The Intersectional Origins of Modern Feminist Legal Advocacy

Serena Mayeri
University of Pennsylvania Carey Law School
The Intersectional Origins of Modern Feminist Legal Advocacy

Serena Mayeri†

Intersectionality, reproductive justice, abolitionism, LGBTQ+ liberation, and democracy defense have moved to the center of twenty-first century feminist legal thought and advocacy, with feminists of color and queer scholars and activists at the forefront.¹ But it wasn’t always so. Or was it?

We often have imagined the trajectory of late twentieth-century United States feminist legal thought as a progression: an initial phase later subjected to critiques that grapple more fully with power’s complexities, with multiple axes of subjectivity and oppression, and with nuanced accounts of human difference. One stylized rendition of this story was that formal legal equality championed by mostly white, privileged feminist lawyers in the 1970s gave way to the difference and dominance feminisms of the 1980s, which then yielded to the intersectional, transnational, and postmodern theories of the 1990s. Accounts of legal struggles over reproductive freedom often began with reproductive rights—a narrow, abortion-focused conception of “choice” that centered upper and middle-class white women— which later gave way to a more expansive conception of reproductive justice pioneered by feminists of color. And we still often tell a story of evolution from a world in which “gender” was merely a euphemism for the “immutable” characteristic of “sex” to one that recognizes gender fluidity

† Professor of Law and History, University of Pennsylvania Carey Law School. I am grateful to Jelani Hayes, Mikaela Cardillo, Katherine Salinas, and the Yale Journal of Law and Feminism staff for editorial assistance, and to Deborah Dinner for comments on an earlier version of this essay.

and expansiveness; the critical potential of queerness; pansexuality; and nonbinary identities and experiences.

Such narratives capture some important truths. But closer examination has revealed their limitations as historical accounts of feminist legal thought and practice. For one thing, excavating the work of key architects of early second-wave feminist legal thought and strategy confounds origin stories of this kind by uncovering transformative contributions made by intersectional thinkers from the beginning. Pauli Murray, a visionary activist, lawyer, poet, and priest now receiving overdue recognition, is a case in point.² Ruth Bader Ginsburg rightly credited Murray with conceiving the litigation strategy that transformed the Supreme Court’s interpretation of equal protection: Ginsburg’s “grandmother brief” in Reed v. Reed relied heavily on theories developed by Murray during Murray’s tenure on the President’s Commission on the Status of Women and in the jury service case White v. Crook, in which Gardenia White challenged race- and sex-based jury exclusions that resulted in an all-white, all-male jury acquitting the murderers of civil rights activists.³ Murray also helped to secure the inclusion of “sex” in Title VII of the Civil Rights Act of 1964 by emphasizing the centrality of equal employment opportunity to Black women’s ability to support their families.⁴ And Murray accomplished these feats in the early 1960s using a politically savvy, analytically sophisticated toolkit informed by what we would now call intersectionality.⁵ By the end of the decade, Murray had conceived and taught some of the first courses on race, gender, and the law.⁶ Murray’s private struggles with extant norms of gender and sexuality and public explorations of interracial identity and family history undoubtedly fueled this record of prescient intellectual and legal innovation.⁷

A singular figure to be sure, Murray was hardly alone: advocates with intersectional experiences and approaches played pivotal roles in early second-wave feminist legal thought and practice. As chair of the New York City Human Rights Commission and later of the EEOC, Eleanor Holmes Norton advanced innovative legal responses to discrimination and harassment born of a Black feminist sensibility. Norton also promoted a vision of gender egalitarian marriage with a long historical pedigree; she cited Black women’s leadership in family life and public activism as a model

² For more on Murray, see, for example, SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011); Serena Mayeri, After Suffrage: The Unfinished Business of Feminist Legal Advocacy, 129 YALE L.J. F. 512 & n.3 (2020) (citing sources).
³ MAYERI, REASONING FROM RACE, supra note 2, at 27-29; LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 185-201 (1998).
⁷ See, e.g., KENNETH MACK, REPRESENTING THE RACE 207-33 (2012); ROSENBERG, supra note 6.
worthy of emulation by white women seeking equality with men. Florynce ‘Flo’ Kennedy played a key role in struggles for reproductive rights, using her experience representing Black Power advocates to “place the state on trial and to mobilize support outside the courtroom” in pre-\textsc{Roe} abortion decriminalization litigation. Legal aid lawyer Antonia Hernández and other Chicana feminists creatively used \textsc{Roe} and other precedents to fight sterilization abuse against Mexican American women in Los Angeles public hospitals in the mid-1970s. Legislators such as Patsy Takemoto Mink and Shirley Chisholm helped spearhead a golden age of feminist legislation in Congress.

Nor are the elite echelons of the legal profession the only place to look for feminist legal innovation. Black women such as Gardenia White of Alabama and Lillie Willis of Mississippi fought for universal jury service and to fulfill the promise of the 1965 Voting Rights Act. Struggles for workplace justice built upon Murray’s and Norton’s advocacy to expand the meaning of Title VII and other anti-discrimination laws beyond their initial ambit. For instance, workers—often led by Black women—organized and litigated against sexual harassment and pregnancy discrimination, expanding the scope of sex equality law to include these harms. In the years following the Civil Rights Act’s passage, gay and transgender workers interpreted the federal constitution and Title VII’s sex provision to protect them from employment discrimination; they prosecuted claims in courts and administrative agencies and even won backing from at least one EEOC commissioner. Lesbian, gay, and transgender activists struggled against

\footnotesize{8 See Mayeri, Reasoning From Race, supra note 2, at 48-49. As historian Martha Jones has shown, Black women had long formed a vanguard that fought for universal suffrage and equal political participation regardless of race or sex. See Martha S. Jones, Vanguard: How Black Women Broke Barriers, Won the Vote, and Insisted on Equality for All (2020); see also Julie C. Suk, We, the Women: The Unstoppable Mothers of the Equal Rights Amendment (2020).


12 Mayeri, After Suffrage, supra note 2, at 521-22.


repression and discrimination in housing, health care, policing, family law, and employment at the state and local level.15

Movements for reproductive justice also have deep historical roots that precede the paradigm of “choice” and single-minded focus on defending abortion rights.16 In the 1960s and early 1970s, activists and plaintiffs used constitutional and statutory law to fight for what Black feminists in SisterSong later named and nurtured.17 Examples abound, including Johnnie Tillmon, who fought for a feminist vision of welfare rights; civil rights leader Fannie Lou Hamer, who defended Black women’s right to bear and nurture children; and Philadelphia community organizer Lois Fernandez, who lobbied and litigated against Pennsylvania’s penalties for “illegitimacy.” Plaintiffs such as Mrs. Sylvester Smith, a worker and parent, challenged Alabama’s “substitute father” law; Katie Mae Andrews, an aspiring educator, vanquished a Mississippi school district policy that barred parents of “illegitimate” children from teaching; Black women and children brought nearly all of the early birth status discrimination cases to the Supreme Court; women contested state policies that imposed fines and imprisonment on mothers who refused to identify their children’s fathers.18

Not all of these activists and plaintiffs called themselves feminists, but they pioneered intersectional claims to equality and justice based on race, sex, poverty, and family status. They resisted punitive government policies that denied public assistance, inheritance and survivorship rights, social

---


16 On the emergence of “choice” and the single-issue focus on abortion among mainstream reproductive rights organizations, see MARY ZIEGLER, AFTER DOE: THE LOST HISTORY OF THE ABORTION DEBATE chs. 3-4 (2015).

17 See LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017); Loretta Ross, Understanding Reproductive Justice, 36 OFF OUR BACKS 14 (2006) (describing reproductive justice movements as fighting for “the right to have a child, the right not to have a child, and the right to parent the children we have” as well as the “necessary enabling conditions to realize these rights,” which means addressing social justice issues including “issues of economic justice, the environment, immigrants’ rights, disability rights, discrimination based on race and sexual orientation, and a host of other community-centered concerns”); UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE (Jael Silliman et al. eds., 2005).

insurance benefits, and equal employment opportunity to unmarried parents, nonmarital children, and their families. They protested coercive sterilization, mandatory paternity disclosure, housing discrimination, and child removal by claiming rights to due process, equal protection, reproductive autonomy, sexual privacy, and family integrity. They emphasized the right to have children and to raise them in flourishing communities with sufficient resources, to call upon the state for support without punitive strings attached. They recast single and poor mothers of color as deserving, equal citizens determined to provide care and support to their children. And in doing so, they confronted formidable opponents, liberal as well as conservative.

Conflicts of material interests, ideology, and strategy surely divided feminists of various racial and class backgrounds—debates about sterilization regulation and family planning funds, the prioritization of an Equal Rights Amendment, and approaches to pregnancy, poverty, and welfare rights among them. But recent scholarship paints a nuanced and complex picture even of advocacy previously viewed as formalistic and incremental. For example, the strategic use of male plaintiffs to promote sex-stereotyping analysis and men’s caregiving roles; efforts to extend protective labor legislation to men; litigation to support the right to have children as well as not to have them; early public accommodations and marriage equality activism—all appear more expansive and potentially transformative than they once did.

To appreciate the diversity of perspectives that informed feminist legal thought from the beginning, we have had to expand our definition of feminism, of legal thought, and of the relationship between theory and practice. If we define feminist legal thought exclusively or even primarily as the output of law school faculties, then (lack of) representation—especially in the early years—radically limits the category.

---

19 I have explored various facets of these movements in Serena Mayeri, Marital Supremacy and the Constitution of the Nonmarital Family, 103 CAL. L. REV. 1277 (2015); Serena Mayeri, Intersectionality and the Constitution of Family Status, 32 CONST. COMMENT. 377 (2017); and Serena Mayeri, Race, Sexual Citizenship, and the Constitution of Nonmarital Motherhood, in HETEROSEXUAL HISTORIES (Rebecca L. Davis & Michele Mitchell eds., 2021).

20 On opposition from across the political spectrum, see, for example, Felicia Kornbluh & Gwendolyn Mink, Ensuring Poverty: Welfare Reform in Feminist Perspective (2018); Robert O. Self, All in the Family: The Realignment of American Democracy Since the 1960s (2012); Lily Geismer, How the Democrats Failed to Solve Inequality (2022); and Marisa Chappell, The War on Welfare: Poverty and Politics in Modern America (2010).

generally encompasses a few more. But to see the full picture, studies of community activism and subnational movements from welfare rights to the Combahee River Collective have been essential. Historians inside and outside the legal academy have contributed to this body of work, some more focused on law than others, but all enriching our understanding of feminist legal thought broadly construed.

In the realm of legal advocacy, too, to appreciate these origin stories we have had to look within but also beyond the most visible feminist organizations such as the ACLU Women’s Rights Project. Groups such as the National Welfare Rights Organization, the Center for Constitutional Rights, the Southern Poverty Law Center, the Women’s Law Project, and the NAACP LDF, played underappreciated roles. So did legal aid and poverty lawyers, labor unions, community organizations, and local civil rights attorneys. To find feminist demands on the state, it has been necessary to examine state and local governments and administrative agencies as well as federal officials and courts. It has also been imperative to look beyond those who self-identified as feminists or who undertook concerted, coordinated campaigns on behalf of self-evidently feminist causes.

These histories move beyond origin stories that depict early feminist legal projects as narrow, one-dimensional, formalistic, and white-dominated—and feminists of color as post hoc critics offering necessary correctives after the fact but exerting little impact on legal and political outcomes. They reveal the capacious visions of equality and justice that powered early modern feminist legal thought and advocacy, and the prominent part played by historical actors often viewed as marginal.

What are the implications of centering these origin stories? Most obviously, doing so gives credit where credit is due. Feminists of color and queer advocates were present at the creation, not as gadflies or retrospective critics but as active participants in shaping law and legal strategy from the start. The leadership of Black feminists and other people of color, of queer thinkers—so abundantly evident today in scholarship, advocacy, and activism—is now more striking, visible, and influential, but it is not a new phenomenon.

Perhaps less obviously, these stories complicate accounts that blame feminists for their failure to achieve more. They shift attention to the myriad obstacles advocates faced in realizing their expansive agendas: alliances built by fiscal and social conservatives, enduring structures of patriarchy and white supremacy, and bipartisan commitments to neoliberal principles such as

---

22 Pauli Murray, for example, and Angela Y. Davis.
23 See, e.g., sources cited supra note 18; Taylor, supra note 15.
as free-market economics, privatization, and personal responsibility. These stories also highlight a temporal disjuncture: feminist advocates and scholars gained hard-won access to positions of authority just as broader legal and political trends placed greater obstacles in their path. If this is a “lost promise” story, it is one in which promise was lost not only because of feminists’ biases and poverty of imagination. Those existed, to be sure, as recent work on “governance feminism,” anti-violence movements, and welfare reform places in sharp relief. But it is also true that what many feminists sought in the final decades of the twentieth century posed a genuine threat to the status quo. And this threat provided fodder for reactionaries who found in anti-feminism a powerful stand-in for overt white supremacy.

Historical accounts, no matter how accurate or compelling, rarely yield definitive prescriptions. But they can provide crucial correctives for those who would invoke “history and tradition” to justify injustice today. They can combat cynical manipulations of the historical record, such as those that compare the individual decisions of Black women exercising reproductive rights to state-sponsored eugenics. They can begin to repair the distortions to legal education and to popular understandings caused by historical erasure.

25 For more on these obstacles and their impact on feminism, see, for example, Mayeri, Reasoning from Race, supra note 2; Dinner, The Sex Equality Dilemma, supra note 13; Alison Lefkovitz, Strange Bedfellows: Marriage in the Age of Women’s Liberation (2018); Turk, Equality on Trial, supra note 14; Suzanne Kahn, Divorce, American Style: Fighting for Women’s Economic Citizenship in the Neoliberal Era (2021); Kirsten Swinth, Feminism’s Forgotten Fight: The Unfinished Struggle for Work and Family (2018); and Deborah Dinner, Beyond Best Practices: Employment-Discrimination Law in the Neoliberal Era, 92 IND. L. J. 1059 (2017).


These histories can also impact law, sometimes in surprising ways. For decades, courts perpetuated myths about the origins of Title VII to undermine expansive interpretations of the statute. Judges and journalists repeated the canard that the sex discrimination prohibition arose as a “joke” or “fluke,” occluding the efforts of Pauli Murray and others who fought for its inclusion. But when the Supreme Court interpreted Title VII to prohibit discrimination based on sexual orientation and gender identity, Justice Gorsuch’s majority opinion used early claims that the sex discrimination prohibition covered gay and transgender workers to support a capacious meaning for “sex.”

For advocates, inclusive origin stories can provide models and cautionary tales. They can alert us to our own shortcomings, and inspire us to amplify and heed silenced voices, present as well as past. And they provide powerful tools for denaturalizing the present, for showing that the way things are is neither inevitable nor necessary.

---

32 See Mayeri, Intersectionality and Title VII, supra note 4; Cary Franklin, Inventing the “Traditional Concept” of Sex Discrimination, 125 HARV. L. REV. 1307 (2012).
33 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750-51 (2020) (“The employers assert that ‘no one’ in 1964 or for some time after would have anticipated today’s result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least some people foresaw this potential application.”) (citing two early court cases addressing claims from 1969 and 1975, respectively); see also sources cited supra note 15.