). Ties are resolved by the average number of pages over the same four categories. The top 10 reviews are determined by combinations of citation counts in *Shepard's* and the *Social Science Citation Index*. The top 10 reviews are California, Chicago, Columbia, Harvard, Michigan, Pennsylvania, Stanford, Texas, Virginia, and Yale. The next ten reviews are Cornell, Duke, Georgetown, Harvard Civil Rights-Civil Liberties Law Review, Journal of Legal Studies, NYU, Northwestern, Southern California, UCLA, and Vanderbilt. Seltzer plans to add book publishing to the final published counts of the most prolific law faculties and individuals.

passed through their doors. As I have said before, lawyers are the ruling class of American liberal democracy.[32] Who teaches the prospective family court judges that only male lifestyles have value?[33] Who teaches state supreme court justices that rape is unforeseeable? Or, worse, who teaches foreseeability without a mention of rape thus concealing both rape and the failure to teach rape?

Putting together the rich and varied body of work of which this Symposium is the tiniest glimpse, I found myself wondering a related question: is the bar exam male? Feminist legal theory has, against all odds just described, and largely through the agency of a tiny handful of women scholars, mostly not at elite law schools, and lawyers and judges, changed the American social landscape through law. Otherwise, *The Defender* would just be enjoying the static social order, not trying to defend it. If all other oversight agencies of legal education have failed to bring many law schools into the modern era, including feminist jurisprudence on the bar examination might be a salutary prod. I know of not a single state where the elementary concepts of sexual discrimination and harassment and the foreseeability of rape and the enforcement of surrogacy contracts, for example, are part of the bar examination.

Yet here we are. The Chief Justice of the highest court of New York, the newest appointee to the Sixth Circuit Court of Appeals, women from popular and elite law schools alike, rethinking every aspect of the legal structure from agency to zygotes. In the words of Justice Judith Kaye, there is a difference. Vive la difference.

32. *See* Hirshman, *Nobody in Here But Us Chickens*, *supra* note 23.
33. Law & Hennessey, *supra* note 22.