

APPENDIX B

Women’s Sexed Status in U.S. History, Custom, Law, and Economics

Any attempt to reform the law around sex and gender must address historic injustices against women, the structural subordination of female status, and the pervasiveness of male violence against women, most of which is committed with impunity. These problems predate the formation of the United States and they persist today. In the colonial period, English law and common law encoded colonial women’s status as chattel, denying or limiting their rights to property, child custody, work, control their earnings, or choose their domicile. It even foreclosed women’s rights over their own bodies. Simultaneously, chattel slavery denied basic human rights to African-Americans while wars of conquest violated the rights of First Nations people. In both instances, rape functioned as a weapon of ethnic as well as sexual subordination.

After 1779, most of these sexed laws were at the state level and overwhelmingly denied women’s rights to property, employment, public office, voting, and jury duty. Married women remained subject to the old status of coverture (in the old Norman phrase “woman covered by a man”), losing their names and authority to husbands. Justice Abe Fortas defined coverture in *United States v. Yazell*, as the old common-law fiction that the husband and wife are one, [and] the one is the husband.” Under this system, wives were denied standing to act in law or business without the husband’s approval (a sexed subordination often referred to as the “legal minority” or even the “legal incapacity of women”).¹ In the 20th century, women had to fight, state by state, to retain their birth name after marriage. Until 1937, the government refused to issue passports to a married woman in her own right (she could only be an add-on to her husband’s papers: “Mr. John Doe and wife”).

Women did not exist in the Constitution, which assumed a masculine default (concurrent with its dehumanization of First Nations and enslaved people). The first mention of sex came with the 14th amendment—which formally debarred women from the vote by declaring that all male citizens over twenty-one years old could vote. (The intended enfranchisement of black men was soon abrogated by Jim Crow laws after Emancipation). Only white men had rights, along with countless privileges they inherited from European common law, social custom, economic practices, and religious doctrine. These men barred women from holding office, attending universities, colleges, and many schools (including public schools²). Women were blocked from entire categories of jobs and were held to subordinate positions in the rest. They were paid less than half of men of their class (sometimes much less). These systemic disadvantages were enforced

¹ William Harland Cord, *A Treatise on the Legal and Equitable Rights of Married Women As Well in Respect to Their Property and Persons as to Their Children*. Volume 1, 1885 p. 358; *North Carolina Reports: Cases Argued and Determined in the Supreme Court of North Carolina*. Vol 111, 1892, p. 610.

² Boston Latin School was the oldest existing school in the United States. It was established in 1635 as the Latin Grammar School, open to boys of all social classes, and tax-supported. Another prestigious public school, Bronx Science (established in 1938) did not admit girls until 1946.

on the basis of sex, as simultaneously racialized caste operated to subordinate people of color, and women of color faced discrimination along multiple axes.

Women were spatially confined in a multitude of ways (and in many instances, still are). The streets and public places were *de facto* male space, which women entered at risk of harassment. Taverns commonly excluded women. There were no public bathrooms for women. Women were barred from posh restaurants and bars, with signs like “No Unescorted Ladies Will Be Served”, and some restaurants had sex-segregated areas from which non-compliant women were ejected. City councils, business associations, and police departments criminalized women who went around unchaperoned. Countless establishments, including rooming houses, threw out women suspected of being “loose” or of selling sex. Women were banned from smoking or wearing pants, and sometimes arrested for doing so.³ Not until Title IX passed in 1972 was schools’ enforcement of skirt-wearing against girls overturned (although states continued to ignore this legal change). These exclusions and coercions were committed on the basis of sex.

In the first half of the 20th century, “morals” police targeted women, especially working class and women of color, under the American Plan”, which allowed them to arrest “suspicious” women, which could mean anything from walking down the street to sitting in a restaurant alone, or for no reason at all. They hauled women off the street and took them in for involuntary genital examinations.

From the 1910s through the 1950s, and in some places into the 1960s and 1970s, tens of thousands—perhaps hundreds of thousands—of American women were detained and forcibly examined for STIs [sexually transmitted infections]. If the women tested positive, U.S. officials locked them away in penal institutions with no due process. While many records of the program have since been lost or destroyed, women’s forced internment could range from a few days to many months. Inside these institutions, records show, the women were often injected with mercury and forced to ingest arsenic-based drugs, the most common treatments for syphilis in the early part of the century. If they misbehaved, or if they failed to show “proper” ladylike deference, these women could be beaten, doused with cold water, thrown into solitary confinement—or even sterilized.⁴

This persecution of women began as a campaign to protect soldiers in WWI, but expanded over the decades, supported even by the ACLU and “progressives.” In the 60s, forced vaginal exams were still being used against political activists—from 18-year-old anti-war protester Andrea Dworkin in the Women’s House of Detention in New York to civil rights activists in Birmingham, Alabama to Black Panther women in Sacramento, “as part of a police harassment campaign.”⁵

³ In 1960, a New York judge threw Lois Rabinowitz out of traffic court for wearing pants, ordering her to come back in a skirt.

⁴ Scott W. Stern, “America’s Forgotten Mass Imprisonment of Women Believed to Be Sexually Immoral” July 21, 2019.

⁵ Kim Kelly, “A Forgotten War on Women.” May 22, 2018, <https://newrepublic.com/article/148493/forgotten-war-women>

Women were excluded from powerful associations such as the National Press Club (founded 1908, women admitted only in 1971). Harvard's undergraduate Lamont library barred female students until 1967. Universities imposed curfews ("parietal hours") on female students into the 1970s; it was common practice to lock them out of their dorms, thus forcing some to seek refuge in a boyfriend's bedroom. Factory workhouses often did the same and also kicked out women rumored to be sexually active (who thus at a single stroke lost their livelihood and housing). The prestigious Rhodes Scholarship was limited to males until 1977. Columbia University was the last Ivy League school to admit women (in 1983). African American feminist and civil rights activist Pauli Murray referred to this constellation of systemic discrimination against women as "Jane Crow." Still today, women continue to be excluded from powerful all-male academic clubs, professional clubs, golf clubs, and religious organizations.

A woman had little or no recourse if a husband drank or gambled away his earnings, beat her, cheated on her, or deserted her (and their children). Marital rape was legal in all states until the late 20th century. Nebraska was the first state to outlaw it (1975), while Oregon was the first to prosecute a husband for raping his wife (*Oregon v. Rideout*, 1978). It was not until 1993 that marital rape was treated as a crime nationally, and even after criminalization some states continue to treat it as a less serious crime than stranger rape. Divorce was equally fraught for women. Each state had its own rules about how many times a man could physically abuse his spouse before she was allowed to divorce him. Courts favored husbands and blamed wives. Even today, when men contest custody in divorces, courts statistically favor them over mothers, even though women remain the primary caregivers.

Husbands had the right of chastisement, and wives the obligation of obedience. While on the surface this language came to be repudiated in the late 19th century, in practice courts continued to allow wife-battering by asserting a new rationale for it: that the state should not intervene but must protect marital "privacy" and (ignoring the brutalization) promote domestic harmony. In 1868, the North Carolina Supreme Court ruled in *State v. Rhodes* that husbands should not be liable for assault and battery on women, "because the evil of publicity would be greater than the evil involved in the trifles complained of, and because they ought to be left to family government."⁶

Further, courts turned down women who sued husbands for battery and false imprisonment. In 1863, the New York Supreme Court ruled against a woman who won damages from a lower court for spousal assault and battery, claiming that the judgement would "sow the seeds of perpetual domestic discord ... [and] offer a bounty or temptation to the wife to seek encroachment upon her husband's property."⁷ In 1877, the Supreme Court of Maine ruled against a woman who "sued her ex-husband in tort, alleging that he violently assaulted her, and for malicious reasons had her forcibly abducted, put in irons, and incarcerated in a mental institution, where she was 'imprisoned as an insane person for a long time against her will and to the great injury of her health and comfort.'" The court ruled that the husband was immune from such suits, again arguing that they could be used against husband's property rights and using the rationale of marital "privacy":

⁶ R.B. Siegel, "Wife Beating as Prerogative and Privacy," p. 2154, https://digitalcommons.law.yale.edu/fss_papers/1092/.

⁷ *Longendyke v. Longendyke*, 44 Barb. 366, 366-67 (N.Y.Sup. Ct. 1863), in Siegel, 2164.

“it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”⁸

This denial of legal remedy to abused women extended also to police policies not to arrest or intervene in beatings which, into the 1970s and beyond, they did not view as crimes, but rather as “family problems.”⁹ Even after legal challenges began to change this picture, male violence remained unchecked. In the early 1990s, “battering of women by husbands, ex-husbands or lovers [is] the single largest cause of injury to women in the United States.” The U.S. Surgeon General stated that “[t]hirty-one percent of all women murdered in America are killed by their husbands, ex-husbands, or lovers.”¹⁰

Justice for women subjected to violence (rape, battery, and femicide) is massively outweighed by the *de facto* impunity of these crimes. Women who defend themselves against batterers, even after enduring decades of abuse, continue to receive much higher sentences than their attackers. The legal bias of “reasonable man” standards works against them as do definitions of “premeditation” that overlook sexed disparities in physical strength and the terror of PTSD survivors who snap after years of abuse. So, the batterer is convicted of manslaughter, while his victim gets slapped with first degree murder; and judges have shown themselves especially punitive toward battered women who finally kill.

Jobs were sex-segregated, with lower pay and status for women (which persists, to a lesser degree, though women of color and mothers continue to face discrimination to a disproportionate degree). Only in 1968 did the Equal Employment Opportunity Commission opine that classifying job ads as “male” and “female” violated Title VII of the Civil Rights Act. Many forms of sex-discrimination were enforced in practice, without any legal basis, by employers and public institutions such as schools, fire departments, and libraries. Female teachers, nurses, and flight attendants were often fired for marrying, for being sexually active, or for pregnancy (until 1978). They were forced to comply with dress codes, age and weight limitations, and other discriminatory rules that punished behavior seen as unremarkable in males. The first equal economic opportunity case under Title VII was a 1971 suit against a company that refused to hire women with children under school age.¹¹

Single mothers, especially African-Americans and other women of color, faced coercion from another direction: government agencies. They were denied benefits as part of attempts to control their personal lives and sexual activities and were subjected to intrusive questioning by social workers and forced searches of their homes, looking for “the man under the bed,” in efforts to terminate their monthly welfare checks. The state also seized poor women’s children, using charges of “neglect” to penalize women working at poverty wages for not being able to afford childcare or sufficient food.¹² Many children were funneled into a foster care system which itself

⁸ *State v. Oliver*, 70 N.C. 60, 61-62 (1874), in Siegel, 2165.

⁹ Siegel, 2171.

¹⁰ Siegel, pp. 2118-19.

¹¹ *Phillips v. Martin Marietta Corp.* 400 U.S. 542 (1971).

¹² This is extensively documented by Louise Armstrong in *Of ‘Sluts’ And ‘Bastards’: A Feminist Decodes The Child Welfare Debate*, 1995.

is rife with neglect and sexual abuse (and which has also swept up children of mothers who were imprisoned for crimes of survival).

Marital status and male permission continued to function as controls on women's self-determination and employment. The birth control pill went on the market in 1960 but was denied to unmarried women until 1972, when the Supreme Court struck down a Massachusetts law that penalized giving birth control to single women. Laws against contraception, abortion, and even against sex education limited women's life choices by forcing them to bear and take care of children, greatly curtailing their earning power. Since *Roe v. Wade*, the restoration of women's right to reproductive self-determination has been subjected to death by a thousand cuts, primarily in the states, but also by the Hyde Amendment and other regulations. Religious conservatives have launched numerous challenge cases into the pipeline and the Supreme Court is poised to overturn *Roe* in the not-distant future.

The law of coverture persisted in custom even after its legal basis had eroded. Until 1974, banks did not allow women to open bank accounts, apply for loans, or get credit cards under their own name (even when they owned or earned more than their husbands). A male co-signer was required and the same applied to buying a car or house (for which women, as also people of color in general, are statistically overcharged).

Women had long been prohibited from serving on juries (and so never got a jury of their peers as the Constitution promised). The dates when this ban was overturned vary by state; Utah, 1879, was the first, but only in 1975 did all states allow women to be jurors (and women of color still faced multiple barriers). Women were not formally admitted to the U.S. military until the Women's Army Corps was established in 1948. The first woman did not enter West Point until 1976 and it took another 20 years for The Citadel, a military academy in Virginia which was the last all-male public university, to admit women. It was forced to do so by a Supreme Court ruling; Rehnquist dissented, arguing for "separate but equal."

Legal, educational, and economic barriers are some of the structural exclusions and deprivations women have faced, based on their sexed status, in the United States. But the greatest single factor limiting women's life, liberty, and pursuit of happiness (earning a living, keeping a job, getting an education, surviving) has been male violence. Men kill women (wives, girlfriends, and exes) at a rate of 4 per day in the United States.¹³ Male violence (battering and rape) is the most common reason for a woman ending up in an emergency room. A third of women suffer violence inflicted by an intimate partner, and those who leave are at highest risk of murder.

Misogynist aggression is a major factor in mass shootings, in which killers often specifically target women or girls, or their families, not excluding their own children. (Media reports stubbornly ignore the sexed nature of this targeting.) Refusal of sexual access is a salient factor in femicides, either by "incel" males or by men that women are attempting to leave. Violent attacks are often the outcome of men following women or stalking them over a period of time. Stalking itself disrupts the targeted women's ability to hold a job, especially when the harassment

¹³ Russell, Diana E.H. and Harnes, Roberta A, (Eds.), *Femicide in Global Perspective*, 2001, p. 13-14.

extends into the workplace, with perpetrators making threatening phone calls or even showing up at the job site.¹⁴

The constant threat of violence forces women into a calculus of where they go, when they go, how and whether they will go: if they are alone, if it is night or a deserted area; if they'd better pay for a cab they can't afford rather than risk assault. Not all men are rapists, but women have no way of telling which ones are, as they hear rapid footsteps approaching them from behind, or are alone in a parking garage or elevator. This unknowability works against women, who are now being excoriated for fearing the presence of males in places of undress, even though male predators do target women in bathrooms and changing rooms.

After rapist attacks, women face presumptions that it was their fault, interrogations about their own dress or behavior, whether they were drinking, or their sexual histories. Women of color, especially Native women, suffer much higher rates of rape and sexual violence. But the great majority of those crimes go unprosecuted and unpunished, as law enforcement commonly refuses even to investigate, and the court system to convict, the perpetrators. White men constitute the majority of rapists of Native women but enjoy near-immunity for these crimes, since the federal government refuses to prosecute them but also denies standing to tribal governments to try white men. Disabled women are a much-overlooked group that is subjected to extremely high rates of sexual assault, at a rate of 83% in a lifetime.

Women continue to be denied equal protection under the law from systemic male violence, in the home, on the job, in public spaces and institutions. It took decades of activism to get police to arrest batterers instead of treating battery and terrorizing as non-crimes. In real terms, impunity for rapists remains the rule rather than the exception. Not until 1993 was it illegal for husbands to rape their wives in all 50 states, and legal loopholes still exist in some states, such as North Carolina. Women who defend themselves against batterers, even after decades of abuse, are sentenced to much harsher terms than men who kill the women they are abusing. Women in the military suffer high rates of rape from within the ranks and then face retaliation from the military for reporting the violence.

The courts have shown a high degree of prejudice against girls who report sexual abuse by fathers, brothers, and other relatives, and against mothers who try to take action to protect their children from incest-rape. Fathers have marshalled lawyers and psychologists touting "parental alienation syndrome" to blame mothers for children's fear of sexually abusive fathers. It is common for judges deny custody to reporting mothers and give custody to abusers. This is an international phenomenon, and shows a high degree of complicity with ancient codes of paternal authority (*patria potestas*) in the court system.

Sex trafficking is another major driver of women's inequality. Because huge amounts of money are made from selling sex, primarily by male pimps, traffickers and brothel owners, coercion is rife, with young women (especially those with prior histories of sexual abuse) as the primary targets. Strategies of entrapment, including threats against the woman's family, ensure compliance and the flow of money into the hands of the traffickers. Those whose bodies are sold are subject to rape, beatings, choking, and murder, by johns, and by pimps who use violence to

¹⁴ Logan et al. 2007; Swanberg and Logan 2005.

enforce quotas of how much money the girl or woman has to bring them. The rate of PTSD for women in the sex industry is comparable to that suffered by combat veterans, battered women seeking shelter, rape survivors, and victims of state-sponsored torture. The dangers of the sex trade is one area where the experience of transwomen overlaps with that of females, although the former are, overall, more likely to advocate for that industry than to articulate its risks.

Equal protection under the law has never existed for women in the United States, especially for Native, Black, Latina or Asian women. Sex constitutes a subjugated socio-political and economic status—one that is usually disregarded and passed over in law. It does not stand alone, since race, class, and citizenship status are potent intersectional factors, but it needs to be taken into account as its own nexus of inequality. It took a concerted effort to achieve women's suffrage (which was on paper but not in practice for many African-American women). Decades later, Congress still did not take women's rights seriously. Women's rights only got added to the Civil Rights Act of 1964 when a congressman who opposed the Act added "sex" as an amendment in Title VII in an attempt to prevent its passage.

Women's rights have long been subsumed into rubrics such as "privacy rights" that fail to address the sexed subordination and the massive levels of violence and discrimination women endure. Violence against women is still not recognized in legal designations of "hate crimes". Femicide is still mostly relegated to the back pages of newspapers. The prevalent near-impunity of male aggression is grounded in a history of treating women as legally, socially, and politically inconsequential. We have climbed out from what the Victorians called "women's legal incapacity" but remain without remedy against state laws that discriminate against or even target us, including the growing number of strict anti-abortion laws.

In the 1970s, women attempted to pass the Equal Rights Amendment so that our rights would not be conditional on the complex patchwork of sex-discriminatory laws in the states and would finally be guaranteed on the federal level. We nearly got there, but came just short of ratification within an artificially-imposed deadline. The effort foundered and was in abeyance for nearly 40 years. So, we have been left with Title VII and Title IX as the only Federal redress against the historic disadvantages imposed on women. However, these provisions don't address the colossal levels of violence that women are subject to in the United States. Neither does the ERA, and neither do proposed reforms which conflate sex and gender identity.

Historically, women have been denied legal standing to determine the conditions of their lives, property (if they had any), children, and even of our own bodies. There is not space here to detail all the ways this happens: through psychiatric imprisonment (which, in addition to terrorizing women who are labeled with mental illness, has been leveraged by abusive husbands and by parents who disapproved of lesbian or gay offspring); through grooming and entrapment into the sex trade; through structural economic precarity and the many ways that it exposes women to homelessness and male violence; and even through child marriage or denial of the right to divorce, as happens in some religious sects.

Women's rights to self-determination are currently being contested from several directions, with an intensity greater than we have seen for a century. Some states are passing or considering laws that restrict and effectively outlaw abortion rights, and even access to certain kinds of birth

control. These rights have only been guaranteed nationally since the Supreme Court ruled on *Roe v. Wade* in 1973.

In the last two decades, women's rights have been increasingly contested from another direction, by transactivists and queer theorists. These disputations take the form of denying the multitude of disadvantages and aggressions that women are subjected to on the basis of sex by, among other tactics, conflating sex with gender identity. Women's speech which analyzes sexed oppression and the gender system which has constrained us in so many ways is now being contested. We face aggressive opposition to our right to advocate for women's self-determination, or even to say that sex and gender are not the same thing. Gains we have fought for, including organizations centered on the needs of girls and women, or ascent to professorial or other professional positions, are being assailed and, in many cases, taken away.

Trans people have the right to earn a living, obtain housing, and be safeguarded against violence or abusive treatment. These rights do not necessarily conflict with women's rights. However, where women's self-determination, equality or security is contested or threatened, there exists a conflict of interests that cannot and should not be swept under the rug. Women's rights are increasingly being violated, as if prevention of sexual violence, intrusion, or other harms is no longer an issue for women. It is.