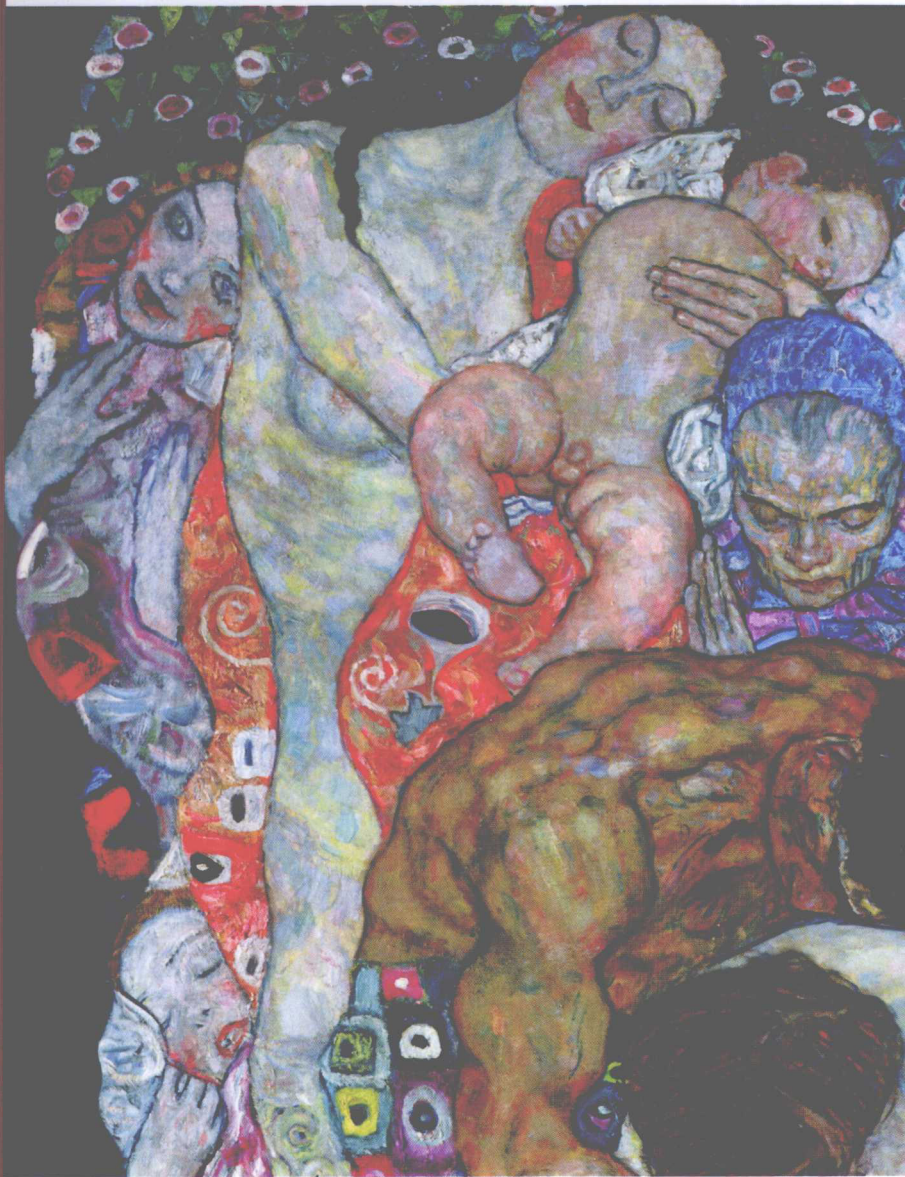


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Gender, Sexualities and Law

Edited by Jackie Jones,
Anna Grear,
Rachel Anne Fenton

ROUTLEDGE

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The idea for this edited collection arose out of conversations between several members of staff at the University of the West of England who teach and/or research in the area of gender, sexualities and the law (broadly defined). We started off by wanting to put together quite a large interdisciplinary collection, with multiple but coherent themes, that could be used by both teachers and researchers in this area. Over time, the project transformed into a much wider conversation with other scholars, and, eventually, it took the shape of this book. For a variety of reasons, some colleagues who originally wanted to be part of the project are not represented. One particular person we would like to mention here is Professor Gayle Letherby, whose partner tragically died during the course of the project, a sad event which prevented her from continuing.

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Gender, sexualities and law

Critical engagements

*Jackie Jones, Anna Grear, Rachel Anne Fenton
and Kim Stevenson*

The idea for this edited collection came out of our individual and collective experience of teaching aspects of law and gender over a number of years at different higher-education institutions. That experience, and talking to colleagues elsewhere in the sector who teach aspects of gender, made us realise that increasingly, for today's younger generation, feminism is perceived as old news while equality is perceived as a fact of life. It is a done deal. There is apparently nothing left to say because now men and women are equal. Theoretically at least women can enter any profession they like, rise to the top and get treated and paid the same as men. They can apparently wear what they want, behave as they wish, even as 'laddishly' as the average young male. This perception, moreover, is constantly reinforced in the media through popular imagery, magazines, newspapers, chat shows and many types of television programmes, as well as being implicated in anti-feminist agendas.¹

In the context of our teaching of undergraduate and postgraduate law students, each of us had noted a certain general reluctance to embrace the feminist cause. There seemed a failure to understand its continued salience. The current younger generation seemed not to believe that glass ceilings still exist, that the representation of sexualised (or pornographic) images of women and girls in the media or their supposed freedom to wear as little as they wish has problematic implications. Feminism, if it means anything positive at all to a broadly 'post-feminist' (and post 'girl power') consumer generation, seems simply to mean 'choice'. Having a choice, in fact, seems anecdotally to be the current student generation's predominant mantra. Individualised choice, moreover, appears all-encompassing, leading many to live in a world where, for them, in effect, consumerism functions as tantamount to a religion. While in some law schools of a more critical tradition the experience of the teaching staff may be different, it seemed that in the context of the majority of law degree courses a relatively 'post-feminist' set of assumptions concerning gender equality remain in play and that the gendered politics that impact upon black-letter law go relatively uninterrogated, in the main.

When we speak about the current younger 'post-feminist' generation we mean (more or less) Thatcher's and Reagan's grandchildren: individuals who have

2 Introduction

been brought up in the post-1980s 'decade of excess', pursuing (state-sponsored) individualistic aspirations in surroundings that value monetary achievements above community spirit. That post-Thatcher generation arguably sees the world through very different eyes from the mainstream viewpoint of preceding generations. There is, it appears, little space in its cultural comprehension for the fact that, with the rise of consumerism, there has been a kind of marketised 'emptying out' of the political. In such a situation, the feminist assertion that the 'personal is political' can appear tired, old, reactionary and irrelevant.

Meanwhile, the reality of the current situation is that consumerism and related trends accompany a marked rise in the commodification of human beings: forced labour, child labour, human trafficking, forced prostitution. Our own students, in the main, seem to grant little acknowledgement of the significant links between sexualisation of the body and the perpetration of violence against the person and to have little meaningful awareness of the fact that there is no region in the world that has not seen an increase in personal violence in recent times such that, despite the civilising process of two millennia, there are more war/conflict zones now than at any other time in human history.

This, of course, is not the fault of our students. They are the products of a generation whose political sensibilities are shaped by market and consumer dominance, the apparent 'success' of feminism and the arrival of 'equality' (of choice) for all. And there seems to be little natural encouragement for large numbers of youngsters in a society defined by consumer excess to focus, for example, on the effect of the increasing poverty experienced by many in the developing world (especially women). Indeed, many might even be surprised to know that there is no single country in the world in which men and women earn the same pay for work of equal value and that the gender income gap is actually widening.

In other words, as contemporary feminists have argued and the genesis of 'backlash' reveals, many of the improvements fought so hard for – and uneasily gained – in the past are now being eroded or undermined, and our 'post-feminist' generation of young people, in the majority at least (there are, of course, exceptions), seems unable to grasp the seriousness of the situation.² While a shift in focus to different areas, perhaps more obviously contemporary in feel, may be necessary and healthy (for example, a focus on sexual orientation and on the fathers' rights movement), and while there are interesting and exciting changes in means of communication with immense political potential (with the rise of Facebook, Twitter and the like), we maintain, as those entrusted with the education of future lawyers, that there is a need to convey the message that the lens of feminism through which to examine injustice and inequality remains vitally important – and that this is a message that the current younger generation need to be helped to understand. Somehow, they need to be captivated by the critical energy latent in the slogan 'the personal is political'.

Is such a critical and near-universal assessment of the younger generation's perception of the current state of gender equality and respect fair? The 'truth'

probably lies somewhere in between this narrative concerning the younger generation and a more traditional feminist assessment of the current state of affairs. So how do we bridge the gap between them? After all, it is not as if the 'post-feminist' consumer generation have no political awareness at all. But that awareness does not seem to embrace, at its heart, a focus upon gender justice. So, how do we re-engage with the perceptions of a younger generation that regards the new 'philosophical and/or political' fight not to be so much about women's (or indeed anyone's) empowerment but to be about, for example, the dangers of global warming and other environmental concerns? And this, in the main, from a position where the vast majority of us, but especially the fashion-driven young, continue the consumer practices that so frequently appear to drown out political awareness and to numb political will. In the face of all these pressures and contradictions, how do we, in short, talk to and in the interests of a younger generation *as feminists* and help them to hear and see feminisms through fresh eyes?

The chapters in this collection directly address perennial problems faced by feminism(s) from a range of contemporary perspectives in the hope of presenting a stimulating and relevant set of engagements with real issues facing real people in the contemporary world situation. These perspectives include law, politics, and policies in relation to aspects of gender, sex, culture, race, reproduction, and relational ties to name but a few. Yet, as the title to the collection implies, law is at all times a central unifying theme. Law has presented its authority, in the main, as a neutral form of power committed to abstract, formal equality. In that sense, the nature of law's self-presentation makes the 'post-feminist' generation's assumption that 'equality is here' and that the 'job is done', understandable. However, law is deeply political. Feminism, in this context, alongside 'the personal is political', can just as reasonably assert that 'law is political' and that 'law is personal'.

At the heart of this collection lies the exposure, in virtually every chapter, of the ongoing reality and effects of the intimacy between law, the political and the personal. The collection is divided into six parts, each critically reflecting upon, dissecting and interrogating the relationship between gender, sexualities and law. Five major themes are explored: introductory theoretical reflections, representations of, by and in law, violence (international and national aspects), reproduction and relationships.

Part I: theory, law and sex

Part I offers some introductory theoretical reflections on the person, law and sex. Ngaire Naffine explores the complexity and exclusions of the legal contours of persons as they appear in law, revealing the persistent sense in which women, *as women*, even today, struggle to find themselves genuinely represented by any of the categories of recognised 'legal persons' (Chapter 1). The struggle of women for inclusion within a legal domain built upon the template of masculine

personhood also forms a central theme in Rosemary Hunter's exploration of the gendered practices of sexing (and strategic de-sexing) employed within the culture of the legal practice (Chapter 2). Naffine and Hunter, in different but related ways, both point to the intimate relationship between law's theoretical constructions of personhood and the oppressiveness of legal culture – the embodiments and attempted disembodiments of life around the law-office water cooler, in the typing pool and in the courtroom. Gendered hierarchy is mediated through what one wears, what one says (or does not say), what one does as a hobby. The personal is political, and the theoretical is worked out in the day-to-day 'trivialities' of legal cultural life. The politics of cultural capital, in other words, is still a major issue not only for women in particular but also for certain categories of men within the domain of the legal.

The immediacy of the relationship between theory and lived reality also forms a central strand of Anna Grear's account of the linkages between quasi-disembodiment, the abstractionism of liberal law and the oppressions enacted by corporate liberal capitalism, oppressions intimately linked to the destructiveness of oppositional binaries and, in particular, the social construction of a sex binary that is imposed by the law upon sexually diverse human bodies (Chapter 3). In the light of the fact that there are more than two kinds of sexed body, Grear attempts to unsettle the sex binary by invoking a spectrum-conception of sex differentiation, suggesting that law should explicitly embrace sexual variation in its conception of persons. A key theme at the heart of reimagining sex and gender is embodiment, its centrality, its complexity, which, in turn, clearly links to the vulnerability, flowing from our embodiment and which is explored by Martha A. Fineman in the final theoretical chapter (Chapter 4). Fineman's work has long been critical of the formally equal autonomous liberal actor – a construction intimately related to a set of oppressions reflecting substantive inequalities, inequalities which the formality of the liberal construction seeks to occlude. Fineman seeks to present vulnerability as a new and vigorous theoretical value capable of providing a more inclusive, substantive concept of social justice. The constructions of individuals and institutions and the interplay between individual and institutional oppression offers another window onto the complex social power relations of our age.

Part II: representations, law and sex

Part II of the collection highlights the power relations implicit in the legal discourses of (dis)embodiment, sex and the construction of identity. It provides a series of reflections on representation, law and sex. The concerns of the previous section with the legal privileging of a masculinist archetypal legal actor are underlined by Alice Belcher's chapter on 'The "Gendered Company" Revisited' (Chapter 5). It links the masculinism of the corporate form to the masculinism of the social culture of corporate environments. Belcher argues that despite the fact that corporate legal theory invokes a gender-neutral formula of

the company as a separate legal person, this concept of the person was male at its inception – and remains so, notwithstanding subsequent legal development, even now.

The partial or deliberate removal of bodies and identities that do not conform to the template of legal masculinity also forms a key underlying theme of Leslie J. Moran's study of the public sex of the judiciary (Chapter 6). His account of 'the individual and the institution', examined through the portraiture of the simultaneously visible and invisible sexuality of the judiciary, and the overwhelming but complexly constituted heteronormativity of judicial office, provides the opportunity to trace the argument concerning the exclusory construction of sexed or sexless 'legal insiders' into one of the most symbolic and archetypically legal of domains. Todd Brower, also focusing upon the judicial, explores the operation of identifiable schemas preventing judges from interpreting legal doctrine and precedent without distortion, in particular the distortion arising from schematic, reductive understandings of lesbian and gay people (Chapter 7). The unconscious nature of schema-matching, he argues, has led to the selective torsion of legal doctrine – revealing a problematic traction in sex-discrimination cases of schemas operating upon the perceptions of judges and other case participants alike.

Arguably, law is at its most potentially oppressive in the context of the criminal trial as this is where the judge operates both as adjudicator and as the institutional agent of relatively obvious state power. Turning to the depiction of women in the criminal-justice process, Rowbotham explores the implications of women's increased visibility as defendants. While the visibility of women as offenders challenges traditional tropes of female crime, the profound discomfort exhibited by the criminal-justice system concerning violent interpersonal crimes committed by women reveals that our understanding of the criminal-justice system remains as gendered as ever. The criminal dock itself, that most poignant symbol of the state's piercing forensic gaze, as Judith Rowbotham's argument suggests, is thoroughly and problematically gendered, and she offers the view that the criminal-justice system should develop a conscious awareness of this reality in order to effect change (Chapter 8).

Part III: violence, law and sex

Part III focuses on the current role and impact of the criminal law and its operation through the criminal-justice process in terms of effectively acknowledging, managing and responding to the issue of gendered crime, particularly gendered violence. In this context, Kim Stevenson highlights the problems implicit in the representation of crime through gendered tropes and stereotypes (Chapter 9). She argues that media and legal constructions of rape and rape victims mislead the public by failing accurately to reflect the actuality of rape crime. Unchecked dissemination of press 'misinformation' combined with the attitudes of certain legal professionals unjustifiably reinforce and perpetuate cultural

understandings of rape. Philip N. S. Rumney and Natalia Hanley, by contrast, utilise student-centred research based around the examination of such cultural understandings in order to challenge feminist perspectives concerning rape as a gendered crime and countering the argument that rape laws should be gender-specific (Chapter 10). They argue that while there might be a degree of privileging of male rape in social attitudes, the claim that male victims receive preferential treatment in legal responses to rape appears to have little basis in reality. The issue of distinctively gendered crime, however, is one that Iain McDonald picks up on again, this time in the context of homophobic violence (Chapter 11). Like Stevenson, he highlights the problem of misrepresentation and social understandings linked to stereotypical portrayals of the typical 'stranger-danger' scenario. He suggests that the focus on hate crime is too simplistic to account for the true complexities of the phenomenon of homophobic violence. In particular, he identifies tensions inherent to the dichotomous construction of recognition wherein public 'recognition' of homosexual violence contrasts with the private domain of lesbian violence. This more complex picture reveals the gendered fault lines, arguably, of the familiar public-private divide, an issue invoked by Mandy Burton's discussion of domestic violence (Chapter 12). Burton argues that the civil jurisdiction can be successfully utilised in conjunction with the criminal process in order to 'unmask' the private nature of domestic violence. However, in making this case, she notes the lamentable slowness of the criminal law to specifically criminalise domestic violence, something that, by contrast, the Government managed to achieve relatively easily in respect of child sexual abuse and the Sexual Offences Act 2003. To greater and lesser extents all the authors allude to the invisibility imposed by the criminal law and its failure to acknowledge and address the individual interests of abused victims. Equally, all emphasise the need to provide mechanisms and support that can empower victims to overcome the inequalities of the law.

Part IV: international violence, law and sex

The chapters in Part III are united by the theme of violence, predominantly in the context of domestic law. Can international and European human-rights instruments offer any positive ways of addressing some of the issues involved in systemic gender violence? In Part IV, Anna Carline offers a bridge between domestic and international law's engagement with the theme by examining the UK Government's response to the Council of Europe Convention on trafficking for sexual exploitation (Chapter 13). She argues that despite the human-rights orientation of the Convention, the domestic response is far more punitive than required and unnecessarily moralistic. As an exception to the other chapters in this section, she argues that the law has not been slow in its response but that its impact criminalises those women who, without force or exploitation, wish to be involved in sex work, thereby reinforcing cultural norms and denying the individual interests of women.