

# William & Mary Journal of Race, Gender, and Social Justice

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## Introduction

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# William & Mary Journal of Women and the Law

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## INTRODUCTION

TONI M. MASSARO\*

At first glance, William and Mary Law School does not seem an ideal setting for a gender journal. Unlike Berkeley, Rutgers, Columbia, and UCLA—to name a few other schools with women's law reviews—William and Mary is a small southern school in a pastoral setting. The campus and community are quaintly and famously colonial, steeped in American history and charmingly atavistic. Students and faculty drawn to this environment are, one must assume, past-oriented enough to enjoy (or at least not be startled by) grocery shopping among adults dressed in full colonial costume. A place best known for such an elaborate recreation of an era of American history in which women were not permitted to serve as jurors,<sup>1</sup> could not become lawyers, could not teach law, and were not allowed to vote may seem better suited to a journal on American legal history than to one on women and the law.

Yet when one reflects further on the location and this topic, one realizes that there is no *better* place than the nation's oldest law school to launch such a journal. What could be a more impressive sign that gender issues now are widely understood to be fundamental, important, and abiding concerns? And if, as

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1. See Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993).

many theorists argue, gender is a social construct, then what better place to remind us of the domestic history that informed its contemporary meaning? A walk down the Duke of Gloucester Street in the midst of writing or editing an article on women and property might cast a powerful, unique light on the subject. Likewise, the changing attitudes about the economic rights and political rights of women take on special significance in a setting that reenacts the stark historical division of labor along gender lines.

So it is with a sense of site-significance that I introduce this inaugural issue of the *William & Mary Journal of Women and the Law*. It also gives me great personal pleasure to usher in the next historical phase of women's achievement here.

When I graduated from William and Mary in May of 1980, Tim Sullivan, who was then associate dean and is now president of the college, commented on the powerful, evocative sense of place and purpose that this school instills in its graduates. "You will miss it," he said, and I have missed it.

But not all parts of the law school memories are as sweet as others. The advent of this new journal effaces some of the less sweet ones, even as it evokes some of the best.

When my class arrived on campus in 1977, the law school was housed in the old facility, behind the Wren Building. The student body and faculty were smaller, the faculty was less diverse, and the library was, well, modest. The curriculum of 1977 made the term "core" painfully apt, pared back as it was to doctrinal basics. The faculty then included only one woman, Professor Ingrid Hillinger, who single-handedly (though marvelously and generously) carried the full weight of students' female "role model" expectations.

Yet despite these limitations—or was it because of them?—a counterpulse beat in the school that helped to make the law school's subsequent dazzling changes possible, including the changes represented by this new journal.

Thus I am happy to refute, at least in part, the claim of the writer who recently observed that "[p]redictably, perhaps, there are no courses on feminist law or related topics at more traditionally conservative places, such as William and Mary, Washington and Lee, or Catholic University."<sup>2</sup> His appraisal of the interest

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2. Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1, 4 n.14 (1992).

in feminist law at William and Mary—past and present—is quite misleading.

For there clearly were, at least by the 1970s and likely well before, people in the law school community who struggled to raise gender issues in that unlikely setting. There were also courses on gender issues at William and Mary; in the spring of 1980 newly hired Professor Lynda Butler introduced a seminar on women and the law. More critically, however, the birth of this journal clearly belies the writer's implication that at "traditionally conservative" places like William and Mary no one regards curricular inattention to gender and the law as worrisome. On the contrary, such silences may be felt most acutely by students in such settings. Many of my classmates—more than forty percent of whom were female—surely felt it more than fifteen years ago, and were gratified when Professor Butler's seminar debuted in 1980.

Even before that addition, however, there were signs of the emerging importance of women's issues at the school. A little known fact is that the editor-in-chief of the first issue of the *William and Mary Law Review*, published in 1957, was a woman. Moreover, the law school organization for women and the law, the Mary and William Society, was in the late '70s a vibrant, uncommonly active group that organized and presented annual workshops on women's issues, which were attended by lawyers from across the state. One of the early keynote speakers was Wendy Williams, a pioneer in feminist jurisprudence. Her lecture on how social structures often are fashioned without regard for women's interests—comparing these structures to small door frames in an African community where her (tall) sister was a Peace Corps worker—hit home for many of us who were then learning law surrounded by a framed legal history—texts, pictures, and vocabulary from which women were entirely absent or seemed to fit awkwardly, at best.

This journal honors these grassroots efforts, for it is, in part, a product of this history of informal collaboration and defiance of the legal conventions that rendered women and gender invisible. Clearly, however, this formal voice will be a much stronger, more certain means of assuring that gender issues will always be raised and given their proper respect. Thus, although this journal is part of a long, informal tradition at William and Mary, it will recast, expand, and formalize that tradition. This is a happy, auspicious development: William and Mary, where so much history is enshrined, now officially recognizes the importance of gender to legal and social institutions.

The students who conceived of the journal and then applied the time and energy necessary to make it happen deserve warm thanks and praise. Law school is a busy three years, in which most students' lives are consumed by the effort to master the material, complete the steady stream of assignments, and land a job. Creating a new journal, which is essentially like starting a small business, is a massive undertaking that is likely to benefit most the students who follow this first board of editors, some of whom will have graduated by the time the first volume is completed. These students' gift to the law school and to future students is considerable.

Yet surely some observers, including some alumnae and alumni, will raise questions about the students' timing and their focus. Some may think that this journal comes too late, and that its appearance is not a sign of progress, but is simply evidence that time again has stopped in Williamsburg. After all, isn't this a post-feminist moment?

Others may share the lament of many modern academics that American education generally<sup>3</sup> and American legal education in particular<sup>4</sup> have placed undue emphasis on divisive particularisms of questionable salience, such as gender, race, and ethnicity. Gender-consciousness, they may argue, has proven to be an unproductive distraction within legal scholarship insofar as gender does not make a stable or generalizable difference in legal or social arrangements. As such, a journal devoted to the isolated concern of "women and the law" is a venture that should be denounced, not celebrated.

These criticisms are hardly weightless and deserve the close attention they already have received elsewhere. I will not reproduce here these thoughtful exchanges; instead, I will simply highlight some of the more persuasive responses to the critics of gender scholarship in an effort to show how vital and unresolved the gender conflicts remain.

A first response is that some critics of gender scholarship may misperceive the intellectual enterprise itself. "Women and the Law" is a question, not an explanation. It does not entail any one, temporally bound prescription, as even a cursory review of feminist jurisprudence reveals. Consequently, the enterprise has

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3. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992).

4. See, e.g., Lasson, *supra* note 2; Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105.

grown increasingly complex in recent decades. Gender scholarship today is marked by an emphasis on context and continuums, and a de-emphasis on fixed borders, grand theories, or categories. Many modern gender theorists view gender as constructed and not as a stable, acultural phenomenon.<sup>5</sup> Indeed, some even question the baseline assumption that at least the biological differences between men and women are fixed and enjoy culturally or historically stable meanings.<sup>6</sup>

Attempts to capture these complexities have led gender scholarship, like many other strands of modern legal scholarship, to become increasingly interdisciplinary and, in some respects, less accessible to nonspecialists than it was in its infancy. Understanding the cultural and myriad other dimensions of gender that bear on legal problems now means consulting both traditional legal materials and less familiar nonlegal materials. Correlatively, presenting the relevant recent work on any specific topic within the realm of women and the law today is more complicated than simply publishing articles that synthesize and critique the reported cases and statutes that touch on that topic. Specialty journals like this one can best perform the task of bringing the widening range of materials deemed relevant to law to the attention of practitioners, scholars, judges, and students. Such journals also can facilitate the necessary cross-fertilization of disciplines that can yield new insights into law and its societal implications.

Obviously, however, these complexities of gender lead to another, quite basic dilemma for gender scholars. In light of the diversity of women's lives, it sometimes seems useless or woefully inadequate to focus on gender—in daily personal and political encounters as well as in scholarship. Exacerbating these practical difficulties is the fact that modern theoretical understandings of gender are so fluid, even baffling. This has led some theorists to speculate that gender's meaning may be so contextual, and its borders so permeable, that "gender" studies—and, by implication, a journal devoted to women and the law—may be hopelessly shapeless endeavors.<sup>7</sup> Gender, they fear, cannot stand as a meaningful division within legal or other scholarship.

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5. See, e.g., Monique Wittig, *One is Not Born a Woman*, FEMINIST ISSUES, Winter 1981, at 47; DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE (1989) (discussing the potential incompatibility of feminism and deconstruction).

6. See, e.g., THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (1990).

7. See FUSS, *supra* note 5, at 24.

This more challenging question of nature versus construct greatly complicates the feminist endeavor, but does not doom it. It presents a paradox for feminist scholars, to be sure—one they have already recognized.<sup>8</sup> But so do many other central concepts within legal practice and theory, as they too are mediated by many factors that limit the stability and usefulness of categories that nevertheless are commonly deployed within legal scholarship.<sup>9</sup> The theoretical challenge is to foster an appreciation for this diversity without losing sight of the ways in which even permeable borders are often useful ways of organizing intellectual inquiries.

Many feminist scholars have responded to this challenge by addressing the nature versus construct dilemma while still maintaining their commitment to the significance of the gender marker. In particular, they have focused considerable scholarly energy on the following issue: what difference does gender *necessarily* (or essentially) make? Is there something essentially male or female? Do women necessarily solve problems differently from men? Are they inevitably more aware of interdependence and connection? Are men naturally inclined to think in linear and hierarchical terms?

Or is gender entirely socially constructed—such that there is no essential female or male voice, though women and men may be placed by their social environment into particular, gender-specific roles?

Much hinges on our responses to these theoretical questions. In law the difference, if any, that gender *necessarily* makes is

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8. Deborah Rhode has explained the gender paradox as follows:

Feminism's authority rests on its claims to speak from women's experience. That very experience, however, demands attention to the diversity in women's circumstances. . . . [G]ender is always mediated by other forces that structure identity, such as race, ethnicity, class, and sexual orientation. Recognition of this diversity complicates the search for theoretical coherence and political cohesion.

Deborah Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1182 (1994).

9. Examples of fundamental legal categories that lawyers and judges deploy despite their contested borders include the following: speech versus conduct; omissions versus commissions; crimes versus torts; and the public/private distinction. Race and ethnicity, like gender, are human characteristics that continue to define legal rights despite their context-dependent salience and internal diversity. Law courses and texts are labelled "civil rights law" though their content may vary significantly across instructors and authors. Legal conferences, professional organizations, and legal journals are organized around such capacious and fuzzily defined themes as "law and society" or "law and economics." All of these legal categories remain useful markers, even though their borders may dissolve in some contexts and reappear in others.

especially relevant in discussions about equality. If women and men are essentially different, then equal treatment may not be a sensible or fair strategy. Treating women the same as men, which is often the reference point law uses to determine equal treatment, may mean treating them less well, if it ignores the ways in which women differ from men. Women consistently will fail to fit the male model—whether because many women solve problems differently from men, or because some women but no men can bear children, or otherwise. As such, we may need to change the workplace, the schoolroom, and other settings in a way that considers these gender differences.

But if the sexes are not *necessarily* different—rather, we merely have been *treated* as different in ways that historically have banished many women to lower paying jobs and constraining social scripts—then equal treatment is a sensible goal. Modifications will be needed in the transition, to ease the passage from gender discrimination and gender-consciousness to a world in which gender is not salient, not determinative, and not a life sentence to a particular caste, line of work, or social function.<sup>10</sup> But equal treatment is the aim, according to this view.

All of this is a well-rehearsed theme in feminist scholarship, presented here in an oversimplified form. Despite the attention it has received, however, the issue is far from resolved. We have not yet reached a cultural consensus about the difference that gender does or should make in our lives. Consequently, far from signalling the modern irrelevance of gender scholarship, the paradox of gender-consciousness raises a matter of central concern within that scholarship. Its complexities are fundamental to an inquiry that entails extremely basic questions about human identity and equality. This issue therefore does deserve separate attention, even while its borders are under intellectual assault. Indeed, the conflicts waged over the gender borders actually are a sign of the issue's vitality and importance, not a sign of its moribundity. Those who argue that the profession already has gotten the gender insight and is ready to move on to other insights underestimate these complexities, and may regard the popularity and accessibility of a field as the sole measures of its cultural significance. Clearly, however, these are not even valid measures, let alone the sole ones for gauging the value of scholarly inquiries.

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10. For a fuller discussion of the essentialism debate and its legal implications see DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989).

Indeed, proof of the continued significance of inquiries into the difference gender should or does make is evident even in such thoroughly mainstream sources as the recent opinions of the United States Supreme Court. Just last term, the Court reaffirmed the principle first advanced in *Reed v. Reed*<sup>11</sup> that classifications based on gender trigger elevated scrutiny under the Fourteenth Amendment.<sup>12</sup> Yet unlike race-based classifications, which trigger strict scrutiny because they are presumptively irrational,<sup>13</sup> gender-based classifications trigger intermediate scrutiny and are lawful when they serve important government interests.<sup>14</sup> This constitutional doctrine suggests that in an ideal legal order, race would be irrelevant; hence, race-based classifications are strongly disfavored. Yet even in an ideal world, the doctrine implies, gender will continue to be relevant in at least some situations. Again, the confoundingly difficult and unanswered question is this: *when* is a gender-based classification benign and sensible? The Court's ambiguous, context-dependent response to this question is a frank admission of its complexity, and of the Court's present inability to resolve it.

The works that appear in this and future issues of the *William & Mary Journal of Women and the Law* may assist the Court and other legal decisionmakers, theorists, and practitioners in responding to this complex and fundamental question. Articles on the gender implications of domestic violence, workplace equity, family leave policies, sexual harassment, and welfare laws are examples of the kind of scholarship this forum will feature. Likewise within its scope will be articles on the biological/sociological construction of sexual identities, reproductive technologies, the public/private dichotomy, and theories of moral reasoning. Works that address the gender implications of capitalism, liberalism, and socialism too may find a home here, as may studies of the economic consequences of various workplace and domestic structures. The problem of a modern journal with a focus on gender therefore lies not in finding articles and issues adequate to fill its pages, but in finding enough pages to encompass the many aspects of this ever-timely, engrossing topic.

I urge scholars nationwide and beyond the United States to support this new entry into the field by submitting manuscripts

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11. 404 U.S. 71 (1971).

12. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (holding that it is unconstitutional for state actors to use gender as a basis for peremptory strikes in jury selection).

13. *See, e.g.*, *J.A. Croson Co. v. Richmond*, 488 U.S. 469 (1989).

14. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

and by subscribing, citing, and referring to this and future issues. The *William & Mary Journal of Women and the Law*, like the law school itself, is dedicated to transforming law to better serve the needs of all members of contemporary society, even as it hopes to preserve the best features of a proud national and local history. The Journal's ultimate success, however, will depend on the interest and active engagement of its readership, which the editors hope will be large, critical, and committed to raising, resolving, and reformulating the fundamental questions that the gender inquiry entails. Our support is the very best way to convey our thanks, and to honor the achievements of the women of William and Mary—past, present, and future.