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## Setting the Stage: A Quick Glance Back at the Journal's History

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SETTING THE STAGE:  
A QUICK GLANCE BACK AT THE  
JOURNAL'S HISTORY

*Julia L. Ernst\**

This symposium, organized by the *Michigan Journal of Gender & Law*, explored several cutting-edge topics related to its over-arching theme, “Rhetoric & Relevance: An Investigation into the Present and Future of Feminist Legal Theory.” When the *Journal* editors invited me to provide a few opening remarks, they informed me that

the goal of this symposium is to have a series of discussions about current happenings in the field of feminist legal scholarship, so that we may start to answer the question, “What’s next?” These discussions will take place in the form of panels that focus on particular areas of the law. The hope is that as the symposium progresses, the focused panels can shed light on larger patterns of development in feminist legal theory.<sup>1</sup>

The organizers of the event did a marvelous job in putting together exceptional panels of experts to discuss three distinct and ground-breaking areas within current feminist legal theory: cyber-privacy, intersex and transgender jurisprudence, and meanings of consent.

These topics are instructive about the role of feminist legal theory, which concerns not only challenging and changing the broader legal framework and jurisprudence, but also continually challenging and changing the feminist legal movement itself, from within. Feminist legal theory impels us not only to reconsider the applications of age-old legal frameworks—such as the concept of consent. It also provides us with new ways in which we might respond to broader changes in society—such as technological advancements giving rise to cyber-privacy concerns. Feminist legal theory also encourages us to reconsider how we perceive the scope of feminism and what it means to be feminist—such

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1. E-mail from Anya Pavlov-Shapiro, Symposium Coordinator, *Michigan Journal of Gender & Law*, to Julia L. Ernst, Adjunct Professor of Law, Georgetown University Law Center, (Oct. 29, 2008) (on file with author).

as the imperative for us to respond to discrimination, marginalization, and oppression based on broad conceptualizations of gender. I want to thank each of the speakers who expanded our horizons through their discussions of these issues throughout the symposium.

I was deeply honored to be asked to present a few thoughts to start off the symposium, and I am grateful to the editors of the *Michigan Journal of Gender & Law* for inviting me to serve in that role. It was incredibly meaningful for me because in 1991, seven friends and I sat in the snack bar underneath the main Reading Room of the Law Library and discussed the possibility of starting a journal at Michigan addressing women and the law.

“Rhetoric & Relevance: An Investigation into the Present and Future of Feminist Legal Theory.” That is an incredibly broad and profound topic. I must admit that I was initially at a loss about how even to begin to scratch its surface with a few brief introductory remarks let alone come up with a crystal ball through which to divine the future. Thankfully, one of the conference organizers subsequently clarified that they would like me to lay the foundation for the symposium through the story of the founding of the *Michigan Journal of Gender & Law* itself.

Therefore, I will reflect upon the creation of the *Journal* and its subsequent contributions in order to help set the stage for the scholarship generated by the symposium’s panelists. This background is especially pertinent to the topic of the symposium—investigating the present and future of feminist legal theory—in light of the adage that in order to understand where you are and to know where you are going, you must also know where you have been and understand the past.

One confession that I feel compelled to make is that I was initially a very reluctant participant in the founding of this journal. In the early 1990s, I had begun to appreciate the validity of feminism only recently, but was so disturbed by its reality that I wanted to have nothing personally to do with it. My happily sheltered background growing up in a quiet little town in northern Michigan, and subsequent privilege of attending an excellent college and law school, had initially led me to believe that “feminism” was unnecessary, and that people just needed to work hard in order to get ahead. I had not really bothered to consider the fact that being a legacy at both schools may have given me an unfair advantage in the admissions process, and I preferred to think instead that everyone’s station in life was attained by merit alone, whether on the top or bottom of the socio-economic ladder, of the social pecking order.

The turning point sparking my interest in gendered perspectives occurred during the summer between my junior and senior year of college, when my father gave me a book by Sally Helgesen called *The Female Advantage: Women's Ways of Leadership*.<sup>2</sup> The book describes a theory that men tend to lead as if they were at the top of a pyramid, with information flowing up the pyramid and decisions flowing downward.<sup>3</sup> By contrast, women tend to lead as if they were at the center of a web, with information not only flowing toward the center, but also across the spokes of the web in a more collaborative manner, thus—according to Helgesen's theory—leading to more and better-informed sources of information, and more efficient and effective decision-making.<sup>4</sup> This seemed to be a fairly appealing argument. Along the lines of Carol Gilligan's theory of "difference feminism,"<sup>5</sup> perhaps these approaches had some merit from which I could learn. And I have a tremendous respect for my parents, so I figured if Dad thought well of the book, then some of these "women's issues" may have some substance to them.

Well, later that summer a colleague gave me a copy of *Feminism Unmodified* by Catharine MacKinnon.<sup>6</sup> Was I ever in for a shockingly horrifying awakening! I was completely unprepared to delve into the reality of many women who find themselves trapped in brutal systems of prostitution, pornography, and even "snuff films" (pornography depicting women actually being murdered, which I had never heard of before). I was working that summer as a research assistant for a professor here at Michigan Law to see whether I liked the school before making a decision to enroll. I distinctly remember reading the book during my lunch hours on beautiful sunny days out in the Quad, how gut-wrenching it was to try to get through each chapter, and how I would feel physically sick all afternoon each day. After forcing myself through the end of the book, I had decided that yes, feminism really did have something to it, but that it (at least radical feminist legal theory) dealt with issues so appalling that I personally couldn't handle it. I was thankful that others were out there struggling to eliminate abuses against women, but I didn't want to be any part of it. I wanted to go back to my happy

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2. SALLY HELGESEN, *THE FEMALE ADVANTAGE: WOMEN'S WAYS OF LEADERSHIP* (1990).

3. See HELGESEN, *supra* note 2, at 8–28.

4. See HELGESEN, *supra* note 2, at 8–28.

5. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

6. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

existence believing that things were generally right with the world; that people who were fortunate deserved their fortunes; and that people who were less so must have done something to bring themselves down (and so could bring themselves up if they really wanted to). Therefore, I could merrily sail through life concerned only about myself and those closest to me, and not worry too much about the plight of others, or at least think that there was little that I really could do to help them. I tried my best to go back to that comfortable and comforting world.

Yet the next year I found myself engaged in that fateful discussion in the snack bar. I had initially declined the invitation from my friends to come talk about starting a women's law journal, but they were well aware of my caffeine addiction and enticed me with the prospect of coffee. In brainstorming about how to get authors to submit scholarship for the first issue (of an untested new journal that may well not get past its first publication), I made the mistake of suggesting that we host a symposium, where we would invite experts on an issue to speak at the Law School and then publish their presentations.

This was a lesson to me *not* to open my big mouth, as I was soon designated to be a co-chair of the symposium on prostitution—about which I knew practically nothing except what I had read in *Feminism Unmodified*. So I undertook a year-long self-education process about prostitution in particular and about different types of feminist legal theory in general. This was the most depressing year of my life, not only due to the gravity of the issues in which I was immersing myself, but also because it upended my entire worldview. No longer could I sit on the sidelines while so many injustices were taking place in the world. They say that converts are the worst zealots, and I have subsequently devoted my career to working against violations against women's human rights. But one of the deepest lessons I have taken away from this experience is that through knowledge, education and dialogue, people can and do change their positions, politics, thoughts, worldviews, and actions. And that is one of the strongest reasons why I believe in the vital importance of feminist legal theory as a catalytic agent in transforming society, and of dialogue fostered by conferences like this one and by journals focusing on gender justice and other social justice issues.

To get back to the *Journal* itself, let me return now to the weeks after our initial brainstorming session about starting the *Journal*. We knew that we would have significant hurdles to overcome, including skepticism of the administration and professors who had heard students discuss the possibility in prior years but had not yet gotten it off the ground, difficulties in finding funding and space to support another journal, opposition to the concept of a women's law journal from vari-

ous students and professors, and other challenges. For example, one manifestation of overt opposition was the frequent stealth removal of our posters advertising meetings about the journal, and another was a quite creative mock-poster campaign sarcastically mimicking ours.

To meet all of these challenges, we decided to develop a detailed proposal spelling out all of the reasons why we thought it was imperative to start a women's law journal, as well as the concrete steps we would need to undertake in order to take the journal from a concept to a reality. We then divided into teams of two and made appointments to talk with every professor and member of the administration with several goals in mind: first, to garner support for the journal; second, to seek their input and advice in improving our proposal; and third (and equally important), to open a discussion with those who were opposed to a women's law journal to try to persuade them to support us or at least neutralize their opposition. We also knew that our most ardent opponents would provide us with tremendous insights as to challenges we may face that we had not previously considered, so we took their critiques very seriously.

Interestingly, one objection voiced by a professor that stands out in my mind is the assertion that the field of "women and the law" is much too narrow—that only a few scholars would submit articles addressing "women and the law," and then there would be nothing more to say. On this view, the journal would serve no further purpose after a few issues had been published. Everything would be resolved, and we could just wrap it up and move on to something else. I have to love this optimism about women's equality, and oh, if it were only that easy!

Another objection, which I encountered from a student rather than a faculty member, is that it would be unfair for the Law School to support a women's law journal without providing equal support for a men's law journal. He appeared to be a bit taken aback when I expressed full endorsement of his idea, acknowledging that if he felt systemic oppression, discrimination, and fear of violence by virtue of being male (and nearly any female who has walked alone after dark knows what I mean), we should by all means have a men's law journal as well.

But in all seriousness, we did take these points to heart, particularly bringing them to light during one of our large general membership meetings, where we discussed and settled upon both the scope of the journal and its official name. We weren't worried about running out of topics for a women's law journal, but we felt it important to address broader issues of gender and the law, as gender-based subordination and marginalization come in many, inextricably inter-related forms, all of

which must be addressed if we are to attain gender justice, non-discrimination, and equality for all people.

For example, domestic violence against a man in a same-sex relationship is just as egregious as violence against a woman in an opposite-sex relationship. It arguably poses even greater challenges, as he may not have as many resources available as women now have (for example, domestic violence shelters are generally limited to women and minor children). He may also face greater stigma in coming forward as being in an abusive same-sex relationship. Female domestic violence survivors in heterosexual relationships already face significant stigma; consider the compounded barrier of possibly having to out oneself unwillingly in order to obtain legal and other assistance to escape from violence. Furthermore, there may be a reluctance to draw any negative attention to same-sex relationships, since these relationships are already largely marginalized and stigmatized by mainstream society in the first place.

As another example of the need for society to treat men equally, if both women and men are to attain true equality, consider the continued pressure against men taking parental leave or working part-time—in law firms and other occupations—in order to spend more time with family. Contrast this with the current general acceptance (sometimes grudging, but normally acceptance nonetheless) of women taking parental leave or working part-time. And by the way, I am a firm believer that women will never attain true equality—in either the public or private sphere—until men fully undertake equal responsibility for taking care of the home and children.

Of course, the years following the start of the *Journal* have demonstrated that the subject of “gender and the law” is far from being exhausted. Let me provide a few examples of the topics that have been addressed in the journal since its first issue appeared in 1993: domestic violence; rape; sexual harassment; lesbian and gay rights; marriage; adoption; reproductive rights; single-sex education; Title IX and athletics; intersectionalities, such as race and gender; women in the workplace, including pregnancy discrimination and parental leave; women judges; women’s experiences in law schools; and many others.

Moreover, if we consider only those cases that have filtered all the way up to the U.S. Supreme Court during the last few terms, we are provided with at least a half-dozen cases addressing contested areas of gender and the law. For example, *United States v. Hayes*,<sup>7</sup> argued in November 2008, concerns the interplay between domestic violence and

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7. *U.S. v. Hayes*, 129 S. Ct. 1079 (2009).

gun laws. *Fitzgerald v. Barnstable School Committee*,<sup>8</sup> argued in December 2008, concerns whether school officials appropriately responded to sexual harassment of a girl in kindergarten by a boy in third grade. *AT&T v. Hulteen*,<sup>9</sup> also argued in December 2008, concerns whether a classification scheme that is discriminatory under the Pregnancy Discrimination Act, if applied before the PDA was passed, can still be used by the company today as the basis for determining the current retirement benefit scheme. *Ledbetter v. Goodyear Tire and Rubber Co.*,<sup>10</sup> decided in 2007, restricted the ability of plaintiffs to bring gender discrimination suits. As Linda Greenhouse described the decision:

The court held . . . that employees may not bring suit under the principal federal anti-discrimination law unless they have filed a formal complaint with a federal agency within 180 days after their pay was set. The timeline applies, according to the decision, even if the effects of the initial discriminatory act were not immediately apparent to the worker and even if they continue to the present day.<sup>11</sup>

On January 27, 2009, President Obama signed his first bill into law overturning the decision, known as the Lilly Ledbetter Fair Pay Act.<sup>12</sup>

In a pair of cases, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*,<sup>13</sup> also decided in 2007, the Supreme Court upheld restrictions on women's access to abortion, for the first time allowing restrictions without an exception to preserve the health of the woman. Justice Ruth Bader Ginsburg was so incensed by these decisions that she read dissenting opinions from the bench. This is an extremely rare occurrence for Justice Ginsburg, underscoring her concern about what these cases signal about the new direction of the Supreme Court under Chief Justice John Roberts and Justice Samuel Alito, and the absence of her long-time friend and colleague Justice Sandra Day O'Connor.

And the cases continue. On January 15, 2009, seven states, Planned Parenthood Federation of America, and the National Family Planning and Reproductive Health Association sued the federal government to block new regulations issued by the Department of Health

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8. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009).

9. *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009).

10. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

11. Linda Greenhouse, *Justices' Ruling Limits Suits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1.

12. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

13. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

and Human Services.<sup>14</sup> These regulations, issued in the twilight of the Bush administration, enable health care providers to refuse to provide health services based on religious or moral objections, such as refusing to provide contraception to patients, including emergency contraception for rape victims.

So the topics that have been addressed in the *Michigan Journal of Gender & Law* over the last sixteen years continue to provide much fodder for new law review articles, new approaches, and new theories. I was pleased to note that several articles have touched upon issues related to the symposium's panel addressing intersex and transgender jurisprudence. For example, some intriguing titles of previous articles include: "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism;<sup>15</sup> Sex Determination for Federal Purposes: Is Transsexual Immigration via Marriage Permissible under the Defense of Marriage Act?;<sup>16</sup> Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People;<sup>17</sup> and A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States.<sup>18</sup> I urge everyone to peruse previous issues of the *Michigan Journal of Gender & Law* to learn about many other fascinating and pioneering issues.

One particularly interesting panel at the symposium focused on "The Lessons Feminist Legal Theorists Can Learn from Intersex and Transgender Jurisprudence." Another panel focused on consent, and the experts on the panel shared with us various meanings of consent from new, unique, and innovative perspectives. With respect to cyber-privacy, I did not see any articles specifically focusing on this topic in previous issues of the *Journal*. So if my quick survey is accurate, this topic may

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14. See Rob Stein, *Lawsuits Filed Over Rule That Lets Health Workers Deny Care: Regulation to Protect "Conscience Rights" Called Too Broad*, WASH. POST, Jan. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011502059.html>.
  15. Darren Rosenblum, "Trapped" in Sing-Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499 (2000).
  16. John A. Fisher, *Sex Determination for Federal Purposes: Is Transsexual Immigration via Marriage Permissible Under the Defense of Marriage Act?*, 10 MICH. J. GENDER & L. 237 (2004).
  17. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005).
  18. Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169 (2008).

have been a first for the *Journal*, and it certainly engaged cutting-edge problems that the world has not previously had to deal with before the last few years.

Consider again the topic of the symposium—"Rhetoric & Relevance: An Investigation into the Present and Future of Feminist Legal Theory." If I had to hazard a guess at what future pressing issues in feminist legal theory and practice would entail, in addition to those discussed at the symposium, they would most certainly include international women's human rights in general, and in particular the intersection between women's rights on one hand, and culture and religion on the other. Some *Journal* articles have already begun to address international and comparative women's rights, such as dowry deaths and bride burning, sex trafficking, gender-based asylum claims, economic abuse of women in India, China's denial of reproductive freedom to Tibetan women, equality rights in Canada, UN Security Council Resolution 1325—calling for increased participation of women in conflict-resolution and peace-building, and human rights discourse and international convention documents.

Through the Leadership and Advocacy for Women in Africa ("LAWA") Fellowship Program that I now direct, I have learned from our LAWA fellows, as well as additional students from around the world, about other human rights violations and injustices that they and other women in their communities confront. Here are a few examples:

Female genital mutilation. The World Health Organization estimates that 100–140 million women and girls have been subjected to FGM, and countless others are forced to undergo the procedure every year.<sup>19</sup> Often it is performed on young girls without anesthesia,<sup>20</sup> antibiotics or sterile instruments, and often several girls will be cut at one time without washing the implement in between, which obviously increases the spread of HIV.<sup>21</sup> FGM causes severe health complications—both physical and psychological. Moreover, some women experience FGM multiple times during their lives, since with infibulation (the most severe form of the practice), they must be re-sown after each childbirth.<sup>22</sup>

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19. See generally World Health Organization, Female Genital Mutilation, [http://www.who.int/topics/female\\_genital\\_mutilation/en/](http://www.who.int/topics/female_genital_mutilation/en/) (last visited Mar. 9, 2010).

20. See Frances A. Althaus, *Female Circumcision: Rite of Passage Or Violation of Rights?*, 23 INT'L FAM. PLAN. PERSP. 130, 130 (Sept. 1997).

21. See Mary Katherine Keown, *Health Activists Link Spread of HIV-AIDS to FGM*, WE NEWS, Aug. 10, 2007, <http://www.womensnews.org/story/genital-mutilation/070810/health-activists-link-spread-hiv-aids-fgm>.

22. See generally Althaus, *supra* note 20, at 131.

Child marriage. Child marriage often involves girls of ten to fifteen years old (and sometimes younger) who are forced to marry men who are on average fifteen to eighteen years older.<sup>23</sup> Our current LAWAW Fellow from Ghana mentioned in a seminar on Tuesday that it is customary for girls in her country to be betrothed while they are still in the womb. A student from India who is in another class I teach commented recently that her grandmother was married at ten years old and had three babies by age thirteen, and that this remains a common practice throughout India today.

Polygamy. Our LAWAW fellows have described many negative consequences of growing up as children of polygamous marriages and the terrible effects that this practice has had on their mothers. In addition to the degradation it entails for the women, it also increases the spread of HIV/AIDS, since although women are required to be monogamous, men are entitled to have sex outside of marriage and then spread HIV and other STDs to their multiple wives. In urban polygamy, the family lives in a single house or apartment with each wife and her children occupying one bedroom, and the husband chooses whomever he wants to sleep with each night. The wives often vie for his attention as it can bring them a few additional privileges, such as a bit of extra money for food. But in doing so, the children are frequently neglected and left to their own devices, which has led to sexual abuse of younger children, resulting in the transmission of HIV to the young children. Stark economic inequalities also result from polygamy. In some communities, wives are considered to be property, and since property cannot inherit property, the women are evicted from the land by the deceased husband's relatives and are left destitute. Even in communities where women can inherit, they must divide the property among all of the wives and children when the husband dies, but when a wife dies, the husband alone inherits all of her property.<sup>24</sup>

In light of the severity and magnitude of these and other violations of women's human rights around the globe, and the fact that they are often justified on the grounds of culture or religion, I believe it is imperative that feminist legal theorists and advocates work together internationally to help eliminate these violations. One strategy would be for law journals to systematically reach out to scholars and practitioners

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23. See generally International Center for Research on Women, Child Marriage, <http://www.icrw.org/childmarriage/index.html> (last visited Mar. 9, 2010).

24. Amelia Vukeya, Polygyny and HIV/AIDS in South Africa: The Fatal Clash between Custom and Women's Human Rights in the Era of HIV/AIDS, (2007) (unpublished manuscript, on file with author).

from other regions of the world to publish articles, essays, briefs, and other materials and to help disseminate, legitimize, and call attention to their versions of feminist legal theory and practice. Another strategy would be for law schools to provide a certain number of scholarships to lawyers from developing countries with a demonstrated commitment to gender justice, enabling them to attain an advanced legal degree in order to enhance their capacity to promote women's rights and gender justice upon returning to their countries. A third strategy would be to encourage the regular exchange of feminist law professors to visit and teach at law schools in other regions of the world (an exchange that should go both ways). I am sure there are countless other strategies, and I encourage you to be creative in brainstorming and implementing them.

In closing, I would like to express my deepest appreciation to all of the law students who attended the symposium. They are the ones who will determine the future of feminist legal theory and action. I am often asked why I do not become terribly depressed working on these extremely difficult issues, and sometimes I do. But more often I am buoyed up by the fellows with whom I have the privilege to work, the students whom I have the privilege to teach, and the women's rights advocates that I have the privilege to meet, who will all continue to make a tremendous difference creating a more just, fair, equal, and safe world in which all of humanity can thrive to their full potential regardless of gender. ♣

