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Law, Gender, and Injustice: A Legal History of U.S. Women

Joan Hoff
New York University Press, 70 Washing-
ton Square South, New York, NY 10012.
525 pp., \$39.50.

Reviewed by Linda A. Malone

In *Law, Gender, and Injustice*, historian Joan Hoff provides a history of the law's treatment of women from the colonial period to the present. This history is divided into four periods: constitutional neglect (1787-1872), constitutional discrimination (1872-1908), constitutional protection (1908-1963), and constitutional equality (1963-1990). Hoff's basic thesis is that women are only accorded civil and political rights when those rights have diminished in value in the political and economic structure:

Women received equal pay for equal work in the 1960s on the eve of declining productivity rates and permanently high unemployment; enforcement of affirmative action beginning for educational and other traditionally female service occupations in the 1970s occurred when these markets were glutted and fewer hirings were taking place; the constitutional right to abortion (as tenuous as this may now be) was granted *after* effective means and mass distribution of contraception existed; ease of no-fault divorce, so quickly enacted by male-dominated legislatures, has contributed to the impoverishment of female heads of households in the 1980s; agitation in behalf of comparable worth began in the 1980s just as computer technology had begun to make those clerical and service jobs traditionally occupied by

women more and more obsolete or "dangerous" to their reproductive systems, in what is being called the dawning "information age"; debates about child care and parental leaves began not at the height of the baby-boom births following World War II but now that the average birth rate is half what it was in 1964; and, finally, an ambiguous tripartite definition of obscenity, indicating when sexually explicit material should be considered legally obscene under criminal law, was handed down by the Supreme Court in 1973—the same decade in which violence against women in multimedia pornographic representations increased dramatically. This essential male definition of obscenity is now meaningless for regulating the current flood of sexually violent pornography on the market and for figuring out whether this kind of material harms women in contemporary American society.

Hoff's "broken barometer" theory of the legal status of women is followed by a piercing criticism of legal liberalism and its recent formulation of the law in critical areas of concern to feminists—marriage, divorce, pregnancy, abortion, and pornography.

Hoff's book is not by any means the first history or legal analysis of women in U.S. society from a feminist perspective. It is, however, a particularly well-documented, thorough analysis of the interrelationship between the law and women's role from a historical perspective. Despite its scholarly treatment of the subject, the book is a very useful overview of the Supreme Court's vacillating perspective on gender-related issues. For the practicing attorney confronted with any issue in which gender is a predominant influence, the book

provides historical background, a current legal analysis, and a feminist critique of the relevant jurisprudence.

Characterizing Hoff's viewpoint as a "feminist" perspective is itself an oversimplification of her theory. It is a feminist perspective in the sense that she contends that the legal status of women has been and continues to be predicated on male standards of justice and equality. She distinguishes with care, however, the different strains of feminist jurisprudence and how radical feminists have distanced themselves from both liberal legalism and the critical legal studies movement. In the last two decades women have made significant progress in achieving *equal rights*, but *equitable treatment* continues to be elusive. She notes that equalizing opportunities does not provide a level "playing field" for men and women so long as women must effectuate those opportunities from a disadvantaged position.

In the 1980s this dilemma led to dissonance among feminists over whether women should be accorded equal treatment (assimilationist feminism) or special treatment (pluralist feminism). The first is the core of traditional legal liberalism with its inadequacy in addressing the unique legal problems of women as a group. The second often carries with it disturbing overtones of patriarchal protective legislation for women.

Hoff attempts to bridge the gap among feminists by contending that emancipation necessitates not only equal rights for women and equitable treatment, but a fundamentally different jurisprudence that goes beyond what she calls an "antiquated" debate of the subject. At this juncture Hoff does not so much devise her own approach as survey the jurisprudence of feminists such as

Catharine MacKinnon and Rhonda Capelon, seeking some reconciliation of the two approaches, to conclude that the most "plausible" jurisprudential mode is the feminist jurisprudence of Robin West. Hoff does, however, make a forceful argument that women must assess what rights will be most important in the newly emerging global com-

munity of the 21st century, rather than proceed under the past decade's already outdated agenda for reform.

Hoff concludes that only when women demand that their "citizenship rights *include* rather than *exclude* the private sphere . . . have [they] come close to escaping their 'broken-barometer' legal status." Considering the recent election's

rhetoric about family values, hers is a warning worth heeding. □

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