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## Introduction to Oxford Handbook of Feminism and Law in the U.S.

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## INTRODUCTION

OXFORD HANDBOOK OF FEMINISM AND LAW IN THE U.S.

Deborah L. Brake, Martha Chamallas & Verna L. Williams

Few fields of law have been as dynamic as the field of legal feminism as it has played out in the United States over the past half century. It is a field marked by constant contestation and negotiation over its boundaries and scope, the terminology used to define its animating principles and commitments, and its relationship to other critical discourses. During this period, the meaning of feminism itself has expanded and de-stabilized, from its early association with promoting the rights and status of women (understood as a distinct biological class), to newer approaches that challenge the strict male/female binary and focus on gender as a social construct embedded in systems of multiple and interacting identities.

Reflecting the complexity and diversity of the field, the contributors to this Handbook employ differing understandings of feminism and often speak in somewhat different languages. As editors we have embraced these variations of feminism, whether tied to women, gender, or intersecting identities and have not attempted to impose a uniform definition of feminism (or feminists) throughout the volume. In keeping with our expansive definition of feminism, we have also not attempted to draw sharp demarcation lines between feminism and other critical discourses. Thus, many of the feminist approaches represented in this volume overlap with other critical discourses, such as critical race theory or scholarship grounded in LGBTQ perspectives. To give a more complete picture of legal feminism's intellectual terrain, we include chapters on adjacent theoretical discourses that reveal their similarity and divergence from more distinctively feminist approaches.

As the title of the Handbook indicates, however, we have generally limited our scope to feminism and the law in the United States, tracking theoretical, doctrinal, and political

developments in the U.S. only. This “domestic” focus is a matter of feasibility, not philosophy, and we note that a few of our authors are from the outside the U.S. and several incorporate international and comparative perspectives into their analyses, tracing how U.S. legal feminism has been or could be influenced by scholarship and developments outside the U.S.

The main purpose of the Handbook is to examine the influence that feminist legal theory and feminist social movements have already exerted on U.S. law and to explore emerging areas of law in which feminist approaches to law have the potential to shape future developments. The framing of the volume reflects our broad understanding of the multiple ways in which feminism engages with law, not only manifesting in litigation and legal doctrine, but also inspiring and impacting social movements that radiate throughout the culture and leave their mark on the law. Our “law and society” understanding of law’s relationship to feminism captures a broad array of scholarly methodologies, often interdisciplinary in character, ranging from a close reading of legal cases to explorations of more general societal trends and discursive shifts. The Handbook embodies a widely held tenet of feminism that theory and practice are intricately linked, and that practice (including feminist activism and feminist movements) often informs and shapes theory. To complement the chapters devoted to feminist theory, for example, the Handbook includes chapters examining key periods of feminist activism in the U.S., from campaigns in the 1970s to pass the Equal Rights Amendment to the contemporary #MeToo and reproductive justice movements.

Scholars usually date the origin of feminist legal theory (or legal feminism) as a field of law to the early 1970s, when women’s rights advocates of the Second Wave of feminism in the U.S. first mounted an organized legal campaign in the courts against sex discrimination.<sup>1</sup> For the most part, the contributions in the volume share a similar starting point, although some look back at the longer history of legal feminism. In the nearly 50 years since its inception, legal feminism has become an established feature in U.S. law schools, generating a rich variety of law school courses, an outpouring of scholarship, and providing impetus for legal reforms, big and small. However, to a certain degree, the field remains marginalized, as critics proliferate and efforts to mainstream feminist approaches have met with only limited success. The Handbook catalogues

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<sup>1</sup> The First Wave of feminism typically refers to the women’s suffrage movement, beginning in earnest in the latter half of the 19th century and culminating in the passage of the Nineteenth Amendment to U.S. Constitution in 1920.

these developments and interrogates (and sometimes resists) the “established yet marginal” status of the field. Overall, the Handbook is designed to provide a relatively compact survey of U.S. legal feminism that takes stock of the field and showcases the latest scholarly thinking about possible new directions.

Although it has undoubtedly been said many times before, feminism in the U.S. is at a crossroads. In recent years, legal feminism has gained a new urgency, particularly as younger generations become impatient with the slow pace of change and the persistent disparities and lack of inclusion in U.S. society. In some respects, the recent feminist mobilizations resemble “old school” feminist campaigns to end violence and discrimination against women and eliminate women’s subordination and marginalization. Contemporary feminist activism, however, also includes demands to rethink feminism’s tie to the rights of “women,” calling for upending the gender binary and insisting that feminists think and act intersectionally by fully attending to injustices and disparities linked to race, ethnicity, sexual orientation and gender identity, disability, immigration status and class. This pressure to move beyond “women” coexists uncomfortably with a reality in which many hard-fought rights important to women are under attack and short-term prospects of achieving meaningful protection through courts and legislatures appear dim.

### **Cultural and Political Context**

To gain a sense of the milieu in which legal feminism presently operates it is useful to juxtapose a few of the more significant cultural and political moments of the last few years -- surely one of the most tumultuous periods in U.S. history -- starting with the election of a blatantly anti-feminist president. The calamitous events that arose on the heels of Donald Trump’s campaign and election in 2016 brought gender injustice to the forefront, once again, after a somewhat dormant period in the early part of the twenty-first century. Feminists around the world marched against Trump and all he stood for – a record of sexual abuse and misogyny that underscored the fragility of the gains that women had made in areas like sexual violence, reproductive rights, and access to high-ranking positions. Trump’s toxic masculinity was on display and licensed virulent forms of bigotry, targeting immigrants, racial minorities (particularly women of color), people with disabilities and progressives generally. His nearly all-white, all-male administration and judicial appointments threatened a return to the naturalization

of white male elites in government. Culminating in the violent insurgency of January 6, 2021, the Trump era dramatized the lesson that feminism could not afford to be narrowly focused on women but must also attempt to understand and engage with men and masculinities and to form progressive alliances with the many marginalized groups who were on the receiving end of Trump's harshest policies.

Beginning in March 2020, the politically induced traumas of the Trump administration were soon rivaled by the cumulative shocks of the COVID-19 pandemic, with its fear, chaos, lockdowns, and school closings. COVID laid bare the depressing state of the U.S. social safety net, marked by longstanding inadequacies in employee protections, day care and public education. Stark gendered divisions in caregiving came to light, as women bore the brunt of homeschooling children, performing "essential" and dangerous labor in places like hospitals and supermarkets and caring for ill family members. The pandemic also exacerbated gendered violence as abuse victims found themselves isolated and vulnerable, unable to exit or escape to safe shelters and largely at the mercy of an unresponsive state. Even valiant attempts by the new Biden administration could barely begin to address the extent of COVID's dislocations.

On the legal front, the death of Ruth Bader Ginsburg in September 2020 and replacement by a conservative anti-feminist woman was a particularly harsh blow to feminists of all stripes. Ginsburg had become the face of feminism for many and represented the promise that law could propel the Nation closer to gender equality. Trump's success in cementing a right-wing majority on the U.S. Supreme Court deepened the wound caused by the confirmation of Brett Kavanaugh and sent a clear signal that feminism was under siege and that basic constitutional rights, like the right to abortion, were hanging by a thread, if not already unraveling.

To be sure, the strong anti-feminist and reactionary forces that emerged in the Trump era were matched by increased mobilization by feminists and progressives. Emerging in its current hashtag form in 2017,<sup>2</sup> the #MeToo movement mounted a mass campaign driven by social media against widespread sexual assault and harassment, leading to the forced resignation of several high-profile harassers. Countless #MeToo stories revealed the complicity of corporate America

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<sup>2</sup> For a critique of the current #MeToo movement for ignoring or underplaying the role of Black feminist activist Tarana Burke, who originated the MeToo movement a decade earlier as a healing force for sexually abused girls and women of color, see Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 Yale L.J. F. 105 (2018).

in turning a blind eye to sexual abuse and in covering up misconduct and protecting those in power. The U.S. also witnessed what some have called a long overdue “reckoning” with white supremacy and racism. The #BlackLivesMatter movement reached an apex in 2020 after the killing of George Floyd and galvanized the nation’s attention not only to police shootings but also to the lack of racial diversity and inclusion throughout society.

As in the past, these mass campaigns were followed by intense backlash and countermobilizations, including charges that the #MeToo movement trampled the rights of men and violated fundamental notions of due process. Even more prominently, critical race theory and intersectionality – distorted by its opponents to encompass virtually any examination of race or gender privilege in U.S. -- became favorite targets of the Right, with well-funded campaigns aimed at school boards and state legislatures. The intertwining of theory and practice was evident, as critical discourses spilled out from academia to fuel larger cultural struggles. The contributions to this volume were written during this challenging period as scholars stretched to find time and energy to reflect on feminism’s place in this volatile environment.

### **The Current State of U.S. Feminist Legal Theory**

The backbone of this Handbook is its many descriptions and interrogations of the various brands or strands of feminist legal theory, discussed not only in the beginning chapters but throughout the volume. We intentionally organized the volume around the now-familiar “brands” or “strands” of feminism rather than adopting a structure that mapped the successive waves of feminism (e.g., Second Wave, Third Wave, and Fourth Wave), as many in the field and some of our authors do. Our design is meant to showcase the diversity of feminist thought and to emphasize that legal feminism has not followed a linear, timebound progression. As the various theoretical contributions make clear, there has been quite a bit of historical overlap among the various brands, even if certain brands have seemed more prominent at certain time periods. The “brands” framing also has the virtue of highlighting what is potentially distinctive about an approach, although here too there is considerable overlap between and among the various brands of feminist legal theories.

The contributions in this volume document that feminist legal theory remains a heterogenous enterprise, best described as a loose collection of approaches, with some commonalities but also many tensions. Perhaps the most fundamental commonality among the

six brands of feminism examined in the Handbook is that they each expose the ubiquity of gender and grapple with its significance -- revealing what is often unseen --even in settings in which women may be absent, as masculinities scholars have so successfully pointed out. Together, they eloquently refute the mainstream view that gender is relevant only in certain obvious contexts and can be ignored elsewhere. Among the tensions that surface, the brands often display different levels of ambivalence in turning to the state, including the legal system, to address gendered harms. Some feminists are quite willing to advocate legal intervention to combat gender violence and discrimination, viewing the law as just another unstable social system that can be turned to feminist ends. Others, however, have grown increasingly wary of the carceral and punitive tendencies of the state, and warn that turning to the state inevitably grows the power of the state, carrying with it a grave risk of worsening racial bias and racial disparities and producing other harmful unintended consequences that end up hurting rather than helping marginalized populations. This tension about the role of state often drives a wedge between feminists that cannot always be mended.

From our vantage point as editors of this Handbook, what is most striking about the six brands of feminist legal theory is that, remarkably, none of the brands has become obsolete, even if their relative visibility and acceptance has waxed and waned. At the same time, there is little doubt that we have witnessed the ascendancy of *intersectional feminism*. Feminists of all stripes now aspire to be intersectional and likely would agree that other aspects of identity (including race, ethnicity, sexual orientation, gender identity, disability, immigration status, and class) must be taken into account in feminist theorizing, policy making and activism. Although many feminists fall short of this aspiration – and there is a complicated relationship between intersectionality and feminism – much has changed since intersectional feminism burst on the legal scene in the 1990s.

Despite trenchant criticism from many quarters, there has also been a revival of *dominance feminism*. The #MeToo spotlight on sexual abuse and harassment has taken a page from Catharine MacKinnon and energized new voices that condemn not only behavior that violates the law, but also the institutions that fail to sanction harmful sexually exploitative behavior. Although commonly associated with state intervention, dominance feminist theory has

proven remarkably successful in sparking extra-legal pressure campaigns with real consequences for offending individuals and complicit organizations.

Meanwhile, *liberal feminism* endures. Its emphasis on autonomy and consent has new relevance in many ongoing feminist struggles, as in the push to gain acceptance of “affirmative consent” as the measure of the lawful and ethical standard of sexual conduct. It has proven malleable enough to accommodate newly disruptive meanings of “gender” that encompass a diversity of gender identities based on individual choice and has managed to generate richer understandings of gender stereotyping that, if imported into legal doctrine, would go well beyond the hollow formal equality once associated with the brand. As reproductive rights have come under fierce attack, feminists find themselves returning to liberal feminism to articulate new understandings of autonomy and agency that can withstand the onslaught.

At the same time, *sex-positive feminism* has entered the mainstream. Sparked mostly by younger women who insist on their right to sexual pleasure and recoil against sexual shaming, sex-positive feminism has produced a willingness to reassess formerly taboo sexual practices like the use of pornography when used to express women’s positive sexual desires. The sex-positive leaning has also promoted a greater acceptance of sex work and sex workers, with a focus on decriminalization and eradication of stigma.

The two remaining brands of feminism – *relational feminism* and *postmodern feminism*—have had somewhat lower profiles but remain relevant and continue to attract new feminist scholars. The COVID-19 pandemic has brought a new visibility to the classic relational feminist emphasis on the value of caregiving, interdependency in human relationships, and collective responsibility for vulnerable populations. Particularly outside the U.S., relational feminism has broadened its scope, reaching beyond intimate human relationships to encompass relationships to the physical environment and to future generations. For its part, postmodern feminism has done much to shift the meaning of personal identity (including gender identity) from static notions based on biology and socialization to more fluid discursive understandings linked to identity performance, greatly accelerating the destabilization of the gender binary. It has also proven useful to explain the complexities of a digital world where feminist interventions often backfire and are appropriated by reactionary forces, requiring feminists to keep up with abrupt shifts in discursive meanings and be ready to form new alliances.



Although we limit our discussion to six of the more prominent strands of feminist legal theory, we recognize that the list is ever-changing and contested. Moreover, as feminist legal theories have matured and proliferated, adjacent intellectual discourses have sprung up, sometimes complementing and adding new dimensions to legal feminism, but also challenging and departing from some of the values and strategies attached to established feminist theories. The Handbook highlights three very different adjacent discourses that each address feminist concerns. One of these, *masculinities theory*, has a very close connection to feminism, augmenting feminist critiques of women's subordination through deconstruction of multiple masculinities and their impacts on marginalized men as well as women. *Queer theory* has kept more of a critical distance from legal feminism, generally abjuring statist responses and regulation (feminist or otherwise), but also complicating and enriching feminist understandings of sexuality. A third emergent discourse, *distributional theory*, is grounded on a critique of what has become known as "governance feminism" and sees a pressing need to investigate feminist sites of power and feminist-inspired reforms to detect where the costs of feminism fall and whether those costs outweigh its benefits. Although it often casts particular feminist reforms and approaches as misguided in their exercise of power, its critique tracks some of the newer brands of feminism that have disavowed reliance on the state (particularly the criminal law) to achieve feminist ends.

### **Connection to Feminist Activism and Movements**

The current state of feminist legal theory also reflects the dialectical relationship between theory and practice that has characterized legal feminism since its inception. Although sometimes quite academic in style, feminist legal theory has deep connections to feminist activism and has often developed in tandem with feminist movements. This close connection reflects feminists' recognition of the importance of changing structures and institutions, beyond modification of the law on the books or legal theory.

We can see the imprint of feminist movements on many of the prominent brands of feminist legal theory. The long (still unsuccessful) campaign to pass the Equal Rights Amendment to the U.S. Constitution propelled liberal feminism into law and eroded many bastions of gender segregation. The early anti-rape and battered women's movements of the 1970s and 1980s shaped dominance feminism and gave rise to a network of state and private

institutions dedicated to curbing gender violence. The more contemporary campus sexual assault and #MeToo movements responded to the failure of law to make good on the promise of dominance feminism, lashing out at a culture of impunity and silence and pressuring universities, employers, and other organizations to hold offenders accountable and take proactive measures to transform institutional cultures. Campus activists and #MeToo stories often invoked and disseminated sex-positive visions of sexuality that assumed a right to be sexual without being exploited or victimized. Finally, intersectional feminism found expression in the reproductive justice movement that centered the needs of women of color, going beyond abortion rights to encompass support for maternal health and welfare. The intersectional character of the #BlackLivesMatter movement has also drawn in women of color and LGBTQ activists, deepening feminist ties to social justice movements and social justice theories aimed at ending mass incarceration and racialized violence and poverty.

In complex ways, legal feminism has also been affected and altered by counter-mobilizations and backlash that has accompanied each of these movements, as they gathered force and blunted some of their progressive effects, sometimes at breakneck speed. To make sense of the dizzying developments, legal feminists have been compelled to theorize backlash, tracing the money and people behind backlash campaigns, and questioning whether such virulent responses to feminist activism are a distinctive “backlash” or simply a continuation of pre-existing forms of misogyny and white supremacy.

### **Feminist Influence on Law**

Unquestionably, feminism has influenced law in the U.S. in profound ways. Feminists (and other critical scholars) have exposed the non-neutrality of law and have made visible harms that in earlier eras went unnamed and unnoticed or were thought to bear little connection to women or gender. Sexual harassment, domestic violence, stalking, date rape, sexual stereotyping, sterilization abuse, and so many other gendered injustices have been brought to light by legal feminism, through theory and practice, that it is now difficult to envision or remember a world where such practices had no feminist valence or words to describe them. To a much greater extent than before feminism’s interventions, the masculine hold on law has loosened its grasp, if ever so slightly.

We can see the footprints of legal feminism not only in specific legal claims and defenses but also in new understandings of important legal concepts. Not all the strands of legal feminism are as easily incorporated into existing legal doctrine. Two brands especially – liberal feminism and dominance feminism – have been the most generative in creating new claims to address gendered injuries and injustices. But other strands have been taken up selectively. Overall, however, the 50-year experience of feminist intervention in law has not altered feminists’ ambivalence about using law to effect social change, and some would argue that contemporary feminists are even more disillusioned than in preceding decades about the power of law to make lasting change, given the precarity of women’s reproductive freedoms under the current conservative Supreme Court, as well as longstanding entanglements with a racist and carceral state.

The maturation of feminist claims and defenses has revealed that feminist influence cannot be measured in blunt assessments of success or failure. The impact and meaning of feminist interventions constantly change, requiring resets, revisions and sometimes retreats. Context – including legal context – matters, with some areas more impervious to change than others. In some instances, legal feminists have fruitfully borrowed from other disciplines, like psychology and sociology, to broaden the meaning of “sex” and of “discrimination,” in order to capture contemporary forms of implicit bias and generate new protections for sexual minorities. The transformative potential of certain feminist claims, however, has been whittled down by courts which have imposed doctrinal restrictions and other barriers to recovery, pushing feminists toward extralegal activism. The U.S. Supreme Court, in particular, has progressively narrowed the scope of constitutional rights affecting reproduction and childbearing, leading many feminists to pivot to a reproductive justice framing that is sensitive to race and class and encompasses positive rights. However, in other cases, law has been a powerful catalyst for change in the larger society and has significantly altered mainstream behavior. At times these changes have produced splits within the feminist community and prompted critics to oppose feminist-driven legal efforts.

Beyond inspiring new claims and defenses, feminism has altered – and in some instances transformed – the understanding of basic legal concepts. These feminist interventions can be cross-cutting and leave their imprint on different areas of law, as when a change in the definition

of consent affects not only criminal law, but legal duties in civil rights law, education law and tort law. At times, feminist disruption of basic legal categories, such as motherhood, has produced contradictory results, such as expanding opportunities for some women but failing to provide essential material support for caregivers more generally. The challenge to address these unmet needs has led feminists to reach beyond the traditional anti-discrimination approach to advocate for accommodation models and endorse universalist policies that reach the most marginalized. Inspired by human rights law, feminists have been moved to find new ways to confront the violence associated with the carceral state and the failure of the U.S. to ensure basic economic, social, and cultural rights.

Feminist influence has not been restricted to direct efforts to change substantive law. Over the past half century, feminism has also infiltrated legal institutions and sought to influence the legal actors responsible for shaping and implementing the law. While the push for gender integration of legal education and the judiciary continues, feminist “insiders” have developed models of feminist pedagogy and feminist judging aimed at resisting hierarchies and giving voice to those governed by law. This growing cadre of feminist law professors and judges alters the terrain, even if these actors often still feel marginalized and outside the inner circle.

As we take stock of the landscape of feminist legal activity, there is little sign that interest in feminist scholarship or feminist activism has declined or dissipated, particularly as compared to pronouncements at the turn of this century that legal feminism had become stale, that feminism had lost its allure among the young, and that feminist academics were decamping to other quarters. Instead, we expect the volume of feminist scholarship to only increase in the near future. It is impossible, however, to predict those areas of law where feminism will have the most impact in next decade, let alone half century. Our canvas of emerging areas of feminist legal scholarship reveals that feminist approaches are popular not just in new fields, such as digital privacy law, but in foundational areas as well, like contracts, torts, and tax law, where feminism has made inroads in narrow pockets of legal doctrine even if it has yet to penetrate general legal principles or mainstream theory. Although still very much a work in progress, the infusion of intersectional feminism and social justice perspectives into high stakes areas of the law – such as immigration law and environmental law – carries the potential to have a major impact not only within U.S. borders but globally. In this emerging scholarship, we see great

value in the heterogeneity of feminist approaches to law that has proven deep enough to nourish the intellectual and political work of successive generations of feminists.

### **Organization and Contents of the Volume**

The Handbook is divided into two major parts. Part I (Theory, Connections and Criticisms) provides the foundation for examining feminism's impacts on law, explaining the various brands of feminist legal theory and some prominent adjacent intellectual discourses. It also discusses influential feminist movements as well as counter-mobilizations and backlash forces. Part II (Feminist Influence on Law) is devoted to identifying and analyzing several specific inroads feminism has made on U.S. law, including the creation of feminist-inspired claims and defenses. It also discusses some of the more subtle interventions that have resulted in altered understandings of traditional concepts and in re-orientations of traditional fields. Beyond legal feminism's effect on substantive law, this Part examines the impact of feminism on law school pedagogy and on judicial decision making. The final chapters of the Handbook are devoted to emerging areas of law that are ripe for feminist analysis but have not yet been as significantly changed by feminist interventions or inroads.

#### *Prominent Strands of Feminist Legal Theory*

The Handbook begins with an examination of six prominent strands of feminist legal theory, flanked by two reflective chapters – one that places the theoretical developments in a longer historical context and one that make sense of the big picture from a comparative perspective. In a chapter narrating the “long history” of feminist legal theory, *Tracy A. Thomas*<sup>3</sup> traces the trajectory of legal feminism covering a 150-year span, from suffragists' emphasis on maternalism, to Progressive-era ideas of global peace, market work and birth control, through to the modern “equal protection” era of formal equality.

The three older established brands of feminist legal theory – liberal feminism, dominance feminism, and relational feminism – are explored next, with authors examining key tenets and commitments of the brands and their continuing relevance. The liberal feminism chapter by

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<sup>3</sup> Tracy A. Thomas, *The Long History of Feminist Legal Theory*.

*Linda C. McClain & Brittany K. Hacker*<sup>4</sup> uncovers its roots in 19th and early 20th century liberal and feminist political theory and in women's rights advocacy and traces its evolution and adaptation, emphasizing Ruth Bader Ginsburg's constitutional litigation campaign and the theory's capacity to generate robust conceptions of autonomy, liberty, privacy, and gender equality. In her chapter, *Kathryn Abrams*<sup>5</sup> discusses the growth, development, and trenchant critiques of dominance feminism, showcasing Catharine MacKinnon's foundational work and contemporary iterations of dominance theory in #MeToo stories of sexualized violence and coercion. The relational feminism chapter by *Jennifer Nedelsky*<sup>6</sup> takes us beyond that theory's early focus on intimate gendered relationships to articulate a broader relational approach to law which reconceptualizes values like security and autonomy and explores questions of hierarchy, racism, property, mental health, and environmental harm.

Following the established brands, the three newer brands of feminism – intersectional feminism, sex-positive feminism, and postmodern feminism -- are discussed by authors who describe their fluid, complex features, and connections to other related critical discourses. In a chapter on intersectional feminism that also discusses critical race theory, *Emily Houh*<sup>7</sup> presents a genealogy of intersectionality theory, canvassing its ties to Black feminist thought and Third World feminism, and showing how different social justice movements have put intersectionality theory into practice and anchored it to contemporary activist struggles. The chapter on sex-positive feminism by *Susan Frelich Appleton*<sup>8</sup> unearths the sex-positive threads in different eras of feminism that challenged stereotypes of female sexualities centered on passivity, subordination, harm, and repronormativity, and explores that theory's capacity to chart a supportive and affirmative course for law and legal institutions grounded in feminist notions of women's sexual pleasure. In her chapter on postmodern feminism, *Camille Gear Rich*<sup>9</sup> examines the fractured feminist gains of the 20th century, theorizes how certain postmodern concepts have been underutilized in contemporary feminist theory and illustrates how

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<sup>4</sup> Linda C. McClain & Brittany K. Hacker, *Liberal Feminist Jurisprudence: Foundational, Enduring, Adaptive*.

<sup>5</sup> Kathryn Abrams, *Dominance Feminism: Placing Sexualized Power at the Center*.

<sup>6</sup> Jennifer Nedelsky, *A Relational Approach to Law and Its Core Concepts*.

<sup>7</sup> Emily Houh, *A Genealogy of Intersectionality*.

<sup>8</sup> Susan Appleton, *Sex Positive Feminism's Values in Search of the Law of Pleasure*.

<sup>9</sup> Camille Gear Rich, *Feminism is Dead, Long Live Feminism: A Postmodern Take On The Road To Gender Equality*.

postmodern tools can allow for greater insights in a digital era of competing and conflicting information and political claims. The final chapter in this Part – a comparative perspectives reflection piece by *Rosalind Dixon & Amelia Loughland*<sup>10</sup> -- develops a framework to enhance understanding of the various brands of U.S. feminist theory and make them more accessible to feminists within and outside the United States, centered on the organizing principles of “disruption,” “amelioration,” and “transformation.”

### *Adjacent Theoretical Discourses*

To round out the discussion of the various brands of legal feminism, the Handbook includes three chapters on adjacent theoretical discourses that bear a close connection to feminism but also diverge in important ways. *Brenda Cossman*'s<sup>11</sup> chapter on queer theory explores how that critical discourse de-naturalizes the assumed connections between sex, gender, and desire and differs from the more rights-based mainstream approach to LGBT issues. In her chapter, *Ann C. McGinley*<sup>12</sup> describes the insights masculinities theory has brought to feminism, with its focus on masculine practices that maintain the power of men as a group over women as a group, while creating competition and division among men. The trio concludes with a chapter by *Aziza Ahmed*<sup>13</sup> on distributional theory which situates it (along with governance feminism) as a descendant to critical legal theory, highlighting Janet Halley's step-by-step analysis of the allocation of costs and benefits of feminist interventions along distributional lines.

### *Feminist Movements and Backlash*

Following the chapters on theory, the Handbook turns to examine some key feminist movements that have informed the development of feminist legal theory, starting in the 19th century to the present. *Julie Suk*'s<sup>14</sup> chapter on the ERA movement takes us along a 100 year, yet-unfinished path to ratify the amendment, shedding light on the processes of feminist constitutional change and the evolution of substantive feminist legal aspirations. *Leigh*

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<sup>10</sup> Rosalind Dixon & Amelia Loughland, *Gender Disruption, Amelioration and Transformation: A Comparative Perspective*.

<sup>11</sup> Brenda Cossman, *Queer Theory Goes to Law School*.

<sup>12</sup> Ann C. McGinley, *Masculinities Theory as an Impetus for Change in Feminism and Law*.

<sup>13</sup> Aziza Ahmed, *Governance Feminism and Distributional Analysis*.

<sup>14</sup> Julie Suk, *The Equal Rights Amendment: Then and Now*.

*Goodmark's*<sup>15</sup> chapter on the anti-rape and battered women's movements of the 1970s and 1980s charts the movements' beginnings in community-based organizing and strategies (such as shelters and safe houses) to increased state intervention through the criminal justice system, a policy choice criticized by anti-carceral feminists.

Three contemporary feminist movements which have had significant influence on legal and cultural understandings of sexual violence and reproduction are explored by authors who trace the movements' impacts on institutions, regulation, and litigation. *Nancy Chi Cantalupo's*<sup>16</sup> chapter tells the story of the grassroots movement against campus sexual assault led by feminist college students that stimulated new Title IX policies and regulations during the Obama administration but generated backlash and retrenchment during the Trump era. The #MeToo movement is dissected by *Tristin K. Green*,<sup>17</sup> who discusses the power of collective action to challenge entrenched institutional sexism in employment and other settings, in the face of countermobilizations aimed at minimizing and individualizing the harm and producing anti-feminist competing counter-narratives. *Mary Ziegler*<sup>18</sup> tackles the complex and fraught relationship between the parallel movements for reproductive justice and the narrower push for reproductive rights, contrasting the broader calls for government support of childbirth, reproductive health, and sustainable communities by justice advocates with the privacy-based framework of rights activists who focused on the U.S. Supreme Court.

Part I concludes with two chapters exploring prominent criticisms of legal feminism and theorizing the phenomenon of backlash. *Martha McCluskey*<sup>19</sup> takes on the powerful law and economics movement, maintaining that law and economics undermines feminism by constructing economics as a sphere insulated from morality and politics, and naturalizes a gendered baseline that makes feminist reforms appear costly, unfair, or ineffective. *Sally Kenney's*<sup>20</sup> contribution contends that perceived backlash to progressive social change often fails

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<sup>15</sup> Leigh Goodmark, *The Anti-Rape and Battered Women's Movements of the 1970s and 80s*.

<sup>16</sup> Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Harassment: How a Civil Rights Law and a Feminist Movement Inspired Each Other*.

<sup>17</sup> Tristin A. Green, *Feminism and #MeToo: The Power of the Collective*.

<sup>18</sup> Mary Ziegler, *From Reproductive Rights to Reproductive Justice: Abortion in Constitutional Law and Politics*.

<sup>19</sup> Martha McCluskey, *Law and Economics Against Feminism*.

<sup>20</sup> Sally Kenney, *Backlash Against Feminism: Rethinking a Loaded Concept*.



to distinguish measurable setbacks from countermobilizations of pre-existing opponents who fear they are losing ground. Kenney urges theorists to think about gender inequality intersectionally and re-examine the loaded concept of backlash.

*Feminism's Impact on the Law: New Legal Claims and Defenses*

Part II of the Handbook focuses on the ways in which feminism has impacted the law and the legal system. Feminism's influence on law can be seen most tangibly in the development of new legal claims for recognizing and redressing previously unremedied harms or, in one instance, a new theory for defending against crimes by survivors of battering and abuse. Perhaps the most well-known of these is the claim for sexual harassment, which *Theresa M. Beiner*<sup>21</sup> explores in her chapter, tracing the origins of the claim in grassroots activism and feminist theory. Beiner credits the claim with important legal victories and an emerging awareness of legally recognizable harm, extending beyond the workplace to such settings as housing and education but also details the ways in which the claim has fallen short, including its cooptation by employers and its doctrinal shortcomings. Another doctrinal development, while not always styled as a distinct cause of action, is the use of gender stereotyping theory to advance discrimination claims. *Stephanie Bornstein's*<sup>22</sup> chapter delves deeply into the theory of gender stereotyping, which she contends has developed from an anti-classification strategy to a more robust principle informed by social science and animated by the key values of anti-subordination, individual liberty, and gender inclusivity.

Other legal developments sparked by feminism have been more controversial, including within feminist circles. Such is the case with the defense to homicide and other violent crime known as the battered women's syndrome (BWS) defense. *Sara M. Buel*<sup>23</sup> criticizes the development of BWS and its application by courts and advocates a more nuanced approach that considers the role of battering and its effects to understand and contextualize crime committed by survivors. One of the most popular feminist-inspired claims, at least at a general level, is Title IX's application to women's sports. Yet here too, controversy brews. *Erin E. Buzuvis*<sup>24</sup> traces the history of Title IX's distinctive approach to sex equality in sports and complicates the law's

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<sup>21</sup> Theresa M. Beiner, *Sexual Harassment: The Promise and Limits of a Feminist Cause of Action*.

<sup>22</sup> Stephanie Bornstein, *Degendering the Law Through Stereotype Theory*.

<sup>23</sup> Sarah M. Buel, *Beyond Battered Women's Syndrome*.

<sup>24</sup> Erin E. Buzuvis, *Title IX: Separate But Equal for Girls and Women in Athletics*.

premise that sex-separate competition best promotes girls' and women's equal opportunity in sports, elaborating the shortcomings of the law's "separate but equal" regime.

### *Changed Legal Understandings*

Beyond individual legal claims and select doctrines, feminism has also made inroads in revising conventional understandings of crosscutting legal constructs and relationships. In the criminal law, no concept has felt the pressure of feminist influence more than that of "consent." The chapter on consent by *Katharine K. Baker and Michelle Oberman*<sup>25</sup> details the feminist reforms that redefined rape as sex without consent and explores the cultural and legal significance of that shift, along with its limitations.

On the civil side, feminism has had a long and protracted engagement with the law's treatment of pregnancy, reproduction, and motherhood – an entanglement that was fraught from the beginning. *Deborah Widiss*<sup>26</sup> explores the ongoing tensions and debates over how law should treat the singular condition of pregnancy and criticizes the neoliberal approach privatizing the costs of pregnancy under U.S. law. Feminist engagement with conventional legal frames for analyzing rights relating to reproduction is carried forward by *Melissa Murray and Hilarie Meyers*,<sup>27</sup> whose chapter showcases the growing influence of the reproductive justice movement to replace a limited "privacy" rights framework with an intersectional approach to reproductive justice. From pregnancy and reproduction to motherhood, *Jennifer S. Hendricks*<sup>28</sup> analyzes feminism's progress in disentangling the biological, social and relational dimensions of motherhood, and argues that future feminist work should move beyond gender neutrality in law to account for the ways in which biological and social motherhood overlap (as in surrogacy, parental rights, and some reproductive technologies).

Finally, this section looks beyond U.S. borders to consider how feminism has changed, and been changed by, international human rights law. In her chapter, *Tracy E. Higgins*<sup>29</sup> considers how the experience of other nations' legal systems and insights from international

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<sup>25</sup> Katharine K. Baker & Michelle Oberman, *Consent, Rape, and the Criminal Law*.

<sup>26</sup> Deborah Widiss, *Pregnancy and Work—50 Years of Legal Theory, Litigation, and Legislation*.

<sup>27</sup> Melissa Murray & Hilarie Meyers, *Constitutionalizing Reproductive Rights (and Justice)*.

<sup>28</sup> Jennifer S. Hendricks, *Disputed Conceptions of Motherhood*.

<sup>29</sup> Tracy E. Higgins, *Applying International Feminist Insights to Gendered Violence in the United States*.

human rights law might enrich U.S. feminist thought and practice, particularly in theorizing the role of the state in addressing gender violence.

### *Legal Education and the Legal System*

Not just law but legal institutions bear the mark of feminist influence. Law schools, legal pedagogy, the judiciary, and judging have all been changed – albeit, not wholly transformed – by feminist activism and feminist-inspired reforms. *Jamie R. Abrams*<sup>30</sup> canvasses the unfinished work of feminists to release the masculine grip on law schools, from the influx of women students and professors, to changes in the curriculum and institutional culture, and the ongoing critiques of the traditional model of legal education.

Judges and judging have also come under the feminist gaze. In her contribution, *Kristin Kalsem*<sup>31</sup> breaks down the rationales for diversifying the bench with “outsider” identities, and examines two feminist projects aimed at incorporating feminist methods into the process of judging,

### *Emerging Areas of Influence*

Even areas of law not typically associated with feminism are increasingly understood by feminist scholars to have relevance for the study of gender and to be rich sites for feminist analysis. We style these “emerging areas” in the Handbook and include contributions on feminism’s engagement with contract law, digital privacy, environmental law, immigration law, intellectual property, tax law, and torts.

One staple of the common law that occupies first-year law students, contract law, has long interested feminist scholars, even if their influence on the development of the law has not yet substantially altered the field. *Martha M. Ertman*’s<sup>32</sup> chapter on the synergistic relationship between feminism and contract law explores the utility of contractual analysis to feminist projects, like advancing women’s equality in the family, and considers how feminist analysis of contract doctrines (focusing on good faith, debtor rights, unconscionability and duress) might reshape the law.

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<sup>30</sup> Jamie R. Abrams, *Feminism’s Transformation of Legal Education and Unfinished Agenda*.

<sup>31</sup> Kristin Kalsem, *Feminist Judging: Theories and Practices*.

<sup>32</sup> Martha M. Ertman, *Contract’s Influence on Feminism and Vice Versa*.

A more recent area of law, digital privacy, raises issues surrounding the meaning and value of “privacy” that have long drawn feminist scrutiny, as *Michele Gilman*<sup>33</sup> reveals in her analysis of how privacy, cyberspace, and big data map onto the public/private divide that has so often subordinated women’s interests. Gilman exposes the failure of current law to address gendered harms in cyberspace and charts a path forward for feminist activism and interventions.

Feminism and environmentalism might be considered a natural pairing, as the evolution of ecofeminism, which links the subordination of women and the subordination of nature, recognizes. In her chapter, *Cinnamon Piñon Carlane*<sup>34</sup> explains how the existential threat of climate change draws new urgency to the need for greater convergence of legal feminism and environmental law and highlights the opportunities for stronger coalition-building between feminists and environmentalists.

Turning to immigration law, *Maria L. Ontiveros*<sup>35</sup> conducts a feminist reimagining of U.S. immigration law and policy, rethinking the three main grounds for entry, employment, humanitarian, and family ties. Ontiveros shows how the legacies of chattel slavery and coverture shape the current approach and critiques the law’s failure to address the gendered harms specific to female immigrants.

Turning the feminist gaze on intellectual property, *Ann Bartow*<sup>36</sup> shows the myriad ways in which intellectual property law has displaced, marginalized, and ignored women as creators, while surreptitiously treating gender itself as a form of property. By revealing the presence of gender where it has been invisible, Bartow’s chapter demonstrates how feminist methods can generate new insights even in fields traditionally understood to have no relevance to the study of gender.

Feminist scholars have confronted a similar baseline assumption about the irrelevance of gender in tax law, as *Bridget Crawford* and *Anthony Infanti*<sup>37</sup> take up in their chapter on

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<sup>33</sup> Michele Gilman, *Feminism, Privacy, and Law in Cyberspace*.

<sup>34</sup> Cinnamon Piñon Carlane, *Re-Attaching Environmental Law to Its Intersectional Roots*.

<sup>35</sup> Maria L. Ontiveros, *Reconceptualizing the Terms and Conditions of Entry to the United States: A Feminist Reimagining of Immigration Law*.

<sup>36</sup> Ann Bartow, *Invisible Women and Intangible Property: A Feminist Consciousness for Authors and Inventors*.

<sup>37</sup> Bridget Crawford & Anthony Infanti, *A Taxing Feminism*.

feminism and tax law. Exploring a long trajectory of feminist tax scholarship dating back to the 1970s, they show that legal feminism's burgeoning critique of tax law is beginning to bear fruit, as mainstream tax scholars are forced to reckon with feminist analysis and advocacy groups and policy-makers more seriously examine the gender equity implications of tax policy.

The final chapter by *Sarah Swan*<sup>38</sup> returns to the common law to consider feminism's growing influence on the field of torts. Swan details feminist challenges to purportedly "objective" measures of compensation and allocation of risk, identifies some discrete areas where feminist interventions have taken root and sparked limited statutory reforms, and advocates for a more sweeping feminist reconsideration of such foundational tort concepts as the duty of care, third party liability, injury, and damage awards.

With its triple focus on theory, doctrine, and social movements, it is our hope that this Handbook will be a valuable resource for scholars and students – in law schools and in other fields -- and will be of interest to lawyers, judges, policy makers and journalists. It was written to meet the needs of those new to legal feminism who seek an introduction to and a thorough statement of the field and to give more established scholars a sense of recent developments, a broader feel for the range of views within the feminist umbrella, and new directions for research. It is our wish that the contributions will be used as background for news stories, legal decisions and briefs, and policy initiatives related to gender. As the first Oxford Handbook devoted to feminism and law, it is a milestone for a field that has brought inspiration and enlightenment to so many.

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<sup>38</sup> Sarah Swan, *Imagining Feminist Tort Law*.