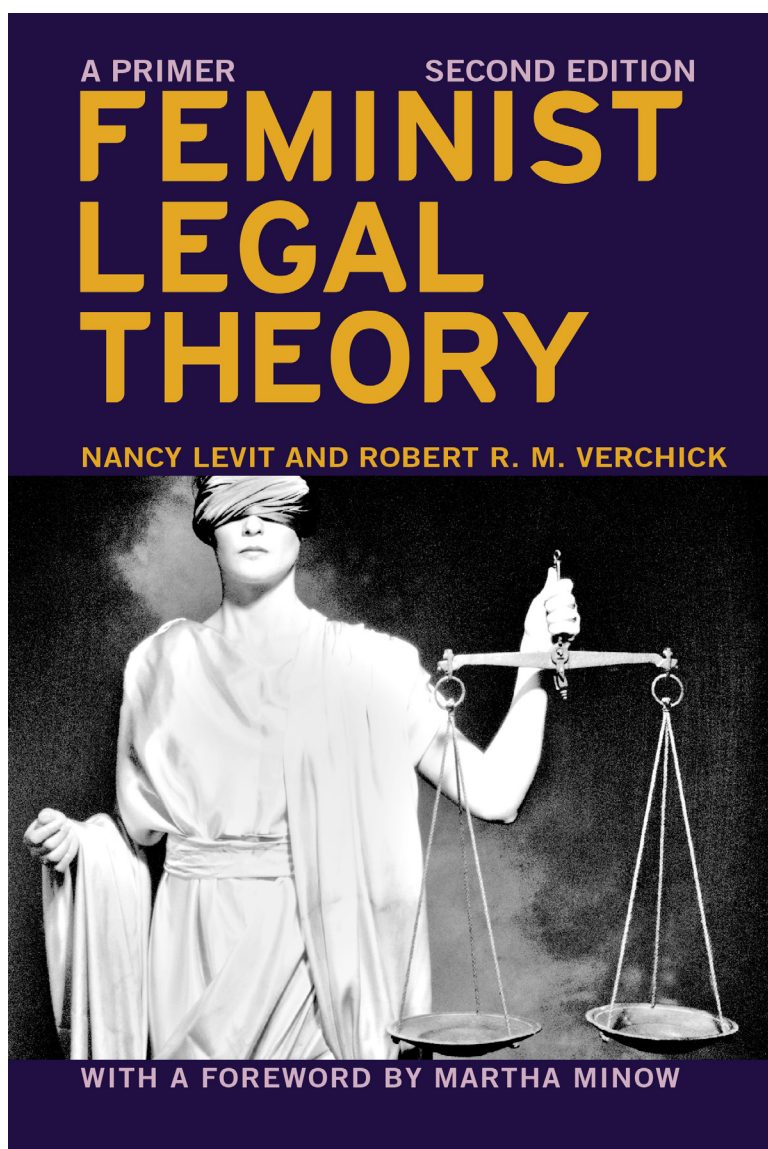


# Feminist Legal Theory Second Edition

## INSTRUCTOR'S GUIDE



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### Why Consider this Book for Your Class?

-Concise, interesting, and digestible introduction to legal issues regarding gender

-Addresses cutting edge topics including pregnancy, maternity leave, the work-family conflict, dress codes, "revenge porn," women's participation in the military, contraception, abortion, and surrogacy

-Works as a stand-alone or as a compact accompaniment to the standard assigned readings in women and gender studies of feminist tracts in literature, politics, and social theory

*"Feminist Legal Theory by Nancy Levit and Robert R. M. Verchick is not only a sophisticated theoretical exposition of feminist legal theory, but also a vivid analysis of real cases and popular culture and their relationship to women's issues. It is the first step in researching women's issues for any academic or student of the law. The book is chock-full of information about law that relates to all aspects of women's (and sometimes, men's) issues ranging from education law to human trafficking. The information is presented through vivid, readable prose that lawyers, academics, and non-lawyers alike will find interesting, informative, and fun to read. I was blown away by the chapter on education with its analysis of constitutional and statutory law, and its up-to-date description of changes in regulatory authority. The book contains timely references to popular culture that will pique the interest of readers. A must-read for anyone who is interested in women's issues."*  
—Ann C. McGinley, William S. Boyd Professor of Law, University of Nevada Las Vegas

## General Summary

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Feminist legal theory is one of the most dynamic fields in the law, and it affects issues ranging from child custody to sexual harassment. Since its initial publication in 2006, *Feminist Legal Theory: A Primer* has received rave reviews. Now, in the completely updated second edition of this outstanding primer, Nancy Levit and Robert R. M. Verchick introduce the diverse strands of feminist legal theory and discuss an array of substantive legal topics, pulling in recent court decisions, new laws, and important shifts in culture and technology. The book centers on feminist legal theories, including equal treatment theory, cultural feminism, dominance theory, critical race feminism, lesbian feminism, postmodern feminism, and ecofeminism. Readers will find new material on women in politics, gender and globalization, and the promise and danger of expanding social media. Updated statistics and empirical analysis appear throughout. The authors, prominent experts in the field, also address feminist legal methods, such as consciousness-raising and storytelling.

The primer offers an accessible and pragmatic approach to feminist legal theory. It demonstrates the ways feminist legal theory operates in real-life contexts, including domestic violence, reproductive rights, workplace discrimination, education, sports, pornography, and global issues of gender. The book highlights a sweeping range of cutting-edge topics at the intersection of law and gender, such as single-sex schools, abortion, same-sex marriage, rape on college campuses, and international trafficking in women and girls.

At its core, *Feminist Legal Theory* shows the importance of the roles of law and feminist legal theory in shaping contemporary gender issues.

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SUMMARY

The introduction serves to accomplish several preliminary goals: to explain how feminism and law are intertwined and how law is utilized to achieve feminist goals in America (and to some extent, the world); to provide a brief discussion of feminist issues in American history as demonstration of these claims; and to outline the organization and approach of the book. To achieve the feminist goals of equality for men and women in the political, economic, and social spheres, these goals must be incorporated into law and made enforceable by the government.

In "A Brief History of Women's Rights and Early Concepts of Equality," the preface briefly documents the early efforts of the women's suffrage movement and the several of the laws which resulted from these efforts: the Married Women's Property Acts, which gave women autonomy to control their own property; the Fourteenth Amendment, which prohibited discrimination against women; and the ratification of the Nineteenth Amendment, which granted women the right to vote. This chapter notes prominent women in history who championed women's rights, such as Elizabeth Cady Stanton and Lucretia Mott, who established the first women's rights convention in 1848; Belva Lockwood, who became the first female member of the bar of the U.S. Supreme Court in 1879; and Sojourner Truth, who reminded the public that black women were doubly burdened by their race and gender. All of these women sought social and legal gender equality, and many understood that new laws would facilitate this change.

The book will focus on feminism principally as it relates to law. The introduction outlines eight categories of feminist legal theory that will be discussed: equal treatment theory, cultural feminism, dominance theory, lesbian feminism, critical race feminism, postmodern feminism, pragmatic feminism, and ecofeminism. These theories will lay the framework for the book, which will serve to acquaint readers with feminist legal theory, introduce readers to more in-depth varieties of feminist legal theory and methods, and discuss the major substantive areas in which feminist theory has informed and helped shape the law.

QUESTIONS FOR DISCUSSION

1. The introduction contains an in-depth discussion of the Equal Rights Amendment (ERA), a bill which states, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction." The ERA was never passed. What are the implications of the failed amendment? How might passing the ERA change feminist law?

## SUMMARY

This chapter defines the eight feminist legal theories listed in the introduction, and explains how they impact U.S. law.

-Equal Treatment Theory: Beginning in the early 1960s with first wave feminism, this theory is based on the principle of formal equality, that women are entitled to the same rights as men. Early efforts to attain equal treatment pursued two goals: to obtain equivalent social and political opportunities, and to do away with legislation intended to protect or simply cabin women by isolating them from the public sphere.

-Cultural Feminism: Also called “difference theory,” this theory argues that men and women should not be treated the same where they are relevantly different and that women should not be required to assimilate to male norms. These differences have been re-identified by cultural feminists as women’s strengths rather than women’s weaknesses.

-Dominance Theory: Also called “radical feminism,” this theory focuses on the difference in power between men and women, with a goal towards liberation from men. Dominance theory suggests that men are privileged and women are subordinated, and that law is complicit with other social institutions in perpetuating this dichotomy. Dominance theorists propose large scale structural or institutional reforms, such as the development of sexual harassment law or the banning of pornography that harms women.

-Critical Race Feminism: A form of anti-essentialism, this theory suggests that the recognition of relational differences and the intersection of characteristics like sex, race, and wealth will lead to liberation, especially through storytelling or narrative. Critical race feminism recognizes that people experience multiple consciousness, and it relies on personal narratives to get this point across.

-Lesbian Feminism: Another form of anti-essentialism, this theory focuses on the legal issues confronted by persons who identify as lesbian, gay, bisexual, or transgender (LGBT). Lesbian feminism asserts that sexual orientation is deeply ingrained in personal identity.

-Ecofeminism: This theory describes women’s relationships with society and nature, holding as its core principle a recognition of shared oppression between women and nature. Ecofeminists combine a love of nature with a love of justice and commit to fighting oppression in all its forms.

-Pragmatic Feminism: This theory offers as a primary insight that a search for contextual solutions is typically more useful than abstract theorizing. Pragmatic feminists criticize universalism and generalizations, relying instead on context and perspective. The theory’s flexibility gives it an advantage in shaping practical

solutions that will appeal to many interests. But its lack of a specific controlling principle makes its prescriptions less predictable and sometimes prone to manipulation.

-Postmodern Feminism: More of an interpretive tool, this theory argues that comparative approaches inaccurately assume all women are the same, as are all men. Postmodern feminists thus reject notions of single truths and instead recognize that truths are multiple, provisional, and linked to life experiences and perspectives. Postmodern feminists emphasize gender as socially constructed, and therefore work to challenge the foundational “truths” of gender that operate to oppress women.

### QUESTIONS FOR DISCUSSION

1. At the turn of the twenty-first century, the movement for gender equality seems to have stalled. Some of the most significant battles, such as the fight for suffrage, *Roe v. Wade*, basic equal pay cases, and men’s rights to sue for sexual harassment, have already been fought. Many of the issues that remain are second-generation discrimination issues—such as the glass ceiling in employment, the absence of paid family leave, women doing a disproportionate share of unpaid domestic work, or simply societal beliefs about appropriate gender roles. Can you identify some others of these smaller second-generation issues: the more subtle forms of discrimination that are not clearly proscribed by existing laws and the micro-inequities that it is difficult for law to even reach? Do any major or landmark legal issues still remain to be fought?
2. The diversity among feminist legal theorists raises the difficulties of building coalitions among oppressed groups. Some anti-essentialists call for greater coalition building. Others caution against it, because alliances among minorities or between minority and dominant groups usually operate to serve the more powerful groups, whose interests may diverge. Choose one of the issues you identified in question 1. Would coalition building be a critical strategy in addressing that issue?
3. Are some of these philosophies of feminism too bleak to gain many adherents or too critical to provide a positive platform? For instance, dominance theory seems to suggest that most, if not all, women are subordinated in many ways—and that they may not even know it (the problem of false consciousness). Individuals, in the postmodern view, are almost purely social and cultural creations. If, as postmodernism seems to suggest, women’s experiences are not “homogeneous,” this raises the question whether they “can ever ground feminist theory.” Will dominance theory gather supporters or will it be perceived as relegating women to permanent victim status? Will postmodernism lead to more fluid gen-

## Chapter 1: Feminist Legal Theories

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der roles or create such anxiety over ambiguity that the status quo remains the preferred model of interpreting gender roles? Even if neither theory gains more adherents, how does its presence in the field of feminist theory affect other, more generally accepted theories?

## SUMMARY

This chapter describes three basic feminist legal methods: the unmasking of patriarchy, contextual reasoning, and consciousness-raising. The unmasking patriarchy method involves feminist legal theorists asking questions designed to reveal male biases behind “neutral” laws. They then work to show how traditional legal underpinnings can be changed to be more fair and equal. The contextual reasoning method involves paying attention to personal and social histories of parties subject to discrimination, relative perceptions among the parties, and overall context. The consciousness-raising method describes the process by which individuals share personal experiences to derive collective significance or meaning. With consciousness-raising, women are able to view their personal experiences as symptoms of broader societal oppression.

In this chapter the fictional story of Gloria, a single mother whose son develops asthma, demonstrates how the three feminist legal methods might be put to use. Gloria loses much needed pay staying home from her job to take care of her son. She soon learns, from speaking to other mothers, that the asthma is a collective problem in the community and a result of pollution from a local power plant. In this story, Gloria unmasks patriarchy by taking notice of the laws of employment that fail to provide a safety net when illness strikes a single-parent family, when in most cases single parents are mothers. Gloria employs contextual reasoning when she uses her own particularized knowledge to draw a connection between pollution and illness. Finally, Gloria raises her consciousness and that of others around her when she discusses her son’s condition with other women who have shared experiences.

## QUESTIONS FOR DISCUSSION

1. Feminist methodology calls for a look “beneath the surface of law to identify the gender implications of rules.” Various writers have applied feminist methods to seemingly neutral legal standards, such as the laws of self-defense (which may deprive battered women of a defense because violence against them may not be “imminent” in the traditional sense when they respond to their attackers) or the rules of evidence (which may reflect male norms in admitting testimony about the prior workplace sexual relationships of sexual harassment victims). Legal scholars have argued that use of feminist principles would lead to significant revisions of substantive rules in areas such as tort law, contract law, evidence, and criminal procedure. If you applied feminist legal methods to the U.S. Constitution, would the provisions of the document or the ways it is interpreted be different?
2. Do feminist legal methods inevitably lead to the elimination of bias in decision making, or do the decision makers themselves need to have different life experiences? Consider the situation of a male office worker who circulates sexu-

ally explicit jokes in e-mails to coworkers or posts a Sports Illustrated swimsuit calendar on the wall near his desk. Does that employee risk a sexual harassment lawsuit or does he have a good free speech defense? If a judge “asked the woman question” about this situation or applied principles of consciousness-raising to it, would that judge uphold a First Amendment defense to sexual harassment liability?

3. Will these methods actually be useful to judges—and used by them—or are the strategies of feminist legal methods helpful only if one is first a believer in feminist principles? While feminist beliefs do not divide neatly along gender lines, it is important to consider the gender composition of the judiciary. Among federal judges, only one-third (three of the nine) of Supreme Court Justices, one-third of the federal courts of appeal judges, and about a quarter of the federal district court judges are women. Can nonfeminist decision makers be persuaded to use feminist methods?



## SUMMARY

This chapter discusses how feminist legal theory is used to fight gender discrimination in regards to the workplace, wages, and welfare.

The chapter begins with an introduction to Title VII, a law in the Civil Rights Act of 1964 which provides that it is unlawful for an employer to discriminate against an individual based on a number of characteristics, including one's sex. Title VII addresses two forms of discrimination: disparate treatment and disparate impact. The former is based on the intent to discriminate while the latter is based on a gender neutral action or policy that has a disproportionately harmful effect on a protected group. Title VII has provided the basis for numerous successful lawsuits for women who face discrimination in the workplace. In many cases, women also face unfair disadvantages in regards to pregnancy, maternity leave, and the work-family conflict (a conflict between work and home responsibilities). Pregnancy and maternity leave are emblematic of the work-family conflict, in which women are at disadvantage because full-time working mothers devote 50 percent more time to childcare than do full-time working fathers.

The materials examine gender and race stereotyping in the workplace, such as performance expectations and grooming codes, and how feminist legal theory has helped win cases for both women and men who have been stereotyped. They also discuss how feminist legal theory and court decisions have worked to reduce sexual harassment in the workplace over the years. In particular, women have been subject to a number of complications when attempting to prove sexual harassment, leading to a number of potential solutions such as the "reasonable woman standard," which helps factfinders understand sexual harassment cases from a woman's point of view.

Another issue women face is the issue of equal pay in occupations that are traditionally segregated by gender but are of comparable worth. In particular, "comparable worth theory" describes how women in traditionally "female" jobs earn less than their male counterparts in traditionally "male" jobs. This type of stereotyping and segregation extends to the military, where women have traditionally been excluded. This chapter also describes women's efforts to join the military, and the negative effects of "Don't Ask, Don't Tell" for equally impacted LGBT individuals.

The final part of this chapter discusses welfare reform, living wage laws, and the "Lean-In" Movement. Welfare, as it exists now, is limited and encourages recipients to enter the workforce, which can be detrimental to women who are unskilled, or who would be best suited caring for their children. Meanwhile, wages are not much better, as the current existing federal minimum wage is not

enough to independently sustain a minimum-wage worker. In recent years there have been campaigns to push for a “living wage,” or one that can sustain low-wage workers. There have also been campaigns to push for women to invest more heavily in their careers, as men are encouraged to do. Called “Lean-in,” the movement encourages women to “lean into” their careers, celebrating their professional abilities and those of other women.

#### QUESTIONS FOR DISCUSSION

1. At the heart of gender and work issues has been societal refusal to value housework and childcare. Some feminists, such as Caitlin Flanagan, argue that professional white women are exploiting Third World women as nannies and housekeepers. Some women’s ability to enter the workforce depends on their taking advantage of another market to provide childcare. This shifts the burden of caretaking from one group of women to another, less economically powerful group. Do you agree that in order for some women to enter the workforce, they have to subscribe to a system that undervalues the work that women do in the house and with children? Is this necessarily exploitive? Is it possible to be a parent and work outside the home without enforcing these stereotypes? Is it the role of private individuals to address this problem or is it the responsibility of government to create a system where people do not have to make Hobbesian choices? Can a woman “have it all”?
2. In your opinion, what can employers do to increase the participation of women in higher-level positions? What should they do? What should the government require them to do, if anything? How would integrating more women into positions of power in corporations, the military, and the government alter current conditions for working women?
3. A substantial divide separates popular opinion about sexual harassment and legal theory and doctrine. Many people think sexual harassment is only about sexual desire. Legal doctrine recognizes that sexual harassment is not just about sex but also about power. Members of the public believe that juries are awarding large verdicts for people saying, “‘Nice ass’ once, jokingly, by the water cooler.” The law requires that harassment must be severe and pervasive. Why do such differences exist between the law and public opinion?
4. We’ve argued that the “dress code” cases suggest a relationship between antidiscrimination law and worker autonomy. That is, in upholding regulations on appearance, courts say that Title VII was not intended to promote autonomy over what one looks like. A right to wear tank tops, flip-flops, a nose ring? Forget it. But other cases, like *Sears*, appear to take a more expansive view of worker

autonomy. In *Sears*, for instance, when the EEOC argued that the department store was shunting women into dead-end jobs, the court insisted that such women were merely exercising their autonomy, their choice—a choice that, the court implied, Title VII protects. Are the dress-code cases inconsistent with *Sears*, or can they be reconciled? Should these cases be seen as disputes over autonomy at all?

5. Law professor Zak Kramer argues that the nature of sex discrimination has changed in recent years:

Sex discrimination has become highly individualized. Modern sex discrimination does not target all men or all women, nor does it target subgroups of men or women—such as women who are aggressive and men who are effeminate. The victims of modern sex discrimination are particular men and women who face discrimination because they do not or cannot conform to the norms of the workplace. In addition to Darlene Jespersen, it is the male truck driver who wears women's clothing; it is the bus driver who cannot find a bathroom to use while she is transitioning from male to female; it is the effeminate man who sticks out like a sore thumb in a rural Wisconsin factory; it is the new mother who needs extra breaks during the workday to pump milk for her newborn baby; it is the hairstylist who is fired from her salon because she is a butch lesbian; and it is the overweight telemarketer who is told she is not pretty enough for a face-to-face sales position.<sup>160</sup>

Assuming that he is accurate about the nature of discrimination, how will these more individualized suits fare in a Title VII regime that expects plaintiffs to show stereotyping based on group subordination? How should legal doctrine change to encompass these new, more idiosyncratic and individualized, forms of discrimination?

## SUMMARY

Chapter 4 explains how women's inclusion in education and sports has been instrumental to achieving feminist goals, and explores the ways in which women have faced or continue to face discrimination in these sectors.

The chapter begins with a discussion of the educational opportunities available to women throughout history until present day. For centuries, women were restricted from receiving an education, or else were separated from men or by race. Coeducational secondary schools began to form in the mid-nineteenth century, along with higher institutions for women. By 1945, 70 percent of all colleges and universities were coeducational, and this percentage continued to increase throughout the years. Women also started to join medical and law schools in greater numbers during this time. Today, inequalities exist in the differences of treatment between boys and girls in education. There are also disparities in the number of women who are full professors and college presidents.

The establishment of Title IX in 1972 has helped to curb gender discrimination in education. Title IX requires that separate school programs for men and women must be "substantially equal," although it fails to define this term, leading to court cases. In the 1990s, single-sex education began to crop up throughout the United States. This educational model has shown, in some ways, to be discriminatory for both men and women, but the Court has not ruled that single-sex education is per se unconstitutional. In military education, particularly, women have faced struggles attempting to pursue an education equivalent to what is offered to men. Evidence concerning single-sex education suggests that there is no evidence that single-sex education works any better or worse than coeducation. Yet there are still programs in place that encourage students to pursue single-sex education, such as charter schools and voucher programs.

The second part of this chapter discusses gender-based discrimination in athletics. A number of benefits accompany athletics, including improved relationships, grades, and individual autonomy. Title IX's mandate of equality of participation opportunities requires schools to offer athletic programs for girls and women, and has been a particular benefit for girls and women of color. Minority female athletes are more likely to develop better self-esteem and become leaders in their communities. Title IX has also led to an increase in female athletes from 2 percent to 43 percent in 2001.

In 1979, the Office of Civil Rights issued a framework for Title IX compliance in college-level sports. The three areas of compliance are: 1) athletic financial assistance; 2) "other program areas," such as equipment and training facilities; and 3) meeting the interests and abilities of both male and female students. Several lawsuits have been prompted by the third requirement, including the 1994 case of *Cohen v. Brown University*. In this case, Brown University looked to cut

women's sports programs, arguing that the cut was justified since the University was planning to cut men's programs as well, despite a much greater selection of sports for men. The court ruled that the university's plan to cut women's sports programs was unjustified. As a result of this ruling, many colleges and universities cut a substantial number of men's sports teams to make way for women's teams.

Importantly, Title IX also prohibits sexual harassment in schools, setting the framework for a number of sexual harassment-related cases.

### QUESTIONS FOR DISCUSSION

1. What is the harm of allowing several thousand of the nation's almost fifty million public school students to be educated in experimental single-sex schools and classes? Does the argument that the single-sex alternative is "diverse"—in the sense of providing an alternative (single-sex or coed)—have anything to do with the constitutional idea of diversity—of affording students fellow travelers with a variety of racial, ethnic, social, or economic backgrounds? Is it possible to imagine a sex-segregated program that would not reinforce traditional notions of separate spheres for males and females?
2. Where sports are concerned, Title IX is particularly tolerant of the separate-can-be-equal philosophy. The act's regulations specifically allow schools to operate separate teams for males and females "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." Defenders of the rule argue that if female students were given the chance to compete for places on male teams, few women or girls would make the cut. As a result, "mixed sex" athletic squads—like the Massachusetts Institute of Technology ski team or Virginia State's golf team—are relatively rare. Should they be? What feminist legal theories might defend the operation of segregated sports teams? Equal treatment theory? Dominance theory? Cultural feminism? Postmodern feminism? Assuming that segregated teams have their place, should exceptional female athletes be allowed to jump from women's teams to men's teams if they are good enough?

## SUMMARY

Chapter 5 discusses the legal rights women hold with respect to their bodies, especially in the realm of reproductive rights.

Throughout much of early American history, abortion remained illegal. But in 1973, the Supreme Court ruled in *Roe v. Wade* that under constitutional privacy precedent, women had the right to control their own bodies, and therefore the right to terminate unwanted pregnancies. The ruling dictates that women can obtain abortions prior to viability.

In response to this decision, numerous states have passed an astonishing number of regulations in an attempt to restrict abortions, such as waiting periods, subjecting women to (sometimes false) information regarding the risks of abortion, and rules that require abortion providers to fulfill unnecessary, costly, and burdensome conditions. The latter laws, called Targeted Regulation of Abortion Provider (TRAP) laws, inflict strict maintenance, record-keeping, building, landscaping, employment, and housekeeping rules on facilities and physicians who provide abortions. Because of these restrictions, close to 90 percent of all counties in the United States have no abortion providers.

Another response to *Roe v. Wade* has been the establishment of the Pro-Life Movement. Activists in this movement believe that all abortion should be illegal except for in cases of rape, incest, or to save a mother's life. Between 2011 and 2013, anti-abortion forces managed to convince state legislatures to pass 205 bills targeted toward restricting abortion access and availability. They have also succeeded in banning intact dilation and extraction (D&X), or "partial birth," abortions through the Partial-Birth Abortion Ban Act, signed into law in 2003.

Anti-abortion activists have even used violent means in attempts to prevent women from seeking abortion. In addition to picketing outside abortion clinics, pro-life activists have blocked clinics, trespassed, given death threats, and have even murdered abortion providers. An online website lists the names and information of abortion providers in "Wanted" style posters. The Freedom of Access to Clinic Entrances Act (FACE) has allowed women and abortion providers some reprieve against these attacks.

Cultural feminists typically agree that women have a right to abortion, framed as an extension of the underlying right of choice. They look to women's individual stories to help frame the law. Pro-life feminists also draw on cultural feminism and women's stories to support arguments against abortion. Anti-essentialist views stress that reproductive rights occur at the intersection of race, gender, age, and class. They point to studies showing that lower-economic-class African American women have lower rates of contraceptive use and higher rates of unintended pregnancy.

Contraception, too, has been contested in many states, with access remaining the biggest concern. Title X of the Public Health Services Act allocates federal funds to family planning services, but has not kept up with inflation over the years. Emergency contraception has been even harder to access, but a 2013 court decision required the FDA to allow the sale of prescription-free morning after pills, regardless of age. Requiring insurance and employers to cover birth control has been widely contested, with a 2014 ruling that corporations were not required to cover birth control based on the owner's religious beliefs and the 1993 Religious Freedom Act.

Other issues surrounding women's sexuality and bodies include surrogacy and pornography, two industries that are often contested for their objectification of women. Surrogacy is illegal in many states, but in states where it is allowed, including California, more than sixteen hundred babies are born each year through the practice. Views of surrogacy range from empowerment to exploitation. In law, one of the biggest issues that arises with surrogacy is if the surrogate mother decides she wants to keep the baby. In this case, questions of true parenthood arise, with mixed results. In the famous 1985 surrogacy case, *In re Baby M*, the court decided that the surrogate mother, who was also the biological mother, was in fact the legal mother of the child. In other cases, where the biological mother was not the gestational mother, the legal dispute has become more murky.

The feminist legal issues surrounding pornography arise when the pornography is shown to perpetuate the objectification of women, or when it is distributed without a woman's consent. Despite many feminists' efforts to redefine pornography as sex discrimination and a civil rights violation, pornography remains largely unregulated by the state. Revenge porn is the online distribution of sexually explicit images of persons without their consent. While it is easy to challenge a stranger who hacks someone's private account and distributes her images, the law is less clear in cases where a vengeful partner transmits a lover's nude photo, even when publication is obviously meant to cause harm.

#### QUESTIONS FOR DISCUSSION

1. If women have the right to control their bodies, should that right extend up to the point of birth? If not, why not? On what principled basis would you make a distinction between abortions at two months and at eight months of pregnancy? On the basis of viability, which current constitutional doctrine emphasizes? On the basis of the idea that in morally ambiguous situations, allowing extreme decisions is more likely to be morally wrong? On the basis of some other principle?

2. A number of legislators recently have introduced riders to reproductive rights bills to regulate male reproductive rights. For example, in Georgia, as an amendment to a bill that would ban abortions for women beyond twenty weeks of pregnancy, a Democratic representative proposed an amendment banning all vasectomies for men unless required to avoid death or serious injury. One justification for the amendment was gender symmetry; another was to avoid leaving “thousands of children . . . deprived of birth.” In Virginia, when the legislature was considering a bill that would require women who wanted an abortion to have an ultrasound, a Democratic senator proposed an amendment to the bill that would require men who wanted to obtain erectile dysfunction medication to have a rectal exam and a cardiac stress test. Are these proposed amendments anything more than media stunts? Even if they are principally media ploys, is this approach a useful strategy to affect public opinion? Will these tactics result in consciousness-raising? Would current reproductive rights law provide any legal or doctrinal support to uphold either of these?

3. Imagine that you have been asked to advise a state legislature on a new law regulating surrogacy. What would you recommend? Would your law allow surrogacy at all? If so, under what circumstances? Would your law permit compensation? Would it make a distinction between traditional surrogacy and surrogacy using in vitro fertilization? If your law sought to discourage surrogacy in some or all circumstances, how would it do so? Would it make such contracts unenforceable? Would it subject the parties to criminal penalties? What arguments could you make to justify your position to those who disagree?



## SUMMARY

This chapter discusses the legal issues surrounding marriage and family, particularly as they pertain to same-sex marriage, domestic partnerships, and divorce and child custody disputes.

There are many benefits to marriage—cultural, legal, and financial. Married couples receive spousal employment benefits, tax deductions, worker's compensation payments, and are able to sue for wrongful death or make medical decisions for an incapacitated spouse. Property succession laws also favor spouses. The fight for marriage equality has often found basis on these grounds, as marriage is no longer a simple matter of religion. In 1996, Congress passed the Defense of Marriage Act (DOMA), which defined marriage as a union between a man and a woman. However, starting with Massachusetts in 2003, states began to legalize gay marriage. By the time the U.S. Supreme Court decided, in June of 2015, that same-sex marriage is a right protected by the Constitution, thirty-seven states and the District of Columbia had recognized same-sex marriage. However, it is important to note that the United States still has a long way to go for equality for LGBT individuals, since they still face many forms of employment and housing discrimination.

When couples live together without getting married, they are participating in a domestic partnership. Domestic partnerships raise questions about how the law should govern these types of relationships internally and externally. Internal questions arise when domestic partners have disputes over explicit or implicit contracts between the partners. External questions arise around how general law should treat domestic partnerships. Some states recognize domestic partnerships, allowing individuals many of the same legal benefits as those who married.

Divorce has become a landmark in feminist progress because it allows women to exercise the right to exit. With divorce, some of the greatest legal questions arise over the division of property, tangible and intangible, and child custody. Intangible property includes degrees, which have value in earning potential. Child custody court decisions generally favor the mother, up to ninety percent of the time.

## QUESTIONS FOR DISCUSSION

1. Imagine yourself in a conversation with your steady, unmarried partner (opposite or same-sex, it doesn't matter). Make the case that you should one day get married. How much of your argument depends on personal reasons? Social reasons? Legal reasons? How easy is it to tell the difference?

2. Some believe that law can help shape society by encouraging people to adapt their economic or social behavior. For women, the messages are often mixed. Rules of marital property division appear to suggest that wives should nurture their careers, work toward financial autonomy, and beware student-husbands. The standards of child custody, on the other hand, appear to reward women who have adopted more traditional roles of homemaker and caretaker. Should these laws be made more consistent? If most people do not expect to divorce anyway, how much influence can such laws actually have on current behavior? Could the legal rules regarding property division and custody help explain the increasing nonmarital birth rate in America—why more than half of births to women under thirty years of age (who give birth to about two-thirds of all children in the United States) now occur outside of marriage? Of the gender-neutral child-custody standards discussed in this chapter, which is most likely to benefit mothers? Fathers? Children? In selecting a standard, whose needs should be paramount? If you say “the children” (and we suspect many of you will), is it possible to serve children without using a standard that visits unfairness upon one of the parents?

## SUMMARY

Chapter 7 focuses on intimate violence perpetrated against women. According to the Centers for Disease control, nearly 3 in 10 women in the United States have experienced rape, physical violence, and/or stalking by an intimate partner, and there is a stunning gap between violence against women and criminal punishment of perpetrators. Feminists have worked to increase official action against intimate violence by redefining the concept as a result of a social system in which men dominate women, rather than as a personal or family issue.

Only 28 percent of all sexual assaults or rapes are ever reported to the police, and of those, only 14 to 18 percent of sexual assault cases and 37 percent of rape cases lead to prosecution. Rape is classified by the inclusion of three elements: intercourse, some kind of forcible compulsion, and nonconsent. Over the years, questions have arisen around what qualifies as nonconsent. Even today, some states have a reasonable-resistance requirement for rape prosecutions, meaning that the victim's verbal objection is not sufficient to show nonconsent. Some rape myths claim that women who have been raped were "asking for it" based on their clothing, reputation, and other factors, but the truth is that only 4 percent of reported rapes involve any precipitative behavior by the victim. A fundamental suspicion remains of women who assert charges of rape, and reformers have had to work hard to abolish discriminatory rape laws and to encourage prosecutors to treat rape as seriously as any other crime. Another common misconception about rape is that most rape is perpetrated by strangers, when, in fact, eight out of ten victims said they knew their rapist. Campus sexual assault is also a prevalent but somewhat hidden issue, since fewer than 5 percent of attempted or completed rapes on campus are reported to law enforcement.

Another major issue of violence against women is domestic violence and abuse. Women who are trapped in abusive relationships more often than not try to leave, but are sometimes prevented based on a number of factors, including lack of resources, fear for their lives, and learned helplessness. According to some theorists, battered women are caught in a cycle of violence and learned helplessness, called the "battered intimate partner syndrome." However, other theorists have suggested that women do not learn passivity and helplessness but actually make repeated attempts to escape domestic violence, called the "survivor theory." Some battered women even resort to killing their partners, and have used the battered intimate partner syndrome to support their claim to self-defense. Intersectionality also plays a part in domestic abuse, as African American women experiences greater rates of violence than women of other races, and immigrant women and LGBT individuals face unique challenges when confronted with domestic violence.

Legal intervention in violence against women has taken many forms. Police responses have historically been lacking, especially in minority communities where underpolicing and overaggressive policing have racialized effects. Some states have established mandatory arrest laws in domestic abuse cases, so that the abuser cannot intimidate the victim into dropping the case. In addition, in 1994 Congress passed the Violence Against Women Act (VAWA), a federal statute to diminish violence against intimate partners, and in 2013, President Obama passed a law extending the protection to LGBT persons, immigrants, and Native Americans. Since VAWA's enactment, the rates of intimate violence have declined, but perhaps due in part to the Supreme Court cutting parts of the law it held unconstitutional, the rates of domestic violence fell less than rates of other crimes from 2001 to 2010.

#### QUESTIONS FOR DISCUSSION

1. Many of the inequalities in the laws regarding rape and intimate violence reflect cultural norms. Reformers have attempted to challenge deeply entrenched social norms through changes in laws and policies. Take as just one example the Sexual Offense Prevention Policy adopted by Antioch College in 1990, with a variation adopted by Gettysburg College in 2006. It says that “[c]onsent must be obtained verbally before there is any sexual contact or conduct,” that “[s]ilence is never interpreted as consent,” and that obtaining consent is an ongoing process during any sexual encounter: “If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed, which is one level, to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before moving to that new level.” The intent of the policy is to place on the person who wants to move to a different level of sexual intimacy the burden of obtaining a clear, verbal expression of consent from his or her partner. Although the policy was mocked by major news magazines and parodied in a Saturday Night Live skit, according to reporters who interviewed students about the effects of the Antioch policy, “People are not having less sex, they are just talking about it.” Are perceptual gaps between men and women so vast that states should change their consent statutes along the lines of Antioch’s policy to require explicit verbal consent or overt conduct indicating consent? As mentioned earlier, in 2014, the California legislature considered a bill that requires any college receiving state funds to use the Antioch “affirmative consent” standard in its campus sexual assault disciplinary policies. If you were a college administrator, what would you do about the phenomenon of campus sexual assaults?

2. At the other end of the spectrum is the question of whether American courts should permit defendants from other countries to raise “cultural defenses” to

criminal charges. In one such case, a California court allowed a Hmong man to introduce evidence that he reasonably believed the woman he was accused of raping consented to intercourse because her behavior fit with the traditional practices of bride capture. In another case, a Chinese immigrant admitted bludgeoning his wife with a hammer, but argued in defense that in his village, bludgeoning was the penalty for her infidelity. In the spirit of multicultural sensitivity, should courts permit the admission of relevant cultural evidence—or is this unacceptably prejudicial to victims or offensive to the policies underlying American criminal laws?

3. Debates are occurring across a variety of disciplines about whether biological or sociocultural theories provide better explanations for the phenomenon of rape. At one end of the spectrum is a claim that rape is essentially a political act that institutionalizes subordination. Susan Brownmiller writes that rape is “nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.” Intermediate positions suggest multiple causes of sexual aggression and emphasize psychopathology, as well as social and cultural influences. At the other end of the continuum are theories of sociobiology. Camille Paglia, for example, argues that “[a]ggression and eroticism, in fact, are deeply intertwined. Hunt, pursuit, and capture are biologically programmed into male sexuality. Generation after generation, men must be educated, refined, and ethically persuaded away from their tendency toward anarchy and brutishness.”

## SUMMARY

The final chapter provides a short discussion on feminist legal theory as it relates to the world as a whole. This chapter discusses globalization, which describes the increased bonding of economies and cultures throughout the world, and its relation to feminist theory. Women fare significantly worse in the world than men. Indeed, women make up 70 percent of the world's absolute poor, earn only one-tenth of the world's income and own less than one-tenth of the world's property, despite accounting for two-thirds of the world's working hours. In a world with so many different cultural and religious beliefs about women, how can feminist legal theory ever hope to make change on a global scale?

Part of the answer involves deciding what feminist interests and values are so important, so universal, that they must be recognized even within the jurisdiction of an autonomous nation. Just as private families should enjoy the right to organize themselves as they want, so too should foreign peoples. But feminism insists there is a limit, a point at which the "private," or the "domestic," becomes the "public"—that is the business of all of us. This is the principle upon which the theory of international human rights is based. Feminist legal theory suggests there is point where a nation's laws become unjust, perhaps illegitimate, when, on account of sex, they seriously damage the well-being or autonomy of women. Even so, feminists must be sensitive to the different experiences and needs of women across lines of culture and class.

Some of the most pressing global concerns for feminists include human trafficking, education for girls, and economic development. One question raised is how national and international laws address human trafficking, or the business of recruiting, transporting, or selling human beings into forced labor and servitude. There is a lack of uniform law surrounding this issue, and the laws of many countries focus on finding and punishing the illegal laborer but ignore the illegal trafficker. To address this issue, the General of Assembly of the United Nations recently approved a Trafficking Protocol to require countries to criminalize human trafficking and places blame on the trafficker.

Education for girls is a global feminist issue because, while many countries deny this right to women, research shows that the education of girls nearly doubles the workforce, and produces a ripple of positive effects within the girls' families and across generations. In the efforts to increase education for women, advocates utilize feminist legal theory in their commitment to formal equality. In addition, cultural feminism plays a part in the explicit recognition of the unique role women play in the household as educators, organizers, and protectors.

Finally, many feminists and feminist legal theorists agree that the key to women's liberation is economic development, because countries that lack resources are less likely to put forth the effort to improve the lives of most women. Among the very poor the promise of rights may not be as immediately important as the promise of material goods. In addition, just because a law grants women's rights does not mean that it will be applied appropriately in the country where it is passed. Finally, there is a schism in the globalization of the workforce, consisting of hypermobile professionals and the class of local support staff. To address these concerns, some groups are relying on cultural feminism to raise up lower class indigenous women, providing them with form farming or crafts-making co-ops where they can collectively pursue personal goals and leverage business assets. Others are relying on postmodern feminist theory to look for practical ways to improve women's situations in a local context.

#### QUESTIONS FOR DISCUSSION

1. Some feminists argue that the international emphasis on crimes like human trafficking, kidnapping, and rape unwittingly reinforce stereotypes of women as vulnerable beings in need of protection. Is that a fair concern? Does criticism like that come with the territory, or can you imagine a way around it?
2. What would a substantive understanding of equality require in terms of governmental policies that a formal guarantee of equality would not reach?
3. Is there a way to develop a concept of universal rights or basic principles of respect without imposing Western political ideals on non-Western cultures?