

# FOREWORD

## Gender Journals and Gender Equality: Reflections on Twenty-five Years of the *Duke Journal of Gender Law and Policy*

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*This Twenty-fifth Anniversary Volume of the Duke Journal of Gender Law and Policy is dedicated to Katharine T. Bartlett, A. Kenneth Pye Distinguished Professor of Law Emerita. She is a path-breaking scholar, inspiring leader, dynamic teacher, and loyal friend. Thank you, Kate, for your many contributions to furthering gender equality for generations of lawyers, students, and scholars.*

### INTRODUCTION

When I was in college, I took a Feminist Legal Theory class in my school's English department. We read two articles by the law professor Catharine MacKinnon: *Feminism, Marxism, Method, and the State: An Agenda for Theory*,<sup>1</sup> and *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*.<sup>2</sup> In these articles, Professor MacKinnon first articulated her extraordinarily influential theory of feminism, in which she showed how laws and practices that appear to be "neutral" can actually "operate as forms of sexual discrimination which disadvantage, or 'subordinate,' women in relation to men."<sup>3</sup> These articles were my first introduction to law; my first introduction to the idea that the theories I was learning about in courses on literature, religion, sociology, and history could be deployed to create actual change in the contemporary world.

I distinctly remember my English professor telling us that Professor MacKinnon published her articles in *Signs: Journal of Women in Culture and Society* because no mainstream law journal would publish them. Recently, I had the opportunity to ask Professor MacKinnon about this, and she confirmed that she did not even *submit* these pieces to law reviews, as she was certain that these journals would not publish feminist theory.<sup>4</sup> Indeed, there was a movement at the time—in the 1980s, when Professor MacKinnon published those two pieces and in

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1. 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515 (1982).

2. 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635 (1983).

3. Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. POL'Y 1, 6 (1994).

4. Conversation with Catherine MacKinnon at the "Celebrating Women's Advancement in Law" Symposium, in Washington D.C. (Feb. 3, 2020).

the 1990s, when I was studying her work—when law schools as well as other academic disciplines were creating journals focused on gender for precisely that reason.

From the 1980s on, the number of law journals focusing specifically on gender proliferated. The first, the *Harvard Women's Law Review* launched in 1978; by 1999, there were at least eighteen.<sup>5</sup> Many of these journals, including this one, published path-breaking work on gender and law, much of which might not have been published in mainstream law reviews.<sup>6</sup>

This expansion was part of a larger movement in which student-edited law journals increased rapidly in number. Participation on journals had long been the province of a select few students at the “top” of any law school class; expansion into secondary journals allowed more law students hands-on development of analytic precision, editorial skills, and management and teamwork that journal membership offers. At the peak of this trend, Duke Law School published ten distinct journals, quite a feat for a school with only 220 students per class.

These journals have now begun to decrease in number. This decrease does not appear to reflect a diminishment of student interest and passion for specific subject areas of the law, or their commitment to engaging in hands-on legal work. To the contrary, it has occurred simultaneously with the increase in clinical opportunities, externships, and other co-curricular opportunities that allow students to develop the analytic and managerial skills that journal participation also offers. I do not believe we can fully understand the waxing and waning of law journals without understanding this greater context. Legal education today is more interactive and experiential than it has ever been, and this change benefits law students greatly in launching their careers. For example, students at Duke Law today can work to combat gender violence through work in the International Human Right's Clinic, represent families who have been separated in the Immigrant Rights Clinic, or prevent the eviction of female-headed families through the Civil Justice Clinic.

It is largely because of these trends—decreased demand by students for large numbers of journals, coupled with increased opportunities for experiential learning outside of journal membership—that we have decided that this volume will be the last, at least for now, of the *Duke Journal of Gender Law and Policy*. Unlike other journals that we have launched and then decommissioned, however, the gender journal has an additional, equally positive thread in its story beyond the simple expansion of experiential opportunities. Gender, once a subject ignored or outright avoided by mainstream law journals, has now become a much more common subject for law reviews. In fact, in the last ten years, flagship law reviews

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5. Laura Rosenbury, *Feminist Legal Scholarship: Charting Topics and Authors, 1978–2002*, 12 COLUM. J. GENDER & L. 446, 447 (2003).

6. For example, Maya Manian's *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009) was one of the most astute and influential pieces on *Gonzales v. Carhart*. Susan Sturm's *From Gladiators To Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER LAW & POL'Y 119, 122 (1997) questioned the “adequacy of [a] one-size-fits-all, gladiator conception of lawyering and legal education.” The Journal also published one of the first definitive studies on the effects of gay and lesbian parenting on children. See Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995).

have published the most influential and highly cited articles on gender and antidiscrimination law,<sup>7</sup> criminal law,<sup>8</sup> family law,<sup>9</sup> religion,<sup>10</sup> citizenship,<sup>11</sup> and abortion.<sup>12</sup> The focus on gender has even opened up new legal topics that did not exist in the 1980s, such as revenge porn,<sup>13</sup> “human vulnerability,”<sup>14</sup> and the role of gender in algorithms.<sup>15</sup>

To celebrate the final, twenty-fifth anniversary volume of this journal, we have commissioned articles from Duke Law faculty that reflect this explosion in gender law scholarship. The resulting essays are rich and varied, and reflect many current trends in gender scholarship. In her opening essay, Professor Bartlett outlines some of these trends. Several are worth noting here.

As Professor Bartlett notes in her essay, an important strand of feminist legal theory developed in the 1980s and 1990s was the “intersectionality critique.” This theory posited that “race and gender often work together to create hybrid forms of bias that the law does not recognize when it looks for bias based on either race or gender alone.”<sup>16</sup> Professor Bartlett observes that this critique has deepened and expanded over the years. In our current volume, Trina Jones and Emma E. Wade’s essay, *Me Too? Race, Gender, and Ending Sexual Harassment*, is a perfect example of the modern deployment of this method. Professor Jones and Ms. Wade show how the narratives employed in judicial opinions often mask the underlying racial dynamics in sexual harassment cases.<sup>17</sup> Similarly, in *Working to Fail*, Sara Sternberg Greene shows how poverty intersects with gender to make single mothers vulnerable to losing their jobs, and suggests improved child care subsidies to help remedy the problem.<sup>18</sup> Jayne C. Huckerby’s *In Harm’s Way: Gender and Human Rights in National Security* identifies another uncomfortable intersection: counterterrorism efforts have deployed gender in ways that undermine women’s security,

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7. See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

8. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

9. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015).

10. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

11. See, e.g., Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of the Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

12. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

13. See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

14. See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

15. See Naomi Cahn, June Carbone, & Nancy Levit, *Discrimination by Design?*, 51 ARIZ. ST. L.J. 1 (2019).

16. Katharine T. Bartlett, *Gender Law: After Twenty-five Years*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 2.

17. Trina Jones and Emma E. Wade, *Me Too? Race, Gender, and Ending Sexual Harassment*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 212.

18. Sara Sternberg Greene, *Working to Fail*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, *passim*.

especially in the case of Muslim women, and “decoupl[e] [gender issues] from human rights concerns.”<sup>19</sup>

Other authors consider the meaning of biological sex in a world that has shifted away from sex toward gender.<sup>20</sup> In *Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, Doriane Lambelet Coleman, Michael J. Joyner, and Donna Lopiano argue that biological sex differences justify differential treatment for men and women in sports to give women opportunities to compete and excel.<sup>21</sup> This paper reminds us that an intersectional analysis does not always lead to an expansion of rights claims; to the contrary, sometimes intersectional identities—here, biological sex and social gender identity, can produce conflicts that result in wins or losses for particular groups. In *Annie Get Your Gun: The Constitution, Women, and Involuntary Service in Combat*, Charles J. Dunlap, Jr. asks the question, “does the Constitution mandate forcing women to serve in [military] combat roles against their will?” and concludes that although Congress *could* include women in the draft, it is not *required* to do so, largely, in his view, because of inherent biological difference.<sup>22</sup>

Perhaps one of the biggest changes in gender scholarship over the past twenty-five years has been the shift to considering the ways in which gendered legal forms shape and regulate men. As Professor Bartlett puts it, “the relatively new field of masculinities studies has taken men . . . as the main subject” and asked “how masculinity is constructed, universalized, stereotyped, by largely through the same kinds of forces that construct, universalize and stereotype women.”<sup>23</sup> Several essays in this volume interrogate notions of masculinity. Rachel Brewster’s piece, *Gender and International Trade Policy: Economic Nostalgia and the National Security Steel Tariffs*, provides a fascinating examination of President Trump’s trade policy through a gendered lens. Professor Brewster shows how the Administration’s emphasis on tariffs to protect “stereotypically masculine jobs” by focusing on the steel industry over the textile and other industries has paradoxically had a “net negative” impact on the American economy.<sup>24</sup> Ernest Young finds in his paternity leave a new understanding of traditional “women’s work” as “holding back the chaos,” consistent with conservative ideals of “preserving existing norms and institutions against the corrosive effects of change.”<sup>25</sup> Joseph Blocher’s essay, *Domestic Violence and the Home-Centered Second Amendment*, shows how Second Amendment jurisprudence—which privileges the home as a site of maximum protection for gun ownership—is grounded in a fundamentally masculine understanding of the home as a private space. For

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19. Jayne C. Huckerby, *In Harm’s Way: Gender and Human Rights in National Security*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 179, 187.

20. See Bartlett, *supra* note 16, at 20.

21. Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 97–98.

22. Charles J. Dunlap, Jr., *Annie Get Your Gun: The Constitution, Women, and Involuntary Service in Combat*, 27 DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 149, 163.

23. Bartlett, *supra* note 16, at 16.

24. Rachel Brewster, *Gender and International Trade Policy: Economic Nostalgia and the National Security Steel Tariffs*, DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 59, 66.

25. Ernest A. Young, *Chaos, Accomplishment, and Work, or What I Learned on Paternity Leave*, DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 273, 275.

women, who typically experience the home as the *most* likely site for gun violence, “gun ownership, *even in the home*, is not merely ‘private’.”<sup>26</sup>

Perhaps the most striking feature of the essays in this volume is the degree to which issues of gender now permeate every legal field. “Gender law” articles used to focus primarily on issues of employment discrimination or family law. While these fields are still disproportionately represented, every area of law is now being analyzed through a gendered lens. From tax law (Lawrence Zelenak’s *“We Will See That You Are Troubled Right Along”: Women and the Politics of the Early Federal Income Tax*) to art law (Deborah A. DeMott’s *Looking Beyond the Easel: Artists’ Contexts and Resale Payments*), from constitutional law (Darrell A. H. Miller’s *Constitutional Pronouns*) to international criminal law (Sara Sun Beale’s *Prosecuting Sexual Exploitation and Trafficking Abroad: Congress, the Courts, and the Constitution*), our faculty authors show with depth and precision how doctrine that may appear to be gender neutral on its face has had extraordinarily different consequences for men and women.

It is tempting, with twenty-five years of such progress and flourishing of scholarship, to simply “declare victory.” Our decision to celebrate this anniversary with a final volume, however, represents only a partial victory, representing our faith that gender scholarship will continue to find homes in a plurality of venues. Despite the progress that has been made, the fight for gender equality is far from over. Neil S. Siegel’s essay, *Why The Nineteenth Amendment Matters Today: A Guide for the Centennial*, reminds us that “the story of the Nineteenth Amendment is at least as sobering as it is inspiring—probably more so” and that “progress is slow, uneven, and halting, not linear.”<sup>27</sup> That “halting progress” can be explained by Catharine MacKinnon’s observation that ostensibly neutral laws and practices often operate to subordinate women. It must be our goal to continually contest this purported neutrality and to examine how the law actually affects the lives of people of all genders. We hope that the essays in this volume give readers a taste of how exciting the outcomes can be when scholars from across a wide spectrum of fields come together to engage in this common project.

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26. Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 54.

27. Neil S. Siegel, *Why The Nineteenth Amendment Matters Today: A Guide for the Centennial*, DUKE J. GENDER L. & POL’Y, no. 1, 2020, at 262, 264.