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**LIBERAL FEMINIST JURISPRUDENCE:  
FOUNDATIONAL, ENDURING, ADAPTIVE  
("LIBERAL FEMINISM")**

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Forthcoming: OXFORD HANDBOOK OF FEMINISM AND THE LAW IN THE UNITED STATES (Martha Chamallas, Deborah L. Brake, and Verna L. Williams, editors, Oxford University Press, forthcoming 2022)

## Liberal Feminist Jurisprudence: Foundational, Enduring, Adaptive

(to be published as chapter on “Liberal Feminism” in OXFORD HANDBOOK OF FEMINISM AND THE LAW IN THE UNITED STATES (Martha Chamallas, Deborah L. Brake, and Verna L. Williams, editors, Oxford University Press, forthcoming 2022)

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### Introduction

Liberal feminism is a significant strand of feminist jurisprudence (or feminist legal theory) in the United States and elsewhere. The relationship between liberalism and feminism, however, is complex. As an historical matter, there is little doubt that liberal political philosophy serves as an important foundation for feminist political and legal thought. Feminists have divided, however, between viewing liberalism and feminism as “incompatible,” and its doctrines as best relegated to the past, and arguing that the better feminist response is to “reconfigure, rather than reject, liberalism.”<sup>1</sup>

Any assessment of liberal feminism as a strand of feminist legal theory starts with the liberal and liberal feminist concepts of individual liberty, autonomy, dignity, and equality and recognition of the injustice of gender-based restrictions based on men’s and women’s proper spheres and roles.<sup>2</sup> A prominent example of the influence of these concepts and commitments is

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<sup>1</sup> Amy R. Baehr, *Introduction*, in VARIETIES OF FEMINIST LIBERALISM 1 (Amy R. Baehr, ed. 2004) (arguing that the incompatibility of liberalism and feminism has been “arguably the *dominant* view among feminist scholars over the past thirty years”); RUTH ABBEY, THE RETURN OF FEMINIST LIBERALISM 2, 4 (2011) (“reconfigure”). We generally use the term “liberal feminist political philosophy” to distinguish it from liberal feminist *legal* thought, but at times simply use the term “liberal feminism” or “feminist liberalism” when the context makes our meaning clear.

<sup>2</sup> See ALLISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 47-48, 173-84 (1988 ed.).

the sex equality litigation of the 1970s undertaken by Justice Ruth Bader Ginsburg and the ACLU's Women's Rights Project, which challenged the pervasive sex-based discrimination in law and society's basic institutions.<sup>3</sup> These gender-based challenges transformed the United States Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment and ushered in a more skeptical judicial review of gender-based classifications, known as intermediate scrutiny.

Under intermediate scrutiny, legislatures may not rely on “fixed notions” about “the sexes” and must offer an “exceedingly persuasive justification” for using sex-based classifications.<sup>4</sup> This gender revolution continues to shape understandings of constitutional equality and the interpretation of statutory civil rights laws, such as Title VII.<sup>5</sup> Within “liberal feminism,” there are feminist legal scholars who, similar to Ginsburg, argue for symmetry or “formal equality” in law, even when dealing with evident differences between women and men—such as pregnancy—because of the risk of protectionism and a return of harmful gender ideology.<sup>6</sup>

Another body of liberal feminist legal theory builds upon liberal legal and political theory and liberal feminist political philosophy, ranging from John Stuart and Harriet Taylor Mill, in the 19th century, to John Rawls and Susan Moller Okin in the 20th century. These scholars have explored the tension between liberal ideals and gender injustice in marriage and family law and argued for governmental obligation to foster the preconditions for and address the obstacles to meaningful personal and political self-government.<sup>7</sup> Such theorists have also advocated law

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<sup>3</sup> Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. CHI. LEGAL F. 9, 11 (1989).

<sup>4</sup> *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

<sup>5</sup> 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

<sup>6</sup> Wendy W. Williams, *Notes from a First Generation*, 1989 UNIV. CHI. L. FORUM 99 (1989).

<sup>7</sup> *See, e.g.*, LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

reform to advance values such as dignity, self-expression, and sexual privacy, particularly as newer technologies, such as the internet, bring both new possibilities and new forms of gendered injury.<sup>8</sup>

This chapter begins with liberal feminism's historical roots in liberal and feminist political philosophy. It then considers the role of liberal feminism in law and legal thought and its relationship to other strands of feminist legal theory. It addresses how liberal feminism responds to internal feminist and external critiques and suggests the generative role of key liberal feminist tenets in ongoing struggles over sex equality.

On one view, the contribution of liberal feminism is mostly of historical interest in light of subsequent generations of feminist legal thought. On another, however, liberal feminism continues to inform feminist legal thought and legal advocacy, although its present-day exemplars engage in a more complex and nuanced discourse about sex, gender, and the gender binary than their forebears did a half century ago. This chapter concludes that the latter view is the more persuasive one. Liberal feminism can offer an inclusive and adaptive theory that provides insight in such diverse contexts as articulating the meaning of liberty and determining the scope of discrimination based on "sex," including transgender rights. Because liberal feminism aims at "disrupting—or bursting asunder" historical and rigid links between "biological sex and particular roles or ways of thinking associated with particular genders," liberal feminism has the potential to adapt as ideas about sex, gender, and identity continue to evolve.<sup>9</sup>

## **Defining Liberal Feminism**

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<sup>8</sup> See, e.g., Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019).

<sup>9</sup> Rosalind Dixon, *Feminist Disagreement Comparatively Recast*, 31 HARV. J. L. & GENDER 277, 315 (2008).

A commonplace criticism of liberalism is the slipperiness of the concept and the difficulty of defining it. The broad “family of positions” described as “liberalism” include positions “profoundly different” from each other, such as Kantian or Rawlsian liberalism, on the one hand, and, on the other, classical utilitarianism liberalism and present-day neoliberalism.<sup>10</sup> For this reason, feminist defenders of liberalism have argued that feminist critics often attack a caricatured or oversimplified picture of liberalism.<sup>11</sup> What, then, is “liberal” in liberal feminism and what makes it “feminist”? Answering these questions begins with visiting the roots of liberal feminism and tracking its emergence as a distinct strand of feminist legal thought through to its current relevance.

*Historical roots: Nineteenth century liberal feminists*

Liberal legal feminism has roots in both liberal and feminist political theory. “Modern Western feminism,” Ruth Abbey asserts, “grew up as a sister doctrine to liberalism.”<sup>12</sup> Classic liberal political theory, such as that of John Locke, challenged patriarchal authority with respect to political power. Pioneering “feminist liberals,” including Mary Wollstonecraft, Harriet Taylor, and John Stuart Mill, extended Locke’s critique to private power. Such early feminists, including American feminists such as Elizabeth Cady Stanton and Lucretia Mott, applied “liberal commitments to women” as a “matter of justice.”<sup>13</sup> Those “liberal commitments” include such values as:

individual freedom; equality before the law; equal opportunity; moral equality; personal autonomy; being rewarded (or punished) on the basis of merit rather than birth; the rejection of arbitrary and unearned power and hierarchy and its

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<sup>10</sup> MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 57 (1999).

<sup>11</sup> Linda C. McClain, “*Atomistic Man*” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); NUSSBAUM, *supra* note 10, at 57.

<sup>12</sup> ABBEY, *supra* note 1, at 1.

<sup>13</sup> *Id.*; see also DEBORAH RHODE, *GENDER AND JUSTICE* 12 (1989) (liberalism was the “most dominant influence” on “American feminism”).

replacement with the idea that the exercise of power by one individual over another must be rationally defended; consent to rule by those ruled; and freedom of conscience.<sup>14</sup>

Such liberal ideals are evident in Abigail Adams's famous plea to her husband John Adams, in 1776, to "Remember the Ladies, and be more generous and favourable to them than your ancestors," as he and other male politicians constructed a "new Code of Laws." Abigail Adams urged: "Do not put such unlimited power into the hands of the Husbands. Remember that all men would be tyrants if they could."<sup>15</sup> John Adams responded that he "cannot but laugh" at her "extraordinary Code of Laws" and "saucy" letter. But the answer, in any case, was no: "Depend upon it. We know better than to repeal our Masculine systems."<sup>16</sup> John Adams asserted that men held such power more in theory than practice, and would "dare not exert" it in "its full Latitude;" nonetheless, to yield their power would subject men to "the Despotism of the Petticoat."<sup>17</sup>

Rather than abolishing coverture marriage (the gender hierarchical common law model of marriage that travelled from England to the colonies), the revolutionary-era political leaders enlisted marriage as an emblem or "analogue to the legitimate polity."<sup>18</sup> They drew on Locke's idea that political legitimacy rested on individual consent to be governed; marriage, they reasoned, was a social contract to which women freely consented.<sup>19</sup>

In the nineteenth century, women's rights advocates continued to challenge coverture and called for full civil and political rights. They employed liberal political ideals of individual self-

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<sup>14</sup> ABBEY, *supra* note 1, at 1.

<sup>15</sup> *Abigail and John Adams Converse on Women's Rights, 1776*, THE AMERICAN YAWP READER, <https://www.americanyawp.com/reader/the-american-revolution/abigail-and-john-adams-converse-on-womens-rights-1776/#:~:text=The%20American%20Revolution%20invited%20a,the%20limits%20of%20revolutionary%20liberty.>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 16 (1999).

<sup>19</sup> *Id.* at 14.

determination and being “free . . . from the constraints of an ascribed status and separate sphere” to shape feminist demands.<sup>20</sup>

Many activists in the movement for women’s rights began as “ardent abolitionists” and their experience in the antislavery movement—including gender discrimination within the movement—led them to draw parallels between abolition and women’s rights.<sup>21</sup> Such women’s rights reformers “contended that both institutions, slavery and marriage, harbored inequalities inconsistent with American principles of liberty and equality.”<sup>22</sup> The reformers applied Locke’s theory that each person had a property in his own person to argue that because both the slave and the wife under coverture lacked such self-possession, they were denied the natural right to self-ownership.<sup>23</sup> Abolitionist sisters Angelina and Sarah Grimké, for example, pointed out parallels between the master/slave and husband/wife relationship, but disclaimed an exact comparison between “free women” and enslaved persons, given enslaved women’s greater “suffering,” “degradation” and denial of any legal status.<sup>24</sup>

Defenders of slavery, in turn, appealed to the parallels between slavery and marriage to justify both systems of white men’s “mastership over their households.”<sup>25</sup> In the pre-Civil War constitutional order, states’ primary responsibility to regulate their “domestic institutions” referred “simultaneously to family and to slavery.”<sup>26</sup>

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<sup>20</sup> RHODE, *supra* note 13, at 12.

<sup>21</sup> See SALLY G. McMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT* 35-70 (2008); RHODE, *supra* note 13, at 12.

<sup>22</sup> COTT, *supra* note 18, at 63.

<sup>23</sup> *Id.* at 64.

<sup>24</sup> *Id.* at 60-66; see also LISA PACE VETTER, *THE POLITICAL THOUGHT OF AMERICA’S FOUNDING FEMINISTS* 128, 132, 139-41 (2017) (explicating Sarah Grimke’s “Quaker liberalism”).

<sup>25</sup> COTT, *supra* note 18, at 63.

<sup>26</sup> MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 83 (2013).

The campaign for women’s suffrage enlisted liberal principles to attack both the unjust structure of family governance and the exclusion of women from the franchise as inconsistent with democratic and constitutional ideals.<sup>27</sup> Illustrative is the Declaration of Rights and Sentiments, which emanated from the Seneca Falls Convention of 1848. It invoked the “liberal premises” of the Declaration of Independence: “created equal,” women had “certain inalienable rights,” which were “usurped” by “man” claiming the “right to “assign” women a “sphere of action,” when that right belonged to “her conscience and her God.”<sup>28</sup> To arguments that gender hierarchy and the separate roles of men and women derived from “nature” and the “Creator,” feminists responded with their own appeals to divine order.

The Declaration of Sentiments foreshadowed 20th century liberal feminism by stressing the equal capabilities of women and men as a basis for equal rights and by condemning the legal disabilities imposed on women.<sup>29</sup> While radical for its time in some respects, the Declaration also “reflected its time;” some of its arguments for women’s rights “elevated white women above male immigrants, free black men and women, and the destitute who lacked the advantages many middle-class women possessed.”<sup>30</sup>

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<sup>27</sup> See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, YALE L. J. FORUM 450 (Jan. 21, 2020).

<sup>28</sup> Declaration of Right and Sentiments, reproduced as Appendix A in MCMILLEN, *supra* note 21, at 237-38; RHODE, *supra* note 13, at 12.

<sup>29</sup> Declaration of Right and Sentiments, *supra* note 28, at 237-41.

<sup>30</sup> MCMILLEN, *supra* note 21, at 91 (quoting the Declaration’s argument “that men withheld rights from women but gave the same rights ‘to the most ignorant and degraded men – both natives and foreigners’”). Susan B. Anthony’s angry, racist criticisms of the Fifteenth Amendment’s extending the franchise only to African American men drew on “ethnic and racial stereotypes and negative views about immigrants [and women] that were common currency in late nineteenth-century America.” Virginia Sapiro, *The Power and Fragility of Social Movement Coalitions: The Woman Suffrage Movement to 1870*, 100 B.U. L. REV. 1557, 1604-06 (2020) (giving example of Frederick Douglass’s criticism of opponents of Black male suffrage as “drunken Irishmen and ignorant Dutchmen”).

The appeal to women's equal capacities also featured in arguments that separate spheres ideology denied women the right to choose their own "proper sphere."<sup>31</sup> Such critiques of sex inequality invoked the influential work of John Stuart Mill and Harriet Taylor Mill.<sup>32</sup> In *The Subjection of Women* (1869), John Stuart Mill wrote that "the legal subordination of one sex to the other" as an organizing principle was "wrong" and should be replaced by "a principle of perfect equality, admitting no power of privilege on the one side, nor disability on the other."<sup>33</sup>

Mill's *On Liberty* (1859) supported liberal feminist arguments about the value of personal and political self-government and anti-paternalism. Further, in explaining *misunderstandings* of liberty, Mill criticized the "almost despotic power of husbands over wives," arguing that "wives should have the same rights, and should receive the protection of law in the same manner, as all other persons."<sup>34</sup>

While liberalism was a dominant influence on 19th century feminism, another prominent strand of feminism used "the rhetoric of natural roles" to argue for including women in public life.<sup>35</sup> This appeal to gender differences stressed that "women's special attributes" as mothers and housekeepers would improve public life.<sup>36</sup> After ratification of the Nineteenth Amendment, these tensions over how best to secure women's full civil, political, and social rights recurred in disagreements over the Equal Rights Amendment, first written in 1923, and over sex-specific protective labor legislation.<sup>37</sup> At issue was the question of whether formal equality (or gender

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<sup>31</sup> WENDELL PHILLIPS, SPEECHES, LECTURES, AND LETTERS (Boston: Lee and Shepard, 1884) ("Woman's Rights," speech made at Convention held in Worcester, Massachusetts, on October 15<sup>th</sup> and 16<sup>th</sup>, 1851).

<sup>32</sup> *Id.* at 12 (praising John Stuart Mill).

<sup>33</sup> John Stuart Mill, *The Subjection of Women* (1869), in JOHN STUART MILL & HARRIET TAYLOR MILL, ESSAYS ON SEX EQUALITY (Alice S. Rossi, ed. 1970).

<sup>34</sup> JOHN STUART MILL, ON LIBERTY 97 (1859) (David Spitz, ed., 1975).

<sup>35</sup> RHODE, *supra* note 13, at 14.

<sup>36</sup> *Id.* at 14. On Jane Addams's idea of civic, or municipal, housekeeping, see JEAN BETHKE ELSHTAIN, JANE ADDAMS AND THE DREAM OF AMERICAN DEMOCRACY 161-68 (2002).

<sup>37</sup> RHODE, *supra* note 13, at 34-50. See Julie C. Suk, *The Equal Rights Amendment, Then and Now*, this volume.

neutral laws) as a constitutional mandate was a better path to “true” equality than an approach that considered the “actual biological, social, and occupational differences between men and women.”<sup>38</sup>

*Feminists engage twentieth century liberalism*

In the 20<sup>th</sup> century, the liberal political philosopher John Rawls re-invigorated liberal thought for many political and legal theorists, including liberal feminists. *A Theory of Justice* (1971) and *Political Liberalism* (1993) offered, respectively, an argument about “justice as fairness” that distilled key liberal social contract traditions and a conception of a “political” liberalism that could support a “stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines.”<sup>39</sup> Rawls posited that free and equal citizens have two moral powers relating to self-government: (1) the capacity for a conception of justice, which allows democratic self-government (or “deliberative democracy”); and (2) the capacity to form, act on, and revise a conception of a good life, which allows personal self-government (or “deliberative autonomy”).<sup>40</sup>

Feminist political philosophers and legal theorists took up and critiqued Rawls’s work.<sup>41</sup> In *Justice, Gender, and the Family* (1989), liberal feminist Susan Moller Okin highlighted the inattention to gender and family in prominent theories of justice.<sup>42</sup> Rawls, she observed, assumed that, as a basic institution in a well-ordered society, families were just and could form children into

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<sup>38</sup> RHODE, *supra* note 13, at 36-37.

<sup>39</sup> JOHN RAWLS, POLITICAL LIBERALISM xxv (1993). Rawls distinguished this “political liberalism” from a “comprehensive liberalism” that would rest on or seek agreement on such doctrines.

<sup>40</sup> *Id.* at 19; McCLAIN, *supra* note 7, at 17 (citing JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 1 (2006)).

<sup>41</sup> See generally Baehr, *supra* note 1; ABBEY, *supra* note 1; Amy Baehr, *Liberal Feminism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 30, 2013) (online).

<sup>42</sup> SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989).

self-governing members of such a society. Contradicting that assumption, however, were forms of injustice within “gendered marriage,” such as domination and family violence, an unequal division of labor between husbands/fathers and wives/mothers during marriage, and divorce law that failed to recognize that inequality.<sup>43</sup> But Okin also argued that aspects of Rawls’s theory—such as his construct of the “original position” in which people (behind a “veil of ignorance”) determine what is a just outcome without knowing their social position in the society, including their sex—could be a powerful tool for feminist criticism of contemporary institutions.<sup>44</sup> Okin proposed that government could promote—but not compel—egalitarian marriage and adopt family law reforms so that marriage no longer contributed to women’s “socially created vulnerability.”<sup>45</sup> Responding to Okin and other feminist critique, Rawls clarified that, on his account, the family was not a space exempt from justice, but instead “the equal rights of women and the basic rights of children as future citizens are inalienable and protect them wherever they are.”<sup>46</sup>

Gender injustice within the family was also a central concern of philosopher and law professor Martha Nussbaum’s “human capabilities approach” to human development, which she characterized as reflecting both a form of political liberalism (akin to Rawls’s) and a universalist feminism.<sup>47</sup> Nussbaum attempted to address feminist critiques of liberalism for inattention to the moral virtues linked to care as well as the practical reality that the family has been a “major site of the oppression of women.”<sup>48</sup> To value care, her approach accorded the capabilities for love and care a prominent place in a political conception of justice and made them “important goals of social

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<sup>43</sup> *Id.* at 93-97.

<sup>44</sup> *Id.* at 101.

<sup>45</sup> *Id.* at 168-86.

<sup>46</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 *UNIV. CHI. L. REV.* 765, 791 (1997).

<sup>47</sup> MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 4-8 (2000).

<sup>48</sup> *Id.* at 242-43.

planning.”<sup>49</sup> To guard against risks that women will not be treated as ends in themselves but as instrumental beings (for example, as “reproducers and care givers”), she insisted that, within the family, the focus should be on “each person,” akin to the liberal tradition’s focus “on the individual as the basic political subject.”<sup>50</sup>

### **Liberal Legal Feminism in the Second Wave**

The political roots of 20th century liberal feminism are often situated in the organized women’s movement (the “Second Wave”) that focused on “achieving equality through litigation and legislative reform.”<sup>51</sup> In 1966, Betty Friedan (author of *The Feminine Mystique*) and civil rights activist and feminist lawyer Pauli Murray were instrumental in forming the National Organization for Women (NOW), born out of frustration over the Equal Employment Opportunity Commission’s failure to enforce Title VII’s prohibition against sex-based employment discrimination. NOW’s purpose (famously scribbled by Friedan on a napkin) was “to take action to bring women into full participation in the mainstream of American society now, assuming all the privileges and responsibilities thereof in truly equal partnership with men.”<sup>52</sup> That equal partnership reached beyond the “public world” to include the conventionally “private” realm of marriage, entailing “an equitable sharing of the responsibilities of the home and children and of the economic burdens of their support.”<sup>53</sup> NOW’s purposes were liberal feminist in arguing that because sexism and gender stereotypes harmed women *and* men, both had a stake in restructuring

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<sup>49</sup> *Id.* at 245.

<sup>50</sup> *Id.* at 245-46.

<sup>51</sup> RHODE, *supra* note 13, at 59; *see also* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829 (1990); JAGGAR, *supra* note 2, at 188-89 (describing NOW’s liberal feminist focus on “equality of opportunity” and rational capacity).

<sup>52</sup> Founding: Setting the Stage, NOW, <https://now.org/about/history/founding-2/> (visited July 4, 2020); PAULI MURRAY, *SONG IN A WEARY THROAT: MEMOIR OF AN AMERICAN PILGRIMAGE* 468-80 (1987; 2018 ed.).

<sup>53</sup> JANE MANSBRIDGE, *WHY WE LOST THE ERA* 99 (1986) (quoting NOW’s 1966 founding statement of purpose).

work, family, and other basic social institutions and in ratifying the Equal Rights Amendment.<sup>54</sup>

*Ruth Bader Ginsburg Helms the Women's Rights Project*

A similar premise about the harms of gender inequality and sexism informed Ruth Bader Ginsburg's constitutional litigation conducted with the ACLU's Women's Rights Project (WRP) while she was a professor at Rutgers.<sup>55</sup> Frequently described as a leading example of "early liberal feminist theorists in America,"<sup>56</sup> Ginsburg does not seem to have used the label "liberal feminist" to describe herself. However, she drew on the liberal philosophy discussed above to dismantle legally-enforced sex inequality. For example, in speaking of "the unfinished business of equality for women," Ginsburg quoted Mill's argument that "the legal subordination of one sex to the other" should be replaced by "a principle of perfect equality, admitting no power of privilege on the one side, nor disability on the other."<sup>57</sup>

Ginsburg's approach to equality is "liberal" because it insisted that people should not be disadvantaged based on membership in a group and instead should be evaluated based on their individual capacity. As Ginsburg explained the "fundamental premise" of the 1970s cases she litigated: "the law's differential treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically had tended to contribute to women's subordination—their confined 'place' in man's world—even when conceived as protective of the fairer, but weaker and dependent-prone sex."<sup>58</sup> Ginsburg's strategy exemplified liberal feminism in identifying how sex role stereotypes and "fixed notions" about the sexes rationalized women's

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<sup>54</sup> RHODE, *supra* note 13, at 59-60.

<sup>55</sup> Ginsburg & Flagg, *supra* note 3, at 11. Ginsburg co-founded the WRP with attorney Brenda Feigen.

<sup>56</sup> Dixon, *supra* note 9, at 298; Cain, *supra* note 51, at 829 (associating liberal feminism in legal academy with Ginsburg, Herma Hill Kay, Wendy Williams and Nadine Taub).

<sup>57</sup> See RUTH BADER GINSBURG (WITH MARY HARTNETT AND WENDY W. WILLIAMS), MY OWN WORDS 119 (quoting Mill in epigraph to Ginsburg's *Women and the Law: A Symposium Introduction*, 25 RUTGERS LAW REVIEW 1 (1971)).

<sup>58</sup> Ginsburg & Flagg, *supra* note 3, at 11.

legal subordination. Ginsburg's sought to help the Supreme Court perceive this inequity and move it toward a "constitutional principle that would provide for heightened, thoughtful review of gender classifications."<sup>59</sup> The challenge was formidable. To use Ginsburg's memorable image about constitutional interpretation at the time the WRP began: "Except for the vote [the Nineteenth Amendment], the Constitution remained an empty cupboard for people seeking to promote the equal stature of women and men as individuals under the law."<sup>60</sup>

The full story of Ginsburg's successful constitutional litigation challenging gender discrimination is amply told elsewhere.<sup>61</sup> This chapter briefly reviews a few cases in that campaign to highlight what they reveal about the contours of liberal feminism.<sup>62</sup> The tale usually begins with *Reed v. Reed* (1971), in which Ginsburg co-authored the plaintiff's brief, and, for the first time, the U.S. Supreme Court held that a law using a gender-based classification violated the Equal Protection Clause.<sup>63</sup> An important prequel that shaped the winning argument in *Reed*, however, was *Moritz v. Commissioner of Internal Revenue*, which Ginsburg successfully argued with her husband, tax lawyer Marty Ginsburg, before the Tenth Circuit Court of Appeals.<sup>64</sup> *Moritz* illustrates a striking feature of Ginsburg's

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 13.

<sup>61</sup> See *id.*; IRIN CARMON AND SHANA KNIZHNIK, NOTORIOUS RBG 51 (2015); RBG (CNN Films 2018); ON THE BASIS OF SEX (Focus Features 2018); Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 18, 2020).

<sup>62</sup> Ginsburg authored the briefs for *Reed v. Reed*, 404 U.S. 71 (1971), *Struck v. Secretary of Defense*, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), *Turner v. Department of Employment Security*, 423 U.S. 44 (1975). She authored the brief and presented oral argument for *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Kahn v. Shevin*, 416 U.S. 351 (1974), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *Edwards v. Healy*, 421 U.S. 772 (1975), *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Duren v. Missouri*, 439 U.S. 357 (1979). She also wrote amicus briefs for numerous other cases in this time period. Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161 (1994).

<sup>63</sup> *Reed*, 404 U.S. 71.

<sup>64</sup> *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10<sup>th</sup> Cir. 1972). In April 1971, Ginsburg sent the brief she and Martin Ginsburg wrote in *Moritz* to Mel Wulf, at the ACLU, who was then working on Sally Reed's appeal to the U.S. Supreme Court, commenting: "Some of this should be useful for *Reed v. Reed*." Wulf solicited her help on *Reed*. CARMON & KNIZHNIK, *supra* note 61, at 52.

litigation strategy: bringing claims by male plaintiffs to show how a sex-based classification violated the Equal Protection Clause. The plaintiff in that case, Charles E. Moritz, lived with his eighty-nine-year old mother and paid someone to care for her when he could not. The IRS denied him a dependent care deduction because he was a never-married man; he would have received the deduction had he been a daughter, widower, or a husband to a woman in need of care. This strange scheme suggested that “the idea that a man on his own might be responsible somehow for caregiving apparently never crossed the government’s mind.”<sup>65</sup> The Tenth Circuit unanimously held that the IRS rule violated principles of equal protection because the classification, “premised primarily on sex,” lacked any justification: Congress could have achieved its evident purpose of giving relief to persons “in low income brackets and bearing special burdens of dependents” without resorting to “invidious discrimination based solely on sex.”<sup>66</sup>

Fortunately, when Solicitor General Erwin Griswold urged the U.S. Supreme Court to overrule the Tenth Circuit, he unwittingly provided Ginsburg a roadmap for attacking discriminatory laws. Included in his filing was a computer-generated list of hundreds of federal “laws and regulations that treated men and women differently, and, thus, were at risk of being found unconstitutional if the Court did not reverse.”<sup>67</sup>

In *Reed v. Reed*, the first of Ginsburg and the WRP’s cases brought before the U.S. Supreme Court, the gender-based law at issue was an Idaho statute giving preference to men as administrators of estates when more than one qualified person was available. Sally Reed sought

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<sup>65</sup> CARMON & KNIZHNIK, *supra* note 61, at 1.

<sup>66</sup> *Moritz*, 469 F.2d at 470. The Tenth Circuit relied on *Reed* for the need to subject sex-based classifications to “scrutiny under equal protection principles.” *Id.* at 470.

<sup>67</sup> CARMON & KNIZHNIK, *supra* note 61, at 58-59.

to administer her deceased son's estate, but, under that statutory preference, the child's father (an abusive husband from whom she was separated) received the appointment.<sup>68</sup> Ginsburg's brief argued that "the sex line drawn by [Idaho's law], mandating subordination of women to men without regard to individual capacity, created a 'suspect classification' requiring close judicial scrutiny."<sup>69</sup> The brief drew analogies to race, already a suspect classification, arguing that, in both instances, an "unalterable trait of birth" should not be the basis for legislative discrimination.<sup>70</sup>

Liberal feminist emphases on the individual, on biology not determining a woman or man's societal roles, and on removing gender-based obstacles to full participation in society were evident in Ginsburg's brief:

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon close inspection, been revealed as a cage.<sup>71</sup>

In comparing race and gender discrimination, Ginsburg drew on the insights of Pauli Murray, who, as a Black woman, experienced both race and sex discrimination and theorized their connection.<sup>72</sup> In *Jane Crow and the Law*, Murray had argued: "That manifestations of racial prejudice have been more brutal than the more subtle manifestations of prejudice by reason of sex in no way diminishes the force of the equally obvious fact that the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issues of human

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<sup>68</sup> *Id.* at 52.

<sup>69</sup> *Id.* at 56 (quoting the brief).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 57.

<sup>72</sup> See Pauli Murray and Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965-66). On Murray's contributions, see Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 IND. J. L. & SOC. EQUALITY 85 (2014); MY NAME IS PAULI MURRAY (Participant 2021).

rights.”<sup>73</sup> To acknowledge that Ginsburg stood “on [the] shoulders” of Murray and Dorothy Kenyon (with whom Murray had successfully litigated civil rights cases that “put their theories of the parallels and intersections of race and gender into practice”), Ginsburg listed their names on the *Reed* brief.<sup>74</sup>

The Burger Court unanimously held the Idaho statute was unconstitutional under the Equal Protection clause of the Fourteenth Amendment because it treated similarly situated applicants differently. The Court, however, did not embrace the heightened standard of review that Ginsburg sought; instead, it claimed merely to be applying a rational basis standard.<sup>75</sup>

Two years later, in *Frontiero v. Richardson*, argued by Ginsburg for *amicus* ACLU, the Court came within one vote of adopting strict scrutiny for classifications based on sex when it struck down a federal statute that automatically gave men in the military an allowance for health care and housing for their wives, but allowed women that allowance only if they proved their spouse was financially dependent on them.<sup>76</sup> Justice Brennan’s plurality opinion recognized the close relationship between sex-role stereotypes and discrimination diagnosed by liberal feminism. He also invoked the pedestal/cage imagery first used in Ginsburg’s *Reed* brief to declare that, “traditionally,” sex discrimination “was rationalized by an attitude of ‘romantic paternalism,’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>77</sup> Referring to “our Nation[‘s] . . . long and unfortunate history of sex discrimination,” Brennan observed how notions about women’s proper place led to “our statute books gradually [becoming] laden with gross, stereotyped distinctions between the sexes,” drawing parallels between such laws and

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<sup>73</sup> Murray and Eastwood, *supra* note 72, at 235.

<sup>74</sup> CARMON & KNIZHNIK, *supra* note 61, at 54-55.

<sup>75</sup> *Reed*, 404 U.S. at 76-77.

<sup>76</sup> *Frontiero*, 411 U.S. at 678, 682.

<sup>77</sup> *Id.* at 684.

“pre-Civil War slave codes.”<sup>78</sup> Applying suspect classification criteria, his opinion characterized sex, like race, as immutable and determined by an “accident of birth.” Declaring that “the sex characteristic frequently bears no relation to ability to perform or contribute to society,” Brennan concluded that individuals must be judged on their capacity, not group membership.<sup>79</sup> While powerful, Brennan’s race/sex comparisons came to illustrate the problem of treating “woman” and “black” as mutually exclusive categories, thus omitting Black women.<sup>80</sup>

In 1976, the Court finally settled on a new test for sex-based classifications: “intermediate scrutiny.” Ginsburg briefed and argued *Craig v. Boren*, in which Justice Brennan—this time writing for a majority—interpreted *Reed* and other cases to establish that “classifications by gender must serve important governmental objections and must be substantially related to achievement of those objectives.”<sup>81</sup> Under that test, as the Court subsequently elaborated, government must offer an “exceedingly persuasive justification” for such classifications.<sup>82</sup>

Ginsburg would bring and win more Equal Protection cases challenging gender-based classifications, often featuring male plaintiffs.<sup>83</sup> As Irin Carmon and Shana Knizhnik summed it up: Ginsburg “firmly believed that for women to be equal, men had to be free.”<sup>84</sup> On this liberal,

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<sup>78</sup> *Id.* at 685.

<sup>79</sup> *Id.* at 686.

<sup>80</sup> For example, Brennan stated: “although blacks were guaranteed the right to vote in 1870 [the Fifteenth Amendment], women were denied even that right . . . until the adoption of the Nineteenth Amendment half a century later.” *Id.* at 686. For legal feminist critique of this problem with categories, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.8 (1991).

<sup>81</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that Oklahoma could not justify higher age for males to drink 3.2% beer (21) than for females (18)).

<sup>82</sup> *Mississippi University for Women*, 458 U.S. at 724.

<sup>83</sup> See, e.g., *Weinberger*, 420 U.S. 636 (holding unconstitutional rule not giving widowers same Social Security benefits as widows); *Califano*, 430 U.S. 199 (holding unconstitutional Social Security provision giving survivor benefits under Social Security Act only to widows).

<sup>84</sup> CARMON & KNIZHNIK, *supra* note 61, at 71-72.

egalitarian view, equal treatment of men and women in law was the best path to freedom *and* equality.

### *Justice Ginsburg on the Supreme Court*

After she was elevated to the U.S. Supreme Court in 1993, Justice Ginsburg had the extraordinary opportunity to explain the gender revolution in the Court’s Equal Protection jurisprudence that she helped to launch. In 1996, in *United States v. Virginia* (“VMI”), Ginsburg declared that “[s]ince *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”<sup>85</sup> Her majority opinion’s emphasis on individual capacity, equal opportunity, and anti-stereotyping marked her approach as liberal feminist. Ginsburg explained that sex-based classifications “may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women,” but may be used “to compensate women ‘for particular economic disabilities [they have] suffered, to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our nation’s people.”<sup>86</sup>

The Court struck down VMI’s male-only admissions policy and concluded that its proposed remedy of offering young women a chance to attend the newly-created Virginia Women’s Institute of Leadership (VWIL) did not cure the constitutional violation. Ginsburg concluded that Virginia offered no “exceedingly persuasive justification for excluding all

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<sup>85</sup> *United States v. Virginia*, 518 U.S. 515, 532 (1996) (“VMI”).

<sup>86</sup> *Id.* at 533 (emphasis added).

women” from VMI’s “citizen-soldier training,”<sup>87</sup> insisting that “generalizations about ‘the way women are,’[and] estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”<sup>88</sup> Noting the long history of excluding women from central societal institutions based on assumptions about their capacities, Ginsburg wrote: “State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”<sup>89</sup> Accordingly, for those women who “want a VMI education and can make the grade,” VWIL was not a sufficient constitutional remedy.<sup>90</sup>

Two decades later, in *Sessions v. Morales-Santana*, Justice Ginsburg drew on VMI’s anti-stereotyping premises to hold unconstitutional a gender-based difference in a 1940 citizenship law that favored “unwed U.S.-citizen mothers” over “unwed U.S.-citizen fathers,” based on “stunningly anachronistic” gender role assumptions that only unwed mothers will care for their children.<sup>91</sup> Ginsburg’s opinion stressed the dynamic nature of constitutional interpretation: “‘new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’”<sup>92</sup> This case illustrates Ginsburg’s liberal feminist conviction that women *and men* benefited from freedom from “fixed notions” about gender roles continued throughout her judicial career.

*Bostock v. Clayton County* (2020) also suggests the capacity of liberal feminism’s commitment to anti-stereotyping to extend to newer understandings of gender. At issue in

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<sup>87</sup> *Id.* at 534.

<sup>88</sup> *Id.* at 572 n. 2.

<sup>89</sup> *Id.* at 541.

<sup>90</sup> *Id.* at 555.

<sup>91</sup> 137 S. Ct. 1678, 1693 (2017).

<sup>92</sup> *Id.* at 1690 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015)).

*Bostock* was whether an adverse employment action based on an employee’s gender identity or sexual orientation was discrimination on the basis of “sex” under Title VII.<sup>93</sup> The employer who fired Aimee Stevens, a transgender woman, stated, in misgendering language, that he did so because “he” wanted to “represent himself” and “dress like a woman.”<sup>94</sup> In finding for Stevens, the Sixth Circuit reasoned: “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”<sup>95</sup> At oral argument before the Supreme Court, Justice Ginsburg observed that “the [precedential] cases have said that the object of Title VII was to get at *the entire spectrum of sex stereotypes*.”<sup>96</sup> While conservative Justice Gorsuch, writing for the majority, did not elaborate a robust gender stereotyping theory, he readily perceived the problem as sex discrimination: “it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex.”<sup>97</sup> The Court’s ready perception that gender identity and sexual orientation discrimination are sex discrimination testifies to the success of the liberal feminist project of shaking loose fixed notions about “the sexes.”

### *The limits of formal equality through courts*

Even as Ginsburg’s constitutional litigation campaign enjoyed success in the courts, liberal legal feminists debated the limits of formal equality and the respective capacities of courts versus legislatures to further substantive equality. One prominent example was the sameness/difference—or equal treatment/special treatment—debate over how to accommodate

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<sup>93</sup> 140 S. Ct. 1731 (2020).

<sup>94</sup> EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018) (drawing on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

<sup>95</sup> *Id.* at 577.

<sup>96</sup> Transcript of Oral Argument at 50-51, R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC, (No. 18-107) (argued Oct. 8, 2019) (emphasis added).

<sup>97</sup> *Bostock*, 140 S. Ct. at 1741.

pregnancy in the workplace.<sup>98</sup> Accounts of this debate use the term “liberal” or “liberal feminist” to characterize the equal treatment or formal equality position taken by such scholars as Wendy Webster Williams or Nadine Taub who, similar to Ginsburg, warned of the risks of judicial protectionism and of reinforcing, rather than challenging, gender stereotypes.<sup>99</sup> Williams related this formal equality approach and its skepticism about “gender-based” or “formally asymmetrical laws”—even if designed to benefit women—to her generation coming of age when gender-based laws “sort[ed] the world by gender in ways that defined us into the single role of wife/mother/dependent and which overtly and explicitly privileged men in the public and private spheres.”<sup>100</sup>

In the face of critiques by “special treatment” and other feminists that formal equality required women to assimilate into a “pre-existing, predominantly male world” and left untouched a legal status quo that expressed “white male middle-class interests and values,” liberal feminists made an institutional argument.<sup>101</sup> Formal equality as a constitutional principle, Williams argued, was what courts were best equipped to deliver; it was “a necessary, although not sufficient, condition for substantive equality of the sexes.”<sup>102</sup> As did Ginsburg, Williams believed that legislatures were the best place for feminists to pursue substantive equality in pregnancy, work/family issues and a wide range of areas.<sup>103</sup>

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<sup>98</sup> For example, they debated the best interpretation of the Pregnancy Discrimination Act, Congress’s 1978 amendment to Title VII. See Deborah A. Widiss, *Pregnancy and Work: 50 Years of Legal Theory, Litigation and Legislation*, this volume.

<sup>99</sup> Anne Dailey, *Feminism’s Return to Liberalism*, 102 YALE L. J. 1265, 1267-68 (1993); see, e.g., Williams, *supra* note 6, at 99-100 (for “symmetrist/asymmetrist” terms to describe equal treatment/special treatment positions, crediting Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987)).

<sup>100</sup> Williams, *supra* note 6, at 110-111.

<sup>101</sup> Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982).

<sup>102</sup> Williams, *supra* note 6, at 110.

<sup>103</sup> *Id.* at 99-100; see also Ginsburg & Flagg, *supra* note 3, at 18.

## Defending and reconstructing liberalism

Justice Ginsburg and “symmetrists” like Williams did not explicitly describe themselves as liberal feminists. Other feminist legal theorists expressly have done so, locating their theories and law reform proposals as growing out of critical conversation with, and feminist reconstruction of, liberal commitments and principles. Although liberalism “became a suspect doctrine” for many feminist theorists “in the second half of the 20th century,” liberal feminist political theorists continued to engage in constructive critique of liberal political theory.<sup>104</sup> Rather than discard liberalism, they argued that the problem was the failure to extend and realize key liberal principles in the context of modern gender equality.

### *Reconstructing the value of autonomy and privacy*

Contemporary liberal legal feminists have developed robust conceptions of autonomy, liberty, and privacy, and theorized foundations for reproductive rights. They have emphasized governmental obligations to promote gender equality and to address inequality in the family. For example, one of the authors (McClain) has drawn on Rawls and Okin to argue that gender equality, including within and among families, is a public value that government should promote. She has argued that a feminist reading of Rawls supports recognizing care as a public value that is part of a formative project of fostering capacity for democratic and personal self-government.<sup>105</sup> On the other hand, some liberal feminist legal scholars, such as Maxine Eichner, find Rawlsian liberalism inadequate to ground a robust argument for government’s responsibility to support families.<sup>106</sup> Notably, both McClain and Eichner enlist liberal principles, but also argue

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<sup>104</sup> ABBEY, *supra* note 1, at 1-2.

<sup>105</sup> McCLAIN, *supra* note 7.

<sup>106</sup> MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010).

for an expanded list of liberal goods to “facilitate caretaking and human development.”<sup>107</sup> Such liberal feminists disagree with perfectionist feminist theorists who argue that liberalism’s commitment to “neutrality,” toleration, and a conception of negative rights prevents government from taking measures necessary to further women’s meaningful liberty and substantive equality.<sup>108</sup>

In the face of feminist skepticism about privacy, liberal legal feminists have also articulated how privacy, rightly understood, is necessary to protect women’s autonomy, self-determination, and individual personhood.<sup>109</sup> In her pioneering book, *Uneasy Access* (1988), philosopher and legal scholar Anita Allen acknowledged that privacy, in many instances, historically isolated and oppressed women, but made a normative argument that women need forms of privacy that foster women’s capacities and ability to “participate as equals.”<sup>110</sup> While privacy once meant “confinement of women in the private household as subservient caretakers,” Allen and other liberal feminists deployed the value of privacy to empower women’s “decisional privacy,” and in turn enable “legal autonomy concerning sexuality, marriage, and the family.”<sup>111</sup> Thus, Allen argued, “privacy and private choice have survived appropriately strenuous feminist critique, re-emerging in beneficially reconstructed forms.”<sup>112</sup> Through bodily and decisional privacy, privacy becomes a means for gender equality.<sup>113</sup>

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<sup>107</sup> *Id.* at 70.

<sup>108</sup> See, e.g., Kimberly Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, 6 UCLA Women’s L. J. 1, 47-48 (1995); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 93-102 (1987). For a liberal feminist response, see Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO STATE L. J. 19 (1998).

<sup>109</sup> Linda C. McClain, *The Poverty of Privacy*, 3 COLUM. J. GENDER & L. 119, 124 (1992); Allen, *supra* note 8, at 754.

<sup>110</sup> ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 180-81 (1988).

<sup>111</sup> Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 446 (1990).

<sup>112</sup> Allen, *supra* note 8, at 728.

<sup>113</sup> See ALLEN, *UNEASY ACCESS*, *supra* note 110, at 180-81.

Liberal feminists have articulated the importance of sexual privacy in the wake of new forms of technology, such as the internet and social media. Danielle Citron builds on Allen and McClain's work to advance a conception of sexual privacy as "egalitarian, liberal feminist."<sup>114</sup> Citron defines sexual privacy as the ability to "manage the boundaries around our bodies and intimate activities" and control information about the human body, sex, sexuality, gender and intimate activities.<sup>115</sup> The values of sexual privacy include securing autonomy, enabling intimacy, and protecting equality.<sup>116</sup> Citron explains that, on the one hand, the internet can foster these values, including for women, LGBTQ persons, and people of color; on the other, because these groups disproportionately experience privacy violations on the internet, the internet can hinder their agency and autonomy.<sup>117</sup> Citron proposes remedies for the gendered and intersectional harms caused by "revenge porn," "deep fakes," and other online abuses.<sup>118</sup>

Liberal feminist have also theorized how decisional privacy in the sense of autonomy is critical to reproductive choice and reproductive justice. The pivotal case of *Planned Parenthood v. Casey* stated that: "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>119</sup> Liberal feminists have related reproductive autonomy to an individual's personhood, liberty of conscience, self-determination, and individual identity.<sup>120</sup> They have elaborated a conception of privacy that is liberal in its aspiration for informed, morally autonomous choice, and egalitarian

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<sup>114</sup> Citron, *supra* note 8, at 1876 n. 17 (2019) (referring to work of Allen and McClain). See Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000); Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 790 (1999).

<sup>115</sup> Citron, *supra* note 8, at 1870.

<sup>116</sup> *Id.* at 1874, 1878.

<sup>117</sup> *Id.* at 1874-75.

<sup>118</sup> *Id.* at 1908-1928; 1944-54. See also DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

<sup>119</sup> 505 U.S. 833, 856 (1992).

<sup>120</sup> McClain, *supra* note 109; MCCLAIN, *supra* note 7, at 223-55; Allen, *supra* note 8.

and feminist in its insistence that educational, economic, and sexual equality are a requirement for meaningful choice.<sup>121</sup>

### *Responses to dominance and relational feminism*

These liberal feminist theorists have sought to address two distinct critiques from other legal feminists. Through reconstructing conceptions of privacy, they respond to dominance feminists arguments that “the private” is a site of inequality for women, such that, in the words of Catharine MacKinnon, “the right of privacy is a right for men ‘to be let alone’ to oppress women one at a time.”<sup>122</sup> They also counter dominance feminists’ contention that autonomy is an illusion for women under conditions of subordination. Similar to MacKinnon, liberal feminists recognize how private power distorts the development of autonomy, but they argue that government has a responsibility to secure the preconditions for developing human capacity or human capabilities.<sup>123</sup> For liberal feminists, government must play an affirmative role in addressing forms of private power that hinder this development of autonomy.

Liberal feminists also engage relational, or difference, feminists’ arguments that construe autonomy as atomistic and contend that liberal models of the self and of self-government fail to recognize care, interdependency, and connection.<sup>124</sup> Liberal feminists respond that when they emphasize *liberty*, the value of individual autonomy, or self-government and self-determination, they do not mean atomism or an unrealistic self-sufficiency. They offer notions of autonomy that

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<sup>121</sup> Allen, *supra* note 8, at 754.

<sup>122</sup> MACKINNON, *supra* note 108, at 102.

<sup>123</sup> NUSSBAUM, *supra* note 47; MCCLAIN, *supra* note 7.

<sup>124</sup> An important influence on relational, or cultural, feminism was Carol Gilligan, *In A Different Voice* (1982). For an overview of relational feminist critiques of liberalism and a liberal feminist response, see McClain, *supra* note 11. For a feminist argument that “autonomy” obscures dependency, see MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

mirror feminist models of “relational autonomy” in recognizing that “it is by virtue of a person’s participation in relationships of nurture and care, initially within families and eventually in other forms of association, that he or she is able to develop the capacity for autonomy.”<sup>125</sup> Thus, relationships in families and other parts of civil society—as well as the broader social structure—play a formative role in shaping a person’s identity and cultivating and enabling the self.

*Responses to anti-essentialist and intersectional critiques*

By the late 1980s, feminist legal theory, including liberal feminism, faced internal criticism for a lack of inclusivity. The “essentialism” critique, prominently associated with Angela Harris, centered on feminism’s assumed claim “that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation and other realities of experience.” She contended that such accounts of women’s experiences ignored the experiences of Black women and many others, silencing the voices of minority women in an effort to craft a unified message of what “feminism” is.<sup>126</sup>

Similarly, Kimberlé Crenshaw’s intersectionality critique faulted feminist discourse for leaving out the experiences of Black women, emphasizing that individuals may face discrimination or disempowerment on multiple fronts, such as race age, class, sexual orientation or gender identity. She argued that the intersection of various harms based on these identities can create unique and serious disadvantages. Like Harris, Crenshaw critiqued feminism that “purports to speak for women of color through its invocation of the term ‘woman,’” while

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<sup>125</sup> MCCLAIN, *supra* note 7, at 18.

<sup>126</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory* 42 STAN. L. REV. 581, 585, 598 (1990) (calling MacKinnon’s approach “essentialist” and “color-blind”). For MacKinnon’s response, see Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in MACKINNON, WOMEN’S LIVES, MEN’S LAWS 84 (2005).

excluding “women of color because it is based on the experiences and interests of a certain subset of women.”<sup>127</sup>

Liberal feminism is compatible with, and strengthened by, these critiques, given its attentiveness to individual capacity and the rejection of stereotypes. Notably, such critiques have largely targeted dominance and relational feminism rather than liberal feminist theory.<sup>128</sup> Liberal feminism is flexible enough to admit and accept the essentialism critique and to develop intersectionally to support an inclusive and antiracist conception of gender equality. Decades ago, Anne Dailey predicted that, informed by such critiques, a “renewed feminist liberalism” could utilize the power of narratives to destabilize “prevailing legal discourse” and develop a richer understanding of diversity based on empathetic listening.<sup>129</sup> This prediction remains apt: liberal feminism embraces the individuality of each person and their choices and stands stronger as it evolves to include women and men of all races, ethnicities and gender identities in their full diversity.

## **Conclusion**

Liberal feminism’s project aims at “disrupting – or bursting asunder – the historical linkage between sex and gender, or between biological sex and particular roles or ways of thinking associated with particular genders.”<sup>130</sup> This theme of disruption offers a point of continuity with newer forms of feminism, even as those newer forms address a “much broader range of linkages and identity categories.”<sup>131</sup> Further, evolving understandings of gender can

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<sup>127</sup> Crenshaw, *supra* note 80, at 1244 n.8 (1991).

<sup>128</sup> Harris, *supra* note 126, at 585 (critiquing construction of “women” in work by MacKinnon and Robin West).

<sup>129</sup> Dailey, *supra* note 99, at 1284-85.

<sup>130</sup> Dixon, *supra* note 9, 315.

<sup>131</sup> *Id.*

extend that promise beyond the gender binary itself, deepening the capacity of liberal feminism to adapt to new demands for liberty, inclusion, and equality.