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NOTE

DOROTHY KENYON AND THE MAKING OF MODERN LEGAL FEMINISM

Samantha Barbas†

INTRODUCTION

In the 1965 case of *White v. Crook*, a federal court, declaring that jury service was considered to be "one of the basic rights and obligations of citizenship" and "a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex,"[1] invalidated an Alabama statute excluding women from juries under the Equal Protection Clause. This groundbreaking case marked the first use of the Fourteenth Amendment to invalidate a sex-discrimination law.

White v. Crook involved the trial of a member of the Ku Klux Klan who was charged with killing two civil rights workers after a march in Selma, Alabama.[2] The trial was to be held in Lowndes County, where the population was eighty-one percent black, but no black man or woman of any race had ever been called or served on a jury.[3] Despite demands by the American Civil Liberties Union (ACLU) that the trials of the alleged murderers be delayed

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1. 251 F. Supp. 401 7-8, 11 (M.D. Ala. 1966).

2. News Release, ACLU, (Nov. 22, 1965) (on file with Princeton University, Mudd Library, ACLU Papers).

3. *Id.*

until blacks and women could serve on juries in Alabama, the *White* Court refused to halt the trial, and the verdict, as expected, was not guilty.[4] Charles Morgan of the ACLU's Operation Southern Justice brought a challenge on behalf of a group of black female plaintiffs, contending that the Fourteenth Amendment was violated by the systematic exclusion of African Americans from the jury rolls and the jury box, and by the law that excluded all women from jury service.[5] The *White* Court concluded that the sex-discriminatory statute, which had been passed on the grounds that jury service would improperly take women away from their homes and family responsibilities for extended periods, was irrational in light of modern social conditions and violated women's right to constitutional equal protection.

Women's rights groups hailed the decision as a victory, believing that the decision could be used to strike down a wide range of sex-discriminatory laws and practices.[6] Dorothy Kenyon, a lawyer and feminist activist who had written the sex-discrimination brief for the ACLU, considered the outcome "magnificent in its impact" and potentially "revolutionary." "Other victories will follow. But this one turned the key in the lock. Like the Civil Rights Boys when the *Brown* decision was handed down, I could cry," Kenyon said.[7]

White v. Crook represented the culmination of Kenyon's career of nearly forty years of legal feminist activism. Since the 1920s Kenyon had worked for women's social, economic, and political rights, including the right to fair labor. To Kenyon, women's economic self-sufficiency was one of the foundations of women's "full citizenship." As Kenyon told lecture audiences in the 1930s, the ultimate symbol of women's freedom was "the hat that sits upon my head, which I have bought and paid for."[8] In the mid-twentieth century, Kenyon was one of the best-known feminist activists and progressive intellectuals in the country. In the 1950s, she again broke new ground when she linked race and sex in a legal argument on behalf of women's rights. Nearly two decades before ACLU lawyer Ruth Bader Ginsburg made the claim the basis of her brief in *Reed v. Reed*, the first major Supreme Court sex-discrimination case in 1971, Kenyon demonstrated the parallels between race and sex discrimination and argued that laws based on archaic gender stereotypes, like those based on racial stereotypes, stigmatize women in violation of the Equal Protection Clause of the Fourteenth Amendment.

Despite her influence and prominence, Kenyon has been largely ignored in

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4. News Release, ACLU, (Oct. 4, 1965) (on file with Princeton University, Mudd Library, ACLU Papers).

5. *Id.*

6. Elizabeth Shelton, *Calls Rights Decision a Landmark*, WASH. POST, Feb. 16, 1966.

7. Letter from Dorothy Kenyon to Charles Duncan (Mar. 17, 1966) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 28).

8. Dorothy Kenyon, The Independent Woman (1937) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

historical and legal scholarship.[9] I suspect that Kenyon's absence can be attributed in part to her unruliness as a feminist and as a subject of feminist historical inquiry. As a feminist who did much of her women's rights work outside of formal feminist organizations and who campaigned against the Equal Rights Amendment while advocating for formal sex equality, Kenyon ruptured many of the established categories and narratives of legal feminist history. Her feminist philosophy blurred the lines between equality and difference feminism. Her persistent women's rights efforts and her fruitful alliance with male activists in the 1940s and 1950s challenged stereotypes of the era's gender conservatism.

This Article attempts to restore Kenyon to the historical record by documenting her complex career and illustrating her importance to modern legal feminist thought and activism. It explores how one feminist intellectual negotiated the "sameness-difference" debate and how that debate powerfully divided women's rights activists in the mid-twentieth century. Kenyon's belief that labor laws should single out women for special protection in the workplace, yet that women must be treated the same as men in other realms, pushed her to search for a legal strategy that would allow for both differential and equal treatment for women. The result was Kenyon's Fourteenth Amendment theory, which laid the foundation for subsequent legal feminist activism in the 1960s and 1970s.

This Article traces the path Kenyon took as she sought legal tools and political allies in her effort to make her feminist vision law. Part I narrates Kenyon's career as a pioneering feminist lawyer and activist whose crusade centered around women's right to just labor. As Part II demonstrates, much of her labor activism focused on her advocacy of protective laws for women workers. This perspective put her in direct opposition to feminists advocating the Equal Rights Amendment, and between the 1920s and 1960s she was at the forefront of a national debate over the meaning of fair labor for women. In Part III, I discuss how her support for sex-specific labor laws generated her Fourteenth Amendment approach. Kenyon believed that using the Equal

9. Kenyon's legal feminist work has been discussed in Susan Hartmann's 1997 book, *The Other Feminists: Activists in the Liberal Establishment*, which examines women's rights activism in the years immediately preceding the rise of second wave feminism in the late 1960s. Kenyon has been mentioned briefly in other histories—legal scholar Serena Mayeri's articles on legal feminist efforts in the 1960s, political scientist Gretchen Ritter's book on women's modern struggle for constitutional recognition, and historian Linda Kerber's *No Constitutional Right to Be Ladies*, on the history of women's jury service laws. SUSAN HARTMANN, THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT (1998); Serena Mayeri, *A Common Fate of Discrimination: Race-Gender Analogies in Historical Perspective*, 110 YALE L.J. 1045 (2001); Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV 755 (2004); KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER (2006).

Protection Clause to secure women's rights, rather than the Equal Rights Amendment, would permit a case-by-case method that would enable the eradication of sex-discriminatory laws in jury service, education, and women's access to public facilities, while still preserving protective labor policies. This in turn led to her model of equal protection litigation that in the wake of *Brown v. Board of Education*[10] hinged on the linkage of race discrimination and sex discrimination.

An overarching theme of the Article is the notion of "constitutional culture" and the impact of identity-based social movements on constitutional interpretation and legal change. Legal scholar Reva Siegel describes constitutional culture as the "network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as 'lawmaking' according to the legal system's own formal criteria."[11] Robert Post explains it as a "specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution."[12] According to theorists of constitutional culture, doctrinal innovation occurs not only in the isolated world of formal adjudication but works through a polyvocal and multidimensional process in which judges interact dynamically with social norms and constitutional discourses in the wider culture. A constitutional culture approach to legal history sees nonjuridical actors as important participants in the production of constitutional meaning. In the twentieth century, as legal scholar William Eskridge points out, identity-based social movements, such as the civil rights movement and feminist movement, have significantly influenced both popular and official understandings of the Constitution.[13] As social movements forward their own constitutional interpretations and definitions of justice and individual rights, they "challenge the background understandings about paradigmatic cases, practices, and areas of social life to which principles properly apply."[14] In their reworking of social norms and legal doctrine, they "connect legal norms to the beliefs and practices of ordinary people, so as to preserve a relationship between what the law regards as licit and what the public does."[15]

Although she was not explicitly connected to an organized feminist movement, Dorothy Kenyon was among the most influential modern feminist interpreters of the Constitution. Like the suffragists of an earlier generation,

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10. 347 U.S. 483 (1954).

11. Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300 (2001).

12. Robert Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 8 (2003)

13. William Eskridge, *Channeling: Identity Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

14. Jack Balkin & Reva Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006).

15. *Id.* at 949.

Kenyon dedicated herself to transforming both popular and official understandings of the Constitution through a dual program of impact litigation and social activism.[16] In addition to her writings and speeches on women's rights, Kenyon's formal legal arguments, discussed and publicized in the popular press, shifted the conceptual frames through which judicial and extrajudicial actors understood women's constitutional rights. In publicizing a new vision of gender equality, Kenyon altered women's understanding of themselves as gendered legal subjects and contributed to the sense of common identity necessary for feminist social mobilization.[17] This Article focuses both on the legal arguments Kenyon made and the ways she promoted those ideas through formal and informal channels. In her recognition of law and culture as mutually constitutive, in her rhetorical techniques, which connected women's rights to established constitutional rights traditions, and in her savvy use of mass media to promote feminist causes, Kenyon established a model for social and legal change that would be followed by later generations of feminist legal activists.

Kenyon's story encourages us to think expansively about feminist legal reform, to see it as something that occurs not only in the courtroom but as a multifaceted process through which alternative social theories of gender and novel doctrinal interpretations are publicized and incorporated into popular and legal discourse, in turn transforming social and legal meanings.[18] Much like the prophetic litigation described by law professor Jules Lobel—cases brought by lawyers who knew their causes were impossible, but who persevered them in order to publicize the issues—Kenyon saw her litigation efforts as a means of "speaking to the public."[19] Her ongoing efforts, both in and out of the courtroom, to reframe sex discrimination as social injustice and legal wrong and to recast the Constitution as a guarantee of women's full citizenship changed the law. It also gave rise to a transformative popular consciousness that fueled the growth of feminism as a mass social movement. Kenyon's race-

16. On the legal and social activist tactics and arguments used by the women's suffrage movement of the nineteenth century, see Adam Winkler, *A Revolution too Soon: Women Suffragists and the 'Living Constitution,'* 76 N.Y.U. L. REV. 1456 (2001), Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005), and Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987).

17. *See* Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and the Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718 (2006).

18. As Nicholas Pedriana notes, "the women's movement was not simply trying to further engage cultural debate over women's proper roles at work, in the family, and in society more broadly; it was also attempting to enshrine those competing cultural constructions of gender into law officially recognized and enforced by the state's judicial and administrative apparatus." *Id.* at 1730.

19. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332-33 (1995).

sex model shifted the conceptual frames through which Americans viewed the unequal treatment of women; her decades-long struggle with the sameness-difference debate and the practical, moral, and social problems involved in the struggle for equal rights not only influenced the social debates of her era but presaged the struggles of women's rights activists today.

PART I

By World War II Dorothy Kenyon was, in the words of the *New York Times*, one of the "best known women lawyers" in the country and an internationally renowned activist working on behalf of a variety of progressive causes, including worker's rights, civil liberties, and women's rights.[20] Her prolific social justice career had started in the 1920s, when Kenyon joined the New York League of Women Voters as legal advisor and spearheaded a campaign to change a New York law that prohibited all women from serving on juries. In the 1930s, she became a prominent member of the American Association of University Women and a legal advisor to the Consumers' League, the organization that had helped prepare the Brandeis brief limiting hours for women workers in the famous 1908 Supreme Court case *Muller v. Oregon*.[21] Kenyon also fought New York laws censoring films as a board member of the ACLU. Her prominence as a liberal public intellectual won her official appointments in state and municipal government. In the 1930s Kenyon served on several state labor commissions, held the position of the Deputy Commissioner of Licenses of New York City, and served as a municipal judge. In 1946, Kenyon was appointed by President Truman to serve as U.S. Representative to the U.N. Commission on the Status of Women, where she focused on education and suffrage rights for women throughout the world.[22]

Like many ambitious young women of her time who became social reformers, Kenyon's life and social vision were shaped by her own personal experience with sex discrimination. The daughter of a family of elite New York lawyers and a 1909 graduate of Smith College, Kenyon was a debutante and social butterfly whose expected life path was domesticity and marriage. Her life changed in 1913, when she witnessed extreme rural poverty while on a trip to Mexico. Kenyon then dedicated herself to pursuing social change through legal work, and she began her legal studies at New York University Law School in 1914. She was belittled by professors and students who assumed that she was less capable because she was a woman and that her education would be wasted because she would marry and never become a lawyer. In 1920, women were a small and marginalized minority of the legal profession, with only about 1700

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20. *New York Woman Gets League Post*, N.Y. TIMES, Jan. 29, 1938, at 7.

21. 208 U.S. 412 (1908).

22. Kenyon's résumés can be found interspersed throughout her personal papers at Smith College in the Sophia Smith Library.

women lawyers in practice nationally.[23] Kenyon was eventually hired as an associate at a small New York firm, yet she was troubled by her inability to secure interesting work assignments and the constant criticism she received from her male colleagues. In 1927, Kenyon opened her own law firm with Dorothy Straus, another feminist lawyer. Like many professional women of her era, she never married.[24]

These struggles taught Kenyon the importance of equal opportunity in the workplace. Kenyon came to believe that perhaps even more than political and social rights, women's rights to pursue their chosen occupation and to secure economic self-sufficiency were the bases of women's freedom. Fair labor—which to Kenyon meant a living wage, a safe workplace, and ideally, personal and intellectual challenge—was the foundation on which women achieved self-realization and independence. Women's freedom meant "the freedom . . . to decide for themselves what they shall do in the world, to exercise freedom of choice in the disposition of their lives, to enjoy the same kind and degree of opportunity [as men] to exercise their diverse talents," she told readers of the *New York Times*. Kenyon believed that work allowed women's potentialities "to blossom to the undoubted enrichment of our society as a whole."[25] She was also a staunch advocate of sex equality in higher education, decrying the "great graduate schools of medicine and law . . . where masculinity reigns supreme."[26] Believing that women's ignorance of the law was one of the primary obstacles to their empowerment, she embarked on a public education campaign and during the 1930s and 1940s wrote dozens of articles for popular publications and made hundreds of speeches and radio addresses on the subject of women's legal rights. In her attempt to "remove the common law disabilities of women," which she described as outdated vestiges of a feudal era, she worked for the legalization of birth control, revision of the penal code to make men equally liable in cases of prostitution, and reform of income tax, divorce, and marital property laws to benefit women.[27]

When it came to women's intellectual and professional pursuits, Kenyon believed that sex-based classifications were never justified and that women

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23. Virginia Drachman, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 179 (1998).

24. By choice, Kenyon never married. For more on women lawyers' struggles to combine work with meaningful personal lives in the early twentieth century, see Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth Century America*, 88 MICH. L. REV. 2414 (1990); *"My Partner in Law and Life": Marriage in the Lives of Women Lawyers in Late 19th and Early 20th Century America*, 14 LAW & SOC. INQUIRY 221 (1989); *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth Century America*, 28 IND. L. REV. 227 (1995).

25. *Text of the Speeches at New York Times Symposium on the World After the War*, N.Y. TIMES, Apr. 1943, at 16.

26. Dorothy Kenyon, *Sauce for the Goose*, N.Y. TIMES, Jun. 15, 1936, at 20.

27. Susan Hartmann, *The Odyssey of a Feminist* (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 10).

must be judged solely on their merits. When a man was appointed president of Mount Holyoke College, Kenyon praised the decision but pointed out that the "rule of joint participation did not apply to men's colleges. Has anyone ever seriously suggested a woman for the presidency of Harvard? Let us urge . . . the principle of the best person for the job . . . regardless of the person's sex."[28] During the Great Depression Kenyon fought state and federal policies that discriminated against married working women on the grounds that they competed with male "breadwinners" for scarce employment. Kenyon petitioned Congress on behalf of married female postal workers who had been dismissed as a cost-cutting measure in 1934.[29] She argued that married women should seek work because "they need to work just like everybody else and our government is based upon the merit principle and that means the employment of the best person for the job regardless of sex or any other consideration."[30] As a member of the Consumers' League, she fought for the abolition of "homework" or "piecework," in which typically urban immigrant women, working out of their homes, sewed or assembled parts of consumer goods and were paid by the piece. She decried such work as little better than "sweatshop" labor.[31] Kenyon also worked throughout her career to secure women's equal access to the legal profession, successfully opening the New York Bar Association to women in 1937 and speaking at colleges throughout the country on the importance of women entering the law. As "the most conservative of the professions," she wrote, the law was one of the most resistant to opening its doors to women and "probably the last refuge of the male."[32]

During World War II, Kenyon waged a successful campaign against a joint income tax bill, arguing that it would "threaten the individual freedom of women, the ability to be themselves, to retain their own separate identity."[33] She believed that World War II, during which six million women entered the paid labor force, could potentially be a turning point in women's statuses by bringing large numbers of women economic self-sufficiency for the first time. If they could retain their jobs after the war, Kenyon believed, women faced an extraordinary opportunity to achieve success and personal fulfillment through

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28. Dorothy Kenyon, Changing Status of Women (1936) (on file with Sophia Smith Library, Smith College, Dorothy Kenyon Papers, Box 19).

29. Dorothy Kenyon, Some Economic Aspects of Mayor's Plan Affecting Married Women (1934) on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

30. Dorothy Kenyon, Notes for Democratic Regional Conference (1939) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

31. Dorothy Kenyon, Untitled (1935) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

32. Dorothy Kenyon, Medieval or Modern—Which? (1933) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

33. Memorandum from Dorothy Kenyon in Opposition to Proposal to Require Compulsory Joint Income Tax (Mar. 25, 1942) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 20).

the pursuit of meaningful careers. "Women must be in the world," she told audiences in 1943. "Women must have both homes and careers [and] there is no incompatibility between the two."[34]

Yet despite her egalitarian commitments, she supported differential treatment for women working in service and industrial jobs—what she described as "sweated labor." Like many privileged reformers of her era, Kenyon believed that maternity leave, minimum wage, and maximum hour laws for women working in industry were necessary protections against long hours and economic exploitation. Women needed special protection because of their weaker bodies and their status as mothers or potential mothers; there were "certain elemental physical differences between men and women which no application of brains or democratic techniques is likely to ever wipe out," she explained.[35] As a socialist, Kenyon believed that safeguards for low-wage women workers were an important step in securing state protection for all workers. Even more, women lacked the protection of the major labor unions, which excluded them on the basis of sex. Whether protective laws, which had been passed by the majority of states, actually helped working women has been much debated. Historian Nancy Cott has suggested persuasively that while the laws did in fact improve conditions for many women in industry, they also limited women's work opportunities by making women more expensive to hire and perpetuating the idea that women were "dependent and secondary wage earners."[36]

Kenyon's attitude towards working-class women reflected her own class privilege. Kenyon believed that housewives supported by well-paid husbands and professional women workers had a responsibility to "protect" their less fortunate working-class sisters. Though sex-specific legislation might be a "humiliation to women" working in a professional context, such distinctions were "humane" for blue-collar women. She explained, "if the world's experience shows that such legislation does in truth help to pull [low-wage women workers] out of the morass, have I got any business letting my pride stand in the way? Isn't it rather their pride, not mine that matters?"[37] As she told audiences of educated white working women, "it is important to visualize our new freedom, not alone in terms of the hat that sits upon my head, and which I have bought and paid for, but also in terms of what it means to these other working women."[38] She assumed that working-class mothers with young

34. Dorothy Kenyon, Untitled (Oct. 1943) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

35. *Equal Rights: A Debate*, N.Y. TIMES, May 7, 1944, at SM 14.

36. Nancy Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 J. AM. HIST., 1, 61 (1984); Alice Kessler-Harris, OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES 194 (1982).

37. Dorothy Kenyon, The Woman's Charter (July 23, 1937) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

38. Kenyon, *supra* note 8.

children would not want to combine work and family as professional women often did, but would rather stay at home, and she never once broached the problem of inadequate child care. She also did not believe that men and women should share equally in child care. While she advocated a state-funded "mothers' pension" providing secure income to stay-at-home mothers, she abhorred the idea of a similar fathers' pension "so that he can stay at home to change the baby's diddies."[39] Consistent with the attitudes of many privileged white reformers at the time, she was also blind to the struggles of working women of color. It was not until the 1960s and her partnership with African American civil rights attorney Pauli Murray, her partner on *White v. Crook*, that she considered the dual oppression at the intersection of race and sex discrimination.

PART II

Kenyon's advocacy of protective labor laws for women threw her into the contentious debate over the Equal Rights Amendment (ERA). Between its introduction in 1923 and 1981, which marked the end of its failed ratification campaign, the ERA, which stated that "equality of the law shall not be abridged by the United States or any state on account of sex," was a major focus of feminist activism. It was deeply polarizing, and it provoked significant debate among progressives and feminists. In the 1920s and 1930s the National Woman's Party (NWP), which became famous for its militant tactics during the suffrage campaign of the 1910s, was the primary backer of the ERA, while a coalition of organizations allied with the Women's Bureau in the Department of Labor opposed it. ERA advocates argued that women's social and legal equality could only be ensured if it were written into the Constitution. A "blanket amendment" would not only invalidate all sex-based classifications at once but would represent an important symbolic national commitment to equal rights.[40]

ERA opponents like Kenyon, often described as "social feminists" by historians, agreed that discrimination against women in many areas, such as jury service and divorce and inheritance laws, should be eradicated, but that many sex-based distinctions, such as female hour and wage laws, maternity benefits, widow's pensions, and laws making family support the responsibility of the husband, were necessary for women's health and economic survival.[41] Social feminists believed that women must be active in the workplace and

39. Dorothy Kenyon's draft of article in WOMAN'S DAY, June 1943 (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

40. On the ERA in the 1920s, see Joan Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital, *1905-1923*, 78 J. AM. HIST. 188, 188 (1991).

41. Nancy Cott, *What's in a Name? The Limits of 'Social Feminism' or Expanding the Vocabulary of Women's History*, 76 J. AM. HIST. 809, 811 (1989).

public life, but that women's unique biology and status as mothers merited special legal protection. In contrast, the "egalitarian feminists" of the NWP argued for the intellectual and dispositional similarities between women and men and opposed differential legal treatment of women. Sex-specific laws, even those that purported to help women, robbed women of their right to be regarded as individuals. In addition to creating disincentives for the hiring of women, protective legislation reinforced notions of female dependency and justified women's second-class citizenship.[42]

As popular and congressional support for the ERA mounted during World War II, Kenyon became one of the Amendment's most vocal opponents. As she explained to *Woman's Day* magazine, "I am so utterly for equal rights that if I thought the amendment could do the slightest bit of good I would be for it." Rather than "waste precious time" debating with other women the "dubious merits of this perennial proposal," she explained:

> I console myself with working strenuously for . . . helping women doctors get commissions in the armed forces . . . fighting to get women appointed to policy making positions, seeking to be as good a lawyer . . . as I can possibly be in the hopes of thereby securing greater recognition for women in the professions. These are the real battlefronts in our fight for woman's freedom.[43]

To Kenyon, formal sex equality in the workplace produced substantive inequalities. Differential treatment was not a sign of inferiority, but rather a sign of women's power: "It is a mark of recognition, a flag run up to call attention to the fact that women have arrived politically . . . and are very much in the picture and a factor to be reckoned with."[44]

After World War II, Kenyon headed the National ACLU's Committee on Discrimination Against Women in Employment, begun in 1944 as a means to defeat the ERA.[45] The ACLU, which had historically allied itself with labor and had a strong labor constituency that supported protective labor laws for women, opposed the ERA.

Along with twenty-seven pro-labor organizations allied in 1945 in a National Committee to Defeat the Unequal Rights Amendment, the ACLU's Committee promoted as an alternative to the ERA a "Women's Status Bill" that would declare a federal legislative policy prohibiting discrimination based on sex except "as reasonably justified by differences in physical structure, biological or social function," thus preserving protective labor laws.[46] Around

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42. SUSAN BECKER, THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT 144 (1981).

43. Kenyon, *supra* note 39.

44. Kenyon, *supra* note 8.

45. *ACLU Backs Women's Status Bill*, ACLU WEEKLY BULLETIN, (ACLU, New York, N.Y.) Apr. 14, 1947, at 1277 (on file with Princeton University, Mudd Library).

46. Questions and Answers on the Women's Bill, (Nat'l Comm. to Defeat the Unequal Rights Amendment) (Apr. 10, 1947) (on file with Princeton University, Mudd Library).

this time Kenyon also began to argue that the Fourteenth Amendment could be used to protect women against arbitrary and invidious sex discrimination, making the ERA unnecessary. Using the Fourteenth Amendment as a vehicle for women's equality, Kenyon argued, would potentially allow the elimination of many discriminatory laws dealing with women's rights in marriage, divorce, property ownership, and jury service without disturbing protective labor legislation.

Kenyon knew that her Fourteenth Amendment approach would face challenges. The Supreme Court had upheld nearly every sex-discriminatory state law that had been challenged under the Fourteenth Amendment since *Minor v. Happersett,* in which nineteenth century suffragists had argued that restrictions on women's suffrage violated the Privileges and Immunities Clause.[47] In 1947, the Court in *Fay v. New York* upheld a New York law that required women who wanted to serve on juries to register with the state, even though the policy in practice kept large numbers of women off the rolls.[48] In *Goesaert v. Cleary*, the Court validated a Michigan statute that prohibited women from being bartenders unless they were the wives or daughters of male bar owners, holding that such discrimination was not "irrational."[49] Despite the wartime expansion of equal protection doctrine in the area of race discrimination and the Court's willingness to reevaluate the meaning of the Fourteenth Amendment in light of contemporary racial attitudes, it refused to apply comparable equal protection analysis to sex. The conservative social climate of the postwar era posed further obstacles to Kenyon's strategy. As Americans came to idealize domesticity, as women war workers were laid off en masse, and as the nation entered into the "baby boom" and focused on family life after the disruption of the war, support for feminist goals and membership in feminist organizations dwindled.[50] Working without the support of an organized feminist movement, Kenyon pursued her women's rights efforts in relative isolation.

In the 1950s, defeating the ERA remained the focus of the ACLU's and Kenyon's women's rights efforts. In 1948, both House and Senate Judiciary Committees reported on the ERA favorably, and Senate passage seemed likely. As a leading member of the Equality Committee, the civil rights committee under which the Committee on Women in Discrimination had been subsumed, Kenyon continued to argue that the ERA would jeopardize important protective legislation for women and that the Fourteenth Amendment made the ERA

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47. Minor v. Happersett, 88 U.S. 162 (1874). *But see* Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (holding that federal minimum wage legislation for women was an unconstitutional violation of liberty of contract), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

48. Fay v. New York, 332 U.S. 261 (1947).

49. Goesaert v. Cleary, 335 U.S. 464 (1948).

50. *See generally* Verta Taylor, *Social Movement Continuity: The Women's Movement in Abeyance*, 54 AM. SOC. REV. 761 (1989).

unnecessary.[51] Kenyon began searching for a sex discrimination case to bring before the Supreme Court under her Fourteenth Amendment theory.

PART III

Kenyon's opposition to the ERA and the declining, polarized women's rights movement led Kenyon to focus her feminist efforts in the 1950s within the ACLU. As historian Susan Hartmann illustrates, this was not an uncommon strategy for feminist activists in this era; in the absence of a broad-based grassroots women's rights movement and strong, formal feminist organizational structures, many feminists pursued women's rights goals within male-dominated liberal organizations. Women in the National Council of Churches, the International Union of Electrical Workers, and the ACLU, among other groups, drew on their organizations' financial, intellectual, and publicity resources to work towards such goals as equal pay for women, greater rights and opportunities for married women workers, and increased representation of women in politics, the professions, and union leadership.[52] These efforts were not only important in raising public consciousness on feminist issues but in preparing the organizations to take on greater women's rights activism in the coming decades. Despite the benefits of working within established structures, however, these feminists were often disadvantaged by their separation from other women activists and their struggles with male leaders. Kenyon benefited from the ACLU's legal expertise and resources, and its well-established civil rights and civil liberties philosophy allowed her to create intellectual and strategic connections between feminist reforms and broader progressive goals. At the same time, Kenyon struggled to convince many of the ACLU leaders of the importance of women's rights.

The search for an ideal sex discrimination case engaged Kenyon and her two strongest male allies in the National ACLU, associate director Alan Reitman, previously a labor lawyer with the Congress of Industrial Organizations, and Rowland Watts, legal director for the ACLU and former president of the Workers' Defense League. Reitman and Watts were crucial in bringing Kenyon's interest in litigating a sex discrimination case to the attention of the National ACLU Board, which generally regarded women's rights as a non-issue or as diverting attention from the more important issue of racial equality. Kenyon, Reitman, and Watts were only able to convince the Board to recognize the importance of women's rights by drawing connections between women's rights and the rights of racial minorities.

In considering possible test cases, Kenyon moved cautiously. Kenyon dismissed a suggestion to challenge the Edison Company's ban on the

51. 1955 Restatement of ACLU's Position on Equal Rights (ACLU, New York, N.Y.) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 28).

52. *See* HARTMANN, *supra* note 9.

employment of married women, responding that the issue posed "great difficulty" as a potential test case because it dealt with the practices of a private company.[53] "A further difficulty is in the fact that the ground here is not sex but marital status," she explained.[54] She continued:

> Whatever we may think of the policy of a business which excludes married women, we must admit that there may be something in what they say about greater absences and so on. In other words, we may not think that their policy is wise but it is hard to maintain that it is utterly unreasonable. I think we can find better cases to fight discrimination against women in.[55]

In the mid-1950s Reitman received a letter from a female public school teacher in Kansas who was protesting a state law that provided male teachers an annual salary $400 above equally qualified women teachers. She asked Reitman, "Since the Supreme Court prohibits unfair treatment because of color, is it also natural to prohibit unfair wages because of sex? Would a test case have any chance at all in Court?"[56] Though Kenyon believed that the law might be declared unconstitutional under the Fourteenth Amendment, the plan fell through when the women teachers refused to serve as plaintiffs in the action.[57] Reitman also brought to Kenyon's attention a Hoboken, New Jersey law restricting the employment of female bartenders unless they were closely related to the owner.[58] Kenyon was hesitant to pursue it because "it has an aspect of morals to it. It would be nice if we could only stay clear of morals and get a clean cut case on discrimination against women without that factor in it to muddy the waters."[59] Reitman wrote back, half-cynically, "I guess women's rights will have to wait!"[60]

Aware that women's economic self-sufficiency hinged on reproductive rights, Kenyon also fought for safe and legal abortions. One of the unacknowledged pioneers of the abortion rights movement, she advocated abortions on demand long before the feminist movement made it a rallying cry in the late 1960s. In the 1950s, Kenyon brought up the subject of abortion law

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53. Letter from Dorothy Kenyon to Louis Joughin (June 5, 1957) (on file with Princeton University, Mudd Library, ACLU Papers).

54. *Id.*

55. *Id.*

56. Letter from Madge Bruce to ACLU (Mar. 25, 1957) (on file with Princeton University, Mudd Library, ACLU Papers).

57. Letter from Alan Reitman, Assoc. Dir., ACLU, to Madge Bruce (Sep. 11, 1957); Letter from Dorothy Kenyon to Rowland Watts, Legal Dir., ACLU (Oct. 1, 1957) (on file with Princeton University, Mudd Library, ACLU Papers).

58. *See* Letter from Alan Reitman, Assoc. Dir., ACLU, to Dorothy Kenyon (June 4, 1956) (on file with Princeton University, Mudd Library, ACLU Papers).

59. Letter from Dorothy Kenyon to Alan Reitman, Assoc. Dir., ACLU (June 8, 1956) (on file with Princeton University, Mudd Library, ACLU Papers).

60. Letter from Alan Reitman, Assoc. Dir., ACLU, to Dorothy Kenyon (June 14, 1956) (on file with Princeton University, Mudd Library, ACLU Papers).

reform with the ACLU Board, telling her colleagues that a "woman should have the right to determine whether or not she should bear a child" and that this was an "important individual right." They responded by saying that the topic was "not one to which the ACLU should properly devote its time."[61] Kenyon was not dissuaded from writing and speaking on the subject, however. In a 1959 speech, she proclaimed that "poor single women disobey abortion law because they do not want stigma or cannot afford a child. What are women? Simple breeders? Why not permit them a choice?"[62]

Kenyon's approach to the Fourteenth Amendment was revolutionized after the 1954 landmark decision in *Brown v. Board of Education*, in which the ACLU had filed an amicus brief. *Brown* expanded the scope of equal protection by recognizing a new kind of harm—stigmatic harms caused by racial discrimination—as impermissible under the Fourteenth Amendment. In *Brown*, NAACP lawyers drew on the work of prominent social scientists to claim that racial school segregation created a sense of psychologically crippling humiliation among black children, a "feeling of inferiority as to their status," such that their education was inherently unequal.[63] The Court, acknowledging the validity of the social science data, held that to separate black schoolchildren from others generated a "feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone."[64]

The Court's willingness to acknowledge the legitimacy of social science data documenting the psychological and social effects of race discrimination, to reinterpret the Fourteenth Amendment in light of changing social standards, and to acknowledge stigmatic harms as constitutionally cognizable injuries gave Kenyon's strategy new dimensions. Two months after the *Brown* decision, Kenyon set out to establish a legal argument that laws that arbitrarily classified on the basis of sex, like racial segregation, stigmatized women as a class in a way that violated the Equal Protection Clause. "Perhaps the most hopeful portent" for women's rights, Kenyon wrote in a June 1954 ACLU newsletter, "lies in the Court's recent interpretation of equality under the Fourteenth Amendment as applied to segregation in public schools. With sex instead of color pleaded as the basis of discrimination, this amendment—without change—might some day turn out to be the very door to equal freedom which we seek."[65]

In the coming years Kenyon, working independently, developed the race-

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61. DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 276 (1998).

62. Dorothy Kenyon, Speech, The Legal Concept of Equality (1959) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 19).

63. Brief of Appellants at 494, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10).

64. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

65. *Equal Rights for Women*, ACLU NEWSLETTER (ACLU, New York, N.Y.) (June 1954) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 28).

sex parallel as the basis for her Fourteenth Amendment approach. Following in the lines of the strategic litigation model of the civil rights movement, Kenyon worked to develop a legal and sociological rationale for the similar legal treatment of sex and race and to compile a "sociological record" on sex discrimination comparable to the materials used by the NAACP in its anti-segregation cases. This was difficult, given the state of popular, social scientific, and legal thought at the time. In constitutional terms, blacks were a "discrete and insular minority"[66] whose historical lack of political representation and influence justified heightened judicial solicitude. Women were neither a numerical minority nor had they been formally excluded from the political process after obtaining the vote in 1920. By the time of *Brown*, many Americans no longer believed that blacks and whites were biologically dissimilar in any relevant way, but most still perceived women's lives, goals, and temperaments as physically determined.

Moreover, in contrast to the burgeoning literature on race discrimination, there was virtually no work in the 1950s on the psychology of women's oppression, making it difficult for Kenyon to construct her "sociological record." Sex stereotyping was generally regarded as benign or biologically justified. Only one academic, sociologist Helen Mayer Hacker, had argued that women's subordination created "personality distortion" in women.[67] Hacker presciently described women as a minority group; although not a numerical minority, women had been victimized by the same social disregard and internalized shame that had defined the African American experience.[68]

Despite the lack of sociological data, by the end of the 1950s, Kenyon was arguing that legal classifications on the basis of sex that were rooted in archaic stereotypes about women and that were not designed to help women achieve substantive equality with men injured women psychically by reinforcing notions of women's "second class citizenship." While Kenyon continued to develop her race-sex theory, she remained without the test case she had been searching for. The opportunity finally arose when the ACLU was invited to participate in a challenge to a Florida state jury service law that denied women the right to participate on the same terms as men. The case, *Hoyt v. Florida*, marked the first major opportunity for Kenyon to link civil rights and women's

66. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

67. *Id.*

68. Helen Mayer Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60 (1951). One of the only other writings in this vein was Gunnar Myrdal's *An American Dilemma*, which had briefly described sex discrimination as parallel to race discrimination. Like blacks, women had come to believe in their inferiority, and their subordination was rationalized by a "myth of contentment" that they enjoyed their second-class status. To cope with discrimination, blacks and women adopted deferential manners that concealed their real feelings. The "similarities in the women's and the Negroes' problems are not accidental" but grew out of a paternalistic social order. GUNNAR MYRDAL, AN AMERICAN DILEMMA 1078 (Reprint of the 20th anniversary ed., Harper & Row).

rights under the Fourteenth Amendment.[69]

In 1957 Gwendolyn Hoyt was convicted of second-degree murder for fatally assaulting her husband with a baseball bat. Her lawyers argued that because she had been tried by an all-male jury, the result of a permissive jury selection statute which required women to register with the state if they wanted to serve, she had been deprived of her Fourteenth Amendment right to be heard by a jury in which members of her own class had been included in the jury pool. Women constituted forty percent of the total electorate and more than half the population of the county, but volunteers for jury service constituted less than one percent of the women electors. The Florida Supreme Court upheld the jury statute on the ground that "[w]hatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility as a class for the daily welfare of the family unit upon which our civilization depends."[70] By the time of *Hoyt*, only twenty-eight states granted jury service to women on the same terms as men, of which seven permitted those with family responsibilities to be excused. Sixteen states allowed a woman to be exempt solely on the basis of sex, and three Southern states prohibited women from serving altogether.[71] Hoyt's appeal to the Supreme Court was taken up by Herbert Ehrmann of the Boston law firm Goulston and Storrs. The National ACLU and its Florida affiliate agreed to file an amicus brief, making it the ACLU's first amicus in a sex-discrimination case.[72] Kenyon believed that sex-discriminatory jury laws were especially vulnerable to equal protection challenge because they were based on outdated stereotypes of female domesticity, and she took the lead on the brief.

Hoyt's primary argument was that she had been denied her Fourteenth Amendment citizenship right to be tried by a fair cross section of the community.[73] Kenyon's brief went further, arguing not only the defendant's rights but the citizenship rights of the prospective woman juror whose exclusion would stigmatize her.[74] Like racial segregation, the exclusion of women sent a message to society and to women in particular that they were unfit to share citizenship on the same terms as men. It reinforced notions of women's inferiority and promoted invidious stereotypes: that women should be exclusively domestic, that they were unfit to assume important civic responsibilities, that they did not want to participate in public life. The law denied a woman both the opportunity for civic involvement and the *feeling* of

69. Hoyt v. Florida, 368 U.S. 57 (1961).

70. Hoyt v. State, 119 So. 2d 691, 694 (Fla. 1959).

71. KERBER, *supra* note 9, at 168.

72. *Id.* at 167-170.

73. *See* BARBARA BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 152 (2d ed.) (1996).

74. Brief of Appellant at 9, Hoyt v. Florida, 368 U.S. 57 (1961) (on file with Princeton University, Mudd Library, ACLU Papers, Box 1142) [hereinafter Hoyt Brief].

involvement, "the chance to feel that she too is performing her duty."[75] Restrictive jury laws worked a "genuine humiliation and degradation of [a woman's] spirit."[76]

Kenyon mobilized *Brown* and the history of women's gradual emancipation in the twentieth century to argue that women's rights under the Fourteenth Amendment, like African Americans' rights, must be updated in light of contemporary standards.[77] It was one of the first attempts to use women's history in a legal argument against sex discrimination.[78] In her *Hoyt* brief, Kenyon argued that while exempting all women from juries to care for young children and the home might have been appropriate in the nineteenth century, it was now "unrealistic and uncalled for."[79] Revolutionary changes had brought about "the advancement and emancipation of women in the last century."[80] By the early 1960s, over a third of women were in the workforce, and a majority of women workers were married. Mothers with small children were only a relatively small percentage of the female population, and judges could easily excuse them. The classification "seems to have outlived its time and purpose."[81]

The final statement was a ringing call for women's rights that William Eskridge characterized as a cry for "complete rather than token integration into the public as well as private institutions of the nation."[82] Kenyon again drew parallels between race and sex by invoking the history of the civil rights movement and the moral authority of *Brown*. Just as the Court had disposed of the separate but equal doctrine, bringing "a fresh breeze across our national life," it was time to admit women to full citizenship.[83] Women had fought a "slow and painful battle during the last century and a half for recognition and status not very different from that of the Negro slaves."[84] Like Jim Crow, sex discrimination also jeopardized America's international credibility. The "responsibilities of citizenship are being granted to [women] practically everywhere on the same terms as men. Should we in the United States be more

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75. *Id.*

76. *Id.* at 25.

77. *Id.* at 26.

78. Reva Siegel observes that this sort of appeal to history, "as a source of narrative understanding, of collective identity, and of practical judgment about constitutional values, is a fundamental feature of our constitutional culture, regularly invoked in constitutional argument inside and outside the courts." Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 343 (2001).

79. Hoyt Brief, *supra* note 74, at 25.

80. *Id.* at 20.

81. *Id.* at 24.

82. William Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2127 (2002).

83. Hoyt Brief, *supra* note 74, at 30

84. *Id.* at 12.

backward than the rest of the world in integrating our women?"[85]

The Court sustained the conviction, maintaining that there was no systematic exclusion and that Hoyt's right to a fair trial had not been impaired. "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life," Harlan wrote in dicta. "We cannot say that it is constitutionally impermissible for a state . . . to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[86] For years, Kenyon decried Harlan's refusal to change the "ancient" rule that "states may refuse to allow women to serve on juries and that the matter is really undebatable."[87] "Harlan's opinion was written in letters of fire in my brain," she explained to an ACLU colleague. This interpretation of the Fourteenth Amendment was "subverted by sophistry and twisted interpretation of the phrase 'protection of the law,' another example of 'interpretations made by men judges influenced by their image or desire to keep women in the home.'"[88] In *Hoyt*, "we fell flat on our face," Kenyon lamented, hoping that some day in the future she would get her revenge.[89]

Kenyon's argument elicited more support in the court of public opinion. Kenyon wrote and lectured publicly on the case, and several popular publications, sympathetic to Kenyon's position, decried the Court's decision. The *New York Times* ran an article by a trial lawyer that criticized *Hoyt* and argued that women's presence on juries was essential for the democratic process. "If women, in their jury service, do not differ from men, then we cannot afford to exclude them any more than men . . . If their sex in some way colors their judgment, then there is all the more reason why we need their views, more truly to reflect mass judgment," he concluded.[90] A few months later, the *New York Times* described women as "still second-class citizens," lamenting that "in the middle of the twentieth century, women are subject to prejudices that smack of the nineteenth century."[91]

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85. *Id.* at 30.

86. Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).

87. Letter from Dorothy Kenyon to Osmond Fraenkel (Dec. 4, 1970) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 29, Folder 1).

88. Dorothy Kenyon, Notes for Article on ERA (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 28, Folder 9).

89. Dorothy Kenyon, undated speech (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 32).

90. Louis Nizer, Verdict on Women as Jurors, N.Y. TIMES, Mar. 11, 1962, at SM11. The Court, in earlier cases, had also made overtures towards a more inclusive view of jury service. In 1946, in *Ballard v. United States*, decided on statutory grounds, Justice Douglas argued in dicta that the presence of women was essential for a representative jury. 329 U.S. 187, 191-92 (1946).

91. Lee Graham, *Who's In Charge Here? Not Women!*, N.Y. TIMES, Sept. 2, 1962, at

Kenyon's opportunity for revenge finally came in *White v. Crook* five years later. On *White*, Kenyon worked with Pauli Murray, a pioneering civil rights lawyer who drew on Kenyon's race-sex analogy in her 1962 report to the President's Commission on the Status of Women, in which she advocated litigating women's rights cases under a Fourteenth Amendment civil rights model.[92] Kenyon wrote to Charles Morgan of the ACLU's Operation Southern Justice that this case was the opportunity she had been looking for. "The one thing I am fighting for madly these days is to get discriminations against women under the umbrella of the Fourteenth Amendment . . . . This case gives us our perfect chance and we mustn't muff it."[93] It was Kenyon who had convinced Morgan to "mix the two issues"—race and sex—in the case. She claimed that civil rights workers were "against the issue," saying that "to mix up the woman issue with civil rights was to muddy the waters."[94]

Like the *Hoyt* brief, the *White* brief centered on the race-sex parallel. The Alabama jury statute constituted an absolute mandatory exclusion "of an entire class based solely on the biological fact of being female." Kenyon again argued that with a majority of women in the workforce, the stereotype of all women as wives and full-time mothers who thus should be exempt from jury service was outdated and unreasonable. Black and white women were common victims of oppression and partners in liberation; in both the brief and in Kenyon's oral argument, Kenyon called black women "Jane Crows" and white women "Jane Does" and "Jane Whites."[95] The brief was suffused with the language of psychology and psychic harm; women's exclusion from juries, like racial segregation, enforced women's sense of social and intellectual inferiority, Kenyon explained.[96] The court agreed, declaring that women's exclusion from

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92. On Murray see also Susan Ware, Pauli Murray's Notable Connections, 14 J. WOMEN'S HIST. 54 (2002); CYNTHIA HARRISON, ON ACCOUNT OF SEX (1983); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH CENTURY AMERICA (2000); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998). On the President's Commission, see Cynthia Harrison, *A New Frontier for Women: The Public Policy of the Kennedy Administration*, 67 J. AM. HIST. 630 (1980).

93. Letter from Dorothy Kenyon to Charles Morgan (Nov. 29, 1965) (on file with Sophia Smith Library, Smith College, Kenyon Papers, Box 28).

94. "How stupid can men be?" she confided to a colleague. "What it does actually is to double the impact of the Negro issue and by force of sheer numbers in a county like Lowndes point out the barbarous stranglehold that massive exclusion gave in these backward areas to a mere handful of white males." Letter from Dorothy Kenyon to Charles Duncan (Mar. 17, 1966) (on file with Sophia Smith Library, Smith College, Kenyon Papers, Box 28, Folder 6).

95. Dorothy Kenyon, Jane Crow and Lily White Males (Jan. 1966) (on file with Sophia Smith Library, Smith College, Kenyon Papers, Box 31).

96. Brief for Appellant at 51-53, White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (Civ. A. No. 2263-N) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 28, Folder 5).

juries was irrational "in view of modern political, social, and economic conditions," and as such, the law violated women's right to constitutional equal protection. It ordered Lowndes County officials to "scrap all existing jury lists and start afresh" without discrimination on the basis of race or sex.[97]

Ultimately the case was never appealed to the Supreme Court, depriving Kenyon of the precedent she had been hoping for. Yet the case had lasting impact. Only a few years after *White v. Crook*, the notion that arbitrary sex discrimination and sex stereotyping inflicted psychological damage to women and that such treatment amounted to a constitutionally cognizable injury under the Fourteenth Amendment had become the basis of several favorable decisions in sex discrimination cases. In 1967, a federal court declared unconstitutional a law that allowed a husband to sue for loss of consortium but forbade a wife from the same action, citing *White v. Crook* for the principle that because the exclusion was not based on physical differences it was therefore arbitrary and denied women their constitutional right to equal protection.[98] Courts used similar reasoning to invalidate laws restricting women's work as bartenders and exclusion of female customers from taverns. Such differential practices based on outdated stereotypes "perpetuate[d], as a matter of law, economic and sexual exploitation."[99]

CONCLUSION

In 1968, Kenyon finally changed her position on sex-specific labor laws. Her views were influenced by the Equal Employment Opportunity Commission's announcement that state protective laws conflicted with Title VII of the Civil Rights Act of 1964, by the growing feminist movement, which largely opposed protective laws, and by the influence of Pauli Murray, who had joined the ACLU's Equality Committee in 1966. Murray had shown Kenyon how race and sex exclusion both stemmed from "blacks' and women's biology being used as a pretext" to separate and thereby denigrate.[100] Kenyon eventually came to see that "the grouping of women qua women in the job market [was] no longer a valid distinction."[101] Kenyon now believed that differential laws had to be confined to pregnancy and maternity leave, which

97. *U.S. Asks Judges to Void Ban on Women Jurors in Alabama*, N.Y. TIMES, Dec. 30, 1965, at 11.

98. Karczewski v. Baltimore R.R. Co., 274 F. Supp. 169, 179 (N.D. Ill. 1967).

99. Seidenberg v. McSorley's Old Ale House, 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969). Laws excluding women from working in taverns "arose in a different social and moral climate when judges, along with others, entertained Victorian ideas as to women and their proper place in the scheme of things." Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne, 270 A.2d 628, 630 (N.J. 1970).

100. Equality Committee Minutes (Dec. 1967) (on file with Mudd Library, Princeton University, ACLU Papers).

101. Minutes, Board of Directors, ACLU (Dec. 1968) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 30).

dealt with legitimate "functional" differences between the sexes, and to compensatory legislation. She felt that laws could legitimately favor women to protect "equality of rights which women, because of their traditionally disadvantaged position in society, have themselves never been adequately able to assert."[102] "Any other use of the word women separately from men, when applied to the facts and circumstances of modern life, is in [my] judgment irrational because almost bound to be discriminatory against some, if not all women," she explained in 1970.[103]

In 1970, House approval of the ERA and Murray's persuasion finally convinced Kenyon to change her mind on the ERA. Kenyon and Murray believed that the ACLU should pursue a "dual strategy" of Fourteenth Amendment litigation and a constitutional women's rights amendment, which they saw as potentially more expedient than a judicial case-by-case approach.[104] They pushed the ACLU to adopt an official statement of support.[105] As Kenyon wrote in a memo to the ACLU Board,

> There comes a time when you cannot wait any longer, when you must find new tools for the tools that have failed you. This I believe is such a time. I sense a groundswell of sympathy for women's cause, for the removal of endless numbers of small discriminations in almost every walk of life, which clog their footsteps and frustrate and paralyze many of their latent talents and potentialities. The ERA is a possible tool.[106]

Four days later the ACLU Board endorsed the ERA by a vote of 52 to 1. A year later, the ACLU's new commitment to women's rights was formalized in its Women's Rights Project, a unit within the national office devoted to the fight against legal sex discrimination.[107]

In its first Supreme Court case, the Women's Rights Project challenged an Idaho statute giving males preference over females in the administration of estates. In *Reed v. Reed*, ACLU attorney Ruth Bader Ginsburg aimed for a Court decision that would make sex a suspect classification. The idea of heightened scrutiny for sex was one that Kenyon herself had articulated in 1970 when she argued that "the kinship between racial and sexual discrimination is overwhelmingly close that it should result in the addition of sex with race as

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102. Letter from Dorothy Kenyon to Alan Reitman (Nov. 2, 1970) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 30).

103. *Id.*

104. On the development of a "dual strategy" of Fourteenth Amendment litigation and ERA activism among feminists, see Mayeri, *supra* note 9.

105. Equality Committee Minutes (Feb. 21, 1968) (on file with Princeton University, Mudd Library, ACLU Papers).

106. Letter from Pauli Murray and Dorothy Kenyon to ACLU (Sep. 23, 1970) (on file with Radcliffe College, Schlesinger Library, Murray Papers, Folder 856).

107. *See* HARTMANN, *supra* note 9, at 81; Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 220 (2002).

suspect and invidious classifications category."[108]

Ginsburg's brief in *Reed*, sometimes referred to as the "grandmother brief" of constitutional gender equality, drew on techniques and arguments that Kenyon had first used in *Hoyt*: she argued that archaic stereotypes of women based on false or outmoded circumstances reinforced notions of women's inferiority; that such stereotyping, in denying women's individuality, harmed women in ways analogous to race discrimination; that blacks and women had a shared history of exclusion from the political process that made them both "discrete and insular minorities;" and that transformations both in doctrinal interpretations of the Equal Protection Clause and in female socioeconomic status necessitated a reconsideration of women's constitutional rights.[109] Although the Court did not accept Ginsburg's strict scrutiny argument in *Reed* nor acknowledge the race-sex analogy, it nonetheless invalidated the Idaho statute under the traditional rational basis test. The biggest innovation of the Court in *Reed* was to adopt the language of a "fair and substantial" relation between the legislation and its object, which Ginsburg believed was a "small step forward" in changing the Court's position on sex discrimination.[110]

In 1973, in *Frontiero v. Richardson*, Ginsburg similarly used historical analysis and sociological insight to again argue that sex should be a suspect classification because virtually all sex-based classifications, like racial classifications, inflicted a "stigma of inferiority." A four-justice plurality led by Justice Brennan endorsed strict scrutiny, acknowledging Ginsburg's sociological data and the nation's "long and unfortunate history" in which sex discrimination was "rationalized by an attitude of 'romantic paternalism' which . . . put women, not on a pedestal, but in a cage."[111] In *Craig v. Boren* in 1976, the Court at last instituted the heightened scrutiny standard for administrative or statutory classifications on the basis of sex.

Kenyon did not live to see these victories or the flourishing of a second wave of feminism in the 1970s, but she knew great changes in women's lives were near. In one of her last speeches, commenting on the reinvigoration of feminist activism in recent years, she wrote that it was "a great moment in history . . . if women choose to take advantage of it." At last, society was recognizing the importance of a true partnership between men and women and "the fact that each sex is dependent upon the other and neither can create alone."[112] The Women's Rights Project carried on Kenyon's work, "ultimately

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108. Dorothy Kenyon, Untitled, Notes (ca. 1970) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 23).

109. Brief of Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133598.

110. Ruth Bader Ginsburg, Comment on Reed v. Reed, 1 WOMEN'S RTS. L. REP. 8 (1971).

111. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

112. Dorothy Kenyon, untitled speech, (Feb. 1971) (on file with Smith College, Sophia Smith Library, Kenyon Papers, Box 23).

achiev[ing] the struggle for equal protection" that Kenyon had begun nearly twenty years earlier.[113]

Kenyon's strategy was far from perfect. The ambiguities and weaknesses of the race-sex analogy soon became apparent, as legal feminists in the mid to late-1970s confronted a series of cases involving pregnancy discrimination and remedial affirmative action legislation designed to combat the impact of past sex discrimination.[114] Feminists became aware that women's traditional roles within the family, their distinct history of subordination, the particular mythology of "romantic paternalism," and the realities of reproductive biology make women's quest to overcome social and legal disadvantages in many ways more complicated than the struggle for racial justice. Yet at the time, Kenyon's efforts to legitimize women's rights by connecting it to what was becoming a revered and established American constitutional tradition—the African American struggle for civil rights—had been an important strategic move.[115] As legal scholar Mary Becker points out, at a time when feminism had stalled over the ERA debate, analogizing sex discrimination to socially and constitutionally proscribed race discrimination created the necessary momentum for feminist activism and eventual legal change.[116]

Through impact litigation and social activism, Kenyon helped build the foundations of modern legal feminism. Working tenaciously and often alone in an era without an organized feminist movement, Kenyon pursued a set of tactics that involved working within male-dominated social justice organizations, forging ties with other social movements, and reshaping established legal doctrine into innovative feminist legal claims. It is my hope that the history I have excavated in this Article will have implications both for the way historians study women's struggle for equal rights and the way we might understand that struggle in our own time. Kenyon's unique feminist work and her long quest to recast the Constitution as a guarantee of women's full citizenship reminds us that legal feminism works along many different pathways to transform social meaning, social practice, and the law that brings them together.

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113. HARTMANN, *supra* note 9, at 81.

114. *See* Kahn v. Shevin, 416 U.S. 351 (1974); Geduldig v. Aiello, 417 U.S. 484 (1974); Califano v. Webster, 430 U.S. 313 (1977).

115. Proponents of a "diffusion thesis" in the sociology of social movements argue that the civil rights movement initiated a "master frame" focused on rights that spread to a wide range of movements in the 1960s and 1970s. Pedriana, *supra* note 17, at 1751.

116. Becker, *supra* note 92, at 248.