FALLING INTO FEMINISM:

A PERSONAL HISTORY

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No one of my generation was raised as a feminist or took a woman's studies course in college. Most people came to the movement through individual personal experience. For many it was simply reading Simone de Beauvoir's *The Second Sex* or Betty Friedan's *The Feminine Mystique* or other works that changed the way they saw the world. I never had even that kind of low-key conversion experience; rather I fell somewhat accidentally into feminism, which then bloomed out to be, like public defense, a central moving force in my life.

My introduction to feminism came in 1970, while I was director of the Public Defender Service in Washington, D.C. Some Georgetown law students, who had been volunteering as investigators, were excited about an NYU School of Law syllabus that they had received from friends for a new course entitled Women and the Law. They had been unable to persuade anyone on the regular faculty at Georgetown to take it on, and they wanted me to teach it.

Initially I begged off, because I didn't know anything about the subject and had not even reflected very much on my own experience of being a woman lawyer. But they pressed hard, assuring me that this would be a great way to learn. I gave in, mainly because I felt some obligation to this particular bunch for their dogged, unpaid contributions to our public defender cases.

This was one of the first times a course like this had been offered at any law school, and it attracted considerable media attention.[1] A story in the local tabloid described me

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1. There is no history of the addition of women's studies to the law school curriculum, though contemporary articles, news stories, and now biographies tell something of the

as "hardly the classic women's lib type. She is feminine, soft-spoken, and seemed to be wearing all of her underwear."[2] (The latter was a reference to the bras that were supposedly burned by "women's libbers" protesting at the 1968 Miss America pageant in Atlantic City.) In another interview, I said to Judith Martin (later the famous Miss Manners), "This is going to be a meat and potatoes course, with an emphasis on remedies. Otherwise a small seminar like this could easily deteriorate into talk about how we were forced to play with dolls as little girls and how it spoiled our lives."[3] I assume I did say that, but where did I get it? I had never taken a course even remotely resembling the one I was to teach—or played with dolls much either.

Feminism did not come easily at first. I had been trying for years to avoid attention directed at my sex, except in the rare instances when it might help me or my client. For me, being female was simply an obstacle, and not as insurmountable as those faced by many others. I did not like thinking of myself as a victim of injustice and initially felt uncomfortable pushing for my own advancement. Soon, however, I came to realize that the movement extended beyond equal opportunity for privileged professionals, and that it could change and improve all of human society.

Even as I moved to this more expansive vision, my main commitment was still to the criminally accused—who roused no rallies on their behalf. But I did enjoy studying the history of the first-wave feminists' fight (1848-1920) for equality and the vote. As an American Studies major at the University of Pennsylvania, I had learned almost nothing about this great liberation movement. Most textbooks devoted, at most, half a page to women's

beginning of the courses. The *Yale Law Report* (the law school's magazine) published an article in 1971 about the course that I taught there. *See* YALE L. REP., Spring 1971, at 8-9. It said that "comparable" courses were "presently being offered at the law schools at Georgetown, New York University, George Washington, Rutgers, Pennsylvania, Buffalo, and California." *Id*. Professor Herma Hill Kay, in writing a biographical chapter about Ruth Ginsburg, tells how she and Ruth were both attracted to the course by students who were eager to learn it. *See* Herma Hill Kay, *Ruth Bader Ginsburg: Law Professor Extraordinaire*, *in* THE LEGACY OF RUTH BADER GINSBURG 12, 17-18 (Scott Dodson ed., 2015).

2. Louise Lague, *Lady Lawyer to Teach Lib via Law*, WASH. DAILY NEWS, July 7, 1970.

3. Judith Martin, *Teaching the Womanly Art of Law*, WASH. POST, May 17, 1970, at K2 (announcing my appointment to teach in the fall).

suffrage, with perhaps a picture of a parade in New York or of Susan B. Anthony and Elizabeth Cady Stanton, or of women chained to the White House fence.

Just as I began teaching about women and the law, the Supreme Court decided *Reed v. Reed*, the first case to rule (and unanimously!) that a classification based on sex violated the Fourteenth Amendment's Equal Protection Clause.[4] Like so many of the first movement cases, *Reed*'s facts made it appear less important than it actually was. An Idaho court had applied a statute that preferred men over women as executors of estates.[5] The estate in question was of a young boy, the adopted son of an estranged husband and wife, and totaled a thousand dollars.[6]

A number of cases followed closely on *Reed*, mostly invalidating sex classifications under equal protection doctrine. But the Supreme Court stopped short of holding that gender discrimination, like race and ethnicity classifications, required strict scrutiny (a strong presumption of unconstitutionality) by a reviewing court. Also percolating through the courts were cases on the right to abortion, which culminated in 1973 in the Supreme Court's *Roe v. Wade* decision, finding in the Fourteenth Amendment a woman's right to privacy and to an abortion.[7]

Even though I agreed that reproductive choice was central to improving women's lives, I would not have started there because I knew it would arouse passionate resistance. Indeed, these cases were not part of the litigation campaign designed by the movement's leaders. Rather, *Roe v. Wade* was initiated by individuals, including health care professionals, who fought for rights they deemed essential, without consideration for what might be strategically best over the long run.

In retrospect, I see that as much backlash as *Roe* stirred, the victory for choice signaled that the second wave of the women's movement was a serious force. Years later, I saw a similar struggle within the gay rights movement when

4. 404 U.S. 71, 71, 76-77 (1971).

5. *Id*. at 71-73.

6. *Id*. at 71 & n.1.

7. 410 U.S. 113, 164-65 (1973). *Doe v. Bolton*, decided on the same day, said that a woman could have an abortion after fetal viability if needed to protect her "health," which included "physical, emotional, psychological, [and] familial" factors as well as her age. 410 U.S. 179, 192 (1973).

some leaders thought employment and housing would be easier to achieve than immediate access to marriage, and worried that fighting for that would lead to defeat and ultimately hurt the cause. I agreed, and turned out wrong on that score too.

Another feminist legal effort was the push for an Equal Rights Amendment to the U.S. Constitution. In 1972, Congress adopted it easily, even triumphantly, but a state-by-state fight failed when only thirty-five of the required thirty-eight states ratified by the June 1982 deadline. A conservative woman Republican, Phyllis Schlafly, forcefully led the opposition, raising such prospective horrors as women being forced into military combat, and compulsory unisex bathrooms.

As to the Amendment, I believed that winning three-fourths of the states would be too hard and that continuing to plug for full inclusion of women under the already existing Fourteenth Amendment Equal Protection Clause was a better way to go. Silently, I lamented the tremendous amount of effort and energy expended, but the amendment came closer to adoption than I expected and the failure of the effort did not set us back as I had feared it would.

Without agreeing with all the strategies, I was impressed by the boldness and breadth of the feminist political movement, and its early progress in the courts. We had lots of cases to incorporate into our class. In addition to the fast-shifting constitutional doctrine, Title VII of the Civil Rights Act of 1964 prohibited employment discrimination by most organizations of any size,[8] and included "sex" among the prohibited grounds for denying equal opportunity in the workplace.[9]

Title VII spawned many interesting cases and somewhat to my surprise, I found that I enjoyed reading and thinking about them as teaching vehicles for the course. Being in the forefront of a new field was fun, and the engaged, enthusiastic students were a relief from some of the daily combat of public defense. After only a few months, I began to identify with the movement and to think of myself as a potential full-time law professor.

I offered the seminar at Georgetown in the fall of 1970,

8. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, §§ 701(b), 702, 78 Stat. 253, 253-54, 255 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 (2013)).

9. *Id.* § 703.

and in the spring of 1971, I taught it at Yale, flying to New Haven on Thursday afternoon and returning early on Friday morning. It had been seven years since I had graduated, and waves of nostalgia washed over me when I passed my favorite carrel in the library. Though physically unchanged, the building felt very different.

The cathedral-like main corridor did not have its former hush, and combative posters were taped to the stone pillars—announcing rallies and protests, denouncing leaders and policies. Since the late sixties the school had been in turmoil over civil rights, and over the Vietnam War, and a decided enmity had developed between some of the faculty and the students. One 1972 graduate described the various protests she joined, culminating in picketing the baccalaureate to support the strike of the janitorial workers.[10] The activists also refused to wear regalia at the graduation and hummed *We Shall Overcome*, drowning out *Pomp and Circumstance*. On receiving the diploma, each shouted a few words into the microphone, many accusing the faculty of collaboration and worse.[11]

Most striking to me at first was that the noisy halls were full of women; in my day one could go for hours without seeing another female. Now they were everywhere. Almost overnight the nationwide proportion of women students went from three to twenty percent. After the initial rush, the numbers continued a steady climb, spurred partly by a decline in applications from men, who could not obtain draft deferments for law school during the Vietnam War.

These new women were unlike any in the past, including my generation from the early sixties. They did not accept the profession's hierarchies as we had done and did not try to assimilate to what they regarded as male "standards." Rather, emboldened by liberation ideology, they called for female law professors, attention to women's professional advancement, and coverage of gender issues in every area of the curriculum.

In his Yale Law School oral history, Abe Goldstein tells of how as newly appointed Dean, he was "waited on" by a committee of "militant women."[12] One of their goals was to

10. Conversation with Ann E. Freedman, interviewed by Mary Clark, New Jersey, Feb. 25, 2000.

11. *See id*.

12. Interview by Bonnie Collier with Abraham S. Goldstein, Former Dean, Yale Law

have their own course in women and the law, and they had a list of hiring possibilities.[13] Abe countered by suggesting me, saying "she's terribly well qualified. She was an officer of the Journal here."[14] They had never heard of me, and being "qualified" by establishment credentials was more likely to worry than to excite them.[15] Actually, I had not been chosen to be an officer of the law journal, due I think to my gender; if the women students had known that, they might have been keener on me, but if Abe had accurately remembered that I was not an officer, would he have suggested me?

In any event, the students responded by asking that the school pay their way to D.C. to interview me. Abe remembers that he said no to that,[16] but at least one of the women recalls that he did pay for the trip. I apparently assuaged their fears, and Abe reports their saying that I was "wonderful" and "how right you were." He added: "It was predictable because she was one of the best we had and the sort that we hoped they would shortly become, if they would just let themselves relax a little bit." Across the years I smile at this and think how the Yale and Georgetown students influenced who I became more than the other way around.

Just as I started teaching about sex discrimination, law schools all around the country came under enormous pressure from the increasing female enrollments to hire women professors; most had never had even one. As the Director of the Public Defender Service for the District of Columbia, *and* a teacher of Women and the Law at Georgetown and Yale, I was a sought-after commodity; I received dozens of inquiries and offers to interview. Without intending or earning it, I found that I was considered, by hiring committees at least, to be a significant legal feminist. And I had respectable (if not overwhelming) conventional credentials for appointment to a law faculty—Court of Appeals clerk (but not Supreme Court), very good grades, law review at a top school

Sch. (Oct. 23, 1996), *in* A CONVERSATION WITH ABRAHAM S. GOLDSTEIN 30, 39-43 (2012), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1003&context=ylsohs.

13. *Id*. at 42.

14. *Id*. (internal quotation mark omitted).

15. *Id*.

16. *Id*.

(though not first or second in the class, or an officer).

A little window of affirmative action for women (well, at least *one* woman per school) had opened, and I sensed that it would not be open for long. Though I was stressed at work and emotionally wrung out by my divorce, I decided I had better interview while I could. Looking back after decades in academia, I marvel at my naiveté about the process. People tried to help me; Ellen Peters, the only woman on Yale's law faculty, suggested that I plan a little presentation on the contents of potential courses and textbooks. Excellent advice, but I didn't have time for such preparation, and I hoped that my unparalleled experience, wit, and charm would carry me through!

I learned that those were not necessarily marketable qualities in academia, where some suspected that too much practice in the real world—especially of the rough adversarial kind I had done—narrowed the mind and disabled it for ground-breaking scholarship. Leading a large agency and trying cases to juries were not considered to be relevant. There was also a whiff of zealotry about me—not on behalf of women's rights but for the defense side in criminal cases.

At my first interview—at Yale—my former civil procedure professor tried to dissuade me: "You are doing influential and exciting work," he noted. "Why would you want to spend your time alone writing things that nobody—certainly not your colleagues—reads?" Next came what was surely a detrimental exchange. When another former professor asked about my scholarly agenda, I said my main interest was in criminal procedure. He countered, "Well, where would you turn for inspiration when you run out of tales from your practice?" I smiled and replied, "By then I would have tenure like the rest of you and could relax." Too late I saw that my somewhat tasteless little joke had fallen flat. For whatever reason, I did not receive an offer from my own law school.

Penn, my undergraduate alma mater, was more accepting. I was fond of the law school there, having often studied in its library, and I had benefited from law students' debate coaching. Philadelphia, where I still had friends, was close to D.C. on a fast train. Penn made me an enthusiastic early offer. The dean called and visited a number of times; once he even observed me in court. It happened to be the day of James Cockerham's sentencing

for child rape and murder, when the judge lost his composure and screamed at the defendant.[17] I later received a copy of the dean's letter to the judge criticizing his courtroom demeanor—an unusual, but welcome recruiting device.

By the time I got to Harvard, I was tiring of interviewing and could not imagine being the only woman on the faculty of such a large and intimidating institution. Yet Harvard's mystique—so ancient and so eminent—drew me in. I could hear Judge Edgerton's reverent tone when he spoke of "The" Harvard Law School. My friends Alan Dershowitz and John Ely were on the faculty there. So was Phil Heymann, a brilliant man who had spent six months with the Public Defender before starting his tenure at Harvard.

I asked Phil if instead of a talk, which I didn't have time to prepare, I could teach a class that people could attend. He said that would be fine, but I would still have to do individual interviews. The demonstration class went well, and the interviews were passable, but I concluded that I did not want to go there. The feeling was apparently mutual because I heard nothing further from Harvard.

For my fourth interview, I chose Stanford, where Mike Wald was teaching. Like Phil, Mike had come to the Public Defender to benefit from the training and experience in the fields he planned to teach. Stanford had paid his salary. In late 1969, when Mike returned to academia, he had said I should let him know if I ever wanted to teach. I had promised that I would but thought it would be a long time before I was ready to leave the active practice of law.

Over the next few years, however, I discerned that law school professorships are not sinecures for retired trial lawyers, which I had somehow been assuming. In fact, I saw that I was already late starting an academic career. I called Mike and within a week was invited to interview at Stanford. I did not recognize then what a feat it was to organize a law faculty for action on such short notice.

Before the interview, I had been to California only once, with my first husband for a convention in San Francisco. Like most people, I had fallen for the city and was hugely disappointed to learn when Mike picked me up at the airport that Stanford was elsewhere. But after my initial

17. *See* United States v. Cockerham, 476 F.2d 542 (D.C. Cir. 1973).

shock, I was delighted with the campus in Palo Alto. It was October and the sky was an intense blue; deep purple cyanotis bloomed next to the golden sandstone buildings, and two lines of palm trees opened to an oval lawn and the law school in one of the university's original 1893 buildings.

Dean Tom Ehrlich said that their faculty was small enough so that I could meet everyone, which, over two days and evenings, I did. I liked the laid-back atmosphere and the lack of pretension even though I suspected (correctly) that it was somewhat studied. But it was refreshing that not one of the men who interviewed me found it necessary to demonstrate how learned he was. One of them—an attractive, bespectacled guy sporting a sand-colored beard and love beads—even rolled himself a smoke right in the middle of a group interview. I imagined it was marijuana, having just heard the university motto: "Let the winds of freedom blow." "Indeed!" I thought. (I learned later of course that it was tobacco.)

The smoker was Tom Grey, my future husband, who recollects that we had had an earlier first meeting. His friends Mike Wald and Matt Zwerling from Yale had encouraged him to apply to the Public Defender Service. Matt had urged me to hire Tom, arguing that his brilliance would add luster to our representation, and Matt thought he would make a splendid trial lawyer. At the interview, I learned that Tom's wife had been admitted to Stanford Medical School and he would be looking for a teaching job in the Bay Area after a single year with us.

Meanwhile, I was trying to enforce the three-year commitment we had instituted at the Public Defender, which was causing us to lose some applicants, especially minorities. (For the first time, they had prestigious, high-paying legal opportunities.) I felt I could not make an exception for a white Yale graduate. According to Tom, I was pleasant but definite about the three-year requirement, which meant he could not take the job; I don't remember the interview. With our marriage midway through its fourth decade, I wonder if we would have been so drawn to each other had we started out as boss and staff.

The outcome of the job search was that Stanford and Penn made me offers with comparable salary and benefits. I would be the first woman at Stanford and the third at Penn. The choice set off a seesaw of competing possibilities.

Though I felt more at home in the East, California was romantic and adventurous and Stanford a paradise, especially compared to the dingy old Philadelphia of the early seventies. My parents were rooting for Penn, but my close friend Gail had promised to join me in the West within the year if I went that way. I also could have stayed in D.C. to teach at Georgetown and even could have spent another year as PDS director. I decided on Stanford.

By the time I joined the law faculty in 1972, I felt that I was a card-carrying member of the women's movement, though I had yet to belong to any organization with an actual card. The university welcomed me mainly for my gender, and I embraced the reception. Myra Strober, the first woman in the business school; Lily Young, the first in engineering; and I—all hired that year—appeared at many press and alumni events. The law school hired its first African-American, Bill Gould, that same year, and he often joined the diversity-on-parade road show.

I taught the course in Women and the Law that I had begun to develop at Georgetown and Yale, and I found the Stanford students eager for the class, which was still a rarity. They sympathized with my being the only woman on the faculty. Stephanie Wildman, one of those students and now a law professor herself, asked with wonder in her voice how I could tolerate faculty meetings "with all those white men." The question startled me because I had spent most of my legal career in rooms full of white men without realizing that it did not have to be that way.

Besides having the course in my pocket, I had arrived in academia with a casebook in progress on women and the law. Historian Linda Kerber has written a stirring account of the birth of the texts in the new field, which started with "[s]yllabi circulated in samizdat."[18] A collection of these was clipped together and distributed at a conference at Yale in 1971. I had been a conference convener and was lead author of the packet (under the name of Barbara Bowman).[19]

The conference was the brainchild of Ann Freedman,

18. Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429, 430 (2002); *see also* Herma Hill Kay, *Claiming a Space in the Law School Curriculum: A Casebook on Sex-Based Discrimination*, 25 COLUM. J. GENDER & L. 55 (2013).

19. *See* Kerber, *supra* note 18; *see also* Lucia Johnson Leith, *Women's Legal Status Explored*, CHRISTIAN SCI. MONITOR, Nov. 23, 1971, at 7.

one of the student instigators of the Yale course. She envisioned bringing together all those involved in the still nascent field of sex discrimination law, and inspiring them to produce a "Cases and Materials" book on the subject. Ann convinced me that women's legal studies could not succeed as a field without such a standard text designed for use in law school classrooms, and that she was the one to produce it—with my help.

At least, that is the way I remember that it happened. In her oral history, given for an organization of Yale women alums, Ann recalled that I was the one who enlisted her for the effort.[20] Either version could be true, though I am almost sure she had the idea originally. I can't believe that I would have launched the project while still directing the Public Defender Service, trying cases, and interviewing for a permanent job in academia.

My idea for adding casebook writing to my schedule was ambitious in conception and impossible of execution; I proposed getting a grant to pay Ann for a year and that Eleanor Holmes Norton and I would edit Ann's work. Eleanor was then human rights commissioner in New York City and one of the first black civil rights leaders to connect with other liberation movements. Needless to say, her job, like mine, was more than full-time.

Acquiring a salary for Ann had been easy. I called on my law school friend, Eli Evans, a professional philanthropist then at the Carnegie Foundation and later president of the Revson Foundation. He had recently spearheaded the foundation's new dedication to advancing women's rights. Our book was only the first of a number of projects Eli supported both at Carnegie and Revson, including the Women's Law and Policy Fellowship at Georgetown, and Equal Rights Advocates—a public interest law firm in San Francisco. He also aided us in putting through a grant to fund the Yale conference.

Ann Freedman's vision and purpose in planning the conference was that it would bring together potential individual contributors to a single unified sex discrimination book. But it turned out others had already started on their own textbooks about women and the law and a number were in the works by 1971 or soon after. First

20. A Conversation with Ann E. Freedman, interviewed by Mary Clark, New Jersey, Feb. 25, 2000.

out in 1974 was one by Ruth Bader Ginsburg, Herma Hill Kay, and Kenneth Davidson.[21] Ours came the following year, with authors Ann, Eleanor, Susan Ross and me;[22] Susan had been an originator of the NYU course, and was a government litigator.

We were disappointed not to be first ourselves, but we knew that two volumes from prominent publishers added legitimacy to the new field. Our book was titled *Sex Discrimination and the Law: Causes and Remedies*. Both books were tomes, quelling any concern about the thinness of the course material. Many other fine texts and casebooks followed as the course itself broke into subsets with titles like Feminist Theory and Gender & Public Policy.

At the Yale conference, I had met three young women from Berkeley Law School (then Boalt Hall) who were to become close associates in California. Like the women in my seminars, Nancy Davis, Mary Dunlap, and Wendy Williams were a new breed: demanding, insistent, filled with confidence in themselves and their cause. They had not known each other well in law school but at the conference talked about forming a feminist law firm together. I had barely arrived at Stanford when Nancy was in my office to offer and enlist aid in teaching, textbook writing, and law firm organization. I can see her now, brown hair flowing down her back, flawless complexion, apple cheeks, and eyes dancing with energy and enthusiasm.

Just as Ann had (I believe) lured me into textbook writing, Nancy recruited my help for the embryonic Davis, Dunlap & Williams, conceived as a teaching law firm, which became Equal Rights Advocates. The three lawyers joined me at Stanford in a law clinic and class rather grandly titled Litigative Strategies against Sex Discrimination. Again, Eli Evans, still at the Carnegie Foundation, funded our efforts, which paid the salaries and overhead of the lawyers.

We wanted the Litigative Strategies course to provide a model for clinical teaching in which students worked on actual cases with real clients while also exploring the

21. KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, TEXTS, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION (1974).

22. BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR H. NORTON & SUSAN ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975).

academic underpinnings of the subject. The class simulated the major phases of a civil law suit from initial client interview through summary judgment. We videoed and critiqued each student doing the oral assignments, and their written work and tactical thoughts were woven into the real case. The students also worked directly on the actual cases at the firm on Turk Street in San Francisco. Finally, we conducted a regular classroom seminar using the book-in-progress.

It was a costly enterprise not only in terms of the time of four practicing lawyers (Joan Graff had joined Equal Rights Advocates), but for the students as well. They were brave to give a semester to an experimental course, covering material certain not to be on the bar examination. Yet we were usually oversubscribed, and even attracted a number of male feminists. Over the years, many graduates have confirmed that the course cemented their commitment to women's rights and prepared them for practice like nothing else they had done in law school.

A student-made photo book shows what a good time we had. I remember especially "the dress," a one-size-fits-all garment we kept in the office closet in case someone was suddenly required to go to court. Though pants were already the uniform of many professional women, especially the young ones, such garb was still not generally allowed in the courtroom or other official legal venues. The dress reminded me of the clothes we kept on hand at PDS so that our clients could appear respectable before the jury.

That Stanford would offer a course connected to a feminist law firm was proof of growing acceptance of women's rights within the academy. Yet in the most important area, hiring female professors, the pace was glacial. In my first five years at Stanford, no women were even invited to interview, though a few were discussed. It became apparent that a majority of the faculty wanted to make sure I worked out before they continued the bold experiment.

Paul Brest, a chief faculty ally, told me that when he had come to Stanford several years before I did, there had been open debate about whether women could ever succeed in legal academia. Though admitted as students in most law schools for almost a hundred years, only a handful of women had been law professors. The doubters pointed out that no women had the qualifications of the best male

candidates, failing to see that discrimination and the entrenched male academic network prevented the women from gaining the usual credentials. An influx of unqualified white women was the open fear of traditional academia in the early seventies. But the deeper unspoken dread was that once the barrier was down, people of color, male and female, would come next, demanding jobs without meeting the usual qualifications.

Not until I left for a few years to serve in the Carter administration did Stanford hire a second woman, Carol Rose. But she had come and gone before I returned. I think Carol found that being a single woman in Palo Alto, and the only one at Stanford Law, was too solitary. She went to Berkeley, then to Northwestern, and on to Yale, where she spent the rest of her distinguished career. After Carol left, Deborah Rhode was hired and was on board by the time I got back in 1979.

At last I had a colleague in the struggle to hire women, although, fresh from clerkships on the Second Circuit and the U.S. Supreme Court, she was even newer to academia and much younger than I. Not until 1982 (a decade after I started at Stanford) did we appoint a third woman. I was head of the appointments committee when Ellen Borgersen, one of the first female Supreme Court law clerks (for Potter Stewart) and a partner at a top law firm, joined the faculty.

For me, the lack of urgency about hiring more women became an ever more grating irritant. Even some of my friends thought that if we could ignore the militant, mounting demands, women with credentials more like the men's would come along. They were right, and that is mostly what has happened. Meanwhile, as we waited, several generations of estimable women were passed over, and years went by in which I was the sole female on the faculty or one of two or three. Thinking about that still makes me angry and a little sad.

It was futile to try to get some of the men to understand the need for more women—why they, good hearted and brilliant, were not sufficient to our purposes, whatever they were. Around that time, I was writing a note on women jurors for the sex discrimination book and was drawn to Justice William Douglas's explanation for a Supreme Court decision reversing a conviction where women had been excluded from jury service. "[T]he two sexes are not fungible; a community made up exclusively of one is

different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. . . . [A] flavor, a distinct quality is lost if either sex is excluded."[23]

Deborah and I wrote a memo to the whole faculty, asking them to imagine themselves as one of two men surrounded by a host of female colleagues. As far as I know, no one was moved by the hypothetical to change his position. In my later years at Stanford Law School, our faculty full of female stars gave me a taste of what I had missed. Having the company of other women mattered, I realized, because I felt known and understood in a new and gratifying way.

Fortunately, even in the early, lonely days of teaching at the law school, I found companionship among a small group of feminists scattered in different departments throughout the university but sharing the common experience of being women in the heavily male and politely hostile world of Stanford academia. I remember especially Diane Middlebrook in the English department (who died in 2007), gender and kinship researcher Sylvia Yanigasako and Michelle Zimbalist Rosaldo in anthropology (Sylvia is now department chair; Shelly was killed in 1981 in an accidental fall while doing fieldwork in the Philippines), and Myra Strober, a labor economist in the business school (and later in the education school).

In my April 21, 1982 diary entry, I wrote of "a gathering of the feminists to talk about our meeting with [Stanford's president Donald] Kennedy over Estelle Freedman—really such a fine little band." Reversing a positive vote by the history department Estelle had been denied tenure by the university's Advisory Board (on which no woman had ever served). We knew that the fact that her work was about women influenced the denial, and suspected that her open lesbianism might also have been a factor.

The women mounted a terrific campaign of rallies, petitions, meetings and classes. My role was to handle public and legal relations; I claimed that we were certain that the university would ultimately do the right thing, and I enlisted a first-rate lawyer to make sure it happened. That was Marsha Berzon, now a judge on the Ninth Circuit. Diane and I arranged lunch with Al Hastorf, the provost, to

23. Ballard v. United States, 329 U.S. 187, 193-94 (1946).

lobby him about Estelle. I followed the lead of Diane, who as always was lucid, gracious, sincere, sweet—and effectively a bit flirtatious. The exercise reminded me of the jury arguments in which I had subtly conveyed that I would be personally pained by a guilty verdict.

Hastorf decided to appoint a well-respected professor from psychiatry and human biology to investigate the case. He recommended awarding tenure to Estelle, which the provost did. We rejoiced in our first feminist victory at Stanford. I always thought of us as the "little band" (as Proust describes Albertine and her friends in Balbec). Especially during the years when I had few female companions in the law school, the "little band" provided much-needed psychological support.

In 1974, led by Myra Strober, we founded Stanford's Center for Research on Women (CROW), which became the Institute for Research on Women and Gender, and ultimately today the Clayman Institute for Gender Research. I remember a lunch with Myra at which she told me about the idea. She said some students had come to her about the need for such a center. It reminded me of how the Georgetown students had drawn me in to teaching.

I was both impressed by the idea and doubtful about doing it. Here we were, two untenured first women; it did not seem a good position for launching an institute or center, or whatever it would be. Myra had two young children and was just settling into the West. But she gathered the little band and started the program, which today is a vibrant research and intellectual institution at Stanford, attracting students and scholars from all over the world. I do not want to imply that I had a large role in the success, only to say I was there at the creation and have tried to help over the years.

As my identification with feminism grew, it occasionally rested uneasily with my other calling: defense of the criminally accused. So-called rape-shield laws, which restricted the use at trial of the victim's prior sexual history, captured my quandary. In the early seventies, such statutes were passed in forty-nine states, and the Federal Rules of Evidence were amended to provide for exclusion of such testimony[24]—an amazingly speedy result for the

24. *See* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 544-49, 550-51 (1980).

women's movement in the first years of the second wave.

A defender at heart, I was torn about limiting the evidence available to the accused. I knew firsthand that victims were often humiliated on cross-examination and that the prospect of public dissection of their sex lives made rape the most underreported of felonies. But I had also seen harshly punitive sentences, even the death penalty in some states, imposed on men convicted of rape, especially when the accuser was white and the defendant black. I suspected that the reason feminists had won rape-shield statutes so swiftly had less to do with justice and more with the absence of any interest group advocating for the criminally accused.

The conflict came to a head for me in 1974 when I was asked with a colleague, Tony Amsterdam, to write a memorandum developing the local ACLU's stance on proposed rape-shield statutes. We thought that the accused should be protected in any legislation and suggested allowing the use of the victim's prior sexual history only when it tended to show certain specified circumstances such as prior consensual intercourse with the defendant or that he knew about the victim's history. Our scheme provided for a closed *voir dire* hearing to establish whether the evidence met one of the conditions. A number of feminists objected to what they termed our concern for "rapists' rights," but some form of closed hearing before excluding such evidence was widely adopted.[25]

Generally, I think the accused gets an extralegal boost in defending against all violent crimes when he has a woman lawyer; applying ancient sex stereotypes, juries may assume a woman would not represent a man who was guilty of such a vicious crime—especially if the charge is rape. As a public defender, I figured any such positive bump from my femaleness balanced some of the negatives from gender prejudice against me.

Public defenders cannot choose their clients according to the charge. Yet today, when I read a transcript of my cross-examination of the accuser in a 1969 rape case, I feel queasy about something I once viewed with pride. The two young people knew each other socially. There was no doubt

25. ESTELLE FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 280-81 (2013); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 182-83 (2013) (describing our memorandum for the ACLU).

that they had sexual intercourse, or that he was rough, hitting her and tearing her clothes. The question was her initial consent. Looking at her closely, I started my cross: "Do you know what it means to lead a man on?" There is no right answer, of course, but she said "yes," and then I went through my client's story of the sequence of events, pausing to repeat: "Don't you call that leading a man on?"

In the end, when the jury believed the woman and found my client guilty, I was, on some deep level where a defender should not dwell, relieved, while still believing I had done my job well in the cross-examination. Though I think defenders must do it if assigned, I realize now that it is hard going for a feminist to defend a rape case, especially when there is a claim of consent.

My women's rights activities—teaching the course and writing the book—opened academia to me. I'm sure that gender figured positively into my promotion as well. Detractors had to bow to the imprudence of firing the only woman the law school had ever hired. Moreover, I came to enjoy being part of the movement. The slogans, especially "the personal is political" and "sisterhood is powerful," spoke to me.

In the 1980s and 1990s, the women's movement was growing and diversifying. New leaders and thinkers were emerging, ranging from radical lesbian separatists to staid constitutional lawyers. And as with many progressive political movements, the more we succeeded, the more real the schisms became. I was bothered by some of the internecine struggles, which to me seemed to deal with unimportant matters of doctrine and nomenclature. Though my liberal, equality-minded version of feminism went out of intellectual style, at least, I have never given up women's cause or on proselytizing for it.

What do I mean these days when I claim feminism as a central part of my identification? Not that I am a leading thinker or theorist in the field—though some of my best friends are. Even on the strictly legal side, I have not constructed arguments or written briefs. The actual "stuff" of the discourse never really interested me—intermediate scrutiny versus strict scrutiny, whether pregnancy is a normal condition or a disability to be compensated, sexual harassment as a form of discrimination. These are just examples of complicated legal issues in which I could have but did not engage.

On the other hand, my main scholarly achievement, and my life's work, was a feminist biography.[26] It tells the story of the first woman lawyer in the west, who also founded the movement for public defense. Though famous in her day, she was largely forgotten until I revived her history and her achievements.

Despite my contributions to the movement, I feel that I am a somewhat incomplete role model because I have not borne children. Interviewers sometimes ask about the absence of any biological offspring; perhaps I'm being overly sensitive, but I pick up the implication that I am therefore unfinished, which pushes me to try to explain. My standard story has been that my first husband did not want children and that by the time I remarried I felt that I was too old, or that there were enough children to care for and love in my life, especially my stepdaughter, who was only ten when we met. And there is some truth to the standard story.

On the whole, however, I believe that I just went merrily along assuming that when the time was right I would have two (the right number) children. But I never had a powerful drive to procreate; I had spent seven years raising my brother Starr, and though I found children fascinating creatures, especially after infancy, I preferred adults and books. Moreover my friends had offspring they were willing to share: Gail's daughter, Hannah; the Rabin girls, Karen, Donna and Nina; Ann and Mark's boys, Jake and Nick; and the Bankman-Fried sons, Sam and Gabe; among others.

Though I have not been a thinker-feminist or modeled having it all by successfully combining motherhood with a high-powered career, I have paid my dues in other ways. Feminism for me has meant putting concerns for women at the center of my thoughts and actions. Whatever I do, I consider its effect on women. I believe deeply and passionately that if we could achieve gender equality in all areas of life, the world would be better for everyone, including the indigent accused.

26. *See* BARBARA BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ (2011).