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A Collective Collage: Women, the Structure of American Legal Education, and Histories Yet to Be Written

Judith Resnik

A COLLECTIVE COLLAGE: WOMEN, THE STRUCTURE OF AMERICAN LEGAL EDUCATION, AND HISTORIES YET TO BE WRITTEN

Judith Resnik*

WLE Chair—1989

We—members of the legal academy—need a collective archive to help us understand the construction of our canon and the mores of our workplace.[1] This point was brought home when, in June 2011, I participated in the Workshop on Women Rethinking Equality, convened by the Association of American Law Schools ("AALS"). Welcomed by a room full of women, many of whom had entered the academy in the last decade, it was plain that they had little knowledge about all the prior convenings that had brought women into focus and helped to authorize our participation in the legal academy.[2]

"Rethinking" equality in 2011 was an option only because "thinking" equality had become a familiar practice when, during the twentieth century, women and men of all colors entered law and pressed for profound reforms of its content. Given contemporary commitments to formal equality, remembering formal instantiations of inequality—de jure as well as de facto—may be difficult. Yet only a few decades ago, neither the legal academy nor the law it taught understood all persons as dignified and equal rightsholders. Law schools were then organizations exclusively run and populated by one segment of the population. The need to identify and document the histories of new entrants to law schools is evident. Also needed are ways to find a home and support for archiving materials tracing these activities and to undertake analyses to parse the

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* Arthur Liman Professor of Law, Yale Law School, Thanks are due to Nancy Levit and Linda Jellum for the invitation to participate, to wonderful junior colleagues, Edwina Clarke, Yale Law School 2013, and Ester Murdukhayeva, Yale Law School 2012, for fast research assistance, and to Denny Curtis, Nancy Gertner, Vicki Jackson, Linda Kerber, Kim Scheppele, and Reva Siegel. This essay is dedicated to Norman Redlich, who died in 2011, who served as the Dean of NYU School of Law from 1974 to 1988, and who was instrumental in gaining support from the AALS and the ABA for the 1990 conference, *Voices of Women*, just as more generally, he helped to welcome women into the legal professoriate.

[1] The beginning of such an archive is underway, as discussed by Lisa Pruitt in her essay, *The Good, the Bad, and the Ugly*, 80 UMKC L. REV 821, 826 (2012). Some of the Section's records from 1970 to 1999 are now archived at the Schlesinger Library, Radcliffe Institute, Harvard University. *See Records of the Association of American Law Schools, Section on Women in Legal Education, 1970-1999: A Finding Aid*, HARV. U. LIBR., http://oasis.lib.harvard.edu/oasis/deliver/~sch01278 (last visited June 7, 2012).

[2] Holding aside the annual meetings, I can account for three other national conferences convened by the AALS—in 1984 (Professional Development for Women in Law Teaching); in 1990 (Voices of Women, cosponsored by the ABA, with papers published in 71 IOWA L. REV. (1991)); and in 2003 (Taking Stock: Women of All Colors in Legal Education, also cosponsored by the ABA, with papers published in 53 J. LEG. EDUC. (2003)). Law schools hosted dozens of other events in which gender and the legal academy were central topics.

import of all the activities sketched through the publication of this chain of memories.

My commentary is one such contribution, prompted by the invitation of current leaders of the Section on Women in Legal Education ("WLE") of the AALS, and enriched by a flurry of emails from Chairs over the past decades who generously shared recollections and old newsletters. In this brief overview, I offer glimpses of the 1980s and 1990s when I first worked in, then chaired, and helped to coordinate various activities of the WLE.[3] My hope is that the accounts in this volume prompt reflections about how the legal academy looks different than it did in decades past, as well as about the continuities, and topics (new and old) that have come to or should currently occupy us.

"*Writing Our Own Rare Books*" is what Linda Kerber called her 2002 essay analyzing the pioneering class materials and casebooks of the late 1960s and 1970s that addressed a then new topic—women and the law.[4] The subject had come into being because of another novelty—a cohort of female law students in sufficient numbers to enlist law teachers to help them fashion new courses taking seriously the complexity of the interactions of law and gender.

By 1971, enough threads of activity existed to spark a meeting, called "Women and the Law," supported by the Carnegie Corporation and convened at Yale Law School. The materials for that conference included a "34-page mimeographed packet" entitled "Women and the Law: A Collection of Reading Lists."[5] Within three years, that packet was augmented by hefty syllabi and two thick casebooks—*Text, Cases, and Materials on Sex-Based Discrimination* (written by Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, and published in 1974 by West's Publishing Company) and *Sex Discrimination and the Law: Cases and Remedies* (written by Barbara Allen Babcock, Anne E. Freedman, Eleanor Norton, and Susan Deller Ross, and published in 1975 by Little, Brown).[6]

Classes and books represent one of the trajectories produced because women joined the legal academy as students, professors, and administrators. The WLE itself represents another innovation. In 1970, the AALS, comprised of law schools rather than individuals[7] and otherwise organized by subject matters (Contracts, Constitutional Law, and Property, for example), recognized its

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[3] I have also served as Chair of the Section on Civil Procedure (1991, 2003) and of the Section on Federal Courts (2002).

[4] Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J. L. & FEMINISM 429 (2002).

[5] The first monograph, *Women and the Law: The Unfinished Revolution* (1969), was published by Leo Kanowitz. Kerber, *supra* note 4, at 429. Likewise, the first Chair of the WLE was Dan Collins, a law professor at NYU School of Law. Both Kanowitz and Collins serve as reminders to appreciate the men as well as women who insisted on shaping ways for women to gain ground in the legal academy. Another was Jack Johnson, my first-year property professor at NYU who devoted class time to the Married Women's Property laws and to chattel slavery.

[6] Kerber, *supra* note 4, at 430-31.

[7] The Society of American Law Teachers ("SALT"), founded in 1972, is an organization that individuals, rather than entities, join.

obligation to facilitate a gender-coded space, a new "section" entitled Women in Legal Education.[8] That decision was mirrored across many academic disciplines in which, during the late 1960s and early 1970s, women's "committees," "task forces," "caucuses," and "sections" came into being,[9] as did the "Committee on the Status of Women in the Profession" of the American Association of University Professors (AAUP).[10] Time and again, these collectives pressed their host organizations to attend to discrimination against women and the challenges of understanding bodies of knowledge in which issues of gender had been sidelined. The underlying theme was that the long-standing absence of women in the professoriate was a problem *for* the academy and *for* the quality of education and research it produced.

The WLE aimed at a structural level to reframe institutional practices, both nationally and locally. What were the issues? The numbers of women employed in various capacities and the conditions of employment were of central concern,[11] as were questions about the substance of what was taught, the way the classes were conducted,[12] the categories of analyses in diverse bodies of law, the range of research questions unexplored, and gender bias in the courts, in the law, in the legal profession, and more generally.[13] Just as class materials and articles aimed to reconceptualize women's relationship to law and law's relationship to women, WLE aimed to reorganize structures within legal education that had

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[8] The AALS Section on Minorities was formed in 1973. Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161, 166 (1999); Andrew Wm. Haines, *The Ritual of the Minority Law Teachers Conference: The History and Analysis of the Totemic Gathering of the Shaman to Reconsecrate the Tribal Totem of Law School*, 10 ST. LOUIS U. PUB. L. REV. 393, 405 (1991). The Section on Sexual Orientation and Gender Identity Issues was founded in 1983, and its first title was the Section on "Gay and Lesbian Legal Issues." *See* Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscrimination Policies: A Survey of American Law Schools*, 2 LAW & SEXUALITY 131, 131-32 (1992).

[9] *See* Ruth M. Oltman, *Women in Professional Caucuses*, 15 AM. BEHAV. SCIENTIST 281, at Appendix I, 297-301 (1971). On her list of organizations, the earliest entities dated were the 1927 "Women's Service Committee" of the American Chemical Society and the 1921 Graduate Women in Science. *Id.* at 297, 300. The twenty-fifth anniversary of the Coordinating Committee on Women in the Historical Profession (CCWHP) produced a reflection that examined the complexity of understanding the kinds of effects that these professional groups have had on the discipline with which they are associated. *See* Berenice A. Carroll, *Scholarship and Action: CCWHP and the Movement(s)*, 6 J. WOMEN'S HIST. 79 (1994).

[10] Oltman, *supra* note 9, at 297. The AAUP *Committee* was founded in 1970. *Id.*

[11] During my year as Chair, the AALS convened a Special Committee on Tenure and the Tenuring Process, which was chaired by Herma Hill Kay. *See* AALS SECTION ON WOMEN IN LEGAL EDUCATION NEWSLETTER 3-4 (Fall 1989) [hereinafter WLE NEWSLETTER]. In addition, the AALS had a Special Committee on Child Care. *Id.* at 4. Another initiative was the Special Committee on Recruitment and Retention of Minority Law Teachers. *Id.* at 5. Other committees included Gender Bias in the Curriculum, Leave Policies, Harassment, and Reproductive Freedom.

[12] *See* Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

[13] *See* WLE NEWSLETTER 9 (Fall 1989).

marginalized women as educators, students, staff at all levels, and as rightsholders.

From the vantage point of 2011, some of the changes to which the WLE contributed are relatively easy to sketch. Today, many members of the legal academy enjoy faculties in which women are significant percentages of the professoriate.[14] Five decades ago, women were both rare and often at the margins. Yet, as Marina Angel and others remind us, while our aggregate numbers have grown, women's marginality has also remained and in some respects, been institutionalized through the restructuring of universities to rely increasingly on contract employees who are given fewer benefits than tenure track employees.[15]

I began in such ad hoc roles. I started teaching at NYU in 1976-1977 as what was then called an "instructor" (and would now be called a "fellow"); the following year, I became a "lecturer in law and supervising attorney" at Yale. I had the good fortune to shift into a tenure-track position when, in 1980, I joined USC's faculty. Another junior woman left, and I became one of two non-clinical female faculty members. Despite the vivid differences in height and hair color between the other female tenure-track professor (Margaret Jane Radin) and myself, we were regularly called by each other's names.

Yet, while conflated with another woman, I was warned not to be women-identified. When starting at USC, a colleague gave me what he understood to be kind advice—not to "teach in any areas associated with women's issues," such as family law or sex discrimination (or even trusts and estates), nor to be "too visible on women's issues."[16] Those were, my colleague assumed, "women's issues," encased in identifiable sets of legal questions. That essentialist approach has, however, long been superseded through deepening appreciation of the complexities of both gender identity and of law. Illustrations come from the many courses, casebooks, and journals (some naming "women" as the subject and others shifting to address "gender," "feminism," "sexuality," "LBGT") that have since been produced.[17]

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[14] A baseline of below 10% makes numbers such as 20% to 40% "significant." But in many law schools, women remain a minority of the tenured faculty. *See Legal Education Statistics from ABA-Approved Law Schools: Law School Staff by Gender and Ethnicity*, AMERICAN BAR ASSOCIATION (Apr. 13, 2010), http://www.americanbar.org/content/dam/aba/migrated/ legaled/statistics/charts/facultyinformationbygender.authcheckdam.pdf (reporting that, as of 2008-2009 in ABA-approved law schools, women constituted just under 30% of tenured faculty).

[15] *See generally* Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Marina Angel, *The Modern University and its Law School: Hierarchical, Bureaucratic Structures Replace Coarchical, Collegial Ones; Women Disappear from Tenure Track and Reemerge as Caregivers: Tenure Disappears or Becomes Unrecognizable*, 38 AKRON L. REV. 789 (2005); Deborah Jones Merritt & Barbara Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489 (2003).

[16] For additional discussion, see Judith Resnik, *Visible on "Women's Issues"*, 77 IOWA L. REV. 41 (1991).

[17] As of 2011, casebooks related to gender and sexuality include: HERMA HILL KAY & MARTHA S. WEST, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (6th ed., 2006); LIBBY S. ADLER,

Moreover, as a series of WLE programs made plain, "women's issues" ran across the first-year curriculum. The newsletters (and my files) from the 1980s and the early 1990s are dotted with descriptions of programs in which the Section on Women in Legal Education co-sponsored sessions with other sections, especially those focused on "first-year" topics. In 1992, WLE joined the Section on Civil Procedure to understand the role gender played in that class's analytics.[18] In 1990, a joint program of the Section on Real Property and WLE was entitled "Losing and Gaining Ground: Feminism and Property."[19] In 1989, WLE held a program called "The Influence of Feminist Theory and Gender Bias in Contracts."[20] But, as that year's newsletter noted, the program was not a jointly sponsored event. Rather, the Chair of the AALS Section on Contracts "declined to co-sponsor the program as he thought that 'the male bias of our society' had not had important consequences for contract law."[21]

WLE's focus was broader than the first-year curriculum and WLE's impact was wider than the annual meetings. Programs looked at tax and corporate law, and podiums were shared with the Sections on Employment

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LISA A. CROOMS, JUDITH G. GREENBERG, MARTHA L. MINOW & DOROTHY E. ROBERTS, WOMEN AND THE LAW (4th ed., Foundation Press, 2007); CATHARINE A. MACKINNON, SEX EQUALITY (2d ed., Foundation Press, 2007); ELIZABETH A. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE (2d ed., Foundation Press, 2007); NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW (3d ed., West, 2009); KATHERINE T. BARTLETT & DEBORAH L. RHODE, GENDER & LAW: THEORY, DOCTRINE, COMMENTARY (5th ed., Aspen, 2009); CYNTHIA GRANT BOWMAN, LAURA A. ROSENBURY, DEBORAH TUERKHEIMER & KIMBERLY A. YURACKO, FEMINIST JURISPRUDENCE, CASES AND MATERIALS (4th ed., West, 2010); WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW (3d ed., Foundation Press, 2011); WILLIAM RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACHTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW (4th ed., West, 2011). Older casebooks include BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (Carolina Academic Press, 1994 & Supps. 2000, 2004); SUSAN DELLER ROSS, ANN FREEDMAN, RHONDA COPELON, WENDY WEBSTER WILLIAMS, DEBORAH L. RHODE, BARBARA ALLEN BABCOCK & NADINE TAUB, SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY (2d ed., Aspen, 1996). In addition, in the 1970s and thereafter, students created many journals related to gender. A list of several can be found in Judith Resnik, *Ongoing Conversations About Women and Legal Education*, 53 J. LEGAL EDUC. 564, 567 n.13 (2003).

[18] Participants were Barbara Babcock (Stanford), Shirley Abrahamson (Chief Justice of Wisconsin), Linda Green (Wisconsin), Harold Hongju Koh (Yale), Elizabeth Schneider (Brooklyn), Georgene Vairo (Loyola-LA), and myself (then based at USC).

[19] Co-moderated by Gregory Alexander (Cornell) and myself (then USC), the panel included Mari Matsuda (University of Hawaii), Margaret Jane Radin (USC), Carol Rose (Yale), Joan Williams (American), Rob Williams (University of Arizona), and Constance Perin (a cultural anthropologist based in Cambridge, Mass.). WLE NEWSLETTER 2 (Spring 1990). The same year, the AALS Section on Poverty held a program on Women and Poverty at which Louise Trubek (Wisconsin), Mary Becker (University of Chicago), Nancy Erickson (who had taught at Ohio State and at New York Law School), and Sylvia Law (NYU) spoke. *Id.* at 3.

[20] Presentations were provided by Clare Dalton (Northeastern), Mary Becker (University of Chicago), Mary Joe Frug (New England), Christine Littleton (UCLA), Elizabeth Mensch (SUNY Buffalo), Marjorie Schultz (University of California, Berkeley), and Robin West (University of Maryland).

[21] WLE NEWSLETTER 1 (Winter 1988).

Discrimination Law and on Labor Relations and Employment Law. These intersections can also be found by looking at other sections' materials. For example, the Torts and Compensation Systems' AALS 1989 newsletter featured an essay, written by Jean Love and entitled "Bringing Gender Issues into the Torts Course."[22]

The national yearly meetings built on regional reading groups (the "Chicago Feminist Law Teachers," the "Boston Area Fem-Crits," the "Baltimore Washington, Virginia Women Law Teachers Group," the "Delaware Valley Law Women," the "Metropolitan Women Law Teachers Association," and others) as well as on groups organized by subject matter, all supported by energetic coordinators in many cities.[23] We helped to produce a CLE on Feminist Jurisprudence, and we supported and publicized conferences at many law schools, as well as the two national AALS-sponsored conferences on women in legal education, held in 1984 and 1991.[24] (A third, as noted, was convened in 2003, and the fourth in 2011.) Furthermore, by the late 1980s, one can also see the glimmerings of the transnational work of the more recent decades, as we identified "international correspondents"—female faculty outside the United States weaving connections across borders.

In short, I owe many debts to colleagues around the United States whom, through the WLE, I came to know and with whom I worked and thought about how law functioned and what teaching law meant. Thus, as I reflect back on my colleague's 1980 injunction—don't be visible on women's issues—I think about the ways in which he was right, as well as wrong. My almost all male colleagues then were *more* interested in my work on topics otherwise categorized (procedure, courts, federalism, detention) than in those named "women."

Indeed, in 2011, gender-coding continues to entail complex decisions. For example, when I label a course broadly, such as the title, "Dignity, Equality, Communities—Transnationally" (a class I co-teach with Reva Siegel), a diverse group of women and men choose to take it. When I have called a course "Gender—Locally, Globally" (which I have co-taught with Vicki Jackson), women overwhelmingly were the students who subscribed.

And yet (and of course), my failure to follow my colleague's prescription against being involved in "women's issues" has been fortunate. Through a focus on women's issues so named, I was nurtured and challenged. More importantly, I joined others in probing how the jurisdiction called "gender" inflects all pockets of the work of law. Indeed, the sex/gender system has many affinities with legal systems as both arenas are replete with questions of borders, sovereignty, and authority. Ready examples come from my own fields. In classes on procedure and on the federal and state courts, hierarchies of authority

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[22] *See* AALS SECTION ON TORTS—COMPENSATION SYSTEMS NEWSLETTER 1 (Fall 1989).

[23] My files noted D.C., Boston, Philadelphia, St. Louis, and Tulsa.

[24] As noted at the outset, the two other national AALS-sponsored conferences were in 2003 and 2011.

reflect gendered assumptions—reflected in doctrines such as one called the "domestic relations" exception to diversity jurisdiction that reads the congressional grant of jurisdiction that makes no mention of this carve out as authorizing federal courts not to entertain some kinds of cases among family members. Another illustration is the Supreme Court holding (five to four) that violence against women is not a substantial impediment to commerce,[25] and a third, coming from international law, permits "domestic" jurisdictions to limit the reach of the Universal Declaration of Human Rights in terms of certain equality mandates.[26]

One can also find the footprints of gender in the contrasting responses in the United States to international efforts to respond to women's oppression. When framed as a problem of victimized sexualized women, such as some of the campaigns against trafficking, the United States has been ready to participate in transnational efforts, as well as to press to shape them in prosecutorial modes. But the U.S. Senate has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), with its focus on wide-ranging interventions to enhance women's equality through reconsideration of practices in all fields ("political, social, economic, and cultural") and remedies such as "temporary special measures."[27]

Thus, this brief overview of decades of WLE work produces accounts of change and stasis. The efforts of the Section are vivid in the transformation of both the AALS and the many law schools it counts as members. From the podium to the law reviews, whole new sets of voices are heard and new areas of research explored. Given the short span of time, the shifts are impressive. Yet those achievements are haunted by disappointments. With all our hopes and energy, our many workshops, meetings, articles, books, and classes, gender remains an analytic predicting complex working lives in which gendered hierarchies continue to limit opportunities and options. Further, while gender-consciousness has reshaped and broadened the curriculum in many respects, disciplinary silos have multiplied. As groups head off to separate discussions of ideas ranging from critical and feminist theory to economics, psychology, and history, intellectual segregation poses yet more challenges.

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[25] *See* Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J. L. & FEMINISM 393 (2002).

[26] Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L. J. 1564 (2006).

[27] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981) (Arts. 3, 4). *See generally* Judith Resnik, *Sisterhood, Slavery and Sovereignty: Transnational Women's Rights Movements from 1840 Through the Beginning of the Twenty-first Century*, *in* WOMEN'S AMERICA: REFOCUSING THE PAST 781-790 (Linda K. Kerber, Jane Sherron De Hart & Cornelia H. Dayton eds., 7th ed., Oxford University Press, 2010); Judith Resnik, *Comparative (In)Equalities, CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. (forthcoming 2012).

Moving outside the spaces of the legal academy, the contemporary picture is similarly mixed. Women have gained senior positions across a host of fields—providing evidence that all those other disciplines' "committees," "caucuses," and "task forces" (formed, like the WLE, in the early 1970s) have likewise had an impact. Within the institution of American law, insistence on formal equality is commonplace, and some targeted interventions aim specifically to respond to violence against women, pay inequity, job discrimination, and the like. Transnational legal regimes offer new definitions of war crimes and new goals of parity of opportunity.

Yet, law's aspirations for equality and for the diminution of subordination have not buffered against the harms experienced by millions of women living in poverty and fear of violence, nor eliminated patterns of discriminatory job structures, of challenges to women's freedom to make choices about their health and families, and of social orders replete with subordination. Four decades of the WLE, and of its parallels across the academy and in the professions, have but scratched the surface of a myriad of problems. Today's tasks are to enjoy and appreciate the successes achieved without using them to mask the need to do so much more.