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Gender, Stamina, and Politics

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Hillary Clinton stumbled while departing early from a New York City ceremony marking the fifteenth anniversary of 9/11. She was in the midst of fighting off what turned out to be a mild case of pneumonia. Trump responded during a speech a short time later with a mocking display of physical ineptitude and a cry that “We need stamina.” Health, of course, has been a common topic of discussion during the ongoing campaign, not only after the 9/11 incident, but for months before and after.



Speaking on Subject of This Blog on Nov. 1, 2016

Media has often taken seriously the claims that Clinton is not physically or mentally up to the task of being President.^[1] That media tendency is in the teeth of a career entailing eight active years as First Lady, eight years as the peripatetic, successful Senator from New York, four grueling years as President Obama’s Secretary of State visiting 112 countries and traveling 956,733 miles, and vigorous participation in two seemingly interminable Presidential election campaigns. Certainly her career has been at least as taxing, if not much more so, than Trump’s during the same time period. And few have questioned Trump’s tendency toward bad health, though he is borderline obese, or toward weakness though his exercise regimen, he quips, consists of waiving his arms at speeches. Nor are many asking if he is subject to any other maladies, even though he and Clinton are approximately the same age. Only in recent days have

a few commentators—such as Amanda Hess in the October 16 New York Times Sunday Magazine—begun to call out the “stamina affair” as gendered.^[2] Something both distressing and interesting is going on.

This, of course, is hardly the first time that women’s mental and physical capacities have played a part in the public’s and the legal system’s reluctance to tolerate their efforts to seek out roles traditionally occupied by men. While Trump has been more tawdry and demeaning about this issue than any other prominent political personality in my lifetime, the cultural strain of belief that women are not mentally or physically capable of assuming roles long occupied by men has been with us for a very long time. Trump, in short, has tapped into a deep strain in American culture. It is a small part of that historical strain that is the subject of this blog.

Some time ago I discovered at a flea market a little book published in 1873 entitled *Sex in Education; or, A Fair Chance for Girls* by Dr. Edward H. Clarke. Clarke was a member of the Harvard Board of Overseers, a former member of the school’s medical faculty, and a highly respected physician. Thought of by liberal women in Boston as their friend because of earlier speeches he had made criticizing men who had driven women out of medical classrooms in Philadelphia, he was invited in 1873 to speak at the New England Woman’s Club of Boston on the education of women. The talk took place during an ongoing controversy about whether women should be admitted to Harvard College.

Clarke was deeply influenced by Charles Darwin's *The Descent of Man* and his notion that sexual divergence was a critical feature of evolution. In Clarke's hands, the 1871 release of Darwin's tome became an important moment in the cultural and legal history of women in the United States. Clarke developed a theory he thought conformed to the idea that a species flourished when men competed for women with whom to reproduce. When he spoke to the New England Woman's Club in 1873, he focused on the physiological and psychological nature of women as an inherent, natural limitation on their ability to tolerate the typical structure of male educational regimes. The need to protect the reproductive capacities of women was a critical part of recognizing the influence of Darwin's "sexual divergence." The open-minded women in the Woman's Club audience received his words with a degree of hostility, a reception that led Clarke to pen his ideas at greater length and produce the volume I bought at the flea market. The book actually was very influential. In all, seventeen editions were released.

Clarke and other "scientists" of his day believed in a distinct theory of sexual divergence. Each person had three basic, God-given systems in their body—a "trinity in our anatomy" as he called it. The first was the "nutritive system" including the digestive, circulatory, and other basic life sustaining structures. The nervous and intelligence system was number two. And the third, not surprisingly, was the reproductive system "by which the race is continued." Only the first two were the same in men and women. And so Clarke opined:

Woman, in the interest of the race, is dowered with a set of organs peculiar to herself, whose complexity, delicacy, sympathies and force are among the marvels of creation. If properly nurtured and cared for, they are a source of strength and power to her. If neglected and mismanaged they retaliate upon their possessor with weakness and disease, as well of the mind as of the body. God was not in error, when, after Eve's creation, he looked upon his work, and pronounced it good. Let Eve take a wise care of the temple God made for her, and Adam of the one made for him, and both will enter upon a career whose glory and beauty no seer has foretold or poet sung.

And a bit further on Clarke continued:

[W]hen the divergence of the sexes becomes obvious to the most careless observer, the complicated apparatus peculiar to the female enters upon a condition of functional activity. * * * The growth of this peculiar and marvelous apparatus, in the perfect development of which humanity has so large an interest, occurs during the few years of a girl's education life. No such extraordinary task calling for such rapid expenditure of force, building up such a delicate and extensive mechanism with the organism,—a house within a house an engine within an engine,—is imposed upon the male physique at the same epoche. The organization of the male grows steadily, gradually, and equally, from birth to maturity. The importance of having our methods of female education recognize this peculiar demand for growth, and of so adjusting themselves to it, as to allow a sufficient opportunity for the healthy development of the ovaries and their accessory organs and for the establishment of their periodical functions cannot be overestimated.[3]

Clarke went on at great length to instruct his readers that the three great systems of the human body must function on a limited bundle of energy and bodily fluids, that when one is overtaxed or expending fluids the others will wither, that when the female reproductive system is maturing, and later in adulthood when it exercises its "periodical functions," women must use the other two systems in limited ways in order to accommodate the extensive energy expended by their reproductive systems. It, therefore, was clear that the daily rigors of a male education system were

inappropriate for women of child bearing age. Indeed, if women learned and studied like men, he argued, they were likely to become sterile, or to get sick and die. And yes, he spun many tales of such events actually occurring in his little book.

Almost immediately after Clarke's book was released and became a hot seller, Julia Ward Howe edited an anthology of essays responding to *Sex in Education*. She, an author, abolitionist, and well known suffragist, had extended the 1873 offer to Clarke to speak at the Woman's Club of Boston and was not pleased by the content of his lecture. Her own essay graced the pages of the book she edited. Surprisingly, much of her retort did not differ significantly from Clarke's theories.

I have known of repeated instances of incurable diseases and even of death arising from rides on horseback taken at the critical period. I have known fatal pulmonary consumption to arise from exposure of the feet in silk stockings, at winter parties. Every matron knows and relates these sad facts to the young girls of her charge. They are sometimes heeded, oftener not. Nothing in our knowledge of youth would lead us to consider them as a rare occurrence. And yet Dr. Clarke attributes most failures of the function and its concomitant, maternity, to the school education received by our girls.[4]

In short, physical activity might not be appropriate for women while menstruating, but more proof was needed before Howe was prepared to believe that exercising *mental* acuity had the same negative effects on women's reproductive capacities as physical activities.

Howe's notions, like Clarke's, were widely accepted in both their time and the following decades. Whether because of concerns about the "survival of the race" among middle and upper class whites, the felt need to protect white women's reproductive capacities, honestly felt beliefs that science—then widely viewed as the potential savior of mankind—correctly described the operation of our physiological systems, a desire to protect the educational, professional, and cultural prerogatives of men, or some other cultural factors, there was general agreement among many women and men that their bodies were zero sum games, that overtaxing one system endangered another, that the task of protecting women was quite a different undertaking than that of protecting men. For such believers it often was a truism that it was better to educate women in a different institution and in a different way.

Since much of Clarke's rhetoric must seem outlandish to modern sensibilities, I can't leave you with the impression that such attitudes about the capacities of women and men quickly fell by the wayside during the decades before and after the turn of the twentieth century. Though always disputed, his views continued to have significant influence for quite some time. One of many important examples is the Brandeis Brief filed in *Muller v. Oregon*—a challenge to the Constitutionality of an hours limitation law for women and children.

The Brandeis Brief marshaled an array of social science data rather than standard legal arguments to support the Oregon hours law. It actually was assembled by Josephine Goldmark, Brandeis' sister-in-law, and Florence Kelley—both very well known Progressive Era reformers active with the National Consumers League. Goldmark and Kelley, and Brandeis of course as a counsel of record, had a bit of a legal conundrum to resolve. *Lochner v. New York*,[5] which invalidated a New York statute limiting the hours of male bakers on Freedom of Contract grounds, was decided in 1905. *Muller* was added to the Court's document just two Court terms later. The Justices had to be convinced that hours legislation protecting Oregon's women and children was in a different category from the similar rules in New York about male bakers. Focusing on the physiological differences between men and women was the obvious strategy. While the brief filed by the Oregon Attorney

General's Office was a traditionally composed document, the Brandeis Brief had virtually no legal argument in its 113 pages—only about two pages worth. One of the short argumentative passages graced the opening page of a section on “The dangers of Long hours.” It read:

The dangers of long hours for women arise from their special physical organization taken in connection with the strain incident to factory and similar work.

Long hours of labor are dangers for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance; in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost is more disastrous to the health of women than of men, and entails upon them more lasting injury.

Following this short “legal” contention, the brief presented quotations from a lengthy series of publications and studies. The tone of a number of them mirrored that of Dr. Clarke. Just one is enough to provide the brief's flavor. Here are the words of Dr. George M. Price, a Medical Sanitary Inspector for the Health Department of the City of New York:

The injurious influences of female labor are due to the following factors: (1) The comparative physical weakness of the female organism; (2) The greater predisposition to harmful and poisonous elements in the trades; (3) The periodical semi-pathological state of health of women; (4) The effect of labor on the reproductive organs; and (5) The effects on the offspring. [6]

The National Consumer League strategy worked. The Court took the rare step of citing the Brandeis Brief[7] and adopting its basic theory whole cloth. As Justice Brewer wrote for the unanimous Court:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

The opinion was remarkably short and virtually bereft of any sharp legal analysis—a statement of how obvious it was that men and women were situated differently in their physiology and therefore in their workplace capacities.

It is very important to recognize that such views were not part of American culture during its founding decades. Women certainly were viewed and legally treated as dependent, seldom seen in important arenas of public life, shunted away from places and activities controlled by men, and legally barred from most commercial and political arenas. And of course, notice was taken that women were often physically less muscular and therefore less strong than men; that notion has been common since the dawn of humanity. But there was little chatter about imposing limitations upon them because development and operation of their reproductive systems limited the *regularity* of their physical or mental capacities outside of the birthing chamber, about the *periodicity* of women's lives altering their ability to perform physical or mental tasks, or about women's psyches being *flighty and episodic*—in short, about stamina.

That made perfectly good sense at the time. Life, largely rural, was rough and rugged. Unless you were very wealthy, maintaining a household took the labor of everyone present. Children were pressed into service at a young age. Raising food, and making cloth and clothing, candles, building homes, and other basic necessities typically required an enormous amount of hard, sometimes back breaking, work. It really wasn't until Clarke's time that the hard lives of significant numbers of women homemakers began to ease with the arrival of food distribution systems, large-scale commerce, electricity, and other "modern" conveniences. The transitions are beautifully described in Susan Strasser's wonderful 1982 book, *Never Done*. And with the arrival of modern commercial life came some leisure time, the arrival of vacation getaways, female "cures" upstate, and the notion that women needed to rest once a month. Science, of course, often is socially constructed. For me, there is no better example of that than the views of Dr. Clarke and his supporters.

By the 1920s, Clarke's views about the mental capacity of women were largely out of favor in the recently created discipline of psychology. Studies, many organized by women, demonstrated no difference in educational performance at various stages of a woman's menstrual cycle. Death and diseases of women were shown to be unrelated to exercise of the mind during menstruation but to other common features of existence on the planet. And, of course, women's suffrage had become a reality.

But this did not mean that claimed differences in the physical capacities of men and women or the episodic qualities of women's mental acuity disappeared from public discourse. Despite the demise of much of Clarke's "science," American culture could not rid itself of the notion that women were inherently, naturally less stable and capable than men. The contours of the debate over the Equal Rights Amendment proposed by the National Woman's Party after suffrage arrived made that clear. Most women then opposed the E.R.A. because they feared it would lead to the demise of protective legislation adopted after the decision in *Muller*. Felix Frankfurter summed up the arguments "nicely." While a Professor at Harvard in 1924, he opined that "Nature made men and women different; the Woman's Party cannot make them the same. Law must accommodate itself to the immutable differences of nature."**[8]**

Such views wove a varied tapestry throughout the rest of the twentieth century. They were culturally manipulable, depending on understandings of cultural needs. Sometimes notions of women's physical limitations surged to the foreground; at other times notions of women's enormous capacity for work dominated. The continuing sense that notions of gender equality were in cultural tension with the limits of women's physical constitutions played out in the movement of women into and out of the factory work force during and after World War II, the bitter debates over the Equal Rights Amendment in the 1970s, and in contemporary arguments about the service of women in the military, among a variety of other controversies.

One episode from our more recent history suffices to demonstrate the continuing cultural tension between equality norms on the one hand and the claimed physical and mental limitations of women on the other. As ratification of the more recent Equal Rights Amendment was nearing its unsuccessful conclusion, President Carter and many other amendment supporters claimed, perhaps in desperation, that if ratified it would not interfere with the motherly and domestic roles of women serving in the military, that even if the E.R.A. was read to require the registration and draft of women if men were so obligated, women's actual military service would be organized to protect their motherly role and that they never would be pressed into combat service. Similar arguments surfaced when President Carter supported legislation requiring men, and men only, to register for the draft in case it was ever reinstated. That legislation passed in 1980. Combat was then assumed to be men's

work—women were too weak, maternal instincts were too strong, menstruation was deemed impossible to handle during combat, women’s emotions were too cyclical, and, of course, women lacked the necessary stamina.

The Supreme Court opinions in *Rostker v. Goldberg*,^[9] the 1981 decision affirming the male only registration system, were heavily influenced by the debates over both the E.R.A. and the draft registration legislation. Justice Rehnquist, writing for the Court, claimed there could not possibly be any serious issue of gender discrimination in male only registration. Since, as President Carter and other E.R.A. supporters claimed, the proposed amendment would not have required combat service by women, an Equal Protection violation under the existing Constitution was simply impossible. In writing about this conclusion 26 years ago, I claimed:

It is hard to take seriously the notion that *Rostker* represents a carefully thought-out rule about intentional gender discrimination. Rehnquist’s presumption that the previously enacted restrictions on women serving in combat roles were constitutional hardly was commanded. Nothing in the underlying framework of discrimination law prevented either the parties or the Court from assuming that the combat restrictions were invalid. Rather, the fact that the plaintiffs in building their lawsuit, Justice Rehnquist in composing his majority opinion, and * * * [the Justices composing their dissents] all assumed that the battlefield bar was valid strongly suggest that the cultural norms frowning upon women in the trenches were too powerful to ignore. There is, therefore, little to support the result save the quite obvious stereotypes that women cannot shoot guns, drive tanks, fly airplanes, push missile buttons, or die as well as men.^[10]

And so too, I assume that many Republicans challenging Hillary Clinton’s physical and mental fitness to assume the Presidency would claim they are not relying upon gender stereotypes. But, it is obvious to me that their challenges to her stamina heavily rely upon unsupported assumptions about the episodic weaknesses of women that have bored very deeply into the psyche, history, and culture of American society since the end of the Civil War.

*This blog is an edited version of a talk I delivered at New York Law School during a November 1st event marking the August, 2016, publication of **Gendered Law in American History**, a large text written by me and Wendy Williams, Professor of Law Emerita at Georgetown University Law Center. A video of the talk is available on the New York Law School website at: <http://nyls.mediasite.com/mediasite/Play/cd10250f342c49dca4b3977ed42b28781d>*

[1] For example, in an Associated Press report posted on the New York Times web site just after her stumble on 9/11, it was said:

Now Clinton is sure to face new questions about whether she’s physically fit for the presidency. Trump and his supporters have been hinting at potential health issues for months, questioning Clinton’s stamina when she takes routine days off the campaign trail and reviving questions about a concussion she sustained in December 2012 after fainting. Her doctor attributed that episode to a stomach virus and dehydration.

Clinton Recovering After Health Episode, Cancels Calif. Trip, The New York Times (Sep. 11 2016), <http://www.nytimes.com/aponline/2016/09/11/us/politics/ap-us-campaign-2016-clinton.html> (Visited Sep. 13, 2016).

- [2]. Amanda Hess, *What's Really Behind Trump's Obsession With Clinton's Health*, The New York Times Magazine (Oct. 11, 2016), <http://www.nytimes.com/2016/10/16/magazine/whats-really-behind-trumps-obsession-with-clintons-stamina.html>.
- [3]. Edward H. Clarke, *Sex in Education; or A Fair Chance for Girls* 32-34, 36-38 (1873).
- [4]. Julia Ward Howe, *Sex and Education*, in Julia Ward Howe (ed.), *Sex and Education. A Reply to Dr. E. H. Clarke's "Sex in Education"* 17-20 (1874).
- [5]. 198 U.S. 45 (1905).
- [6]. A litany of similar quotes may be found in pages 18-55 of the Brief for Defendant in Error, *Muller v. State of Oregon*, October Term 1907, Case No. 107, United States Supreme Court (1907).
- [7]. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).
- [8]. Editorial, *Equal Rights Amendment Arrives*, 58 A.B.A. J. 604, 605 (1972).
- [9]. 453 U.S. 57 (1981).
- [10] Richard H. Chused, *Gendered Space*, 42 Florida L. Rev. 125, 150 (1990).