SHERRY COLB: FEMINIST THEORIST AND SOCIAL CHANGE AGENT

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Introduction

Social movements change hearts and minds by shifting how people understand what is true about the world around them. They start by making differences visible, centering lives and experiences previously pushed to cultural margins. Such differences are often at once biological and social, inherent and constructed. Feminist scholars and activists, for example, have grounded ethical and policy visions in women's experiences of bodily intimacy. Disability rights advocates show how physical infrastructure and institutional practices are premised upon normative bodies and capacities. In addition to bringing difference to the fore, social movements make legal claims respecting those differences. They show how difference shapes social groups' varying perspectives on harm and liberation. Last, social movements connect the perspectives of subordinated groups to accounts of state protection and oppression. Domestic violence activists, for example, made claims to state protection based on women's experience of vulnerability within the family. Black freedom activists, by contrast, argue for familial privacy in response to racial subordination by the carceral state. The voice in which social groups register injury shapes their claims about state power.

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What is the role of an academic in these social movement processes? How does the professional intellectual manifest difference, express collective voice, and forge new power formations? Sherry Colb offered one answer to that question in her life's work. It was to blur the distinction between academic scholarship and advocacy. Colb wrote for lawyers, students, and members of the public as well as for scholars. In addition to her scholarship in law journals, in online forums that ranged from *Verdict* to the *Dorf on Law* blog, she responded to many of the most important legal issues of her time. In particular, Colb engaged in feminist struggles for reproductive rights, against carceral regulation of pregnant women, for LGBT family recognition, and for freedom from sexual violence.[1] Her clear, sharp, sometimes sardonic writing made her incisive legal analysis accessible. She put her rhetorical genius to work in favor of a strong ethical vision, one grounded in the intertwined bodily, psychological, and social experiences of women.

This Article considers how Sherry Colb acted at once as a feminist theorist and as a social change agent. I focus on Colb's writing from the early 2000s anthologized in *The Difference Sex Makes: Making Babies Making Law* and consider some later pieces. First, Colb developed a legal theory of women's embodiment, exploring the meaning of reproductive sex difference in women's lives and under the law. Second, Colb advanced the feminist movement by explaining "women's perspective" on social and physical injuries. Colb acted as a feminist in a third way, by fighting simultaneously against state intrusion and for state protection. This Article further explores how Sherry Colb's personal attributes—compassion, engagement, and courage—well complimented her intellectual work on difference, voice, and power. In conclusion, I consider the ongoing importance of Colb's own voice to feminist struggles, including those for reproductive justice and equity in the workplace.

I
Difference: Pregnancy and Embodiment

The legal regulation of pregnancy has constructed gender hierarchies throughout U.S. history. To start, women's capacity for pregnancy has legitimated women's political and

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[1] Colb played a similar role as engaged scholar/activist with respect to animal rights and (less frequently) criminal justice broadly understood. This Article focuses on her feminist work.

socioeconomic exclusion. More specifically, states have cited pregnancy and motherhood as reasons to bar women from jobs,[2] impose sex-specific regulations on the conditions of their work,[3] and exclude them from the full obligations of citizenship.[4] Even as the state's asserted interests in regulating pregnancy served as abstract rationale for such disparate treatment, the law failed to protect pregnant women in the flesh. The United States stands alone among industrialized nations in the lack of an entitlement to paid maternity leave. Until 1978, the law formally tolerated employers' routine firing of pregnant women. It took until late 2022 for federal law to create a right to pregnancy-related accommodations on the job.[5] Patriarchy rested on these dual facets of regulation: the differential treatment of pregnancy and the failure to accommodate the differences pregnancy makes to women's lives.[6]

Colb's brilliant scholarship showed that exclusion and lack of recognition were flip sides of the same coin. Notwithstanding her erudition, Professor Colb did not build a theory of pregnancy from a lofty perch. She drew on her knowledge of both philosophy and biology, but she did not start with arcane texts or elusive scientific knowledge. Instead, she derived her analytic building blocks from pregnant women's "embodiment": their experience of selfhood intertwined with the physical, biological, and emotional processes of pregnancy. This itself was an important feminist act because it raised up pregnant women's experiences into the realm of legal theory. Colb resisted impulses either to develop an account of women's rights that transcended the body or to celebrate women's bodies. As theorist Shatema Threadcraft observes, both approaches reinforce the Cartesian body/mind and nature/culture binaries. Colb's analysis of pregnancy exemplified scholarship that instead

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[2] Bradwell v. Illinois, 83 U.S. 130 (1872).

[3] Muller v. Oregon, 208 U.S. 412 (1908).

[4] Hoyt v. Florida, 368 U.S. 57 (1961).

[5] 42 U.S.C § 2000gg–1.

[6] For historical and legal accounts of the failure to accommodate pregnancy in civic spheres, see generally SERENA MAYERI, REASONING FROM RACE (2014); DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2003); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167 (2020); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013).

treats bodies as "a site for the symbolic construction of sexual difference, a ground for political exclusion or inclusion, a locus of subjectivity, a prospect for self-realization, and the material focus of many labors that typically fall to women[.]"[7] Colb's attention to embodiment shaped her understanding of pregnancy's implications for abortion rights and criminal law.

Colb's analysis of embodiment led her to two broad analytic frames that guided her exploration of these particular doctrinal areas: pregnancy as a relational condition and gestation as a form of labor. Although experiences of pregnancy are varied and diverse, pregnant people share a fundamental experience in common. They at once retain their identity as independent beings and, also, nurture developing humans within their bodies. Pregnancy, therefore, is fundamentally relational, meaning that the individual person must be understood as constituted by her network of relationships.[8] Although inherent to the human condition, relationality is heightened in the case of pregnancy. The location of two distinct, potential legal subjects within a single body is the reason why, in Colb's words, "pregnancy differs from all other human conditions."[9] The fact of these two potential legal subjects—one already in being and one future—shapes multiple relationships: between the pregnant person and fetus and between the pregnant person and other individuals. To treat pregnancy as relational is not to romanticize this condition. Colb reminded her readers that the "embryo or fetus [might] find[] itself inside the body of a woman who would prefer that it not be there."[10] Indeed, Colb at times referred to embryos and fetuses as "parasites," though adding that this parasitic relationship was acceptable in wanted pregnancies.[11] Whatever form the relationship between a particular gestating mother and the fetus inside her took, Colb insisted that the law extend it respect. Colb's

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7 Shatema Threadcraft, *Embodiment*, *in* THE OXFORD HANDBOOK OF FEMINIST THEORY 207, 207 (Lisa Disch & Mary Hawkesworth eds., 2015).

8 Jennifer Nedelsky, *A Relational Approach to Law and Its Core Concepts*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 57, 59 (Deborah Brake ed., 2021).

9 SHERRY F. COLB, WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW 1 (2007).

10 *Id.* at 31.

11 Sherry F. Colb, *"Never Having Loved at All": An Overlooked Interest that Grounds the Abortion Right*, 48 CONN. L. REV. 933, 949 (2016); *see also* SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 79–81 (2016).

demand—simple and radical—challenged the individualistic orientation of liberal legal theory.[12]

In addition to relationality, Colb emphasized that pregnancy is not a static condition but an active labor process (including both childbirth and the forty weeks prior). She was particularly sensitive to the ways in which language distorted the reality of pregnancy, pastoralizing the labor required to gestate. References to the "adoption" of embryos or the "human being" in the womb obscured the fact that no human can develop absent the blood, oxygen, and nutrient transfers of pregnancy.[13] Colb used her sardonic wit to challenge the depiction of the pregnant woman as happenstance—merely the fertile soil in which the "unborn child" is planted. She emphasized the biological sacrifice, fatigue, pain, and risk of disease inherent in pregnancy.[14]

Wielding her pen as a sword, Colb used her analyses of relationality and gestational labor to intervene in some of feminism's most important struggles from the late 1990s to her passing in 2022. Colb acted as a leading public intellectual in the pro-choice struggle, as others in this symposium attest. Colb challenged the idea, which the anti-abortion movement strategically developed in the 1970s and 1980s, that fetal and maternal interests were binary and in conflict.[15] Rather, Colb understood the fetus's biological dependence on the pregnant woman as justification for the latter's bodily autonomy. In Colb's view, the law should recognize a fetus's separate interests only at the point of viability, when it might exist and continue to develop outside the womb.[16] Before that point, she explained, a pregnant person should have access to abortion. This is not because she has the right to kill but because she

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12 For further discussion of the challenge a relational account of selfhood poses to legal liberalism, see JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 19–90 (2011).

13 Colb, *supra* note 9, at 2–3.

14 Sherry F. Colb, *All Hail Justice Coathanger*, DORF ON LAW (May 5, 2022), https://www.dorfonlaw.org/2022/05/all-hail-justice-coathanger.html [https://perma.cc/DGH6-XVR9] (arguing that "women's role in reproduction is far more demanding, physically and psychologically, than men's" and cataloguing burdens including "nausea . . . risk of gestational diabetes . . . life-threatening pre-eclampsia . . . vaginal tearing . . .").

15 For a detailed discussion of the historical forces yielding the legal and political paradigm of conflicting maternal and fetal rights, see SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA (2011).

16 Colb did state that *morality* as opposed to law should recognize fetal interests when fetuses achieved sentience, which some scientific evidence suggests may be shortly prior to viability. COLB & DORF, *supra* note 11, at 22–25.

possesses the right to bodily integrity.[17] Colb exposed the ways in which antichoice rhetoric strategically obfuscated gestation as a labor process.[18] Building on the Thirteenth Amendment case for abortion rights,[19] Colb argued that the state should not compel the involuntary labor of pregnant persons in service of the fetus. Even if one accepted the premise of fetal personhood, she argued, the legality of abortion should not turn on the resolution of a contest between competing rights. Rather, the claim to previability abortion rights was just because the pregnant person does not owe the fetus inside her a servile duty to assume the burdens of pregnancy.

Her sensitivity to both relationship and gestational labor led Colb to intervene productively in legal debates generated by artificial reproductive technologies (ART). ART separated two functions of biological motherhood that had historically defined legal parenthood: the genetic contribution of an egg and the carrying of a pregnancy to term. It thus led to controversies respecting legal access to the rights and responsibilities of parenthood in cases of disputed surrogacy contracts,[20] custody battles between biological fathers and mothers who were not genetically related to the children to whom they gave birth,[21] and lesbian mothers who had each fulfilled one of the dual dimensions of biological motherhood.[22] The law's response to ART was particularly important to the capacity for lesbian and gay parents to win protection for their familial integrity and parental rights, both before and after the legalization of same-sex marriages.[23]

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17 Colb, *supra* note 9, at 6.

18 Sherry F. Colb, *Justice Aborted*, DORF ON LAW (May 13, 2022), https://www.dorfonlaw.org/2022/05/justice-aborted.html [https://perma.cc/CU87-J3U4] (arguing that by using the phrase "'aborted fetuses'" Justice Samuel Alito's draft decision in *Dobbs* erases the physiological processes by which a pregnant person "creates someone from something" via gestation).

19 *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); Sherry F. Colb, *Abortion, the Thirteenth Amendment, and a (Hypothetical) Conversation with Justice Souter*, DORF ON LAW (June 8, 2022), https://www.dorfonlaw.org/2022/06/abortion-thirteenth-amendment-and.html [https://perma.cc/7SQ2-8KCA].

20 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

21 *See, e.g.*, *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005).

22 *See, e.g.*, St. Mary v. Damon, 309 P.3d 1027 (Nev. 2013) (adjudicating a controversy between a woman who gave birth to a child conceived via the fertilization of the egg of her romantic partner by an anonymous donor's sperm).

23 Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264–65 (2017).

Colb's theory of gestational labor led her to offer new insight into the legal definition of "mother." In determining whether a genetic or gestational mother is the legal parent, Colb explained, the court prioritizes the egg donor. This rule replicates the patriarchal privileging of men's donor material over women's gestational labor.[24] It treats pregnancy as "simply a capacity that women alone have" rather than a "difficult and burdensome job that women alone perform."[25] Colb considered this view might wrongly influence the outcome of a case in which a fertility clinic made a mistake. The clinic implanted an embryo intended for another couple in a third person who also wanted to use in-vitro fertilization to become a mother. Colb argued that the law should reward the labor of the woman who had brought the pregnancy to term, by recognizing her rights as a legal parent. For Colb, gender equality required recognition of the difference pregnancy makes—not as a moral or ethical orientation—but rather as a particular labor burden.

In her writing on these disparate areas of law, from abortion rights to the criminalization of pregnant women to the legal regulation of ART, Colb disputed formalist binaries. She showed why the idea that feminists have to choose between difference and equality is so wrong-headed. When one's theory of justice is built out from women's embodiment, one sees that recognition of difference serves the goal of equality. The achievement of liberal autonomy for women—a condition necessary for their full participation in society—necessitated recognizing the unique characteristics of pregnancy. Its relational and labor dimensions made a difference to women's lives and thus, Colb argued, should also matter to law. Equality required recognition of difference.[26]

II
Voice: Women's Perspectives

Reflecting on Colb's ideas about embodiment brings me to a second theme of her work: her argument that the law should adopt women's perspectives. Colb was attentive to the extant legacies of the historic common law, which marginalized

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24 Colb, *supra* note 9, ch. 12 (explaining that to prioritize the egg donor over the gestational mother reinforces a legal regime that ignores and devalues the labor of pregnancy).

25 *Id.* at 65.

26 Colb shared this conclusion with other legal and feminist theorists. *See generally* Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (1990); Iris Marion Young, Justice and the Politics of Difference (2011).

women's perspectives on injury within intimate relationships. The law's failure to recognize gendered harms originated, in significant part, with the doctrine of coverture. This was the idea that marriage subsumed a wife's legal identity within that of her husband. Coverture imbued marital status with sex-differentiated obligations and privileges that a husband and wife could not contract to modify.[27] Because coverture unified husband and wife as a single legal subject, it rendered the harms of the former against the latter illegible under the law.

Coverture gave husbands the power to abuse and assault their wives. As articulated by Blackstone, the common law allowed a husband to beat his wife: to "chastise[]" her for disobeying him, so long as he did not inflict permanent injury.[28] The rise of companionate marriage and feminist agitation prompted courts to repudiate this doctrine in the Reconstruction era. As Reva Siegel demonstrates, courts nonetheless preserved the prior status regime by invoking the doctrine of "marital privacy" to insulate middle- and upper-class men from both criminal prosecution and tort suits.[29] Nineteenth-century legal authorities similarly shielded marital rape from scrutiny, presuming that the state could not prosecute husbands for the rape of their wives.[30] A deafening silence in the historical record attests, in Jill Hasday's analysis, to "[c]ases . . . uninvestigated and unbrought."[31] In a 1736 treatise, Sir Matthew Hale offered the rationale for the marital exemption, which remained authoritative in U.S. legal thought for over a century. Hale asserted that a wife gave irrevocable consent to sex with her husband by virtue of her willing contract to marry, regardless of her subjective state of mind at the time of subsequent intercourse.[32] In the second half of the nineteenth century, the women's rights movement argued for women's rights both to control over their sexual activity within marriage and to structural alternatives to marriage.[33]

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27 Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 59–60 (2011).

28 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2123–24 (1996).

29 *Id.* at 2151–53.

30 Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373, 1392 (2000).

31 *Id.* at 1393.

32 *Id.* at 1397–99 (citing 1 Matthew Hale, The History of the Pleas of the Crown (Robert H. Small 1st Am. ed. 1847) (1736)).

33 *Id.* at 1416–17, 1427–28.

Yet, beyond recognizing that marital rape might be grounds for divorce in limited instances, the law did not incorporate the demand of nineteenth-century women's rights activists.[34]

In the late twentieth century, a reinvigorated mass women's movement once again challenged gender violence within intimate partnerships. Feminist activists in the 1970s and 1980s organized to render domestic violence visible, to make sexual harassment understood as an injury, and to promote the enforcement of laws against sexual assault. Although all states had eliminated the marital rape exemption by the late twentieth century, they continued to treat rape within marriage differently than nonmarital rape. For example, state criminal codes required physical force or physical harm as an element of marital rape, established procedural hurdles barring married women's claims, or reduced penalties for rapists who assaulted their spouses.[35] Feminist attorneys, grassroots activists, legislators, and individual women litigants succeeded in transforming the law on the books. Yet police often remained unwilling to act—sometimes with lethal consequences—and sexual violence escalated on campuses across the nation.

Colb's public scholarship intervened in this context of partial legal and institutional response to women's voiced experience of sexual violence. She exposed the ways in which the criminal laws regarding rape continued to embrace men's perspectives into the twenty-first century. Colb challenged myths that women invited sex by their promiscuity, dress, or engagement in prostitution.[36] Drawing on a tradition of feminist comparisons between marriage and sex work,[37] Colb argued that the contemporary belief that sex workers inherently consented to intercourse reflected the common-law view that husbands held entitlements to their wives' sexuality.[38] Colb wrote persuasively about the reasons why rape by a partner or other acquaintance is no less injurious, and perhaps even more harmful than "stranger rape." She called attention to the particular psychological trauma that accompanies assault by an intimate partner.[39] A particularly powerful Article addressed the question whether a woman who consented to

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34 *Id.* at 1464–65, 1468–69.

35 *Id.* at 1484–85.

36 Colb, *supra* note 9, at 107.

37 *See generally* Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation (1998).

38 Colb, *supra* note 9, at 87–88.

39 *Id.* at 103.

sex could subsequently end the same encounter.[40] Colb asked her readers to interrogate whether they sympathized with the allegedly "unstoppable male,"[41] or with a woman who, for whatever reason, had decided she no longer wanted to continue intercourse. Colb concluded that consent should not be treated as an irrevocable waiver.[42] For the law to respect women's perspective, it had to take a woman's expression of "no" seriously whenever voiced.[43] Thus, Colb advanced a much longer feminist argumentative tradition, which challenged the idea that the structure of a relationship—or a sexual encounter—rendered consent automatic and irrevocable.

Colb's writing on date rape drew upon her analytic skills as a scholar of evidence. As the controversial prosecution of basketball player Kobe Bryant unfolded in 2003, Colb considered the presumption of innocence. She disabused readers of the popular misconception that jurors had to believe an alleged perpetrator was *actually* innocent until proven guilty. Rather, the jurors merely had to select 'not guilty' unless the prosecution proved its case beyond a reasonable doubt. This requirement did not necessarily preclude jurors' individual conclusions that a defendant was guilty.[44] The mistaken belief that jurors, as well as members of the public, were obligated to assume a skeptical attitude toward the prosecutorial evidence had particularly noxious consequences in date rape cases. In these instances, it was implausible that the accuser was simply mistaken as to the identity of the person who assaulted her. After all, the question at hand was not *who* committed an assault, but whether the sexual intercourse in question was consensual or forced. If one was obligated to *believe* the accused, rather than merely to refrain from prejudging the evidence, then one necessarily had to assume the accuser was lying.[45]

In later writing, Colb deconstructed an apparent paradox—that of "he said/she said." She exposed as a fallacy the idea

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40 *Id.* at 106.

41 *Id.* at 110.

42 *Id.* at 109–10.

43 *Id.* at 111.

44 *Id.* at 97–98.

45 *Id.* at 98–99; *see also* Sherry F. Colb, *Whodunit Versus What Was Done*: *When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. Rev. 939, 973–79 (2001) (developing the concept of "conditional irrelevance" to explain why evidence of a victim's sexual propensity should not be admissible in consent-defense rape cases, notwithstanding the admissibility respecting evidence of a defendant's propensity to commit sexual assault).

that a factfinder lacked the capacity to evaluate the claims of the accused and accuser respecting an alleged sexual assault. In no other criminal allegation did an analysis begin by pitting the word of the victim against that of the alleged perpetrator. In place of a false neutrality, Colb exposed the values that actually underpin the he said/she said frame. It perpetuates false myths that women who are romantically spurned or come to regret intercourse take revenge by making rape allegations.[46] Colb also compared the disparate incentives that the accuser and accused had to lie. "The response of an accused to the accusation is overdetermined."[47] All defendants engage a script in which they proclaim innocence. By contrast, Colb argued, "the sexual assault script . . . is far less determinate than the rape accusation script."[48] The victim of an assault (or of a consensual encounter she regrets) has the option to remain silent. If she comes forward, she risks a stigmatizing, long, and painful adjudicative process.[49] Colb thereby flipped what is the common cultural narrative about the unfairly maligned victim of an accusation and the vengeful or mendacious accuser.

Colb exposed how one's perspective on empirical realities shaped how one judged the normative desirability of different evidentiary standards. In other words, the baseline narrative that one believes is "true" about the world acts as the lens for interpretation of the facts in any given instance. "It was no accident," Colb argued, "that #BelieveWomen came along after #MeToo."[50] She explained that we would be more likely to believe a witness who said he saw a horse than a Zebra in Manhattan. "#MeToo tells us that we have a horse and not a zebra before us when a woman says she was raped."[51] By shifting the public's narrative about how the world worked, the #MeToo movement made it possible to meet accusers with trust

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46 Sherry F. Colb, *He Said/She Said, Save Our Sons, and the Stories that Stick: Part Two of a Two-Part Series of Columns*, VERDICT (Oct. 21, 2020), https://verdict.justia.com/2020/10/21/he-said-she-said-save-our-sons-and-the-stories-that-stick-2 [https://perma.cc/78QE-26YZ].

47 Sherry F. Colb, *He Said/She Said, Save Our Sons, and the Stories that Stick: Part One of a Two-Part Series of Columns*, VERDICT (Oct. 7, 2020), https://verdict.justia.com/2020/10/07/he-said-she-said-save-our-sons-and-the-stories-that-stick [https://perma.cc/RYN4-U5TY].

48 *Id.*

49 *Id.*

50 Sherry F. Colb, *What Does #BelieveWomen Mean?*, VERDICT (Nov. 7, 2018), https://verdict.justia.com/2018/11/07/what-does-believewomen-mean [https://perma.cc/T2TH-BBEY].

51 *Id.*

rather than skepticism. This did not mean that a factfinder—whether a court or a Title IX body at a university—had to find the accused "guilty" or the equivalent in the educational setting. Rather, it meant that the police, factfinders, and decision-making authorities, as well as the public, should treat the accused with compassion, and listen to her account with the initial presumption of its verity.[52]

Colb made particularly effective interventions in the debate about the evidentiary standards concerning sexual harassment and assault on campus. When the Trump administration issued Title IX regulations raising the standard to "clear and convincing evidence," Colb argued in favor of the lower "preponderance of the evidence" standard. Here again, Colb invited her readers to consider how their narratives about "rape culture" shaped their views on the Title IX debate. Stock cultural memes and stories, such as those concerning women who allege rape to avenge a rejection or breakup, drove the reluctance to penalize male students accused of assault.[53] One's empirical assumptions about the prevalence of rape and harassment underpinned one's view of the appropriate standard. If one thought misconduct infrequent, then to believe any particular accusation might lead to the punishment of a man who did not commit the assault. If misconduct, however, were common, "then the odds of a false positive diminish."[54] The argument that Colb and the broader movement made for the preponderance standard met with a welcome reception in President Joe Biden's administration.

Ultimately, Sherry Colb herself helped to change people's views about how the world worked. She advanced both knowledge about women's experiences of sexual assault and harassment that privileged women's perspectives and collective wisdom about the legal consequences of such knowledge. In sum, Sherry Colb helped to construct a legal epistemology that placed women's perspectives at its center.

III
Power: State Intrusion and Protection

Colb advanced a theory of the state that accounted for gender difference and responded to women's perspectives. She

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52 *Id.*

53 Colb, *supra* note 47.

54 Sherry F. Colb, *#MeToo and What Men and Women Are Willing to Say and Do*, Verdict (Aug. 12, 2020), https://verdict.justia.com/2020/08/12/metoo-and-what-men-and-women-are-willing-to-say-and-do [https://perma.cc/T937-XVBM].

fought both against state intrusion and for state protection. Arguments for these dual ends only appear paradoxical when viewed from men's perspective. When viewed from the perspective of people capable of pregnancy or defined by the perception of that capacity, they are not. Colb insisted that state power account for gendered embodiment and relationality. Justice required that the state respect women's bodily autonomy precisely because of pregnancy's relationality, and not in spite of it. It required that the state as well as employers refrain from gender stereotyping that subordinated LGBTQ people. Justice further required that the state protect women from sexual assault because of the vulnerabilities created by gendered power.

Colb pushed back against escalating efforts, in the early 2000s, to surveil & punish pregnant women for behaviors considered injurious to the fetus. In addition to abortion rights, Colb fought for pregnant women's freedom from oversurveillance by the state. Pregnancy renders the fetus vulnerable to the actions of the pregnant person, from her diet to the medical treatment she undergoes. Beginning in the 1980s and 1990s, state governments began to prosecute pregnant women for crimes against "unborn children." Dorothy Roberts and other legal scholars deconstructed the way in which racism, class bias, the 'war on drugs,' and anxieties about the role of Black women's reproduction produced these protections.[55] Colb added to this critique an analytic account of when a pregnant woman should be obligated to refrain from actions that held a particular risk of harm to their future children.[56] She thus fused a gender equality argument with a larger critique of the consequences of the carceral state for poor women and women of color.

Pregnant women, Colb argued, should not be held to a higher standard of altruism than the law ordinarily demanded. She opposed Utah's prosecution of a pregnant woman for failing to undergo a C-section and thereby allegedly causing the death of one of her twins in utero. Colb argued that the state could not force pregnant women to undergo surgery for the sake of their fetuses when the same duties are not required of non-pregnant

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55 *See generally* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770 (2020).

56 Colb, *supra* note 9, at 5.

persons toward second parties.[57] Similarly, Colb reasoned that the state did not have justification for prosecuting pregnant women for illegal drug use. The pregnant woman only harmed herself directly—it was pregnancy alone that turned such self-harm into the delivery of drugs to a child. "When the law punishes the pregnant woman more harshly for drug use than it would another person, it consequently burdens her uniquely by virtue of her sex-based status."[58] Colb challenged the use of pregnancy's relationality to justify gender subordination.

Although attentive to the difference that the capacity for pregnancy made to women's lives, Colb did not essentialize gender difference. Rather, her feminist concerns extended to support for gender nonconformity. For example, she roundly criticized the Ninth Circuit's 2006 en banc opinion in *Jespersen's v. Harrah's Operating Co.*, which upheld a casino's "personal best" policy that required women to wear makeup. Departing from the ordinary analysis of facial disparate treatment under Title VII, the Ninth Circuit had implemented a novel "unequal burdens" analysis. Colb suggested that the injury was not confined to the fact that women had to pay more to dress for work. Nor was it the fact alone that Harrah's grooming policy was sex-differentiated. Rather, it was the fact that the policy imposed sexualized femininity, "requiring female employees to "decorate[]" themselves so as to be "in place" for the benefit of men.[59] Colb thus did not evince a belief in formal sex equality—the same treatment of individuals for the sake of nondifferentiation itself. Rather, she embraced anti-stereotyping as a means to chip away at the cultural norms and social structures that "correspond[ed] historically to second-class citizenship."[60]

Advocating freedom in gender expression, Colb supported a burgeoning LGBTQ rights movement. She argued that discrimination against gays and lesbians stemmed from the conservative fidelity to gender hierarchy: "[m]en must be dominant, women subordinate, and homosexuality [] threatens that division."[61] Colb recognized earlier than many that opposition to gender stereotypes must also encompass support for gay and lesbian equality. For example, she advocated

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57 *Id.* at 6–8.
58 *Id.* at 15.
59 *Id.* at 135.
60 *Id.* at 139.
61 *Id.* at 146.

freedom of access to reproductive technologies that might help gay parents build families.[62] She also spoke to one of the most difficult cultural questions regarding the movement for trans liberation: whether transgender identity reinforces gender stereotypes. Some argued that trans identity lends stable meaning to the categories "man" and "woman," while others argue that the concept of transition itself destabilizes the gender binary. Colb did not take sides in this debate. Rather, she argued that whether or not trans people themselves policed gender boundaries, the law should prohibit employers from doing so. A decade and a half before the Supreme Court recognized that discrimination on the basis of gender identity was unlawful sex discrimination under Title VII,[63] Colb argued the same.[64]

Notwithstanding her critique of government interference in fundamental reproductive rights, Colb did not believe in a classically liberal state. To start, as discussed above, she was committed to the fundamental importance of anti-discrimination law. She also argued for a robust criminal law regime that actively protected women from assault by men. At times, Colb focused on procedural protections. For example, she advocated the withdrawal of New York's statute of limitations for rape, before the state legislature enacted a bill to this effect in 2006. The advent of DNA evidence, Colb reasoned, yielded a category of cases that were time-barred despite the fact rapes might be proven. Colb argued that victims in these cases deserved closure, and future victims deserved protection.[65] In other essays, Colb took up substantive criminal law. She considered, for example, the ways in which pregnancy's relationality made women susceptible to enhanced injury. In an especially provocative essay, Colb considered the case of a man who shot his ex-girlfriend and, in so doing, also killed her fetus. She argued that the defendant should be held guilty for killing the fetus, even though he did not know she was pregnant.[66] In drawing this analogy, Colb gave legal priority to a pregnant woman's embodiment over her killer's mens rea. She favored

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62 *Id.* at 155–56.

63 Bostock v. Clayton County, 590 U.S. 644, 651–52 (2020).

64 Colb, *supra* note 9, at 140–41.

65 *Id.* at 114–16.

66 Colb conceded that the defendant would not be guilty were he to have entirely lacked the intent to murder or had not acted in a reckless manner. She analogized, however, to a hypothetical in which a man shot into a woman's bed and, in so doing, also killed her child concealed in the blankets. *Id.* at 19–20.

affirmative protection for victims over liberal conceptions of due process for perpetrators.

Colb's stances on reproductive rights and criminal law raise the interesting question of how she conceptualized state power. The Finnish political scientist Johanna Kantola explains that feminist theorists share an ambivalence about the state, even as they debate its relationship to gender inequity.[67] Some feminist scholars evince a more optimistic view of the state as an institution that might be lobbied, captured, or otherwise pressured to serve women's interests. Advocates conventionally termed "liberal" have pursued equal rights through both legislation and litigation.[68] Social democratic feminists envision a welfare state modeled on the needs of women, as both caregivers and economic providers for their families.[69] Though these feminist traditions had different goals, and often came into conflict with one another, they both had faith in the state's power to advance justice for women.

By contrast, other feminist scholars are highly skeptical of the potential for state actors to exercise power in ways that disrupt rather than reinforce gender subordination. Kate Millet's *Sexual Politics* in 1971 was a foundational text defining patriarchal power in Western traditions as male supremacy. In her important 1989 treatise, *Toward A Feminist Theory of the State*, Catherine MacKinnon argued that the liberal state served the interests of men. For example, the consent standard in rape law made protection for women dependent on men's perspectives, and the construction of reproductive rights in terms of privacy undermined state responsibility for women's healthcare.[70] More recent scholarship moves away from a focus on the state's regulation of gender relations and toward an examination of the ways in which states use gender as discourse, affect, and materiality. This scholarship is attentive to the ways in which gender sustains state power in specific instances, from the use of women's rights as a rationale for war

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67 Johanna Kantola, *State/Nation*, in THE OXFORD HANDBOOK OF FEMINIST THEORY, *supra* note 7, at 915–17. The overview in this paragraph draws on Kantola's schema.

68 There is an extensive literature on liberal feminism in the United States. For one insightful overview, see generally SUSAN M. HARTMANN, THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT (2013).

69 For a historical account of U.S. labor feminism—the political movement in this country that came the closest to the feminist social democratic tradition—see generally DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2004).

70 CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171–94 (1989).

to the role of sex discrimination law in neoliberal governance. Within legal theory, the critique of "governance feminism" warns about the cooptation of feminist movements and ideas to heighten surveillance, discipline, and incarceration of racialized, poor, and otherwise marginalized communities.[71] These evolving debates within feminist theory about the nature of state power evince some of the same dualism with which Colb wrestled.

Colb's public scholarship might best be characterized as taking a pragmatic stance on the state. She was ultimately concerned more with advancing women's interests in specific controversies, rather than with advancing any particular theoretical position. From this vantage, she saw that women required both freedom from state power and state protection. This was not a contradiction so much as a bold rethinking of state responsibility from women's perspectives.

IV
Movement: (Com)passion, Engagement, and Courage

In addition to her original thinking, there were three exceptional attributes of Sherry Colb's person and writing that made her such a powerful social movement actor: compassion, engagement, and courage. These traits mirrored the tropes in her feminist legal theory. First, like her account of the difference that pregnancy should make to gender equality, Colb's writing generally showed compassion for individuals' lived experiences. Second, she used her voice not only to advance her ideas among those disposed to agree with them, but also to engage academic critics and political adversaries. Third, Colb fused anger and courage together to speak truth to power.

Colb's passion for her ideals was driven by a sensitivity to human fallibility, whether mundane or extreme. For example, Colb considered a form requiring a woman to relinquish her parental rights as a prerequisite to proceeding with egg retrieval at a fertility clinic. A court used the form to conclude that a lesbian woman, who had donated eggs to her female partner, was not a mother. Taking a social realist position, Colb argued

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71 *See e.g.*, Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, Governance Feminism: An Introduction (2018); Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, Governance Feminism: Notes from the Field (2019); Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration (2021); I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 Lewis & Clark. L. Rev. 185 (2018).

such a reading was "preposterous."[72] All of us can sympathize with the failure to read or to take seriously a default waiver, and Colb argued compassionately that legal formalism in this case discriminated against gays and lesbians. In another essay, Colb considered the very different case of a mother who drowned her five children. She explained that mental illness differs in reality from the media portrayal of a ranting and raving person who does not understand what she is doing.[73] Colb argued that the woman should have received treatment rather than a prison sentence.[74] Her account both acknowledged the horror of the crime and argued for a compassionate response over a punitive one. Colb used her sharp mind and acerbic wit in service of her profound humanity.

In addition to showing compassion for those whom the law either failed to protect or punished, Colb showed empathy for her ideological, legal, and political opponents. The second personal trait that made Colb an effective advocate was her willingness to engage people with whom she strongly disagreed. She had the ability to view controversies from others' perspectives, and her intellectual integrity led her to do so. I remember Sherry telling me about some of the email exchanges she had with anti-abortion advocates. I was impressed by the dedication and patience she showed in endeavoring to persuade even those who outright rejected her views. She related to me that some anti-abortion activists told her that she was the legal thinker who did the most to take their positions seriously. It was apparent to me that she took pride in this fact, and I admired her for it.[75]

Last, Sherry Colb showed great courage in her writing. Her columns on the *Dobbs* decision burned hot. They did not aim to inflame controversy, however, so much as to elucidate hypocrisy and flawed reasoning. Colb argued that even if one put aside the question of stare decisis and the obligation to remain faithful to *Roe* and *Casey* as precedents, Alito might have subjected the law in question to strict scrutiny. Instead, he treated the liberty interests involved in forced pregnancy as no more important than those at stake in traffic laws. "The notion that 40 weeks of having one's body systems hijacked to

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72 Colb, *supra* note 9, at 69.

73 *Id.* at 78–79.

74 *Id.* at 82.

75 Colb evinced a similar enthusiasm for engaging skeptics in her advocacy for animal rights. *See* SHERRY F. COLB, MIND IF I ORDER THE CHEESEBURGER? AND OTHER QUESTIONS PEOPLE ASK VEGANS (2013) (offering answers to commonly posed questions about veganism).

build a baby out of a fertilized egg cell is a trivial imposition on liberty is deeply offensive."[76] Colb did not disguise her anger.

Her outrage was most evident when she argued that the Alito opinion normalized rape. This was not just because Alito cited Hale, albeit for a proposition other than his infamous statement about the difficulty an accused rapist faced in proving his innocence. Rather, it stemmed from the opinion's silence about the consequences of the Court's decision for women who were pregnant as a result of a rape. The opinion rendered their predicament invisible. It disguised the violence that yielded some conceptions, the violence of forcing rape victims to continue their pregnancies to term, and the violence of the "back alley" abortions that the *Dobbs* opinion would drive many women to use. Yet Colb made the blood on the hands of the state visible.[77] Her relentless and skillful dismantling of Alito's opinion was an act of generosity to her readers. By renewing and strengthening her arguments about the labor of gestation and the relational dimensions of pregnancy, she gave reproductive justice activists incisive tools.

Conclusion

In conclusion, I suggest that Colb's ideas, writing, and powerful voice have ongoing relevance. Her perspective on embodied difference supports advances in the legal regulation of pregnancy at work. Her attention to women's voices helps to guide where the #MeToo movement should head next. Last, her account of state power provides new insight into the struggle for reproductive justice.

To start, Colb's writing on pregnancy should be understood as part of the shifts in legal thought that culminated in the Pregnant Workers Fairness Act ("PWFA"), in December 2022. The PWFA requires that employers offer reasonable accommodations unless such an accommodation would impose an undue hardship on the business.[78] The major federal law that governed treatment of pregnancy in the workplace up

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[76] Sherry F. Colb, *Rational Basis Scrutiny?*, Dorf on Law (May 17, 2022), https://www.dorfonlaw.org/2022/05/rational-basis-scrutiny.html [https://perma.cc/V542-XWH9].

[77] Sherry F. Colb, *Alito, Rape, and Incest* (May 12, 2022), https://verdict.justia.com/2022/05/12/alito-rape-and-incest [https://perma.cc/G7LB-LTLD]; Sherry F. Colb, *The Link Between Justice Alito's Leaked Abortion Opinion and Rape Culture*, Dorf on Law (June 16, 2022), https://www.dorfonlaw.org/20 22/06/the-link-between-justice-alitos-leaked.html [https://perma.cc/T5NF-SJX3].

[78] 42 U.S.C § 2000gg–1(1).

until this past year, the Pregnancy Discrimination Act of 1978 ("PDA"), fell short of meeting pregnant workers' needs. It did not itself require workplace accommodations unless their denial amounted to unlawful discrimination. The PDA represented an earlier moment in feminist legal theory and history when many feminists feared that any differential treatment of pregnancy might undermine the claim to equality. Over time, women workers and their advocates, along with feminist legal thinkers, came to understand the limitations of this liberal approach. Colb's writing played a significant part in the theoretical and political evolution toward a law that recognized difference as a crucial component of equality. Her views on embodiment should guide both employers and courts, as they work out together with pregnant employees the scope and meaning of accommodation for pregnancy.

Colb's insights respecting women's voices also offer lessons for the future of #MeToo. This movement has used social media to make visible and to re-politicize women's shockingly common experience of sexual harassment. Measured in cultural salience and the toppling from power of several high-profile perpetrators, the movement has met with tremendous success. It, however, has been criticized as class limited. Most of the attention has been on high-wealth sectors, from the upper echelons of entertainment to news anchormen to leading business executives. The movement has achieved less success in shifting focus to low-wage service industries, from fast food to domestic work, where women are notoriously vulnerable to harassment from supervisors as well as customers, clients, and coworkers. Although she did not adopt an explicitly intersectional stance, Colb did write about the effects of class on access to legal remedies. Her concern for those who are silenced suggests that the #MeToo movement must be extended into workplaces and workers far beyond the spotlights.

Last, Colb's voice was itself most resonant in the last year of her life in debates about reproductive justice. She focused on abortion rights and the freedom to pursue healthcare. Yet we might also connect her writing to the "care crisis," intensified and made particularly visible by the Covid-19 pandemic yet running far deeper.[79] What normative theory can support both state responsibility to support social reproduction—from unpaid

[79] Deborah Dinner, *The Care Crisis: Covid-19, Labor Feminism, and Democracy*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 217 (Mark Barenberg & Angela B. Cornell eds., 2022).

caregiving in the home to public hospitals—and women's right to self-determination in reproductive decision making? Colb's focus on relationality and its implications for a dual theory of the state direct us toward an answer. Relationality demands both respect for individuality and support for mutuality. It invites both safeguards against the crushing of individual self-determination and public generation of the collective assets needed to sustain networks of care.

I wrote a draft of this Article in the days before and following Yom Kippur. I am not theistically oriented, and I know Sherry no longer subscribed to the rigid strictures of her Orthodox upbringing. Nevertheless, the haftarah reading from the Book of Isaiah recalled for me Sherry's power as a thinker and actor. Like Sherry, this reading expressed an intolerance of hypocrisy. "Is such the fast I desire, a day for men to starve their bodies?"[80] Ritual performance is empty when in service of oneself rather than others, Isaiah cautioned. "No, this is the fast I desire[] . . . To let the oppressed go free; to break off every yoke."[81] Sherry warned that legal formalism is hollow when divorced from social justice, and she used theory to advance feminist praxis. Sherry Colb's was a prophetic voice. Her "light burst through like the dawn[.]"[82] It will continue to guide us.

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80 *Isaiah* 58:5.

81 *Isaiah* 58:6.

82 *Isaiah* 58:8.