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## Ifeminism

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# NOTICE

## Ifeminism

*Ashlie Warnick*

LIBERTY FOR WOMEN: FREEDOM AND FEMINISM IN THE TWENTY-FIRST CENTURY. Edited by *Wendy McElroy*. Chicago: Independent Institute. 2002. Pp. xiv, 353. \$30.

Laws should be judged not by their words or intentions, but by their effects and consequences. When government enacts laws designed to benefit one group, society should judge those laws first by examining whether they have, in practice, provided a net benefit to the law's intended beneficiaries. Next, any such benefit must be weighed against the costs imposed on the rest of society. If the benefits outweigh the costs, this is a socially efficient law. Government should repeal a law when the costs it imposes outweigh its benefits. When laws do not provide a net benefit to the group they are designed to assist but nonetheless provide an overall social net benefit, these laws may be retained. These laws, however, can no longer stand on the discredited proposition that they benefit the intended group.

Ifeminism, or Individualist Feminism, is a branch of feminism based on classical liberal philosophy. Ifeminism advocates repeal of many laws concerning women's issues. Ifeminists view individual autonomy as paramount and believe that laws restricting women's choices do more harm than good. In some cases, empirical, anecdotal, and historical evidence support such a belief. These are the easy cases. In other cases, however, the evidence is weaker or unavailable; there, ifeminists can only support their positions by relying on the dogma of individual rights.

A recent collection of articles, *Liberty for Women: Freedom and Feminism in the Twenty-First Century*, presents a thorough discussion of the ifeminist view. *Liberty for Women* makes strides in showing that treating women as a separate group in need of protection is demeaning and ultimately harmful to women's interests. In order to persuade readers of their free-market/individualist points of view, the articles' authors must confront the likely response of the other side. For some topics, the authors' logical arguments are buttressed by statistics and anecdotal evidence. For others, however, the reader must take *Liberty for Women's* arguments on faith. Even so, the book presents arguments that those concerned with women's issues should not dismiss or discount out of hand.

This Notice reviews *Liberty for Women* and finds that, at least in some cases, *Liberty for Women* makes powerful and persuasive arguments that should reframe the women's issues policy debate.<sup>1</sup> Part I examines the evolution of feminist theories and presents the basic ifeminism model. Parts II and III consider several women's issues and analyze whether ifeminism provides a convincing framework for considering an issue's impact on women. Part II finds that for some issues, statistical and anecdotal evidence support the conclusion that individual liberty benefits women more than laws designed to protect them. Part III, however, shows the weaknesses of *Liberty for Women's* arguments when considering issues where the effect of laws designed to benefit women is unclear.

### I. WHAT IS IFEMINISM?

While feminists do not agree on what feminism means,<sup>2</sup> most agree that the feminist movement began with the abolitionist-suffragettes.<sup>3</sup> These pioneering women have been called the "first-wave" feminists.<sup>4</sup>

Women could not vote until 1920; they could not be legislators; they could not serve on juries; and they could not be judges.<sup>5</sup> They

1. This Notice assumes that the audience for the debate between radical-feminist theorists and the ifeminist authors featured in *Liberty for Women* are women who are committed to neither view beforehand.

2. See, e.g., Christine L. Williams, *Preface* to 571 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 8-9 (2000) (Opening a special issue devoted to the progress and future of the feminist movement, Professor Williams notes that "[i]t was surprising to [her] that few of the authors attempted to define feminism themselves. . . . [F]eminism is a movement that refuses to be pinned down, even by its proponents."). For some of feminism's varied definitions and goals, see, for examples, BARBARA ARNEIL, *POLITICS AND FEMINISM* 3-4 (1999) explaining how feminism is:

[t]he recognition that, virtually across time and place, men and women are unequal in the power they have, either in society or over their own lives, and the corollary belief that men and women should be equal; the belief that knowledge has been written about, by and for men and the corollary belief that all schools of knowledge must be re-examined and understood to reveal the extent to which they ignore or distort gender.

*Id.*; POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow et al. eds., 1983) (arguing that the goal of feminism is to empower women); Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 217 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)) ("Feminism aspires to assist us to come closer to discovering and experiencing our authentic selves."); and Rosemarie Tong, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 185 (2000) (book review) (The goal of feminism is to "eradicate[e] the oppression of women.").

3. See, e.g., MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 1-16 (1994) (describing the activities of the "abolitionist feminists" and the "suffrage feminists"); DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 63-198 (1998) (same).

4. See, e.g., Marina Angel, *Susan Glaspell's Trifles and A Jury of Her Peers: Woman Abuse in a Literary and Legal Context*, 45 BUFF. L. REV. 779, 790 (1997).

5. "The first wave of feminism saw both the vote and the right to serve on juries as essential political rights in a democracy." Angel, *supra* note 4, at 832.

had little to no direct control over or say in how the law affected their lives.<sup>6</sup> Women organized the first movements to correct their “obscurity and even invisibility in the law.”<sup>7</sup>

In the Introduction to *Liberty for Women*, editor Wendy McElroy<sup>8</sup> details the historical background of the feminist movement beginning with the first-wave abolitionist/suffragettes (pp. 5-14). While the abolitionist movement “declared that each human being was a self-owner” (p. 5), not all male abolitionists agreed this sentiment applied to women as well as slaves (p. 6). The feminist movement was born, according to McElroy, when “[a]bolitionist women began to ask themselves, ‘Do not we — as women — own ourselves as well? Or do we fight only for the rights of male slaves?’ ” (p. 6). Following enfranchisement of all men regardless of race or color via the Fifteenth Amendment, feminists focused on extending suffrage to women as well (p. 8). From this point on, the women’s rights movement took its own path separate, but parallel to, the continuing efforts to end race discrimination.<sup>9</sup>

These early feminists of the late nineteenth and early twentieth centuries did not always agree with each other about the movement’s goals.<sup>10</sup> For example, some women’s groups supported “protective” labor laws limiting the hours of work for women as part of a larger effort to use government regulation to limit work hours of all workers, male and female.<sup>11</sup> Other women’s groups fought against these laws as

6. See, e.g., *id.* at 795 (“Laws excluded women from the public sphere by denying [them] the right to participate in government. Laws denied [women] the right to economic independence by prohibiting [them] from having an occupation or profession, holding property or maintaining a legal status independent of [their] fathers or husbands.”).

7. Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 188 (1994).

8. Research Fellow, The Independent Institute.

9. See pp. 6-7, 32.

The Fifteenth Amendment assured that the right to vote could not be abridged because of “race, color, or previous condition of servitude.” It made no reference to sex. The abolitionist women felt betrayed by their male counterparts at whose behest they had subordinated their own political interests in favor of blacks. . . . Susan B. Anthony pleaded, “We [women] have stood with the black man in the Constitution over half a century. . . . Enfranchise him, and we are left outside with lunatics, idiots, and criminals.”

P. 7.

10. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15-19 (1995) (detailing the 1920s debate among feminists about the wisdom of an Equal Rights Amendment which might preclude protective laws for women); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2027 n.53 (2000) (describing how the feminist movement was splintered regarding strategy to achieve suffrage).

11. JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN* 133 (2001). Novkov describes the movement’s growing divide:

The final battles for and passage of the Nineteenth Amendment in the state legislatures had promoted unity among women’s groups but could not completely mask growing differences

limiting the opportunities of women to support themselves and their families.<sup>12</sup>

Meanwhile, other women fought for freedom outside the workplace. These early ancestors of individual feminists advocated sexual freedom by calling for “marriage reforms that ensured women’s equality and free access to birth control information”; “free thought” by insisting on “leaving all spiritual matters to the conscience of individuals”; and “individualist [a]narch[y]” through “society by contract” (p. 8). McElroy points out that the “free love” movement had the most resonance with early ifeminists (p. 8). For example, it was these feminists who were the first to call forced sex in marriage “rape” (p. 8); the first to demand access to birth-control information (p. 8); and the first to raise the ire of Anthony Comstock, whose infamous Comstock Act<sup>13</sup> banned the dissemination of that same birth control information as obscene.<sup>14</sup>

After the Nineteenth Amendment’s passage guaranteed women the right to vote, the movement became relatively silent.<sup>15</sup> What little debate there was in the 1930s and early 1940s concerned whether women should be “protected” from long work hours, unsafe working conditions, and low-paying jobs.<sup>16</sup> As men fought in World War II, more women entered the workforce to replace the soldiering male

regarding both tactics and goals. In the decade after 1910, some feminist activists concluded that supporting protective labor legislation aimed specifically at women was no longer a wise tactic. Others remained convinced that only support for such legislation would lead to the adoption of universal legislation. Still others began to express the view that while universal legislation was desirable, women would always need a higher degree of protection than men.

*Id.* (citation omitted).

12. NOVKOV, *supra* note 11.

13. Pp. 51-53; MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 176-77 (1985). The Comstock Act banned materials that included information about contraception and carried a penalty of up to ten years of hard labor and/or a \$5,000 fine for violations. *Id.*

14. P. 8. Feminists fought against increasing restrictions on sexual autonomy:

At the turn of the century, the repression of sexuality within American society remained pervasive. With the assassination of McKinley, political radicalism in almost all forms was suppressed as well, thereby silencing many ifeminists. World War I — with the expanded governmental powers and the political intolerance that it ushered in — dealt a further blow to individualist movements in general.

P. 10.

Eventually, the United States Supreme Court held state laws similar to the Comstock Act unconstitutional violations of the right to privacy. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

15. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2113-14 (2002) (“Yet once [women] had won the franchise, feminist politics went into partial hibernation . . .”).

16. P. 11. See NOVKOV, *supra* note 11, at 183-239 for a detailed account of the debate about minimum wages for women, specifically, and workers, generally, during this time.

workers.<sup>17</sup> When the War ended, the government encouraged women to return to their more traditional roles as wife and mother and to leave the wage-earning for their husbands.<sup>18</sup> Many did but, importantly, some did not. These working women sowed the seeds for later efforts to ensure equal pay for equal work<sup>19</sup> and employment antidiscrimination laws<sup>20</sup> to protect women in the workplace.

In the 1960s and 1970s, feminist theory enjoyed a resurgence, calling for women to discard their notions of inferiority and stand toe-to-toe with men. This new “second-wave” of feminism<sup>21</sup> led by Betty Friedan,<sup>22</sup> Simone De Beauvoir,<sup>23</sup> and others urged women to burn their bras, “not iron while the strike was hot,”<sup>24</sup> discard notions of women’s rightful place being in the home, and demand equal rights and equal pay for equal work. This movement lost most of its steam following the Equal Rights Amendment’s failure in 1982.<sup>25</sup>

Out of the ashes of that grassroots activity arose a movement in academia — often called “radical feminism” — that concentrated on gender rights within a patriarchal system.<sup>26</sup> Two women stood out in this movement — Catharine MacKinnon and Andrea Dworkin.

17. MAUREEN HONEY, *CREATING ROSIE THE RIVETER: CLASS, GENDER, AND PROPAGANDA DURING WORLD WAR II* (1984); Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CAL. L. REV. 791, 798 (2002).

18. See *THE LIFE AND TIMES OF ROSIE THE RIVETER* (Clarity Productions 1980) (depicting the propaganda campaign launched at the end of World War II to persuade women who had responded to the patriotic call to enter the wartime industrial labor force to return to homemaking at war’s end).

19. The Equal Pay Act passed in 1963. 29 U.S.C. § 206 (2000).

20. When Title VII passed in 1964, it prohibited employment discrimination based on sex. 42 U.S.C. § 2000(e) (2003).

21. See, e.g., Tong, *supra* note 2, at 184.

22. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

23. See SIMONE DE BEAUVOIR, *THE SECOND SEX* (1952).

24. This phrase was the slogan of the 1970 Women’s Equality Day commemorating the fiftieth anniversary of women’s suffrage.

25. Congress passed the amendment in 1972, but the amendment failed to garner the necessary support of thirty-eight states before the self-imposed 1982 deadline. Ironically, the failure of the amendment may have been a blessing in disguise for some feminists, especially second-wave feminists, because passage of the amendment would have precluded any laws that singled out women for beneficial treatment. “The Equal Rights Amendment (‘ERA’) [may] have forbidden all exclusions used to deny access to a benefit based upon gender.” Christopher H. Pyle, *Women’s Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 220 (1997). Many of the laws debated today — from affirmative action plans to same sex colleges — may have failed that test. Not all feminists, however, supported the ERA for precisely this reason.

26. “The dominant trend in modern feminism (also known as Second Wave feminism, gender feminism, equity feminism, etc.) has evolved from one of equality-seeking to one intensely focused on women’s victimization by men.” Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U. J. GENDER SOC. POL’Y & L. 465, 495 n.194 (1999); see also JOANN BREN GUERNSEY, *VOICES OF FEMINISM: PAST, PRESENT, AND FUTURE* 52 (1996).

Radical feminists<sup>27</sup> called not for equal rights but more protections to compensate for the twisted notions of gender relations the patriarchal system forced women to accept.<sup>28</sup> The literature, especially the works of Catharine MacKinnon,<sup>29</sup> concentrated on dominance issues.<sup>30</sup> To MacKinnon, all relations between men and women are really relationships of dominance and submission. Every male action is designed to “systematically empower[] men, while subordinating women and endangering their lives and bodily integrity.”<sup>31</sup> According to MacKinnon, our system is fundamentally flawed and women are constantly oppressed by men. Any advances by women meet with male backlashes that cause women to regress into traditional, self-destructive behaviors.<sup>32</sup> Even governmental actions that appear to benefit women are just means to placate them.<sup>33</sup>

Radical feminism is the ideology that views men and women as separate and politically antagonistic classes. Men oppress women. They do so through the twin evils of the patriarchal state and the free-market system. The goal of radical feminism is not equality with men: it is gender justice (equity) for women as a class (p. 14).

While second-wave feminists, like Friedan, strove to expand women’s opportunities, radical feminism claims these “opportunities” present women with a false choice<sup>34</sup> because patriarchy clouds all women’s judgments. This viewpoint led many radical feminists, in-

27. Most scholarly literature concerning feminism refers to “dominance feminists”, such as Catharine MacKinnon, as “radical feminists.” This Notice will continue that tradition.

28. MacKinnon dislikes the sameness/difference debate because she believes it distracts from the dominance/submission debate. *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11 (1985); see also Joan Williams, *Is Law an Art or a Science?: Comments on Objectivity, Feminism, and Power*, 7 AM. U. J. GENDER SOC. POL’Y & L. 373, 379 (1998).

29. “The most well-known and influential of [radical] feminists is... Catharine MacKinnon. Her development of dominance theory effected one [of] the most significant paradigm shifts in feminist legal theory. Showing how dominance is eroticized, she has argued for reform of harassment, rape, and pornography law.” Adrienne D. Davis, *Straightening It Out: Joan Williams on Unbending Gender*, 49 AM. U. L. REV. 823, 824 n.5 (2000).

30. Catharine MacKinnon, *Desire and Power*, in FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW 46 (Catherine Stimpson ed., 1987); see also, e.g., CAROL SMART, FEMINISM AND THE POWER OF LAW 86 (1989) (suggesting that the adversary system of law injects male domination into our legal system).

31. Davis, *supra* note 29, at 824 n.5; see, e.g., IN HARM’S WAY: PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (examining how pornography harms women).

32. KAREN LEHRMAN, *THE LIPSTICK PROVISOR: WOMEN, SEX & POWER IN THE REAL WORLD* 9 (1997).

33. “The prevailing feminist analysis of American society as systematically unfair to women inevitably [led] some to regard liberty as a male prerogative, even a tool of male oppression.” P. xi.

34. “[C]hoice is a central problem [for radical] feminist theory because much of the agenda of second-wave feminism was to enable women to be respected as agents and autonomous of their husbands.” Davis, *supra* note 29, at 828 n.19.

cluding MacKinnon, to discount the importance of individual choice.<sup>35</sup> According to some commentators, this move made “American feminism veer toward tyranny after its early successes in the late 1960s.”<sup>36</sup>

Ifeminism stands in contrast to radical feminists.<sup>37</sup> Ifeminism attempts to return the feminist movement to its earlier roots — the ideas of the abolitionist-suffragettes — coupled with a modern understanding of how markets work. Ifeminists believe individuals, including women, make the best decisions for themselves and encourage women to “vigorously oppose all special protections of women . . . as inherently infantilizing” (p. 28).

Ifeminism is based upon the belief that all human beings have a right to the protection of their persons and property. It consistently applies the principle of “a woman’s body, a woman’s right” to every issue that confronts women today from reproductive choice to pornography, from economic opportunity to prostitution (p. 5).

Above all, ifeminists believe in self-ownership. An individual has a fundamental right to use “his or her own body” and “his or her capacities” to maximize his or her own welfare (p. 154). Each individual — regardless of gender, race, national origin, sexual orientation, etc. — possesses this right.<sup>38</sup>

The only legitimate role of government in the realm of sex relations, according to ifeminism, is to treat men and women the same before the law. Requiring that the government protect the rights of all individuals equally — without regard to sex or race — prohibits the government from favoring some groups over others or some individuals over others (p. 5). Government should be restrained from passing facially discriminatory laws.

35. Choice is impossible because “[w]omen are used, abused, bought, sold, and silenced. . . . [N]o woman is exempt from this condition from the moment of her birth to the moment of her death, in the eyes of the law, or in the memory of her children.” Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 796 (1991).

36. P. 28. McElroy criticizes radical feminism for its divergence from first-wave and individual-feminism norms:

In the twentieth century, feminist thought has shown a disturbing tendency to jettison the individualist and classical liberal foundations that animated the movement in the late eighteenth and nineteenth centuries. On issues such as free speech, economic liberty, sexual liberty, and “victimology” contemporary feminism has advocated approaches which individualist feminism rejects as contrary to the interests of both women and men.

Pp. 167-68.

37. “The true ideological contest within the movement is between ifeminism and radical feminism.” P. 16. Holly Wilmet describes ifeminists — she does not use that terminology, however — as the critics to the second-wave. Wilmet, *supra* note 26, at 495 n.194.

38. This prohibits the use of force by an individual as a means to welfare-maximizing ends because any force used will violate someone else’s fundamental right of self-ownership. “Any other position would imply some form of slavery is acceptable.” P. 154.



Ifeminism . . . considers men and women to be human beings whose commonality far outweighs any secondary characteristics that might divide them. Men and women share the same political interests. Ifeminism states: in the absence of coercion, pornography and prostitution are merely choices; the free market liberates women; and technology can be used for good or evil but tends toward the good because it empowers the individual. (pp. 14-15)

Women make choices as individuals, not as groups. For example, while women collectively may believe that more women should be CEOs of Fortune 500 companies, individual women choose not to pursue that path. Though the ideal is never achieved, it would be incorrect to assume that any outside dominating force, be it government or men in general, caused the outcome.

## II. THE EASY CASES

While *Liberty for Women* covers a broad range of women's issues, some present easier arguments for ifeminists than others.<sup>39</sup> In some areas where statistical and anecdotal evidence support a free-market position, ifeminism presents a strong rebuttal of the radical feminists' creed. These topics fit nicely into the second-wave feminist catchphrase: "woman's rights, woman's bodies." This Part considers three such issues: pornography, prostitution, and gun ownership. These topics concern free speech — the right of each individual to pursue the employment of his or her choice — and a woman's right to protect herself from aggressors.

### A. Pornography

Radical feminists have supported strong bans on pornography.<sup>40</sup> In 1983, Andrea Dworkin and Catharine MacKinnon proposed ordinances in both the U.S. and Canada that declared pornography to be sex discrimination.<sup>41</sup> Two U.S. cities and Canada enacted these laws.<sup>42</sup> The Supreme Court affirmed a Seventh Circuit decision finding

39. The purpose of the book is not to dissuade radical feminists from their views of a dominant patriarchy, but rather to convince women not tied to any feminist philosophy to consider ifeminists' arguments. According to Camille Paglia, libertarian feminism is more "in tune with a younger, sassier generation of feminists." P. 28.

40. See *IN HARM'S WAY: PORNOGRAPHY CIVIL RIGHTS HEARINGS*, *supra* note 31.

41. See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 24-28 (1985); MacKinnon, *supra* note 35, at 796 ("Women in pornography are bound, battered, tortured, harassed, raped, and sometimes killed; or, in the glossy men's entertainment magazines, 'merely' humiliated, molested, objectified, and used.").

42. The two U.S. cities were Indianapolis, Indiana, and Bellingham, Washington. Minneapolis almost enacted a similar ordinance — it was vetoed by the mayor twice. Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of Butler*, in *FEMINISM AND PORNOGRAPHY* 318, 333 n.2 (Drucilla Cornell ed., 2000).

one of the ordinances an unconstitutional violation of the First Amendment.<sup>43</sup> The Canadian Supreme Court, however, upheld the ordinance.<sup>44</sup>

*Liberty for Women*, in “On Pornography: Lessons from Enforcement” by Nadine Strossen, favors allowing more freedom of speech, even if that speech may be offensive to some women (pp. 45-70). Freedom of speech provides those holding minority views with one of their most effective tools for promoting societal change.<sup>45</sup> Without the protection of the right to use provocative speech to grab attention and inform through protests, literature, and academia, many of the civil rights movements in the United States would probably have been far less effective.

Historically, restrictions on speech end up banning more than just targeted speech (p. 47). Laws banning obscene or pornographic content “have been used to condemn a wide range of views, far beyond the legal or dictionary definitions of those terms, and even altogether outside the realm of sexuality,” such as political dissent.<sup>46</sup> When government is tasked with defining “obscene” or “pornography” the desire for the majority to suppress unpopular minority views becomes too great.

Like other speech restrictions, the danger exists that anti-pornography statutes could be used against those whom the laws are designed to protect.<sup>47</sup> For example, governments have used anti-pornography laws to bar the dissemination of information about sex, birth control,<sup>48</sup> and feminist and lesbian books and magazines (pp. 48-66). Interestingly enough, the Canadian anti-pornography ordinance stopped two of Andrea Dworkin’s books at the United States-Canada

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43. *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986); *see also* Lynn S. Chancer, *From Pornography to Sodomasochism: Reconciling Feminist Differences*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 81 (2000).

44. *Butler v. The Queen*, [1992] S.C.R. 452; *see also* Chancer, *supra* note 43, at 81.

45. “Throughout history, free speech consistently has been the greatest ally of those seeking equal rights for groups that have been subject to discrimination.” Pp. 47-48.

46. P. 47. “Even in societies that generally respect human rights, including free speech . . . the term ‘pornography’ tends to be used as an epithet to stigmatize expression that is politically or socially unpopular.” *Id.*

47. “Rather than curbing speech offensive to minorities, [the British racial hate speech law] has instead been used regularly to curb the speech of blacks, trade unionists, and anti-nuclear activists.” P. 48. The “enforcement record” of anti-speech laws being applied against the groups they were designed to protect “should come as a rude awakening to any who believe that anti-hate-speech laws will protect or benefit racial minorities, women, or any other group that has traditionally suffered discrimination.” P. 50.

48. One of the most well-known laws of this type was the Comstock Act. *See* GROSSBERG, *supra* note 13.

border for a short time because the law's enforcers believed portions of the book violated the ordinance.<sup>49</sup>

Any scheme for censoring would suppress many works that are valuable to women and feminists; would be enforced in a way that discriminates against the least popular, least powerful groups in our society, including feminists and lesbians; would perpetuate demeaning stereotypes about women, including that sex is bad for us; would perpetuate the disempowering notion that women are essentially victims; would harm women who voluntarily work in the sex industry; and would reinforce the political power of factions with a patriarchal agenda. By undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality. Since sexual freedom and freedom for sexually explicit expression are essential aspects of human freedom, censoring such expression would undermine human rights more broadly. (p. 67)

Strossen also points out the irony of the anti-pornography feminists using government to achieve their goals. Government was responsible<sup>50</sup> for oppressing women through "protective" labor laws, restrictions on property ownership, limitations on access to birth control and reproductive information, and failure to enforce domestic violence and rape laws. First, it is odd that women oppressed by government in the past would seek to use government through anti-speech laws to oppress others' freedom. Second, trusting the patriarchal system that oppressed women in the past to now protect women from that same patriarchy seems incongruent. "The fundamental premise in the procensorship feminists' philosophy — that our entire societal and legal system is patriarchal, reflecting and perpetuating the subordination of women — itself conclusively refutes their conclusion that we should hand over to that system additional power" to regulate expression by regulating pornography (p. 45).

Anecdotal, historical, and statistical evidence shows that restrictions on speech — from hate-speech regulations to bans on pornography — hurt the groups they are designed to protect (pp. 48-51). Ifeminism provides a reasoned argument against these regulations and deserves consideration when debating the wisdom of adopting such laws.

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49. "According to [Canadian] customs, [the books] 'illegally eroticized pain and bondage.'" P. 61. "As far as Canada is concerned, Erica Jong's prediction . . . that 'feminists would be the first to suffer' under any newly imposed censorship . . . is, unfortunately, now a description." P. 54.

50. Radical feminists might argue that it was men who used the government to suppress women. Government, however, was the ultimate enforcer of these laws (or the ultimate un-enforcer in the case of domestic violence and rape laws) even if the laws were passed at the behest of the male patriarchy.

## B. Prostitution

Prostitution<sup>51</sup> presents an interesting area of disagreement between radical feminists and ifeminists.<sup>52</sup> While radical feminists' theories focus on men's dominance and women's victimization, ifeminists view the choice to become a prostitute in the same way as the choice to undertake any other profession.<sup>53</sup> *Liberty for Women*, in chapters by Norma Jean Almodovar (pp. 71-87) and Martha Nussbaum (pp. 88-118), advocates legalizing prostitution. Like abortion, prostitution involves a woman's decision about what she will and will not do with her own body. At root, that decision is a choice and it should be the woman's choice, not the government's (p. 75). Either a woman can choose an option — including the “good, bad, moral, or immoral” ones — or “choice” means nothing (p. 75). If a woman is only allowed to choose wisely, she never had any choice to begin with.<sup>54</sup>

One argument commonly raised against legalizing prostitution concerns the few options facing women who choose to become prostitutes. If a woman with relatively little education and no employable skills becomes a prostitute, did she really *choose* that profession? She may not have had any other options. Nussbaum acknowledges the argument's validity, but concludes that banning prostitution hurts these women more than it helps them (p. 90). The real solution is to

51. See generally pp. 71-118; Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993). This Notice's definition of “prostitution” does not include the “forced prostitution” of the sex-slave trade that concerns many international-human rights activists. It focuses, instead, on women who decide to trade sexual acts for money. Radical feminists would disagree that the latter can ever be a “choice.” Both radical feminists and ifeminists agree that the former is never a choice.

52. Catharine MacKinnon does not agree. She believes that these types of disagreements are just contests between real feminists and fake ones. Thus, in the context of one dispute over whether speakers who favored the legalization of prostitution should be allowed to be heard at a law school conference, she is said to have stated, “I don't see this as a fight within feminism, but a fight between those who wish to end male supremacy and those who wish to do better under it.” Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U. J. GENDER SOC. POL'Y & L. 31, 49-50 (2000) (quoting Tamar Lewin, *Furor on Exhibit at Law School Splits Feminists*, N.Y. TIMES, Nov. 13, 1992, at B9).

53. Some ifeminists view the efforts to keep prostitution illegal as traitorous moves against women. “There are some very angry women [radical feminists] who truly believe that it is acceptable to abrogate the freedom of other women to prevent a [perceived] greater harm to women as a whole.” P. 75. “This prostitute-as-victim theory [extolled by the radical feminists,] now so deeply imbedded into law . . . involves the irrational belief that all women except for [radical feminists] and their peers are inherently incapable of self-determination and need ‘big sister’ protection.” P. 77.

54. Even if a woman were only allowed to make the “right” choices,

[t]he question is, who determines whose values, opinions, and preferences become law in this “society”? Who decides what is offensive to us all? If there is a sufficient number of people who do not like gays, and there are, and they are vocal enough, should we return to incarcerating homosexuals because they offend “society”?

improve the choices these women face,<sup>55</sup> not to “remov[e] one of the options they actually have” (p. 103).

Anti-prostitution laws marginalize physical and sexual abuse claims of prostitutes. Law-enforcement personnel view prostitutes as criminals rather than victims (p. 72-73). Writing from her own experience as a prostitute, Almodovar shows that anti-prostitution laws designed to protect women “from the ‘exploitation’ and degradation of prostitution are abused by those who are supposed to uphold them” (p. 74). Police officers use laws against prostitution to harass prostitutes, enjoy “freebies” from the women, and discount prostitutes’ allegations of violent abuse at the hands of their pimps or clients (p. 80). Because generally applicable laws against violence are not fully enforced when the victim is a prostitute,<sup>56</sup> laws against prostitution put these women at even greater risk of abuse.<sup>57</sup> A prostitute, threatened with violence from her pimp or a customer, cannot seek protection from the police because the law has made her a criminal and the police are unlikely to help anyway.<sup>58</sup>

### C. Gun Ownership

In *Liberty for Women*, Richard Stevens, Hugo Teufel III, and Matthew Biscan make a persuasive, and all too rarely heard,<sup>59</sup> argu-

55. “The really helpful thing for feminists to ponder, if they deplore the nature of these options, will be how to provide more options for these women, through education, skills training, and job creation.” Pp. 90-91.

56. In addition to prostitution’s illegality, another reason for underenforcement of generally applicable laws when prostitutes are victims is the stigma attached to prostitution. Police officers similarly may not enforce anti-violence laws when victims belong to unpopular, but legal, groups — strippers, gay men, lesbians, etc. The endogeneity between legal rules and social stigmas, however, is beyond the scope of this Notice.

57. MacKinnon admits that law-enforcement officials practice bias in enforcing anti-prostitution laws. Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 769 (1987) (reviewing JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986)) (“[B]iased enforcement of biased laws against prostitution so that prostitutes (most of them women) are harassed and violated while pimps and johns (men) are allowed to ensure that prostitution, something men made a crime, will continue to exist for their pleasure.”).

58. “Until we return the control of all individual choices to the individual, the presumably unintended consequences of protectionist legislation will be the continued victimization of those the laws were designed to protect.” P. 87. Since virtually every jurisdiction in the United States bans prostitution, statistics about the effects of prostitution are hard to come by. Some commentators, however, have conducted behavioral studies and found that legalizing prostitution may lead to reduced rates of rape. “[A] legislature that valued reduced rape more than reduced prostitution might experiment with legalizing prostitution.” Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 929 (1999).

59. One commentator who supports gun ownership for women notes that the gun-control debate “virtually ignore[s] the extent to which restrictive gun legislation and standards of self-defense affect” women. Inge Anna Larish, Note, *Why Annie Can’t Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 507 (1996).

ment in favor of relaxing gun control laws to empower women (pp. 238-63). Women on average are physically weaker than men and firearms provide one mechanism for countering that disparity.<sup>60</sup> Women, of course, are not the only individuals who may own guns — men are also gun owners. In a confrontation between an armed man and an armed woman, however, the man's physical advantage over the woman plays less of a role in the outcome than if both were unarmed.

Not all women, however, agree on the benefits of gun ownership for women.<sup>61</sup> Women, as a group, tend to support restrictions on gun ownership.<sup>62</sup> Some commentators suggest that women's general aversion to gun ownership may result from the socialization of women "that emphasizes maternalism, pacifism, and sympathy for others."<sup>63</sup> Society teaches women that they should pursue peaceful resolution of conflicts and avoid weapons. From a radical-feminist perspective, advocating fewer restrictions on gun ownership "is not powerful — it is lethal. For both women and society, a better society is an unarmed society"<sup>64</sup> and guns are the weapons of men.<sup>65</sup>

Statistical data, however, support the pro-gun approach. On average, the greatest threat to a woman's personal safety comes from inside her own home. Data show that "the frequency of wife-on-husband assault . . . is about equal to the frequency of husband-on-wife assault" (p. 243). The disparities, however, arise when it comes to injuries arising from such assaults (p. 243). Women are more likely to suffer injuries following a domestic assault than men because men hit harder than women.<sup>66</sup> Additionally, many wife-on-husband assaults may actually be defensive (and justifiable).

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60. P. 246 ("A sidearm can 'equalize' physical disparity between a woman and her attacker.").

61. For example, in 2000 hundreds of women and some men marched on Capitol Hill calling for stricter gun-control laws. See Susan Levine, *Many Moms' Voices Are Heard on Mall: Rally Supporting Stricter Gun Laws Draws Thousands*, WASH. POST, May 15, 2000, at A1.

62. See, e.g., Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 90 (2002) ("Members of the anti-gun culture tend to be women or men with an appreciation of feminist perspectives."); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 406-07 (1999).

63. Luna, *supra* note 62.

64. Alana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN'S L.J. 351, 363 (1997).

65. See, e.g., Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 666-67 (1989) (responding to Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989)) ("His gun could well have made the difference between an assault that my hard-won skills in self-defense could have fended off and one against which they were useless.").

66. P. 243. "Recent data suggest that 50 percent of female victims of domestic abuse suffer physical injuries, while only 32 percent of male victims are physically injured." *Id.*

Thus, the fifty percent of interspousal homicides in which husbands kill wives are murders, but in the overwhelming majority of cases where wives kill husbands, they are defending themselves or their children. In Detroit, for instance, husbands are killed by wives more often than wives are by husbands, yet the men are convicted far more often. In fact, three-quarters of wives who killed their husbands were not even charged, prosecutors having found their acts lawful and necessary to preserve their lives or their children's.<sup>67</sup>

Finally, guns and gun ownership may serve to deter violent acts.<sup>68</sup> Firing a warning shot or simply displaying a gun may dissuade an attacker's impending assault.<sup>69</sup> Access to and mere possession of a weapon by a woman may stop violence before it even starts. And, as violence against women falls because guns have neutralized the physical differences between men and women, women become more empowered to make their choices based on their wants and needs, not their fears.

Women increasingly are becoming gun owners to protect themselves against aggression.<sup>70</sup> Guns provide women with a mechanism to counter men's physical advantage. "These new gun owners . . . view their gun ownership as a politically significant act, a defiance of ancient and oppressive gender structures."<sup>71</sup> One group devoted to

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67. Don B. Kates, Jr., *The Value of Civilian Handgun Possession as Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 128-29 (1991). "[W]hen a woman kills her husband, it is almost always the case that he abused her before he was killed. Homicides that involve women who kill their abuser should be counted as evidence of the protective effects of gun ownership." Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509, 535 (1993).

68. See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (1998). Gun ownership deters crime and does not seem to increase homicide rates. "Despite the increase in the number of firearms [between 1973-1992], there was no correlation with homicide rates in general nor an increase in the percentage of murders committed specifically with firearms." P. 249.

69. P. 246. "In over 92 percent of defensive gun uses, the defender succeeds by firing only a warning shot or never firing the gun at all." *Id.*

70. Williams, *supra* note 62, at 433 ("[F]or the women and guns movement, the central reason for arms ownership is self-defense, rather than hunting, target shooting, or revolution."). "[S]elf-arming allows women to rely on themselves, rather than the men in their lives. . . . Similarly, self-arming allows women to rely on themselves rather than on the state, which cannot or will not adequately protect women." *Id.* at 434. The argument that women should arm themselves for protection and to compensate for the size differential between themselves and their (usually) male aggressors was first made by PAXTON QUIGLEY, ARMED & FEMALE (1989). Additionally, Naomi Wolf advocates that women embrace "power feminism" by arming themselves. NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY (1993). Some pro-gun women have criticized anti-gun feminists for their victimization theory that suggests that women cannot use guns properly. "What is truly amazing is the large number of otherwise intelligent, so-called 'liberated' women who blandly accept and even promote the idea that women are incapable of defending themselves with [guns]." Karen McNutt, *Perpetuating the Victim Status of Women*, WOMEN & GUNS, Dec. 1991, at 7.

71. Williams, *supra* note 62, at 429. Professor Williams also notes that "these new gun proponents tend to be politically liberal and to identify themselves as feminists." *Id.*

women and gun deregulation, Second Amendment Sisters, formed to educate women about their constitutional right to bear arms and how gun ownership can empower them.<sup>72</sup>

### III. THE HARD CASES

When I went to school I learned to write and how to read History, geography and home economy  
 And typing is a skill that every girl is sure to need  
 To while away the extra time until the time to breed  
 And then they had the nerve to ask, what would I like to be?  
 I says, "I'm gonna be an engineer!"  
 "No, you only need to learn to be a lady  
 The duty isn't yours, for to try to run the world  
 An engineer could never have a baby  
 Remember, dear, that you're a girl" . . . .

Well, I started as a typist but I studied on the sly  
 Working out the day and night so I could qualify  
 And every time the boss came in, he pinched me on the thigh  
 Said, "I've never had an engineer!"  
 "You owe it to the job to be a lady  
 The duty of the staff is to give the boss a whirl  
 The wages that you get are crummy, maybe  
 But it's all you get, 'cause you're a girl" . . . .

As soon as [husband] Jimmy got a job, I studied hard again  
 Then busy at me turret-lathe a year or two, and then  
 The morning that the twins were born, Jimmy says to them  
 "Your mother was an engineer!"  
 "You owe it to the kids to be a lady  
 Dainty as a dish-rag, faithful as a chow  
 Stay at home, you got to mind the baby  
 Remember you're a mother now!"

Every time I turn around there's something else to do  
 Cook a meal or mend a sock or sweep a floor or two  
 Listening to Jimmy Young — it makes me want to spew  
 I was gonna be an engineer. I only wish that I  
 could be a lady I'd do the lovely things that a lady's s'posed to do  
 I wouldn't even mind if only they would pay me  
 Then I could be a person too. . . . Oh, but now the times are harder  
 and me Jimmy's got the sack; I went down to Vicker's,  
 they were glad to have me back. But I'm a third-class citizen,  
 my wages tell me that But I'm a first-class engineer!  
 The boss he says "We pay you as a lady,  
 You only got the job because I can't afford a man,  
 With you I keep the profits high as may be,  
 You're just a cheaper pair of hands." You got one fault,  
 you're a woman; You're not worth the equal pay.  
 A bitch or a tart, you're nothing but heart,  
 Shallow and vain, you've got no brain . . . . Well, I listened to my mother  
 and I joined a typing pool  
 Listened to my lover and I put him through his school  
 If I listen to the boss, I'm just a bloody fool  
 And an underpaid engineer  
 I been a sucker ever since I was a baby  
 As a daughter, as a

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72. See, e.g., Alexandra Hall, *Girls with Guns*, BOSTON MAG., Jan. 2003, at 80 (reporting on the Second Amendment Sisters group and its first college chapter at Mount Holyoke). Second Amendment Sisters formed in response to the "Million Mom March" in 2000. *Id.* at 82.



mother, as a lover, as a dear But I'll fight them as a woman, not a lady I'll fight them as an engineer!

Peggy Seeger, *I'm Gonna Be an Engineer* (1970).

Peggy Seeger's song describes some of the central issues facing women in the workplace: employment discrimination, sexual harassment, and family<sup>73</sup> versus work commitments. While the song harkens back to a time before Title VII, the Equal Pay Act, and the Family Medical Leave Act,<sup>74</sup> many women still feel like "third-class citizens." Is this feeling justified? Are conditions better now because of the assistance of these laws? Are conditions so much better that the laws are no longer justified? These questions should be answered when considering whether to maintain or scrap employment laws designed to benefit women, but *Liberty for Women's* articles concerning employment discrimination and employment-related issues do not provide enough hard evidence to answer them.

In *Liberty for Women*, Richard Epstein<sup>75</sup> presents the first of several chapters that address women and employment issues.<sup>76</sup> No one disputes that, in the past, government played a role in distorting the employment choices of women.<sup>77</sup> Epstein, however, stresses that indi-

73. Working women account for over seventy percent of all pregnancies each year. P. 133. Radical feminists discount the real economic cost in terms of time and money of childbearing and childrearing to women. Having and raising children is a task that for either historical reasons or comparative advantage, or both, falls mostly on women.

Nine out of ten men in upper-level corporate management have children and a non-working spouse. As Deborah Rhode has pointed out, most female executives have neither. Almost one-third of women in senior positions, but only six to eight percent of men, never marry. Only about thirty percent of women in senior positions have children, as compared to ninety percent of men. Ninety-three percent of married women lawyers have spouses who work full time, a disproportionate number of them as high-level professionals; these husbands do not provide their wives with the flow of family work available to the nearly half of married male attorneys who are married to housewives. Female executives also tend to be married to same-class males who work full time, but male executives are often married to homemakers. A recent DuPont study found that its male executives are now more likely to have an at-home wife than they were ten years ago. Davis, *supra* note 29, at 830 (citing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 72-73 (2000)). "[D]ata suggest that, very conservatively, at least two-thirds of the wage gap between men and women reflects women's load of family work." WILLIAMS, *supra*, at 15.

74. Maternity-leave policies may harm some women. If government mandates maternity leave, it precludes women who do not plan to have children from accepting employment (for presumably higher wages) from firms that do not provide this fringe benefit.

75. In other work, Epstein advocates abolishing Title VII. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). Additionally, he supports scrapping Title IX. See Richard A. Epstein, *Foreword: "Just Do It!" Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. (forthcoming 2003).

76. Pp. 30-42. The other chapters deal with women as managers, pp. 121-30; fetal-protection laws, pp. 131-51; affirmative action, pp. 181-88; sexual-harassment laws, pp. 187-202; comparable worth, pp. 203-29; and laws prohibiting midwifery, pp. 284-329.

77. See, e.g., p. 30. Battles of the past over

vidual choices by women,<sup>78</sup> and not systemic current discrimination against women,<sup>79</sup> generate any gender-based employment disparities we see today. “[E]qual opportunities will always yield unequal results” (p. 33), and we should not look to government to force equal results on individuals who freely choose the path that was best for them absent any discrimination.<sup>80</sup> Thus, any government reaction to the differences in outcomes is unjustified because individual choices generated these differences, not systematic discrimination.<sup>81</sup> According to ifeminists, individuals — women and men — should compete for employment based on some objective standard of how well each person would complete the tasks the job entails.<sup>82</sup>

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civil capacity (for example, during the nineteenth century the ability of married women to make contracts in their own right, to give evidence, and to serve on juries) and over political capacity (during the early twentieth century the right of women to vote in political elections and to stand for office.

P. 30. “[H]istorically, women have been the victims of discrimination.” P. 183.

78. “The basic point is that the ordinary definition of liberty gives one not only the capacity to move about freely but also the capacity to better oneself through voluntary transactions. The logic of these transactions is that of mutual gain through mutual consent.” P. 31.

79. Libertarians, like Epstein, believe that private employers should be allowed to discriminate among employees — the market, over time, will punish employers who base employment decisions on something other than merit. Individual choices make the outcomes, not pervasive discrimination.

Self-ownership . . . requires the right to discrimination. . . . [P]eople may choose to deal with women in a biased and offensive manner. As long as this “discrimination” is peaceful — that is, it involves no physical injury or threat of harm — it is not a violation of rights. Such discrimination is simply ignorant behavior, which shows incredibly poor taste. But both freedom of speech and freedom of association guarantee that people have the right to be wrong. To be offensive. To be prejudiced. Freedom of association requires the right to say “no” and to refuse to associate.

P. 186. “[T]he market is to a great extent self-correcting, because it acts to penalize those who make business decisions in an unbusinesslike way, say by indulging in racial hatred or sexual stereotyping. Over the long run, such businesses will languish while their more meritocratic competitors will prosper.” P. 209 (citing economist Gary Becker’s work on discrimination in employment).

80. Differences in outcomes

will reflect powerful systematic tendencies. With respect to employment and social role differentiation by sex, the conclusion seems clear: a system of equal rights to participate in business and political life will result in differences of occupational choice and political behavior, among other things, as actual experience has amply confirmed.

P. 33.

81. “In many cases the difference in outcomes has not been taken as a response to systematic differences in preferences between men and women. Rather it has been viewed as proof that the system itself does not operate in the proper fashion.” *Id.*

82. Ifeminism calls for the removal of government from individuals’ decisionmaking — whether that individual is employer or a potential employee — and for men and women to be treated equally before the law. This entails removing government restrictions on women’s ability to compete with men, such as the protective labor laws and restrictions on property ownership and inheritance of the past. Radical feminism on the other hand, supports using government to prevent discrimination in the market.

Although legal barriers to women had largely fallen, it was argued that the ill effects of history still impacted modern women. The lingering injustice was especially blatant in the

The persistent differences between the sexes lead to both behavioral and attitudinal differences. The effects are not cabined into some tiny area of human life — they influence all our experiences and interactions. We must oppose the common view that equality of opportunity, rightly conceived, necessarily and properly brings about equality of results. More specifically we should not try to tinker with the outcomes of markets by imposing the strong norm of equality of results, which we cannot and should not achieve, given the differences of preferences and abilities of men and women. . . . Rather than posit our knowledge of what the ends should be, we should let the process run as it will, taking care to see that no major impediments interfere with bargaining and career choice. (p. 41)

This explanation, however, begs the question. Did past discrimination distort these “choices?”<sup>83</sup> This is basically a “chicken or the egg” problem: if past discrimination resulted in women being excluded from certain professions, does that past discrimination affect choices today? Did discrimination by employers lead to women’s jobs being limited and did the resulting definition of “woman’s work,” force women into certain types of employment?

Past discrimination could take many forms limiting women’s employment choices. For example, in education, girls may be implicitly or explicitly steered away from math or science.<sup>84</sup> This bias could lead girls to see their choices as more limited than boys’.<sup>85</sup> This calls for concerted efforts by today’s feminists (of all varieties) to spread the word that women can be whatever they want, no matter the field.<sup>86</sup> Radical feminists have forgotten this mantra — their concentration on

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marketplace, which continued to undervalue women’s work. The removal of legal barriers had not cured this exploitation; legal protection was required. It was necessary for the law to prefer women in order for the marketplace to treat them fairly.

P. 183.

83. Ideally, in a world with no past discrimination, men and women would compete for jobs based on their natural talents alone. Basically, to analogize to Justice Harlan’s famous dissent in *Plessy v. Ferguson*, the world would be “sex-blind” or “gender-blind.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

84. Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. 209, 213 & nn.10-13 (2000) (citing AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *GIRLS IN THE MIDDLE: WORKING TO SUCCEED IN SCHOOL* (1996); AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS* (1993); AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS* (1992); AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *SHORTCHANGING GIRLS, SHORTCHANGING WOMEN* (1991)).

85. In a public-school setting, this would amount to discrimination by government. In private schools, parents could react to any bias towards their daughters by removing them from the schools.

86. Camille Paglia notes that “the education and training of Western women must be better designed to prepare them for leadership positions in business and politics.” P. 27.

“woman-as-victim”<sup>87</sup> may actually exacerbate the problem of women viewing their choices as limited.<sup>88</sup>

Past government-sanctioned discrimination in employment<sup>89</sup> could generate society-wide ideas about what is “woman’s work.” Epstein does not address whether natural talents<sup>90</sup> or discriminatory laws led women to choose some occupations over others by sending signals to girls that those were women’s jobs.

In the past, women were discriminated against by government, the education system, and employers. Ifeminists concentrate on past government discrimination to explain why women’s options were limited. With that type of discrimination largely eliminated, ifeminists believe any disparities between men and women in the workplace result solely from women’s individual choices about which careers to pursue. Removing governmental barriers may not be enough, however, to produce the equality of opportunity that ifeminists hold so dear. First, it remains unclear whether applying antidiscrimination laws to private employers assisted women by countering past discrimination. Equally murky is whether these laws, even if beneficial in the past, continue to provide benefits to women that outweigh the costs imposed on employers and nonfavored groups. *Liberty for Women* presents a strong argument for why government barriers should be removed for women in the workforce, but does not sufficiently address whether government interventions — such as Title VII or the Equal Pay Act of 1963 — have assisted in breaking down private barriers. Before the argument for removing government interventions can be considered, feminists and policymakers need more information about the costs and benefits associated with these policies.

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87. The media, on occasion, promotes this “woman-as-victim” image.

Reporters on Fox News Channel and MSNBC are displaying an exceedingly annoying habit of referring to [Prisoner of War from Operation Iraqi Freedom] Pfc. Jessica Lynch as just “Jessica” in news stories, the better to tug the viewers’ paternal/maternal heartstrings. But Jessica Lynch is not the little girl who fell down the well. She is a U.S. soldier serving in harm’s way. If you’re old enough to be a POW, you’re old enough to be referred to as “Private Lynch.” Even if you’re female.

Virginia Postrel, *Little Jessica*, at <http://www.dynamist.com/weblog/archives/000059.html> (last visited Apr. 5, 2003).

88. “Many women are repulsed by the [radical feminist] notion that [women] are men’s victims. They don’t feel like victims, and believe that feminists’ descriptions make them sound like losers.” Williams, *supra* note 28, at 377.

89. “Protective” labor laws provide one example of government-sanctioned employment discrimination against women. See NOVKOV, *supra* note 11, at 133.

90. One contributor, Mimi Gladstein, says that management skills are among women’s natural talents. “When one has balanced the needs of home and family and a professional life, one does not survive unless one develops sound managerial skills.” P. 123.

## CONCLUSION

For easy cases, *Liberty for Women* provides convincing evidence that providing women with greater freedom to pursue the literature, work, and self-defense methods of their choice maximizes their welfare. Banning pornography silences women. Criminalizing prostitution leads law enforcement to view prostitutes as criminals and discount their claims of abuse. Laws prohibiting prostitution also deny some women one of the few employment options available to them. Laws restricting gun ownership leave women virtually defenseless against stronger male aggressors. *Liberty for Women* contributes to the feminist debate in these easier cases where governmental laws designed to benefit women actually harm them. There may be other rationales supporting these laws, but the protection and benefit of women cannot serve as a justification. The anecdotal, historical, and statistical evidence provided in the book should persuade some women to reconsider their views.

*Liberty for Women's* justification for laissez-faire individualism in harder cases where it remains unclear whether government action harms or benefits women, however, lacks evidentiary support. For these harder cases, like employment discrimination, a reader who is not an ifeminist or at least sympathetic to libertarian views will not be persuaded. *Liberty for Women* provides evidence justifying the removal of governmental barriers to women's employment, but fails to address adequately whether government interventions for the benefit of women — such as Title VII and the Equal Pay Act of 1963 — have had positive impacts by breaking down private barriers. Are “liberty” interests enough to condemn these governmental acts? It seems thin to justify repealing what may be beneficial laws based solely on dogmatic interests in individual autonomy. This is not to say that ifeminism cannot convince women on these issues; it just seems unlikely that *Liberty for Women* will do so without more evidence.