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Foreword

Mary Dunlap

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*by Mary Dunlap**

The emergence of feminist jurisprudence in my lifetime is a phenomenon that has brought me much happiness. In this introduction, I celebrate and welcome a new vehicle for this joy, the *Hastings Women's Law Journal,* whose first volume you are holding right now. As you feel the weight of this newborn in your hands, please pause to consider that there was nothing certain about this development. After all, women could have entered law in record numbers over the past two decades and still could have made no discernible difference in the ways in which legal reasoning and legal discourse proceed. (Or could we, Mrs. Schlafly?) As the most recent mass of unfamiliar immigrants into the land of the "seamless web," women could have been so gratified and relieved to have made it "into" the profession of law that we might have set aside whatever petty ambitions burned into us to turn it upside down, or at least to improve it as much as our energies would allow. Women could have studied law and become lawyers and accepted the idea that "gender is irrelevant" to law, and we might have learned quietly and deferentially to go along with whatever residual, persistent mistreatment of women we unfortunately but unavoidably had inherited, in a system that had made ringing, enduring pronouncements on the powerlessness of women in order to justify and preserve that powerlessness. See for example, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 103, 141-42 ("[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"); *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908)

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upholds that which is designed to compensate for some of the burdens which rest upon her."); *Goesaert v. Cleary*, 335 U.S. 464, 466, (1948) ("[s]ince bartending by women may, in the allowable legislative judgment, give rise to moral and social problems," a law prohibiting most women from bartending does not deny equal protection); *Hoyt v. Florida*, 368 U.S. 57, 62, (1961) (exclusion of women from juries is permissible because "woman is still the center of home and family life"); *Goldberg v. Rostker*, 453 U.S. 57, (1981) (holding that because "[w]omen as a group . . . unlike men as a group, are not eligible for combat," Congress may exempt women from registration for the military draft). Women could have found a place in law, albeit less well-paid and un-partnered and low-visibility and surely very far from the courtrooms and legislative halls and corporate board rooms for which our "very womanhood undermine[s] [our] . . . capacity," *cf. Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Court upheld *per se* disqualification of women from prison guard positions in male maximum security prisons because, *inter alia*, women might be raped by inmates). Women safely if inhospitably arriving at the Bar could have been "satisfied with Susan B. Anthony's picture on the dollar." (Or could we, Chief Justice Rehnquist?)[1]

But, so far, the story of women in law in the 1970s and 1980s overall has been a story of struggle and confrontation and ferment, and not usually one of acceptance and habitation to the diminutive prescriptions of patriarchy. We women in law for the most part have not accepted its chauvinistic *status quo*, and generally we have not gone and do not go "along" with traditions and habits of law that enforce and reinforce sexist models. Our fires to change the system, even as we have learned to respect its awesome power, and to draw bread and butter from its daily machinations, continue to burn brilliantly.

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1. At the close of her argument for non-discriminatory inclusion of women on juries in Duren v. Missouri, 439 U.S. 357, (1979), then-Professor Ruth Ginsburg, a widely heralded feminist author and teacher who is now an active Judge of the U.S. Court of Appeals for the District of Columbia, reputedly was asked by then-Justice William H. Rehnquist, Jr., in a stage whisper and a rhetorical tone, "I take it then, that you are not satisfied with Susan B. Anthony's picture on the dollar?" This verified story has it that Professor Ginsburg responded politely by not responding.

In my view, the fires of feminist thought in law burn particularly brightly because they are unapologetically and openly fueled by the twin flames of reason and emotion. Pretentions of neutrality and assertions of objectivity are replaced by admissions of perspective and assertions of value. If Professor Laurence Tribe led the way in 1978 in his declaration that "the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description . . . [but] to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions," [2] then feminist scholars surely have deepened this path in the decade since. For those who are pleased, as I am, to see that the information of feelings and personal experiences are gaining strong, appropriate attention in legal analysis, alongside the hallowed and traditional sources of rhetoric and reason, the birth of the *Hastings Women's Law Journal* must be considered an especially blessed event. In the legal writing of this first volume, concerning family equity, fetal protection, feminist jurisprudence, battered women, feminist ethics and reproductive choice, the pages fairly glow with the power of women hearing women, learning women speaking women's rights. To find room in legal research and writing for variations, diversity, and outright changes in method as well as tone, and for the recognition that caring and involvement in a writer's subject may be sources of insight instead of or in addition to causes of bias, constitute significant contributions to legal scholarship for which feminist legal writers must take considerable credit, along with the ever-available dose of Borkish blame.

In my enjoyment of the emergence of feminist jurisprudence, I am most grateful for the elevated consciousness that has tended to accompany the realization that women's "sphere," like men's, includes law. The ignorance of the normalcy of women in the universe has been hard to bear; the effort to undermine women in law by viewing us as sexual objects or metaphors has been exactly unbearable. Truly I am certain that I could not have borne an entire lifetime and career of thinking about whether the "[l]aw is a jealous

2. L. TRIBE, AMERICAN CONSTITUTIONAL LAW IV (1978).

mistress." I swear as an eye-witness that this quotation of Oliver Wendell Holmes was chiseled on the face of the stone wall that greeted me every day as I walked through the lower Bancroft entrance to Boalt Hall during 1968-72. The quotation has since disappeared from my view, making me wonder *not* whether I hallucinated it but how the stone was replaced with another, without a visible scar. I am amused by the fantasy that a group of active practitioners of feminist jurisprudence stole into the shadows of that forbidding wall on some dark night in Berkeley and simply wiped clean the stoneface above which those engaged in legal education would continue to pass.

Would that feminist jurisprudence could be delivered up, made to be reckoned with and to be understood so efficiently, so painlessly as that inscription was replaced, at least in my fantasy. (Even as I write this, I wonder if it is not reappearing on other law school walls, in the form of sexist graffiti and curses of feminists and the other epithets that Hastings College of Law, among numerous other law schools, has suffered of late.) Would that we who have felt the howling outrage and appalling waste caused by misogyny in law could simply sweep the wall clean, and place our messages upon it for all to see and understand, to elevate the dialogues that would result high above the categorical denunciations and the raw oaths against feminists that can be heard, without much effort, in law schools and other legal milieus even today.[3]

I know this: I have been comforted and reassured in my own abiding recognition of the importance--indeed, for justice, the

3. A legal journalist of my acquaintance, whom I shall protect as a valuable source by not identifying her here, recently informed me that of more than two dozen profiles of women judges that she has written, not one of those profiled was willing to describe herself as a "feminist," for recited reasons ranging from the alleged appearance of bias of such a descriptor to its political hazardousness in the post-Bird era. In a panel at the 20th National Conference on Women & The Law entitled "The F-Word: Marginalizing and Mainstreaming of Feminism" (Oakland, Cal., March 31, 1989), our explorations of the dirty-word quality of "feminism" established that it is partly attributable to fear of lesbian identification (a fear I no longer share personally, as an open lesbian, but which I continue to understand well, in this homophobic world) and to fear of seeming partisan, narrow and opinionated. As to this latter fear, I suppose all values that we hold require some degree of risk-taking in this regard; to stand up for what we believe is right will inevitably draw some to say that we are "special interest" groups, even if we are 53% of the world's population (or more, as men can be feminists too.)

necessity--of women's insights and experiences in the teaching, practice, and development of law, by the voices of women being heard more and more clearly in the legal system over the years since I graduated from law school. So here's to the *Hastings Women's Law Journal,* and to those who have seen feminist jurisprudence as a source of opportunity and enlightenment in law that deserves the labor, energy, and resources that must be devoted to nurture and rear this publication. I hope this *Hastings Women's Law Journal* is Clara Foltz's well-earned and long-overdue honorary law degree, albeit in a different form.[4]

4. The path-blazing lawsuit of Clara Foltz that first opened the doors of Hastings Law School to women, and the life and work of this extraordinary and unabashed feminist foremother, never resulted in the bestowing of a law degree upon Ms. Foltz, honorary or routine, though she quested and labored hard for both. Babcock, *Clara Shortridge Foltz: First Woman,* 30 ARIZ. L. REV. 673, 715 (1988). But it is hard not to imagine how proud she would be that a hundred-ten or so years after her litigation, *her* law school would yield the *Hastings Women's Law Journal.*