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INTRODUCTION: MAKING HISTORY

FELICE BATLAN*

When I first entered NYU's doctoral program in history more than a decade ago, I did so hoping to study women's legal history. I feared, however, that such a field did not exist, and I did not know where to look for it. Certainly no courses were taught in it, and few scholars identified themselves as doing such work. This paucity surprised me as the fields of feminist legal theory, gender and women's history, and legal history were flourishing. Yet mainstream legal historians often focused on decisions of high courts, elite legal academics, and elite lawyers. By custom and often law, women had long been excluded from such positions. Thus, women's historical exclusion replicated itself in the production of legal history and the topics about which legal historians traditionally wrote.

Change, however, was occurring and a previous generation of scholars had begun laying a rich foundation. As early as 1986, Norma Basch in a review essay mapped this early historiography and optimistically looked to the future while recognizing that it was unlikely that anyone working in the field could agree "on what women's legal history is or ought to be."¹ In the last decade or so, scholars have produced work that is consciously identified as women's legal history or feminist legal history and which together knit themselves into a field that stands at the intersection of women's history and legal history. Women's legal history is intended to act as an anecdote to legal history narratives, which in the past have often ignored women, assumed a male universal subject, accepted that the law's treatment of women as so exceptional that it stood isolated from the "real" trajectory of legal history, or believed that women were so subjugated that they did not

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1. Norma Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 *SIGNS* 97, 99 (1986).

function as legal actors.² As I have said elsewhere, at its best women's legal history rethinks and revises the dominant paradigms of legal history and how law produced and reflected cultural and social norms. Women's legal history is not just the writing of women into the history of law. Rather it produces new histories and innovative modes of how we imagine, characterize, and locate law, rights, citizenship, the family, and the state. It thus challenges some traditional meta-narratives of law while producing others.³

Although scholars working on topics involving women's legal history often presented papers at more mainstream conferences of legal historians, legal scholars, and historians, such presentations and panels were often episodic and did not provide a space for extended discussion. This changed in an exciting way that was full of possibilities in 2008 when the University of Akron Law School held the first women's legal history conference. The conference was important for a number of reasons. It formally and visibly announced that there was such a field as women's legal history, and it legitimated that this field could be, at least in part, situated within a law school environment. In other words, it functioned as a cultural and symbolic marker. The publication of the symposium in the *Akron Law Review* further situated the field as part of legal scholarship and made the participants' writings available to a wide-audience.⁴ Finally, emerging from the conference was the first anthology of women's history, *Feminist Legal History*.⁵ The anthology in part was intended to make women's legal history more easily taught to law students, undergraduates, and graduate students. Yet the title *Feminist Legal History* sparked some controversy as well as excitement. What did it mean? Did it situate the authors as feminist? Did it indicate that the historical actors about which the authors wrote were feminists? Did it claim that the very project of writing women's legal history was part of a larger feminist agenda? At a panel on women's legal history at the 2011 Berkshire Conference of Women's History, some historians were particularly excited that that feminist legal history directly spoke to the present and specifically embraced the idea of creating a useable past. As historian Joan Scott writes about feminist history, the production of knowledge about the past is "a criti-

2. Felice Batlan, *The State of Women's Legal History*, in BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY (Sally Hadden & Alfred Brophy eds., forthcoming 2013).

3. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823 (2005).

4. Tracy A. Thomas, 41 AKRON L. REV. 695 (2008).

5. FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND THE LAW (Tracy A. Thomas & Tracey Jean Boisseau eds., NYU Press 2011).

cal operation that uses the past to disrupt the certainties of the present and so opens the way to imagining a different future.”⁶ In this sense, the articles here are part of feminist legal history, although many of them speak about historical actors who certainly were not feminists.

Immediately following Akron, participants in and organizers of that conference began thinking about staging a second conference. Thanks to the IIT Chicago-Kent Institute for Law and the Humanities and the *Chicago-Kent Law Review*, this second conference took place at the IIT Chicago-Kent College of Law in October 2011. I was the organizer of the conference, and a number of issues were important to me. All of the papers from the Akron conference and the essays in *Feminist Legal History* focused on U.S. law and history. This is entirely understandable as law is so closely related to the sovereign state and women’s legal history remains a young field with so much local content still unexplored. The larger trend in history, however, has been to move away from the individual nation state and explore international and transnational trends, currents, and ideas.⁷ Thus as a start, I hoped to put scholars working in different countries and legal systems in dialogue with one another to begin to explore how we can write a transnational women’s legal history. I was also guided by the idea that panelists who presented papers at the Akron conference should not present articles at the Chicago-Kent conference. I wanted to ensure that these conferences could produce a continual stream of different voices, new works, diverse participants, and fresh conversations while simultaneously being intergenerational and putting scholars new to the field in conversation with those whose work has been foundational to the field.

When the call for conference papers went out, I was not confident that it would elicit many responses. I was shocked when I received proposals from dozens of scholars from around the world. It immediately became clear to me that our budget and time allocated for the conference would be an insurmountable barrier in making this a truly international conference. Yet our conference was a beginning and demonstrated that scholars on every continent are doing work on excavating, constructing, narrating, and re-narrating the multiple and often conflicted ways in which women have been legal actors across

6. JOAN WALLACH SCOTT, *THE FANTASY OF FEMINIST HISTORY* 34 (2011).

7. See, e.g., THOMAS BENDER, *THE LA PIETRA REPORT: A REPORT TO THE PROFESSION* 50 (Organization of American Historians 2000), available at <http://www.oah.org/activities/lapietra/final.html>.

both time and national boundaries. It demonstrates that we still need such a truly international conference and as Tracey Jean Boisseau elaborates in her foreword, we must continue puzzling out the transnational themes of women's legal history.⁸

All of the articles in this volume confirmed some of the fundamental premises of women's legal history. First, throughout history women have been legal actors. Even in the most oppressive periods, women were seldom just passive objects of the law but rather in constricted space attempted to manipulate law and take advantage of legal processes. Thus, Lloyd Bonfield, analyzing the English Peter King manuscript reports of the 1720s–1730s, finds that women married and unmarried were litigants both alone and with their husbands on wide-ranging legal matters including, property, commercial transactions, estates, defamation, and marriage. As he writes, “[women] were there.”⁹ Yet moving beyond finding the presence of women, which is of course a crucial and necessary first step, women's individual agency often played out in complicated ways benefiting the individual while confirming larger structures of hierarchy and domination. Women's legal history hones in on these tensions and contradictions, emphasizing how law and legal processes allowed some women to be agents while also constricting the agency of other women.¹⁰

A second fundamental tenet of women's legal history understands that law is not nor has it ever been neutral, self-contained, or apolitical. Law constitutes a discourse and acts on a symbolic level, but it also has real and material power. Law can function as a means of social control used to enforce gender norms and contributed to and shaped patriarchy and women's oppression. Simultaneously, law could empower some women and act as a privileged site of change. One of the fascinating elements that Susan Hinley's article hones in upon is how much the Pre-World War I international women's movement believed in the power of law to affect real on-the-ground change.¹¹

These papers also illustrate the third tenet of women's legal history in that they historicize the role of women as legal actors and depart from any Whiggish notion of the continual progressive march of wom-

8. Tracey Jean Boisseau, *Foreword* to 87 CHI.-KENT L. REV. 331 (2012).

9. Lloyd Bonfield, *Finding Women in Early Modern English Courts: Evidence from Peter King's Manuscript Reports* 87 CHI.-KENT L. REV. 371, 390 (2012).

10. Batlan, *The State of Women's Legal History*, in BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY, *supra* note 2.

11. Susan Hinley, *The Global 'Parliament of Mothers': History, the Revolutionary Tradition, and International Law in the Pre-War Women's Movement*, 87 CHI.-KENT L. REV. 439 (2012).

en gaining legal rights or a teleological history of feminism itself. For example, Carla Spivack argues that Lady Anne Clifford (1590–1676), who spent much of her life litigating for the estate left by her father to her brothers, was not an example of early feminism or an attempt at Clifford claiming gender equality. She cautions against using her as an example of “proto-feminism,” arguing instead that her legal identity drew from earlier ideas of feudal property rights which saw rank and social hierarchy as at times more important than sex. Yet during Clifford’s lifetime, such claims to property were becoming increasingly unavailable to women.¹² Likewise, Adetoun Ilumoka argues that Nigerian customary law in the nineteenth century may have allowed for more protection of women’s property rights to land than do current constructions of Nigerian law.¹³

Yet even as we write women’s legal history, the enterprise to some may feel old fashioned, as decades of women scholars have deconstructed the very category “woman” as too hegemonic and as an organizing category that assumes a unity of women’s experience which elides race, class, nationality, sexuality, and a host of other things. Yet as Susan Hinely writes in her article, historically the category “woman” did have meaning and was indispensable to a “historical identity” that allowed for mobilization.¹⁴ Likewise, in a myriad of ways too numerous to recount here, the law did and does recognize the category “woman” and distributed rights and obligations based upon it. “Legal recognition is a real and circular process. It recognizes the things that correspond to the definition it constructs.”¹⁵ Some of the most sophisticated legal histories of women simultaneously question the category “woman” while recognizing its tremendous, materially real, but changing importance, meanings, and constructions.

Although the symposium articles span space and time, significant methodological similarities exist. Most vividly the authors expand the sites where they look for law and draw upon sources that we do not always think of as legal sources. If we look only at high court legal decisions and luminous judges, jurists, and legislators, it is often too easy to say that women played a minimal role in the legal arena. Rather the

12. Carla Spivack, *Law, Land, Identity: The Case of Lady Anne Clifford*, 87 CHI.-KENT L. REV. 393 (2012).

13. Adetoun Ilumoka, *Globalization and the Re-Establishment of Women’s Land Rights in Nigeria: The Role of Legal History*, 87 CHI.-KENT L. REV. 423 (2012).

14. Hinely, *supra* note 11, at 443.

15. Parveen Adams & Jeffrey Minson, *The ‘Subject’ of Feminism*, in *THE WOMAN IN QUESTION: M/F 99* (Parveen Adams and Elizabeth Cowie eds, Cambridge 1990).

universe of what we consider legal sites must be creatively expanded.¹⁶ When this occurs, not only do we find women as legal actors but it also presents a richer, more complicated and contested understanding of law.¹⁷ Thus, Carla Spivack examines the diary and writings of Lady Anne Clifford. In addition to these written sources, Spivack also “reads” Clifford’s building projects and the art that she commissioned for her estate as ways in which Clifford created and visibly enshrined her contested legal identity as a fully vested property owner. In a very different era, Kara Swanson sees the gynecologist’s office and medical journals as sites of legal improvisation as doctors and patients discussed and engaged in artificial insemination. For both Barbara Babcock and Mary Jane Mossman, Chicago’s 1893 World’s fair, which has long been of interest to historians of popular culture, gender and women, and those exploring the making of race and whiteness, was also a site that provided a world stage for the first generation of women lawyers.¹⁸ It is striking that so many of these articles do not center on court decisions as their primal focal point nor do they use the opinions of courts as privileged texts. Rather in their sources and in their subject, each of the articles in this volume are filled with creativity, re-imaginings, and re-narrations.

Another commonality that was so evident at the conference was the role of passion and engagement and how they functioned on multiple levels.¹⁹ Each of the presenters was clearly passionate about their subjects and had spent years finding their sources and weaving their texts. There was a palpable sense of excitement as new stories were told and connection was made between our historical actors and topics. But the actors whom we write about were also passionate and at

16. There is a great irony here. James Willard Hurst, often considered the grandfather of legal history, made this point early on pointing legal history towards social history. Yet Hurst entirely ignored women in his work. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (University of Wisconsin Press 1956). On this point regarding Hurst and the absence of women see Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 *LAW & HISTORY REV.* 196 (2000).

17. Felice Batlan, *Florence Kelley and the Battle Against Laissez-Faire Constitutionalism* (Social Science Research Network, working paper, 2010), available at <http://ssrn.com/abstract=1721725>.

18. See GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917* (University of Chicago Press 1995). On other world’s fairs and gender see TRACEY JEAN BOISSEAU & ABIGAIL M. MARKWYN, *GENDERING THE FAIR: HISTORIES OF WOMEN AND GENDER AT THE WORLD’S FAIRS* (University of Illinois Press 2010).

19. In Barbara Young Welke’s talk at the 2012 American History Association, “Telling Stories: A Meditation on Love, Loss, History and Who We Are,” Welke called upon historians to be deeply and emotionally engaged with their work and to reveal their own and their historical actor’s periods of grief and despair rather than searching for historical objectivity. Available at <http://aha.confex.com/aha/2012/webprogram/Paper10299.html>.

times difficult women. There are murderous French women turning to poisons to kill husbands and lovers, freedom fighters engaged in attempted assassinations, infertile women hoping to conceive, women who lose family land, women who spent their lives involved in litigation against family members, women who passionately wanted to become lawyers and sought careers dedicated to legal reform, and women devoted to activism and social justice who often saw their hopes and dreams dashed. The authors write of such women vividly, passionately, and with compassion.

Although some of the articles focus on everyday events, two very different articles explore the relationship between gender, crime, violence, and the state honing in upon dramatic events. Benedetta Faedi Duramy examines three French women of different classes implicated in a poisoning scandal involving the court of Louis XIV. She uses these events to explore discourses involving the relationship between women, black magic, and murder, concluding that women used poison, closely associated with the black arts, to murder abusive husbands and to seek financial independence at a time when divorce was all but impossible.²⁰ These poisoning episodes, however, were not just private affairs, but rather the state interpreted them as a wide-spread threat to the well-being of the king and the body politic. Duramy creatively uses the stories of the accused, often given under torture, to analyze connections between the black arts, class, gender, law, religion and crime and refuses simply to dismiss the idea of magic and potions as superstitions and the faulty belief system of the Ancien Régime. At times, the reader is disoriented, unsure of what is “real” or imaginary, truth or make believe, causing us to reflect upon our own tenuous grasp of current-day reality.

In a very different context, Margaret Power examines a number of women in the Puerto Rican Nationalist Party in the 1950s who, in armed rebellion, fought for the independence of Puerto Rico against the U.S. and were imprisoned for lengthy sentences.²¹ One of these women, Lolita Lebron, actually led an attack on the U.S. Capital building in D.C. Power poses the question of how the U.S. government responded to these women as “anti-colonial fighters and as women” at the height of the Cold War and intense gender conservatism. Like

20. Benedetta Faedi Duramy, *Woman and Poisons in 17th Century France*, 87 CHI.-KENT L. REV. 347 (2012).

21. Margaret Power, *Puerto Rican Women Nationalists vs. U.S. Colonialism: An Exploration of Their Conditions and Struggles in Jail and Court*, 87 CHI.-KENT L. REV. 463 (2012).

Duramy, *Power* explores the question of the use of torture and explains the conditions of confinement as these women experienced them. Power situates her article in the context of imperialism, anti-colonial struggle, and the Cold War. She also connects the past and the present as the issue of women freedom fighters (terrorists in the eyes of the U.S. government) are once again in newspaper headlines. Power further creates a story of continuities and connections between the past and the present as she conducts oral histories of these women, still devoted to Puerto Rican independence.

Like Power, other authors as well situate issues of gender and law within a transnational environment deeply shaped by western imperialism. Moreover, they consciously link the past and the present, the local and the global. Adetoun Ilumoka examines the dispossession of women from land in Nigeria justified by the assertion of "customary law." Ilumoka restores historicity to customary law and demonstrates that it was never static but shaped by colonialism, migration, shifting status arrangements, changing concepts of the family, and labor arrangements. Thus, unlike its imagined past of continuities, its history is one of ruptures. Ilumoka begins to explore how in the nineteenth century customary law in specific contexts recognized women's rights to family land, and multiple women within individual contexts actively fought for such rights. As Ilumoka argues, normatively grounding customary law within specific historical contexts, including a long history of a globalized political economy, creates a multiplicity of strategies that can currently be used by lawyers arguing for women's property rights.²²

Susan Hinely explores the transnational women's movement in the decade before World War I and argues that this movement's agenda, which included anti-colonialism, went far beyond calls for women's suffrage. Hinely re-narrates the movement as a broad based radical international human rights movement whose heroines belong next to male leaders such as Ghandi, King, and Mandela rather than tucked away and marginalized as women's suffrage leaders. Instead of the vision of first wave feminists as privileged white women, Hinely argues that the international women's movement was filled with radical women from around the world who spoke out and organized against capitalism, colonialism, the nation-state, and patriarchy. Within a wide range of women's global networks, which again connected the local

22. Ilumoka, *supra* note 13, at 436-37.

and the global, women became particularly involved in advocating for and creating international law.

A host of articles explore women lawyers and their relationship to the legal profession and first wave feminism. They further focus on how women lawyers fashioned their self-identities, how they were forced to improvise and innovate careers, and the important transnational dimensions of their lives. Mary Jane Mossman examines the role of women lawyers at the Congress of Jurisprudence and Law Reform held at the 1893 Chicago World's Fair and focuses upon the four women (two from the United States, one from the U.K., and one from India) who presented papers.²³ She analyzes the connection between these lawyers and the larger women's rights movement, exposing the tensions between gender, professional ideologies, and women lawyer's construction of their self-identities. Mossman concludes that at least some of these women consciously and strategically chose not to focus their conference papers on issues involving women's equality, understanding that the unstated condition to their speaking was "their conformity to emerging norms of legal professionalism."²⁴ Barbara Babcock discusses Clara Foltz's presentation at the same congress. There, Foltz articulated the need and called for the creation of a public defender's office. Babcock argues that Foltz's strategic choices were brilliant as she used sophisticated legal discourse that her audience of elite legal scholars and lawyers would appreciate. She thus publicized the concept of a public defender while demonstrating her legal acumen and hoping to advance her own difficult career. Indeed, Foltz would become the first public defender in Los Angeles. At a time when it was extremely difficult for women lawyers to earn a living, Foltz invented her own career. Mossman and Babcock are in a generative conversation with each other seeking to puzzle out the relationship between the first generation of women lawyers to the women's rights movement and the often constrained choices that they had to make.

Gwen Jordan examines the career of Edith Sampson, an African American attorney and patriot, often condemned for her State Department sponsored tours which touted the progress of U.S. race relationships during the Cold War.²⁵ Jordan argues that Sampson was not naïve regarding American racism but rather walked a tightrope recog-

23. Mary Jane Mossman, *Women Lawyers and Women's Equality: Reflections on Women Lawyers at the 1893 World's Columbian Exposition in Chicago*, 87 CHI.-KENT L. REV. 503 (2012).

24. *Id.* at 518.

25. Gwen Jordan, *Engendering the History of Race and International Relations: The Career of Edith Sampson, 1927-1978*, 87 CHI.-KENT L. REV. 521 (2012).

nizing and condemning pervasive racism while also acknowledging significant racial change and the promise of democracy. Jordan positions Sampson as an African American woman whose intertwined gender and race made her particularly concerned with the rights of other women of color internationally as well as locally. She used her position not only to reach out to women in newly de-colonized African countries but used such women's concerns to further pressure the U.S. to institute domestic racial reforms. Jordan implicitly asks us to view Sampson in the same light as Thurgood Marshall, whose international work, especially his work in Africa, has been duly celebrated by historians.²⁶

Karen Tani helps us re-imagine the New Deal and its legal heroes. Legal scholars have long explored a host of celebrated male lawyers who created the new administrative state, and until now we have understood these lawyers to be all male. ²⁷ Tani makes the exciting discovery that hundreds of women lawyers labored in New Deal agencies and participated in creating the administrative state. Moreover, some of these women stayed long after the heroes of the New Deal either left federal government or were appointed to the bench. Significantly, Tani suggests that such lawyers' presence should be of importance to legal historians for they point to the everydayness of law and how agencies functioned away from the limelight and those whom we deem (and who deemed themselves) legal luminaries. Focusing upon such lawyers, some who headed regional offices, also allows our focus to shift from Washington, D.C. to a more local level where federal programs were enacted. Yet Tani's article also exhibits a slight discomfort as she tries to fully articulate why her discovery should matter to legal historians. In other words, why is it historically important that these women existed? She thus subtly offers a challenge to all of us to more fully conceptualize how our narratives change more traditional stories of legal history.

Both Kara Swanson's and Mary Ziegler's articles discuss reproductive rights and add complexity and nuance to our understandings of this crucial and central topic. Swanson posits that in the post-World War II period, the most controversial issue regarding reproduction was not abortion but rather artificial insemination.²⁸ From the turn of

26. See, e.g., MARY DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (Oxford University Press 2008).

27. Karen M. Tani, *Portia's Deal*, 87 CHI.-KENT L. REV. 549 (2012).

28. Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591 (2012).

the century on, doctors, lawyers, and couples functioned in a legal gap in which there was a host of questions, including the very legality of the procedure itself. The article traces the ways in which medical, legal, and popular discourses framed the issue and how such answers reverberated in the ways in which doctors performed the procedure, which clients had access to it, and eventually how legislators created laws governing it. She thus historicizes this reproductive technology that some viewed as subversive for it detached biology and fatherhood while others viewed it as extending traditional conceptions of family and the importance of maternity. As Swanson writes, who controlled the use of such technologies—doctors, couples, legislatures, or courts—and what cultural, political, and legal significance such actors had would replicate and help construct the debate over abortion.

Mary Ziegler intervenes in the significant on-going debate among historians regarding whether Supreme Court decisions create public backlash and political polarization. Connecting high legal culture with grass roots activism, she argues that current day scholars who point to the polarizing effect of *Roe v. Wade*²⁹ miss that in the aftermath of the case a moderate feminist but anti-abortion position grew. Such activists were proponents of state sponsored child care, welfare, birth control, and anti-discrimination laws, attempting to eliminate the structural and economic need for women to have abortions. Yet these activists could not maintain this moderate position in the face of a growing conservative movement that explicitly opposed feminism. Thus, Ziegler historicizes the debate surrounding abortion and *Roe v. Wade*, arguing that the case itself did not produce immediate backlash and later backlash was part of a much larger and complex conservative movement.³⁰

The collection of articles here of course only represents a small sampling of the work that is being produced in women's legal history. Recently one legal historian wrote that scholars working on women's legal history may be the "new insiders."³¹ Yet I am uncomfortable with this label for perhaps women's legal history most always stands at the margins and intersections of multiple disciplines. At its best, women's legal history seeks to eliminate an inside and an outside. Whether we

29. 410 U.S. 113 (1973).

30. Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates after Roe v. Wade, 1973–1980*, 87 CHI.-KENT L. REV. 571 (2012).

31. Felicia Kornblauh, *Feminist Legal History: The New Insiders?*, LEGAL HISTORY BLOG (Dec. 22, 2011, 3:10 PM), <http://legalhistoryblog.blogspot.com/2011/12/feminist-legal-history-new-insiders.html>.

are inside or outside, peripheral or central, my call is for us to reach out and to situate our work within a global, international, and transnational context. In doing so, we must connect the local and the global while continuing to give voice to the many individual historical actors, who have so long been invisible, but who literally made history.