

# LEGAL THEORY AND GENDERED HISTORY

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As a group, historians tend to be, if not anti-theoretical, at least atheoretical. We back away from developing theory, although we shamelessly adopt and adapt it and frequently invoke it to legitimize our interpretations. Marx, Freud, Foucault and Martha Nussbaum have all entered our work. Historians tend to use theory to sustain flimsy or controversial evidence—to provide the scaffolding that supports our conclusions. My comments in this Article address how we do that. How do we test abstract and thinly rooted theoretical frames against historical evidence that has often been carefully amassed and allowed to speak only for itself? How, specifically, do we do that with the work of Martha Nussbaum?

For those of us who work on gender, Nussbaum's work has played a crucial role. We rely on books like Nussbaum's *Sex and Social Justice*<sup>1</sup> as a guide. When we want to think about what liberalism means for women in the contemporary world, we turn to Martha Nussbaum. And when we get involved in debates about cultural relativism, it is Martha we turn to. We do so not because only a few people write cogently about feminist theory; rather, we do so because few scholars approach feminist theory with both anecdotal knowledge and legal expertise. Let me try to explain why that is important. Martha's work has been guided by an effort to explore questions of values in general, and, in particular, questions of how aspirations to achieve a good society influence American law, international law, and public policy.<sup>2</sup> But the historian who admires that goal also pauses to push

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<sup>1</sup> MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (2000) [hereinafter NUSSBAUM, *SEX AND SOCIAL JUSTICE*].

<sup>2</sup> See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).

the question a step further. How, we ask of Martha, do you understand the meaning of “good”? Historians might rephrase the question to ask, what does “the good” mean in any given society at a particular moment in time? Who defines “the good”? Who sets its boundaries? How is “the good” realized under particular historical circumstances? How is it rewarded? How does a particular image of “the good” produce particular behaviors, and under what conditions?

This effort to construct a society, as lived and experienced, has been enabled by a gendered history. Beyond rehabilitating the lives of previously unknown women, beyond celebrating their accomplishments, beyond uncovering gendered relationships, historians have, in the past two decades, turned to asking why and how the role of gender matters in the process of historical change. Is it merely a delightful piece of trivia to discover that the relationships among men and women in the nineteenth century were far more complicated than we ever imagined they were? Can we find some larger meaning in our discovery that same-sex and companionate relationships, though sometimes hidden, existed in far greater numbers than anybody ever imagined?<sup>3</sup> We are now confronted with providing adequate answers to the question of whether gender matters at all.

The answers that we provide often rest on a deep historical understanding of the belief systems within which ordinary people made decisions about their own lives. For example, if we discover that same-sex relationships were much more frequent than we had ever imagined, we need to ask how they figure not within our own social parameters, but within the historical circumstances experienced at particular moments in the past. Were such relationships socially sanctioned or socially condemned? With what fervor? Among what classes, generations and sexes did they occur? How do we actually see people imagining themselves in the lives that they lived? These are the kinds of questions that we seek to answer by placing ourselves in the mindsets of those we study. They separate us from the philosopher by provoking us to think more deeply about how “the good” is differently constructed at different moments in time.

A few historical examples will illustrate the point. Edward Hallet Carr, one of Britain’s premier historians, wrote an influential book called

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<sup>3</sup> See Margaret Marsh, *Suburban Men and Masculine Domesticity, 1870–1925*, in *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA* 111–27 (Mark C. Carnes & Clyde Griffen, eds., 1990); Carroll Smith Rosenberg, *The Female World of Love and Ritual*, in *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 53–76 (1985); E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993).

*What Is History?* in the early 1950s.<sup>4</sup> Carr argues that historians are inevitably products of their own time.<sup>5</sup> The questions they ask and the hypotheses they put forward emerge from their own experiences, and tend to reflect their own visions of a desired future.<sup>6</sup> The historical past, in Carr's view, is merely a figment of the present out of which the historian writes.<sup>7</sup> By the same token, we look back on history and comprehend its meaning as a force that shapes the way we think about the future. This poses a bit of a conundrum. If the historian's capacity to interpret the past is limited by his or her vision and perspective, then there can be no "past" that does not reflect a rather limited future.

If freedom, for example, counts among the significant values and major goals of a historian's world, the historian will pose questions about the past that rotate around his conception of freedom. Did freedom exist? For whom? How was it acquired? How was it maintained and defended? Out of historical research will come a series of answers that will help us to understand freedom to be sure—but freedom as we understand it now.

The perceptive historian who asks whether definitions of "freedom" remained constant over time might come up with a different set of answers. He or she might ask whether a given society had other equally pervasive value systems. What about values based on community, stability, safety, hierarchy, family or Godliness? For any one of these, the men and women of a past society might have been willing to give up their lives. But they are rendered invisible by our present obsession with freedom. Had one of these issues been at the forefront of the historian's agenda—an issue like Godliness, for example—then his exploration of the past might have overlooked freedom altogether to ask about the role that religious faith played.

E. H. Carr would have thought of words like "liberty," "equality," "justice," "fairness," and "the good" as what we call "empty boxes" containing no meaning. He would have asked what those boxes contained and how their contents varied over space and time. Another historical illustration might illuminate the point: until the 1960s, historians dealt with slavery not as a problem of freedom, but as an issue of labor. The slave system occupied the pages of history books as a labor system that provoked

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<sup>4</sup> EDWARD HALLETT CARR, *WHAT IS HISTORY?* 158–66 (1961).

<sup>5</sup> *Id.* at 48.

<sup>6</sup> *See id.*, ch. 5.

<sup>7</sup> *Id.* at 158–66.

questions about how labor was deployed, how workers were used and utilized, and how they were controlled and incentivized.<sup>8</sup> Questions of freedom did not fully emerge until the 1960s, when a lively civil rights movement posed its own dilemmas in those terms.<sup>9</sup> Only then could historians begin to imagine the yearning of slave labor for something called freedom.

My own research in the history of social policy provides equally salient evidence and brings us back to Martha Nussbaum. On what, Martha asks, is public policy based?<sup>10</sup> She replies by noting that it is rooted, at its best, in a set of nineteenth century liberal notions, in an effort to achieve “the good” for larger numbers of people. As I understand her usage of the term, conceptions of “the good” rotate around three arenas: “liberty,” “fairness,” and “democracy.” Each of these is worth a little gendered historical scrutiny. The nineteenth century liberal associated liberty with *freedom from* intervention, particularly from intervention by governments in individual desires. But the twentieth century liberal associated freedom *with the capacity to participate in the polity and the economy, and to live a good life*, both of which required the state to restrict the liberty of individuals—to intervene to protect them against predatory capitalists, unscrupulous employers, and corrupt politicians.

For women, freedom took on a different cast. The idea of liberty as freedom *from* government constraints never really worked for them. Nineteenth century American women, eager to acquire liberty, asked state governments to free them to go to work, to keep their own wages, to inherit and control their own property, and to have custody of their children in the event of divorce.<sup>11</sup> For them, the state would serve as a buffer between the patriarchal family and their capacity to develop as individuals. Nineteenth

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<sup>8</sup> See, e.g., EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH* (1965); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH, 1820–1860* (1964); cf. DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* (1966).

<sup>9</sup> Among the many excellent volumes that deal with slavery as a question of freedom, see particularly the work of Ira Berlin, including IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN AMERICAN SLAVES* (2003); IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* (1998).

<sup>10</sup> See NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 1 at 56–59.

<sup>11</sup> See e.g., JEAN BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (1990); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 138–218 (1998).

century property laws provide a good example. In most states during the first half of the century, property inherited by married women went directly to their husbands or passed through them to their children. In order for women to acquire the right to keep property in their own names, state laws that would protect women's freedom *to* inherit and women's freedom *to* control their own money were required.<sup>12</sup>

Poorer women who earned wages found themselves in the same dilemma. During most of the nineteenth century, women's wages *legally belonged* to the husband or male head of the household to which the woman was attached.<sup>13</sup> A daughter living in her father's home or a married woman who found work in one of the rapidly opening textile or paper mills had no legal control over her own wages.<sup>14</sup> To keep her income, she would need the state *to* guarantee her right to her own wages.

Nor does the idea of individual liberty have the same resonance for men and women at the turn of the century. When, in the early twentieth century, the progressive movement invoked the protection of government to defend a man's liberty from predatory corporations by guaranteeing his freedom as a contracting individual to make a living or to vote, it did so on the grounds that men were reasonable individuals and that their rights as such required affirmative guarantees.<sup>15</sup> But the notion of liberty for women took on a different form, a collectivized form. For example, protective labor legislation, enacted in the early part of the twentieth century and upheld by the Supreme Court in its 1908 decision *Muller v. Oregon*, permitted the various states to regulate the hours and conditions of work of women, but not of men.<sup>16</sup> After 1908, states could, at will, prohibit night work for women, define certain jobs as off limits to them (operating elevators, for example, or delivering telegrams), and require that only men be employed around moving machinery.<sup>17</sup> *Muller v. Oregon* paved the way for some two-

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<sup>12</sup> NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982).

<sup>13</sup> JANE TURNER CENSER, *THE RECONSTRUCTION OF WHITE SOUTHERN WOMANHOOD, 1865-1895*, at 98-126 (2003); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 292-97 (2000).

<sup>14</sup> ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH CENTURY AMERICA*, ch. 1 (2001).

<sup>15</sup> *Id.* at 19-65.

<sup>16</sup> *Muller v. Oregon*, 28 U.S. 412 (1908).

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

thirds of the states to adopt protective labor legislation for women only, which protected women *from* exercising individual liberty in the labor force. Male workers, in contrast, were free (for good or ill) to exercise freedom of contract: that is, to work under whatever conditions they chose to so long as the public safety was not injured.<sup>18</sup> Neither a trade union nor the state could prohibit an adult male from working as many hours a day as he wished.<sup>19</sup> Not so for women. As women, their liberty was collectively curtailed. The consequence was to put women in a very different position than men in relation to the Constitution. The differentiation continued in the United States until the late 1960s, when the Equal Employment Opportunities Commission (created by Title VII of the Civil Rights Act of 1964), finally took on the issue.

One finds a similar difference between men and women with regards to ideas of “fairness.” Among the –wage-earning women who benefitted from the shorter hours and improved working conditions made possible by *Muller v. Oregon*, “fairness” could very well have meant the capacity of the state to restrain employers. But wage-earning women who found their wages cut as their hours were reduced, and those who discovered that they were no longer eligible for jobs they thought they might have had, experienced the intervention of state legislation as far less fair. Among men who did not benefit from limits on hours and minimum wages until 1937, what was “fair” was something else altogether. To some, whose manliness depended on their capacity to negotiate their own contracts, “fairness” encompassed the capacity of the state *not* to restrain employers.<sup>20</sup> What then was the meaning of “fairness”? From the position of the largely middle-class female reformers who promoted protective labor legislation for mostly white women who worked in factories, protective labor legislation was a very good thing indeed. Was it fair? From the perspective of those women who found their job opportunities constrained, probably not.

There are yet more examples of the differential implications of “fairness.” Title VII of the 1964 Civil Rights Act, as everyone knows, added sex to race, ethnicity, religion and other groups against whom

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<sup>18</sup> ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES*, ch. 7 (1982).

<sup>19</sup> *Id.* at 180–217.

<sup>20</sup> For a lengthier discussion of the changing, gendered, meanings of fairness, see KESSLER-HARRIS, *supra* note 14, at 117–70, 239–80.

employers could no longer discriminate in hiring or promotion.<sup>21</sup> Although today, most thinking people would agree that sex was an appropriate category to add, in 1964, adding sex seemed manifestly unfair to many.<sup>22</sup> A vast majority of American men and women, including the legislators who added “sex” to the legislation, believed that differences attributed to the two sexes were natural, and that employment patterns that reflected those differences were appropriate and “fair.” As a result, the EEOC at first declined to enforce the sex provision of the law: it seemed absurd to them. Only when employed women, often members of trade unions, challenged the EEOC’s obstinacy, did the courts insist on enforcement, with a resulting change in the construction of “fairness” that the EEOC had ascribed to the bill.<sup>23</sup>

Democracy provides a third arena whose implications are both gendered and time-bound. One brief example might make the point: American women, denied the vote, in the late nineteenth century, evolved a series of strategies to ensure that they would be included in the polity.<sup>24</sup> Among those strategies were engagement in women’s clubs, participation in political parties, and involvement with municipal reform movements.<sup>25</sup> All these strategies and more allowed women to exercise public voice and to harbor the expectation that democracy could be defined by more than the vote.<sup>26</sup>

Martha’s questions pose a series of challenges for historians. They invite us to probe historical circumstances in order to find empirical answers to seemingly abstract problems. They urge us to investigate the meanings of words such as goodness, justice, and virtue, and to interpret the past accordingly. Lest I be accused of sliding down the slippery slope of relativism, let me pause for a second as I conclude to say that I agree with Martha that at any given point in time and place we might identify shared and common values. The difficulty is to identify the meaning of the values

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<sup>21</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (LexisNexis 2010).

<sup>22</sup> CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN’S ISSUES, 1945–1968*, at 138–69 (1988).

<sup>23</sup> *Id.* at 187–191; *see also* KESSLER-HARRIS, *supra* note 15, at 239–80.

<sup>24</sup> PAULA BAKER, *THE MORAL FRAMEWORKS OF PUBLIC LIFE: GENDER, POLITICS AND THE STATE IN RURAL NEW YORK, 1870–1930*, at xvi–xvii (1991).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

implicit in the language of actors as they understood those meanings in their own contexts.

Historians try not to make moral judgments, to ask whether a given stance was right or wrong; our task is to assess how specific notions of morality (whether we like them or not) produce or resist particular decisions or behaviors. Martha Nussbaum's work leads us into asking those questions. Her provocations foster a dialogue about what a history of such values as justice might look like; they encourage us to think about the good and the fair not as measures of morality, but as historical concepts to which we can fruitfully turn our attention.