

**Ernst Fraenkel Vorträge**  
zur amerikanischen  
Politik, Wirtschaft, Gesellschaft und Geschichte

Herausgegeben von Carl-Ludwig Holtfreich

**5**

John Hope Franklin

**What Europeans Should Understand  
About African-American History**

Linda K. Kerber

**Paradoxes of Women's Citizenship  
in the United States**

John F. Kennedy-Institut für Nordamerikastudien  
der Freien Universität Berlin

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## **Editor's Preface**

This series published by the John F. Kennedy Institute of the Free University Berlin aims at preserving in a longer perspective the results of the Ernst Fraenkel lectures on American politics, economy, society and history and making them accessible to a broad public outside of Berlin as well. These lectures are dedicated to Ernst Fraenkel, himself a German-American and an internationally renowned political scientist and expert on American affairs, who taught at the Free University from 1951 to 1967 and whose initiative led to the founding in 1963 of the John F. Kennedy Institute for North American Studies. As was the case with Ernst Fraenkel's life and work, these lectures held by eminent American scholars and authorities of some particular field are meant to contribute to forging an academic link across the Atlantic and to provide stimulation for research at the Kennedy Institute as well as at other European institutes for North American studies.

This issue contains lectures delivered at the Kennedy Institute by two outstanding American historians on minority and female-equality problems: John Hope Franklin (Duke University) on the history of African Americans, given April 25, 1990 and Linda K. Kerber (University of Iowa) on historical court cases concerning the legal status of women in the U.S., given June 13, 1990. The funding of the program by the Fritz Thyssen Foundation is gratefully acknowledged.

Berlin, September 1990

Carl-Ludwig Holtfrerich



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# What Europeans Should Understand About African-American History

John Hope Franklin

## I

During the past year a book with the curious title, "Everything I Needed to Know I learned in Kindergarten" has appeared in many bookstores in the United States and was, for a few weeks, on some bestseller lists. Although I read several reviews of the book, I did not read it, and I am therefore not truly familiar with its contents. For my purposes today it was the title that intrigued me, for I am tempted to draw an analogy between the title of that book and what I shall say today. It suggests to me that what Europeans should understand about African-American history must be based on what they should have learned about the subject long, long ago. In any case, I am delighted to be here, to visit this great city and this remarkable center of learning which I have not had the pleasure of visiting for some twenty years, and to have the honor of speaking in a lectureship dedicated to one of the great men of this century, Ernst Fraenkel.

African-American history properly begins in Europe; and had there been no contact between Europe and Africa, we can surely say that the history of Africans in the New World would be quite different. Imagine, if you will or if you can, that some intrepid sailors from Luanda or Accra or Goreé had made landfall in Florida or Virginia in the fifteenth century and subsequently planted settlements to which other African peoples came in ensuing years and centuries. Imagine, further, that these Africans were well established in the New World by the time the Europeans made their feeble, halting attempts to gain a foothold in North America (let us call it North Songhay) in the late sixteenth and early seventeenth centuries. One need not pursue this idle speculation further. It is enough to say that the history of the New World as well as the Old would be far different from what it actually became had events occurred in this manner.

Since that scenario was never played out and since the New World is essentially a European enterprise, it is Europeans who, in one way or another and in varying degrees of responsibility, created the intellectual and social phenomenon that we call African-American history. (I should interject at this point that I do not attach much significance to the various appellations for the racial group with which I am identified. Many years ago some of that group insisted on being called "colored". Later, they expressed a preference for "Negro" and that term declined in popularity as "black" was adopted as a more defiant, militant, race-conscious term at the peak of the Civil Rights movement. Meanwhile, the term "Afro-American" has had several separate periods of popularity and, more recently, has undergone a slight modification in the currently popular term "African-American." My focus has always been on status, regard, and treatment, and I find it difficult to see how nomenclature alone will have a significant impact on, say, the status of coloreds, blacks, Negroes, Afro-

Americans, or African-Americans. I tend to use all or most of the terms interchangeably, although I do admit that "colored" seems a bit archaic these days as well as suggesting a group in South Africa with which there is no valid analogy.)

As the scenario was actually played out from the seventeenth century onwards, the peopling of America was dominated by Europeans. As the years passed they came in increasing numbers, particularly after the middle of the seventeenth century. At times the flow was largely British, then came the Dutch, the Scandinavians, the French, and the Germans. Later, they would come in large numbers from Southern and Eastern Europe, by which time the institutions, laws, customs, and traditions as they related to African-Americans were fairly well established. That is not to say that the arrival of each succeeding group, however recent, did not have some real impact on the lives of black Americans, if in no other way than to take the place of blacks at the bottom rung of the ladder as they created their own success stories in their climb toward the top.

It is difficult to ascertain with any degree of precision the extent to which Europeans had a clear notion of just where to place Africans on the scale by which they ranked human beings. In his seminal work, *White Over Black*, Winthrop Jordan argues persuasively that by the time of the reign of Elizabeth I, the British disesteem for Africans was pronounced and that their experience with them in Europe, Africa, and the New World did little to change their general attitude.<sup>1</sup> Even if they were not convinced at the outset that they should make slaves of Africans, they had no intention of treating them as equals. Long before African slavery was established in law as well as in fact, the colonists were making clear distinctions between whites and blacks. In 1640, when a black indentured servant by the name of John Punch ran away with two white indentured servants, a Dutchman and a Scot, the punishment for the two white fugitives was relatively mild. The General Court ordered them to serve their master for one additional year and then the colony for three more years. By contrast, the sentence of John Punch was extremely harsh. The Court ordered him to serve his master or his assigns "for the time of his natural life here or elsewhere."<sup>2</sup> The distinction was as clear and unequivocal as it was unjust.

As the laws of the American colonies made quite clear during the period of the English Restoration, Africans were to occupy a permanently inferior place in American society. The slave codes that determined that the child of a female slave should follow the status of its mother, left no doubt that slavery would become as permanent as the slave trade and colonial jurisprudence could make it. This was, in a sense, most curious, since the colonists were making much of the great opportunities that the New World afforded and the diversity of the population that gave it much of its vitality. There were, of course, those who, like Benjamin Franklin, complained that Pennsylvania was becoming a colony of aliens, "who will shortly be so numerous as to Germanize us instead of us Anglifying them." Much more serious for Franklin and many of his colleagues was the fact that the steady importation of African slaves had, as he put it, "blacken'd half America."<sup>3</sup>

Even if Franklin was distressed over the number of Africans or even Germans in the area soon to be known as the United States, he joined his white colleagues in paying tribute to the Europeans who made America, while ignoring the role that



Africans were playing. When the Continental Congress in 1776 appointed a committee, comprised of John Adams, Thomas Jefferson, and Benjamin Franklin to devise a seal for the new nation, they consulted a Geneva-born artist, P.E. Du Simitière, who had been in the country for eleven years. They came up with a report that included six national symbols for England, Scotland, Ireland, France, Germany, and Holland. This would indicate "the countries from which these States have been peopled."<sup>4</sup> The Swedes could object, but in terms of numbers they did not have a strong case. But, what about the Africans who had "blacken'd half America?" No consideration was given them on the basis of their numbers or in terms of what they had done to provide the labor that had done much to make the new nation viable.

Nor did Thomas Jefferson himself do much better in taking cognizance of the presence of Africans when he wrote the Declaration of Independence. One can dismiss the electrifying words "all men are created equal" as having anything to do with Africans, for Jefferson's own record makes it clear that he believed blacks were inferior to whites. To be sure, in an early draft of the Declaration he had recognized Africans by attempting to place responsibility for their presence solely on the King:

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.<sup>5</sup>

These charges, described by John Adams as the "vehement philippic against Negro slavery," not only were inaccurate but totally unrealistic. They were, in consequence, unacceptable to slaveholders as well as some others, and were stricken from the final draft of the Declaration of Independence.

It is remarkable how white colonists in general ignored the presence of Africans during their struggle for independence from Britain. They showed no disposition to extend to Africans the freedoms that they were seeking from Britain for themselves. In the early stages of the War for Independence they rejected the use of African-American soldiers; and only the dire emergencies brought on by military reverses persuaded George Washington and his council of war to employ Negro troops. African-Americans themselves were quite aware of the inconsistency of the colonists' position of fighting for their own freedom while withholding it from others. It was left to them, moreover, to make the most uncompromising plea for the freedom of all peoples. A group of Massachusetts slaves in 1777 told the General Court that "they have in Common with all other men a Nature and Unaliable Right to that freedom which the Grat Parent of the Unavers hath Bestowed equalley on all menkind and which they have Never forfeuted by any Compact or agreement whatever..."<sup>6</sup>

Similarly, African-Americans who were free suffered racial discriminations of one kind or another at the hands of the white leaders during the War. They were not permitted to vote, despite the fact that a major issue of the whites' case against Britain was that the mother country had not granted them the opportunity to vote for representatives in Parliament. When free blacks, who were qualified to vote by every objective criteria, including the ownership of property, attempted to vote, they were refused. And, when following the example of the white colonists in their struggle

against Britain, they refused to pay their taxes, they were sent to jail.<sup>7</sup> Thus, it seems clear that Europeans on the western side of the Atlantic brought with them into the revolutionary movement preconceptions that were not only undemocratic but racist as well, and from which emerged a range of views and policies that were so ambivalent at best, and so hypocritical at worst, that they would haunt Americans from that day to this.

Two other events of the revolutionary era deserve mention as we canvass the range of items that Europeans should understand about African-American history. In 1782 a French émigré, Hector St. Jean de Crevecoeur, published an engrossing little volume, *Letters from an American Farmer*, that immediately gained a wide readership on both sides of the Atlantic. Crevecoeur's enthusiasm for his new home was virtually boundless, and he was persuaded that the New World had produced a new man, the American. "What then is the American this new man?" he asked. Answering his own question, he said, "He is either an European, or the descendant of an European, hence that strange mixture of blood, which you will find in no other country. I can point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman and whose present four sons have now four wives from different nations. *He* is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds... Here individuals of all nations are melted into a new race of men, whose labours and posterity will one day cause great changes in the world."<sup>8</sup>

By suggesting that only Europeans were involved in the process of becoming Americans, Crevecoeur pointedly ruled out three quarters of a million African-Americans already in the country who, along with their progeny, would be regarded as ineligible to become Americans for at least another two centuries. To be sure, the number of persons of African descent would increase enormously, but the view of their ineligibility for Americanization would be very slow to change. And when such a change occurred, even if it merely granted freedom from bondage, the change would be made most reluctantly and without any suggestion that freedom qualified one for equality. It was beyond the conception of Crevecoeur, as it was indeed beyond the conception of the founding fathers, that Negroes, slave or free, could become true Americans, enjoying that fellowship in a common enterprise about which the French émigré spoke so warmly. Americanization in the late eighteenth century was a precious commodity to be valued and enjoyed only by a select group of persons of European descent.

The other event was the writing of the Constitution of the United States in the summer of 1787. Many of the nation's most creative and profound thinkers came together to design a new frame of government, with John Adams and Thomas Jefferson being the notable absentees. But there were Alexander Hamilton, Benjamin Franklin, James Wilson, James Madison, and the Pinckneys of South Carolina. Here was the grand opportunity to make good on any professions of equality, a chance to create a free social order that would pay homage to the dignity of man, a golden moment in which to set a shining example of democratic self-government for all the world to see and to follow if it was so inclined. But here the equivocation on the

critical issues of freedom and bondage was even more pronounced, if such was possible, than it had been when the colonists issued the Declaration in 1776.

In the discussion over the slave trade during the Constitutional Convention, only practical and economic considerations held sway. Humane considerations simply did not arise. Maryland and Virginia opposed the slave trade because they were overstocked. South Carolina and Georgia, where the death rate in the swamps was high and where slaveholders needed new recruits, demanded an open door for slave dealers. The opponents of the slave trade were content to temporize and compromise and content themselves by agreeing that the slave trade could not be prohibited for another twenty years.<sup>9</sup> One need only look at the slave importation figures between 1788 and 1808 to appreciate how much advantage was taken of this generous reprieve. Thus, perhaps the most inhumane aspect of the abominable business of trading in human beings, the foreign slave trade, was tolerated *legally* for another twenty years and *illegally* until the end of the Civil War.

The members of the Constitutional Convention did no better when it came to counting slaves for purposes of representation and taxation. Northerners, gradually divesting themselves of their own slaves whom they regarded as property, insisted that for the purpose of representation they could not be counted as people. Southern slaveholders, while cheerfully admitting that slaves were property, insisted that they were also people and should be counted as such for purposes of determining representation. It is one of the remarkable ironies of the early history of the United States that the very men who had shouted so loudly that all men were created equal, could not now agree on whether or not persons of African descent were men at all. The irony was compounded when, in the so-called major compromise of the Constitution, the delegates agreed that a slave was three-fifths of a man, meaning that five slaves were to be counted as three persons.<sup>10</sup> Racism can work magic with the human mind. One wonders whether Catherine Drinker Bowen had this in mind when she called her history of the Constitutional Convention *The Miracle at Philadelphia*.

Finally, at Philadelphia, slaveholders wanted to be certain that the Constitution recognized slaves as property to be protected by the Constitution, especially if the property ran away. The slaveowners had already won such sweeping constitutional recognition of slavery that the fugitive slave provision may be regarded as something of an anti-climax. Thus, slaves who ran away were not to enjoy the freedom that they had won in their own private war for independence, but were to be returned to those who claimed title to them.<sup>11</sup> Consequently, there was a remarkable distinction between fighting for one's political independence, which the patriots expected to win, and did, and fighting for one's freedom from slavery, which these same patriots made certain that the slaves would not win.

By the end of the revolutionary era, the status of Africans in America had evolved to the point where it was hardly debatable regarding their degradation. From indentured servants with perhaps few rights in the early seventeenth century, they had become slaves in perpetuity with no rights that a white man was bound to respect, as Chief Justice Taney was to say later in describing the status of blacks during the revolutionary era. One can say that at least up to this period the whites in the New World were essentially Europeans, shaping the course of New World history with

remarkable talents and resourcefulness. There was also a ruthlessness, bordering on barbarism, that conceded no quarter to competitors, interlopers, or those who sought simple justice. Thus, the colonial history of African-Americans was shaped primarily by Europeans, and Europeans should understand the critical role that they played in those formative years.

## II

If one is not completely overwhelmed by Crevecoeur's argument that a new man, the American, had emerged by the end of the eighteenth century, it is possible to see some continuing influence of Europeans on African-American history in subsequent years. One crack began to appear in the slavery wall as Northern states gave up slavery and gradually began to assume the role of moral giants lording it over the lowly slaveholders, if not always over the prosperous slave traders who continued to flourish among them. Many of those who lived in the areas that came to be called the free states and territories developed and nurtured an antipathy to the institution of slavery as one not only abhorrent but alien to the high moral standards maintained in the free states. Their condemnation of slavery and slaveholders ranged all the way from the relatively mild censure of slavery by intellectuals such as Theodore Parker and Ralph Waldo Emerson to the maledictions expressed by William Lloyd Garrison and Samuel Grandisson Finney. Adding their eloquent attacks were such black abolitionists as Frederick Douglass, William Wells Brown, Sojourner Truth, David Walker, and Henry Highland Garnet.<sup>12</sup>

Slaveholders would not take these strictures lying down, and as they began to develop strong defenses of the institution of slavery and sought to justify it, they used whatever sources of support they could find. Central to the defense of slavery was the doctrine of the superiority of the white race, a defense based on the scriptures, ethnology, politics, economics, and sociology as well as traditions, beliefs, etiquette, and even superstitions. From every part of the slave states they came, these fearless, eloquent defenders of slavery. Educators such as Thomas Roderick Dew of Virginia, legal luminaries such as William Harper of South Carolina, and members of the clergy such as Thornton Stringfellow of Virginia examined slavery from every possible angle and found it to be a healthy, legal, divinely ordained institution.<sup>13</sup>

The defenders of slavery not only insisted that it was good for the nurturing of white civilization but that it was beneficial to the slaves as well. Surely, they concluded, the most absurd eventuality that one could imagine was the effort on the part of blacks to secure their own freedom. Thomas R. Dew, for example, ridiculed the idea that blacks could or should carry on a struggle for *their* freedom such as some Europeans were doing in the nineteenth century.

There are some who, in the plenitude of their folly and recklessness, have likened the cause of the blacks to Poland and France, and have *darkly hinted* that the same aspirations which the generous heart breathes for the cause of bleeding, suffering Poland, and revolutionary France, must be indulged for the *insurrectionary blacks*. And has it come at last

to this? that the hellish plots and massacres of Dessalines, Gabriel, and Nat Turner, are to be compared to the noble deeds and devoted patriotism of Lafayette, Kosciusko, and Schrynecki? There is an absurdity in this conception, which so outrages reason and the most common feelings of humanity, as to render it unworthy of serious patient refutation.<sup>14</sup>

Dew's heart went out to the freedom fighters of Europe, but there was no place in the circle of free human beings for persons of African descent.

A number of Europeans felt the same way, and in due course they joined in the general support of the proslavery argument. The position they took was at a much higher, more theoretical, and - they would insist - on a more scientific level. Perhaps it would not be too much to say that if Americans were preoccupied with the practical arguments for the justification of slavery, the Europeans were more concerned with developing the principles of scientific racism. That is not to say that some Americans were not involved in developing and expounding theories of scientific racism. Surely, Josiah Nott and George Gliddon in their *Types of Mankind* and Samuel C. Cartwright in his "Diseases and Physical Peculiarities of the Negro Race," did what they could to bolster theories of scientific racism.<sup>15</sup> But their attention was invariably diverted by the practical consequences arising from the presence of three or four million African-Americans in their midst. This bald fact brought them down to earth post haste!

If any additional support was needed to bolster the argument about scientific racism, it was provided by the French man of letters, Joseph Arthur Comte de Gobineau. In 1853-55 he published his monumental *Essai sur l'inégalité des races humaines*, called by William Stanton "the Bible of nineteenth century racists."<sup>16</sup> With little concern for the impact of his findings on the institution of slavery, Gobineau merely set forth his argument supporting the view that Aryan purity could be maintained only by preserving and strengthening the Nordic strains. This was not exactly what the doctor ordered for the defense of slavery, especially since the mixture of the races in the South was so obvious with the burgeoning mulatto population. It was, at the same time, a rebuke to the James Hammonds and the other defenders of slavery who had no qualms about sleeping with their female slaves and producing a progeny of "half-breeds" as some called them.<sup>17</sup> Their presence was a denial, moreover, of those who, believing in two distinct species, claimed that a union of the two could not produce perfectly fertile offspring.

What is important here for understanding African-American history is that it was the collaboration, in a sense, of Europeans and white Americans that established the theoretical and scientific basis for racism that persisted into the twentieth century.

Once the Civil War had ended and all the slaves had gained their legal freedom, racism had such a powerful, practical and jurisprudential base that it would be extraordinarily difficult to dislodge it. Scientific racism, so-called, was replicated in such vulgar if unlikely treatises as Charles Carroll's *The Negro a Beast*, William P. Calhoun's *The Caucasian and the Negro in the United States*, and Robert W. Schufeldt's *The Negro, a Menace to Civilization*.<sup>18</sup> The slave codes took on new life in later years as black codes, and the degradation of slavery found a new identity in segregation, discrimination, and disfranchisement. It is not difficult for a black Amer-

ican to see in the racism of the United States a role model for the Aryan racism of Nazi Germany, or the system of apartheid in South Africa. American racism was exported in large quantities and in many different modes in our overseas operations during two world wars. And what is easy to see, therefore, is the manner in which the venom of racism moves around the world, reinforcing and reinvigorating its counterpart wherever it happens to be.

This, then, is essentially what Europeans should understand about African-American history: First, that in transporting Africans to the New World and in interacting with them economically, culturally, even physically, Europeans contributed an indispensable ingredient to the emergence of a new, distinctive historical scenario that has been at once exciting and depressing. Secondly, that in justifying the capture, transportation, and enslavement of peoples so different from them and yet so necessary to their own social and economic well-being, Americans - in collaboration with Europeans - developed an ideology not only of slavery but also of race, whose venom was so infectious that it would challenge the very existence of the United States in the nineteenth century, and of western civilization itself in the twentieth century. Finally, there can be no extended contact between two groups of people without both groups being deeply and permanently affected by the contact. That is why the study of the history of African-Americans is so fascinating and why, in more recent years, we have come to recognize the manner in which the history of black and white Americans is so inextricably woven together.

### III

It remains for me, in these final minutes, to indicate, in the context of what I have already said, what Europeans should understand about the history of African-American history.<sup>19</sup> They should know that in 1882, when George Washington Williams published his monumental *History of the Negro Race in America*, the emphasis was on defining and describing the role of blacks in the history of the country. For another generation, there were no trained historians among them, except for W.E.B. Du Bois who gave more attention to social and political reform than to the writing of history. And in the face of attacks made on the moral, mental, and physical characteristics of Negroes by a veritable chorus of white American writers, the feeble cry of those blacks who were articulate was that they were being attacked and defamed by dishonest racists. To redress the balance, they wrote such books as *The Progress of the Race*, *A New Negro for a New Century*, and *The Remarkable Advancement of the American Negro*. While few of them can be commended for their scholarship, they were not complete failures when compared with the attacks on them by white historians who had all the advantages of historical training in the United States and in Europe.

Two major events occurred in 1915 that greatly affected the course of African-American historiography. One was the publication of *The Negro* by W.E.B. Du Bois, a unique monograph by a man of remarkable intellectual gifts, and the other was the

founding of the Association for the Study of Negro Life and History by Harvard-trained Carter G. Woodson. Under the auspices of the Association, Woodson not only launched the *Journal of Negro History* in 1916, the first learned journal published by African-Americans, but sponsored a series of monographs on nineteenth century African-American history that were, in many ways, models of historical scholarship. In addition, because he appreciated the critical importance of people knowing and understanding their own history, Woodson held annual meetings of the Association, inaugurated "Negro History Week", and published the *Negro History Bulletin* to be used in the schools. Coming to maturity when it did, shortly after the close of World War I, it raised the consciousness of Negro Americans at a time when they were suffering the humiliation of race riots and various forms of recrimination growing out of their war-time experiences.

A third period of Negro-American historiography began with the publication in 1935 of *Black Reconstruction*, by W.E.B. Du Bois. After many years as an activist with the National Association for the Advancement of Colored People, where he was editor of *Crisis Magazine* and Director of Research, Du Bois returned to the field of history with a quite original account of "the part which black folk played in the attempt to reconstruct democracy in America." What it lacked in original research, it more than made up in its interpretation of the period following the Civil War as one characterized by a conservative reaction and a betrayal of the basic principles of freedom and equality. It was in this period, moreover, that historians of black America were put to the ultimate test of trying to remain detached at a time when they were especially sensitive to the hypocrisy of the United States in fighting racial bigotry abroad and practicing it at home.

A salient feature of this period was the increasing number of white historians taking up the study of Afro-American history. They began to study slavery, which had been neglected for such a long time; and they turned to the study of Negro intellectual history, while others gave attention to Afro-Americans in the antebellum North and Afro-Americans in urban settings. Woodson, who always welcomed whites into the Association for the Study of Negro Life and History, and invited distinguished white historians to sit on the editorial board of the *Journal of Negro History*, would have been pleased with this new development, much of which occurred after his death in 1950.

The fourth period, which began around 1970, is characterized by having the largest and best trained group of historians studying African-American history that has ever existed. They have been trained at many centers of historical study in various parts of the country, and their range of interests goes from the colonial period to recent years, from black institutions to cultural subjects, from economic activities to military service. They are white, black, Asian and European. The field has gained both respectability and prestige, and courses in the field are to be found at most major American institutions. The national and regional historical associations give considerable attention to the study of African-American history both at their annual meetings and in their journals.

Perhaps it was because scholars in the field of African-American history saw so many opportunities to reinterpret the field that such a large number of them were en-

gaged in research and writing. There was zeal, even passion, in much that they wrote, for they were anxious to correct the errors and misinterpretations of early historians. Thus, some of them undertook to reinterpret the racist historians of an earlier day. Europeans should know, however, that all these developments did not necessarily have a sound intellectual basis. After all, the pursuit of African-American studies has become a lucrative field, and some of the writing has been stimulated by publishers who have been anxious to take advantage of a growing market. Consequently, as in any other field, some of the work produced has been more for financial gain than intellectual enrichment; and it shows. In due course, in the free market of ideas, the less deserving works have tended to fail in their effort to attract much attention.

Europeans should know that what they began in the sixteenth and seventeenth centuries has had a most important history that has, at long last, come to be regarded as being respectable and having intellectual validity. But Europeans already know so much about this. In the last forty years, they themselves have been active participants in the study and writing of African-American history. The various associations of American studies in Europe, the journals that are now being published, and the institutes and departments that offer courses in American history and literature all take cognizance of African-American history. Thus, the circle has become full, for in the study of African-American history it is inevitable that Europeans will discover their own importance in making this into a field of study and of giving it a special blessing as they engage in their own study of it.

#### Notes

- 1 Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968), pp. 3-43.
- 2 *Ibid.*, p. 75.
- 3 Leonard W. Labaree et al., eds., *The Papers of Benjamin Franklin* (New Haven: Yale University Press, 1961), IV, p. 234.
- 4 Julian P. Boyd, *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1959), I, pp. 494-496.
- 5 The early draft is discussed and analyzed in Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Alfred A. Knopf, 1953), pp. 141-151.
- 6 *Collections*, Massachusetts Historical Society, 5th Series, III (Boston, 1877), pp. 436-437.
- 7 For an account of the experiences of the Cuffe brothers who were denied the vote, see Lamont D. Thomas, *Rise to be a People: A Biography of Paul Cuffe* (Urbana: University of Illinois Press, 1986), pp. 9-11.
- 8 Hector St. John De Crevecoeur, *Letters from an American Farmer* (London: J.M. Dent and Sons, 1912), pp. 43-45.
- 9 *The Constitution of the United States*, Article 1, Section 9.
- 10 *Ibid.*, Article 1, Section 2
- 11 *Ibid.*, Article 4, Section 2.



- 12 For discussions of the abolitionists see Martin Duberman, *The Antislavery Vanguard* (New York, Alfred A. Knopf, 1965) and Benjamin Quarles, *Black Abolitionists* (New York: Oxford University Press, 1969).
- 13 Drew Gilpin Faust, ed., *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860* (Baton Rouge: Louisiana State University Press, 1981), the Introduction.
- 14 *Ibid.*, p. 59
- 15 William Stanton, *The Leopard's Spots: Scientific Attitudes Toward Race in America, 1815-1859* (Chicago: The University of Chicago Press, 1960), *passim*.
- 16 *Ibid.*, p. 59. See, also, John Hope Franklin, *The Militant South: 1860-1861* (Cambridge, Harvard University Press, 1956), pp. 80-95.
- 17 Drew Gilpin Faust, *James Henry Hammond and the Old South: A Design for Mastery* (Baton Rouge: Louisiana State University Press, 1982), p. 314ff.
- 18 For a discussion of the latter-day advocates of racial superiority, see John Hope Franklin, "Ethnicity in American Life: The Historical Perspective", in *Race and History: Selected Essays, 1938-1988* (Baton Rouge: Louisiana State University Press, 1989), pp. 321-331.
- 19 The recent history of African-American history is examined thoughtfully and extensively in August Meier and Elliott Rudwick, *Black History and the Historical Profession* (Urbana: University of Illinois Press, 1986) and Darlene Clark Hine, ed., *The State of Afro-American History: Past, Present, and Future* (Baton Rouge, Louisiana State University Press, 1986).

## Paradoxes of Women's Citizenship in the United States

Linda K. Kerber

I am deeply honored by the invitation to offer this Ernst Fraenkel Lecture, commemorating a brave lawyer, political scientist, and early faculty member of the Free University of Berlin. As a Jewish refugee from Nazi Germany, Fraenkel had the most desperate of reasons to contemplate the paradoxes of citizenship in the modern world. In *The Dual State: a Contribution to the Theory of Dictatorship*, published in the United States in 1940, he wrote of "the paradox of a capitalistic order continuing within a system under which there is no possibility of rationally calculating social chances." Our topics are quite different, and mine not so brutal, but I like to think that we share an interest in and taste for irony, skepticism and paradox.

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The citizenship of individuals is normally understood in terms of rights; of the claims which the citizens can, by virtue of their citizenship, make on the state. Thus, for example, the Kentucky Court of Appeals, in 1822: it is "not the place of a man's birth, but the rights and privileges he may be entitled to enjoy, which makes him a citizen."

When American women's rights advocates became restive at the derivative and marginalized citizenship by which they were defined, they most frequently complained in terms of rights and privileges which they felt themselves denied, notably the right to vote. It is my impression, although I have not studied this at any length, that this observation would also be true for women's rights advocates in western Europe as well. Claiming the right to vote has been the most visible, the most easily publicized of women's claims to citizenship; it required the longest and most visible public campaigns. Although the history of women's suffrage has certain parallels to the history of men's claims for suffrage, it has not been at all the same. Indeed, as the historian Carl Degler pointed out a decade ago, some aspects of the two histories have been contradictory. Through the nineteenth century, when barriers of race and property to male suffrage were steadily eroding, barriers to woman's suffrage retained their force and seemed virtually impervious to change.

But the rights of citizenship are not reducible to suffrage alone, nor is citizenship reducible to rights. Citizenship also involves a wide range of civic obligations — patriotic loyalty, the payment of taxes, jury service, military obligation — indeed all aspects of the relationship of the individual to the state. Just as the long and complex history of women's suffrage is quite different in its ingredients than the history of men's suffrage, so the histories of each of women's obligations to the state are quite different from the histories of men's obligations to the state.

The language of citizenship is a language of claims — claims to civic identity, to authority, to reciprocal obligation, and to mutual consent. These claims have developed historically, but most legal scholars have tended to set them in a timeless, philosophical context. The work of legal historians has leaned heavily on argument from

judicial opinions, one opinion leading to another, marginalizing women as active agents in the reconstruction of the understanding of citizenship and of the political context for change. As I review these different histories, I am struck by how problematic women's relationship to the state has often seemed. Each political generation since the Revolution — including our own — has had to struggle with an aspect of women's citizenship which it perceived to be deeply paradoxical and resistant to solution.

This afternoon I shall discuss three court cases, stretching from the era of the American Revolution to the present, which capture aspects of the paradoxical relationship between women and the state in America. These narratives are yet another example, if more are needed, of how risky it is to assume that the same historical narrative will describe women's experience as well as men's. These cases help us identify some strategic moments when the relationship between women and men, and between men, women and the state has been problematic. They demonstrate that the political discourse of citizenship has been gendered since its origins, in ways that we are only beginning to understand. I offer them as contributions to a richer, more complex historical narrative of citizenship in the United States.

## I. The Paradox of Political Obligation

Sometime during the Seven Years War, Anna Gordon, the daughter of a wealthy Boston merchant, married William Martin, a British officer in the Royal Regiment of Artillery, who was stationed in the colonies. When Anna and William Martin and their children fled Massachusetts for Halifax, New York City and ultimately London, they left behind substantial properties which Anna Gordon Martin had inherited from her father — farms, unimproved land, and a house near the Boston harbor. The formalities of confiscation were final in 1781.

Exactly twenty years later, their son James appeared before the Supreme Judicial court of Massachusetts, demanding the return of the properties confiscated from his mother.<sup>1</sup> His lawyers, the well-established Boston practitioner George Blake, and Theophilus Parsons, a leader of the most conservative wing of the Massachusetts Federalist party, implicitly acknowledged that the patriot government had been within its rights when it seized the property of William Martin and other male loyalists. It was understood that the rebel government had a right to make violent claims on the loyalty of all men who lived on its soil. But Martin's lawyers argued that the state had no right — and, indeed, that the revolutionary government of Massachusetts had never intended — to claim the loyalty of married *women* inhabitants and to enforce this claim by the seizure of their property. A married woman, they believed, was not bound by the obligations of a patriot.

According to Anglo-American civil law, which the revolutionary state governments did not change, women were understood to have surrendered their claims to independent agency at marriage. The legal concept, known as *coverture*, assumed that within a marriage there could be only one will, and that will was the husband's. In colonial America, a complex series of rules defined varying degrees of control which husbands might exercise over the property of their wives; in general, husbands con-

trolled all property which wives brought into the marriage and might sell or devise two-thirds of it in their wills. The other third — the dower property — was guaranteed to the widow for her *use* during her lifetime; after her death it reverted to her husband's heirs (who might be the same as her own, but not necessarily). Property which married women directly *inherited*, however, like the property of Anna Martin, normally stayed in the woman's family line and descended to *her* heirs.

Classical republican theory assumed that citizens could not display independent judgment unless they controlled a reasonable amount of property; the votes of those with little property were thought to be vulnerable to manipulation by the rich. Since married women had surrendered control of their property (and of their bodies) at marriage, it seemed to follow that their judgment must necessarily follow that of their husbands. It was not that they could not *think* independently of their husbands, but rather that husbands could enforce subservience by their control of their wives' property and — in extreme cases — their wives' physical bodies. Therefore the expressed judgment of the wife could not be trusted to be independent; to give her a public voice was, it was thought, rather to give married men the advantage of *two*.

Martin's lawyers leaned heavily on this reasoning in their argument before the Supreme Judicial Court. They made explicit what had always been implied in the concept of the *feme covert*, the woman "covered" with her husband's legal identity. The Confiscation Act addressed itself to "every *inhabitant* and *member* of the state...." Women were inhabitants of the state; were they also *members*? Martin and his lawyers thought not.

Upon the strict principles of law, a *feme covert* is not a member; has no *political* relation to the *state* any more than an alien... The legislature intended to exclude *femes covert* and infants from the operation of the act; otherwise the word *inhabitant* would have been used alone, and not coupled with the word *member*.

The relation between the state and its members was reciprocal: the state offered protection for persons and property and in return received the "personal services" and the "aid and assistance" of its members in the event of attack and invasion.

But women were of no use in the defense of a state; indeed, in time of war it was usual to send them far from the places where enemies converged. If a woman withdrew from the government with her loyalist husband, he should be punished, but not she: "If he commanded it, she was bound to obey him, by a law paramount to all other laws — the law of God." It would be hard to imagine a more thorough rejection of the concept of women's independent citizenship than this: she could not be a patriot, because she owed her loyalty to her husband, even if he were disloyal; she had "no more relation to the state than an alien."

But Attorney-General Daniel Davis and Solicitor-General James Sullivan, arguing for the State of Massachusetts, challenged that view. They emphasized that the confiscation statute used the words "any person"; they interpreted the statute to define all *persons* as "inhabitants and members of the state" who owed it not only physical service where appropriate but also the emotion and mental act of allegiance. They insisted that the pronoun "he" in the statute was generic, not specific. "Cannot a *feme-covert* levy war and conspire to levy war?" Sullivan demanded. "She certainly can

commit treason; and if so, there is no one act mentioned in the statute which she is not capable of performing."

Sullivan and Davis maintained that the state had a right to expect that Anna Martin *would* indeed make her judgment independent of her husband. When she left with her husband, like him she had thrown her lot with the British; she and her heirs had no right to complain when the patriot government seized her property. This argument is the most radical interpretation of the legal status of women which I have yet seen to emerge in revolutionary era political thought; that it was not sustained does not negate the stunning force of its departure from centuries of precedent in English and American legal theory and practice.

All four judges, Federalist by conviction and deeply conservative by temperament, voted to support James Martin's claim to his mother's property. In their opinions, the judges stressed the authority of the husband under the system of coverture; they chose common law precedent over natural law innovation. They agreed that the married women had no obligation to the revolutionary government; they defined as absurd and cruel a situation in which wives would be encouraged to make a political choice which might contradict the political choices of their husbands. Although the state had demanded that sons rebel against their fathers, they thought it was impossible to imagine the revolutionary coalition in Massachusetts as having intended — at the time of the drafting of the Confiscation Law of 1779 — to have called upon married women to rebel against their husbands. Judge Theodore Sedgwick observed:

A *wife* who left the country in the company of her husband did not *withdraw* herself; but was, if I may so express it, *withdrawn* by him. She did not deprive the government of the benefit of her personal services; she had none to render; none were exacted of her.

It is significant, I think, that the state undertook the defense of this case so seriously, and that James Sullivan and Daniel Davis offered the arguments they did in favor of the civic capacity of women. Neither was outrageously radical; Sullivan was associated with the moderate center of the Jeffersonian Republican party, and he was capable of elitist opinions on many matters. But Sullivan took pride in his participation in the judicial decision, in the Quok Walker case of 1781, to ban slavery in Massachusetts; he had defended Universalists in their struggles with conservative churches, and had written a powerful pamphlet in support of the French Revolution. In Sullivan's language, the insistence that married women had the power to make choices was associated with a vision of the Revolution as deeply radical, a violent rearrangement of traditional hierarchical relationships — between master and slave, between established churches and their competitors, even between husbands and wives.

The ironic paradox of women's patriotic obligation in the early republic is that the result of treating Anna Martin as a "member" of the Commonwealth was that she and her heirs would have had to forfeit their property. She and her heirs benefited financially only if she were defined as a person with no civic capacity. Sullivan lost his case; the revolutionary generation resolved the paradox in a way which left the traditional relationship of women to the state undisturbed. It was left to the next generations of women — epitomized by Elizabeth Cady Stanton, the grand-daughter of a

revolutionary war soldier, whose long life spanned the work of three generations of politically active women — to attack the absolute claim of husbands to their wives' bodies, and, by extension, to the control of their wives' property and ultimately of their wives' political judgment.

## **II. The Paradox of Jury Service**

By the early twentieth century, virtually every state recognized the right of married women to hold property in their own names (although the details of these laws varied greatly). Over the course of the nineteenth century, the older association of property ownership and the right of suffrage had also eroded; in 1920 the right to vote became one of the rights of citizenship guaranteed to American women. Since traditionally the names of jurors were drawn randomly from lists of registered voters, it seemed to follow that women now were also obliged to serve on juries. Many states adjusted their laws to recognize that obligation. By 1923, eighteen states and the territory of Alaska had arranged for women to serve on juries.

But then the momentum ran out; even in states which were early to add women to their juries, it was not clear whether jury service was a right or an obligation. In many states, even when women's names were added to the pool from which jurors were selected, they could choose to be exempted from service if they were called. In other states women were fully excluded from jury service; in Louisiana this exclusion persisted until 1975. In still other states, women's names were added to the jury pool only if they specifically registered their wish to serve.

In the discourse over jury service was embedded much that was otherwise left unexpressed about women's relationship to the political community and of the capacities of women's minds. The exclusion of women reflected the position that women don't "belong" in the courtroom; that they are too frivolous to take serious matters seriously. Sometimes exclusion reflected the position that women should be offered a certain indulgence because of the weakness of their sex; that excusing women from jury service protected them from exposure to testimony about crude and violent crime that they were apt to hear there, and from embarrassment at having to discuss these things with men in the jury room. Excusing women from jury service was often understood not to be a denial of right but an expression of privilege. Those who insisted that women belonged on juries sometimes argued that there are things which women intuit better than men do. Only rarely was the claim made that women's experience and interests are distinct from men's and that courtroom equity requires their presence.

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Gwendolyn Hoyt was 32 years old in 1957 when she killed her husband Clarence, an air force pilot, with a broken baseball bat which their eight-year-old son had found. Theirs had been a difficult marriage — they had once been divorced and remarried, and there was also a history of domestic violence. She suffered from mild epilepsy. They had been living in Tampa, Florida since 1950; he was stationed at

Homestead Air Force Base and returned to their home infrequently. He received telephone calls from strange women; on at least one occasion he beat Gwendolyn Hoyt "unmercifully."<sup>2</sup>

On September 18, 1957, Gwendolyn and Clarence Hoyt spent the evening visiting friends who knew of their marital troubles. When they returned home, she said at her trial, "I put on a night gown which he liked. But when I went to him where he was lying on the davenport ... He says 'Don't, I won't touch you.' And we just had to discuss our marriage, our problems. I said, 'You just got to discuss them. We've just got to' ... I was turning around, I saw the bat and I picked it up. I thought I'd put it into the trash ... when I went in there, he turned over and he said, 'Don't bother me. Get away. I'm going back to Homestead in the morning, and that'll be the end of it.' That's when I hit him." "I just picked up that horrible bat to throw it away," she told reporters two days later. "The room was dark, and I struck out to hurt him. If it hadn't been for [that horrible] bat, I would have slapped him — and then he probably would've gotten up and slapped me back and none of this would have been."

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Clarence Hoyt died the following day, and Gwendolyn Hoyt was charged with second-degree murder. Her defense attorneys pled "not guilty by reason of temporary insanity." They also objected to the all-male jury.

Until 1949 women had been totally excluded from service on Florida juries. When the law was changed, partly at the urging of women's rights groups, six-person juries were selected from all males registered to vote and those female voters who had registered their desire to serve with the clerk of the circuit court. Although 46,000 women made up 40% of the registered voters of Hillsborough County, only 275 women had volunteered for jury service, barely 35 of them in the 5 years preceeding 1957. The Jury Commissioners drew a list of 10,000 jurors; the list that was used in the Hoyt case included only 10 to 15 women's names.

Hoyt's lawyer, C. J. Hardee, moved to quash the jury panel on the ground that the Florida statute on jury service denied Gwendolyn Hoyt her constitutional right to a fair trial. The Criminal Court judge who tried the case denied the motion, partly on the grounds that the claim was so basic that "we ought to have the Appellate Court first to declare the act unconstitutional, if it is unconstitutional." But Judge L. A. Grayson also observed: "Throughout our entire history...women have been treated as superior to men, until they sought to get equal rights and got brought down to our level. They are now our equals and no longer our superiors."

After three days of what the newspapers called "bitter and intimate" testimony, it took the six-man jury only twenty-five minutes to convict Gwendolyn Hoyt of second-degree murder. On January 20, 1958, she was sentenced to imprisonment at hard labor for thirty years. Hardee appealed to the Florida Supreme Court. He lost, but was determined to appeal the case to the U.S. Supreme Court. Gwendolyn Hoyt moved back to her family's home, north of Boston, Massachusetts, to avoid publicity. Her family's minister there persuaded a distinguished Boston attorney, Herbert Ehrmann, to handle the appeal. Ehrmann in turn gave most of the responsibility for pre-

paring the appeal to his young assistant, Raya Dreben, a recent graduate of Harvard Law School. Dreben, in correspondence with Hardee, wrote the brief for the appeal to the Supreme Court; the American Civil Liberties Union filed its own supporting brief as a "friend of the court."

So far as the State of Florida was concerned, the case was an easy one. The facts were not in dispute. Was an all-male jury capable of offering Gwendolyn Hoyt a fair trial? The state was certain that it could. Twenty years earlier, when women had been *totally* excluded from jury service in Florida, a state Supreme Court judge had denied a claim by a woman that she had the right to be tried by a jury for which other women were eligible. What Gwendolyn Hoyt really wanted, said Florida Assistant District Attorney George Georgieff, was not justice, but favoritism.

She has no constitutional right to female friends' on the jury.... 'Impartiality' is a *state of mind*. Its existence or absence does not depend upon whether the juror is male, female, black, white or what have you.

Offering women an easy excuse from jury service was, Georgieff thought, a reasonable recognition of their domestic obligations:

Ever since the dawn of time conception has been the the same....The rearing of children, even if it be conceded that the socio-psychologists have made inroads thereon, nevertheless remains a prime responsibility of the matriarch.... The advent of 'T.V.' dinners does not remove the burden of providing palatable food for the members of the family, the husband is still, in the main, the breadwinner, child's hurts are almost without exception, bound and treated by the mother....*The only bulwark between chaos and an organized and well-run family unit is our woman of the day.* [my italics]

Gwendolyn Hoyt's attorney could not claim temporary insanity as it was usually understood. What they tried to establish was extreme mental destabilization engendered by the effects of her epilepsy. It was, argued the defense, the effects of her epilepsy *combined* with the normal response of a woman to her husband's infidelity that had triggered the attack.

A defense framed this way needed women on the jury to confirm that Gwendolyn Hoyt's had been a *woman's* response. Since second-degree murder required an act "evincing a depraved mind regardless of human life," wrote Dreben, "The issues before the all-male jury involved the determination of a woman's state of mind." To argue this point effectively, they had to stress the *difference* between men and women. The defense used the findings of a study which seemed to show that in jury deliberations, women show "more social and emotional specialization," while men are more "task-oriented"; that women "tend to play the role of mediators, and to break tensions more than men." As a woman, Gwendolyn Hoyt had a right to a women in the pool from which jurors were drawn; taken further, she *needed* women on her jury, because women's distinctive emotional configuration would make it more likely that women could understand her plea. Paradoxically, the defense had to call on stereotypes similar to those that the prosecution used, but deploy the stereotypes differently.

The Supreme Court's decision was unanimous. "If women are politically aggressive, if they really want not to [have to] register," observed William O. Douglas,



"the legislature could change the law." The Justices were not dismayed by the miniscule number of women who had volunteered. They allowed states to choose whether jury service was to be understood as a privilege or as an obligation. And, for the majority, jury service was positioned against women's obligation to nurture. Harlan wrote:

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. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, 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.

Raya Dreben had hoped that her historically based *Hoyt* brief might do for legal precedents which permitted exclusion of women from jury service something analogous to what *Brown v. Board of Education* had done for *Plessy v. Ferguson*. But it did not. That change would have to wait for two developments. The first, of course, was a civil rights movement which opposed *all* exclusion on the basis of physical and innate characteristics, not only of race but also of sex. The major test cases were *White v. Crook* (1966) and *Taylor v. Louisiana* (1975). But even *Taylor*, in which a man convicted of kidnapping successfully overturned his sentence on the grounds that Louisiana had denied him trial by a jury drawn from the full community because women were still fully excluded from jury service, did not address the matter of what specifically was lost when women were excluded. The argument for women's service on juries was still framed in terms of the "flavor" they added, the "quality" that was lost if they weren't there.

The second development occurred in the late 1970s, when the battered woman's defense was articulated by feminist lawyers. The "battered woman's defense" revised concepts of appropriate force: a small woman who killed an unarmed man with a pistol was now understood to be acting reasonably. The battered woman's defense recognizes that men and women may indeed be differently situated in relation to the law, and that women may bring to their jury service predictably different experiences and interests than do men.

The paradox of women's jury service was largely resolved by the 1980s. Equal citizenship is now understood to mean equal obligation to jury service; the defendant's right to an impartial jury is understood to mean that all adults in the community are equally vulnerable to be called for jury service. The observations about the conflict between women's obligations for domestic service at home and women's civic obligation that so infused the comments of lawyers and judges in the years between 1920 and 1961 strike modern readers as quaint.

### III. The Paradox of Military Obligation

In the era of the American Revolution, the word *citizen* still carried overtones inherited from antiquity and the Renaissance, when the citizen made the city possible by taking up arms on its behalf. The male citizen "exposes his life in defense of the state and at the same time ensures that the decision to expose it can not be taken without him."<sup>3</sup> This way of relating men to the state had no room in it for women except as objects of contempt. The principal section on women and the state in Machiavelli's *Discourses* is entitled "How a State Falls Because of Women."

The understanding of the citizen developed during the era of the American Revolution reached back to the Renaissance to include those who would take up arms for the defense of the republic. Thus a toast offered on the first anniversary of the Declaration of Independence: "May only those Americans enjoy freedom who are ready to die for its defence." In *Common Sense*, Tom Paine linked independence from the empire to the natural pride and independence of the grown son. "To know whether it be the interest of the content to be independent, we need only ask this easy, simple question: Is it the interest of a man to be a boy all his life?" Addressing his readers as "husband, father, friend or lover," Paine wrote "to awaken us from fatal and unmanly slumbers."

Formulations of citizenship and civic relations in a republic were tightly linked to men and manhood. Manliness and honor were sharply and ritually contrasted with effeminacy and dishonor. Women could not pledge their honor in defense of the republic, since honor, like fame, was psychologically male. The connection to the Republic of male patriots — who could enlist — was immediate. The connection of women, however patriotic they might feel themselves to be, was remote.

But the new definition of citizenship also rested on *allegiance* (as demonstrated by one's physical presence and emotional commitment), which gradually came to be given equal weight with military service. An allegiance defined by location and volition was an allegiance in which women could join. The new language of independence and individual choice (which would be called *liberal*) welcomed women's citizenship; the old language of republicanism deeply distrusted it.<sup>4</sup>

The founding generation transmitted to its successors the understanding that bearing arms was both a right and an obligation of citizenship; the awkwardly framed Second Amendment is not clear about whether the bearing of arms is limited to the context of "a well-regulated militia" but it is clear that it is "the right of the *people* to bear arms" [*italics mine*].

The first veterans' benefit enacted in this country seems to have been a pension provided by Plymouth Colony in 1636. Pensions continued to be the most common form of benefit, but other forms were gradually added, notably the preferential hiring of veterans which the federal government endorsed during the Civil War. The preferential hiring of veterans was understood to be a gesture of gratitude by the community, which offers the jobs in its control and paid for by its taxes to those who have risked their lives to protect it. The most common form are initial hiring preferences,

but promotional preferences and layoff preferences — last to be fired — were used as well.

Every state and the federal government now practices some form of veterans' preference in civil service examinations. Most states follow the federal government in granting veterans a point advantage: often 10 points for a disabled veteran and 5 for one who is not disabled. A handful of states, among them New Jersey, Utah, Washington, and Massachusetts, grant veterans *absolute* preferences — that is, veterans who achieve a passing score are placed at the top of the civil service list. In Massachusetts the veterans' preference legislation was particularly sweeping. It offered *absolute* preference for their entire lives to anyone who had served the military in wartime for so much as a single day, not necessarily in a theatre of war. Indeed, wartime is so generously defined in the statute — World War II, Korea, Vietnam were understood to be contiguous — as to cover the *entire* period from September 1940 to May, 1975. Women who served in auxiliary corps like the WACS and WAVES, as well as military nurses were specifically included.

Helen B. Feeney was not a veteran, but she had 15 years experience when she was hired in 1963 as a Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. She was promoted to Federal Funds and Personnel Coordinator with the same agency in 1967; a job she held until 1975. Meanwhile she tried to improve her position and her pay. In 1971 she took the examination for the position of Assistant Secretary for the Board of Dental Examiner. She received the second highest score, but she was ranked sixth on the hiring list, behind five male veterans, four of whom had received lower grades than she. A male veteran with a grade 8 points lower than hers was appointed to the job. This experience repeated itself. On March 28, 1975 Mrs. Feeney was laid off from her position with the Civil Defense Agency.

As the Commonwealth of Massachusetts saw it, Helen Feeney had no grounds for complaint. The veterans' preference statutes had not been intended to disqualify women; indeed, they explicitly included female veterans. Had Helen Feeney served her country, she too could have been bounced to the top of the list.

But as Helen Feeney saw it, the statutes were hopelessly lopsided. She was unemployed after repeatedly achieving examination scores which otherwise would have made her a prime candidate for placement in a range of good positions. Less than 2% of the women who held civil service appointments were veterans, while 54% of the men were. This was an accurate reflection of the fact that for most of the post-World War II period, no more than 2% of the armed forces personnel *could* be women, by U.S. law. Moreover, the women in the Civil Service were not distributed normally across the various rankings of jobs; most served in lower grade positions for which men traditionally had not applied.

The practical consequence of the operation of these proscriptions in *combination with the veterans' preference* formula was, Feeney thought, to make it virtually impossible for her to compete for the most attractive positions in the state civil service. It was, she claimed, an excessive response to the service which men had offered the state. Since most men had offered military service involuntarily, she did not see

that she, as a non-volunteer, was any more to blame for her disadvantaged position than most men were for their advantaged one.

By a 3-2 decision, the Federal District Court upheld Feeney.<sup>5</sup> Although the state's purpose — to assist veterans — was legitimate, the Court concluded that the strategy by which the state accomplished it — an *absolute* preference rather than points, a permanent preference rather than a time limit which would gear the program to veterans' re-entry into civilian life — unconstitutionally deprived women of their equal protection rights under the Fourteenth Amendment. In the spring of 1979, the state appealed to the Supreme Court.

Thurgood Marshall and William Brennan agreed with the District Court, but they were the minority in a 7-2 decision.<sup>6</sup> Helen Feeney had questioned the nature of the reciprocal obligations between the military and the civilian sectors of government. When the legislators of Massachusetts chose to take the position that the people of the state owed a major advantage in state jobs to those who had been — however recruited — part of the uniformed services, the Supreme Court refused to place a limit on the extent of this advantage. What was at issue here was what Judith Stiehm has called "the myth of substitutability"; that is, that although not every man served in combat, or had much chance of serving in combat, every man *could* have served in combat, and so was entitled to be treated as though, having risked his life for his country, he is entitled to the gratitude of the community and to civil advantages for the rest of his life. That this position was upheld suggests how much life remains in the antique republican tradition that links military service to the claims which citizens can make on their state.

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The claim that women have the capacity for political loyalty and the obligation of political loyalty was seriously contested in the early nineteenth century; it now seems an easy and obvious claim to make. But in the era of the democratic revolution, lurking behind the problem of women's political loyalty was the definition of women as wives: sexual access linked to political dependence.

The claim that women have the capacity for measured judgment, which was once thought to have been settled by the establishment of their right to education, was contested far more recently than most of us care to remember. Embedded in that problem was a construction of women as mothers; their exclusion from juries followed from a vision of the female in service to others, primarily as food givers, whether with babies at their breasts or — as the Florida attorney-general blurted out in Court — "cooking our dinners." Only through the critique of marginality developed in the civil rights movement did women's rights activists learn to define women as Other, and to deploy that knowledge to link women's claim to equal protection with that of Blacks; both were phases of the same movement for equality.

It took a century to arrive at a general consensus that jury service is a right and an obligation which rests equally on citizens regardless of gender. But of bearing arms there is still nothing resembling a consensus; indeed, ambivalence and anxiety permeate virtually all positions on the subject, whether of the left or the right. For nearly a

decade, the theoretical, analytical issues of the relationship of citizenship to military service have slumbered. I would suggest that just as the issue of jury service was left from the 1920s for resolution in the 1970s, so the military issue is one which we have left from the 1970s. It was possible to resolve the issue of jury service in the 1970s, I would suggest, because we had developed a more sophisticated understanding of women's psychology and women's competence. As late as 1961, even supporters of women's jury service could say little more than that women would bring "a certain something" to the jury room; their arguments strike us now as halting. The topic of women and state violence is much more heavily fraught; it challenges us to know considerably more than we do know about the relationship between gender and aggression. Approximately 10% of the armed forces in the United States today are women. Although they are formally excluded from combat roles, they are increasingly trained for roles that bring them close to combat zones, and there are occasions, most recently in Panama, in which a few women have exchanged gunfire with an enemy.

The paradoxical relationship between the right and obligation to bear arms, unresolved in the eighteenth century, remains unresolved today. Alas, I have no hope that I can dispell this ambivalence and anxiety; indeed I feel it myself. But it seems to me that it would be salutary to situate it historically and pay very close attention to understanding it. Elizabeth Cady Stanton and her colleagues drew up the agenda of Seneca Falls in an effort to connect women to the promises of the Declaration of Independence and the Constitution; the relationship of women to arms bearing is perhaps the last item left unresolved on the nineteenth-century agenda.

### Notes

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- 1 James Martin (Plaintiff in Error) *versus* The Commonwealth of Massachusetts ..., *Reports of Cases Argued & Determined In the Supreme Judicial Court*, 1 (Sept 1804-June 1805), pp.348ff.
- 2 *Hoyt v. Florida*, 368 U.S. 57. Quotations in this section come from newspaper reports, judicial opinions in the Hillsborough County Court, the Supreme Court of Florida and the U.S. Supreme Court, briefs filed by both sides, transcript of oral argument before the Supreme Court of the United States and the papers on file relating to the case in the private archives of Goulston and Storrs, Boston.
- 3 J. G. A. Pocock, *The Machiavellian Moment* (Princeton, N. J. 1975), pp. 84, 90.
- 4 James H. Kettner, *The Development of American Citizenship 1608-1870*, (Chapel Hill, University of North Carolina Press, 1978), ch. 7.
- 5 *Anthony et al v. Commonwealth of Massachusetts*, 415 F. Supp. 485 (1976).
- 6 *Personnel Administrator v. Feeney*, 442 U.S. 283.