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## ARTICLES

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# **WOMEN AS AN IDENTITY AND ITS INTERSECTION WITH THE LAW: *Gender Justice and the Law* and Theoretical Practices of Intersectional Identity**

Zalman A. Robles

When students enter law school, they are introduced to a formulaic world where success depends on the individual's ability to apply law to facts. The law is the full story, unconcerned with background, circumstance, or situation—that is, the law is objective. This premise is imposed on first-year law students in their prescriptive bar courses because the main object of legal education is to pass the bar, and the bar does not care about the external, subjective factors implicated in making and applying law. But the law is not objective; it is necessarily created by humans with beliefs and prejudices that inform whom the law benefits. Beginning from this premise, *Gender Justice and the Law: Theoretical Practices of Intersectional Identity* (hereinafter *Gender Justice and the Law*)<sup>1</sup> attempts to highlight and deconstruct the gendered prejudices inherent in certain laws. The book contains twelve essays that examine legal issues affecting women, particularly women of color, and members of the LGBTQ+ community.

The essay collection—compiled by Dr. Elaine Wood, a lecturer of women's and gender studies affiliated with the Center for the Study of Race, Ethnicity, and Gender at Bucknell<sup>2</sup>—focuses on the intersection of race, sex, gender, nationality, and class, viewed primarily through the lens of gender and the law's impact on women.

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1. GENDER JUSTICE AND THE LAW: THEORETICAL PRACTICES OF INTERSECTIONAL IDENTITY (Elaine Wood ed., 2021) (hereinafter GENDER JUSTICE AND THE LAW).

2. *Gender Justice and the Law: Theoretical Practices of Intersectional Identity*, ROWMAN & LITTLEFIELD, <https://rowman.com/ISBN/9781683932390/Gender-Justice-and-the-Law-Theoretical-Practices-of-Intersectional-Identity> [<https://perma.cc/E3VN-G2DG>] (last visited June 14, 2021).

The collection is international in scope, ensuring that national identity is included in the essays' treatment of intersectional legal issues. For example, the first essay, "Constructing Criminality: *R. v. Gladue*, Intersectionality, and the Criminalization of Indigenous Women" (Constructing Criminality),<sup>3</sup> focuses on the treatment of indigenous women in the Canadian legal system. As American readers, it is easy to only think about intersectionality within the context of the U.S. identities; however, feminist legal theory and critical race legal theory tries to conceive of all identities and has always strived to think about it as a global issue.<sup>4</sup> *Gender Justice and the Law's* breadth of topics also encompasses identities that are not often highlighted in feminist scholarship, such as disability. Because the book's theme of intersectionality and law is so broad and each essay covers a discrete topic, the essays are not explicitly connected to one another. The book attempts to organize the essays into three sections—Praxis and Policy, Policing Bodies, and Activist Politics and Resistance—but there is nevertheless very little other than a focus on gender that ties the essays into a coherent whole.

The first section, "Praxis and Policy," prompts readers to think about how the law constructs the content and meaning of gender categories. The most interesting essays are "Constructing Criminality"<sup>5</sup> and "Justice, Gender, and Caste: A Case for Dalit Feminist Testimonio."<sup>6</sup> Both essays focus on issues of narrative and testimony in law. Specifically, they argue that the law can fail to protect those it purports to protect if the testimonial account of a group's narrative, which helps inform the creation of law, contains stereotypes and explicit or implicit biases. Here, the authors conceive of narrative as the account of the needs and challenges experienced by a group. They argue that it is important for judges and legislators to receive a proper narrative account free of harmful stereotypes and biases, as a legislator drafting a law or a judge interpreting it can impart their own biases or beliefs that may perpetuate harm against marginalized groups.

One demonstration of flawed narrative driving the harmful enforcement of laws ostensibly designed to protect women is the

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3. Arunita Das, *Constructing Criminality: R. v. Gladue, Intersectionality, and the Criminalization of Indigenous Women*, in *GENDER JUSTICE, AND THE LAW I* (Elaine Wood ed., 2021).

4. See generally *ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES* (GLORIA T. HULL ET AL. ed. 1982).

5. Das, *supra* note 3.

6. Lissa Lincoln, "Justice, Gender, and Caste: A Case for Dalit Feminist Testimonio," in *GENDER JUSTICE AND THE LAW* 47 (Elaine Wood ed., 2021).

murder of Sarah Everard.<sup>7</sup> Everard took all the precautions women are told to take before walking home.<sup>8</sup> She wore bright clothing, told her boyfriend where she was, and took a well-lit path back to her apartment.<sup>9</sup> However, she was still abducted and allegedly murdered by a police officer.<sup>10</sup> The police's response was to go door to door and tell women to stay home.<sup>11</sup> There was a large vigil orchestrated by a group called Reclaim These Streets in an attempt to take back the narrative of fear which the police perpetuated and shift the focus toward men's responsibility to prevent the killing of women.<sup>12</sup> The police's response to the killing of Sarah Everard suggested they believed it was the responsibility of women to ensure their own safety.<sup>13</sup> The vigil and the demands of those who participated showed that women in the community wanted the London police to understand that the perpetrators of gender-based crimes bear sole responsibility, and women cannot stop such violence on their own.<sup>14</sup>

This emphasis on narration in the first part of *Gender Justice and the Law*, "Praxis and Policy," highlights how important it is that the people who create law, interpret it, and enforce it understand their own biases against women, women of color, and the LGBT+ community and the actual issues afflicting these communities. If the narrative accepted or promoted by the lawmaker contains biases and stereotypes and does not address the real problems afflicting people, the prescriptive law will fail to address the harms that the law creates.

The second section of the book, "Policing Bodies," focuses on how the law controls bodies—a more technical subject than the first section's. The essay "*Gender and Justice in International Human Rights Law: The Need for an Intersectional Feminist Approach to Advance Sexual and Reproductive Health and Rights*,"<sup>15</sup> imagines

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7. Amanda Taub, *In Rage Over Sarah Everard Killing*, "Women's Bargain" Is Put on Notice, N.Y. TIMES (Mar. 14, 2021), <https://www.nytimes.com/2021/03/14/world/europe/sarah-everard-women-protest.html> [https://perma.cc/PLT4-7AWA].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Taub, *supra* note 7.

14. *Id.*

15. Rebecca Smith, *Gender and Justice in International Human Rights Law: The Need for an Intersectional Feminist Approach to Advance Sexual and Reproductive Health and Rights*, in *GENDER JUSTICE AND THE LAW* (Elaine Wood ed., 2021).

an international human rights enforcement system that can better protect women and nonbinary individuals. As they currently stand, international human rights regulatory systems have a narrow, binary conception of gender and thus cannot properly protect all women, transgender, and nonbinary individuals against gender violence.<sup>16</sup>

Other essays in section two cover issues including divorce law, the policing of sex workers, and laws pertaining to people with disabilities.<sup>17</sup> Through such varied and dynamic discussions, this section deftly examines the shortcomings of a legal system rooted in a binary understanding of gender. It demonstrates that these shortcomings harm non-cisgender and non-heterosexual persons despite any good intentions. The law, by only considering binary gender, fails to consider how other identities, such as marital status, profession, and disability, interact with nonbinary individuals. Intersectionality is complex and constructing law around gender as a fluid spectrum will allow the law to properly consider and protect a trans sex worker or other marginalized women who do not fit within the binary conception of gender.

The book concludes with “Activist Politics and Resistance,” essays about resistance and space making—that is, creating a safe space for marginalized individuals that also furthers the protection of those marginalized people.<sup>18</sup> It is an appropriate way to end the collection, as the book and its essays are themselves examples of how to reinvent laws as to appropriately redress harms to women broadly, women of color, and nonbinary individuals. The essay “Becoming Theodore: Spatial Legal Consciousness and Transgender Name Changes” by Theodore Davenport is especially compelling as it follows the author on his journey to change his name to match his gender. When attempting to change the name on his government documents, the author meets significant resistance and eventually decides not to pursue changing his name on

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16. *Id.*

17. Christin M. Mulligan, *Divorce Ruling without Consent: Gender, Penal Law, and the Feminized Body in Nuala O’Faolain’s “My Dream of You,”* in *GENDER JUSTICE AND THE LAW* (Elaine Wood ed., 2021); Rebecca Smyth, “*Like Cats and Dogs in the Streets*”: *Disability and Sexuality in the Eugenic Legal Imagination*, in *GENDER JUSTICE AND THE LAW* (Elaine Wood ed., 2021); Menaka Raguparan, *Victims of State Violence: Indigenous and Women-of-Color Sex Workers’ Interactions with Law Enforcement in Canada*, in *GENDER JUSTICE AND THE LAW* (Elaine Wood ed., 2021).

18. See generally Theodore Davenport, *Becoming Theodore: Spatial Legal Consciousness and Transgender Name Changes*, in *GENDER JUSTICE AND THE LAW: THEORETICAL PRACTICES OF INTERSECTIONAL IDENTITY* (Elaine Wood ed., 2021).

all such documents.<sup>19</sup> By incorporating his narrative, the essay highlights the difficulties transgender individuals face when trying to create space for themselves and demonstrates Theodore's resistance in the face of institutionalized persecution.<sup>20</sup>

The legal sanctuary that Theodore seeks is something that can and must be created for all the marginalized identities discussed in *Gender Justice and the Law*. Two of the essays, "Constructing Criminality"<sup>21</sup> and "Victims of State Violence: Indigenous and Women-of-Color Sex Workers' Interactions with Law Enforcement in Canada"<sup>22</sup> show how the creation of physical safe spaces can be harmful if outsiders, or people who do not identify with the group for whom the space exists, create the safe space. The essays in the final section demonstrate the imperative to consider intersecting identities in order to successfully create a safe space for individuals to fight against what the authors see as a persistent flattening of identities.

*Gender Justice and the Law* is part of a growing body of feminist legal scholarship that strives to be more inclusive and incorporate an intersectional perspective and method. Works of feminist legal studies force institutions, such as courts and legislators, to reckon with their own complicity in violence against women and other marginalized communities. Additionally, feminist theory and critical race theory validate the experiences of marginalized communities through the narration of stories of shared struggle and experiences. Feminist legal theory pushes the male-dominated legal profession toward a future in which there will never be a legal opinion such as *Rusk*.<sup>23</sup>

Overall, *Gender Justice and the Law* is a collection of essays that offers a solution to specific laws by examining the shortcomings of the current law and how they could be better constructed with all intersecting identities. The essays are valuable for any reader curious about the application of feminist theory to the law. Most importantly, the book continues the conversation about gender

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19. *Id.*

20. *See id.*

21. Das, *supra* note 3.

22. Raguparan, *supra* note 17.

23. 73 percent of Congress is male, and 77 percent of congress is white, outpacing the general population where 50.8 percent of the population is female, and 60.1 percent of the population is white without Hispanic or Latino heritage. Katherine Schaeffer, *The Changing Face of Congress in 7 Charts*, PEW RESEARCH CNTR. (Mar. 1, 2021), <https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress> [<https://perma.cc/Z38H-KN3M>]; US CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/L8QJ-2ERT>].

and law at a time when it is needed the most. There are so many issues of gender violence that the academic conversation, and the scrutiny it brings against the legal system, is necessary to create a society that is safe for women with their various intersecting identities. *Gender Justice and the Law* tries to address the ways that the laws are implicitly or explicitly violent against women. Unfortunately, the example of Sarah Everard discussed early in this book review is not the only contemporary example of violence against women. During the writing of this article, a man shot six Asian women who worked in Atlanta spas—a crime at the intersection of race and gender oppression.<sup>24</sup> By studying and discussing the prejudices embedded in the law, we can hopefully avoid the instances of violence that occur against women, women of color specifically, and nonbinary individuals.

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24. Cameron McWhirter & Valerie Bauerlein, *Atlanta-Area Shootings at Spas Leave Eight Dead*, WALL STR. J. (Mar. 17, 2021), <https://www.wsj.com/articles/atlanta-massage-parlor-shootings-leave-eight-dead-suspect-detained-11615946872> [<https://perma.cc/YN7F-63YV>].