

WOMEN IN LAW

Rebels in Law: Voices in History of Black Women Lawyers. Edited by J. Clay Smith. Ann Arbor, Michigan: The University of Michigan Press. 1998. Pp. xviii, 323.

Sisters in Law: Women Lawyers in Modern American History. By Virginia G. Drachman. Cambridge, Mass.: Harvard University Press. 1998. Pp. xiv, 334.

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Much dispute surrounds questions of women's "special" experience in the legal profession. This issue has become a lightning rod for the "sameness/difference" debate in feminist legal academia. Feminist scholars such as Carrie Menkel-Meadow have made the case for women lawyers' special perspectives¹; equally respected theorists have cautioned against such arguments.² These arguments have taken place mostly within the realm of theory, with some borrowing from social psychology studies by Carol Gilligan and others.³ Sociologists who have sought empirical verification of women's special lawyering perspectives by studying contemporary legal

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1. See, e.g., Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 312-13 (1989); Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (considering implications for the legal profession of social psychology data revealing differences in male and female styles of moral reasoning); Carrie Menkel-Meadow, *Portia Redux*, 2 VA. J. SOC. POL'Y & L. 75 (1994) (reassessing earlier article in light of decade's further insights).

2. See, e.g., Margaret Radin, *Reply: Please Be Careful With Cultural Feminism*, 45 STAN. L. REV. 1567 (1993).

3. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 1-4 (1993 ed.) (1982); see also NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976) (all examining and theorizing psychological differences between women and men).

workplaces have reached conflicting results.⁴ Far too little work has approached the question of women's experiences in the law from a careful, historically sensitive perspective.⁵

J. Clay Smith's *Rebels in the Law*,⁶ which examines the perspectives of leading black women lawyers from the 1890s to the present, and Virginia Drachman's *Sisters in Law*,⁷ which studies women lawyers' experiences from the 1860s to the 1930s, both make significant contributions in remedying this deficit. What these two books reveal, especially when read together, are the ways in which women's perspectives on their professional lives and on the law are both deeply shaped by their experiences of gender and race in particular social milieus and historical periods, and, at the same time, variable and unpredictable. The women lawyers on which Smith and Drachman focus largely agree that their perspectives have been shaped in important ways by sex, race, or the combination of both, but describe vastly different conclusions based on those experiences. And although some part of the great range of perspectives presented in these two books can be accounted for by differences in historical period and social situation, significant variation remains that can only be attributed to the idiosyncrasies of individual personality. We thus walk away from these books convinced equally that sex and race have mattered a great deal to lawyers' lived experiences in the law, and that the ways in which these factors have mattered are in many respects not amenable to broad-brush generalizations.

J. Clay Smith is renowned for his earlier magnum opus, *Emancipation*,⁸ an invaluable resource that collects virtually all known historical evidence about early black lawyers. *Emancipation* does not exclude black women lawyers from its coverage but, because the number of black women lawyers was historically so tiny, the book's focus necessarily stays with black men's experiences in the law. *Rebels in the Law* appears to be Smith's effort to make up for his earlier

4. Compare Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309 (1990) (reporting on empirical findings establishing no clear correlation between gender and lawyering approaches) with Dana Jack & Rand Jack, *Women Lawyers: Archetype and Alternatives*, 57 FORDHAM L. REV. 933 (1989) (applying Gilligan's framework to women lawyers). See also Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 LAW & SOC. INQUIRY 681 (1998) (reviewing recent additions to this literature).

5. See Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239 (1999) (making arguments for such an approach).

6. REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS (J. Clay Smith, Jr. ed., 1998) [hereinafter REBELS].

7. VIRGINIA DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998).

8. J. CLAY SMITH, EMANCIPATION (1993).

heavy emphasis on black men's experiences in the law by giving black women lawyers a "book of their own." Unlike *Emancipation*, however, *Rebels in the Law* is not a detailed historical chronicle of black women lawyers' struggles and accomplishments; instead, it consists of a sampling of writing by black women lawyers, organized by broad topics such as "The Power of Black Women," "Race, Equality, Justice, and Freedom," and "International Concerns."⁹

Having approached Smith's book with the expectation that I would find jewels of historical insight about black women lawyers comparable to the treasure trove of research in *Emancipation*, I admit to initial disappointment at the format of *Rebels in Law*. But a careful reading of the essays collected there convinced me of the format's advantages. Each of the texts chosen for inclusion is rich with interest and complexity. The reader is thus left to apply her own set of questions to the primary texts, unmediated by another historian's interpretations.

Moreover, the reproduction of entire texts or large parts of texts highlights the range and diversity in concerns, conclusions, and writing styles of the black women lawyers represented in the collection. We see areas of strong disagreement, as in Jewell Rogers Stradford's staunch defense of U.S. Supreme Court candidate Robert Bork's civil rights credentials,¹⁰ which readers will recognize as at odds with the positions of others represented in the book. We read accounts of various pivotal moments in the careers of prominent black women attorneys in the national political spotlight, including Mary Frances Berry's account of her lawsuit against President Ronald Reagan for firing her from the U.S. Civil Rights Commission in the early 1980s¹¹ and Lani Guinier's gracious but impassioned statements after President Clinton abandoned her nomination as Assistant Attorney General for Civil Rights.¹² We read Joyce Anne Hughes' telling account of the forms of discrimination she encountered as a professor at the University of Minnesota law school in the 1970s, where a dean took seriously student complaints about her but not about other professors, and extended the period of her probationary appointment on the grounds that she had displayed insufficient collegiality.¹³ As Hughes explains, sounding a complaint that still

9. Smith, *REBELS*, supra note 6, at vii-x. Other topics are "Law and Its Call to Black Women," "Legal Education, the Legal Academy, and the Legal Profession," "On Presidents and Judges," and "Crime and Criminal Justice." *Id.*

10. See Smith, *REBELS*, supra note 6, at 128-30.

11. See Smith, *REBELS*, supra note 6, at 118.

12. See Smith, *REBELS*, supra note 6, at 123-27.

13. See Smith, *REBELS*, supra note 6, at 96-100.

resonates with some women and minority professors today, in even the most purportedly progressive law schools:

Such a desire [for collegiality] would have been welcome if it meant that one could retain viewpoints influenced by the Black experience and retain one's personhood as an African-American woman. But to the extent that [it] requires masking one's ideas and demands that one become an "honorary" white male, then the offer must be rejected.¹⁴

Although there is little in the book that is directly in Smith's voice, his presence is pervasive throughout; he has, after all, made all the editorial and organizing decisions that give the book its coherence and focus. The key disadvantage to the format Smith has chosen for *Rebels in Law* is the lack of analysis to provide context and connection among the selections. In reading the selections, the reader begins to formulate her own hypotheses — for example, it appears as if the black women lawyers writing early in the century are more focused on the barriers to law practice posed by gender than by race, while writers in the 1960s and 1970s are more focused on the problems of racial oppression. Writers in the 1980s and 1990s seem to articulate the complexity of the interconnections between race and gender as modes of discrimination. Such an hypothesis has a certain plausibility, given general trends in the historical periods in question. But without further guidance by the editor, the reader cannot know whether Smith intended through his selection of particular readings to steer her towards such comparisons. It is in this respect that Smith's decision not to overtly inject himself into the book's discussions is most problematic. The reader may find herself wishing for Smith's voice, as the trustworthy historian who could helpfully steer her towards a better understanding of general themes and trends in the materials.

It is possible that Smith refrained from providing such commentary out of a sense that it was not his place to interpret experiences across the divide of gender. If this is so, Smith's restraint is unfortunate. As the breadth and diversity of the voices that emerge from the book demonstrate, further expansion of our knowledge about race, gender, and the legal profession requires *more* voices from *more* perspectives. Indeed, one can hardly imagine a scholar whose voice would be more welcome on the issues raised in *Rebels in Law* than that of J. Clay Smith.

Smith does offer introductions to the book and to each of its sections, but these are short and not particularly informative. The

14. See Smith, *REBELS*, supra note 6, at 99 (footnote omitted).

reader continues to have many questions, including queries about methodology. How, for example, did Smith decide which lawyers should be represented in this book, and which writings by these lawyers to include? Did he articulate formal selection criteria; if so, what were they? Did Smith work collaboratively with the many living lawyers included in the anthology in choosing which writings to include, and, if so, how did those collaborative processes take place? How many documents did Smith consider in all? How did he conduct his searches for documentary evidence? How much of the universe of such documents did he locate? What materials would warrant further examination? Answers to these and related questions would be enormously helpful to future scholars.

Despite these omissions, Smith's book remains an invaluable contribution to scholarship about race, gender, and the legal profession. It provides a rich and wonderful resource that can provide the basis for Smith or some other scholar to prepare a companion volume to *Emancipation* that will chronicle and analyze black women lawyers' experiences in a more comprehensive and definitive manner.

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Those interested in the subject of women in the legal profession will probably already be familiar with much of Drachman's new book, *Sisters in Law*, which consists primarily of reworked material from major articles Drachman published in *Law and Social Inquiry*, *Michigan Law Review*, and other journals. Despite the prior publication of much of the material Drachman presents, Drachman's synthesis of her decades-long research in book form allows for many new insights, especially on matters of change through time. Drachman traces, for example, the trajectory of women's thinking about their progress in the bar, starting with a pioneering period in the late 1900s and first decades of this century, in which women lawyers were breaking barriers by becoming "firsts" in various aspects of law, such as law school graduations, bar admissions, and achieving positions of distinction in practice and public service;¹⁵ a following period of optimism in the 1920s, when women lawyers hoped they would soon gain a position of equality with male practitioners in the profession;¹⁶ and then, in the 1930s, the sobering realization that true equality would be far more difficult to achieve than initially hoped.¹⁷ We benefit from the comparative perspective Drachman is able to add

15. See DRACHMAN, *supra* note 7, at 37-64.

16. See DRACHMAN, *supra* note 7, at 168.

17. See DRACHMAN, *supra* note 7, at 248.

throughout this discussion by drawing on her previous research on women in medicine; Drachman argues that law proved more resistant to women's efforts at integration than medicine did, for many reasons, including law's inherently conservative ideological groundings.

Drachman's book combines a willingness to grapple with controversial questions about women's "differences" and careful historical analysis. Drachman convincingly shows that gender did affect these early women lawyers' experiences, but often in complex and unpredictable ways. Drachman documents, for example, that the earliest practicing women lawyers were more likely to be married than not — and more specifically, to be married to other lawyers. The reason for this somewhat counterintuitive phenomenon, Drachman explains, is that, in a profession in which virtually all career opportunities remained closed to women, women lawyers married to male attorneys were the only ones likely to find employment — in their *husbands'* law offices.¹⁸

In later periods, when the organization of practice had changed, the relationship between marriage and a woman lawyer's chances of professional success became more complicated. Women lawyers debated about whether the gendered duties of married life were incompatible with a professional career, especially in a field as demanding as law. Many argued that having a marriage and a legal career crucially depended on selecting a spouse willing to eschew the gendered division of labor within marriage. Drachman's discussion of the rise of ideals of "companionate" marriage is one of my favorite aspects of her book, rich with vivid quotes and detail.¹⁹

Thus, Drachman does not shy away from discussing the subjective aspects of early women lawyers' experiences. Drachman describes early women lawyers as being caught in the "burden of double consciousness — the tension between their gender and professional identity."²⁰ But Drachman is careful never to slip into the reductionist or essentialist tendencies that sometimes mar discussion of these matters. At every turn, Drachman emphasizes the great diversity of women's views. Some early women lawyers reported that their "gendered" consciousness affected the way they practiced law and the kinds of work they chose to do; others equally vehemently denied any such connection. Some felt a special duty to work for the improvement of society; others cared about success and wealth.

18. See DRACHMAN, *supra* note 7, at 103.

19. See DRACHMAN, *supra* note 7, at 211-14.

20. DRACHMAN, *supra* note 7, at 248.

Drachman is particularly good at highlighting the way in which class privilege intersected with early white women lawyers' efforts to gain entry into the legal profession.²¹ She does not hesitate to expose the race prejudice that went hand-in-hand with some efforts to increase opportunities for women in the law.²² Drachman is also careful to include a considerable amount of material on the accomplishments of early black women lawyers.²³

What Drachman's analysis lacks, however, is a sustained focus on the difference race made to the experience of being a woman lawyer. It is perhaps not fair to fault her for this flaw, given the very small numbers of black women lawyers in practice during the period she covers and the many other themes Drachman is juggling throughout the book. But it is nevertheless clear that *all* the complex aspects of women lawyers' historical experience must eventually be understood together if we are to properly analyze the development of the American legal profession. We are thus fortunate to have both *Sisters in Law* and *Rebels in Law* to read together in pursuing this quest.

21. See DRACHMAN, *supra* note 7, at 133-35.

22. See DRACHMAN, *supra* note 7, at 149-57.

23. See DRACHMAN, *supra* note 7, at 160-61, 206-10, 220-21.

HARD BARGAINS

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How many books about law can you read on a skiing vacation and not regret the choice?

*Hard Bargains*¹ is one of them. It is about sex. One of my chief regrets, despite my awkward contentment with middle age, is that my own interest in sex is not professional. I ask myself: why on earth did I pass up the opportunity of writing about sex for a living?

Feminists have long been confused about sex. That is one reason they have not been at the forefront of the discussion on the scandal that gave rise to impeachment proceedings against President Clinton. In the eyes of some feminists, the sex between Monica Lewinsky and the President was consensual sex between adults. Exposing their relationship is precisely the kind of surveillance that traditionally has hurt women. In the eyes of others, Lewinsky's eroticizing of Clinton's prominent position — "I'm going to put on my presidential knee pads" — is the kind of sexuality that historically has victimized women. Who is right?

These issues go beyond the Lewinsky scandal. For example, what are feminists to think about adultery? As *Hard Bargains* points out, fully one-fourth of married men have had adulterous affairs, something any divorce lawyer knows. Yet, we hesitate to condemn adultery. It sounds old-fashioned, Victorian, unliberated, . . . unfeminist.

Hard Bargains provides an answer. To understand it requires us to review the book. This is important because it articulates, in a careful and measured way, an alternative to the two dominant views of sexuality, associated with the "sex wars." On one side are the antipornography feminists, whose position is now associated with Catharine MacKinnon. MacKinnon opposes pornography on the

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1. LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX*, (Oxford Univ. Press, 1998).

ground that it causes the domination of women by eroticizing dominance.² On the other side are commentators Ellen Willis, Nadine Strossen and Joan Nestle, whose wonderful “My Mother Loved to Fuck” epitomizes their view of sexuality as a key site of liberation and self-expression.³

What *Hard Bargains* offers is a feminist understanding of sexuality more complex than that offered by either of the two sex-war camps. It articulates a feminist agenda premised on the view that sexuality is *both* potentially oppressive (when it eroticizes dominance) *and* potentially liberatory. This more nuanced formulation does what (the authors claim, and I believe them) feminism has never done before: articulate a positive regime of sexual regulation that will offer sexuality on better terms than those available under the current (if unacknowledged) regime of sexual regulation. The final chapter details the kinds of regulations on rape, prostitution, fornication, and adultery that would characterize a new era of “hard bargains” in which women get a better “deal” sexually than they do today.

In reaching their conclusions, the authors use two key concepts. The most important is a new paradigm: their notion of the libertine sexual regime.⁴ The book does not trace its origins to the licentious aristocratic sexuality of Don Juan, Casanova, and *Dangerous Liaisons*. Instead, it traces the democratization of libertine sexuality in the 1950s and 1960s. The description of this development is fascinating.

With so much being negotiated in the decentralized and fluid space of daily life, libertinism has no shared structure of belief, and the emerging attitude and way of life was inherently unstable. In practice, libertinism embraced a classical liberal approach to sexual regulation, embodied in the Model Penal Code and *Griswold v. Connecticut*,⁵ and at the same time a utilitarian hedonism, reflected in Kinsey’s love affair with the orgasm and the sexual exaltation of the *Playboy* philosophy.⁶

This passage hints at the analytical richness of the book’s combination of historical and philosophical analysis. From these perspectives, libertinism emerges as a strain of liberalism that links a libertarian aversion to government regulation with a hedonism that

2. *See id.* at 223 (noting that dominance reinforces a submissive role for women).

3. *Id.* at 224.

4. *Id.* at 211.

5. 381 U.S. 479 (1965) (holding that married couples have a fundamental right to privacy in their marital relations, and that a Connecticut law that proscribed the use of contraceptives by married couples was unconstitutional on that basis).

6. HIRSHMAN & LARSON, *supra* note 1, at 214.

views sexuality as an integral part of spiritual and emotional self-actualization.

Feminists' confusion about libertinism is what has left them without a confident voice on issues related to sexuality (except in contexts, such as sexual harassment, where the goal is to brand sexuality as inappropriate). Are the attacks on Bill Clinton, and Robert Livingston's resignation as House Speaker, expressions of "a new sexual McCarthyism" feminists should oppose?

Not to me. But neither does my dissatisfaction with adultery stem from an inability to distinguish between heterosexual sex and rape. It is therefore with a sense of relief that I read Hirshman and Larson articulate the position that the values embedded in "sex in itself" do not "preempt[] all criticism of its delivery system."⁷

Though this no doubt reveals my ignorance, *Hard Bargains* explained to me that there is a key problem with libertarianism. In general, this problem can most easily be understood in market contexts: free markets deliver all goods efficiently, including racism and sexism. In the sexual context, libertinism leaves men free to structure the terms of sexual encounters within a framework that takes their economic power and cultural authority as a given. What *Hard Bargains* proposes is a system of sexual regulation that offers sexuality to women within a framework of "supported bargaining" that ends the unattractive choice between no heterosexual sex, and sex only available within a framework that maintains men's social power over women.

Less satisfying to me is the book's other major analytical framework: its use of bargaining theory.⁸ Bargaining theory, a branch of game theory, is currently influential within legal feminism. It is useful to the extent that it captures the way men's economic power outside the household translates into power inside it, a theme explored by sociologists since Blood and Wolfe introduced the topic in the 1960s. Bargaining theory translates forty years of sociology into the currently fashionable language of economics.

Economics as a language of human relations has many limitations, some of which emerge from this book. The economic language commodifies intimate relations in ways that are off-putting to many of us, as when Larson and Hirshman refer to "sexual transactions."⁹ When did you last have a session of sexual bargaining followed by a

7. HIRSHMAN & LARSON, *supra* note 1, at 216.

8. HIRSHMAN & LARSON, *supra* note 1, at 23.

9. See, e.g., HIRSHMAN & LARSON, *supra* note 1, at 20 (characterizing people as having desires for sexual transactions).

sexual transaction?

An alternative is a language of social power. While it seems hard to imagine a language of social power with wide appeal in United States, inventing one needs to be at the center of the feminist agenda. Otherwise feminists who feel comfortable with talking about gender and sexuality in the language of social power will feel uneasy with analyses of power relations framed in the economic language of bargaining theory. Robin West comes to mind, for she gave a complimentary blurb for this book but called the bargain language “controversial.” In addition, indeed even more important, linking power analysis with the language of economics leaves feminists open to the charge that anyone who wants to equalize the social power positions of men and women is advocating an agenda that will result in the end of intimacy.

To summarize: This book is a good read. It introduces a new analytical paradigm (libertinism) with impressive potential. And it uses another analytical tool — bargaining theory — that is a net liability for feminism. I will conclude with a roadmap of the book, and explanation of how *Hard Bargains* helped me formulate my thoughts of Monica and Bill.

Roadmap first: After an initial discussion of “the possibilities of theory,” Parts 1 and 2 discuss the early sexual regimes of Greece and Judaism, and Christian thinkers from the early celibates to Aquinas and Augustine. These were fascinating to me, not the least because they remind us that the celebration of homosexuality in Greece (so often favorably cited in gay studies) was an integral part of an often-misogynous regime designed to increase the sexual pleasure and preserve the property rights of high-status men. A discussion of the United States follows, and may hold more interest for the general reader than for readers familiar with existing histories of domesticity.¹⁰ Throughout both of these beginning sections, and in Parts 3 and 4 on libertinism and hard bargains, the history is intertwined with philosophical analysis, which suffers from the limitations of a canon-based study of politics, notably its difficulty in capturing the complexity of the liberal tradition in America. This proves only that intellectual history provides a more useful tool for studying our political past than does canon-based political theory.

While I will leave readers to buy the book at their leisure and assess its proposals on rape, concubinage, fornication, and sex with children, I will end with some final words on the Impeachment

10. See Hirshman & LARSON, *supra* note 1, at 59 (beginning the chapter entitled “American Beginnings” with colonial versions of sex).

Couple. *Hard Bargains* proposes to “restore to marriage a nonnegotiable duty of sexual exclusivity.”¹¹ It points out that the real injury with respect to adultery (as opposed to fornication, which they propose to decriminalize except when it involves children) is to the injured spouse, not the state. Therefore, they propose a civil compensation remedy for the injured spouse within marriage, and to define adultery as marital fault in a new regime in which fault affects property division upon death and divorce. This proposal leaves people free to pursue sexual pleasure without requiring us as feminists to endorse the behavior of a fifty-something married President who has sex with a twenty-one-year-old for a month before he (allegedly) bothered to learn her name. Even if Hillary would not sue for damages, many other women would, and the way to a man’s brain, they always say, is through his wallet.

11. HIRSHMAN & LARSON, *supra* note 1, at 285.

