

**THEMATIC:
BEYOND THE GENDERED SUBJECT:
LAW AND FEMINIST THOUGHT**

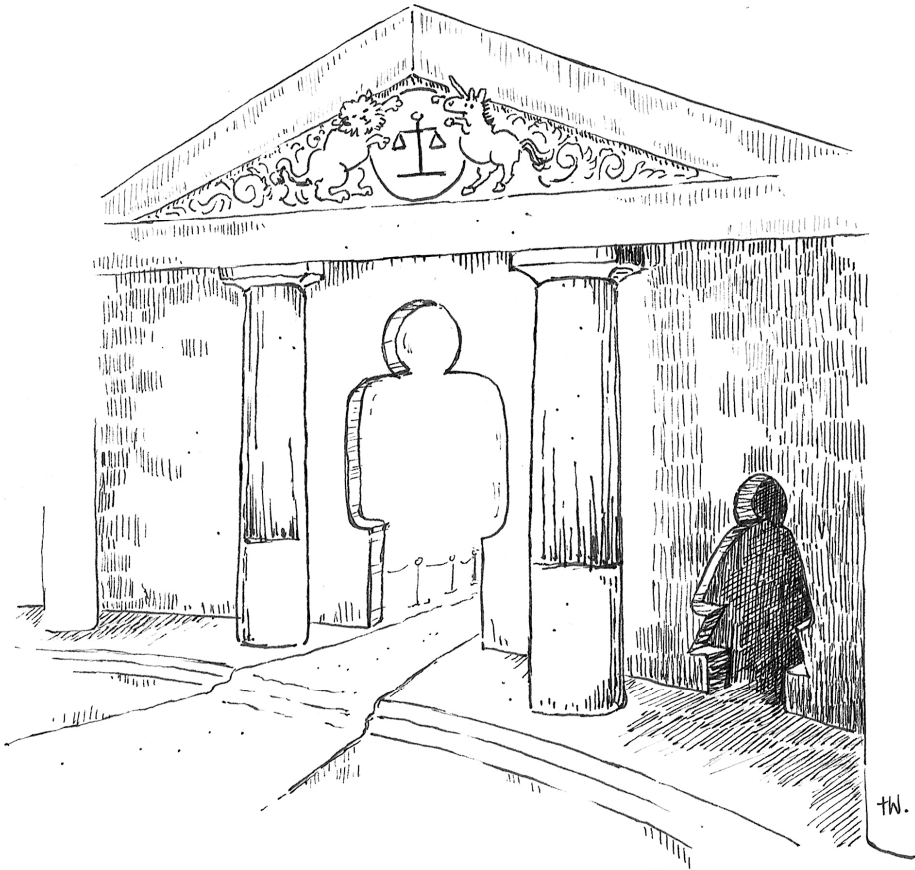


Illustration by Tilley Wood

EDITORIAL

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Recent years have seen a resurgence of feminist discourse in popular culture, both in Australia and more broadly. It has become *de rigueur* for female celebrities to self-identify as feminist,¹ while gendered harms such as domestic violence² and sexual assault³ have gained significant attention in both traditional and new forms of media.⁴ Perhaps paradoxically, this trend has simultaneously fuelled a ‘women-are-on-top-now!’ narrative while also drawing attention to the very real consequences of ongoing gender inequality.

This broader social setting provides a pertinent frame for the thematic component of this Issue and the questions it attempts to tackle. Perhaps self-evidently, the Issue turns to law to consider the manner in which legal structures and institutions continue to enact and obscure gender-based inequality, as well as the potential opportunities for such inequality to be resisted and challenged. While it is impossible to provide a comprehensive overview of the contributions and variants of feminist legal theory in this short space,⁵ I would like to briefly outline the significance of a gender-based approach to law.

* Editor, Issue 39(2), 2016.

1 See, eg, Andi Zeisler, *We Were Feminists Once* (PublicAffairs, 2016).

2 2015 Australian of the Year Rosie Batty played a key role in raising the profile of domestic violence in Australia and emphasising its gendered nature: see, eg, Judith Ireland, ‘“Stop Blaming the Victim”: Rosie Batty to Address MPs’, *Sydney Morning Herald* (online), 2 March 2015 <<http://www.smh.com.au/federal-politics/political-news/stop-blaming-the-victim-rosie-batty-to-address-mps-20150302-13sx55.html>>. See also the work of organisations such as the Counting Dead Women project, which seeks to raise awareness of female victims of violence: Melissa Davey, Nick Evershed and Tod Moore, ‘“These Women Are Not Statistics”: Deaths in Australia in 2015’, *The Guardian* (online), 30 September 2015 <<http://www.theguardian.com/global/ng-interactive/2015/mar/17/these-women-are-not-statistics-deaths-in-australia-in-2015>>.

3 See, eg, the strong backlash against the six-month prison sentence imposed on Stanford University student Brock Turner who was convicted of rape in June 2016: Marina Koren, ‘Telling the Story of the Stanford Rape Case’, *The Atlantic* (online), 6 June 2016 <<http://www.theatlantic.com/news/archive/2016/06/stanford-sexual-assault-letters/485837>>.

4 The YesAllWomen hashtag is a particularly striking example of this: Rebecca Solnit, ‘Why #YesAllWomen Matters’, *Mother Jones* (online), 3 June 2014 <<http://www.motherjones.com/politics/2014/06/yesallwomen-shape-conversation-ista-vista-massacre-violence-against-women>>; Sasha Weiss, ‘The Power of #YesAllWomen’, *The New Yorker* (online), 26 May 2014 <<http://www.newyorker.com/culture/culture-desk/the-power-of-yesallwomen>>.

5 Emeritus Professor Reg Graycar provides a fascinating overview of the history of feminist legal critique in Australia in her foreword. I am indebted to her for this discussion.

First, law can be understood as playing a key role in shaping, producing and reinforcing dominant understandings of gender and gender roles, through both positive, normative controls and negative restraints such as prohibitions or penalties.⁶ In this respect, law ‘constitutes’ gender, reproducing not only hierarchical gender identities but also problematising the behaviour of those who stray beyond the boundaries of their gender.⁷ Second, scholars such as Catharine MacKinnon have drawn attention to the manner in which fundamental precepts of liberal legal systems, such as reasonableness and objectivity, reflect and refract the male perspective, which has historically dominated legal and political institutions.⁸ This means that law operates to privilege the male experience, subordinating women and marginalising non-male identities as the *other*.⁹

The articles in this thematic reflect the rich diversity of feminist legal theory, covering a diverse range of topics – from attempts to balance female workforce participation with reproductive rights to the gendered nature of the Catholic Church’s position in relation to child sexual abuse. As Emeritus Professor Reg Graycar points out in her foreword, the articles in the Issue are a timely consideration of issues which continue to present challenges to gender-based equality. Hopefully, as she suggests, this Issue will mark the start of an ongoing dialogue in which the ‘gender question’ continues to be asked across all Issues of the *UNSW Law Journal*, applying as it does to all areas of law.

I would like to express my sincerest gratitude to Professor Graycar for her excellent foreword and for delivering the keynote address at the launch of this issue on 27 July 2016. We are incredibly lucky to have someone who brings such a wealth of personal experience to the task and it seems fitting that the *UNSW Law Journal*’s first Issue specifically focusing on law and gender should be launched by the UNSW Law Faculty’s first lecturer in law and gender.

I also am grateful to the authors of each article in the thematic component for giving substance to my original vision and developing it in new and sometimes unanticipated directions. I would like to express further thanks to all the authors published in Issue 39(2), across both the general and thematic component, for their patience and dedication over the course of the last year. It has been a pleasure to work with each of them.

There are many other people who have generously given their time and energy to this Issue, for which I am sincerely grateful. First, I would like to thank

6 Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, 1997) 84. See also Emma L Jeanes, ‘The Doing and Undoing of Gender: The Importance of Being a Credible Female Victim’ (2007) 14 *Gender, Work and Organization* 552, 555.

7 See Julie A Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press, 2012); Eric A Stanley and Nat Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press, 2011); Joey L Mogul, Andrea J Ritchie and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Beacon Press, 2011); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of the Law* (South End Press, 2011). For a discussion of the impact of gendered legal norms on men, see Nancy Levit, ‘Feminism for Men: Legal Ideology and the Construction of Maleness’ (1996) 43 *UCLA Law Review* 1037.

8 Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 162–3.

9 *Ibid* 160–3.

Dr Vicki Sentas, whose assistance has been invaluable, from her input on the initial proposal for the thematic through to the review process and ideas for the launch. I would also like to thank Dr Justine Rogers for her input on the initial proposal, Mehera San Roque for assistance with the review process and Professor Rosalind Dixon for her advice along the way. Of course, I am also grateful to the *Journal's* Faculty Advisors, Associate Professors Lyria Bennett Moses and Michael Handler, for their continued support and encouragement. This issue marks the end of Associate Professor Michael Handler's time as faculty advisor. Michael has served in the position of faculty advisor for an impressive ten years and we are all indebted to him for his generosity, good humour and sage advice over this time.

Next, I would like to thank Ashurst for hosting the launch for this Issue of the *Journal*. I also acknowledge our Premier Sponsors, Allens Linklaters, Herbert Smith Freehills and King & Wood Mallesons. Their generous support makes the continued high standard and quality of the *Journal* possible.

I must, of course, acknowledge the huge amount of work undertaken by the Student Members of the *Journal's* Editorial Board. The editors dedicate a significant amount of time to ensuring that each article meets the exacting standards expected of one of Australia's leading generalist law journals. They balance their work for the *Journal* with many other commitments and I am personally very grateful for their professionalism and dedication in this respect. I am also grateful for the entertainment they provided as I spent many nights at home working on the articles, I suspect that there are few other people who would find such joy in en-dashes and commas!

Next, I would like to express heartfelt thanks to the members of the Executive Committee, both past and present, who provided advice and support over the course of the last year. My experience has been immeasurably enriched by their good humour, which permeates even the most difficult of tasks. Special thanks go to former Executive Editor James Norton and current Executive Editor, Wee-An Tan, who skilfully guided me through the publication process and happily provided a sounding board in moments of indecision. My fellow Issue Editor Damian Morris offered kind and patient advice at each stage of the process and his counsel was crucial to ensuring the Issue ran smoothly.

On a more personal note, I'd like to express my thanks to my partner Kyle Redman. His patience and care as this Issue has slowly taken form have been almost without limit and I am grateful to him for sharing the journey with me.