

Although enduring rather well, it is largely unappreciated. Although creaking at the seams, it is impervious to formal change.

This analysis of the Constitution of the Australian Commonwealth lacks the historical authenticity of Quick and Garran. It lacks the subtlety and polish of Dr Wynes. It cannot rival the analytical clarity and conceptual thinking of Colin Howard. It is, from first to last a very personal encounter with the Constitution. But if it takes the history, operation and letter of the Constitution into the homes of lawyers and other citizens, that will be no bad thing. To do so in the Bicentennial year makes it especially timely. If Coper can do this for 1988, what fireworks can we expect from him in 2001!

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FOOTNOTES

- 1 See *Kirmani v. Captain Cook Cruises Pty Ltd (No. 1)* (1985) 159 CLR 351, (*No. 2*) (1985) 159 CLR 461.
- 2 See *University of Wollongong v. Metwally* (1984) 158 CLR 447.
- 3 See *Commonwealth v. Tasmania* (1983) 158 CLR 1.
- 4 (1987) 7 *Adel L Rev* 174, 194.
- 5 *Building Construction Employees and Builders' Labourers Federation of NSW v. Minister for Industrial Relations* (1986) 7 NSWLR 372.

Feminism Unmodified: Discourses on Life and Law, by CATHARINE A. MACKINNON. (Harvard University Press, Cambridge MA, 1987) pp.1-315. Cloth recommended retail price US\$60.50 (ISBN 0 674 29873 K).

“What is a gender question a question of? What is an inequality question a question of?” (page 32). These questions form a recurring theme for this extraordinarily compelling collection of speeches by one of North America’s foremost feminist legal scholars. Each of the essays in the book was originally delivered as a speech and many are reproduced precisely as spoken, some without a written text (page 1). Professor MacKinnon’s eloquence and presence resonate from each page of this book, which powerfully achieves her goal of having her reader “hear [her] speaking, rather than read [her] writing” (page 1).

In her introduction, MacKinnon outlines the three key themes of the book. First,

is the analysis that the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual — in fact, is sex...The second theme is a critique of the notion that gender is basically a difference rather than a hierarchy...The third theme identifies pornography in America as a key means of actualizing these two dynamics in life. (page 3)

The essays are organised within three sections: I. Approaches; II. Applications and III. Pornography. Finally, by way of introduction: a word about the title. MacKinnon's account of feminism unmodified: "...simply, feminism" (page 137) rejects the modifying adjectives such as 'liberal', 'socialist' or 'marxist' which have frequently characterised second wave feminist theory and practice. "To remake society so that women can live here requires a feminism unqualified by preexisting modifiers" (page 16). MacKinnon argues forcefully that liberal feminism ("liberalism applied to women") shares with marxist feminism a common maleness of epistemological posture (page 60). This focus on epistemology, though a recurring theme, is perhaps most explicitly addressed in the third essay, "Desire and Power", where she explores her critique of objectivity, or as she has referred to it elsewhere, "point-of-viewlessness".¹ For MacKinnon, "objectivity is the epistemological stance of which objectification is the social process of which male dominance is the politics, the acted out social practice. That is, to look at the world objectively is to objectify it" (page 50).

For the reader seeking the clearest and most specific answer to the questions posed at the beginning of this review, Chapter 2, "Difference and Dominance: On Sex Discrimination" is a good starting point.

Here I expose the sameness/difference theory of sex equality, briefly show how it dominates sex discrimination law and policy and underlies its discontents, and propose an alternative that might do something. (page 32)

MacKinnon addresses perhaps the central conundrum posed by sex discrimination laws: are women the same as men, or different from men, an argument that has been played out at some length in the United States Supreme Court, particularly with regard to pregnancy and maternity leave issues,² culminating in the remarkable statement that a Californian law which denied employed women disability benefits for pregnancy did not discriminate against women on the grounds of sex; rather it distinguished between "pregnant women and nonpregnant persons".³ MacKinnon rejects both the sameness and the difference approaches as being quintessentially based on male standards. The first requires women to be the same as men. "This path is termed gender neutrality doctrinally and the single standard philosophically. It is testimony to how substance gets itself up as form in law that this rule is considered formal equality" (page 33). She continues:

To women who want equality yet find that you are different, the doctrine provides an alternate route: be different from men. This equal recognition of difference is termed the special benefit rule or special protection rule legally, the double standard philosophically. (page 33)

MacKinnon eschews concern with the question of which of these paths to take: “[m]y point is logically prior: to treat issues of sex equality as issues of sameness and difference is to *take a particular approach*. I call this the difference approach because it is obsessed with sex difference” (page 34).

She continues with a compelling critique of both sides of the differences approach, including a critique of educational psychologist Carol Gilligan’s *In a Different Voice*, a book which has been central to the development of much North American feminist jurisprudence.⁴

The work of Carol Gilligan on gender differences in moral reasoning gives it a lot of dignity, more than it has ever had, more, frankly, than I thought it ever could have. But she achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness. (pages 38-39)

Power and powerlessness are central to MacKinnon’s approach to the gender and inequality questions. In her view, which is “a dissident answer in law and philosophy, an equality question is a question of the distribution of power” (page 40). “Gender is an inequality of power, a social status based on who is permitted to do what to whom. Only derivatively is it a difference” (page 8). Central to this approach is the proposition that power precedes distinction or difference.

Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power.

I call this the dominance approach and it is the ground I have been standing on in criticizing mainstream law. The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. (page 40)

Here and in several other chapters of the book, MacKinnon reminds us of the reality that is women’s lived experience: the material desperation produced by an unequal job market, the systematic, epidemic rape and sexual abuse of women and children, battery in the home and pornography, and the incidence of these phenomena is graphically illustrated by empirical data.

These experiences have been silenced out of the difference definition of sex equality largely because they happen almost exclusively to women. Understand: for this reason, they are considered *not* to raise sex equality issues. Because this treatment is done almost uniquely to women, it is implicitly treated as a difference, the sex difference, when in fact it is the socially situated subjection of women. The whole point of women’s social relegation to inferiority as a gender is that for the most part these things aren’t done to men. Men are not paid half of what women are paid for doing the same work on the basis of their equal difference... When they are hit, a person has been assaulted. When they are sexually violated, it is not simply tolerated or found entertaining or defended as the necessary structure of the family, the price of civilization, or a constitutional right. (page 41)

MacKinnon draws an analogy between her dominance approach and the United States Supreme Court doctrine of the 1960s which recognised that the oppression of Blacks was

not fundamentally a matter of rational or irrational differentiation on the basis of race but was fundamentally a matter of white supremacy... (page 42). The dominance approach, in that it sees the inequalities of the social world from the standpoint of the subordination of women to men, is feminist. (page 43)

MacKinnon's dominance/difference dichotomy is by no means a novel thesis, having been articulated by her in her significant 1979 book, *Sexual Harassment of Working Women*,⁵ which has been central to the development of law on sexual harassment in both North America and Australia (although discrimination doctrine has to date confined itself to applying the differences approach, most recently in a 1986 United States Supreme Court decision⁶ where MacKinnon was counsel for the complainant). MacKinnon returns to the issue in "Sexual Harassment: its First Decade in Court", a 1986 assessment. Perhaps more explicitly than any other in the book, this essay demonstrates the tension between MacKinnon's fundamental critique of the law and her exhortation of its use as a feminist strategy.

Sexual harassment, the event, is not new to women. It is the law of injuries that it is new to...It became possible to do something legal about sexual harassment because some women took women's experience of violation seriously enough to design a law around it, as if what happens to women matters. This was apparently such a startling way of proceeding that sexual harassment was protested as a feminist intervention...(page 103)

The law against sexual harassment is a practical attempt to stop a form of exploitation. It is also one test of sexual politics as feminist jurisprudence, of possibilities for social change for women through law...(page 103). The legal claim for sexual harassment made the events of sexual harassment illegitimate socially as well as legally for the first time. Let me know if you figure out a better way to do that ... (page 104)

The legal claim for sexual harassment marks the first time in history to my knowledge, that women have defined women's injuries in a law. (page 105)

Here MacKinnon contrasts this with what has happened to rape, which has always been defined by men, with reference to male notions of sexuality and in disregard of women's actual experience of the phenomenon. (See "A Rally Against Rape" pages 81-84). By contrast, the law of sexual harassment is, in her assessment, working well.

If the question is whether a law designed from women's standpoint and administered through this legal system can do anything for women which always seems to me to be a good question — this experience so far gives a qualified and limited yes. (page 105)

Others may not be so sanguine about the development of sexual harassment doctrine, both in the United States and in Australia. In one case to which MacKinnon refers,⁷ a claim based on hostile work environment, constituted by offensive epithets directed at the plaintiff, and graphic and distressing pornographic imagery, was dismissed on the basis that, since this sort of material was pervasive in United States culture, "the average American should not be legally offended by sexually explicit posters".⁸ MacKinnon comments in a footnote: "Note that the plaintiff did not say that she was offended but that she was discriminated against" (page 256). And in *Vinson*,⁹ the most recent United States Supreme Court decision, argued by MacKinnon, it was held that, although the claim of hostile work environment was made out, there was no general rule rendering inadmissible evidence of a plaintiff's "sexually provocative speech or dress" as "such evidence is

obviously relevant” in determining whether a plaintiff found certain advances unwelcome.¹⁰ These decisions make it somewhat difficult to see how the legal claim for discrimination based on sexual harassment differs so significantly from the way rape is treated by the courts.¹¹

But these concerns should not detract from the forceful way in which MacKinnon argues that it is possible to use the law to respond to women’s injuries. Yet the very persuasiveness of these arguments arguably sits in uneasy tension with some of her broader theoretical critiques of law and legal reasoning. In another chapter, “Francis Biddle’s Sister: Pornography, Civil Rights and Speech”, a 1984 address at Harvard Law School, she suggests:

[d]oing something legal about a situation that is not really like anything else is hard enough in a legal system that prides itself methodologically on reasoning by analogy. Add to this the specific exclusion or absence of women and women’s concerns from the definition and design of this legal system since its founding, combined with its determined adherence to precedent and you have a problem of systemic dimension. (page 167)

MacKinnon pursues the question of the exclusion of women from the legal system in her essay, “On Exceptionality: Women as Women in Law”, a speech given to honour the appointment of two women as judges of the Minnesota Supreme Court in 1982. MacKinnon suggests that the two standards of sameness and difference, which in her view obscure the power and hierarchy aspects of the gender question, also apply to women in the practice of law. They must be men, and ‘ladies’ too. “The lawyer role has as its implicit norms the same qualities that are the explicit norms of masculinity as it is socially defined. It is a power role.” (page 74). She concludes:

[w]hen I think about Rosalie and Mary Jean on this Court, I ask myself: will they use the tools of law as women, for all women. I think that the real feminist issue is not whether biological males or biological females hold positions of power, although it is utterly essential that women be there...My issue is what our identifications are, who our community is, to whom we are accountable...(page 77)

MacKinnon follows through this theme of women in the law in a number of other sections of the book:

[w]omen have also been systematically excluded from access to the tools of the law and from the possession and legitimacy of a legal and political education. To the extent we are granted that access, we are not allowed to identify as women ... Nor are we allowed to make women the center of our work, so that essentially there is no feminist critique of law. The price of getting the tools to do it seems to include being trained out of wanting to. (page 131)

She notes that she herself has taught, *inter alia*, at Harvard, Yale and Stanford Law Schools, and comments that “law gives [her] some credibility, but that being woman-identified takes it away. The law gives male credibility; female identification erases it” (page 132).

In an essay “On Collaboration”, she advances this point:

[w]hat law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience. (page 205)

MacKinnon’s reference to the absence of a feminist critique of law is puzzling given the wealth of published material in recent times,¹² not least her own, though perhaps it is explicable by her own uncompromising

position on what precisely *is* a feminist (unmodified) perspective. The chapter on *Roe v. Wade*:¹³ "Privacy v Equality" is perhaps one of the most compelling feminist analyses of legal doctrine yet published. In this essay, MacKinnon applies the feminist critique of the public/private dichotomy¹⁴ to the well known 1973 United States Supreme Court decision upholding women's 'right' to abortion, based on the constitutional doctrine of privacy.

Privacy doctrine reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split. The political and ideological meaning of privacy as a legal doctrine is connected with the concrete consequences of the public/private split for the lives of women. (page 93)

To demonstrate the fragility of the 'right' to abortion, MacKinnon examines the 1980 decision *Harris v. McRae*¹⁵ where the United States Supreme Court upheld legislation which denied women access to publicly funded health services for abortions. She continues:

[i]t is not inconsistent, then, that framed as a privacy right, a woman's decision to abort would have no claims on public support and would genuinely not be seen as burdened by that deprivation. (page 101)

... The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect...From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape and women's exploited labor.

This is an instance of liberalism called feminism, liberalism applied to women as if we *are* persons, gender neutral. It reinforces the division between public and private that is *not* gender neutral. (page 102)

It is difficult to be selective when attempting to provide a brief account of a book so replete with novel analyses of well known cases and compelling philosophical and jurisprudential argument. But an account of MacKinnon's work would be incomplete without some reference to her controversial campaign, with Andrea Dworkin, for the enactment of laws against pornography. MacKinnon and Dworkin argue that, like sexual harassment, pornography is "a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality" (page 175). Their law, adopted so far by two city councils, Minneapolis and Indianapolis and held by the United States Supreme Court to violate the First Amendment,¹⁶ defines pornography

as the sexually explicit subordination of women through pictures or words that also includes women presented dehumanized as sexual objects who enjoy pain, humiliation or rape; women bound, mutilated, dismembered or tortured; women in postures of servility or submission or display; women being penetrated by objects or animals. (page 201)

Their law allows victims of coercion, force, assault and trafficking to bring civil actions against those who hurt them through pornography. A considerable portion of the book is devoted to discussion of the law, and discussion of the way in which, in MacKinnon's view, it has been misconstrued as a breach of the First Amendment, protecting freedom of speech. As will be well known, the pornography debate has provoked considerable argument in North America and several of the essays are speeches by MacKinnon addressed at audiences who do not support her law.

On the First Amendment, MacKinnon's view is that it

essentially presumes some level of social equality among people and hence essentially equal social access to the means of expression. In a context of inequality between the sexes, we cannot presume that that is accurate. (page 129)

In "Not a Moral Issue", one of the few essays in the book already published elsewhere,¹⁷ MacKinnon draws a doctrinal distinction between obscenity on the one hand, which she classifies as a moral idea, and pornography on the other, which in her account is a political practice. "In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act" (page 154).

She returns to the critique of the public/private distinction when she states that:

First Amendment theory, like virtually all liberal legal theory, presumes the validity of the distinction between public and private:...The problem is that not only the public but also the private is a "sphere of social power" of sexism...The distinction between public and private does not cut the same for women as for men. It is men's right to inflict pornography upon women in private that is protected (page 155)...But liberalism has never understood that the free speech of men silences the free speech of women. (page 156)

The debate about pornography is by no means concluded in the United States (or elsewhere, for that matter) and the publication of this collection is an important constituent element of that debate. But the book travels well beyond that debate, as the first two sections illustrate. It draws together some of MacKinnon's finest speeches (and anyone who has had the privilege of hearing her speak will recognise the distinctive style in these pages). It is a model of feminist critique both of law and of contemporary society at the same time as it is a model of feminist engagement with law (though MacKinnon astutely points to this tension in her essay on sexual harassment discussed above).

Feminist jurisprudence has now established its place as an integral part of the legal theory project in North America, Europe and Britain. Though many feminists (and others) would take issue with MacKinnon's political position, especially in her views on pornography, even her critics acknowledge the intellectual force of her arguments, as some of the testimonials, from law professors, judges and others on the book's back cover indicate. This book is essential reading for women and men interested in jurisprudence, for those who have views on the pornography debate as well as for those who simply derive pleasure and inspiration from eloquent and forcefully argued debates about law. The only hesitation in Australia should be the price, but with the book now being prescribed as a text in a number of law courses in North America, it is to be hoped that the publishers will bring out a paperback edition in the not-too-distant future.

By way of conclusion, a last quote from the book, this one from a debate between MacKinnon and New Right activist and anti-Equal Rights Amendment campaigner, Phyllis Schlafly:¹⁸

[f]eminism seeks to empower women on our own terms. To value what women have always done as well as to allow us to do everything else. We seek not only to be valued as who we are, but to have access to the process of the definition of value itself. In this way, our demand for access becomes also a demand for change. (page 22)

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FOOTNOTES

- 1 Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635, 639. See also "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 *Signs* 515.
- 2 For some examples of the literature in which these issues have been discussed, see Lucinda M. Finley, "Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate" (1986) 86 *Colum L Rev* 1118; Ann Freedman, "Sex Equality, Sex Differences and the Supreme Court" (1983) 92 *Yale L J* 913; Linda J. Krieger and Patricia N. Cooney, "The Miller Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality" (1983) 13 *Golden Gate U L Rev* 513; Sylvia Law, "Rethinking Sex and the Constitution" (1984) 132 *U Pa L Rev* 955; Ann Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 *Yale L J* 1373; Ann Scales, "Towards a New Feminist Jurisprudence" (1981) 56 *Ind L J* 375; Wendy Williams, "Equality's Riddle. Pregnancy and the Equal Treatment/Special Treatment Debate" (1985) 13 *NYU Rev Law & Soc C* 325; Elizabeth Wolgast, *Equality and the Rights of Women* (1980).
- 3 *Geduldig v. Aiello* 417 US 484, 496-497 n.20 (1974); see also *General Electric Co. v. Gilbert* 429 US 125 (1976). Compare, however, the more recent decision in *California Federal Savings and Loan Association v. Guerra* 55 US Law Week 4077 (1987).
- 4 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982). Gilligan undertook research on moral development on samples of women and men, and young girls and boys. This followed her discovery that Kohlberg's scales for moral development had been constructed using samples of men and boys only, yet were applied as if they were universally applicable to all persons. She concluded that women and men approach problems differently: women are more inclined to see the problem as one involving a complex web of relationships, rather than a ladder of rights. Women are more likely to look at the context, the effect of the problem on others involved with the parties; men on the other hand, were more likely to approach the issues as questions of "rights", with win/lose outcomes, as "math problem[s], with humans" (page 26), rather than questions of responsibilities. It should be noted that in her introduction, Gilligan states that the different voice she "describes is characterized not by gender but by theme. Its association with women is an empirical observation..." (page 2).
- 5 Catherine A. MacKinnon, *Sexual Harassment of Working Women* (1979).
- 6 *Meritor Savings Bank, FSB v. Vinson* 106 S Ct 2399 (1986).
- 7 *Rabidue v. Osceola Refining* 584 F Supp 419 (E.D. Mich. 1984).
- 8 *Id.*, 435.
- 9 Note 6 *supra*.
- 10 *Id.*, 2407. See, for a comment on this case, Grace M. Dodier, "Meritor Savings Bank v. Vinson: Sexual Harassment at Work" (1987) 10 *Harv Women's L J* 203.
- 11 For a graphic Australian example, see *O'Callaghan v. Loder* (1984) EOC 92-127.
- 12 For a discussion of some recent British and Canadian feminist legal work see Regina Graycar "Yes Virginia, there is feminist legal literature: a survey of some recent publications" (1986) 3 *A J L & Socy* 105; and see generally the other articles in that issue; on American legal feminisms see Jenny J. Morgan, "Feminism and Law: An Australian Perspective on American Legal Feminisms or Why Law and Feminism is not like Law and Underwater Basket Weaving", paper delivered at UNSW Law School, October 20 1987, and for a published bibliography of Canadian feminist legal material, see Susan Boyd and Elizabeth Sheehy, "Canadian Feminist Perspectives on Law" (1986) 13 *J L & Socy* 283.

- 13 410 US 113 (1973).
- 14 See, inter alia, Katherine O'Donovan, *Sexual Divisions in Law* (1985).
- 15 448 US 197 (1980).
- 16 *American Booksellers, Inc. v. Hudnut* 598 F Supp 1316 (S.D. Ind. 1984), 771 F 2d 323 (7th Circ. 1985) affirmed 106 S Ct 1172 (1986).
- 17 (1984) 2 *Yale L & P Rev* 321.
- 18 "Not by Law Alone: From a Debate with Phyllis Schlafly", also published in (1983) 1 *Law & Inequality: A Journal of Theory & Practice* 341.

International Law and Australian Sovereignty in Antarctica, by GILLIAN TRIGGS LL.B. (Melb.), LL.M. (S.M.U.), Senior Lecturer in Law, University of Melbourne, (Legal Books, Sydney, 1986), pp. 1-324, with Appendix, Bibliography and Index. Cloth recommended retail price \$39.95 (ISBN O 949553 23 9).

Australia is one of the seven States that claim sovereignty over sectors of Antarctica. Its area is the largest, being 42% of the Antarctic continent. Australia also claims, as a consequence of its sovereignty over the land mass, exclusive jurisdiction over the continental shelf and maritime zones adjacent to the Australian Antarctic Territory (the AAT).

Are these claims soundly based in international law? Even if the general answer to this question be yes (as Dr Triggs, with scrupulously fair attention to opposing points of view, concludes) can Australia's exclusive sovereignty be maintained at the political level in the face of demands for a different legal order in Antarctica, especially those that are based on the concept of the common heritage of mankind? That the new order proponents represent a greater challenge to Australia and the other Antarctic Treaty Parties than hypothetical counter-claimants is even more evident since September 1985, which was the effective date of completion of this book. The United Nations General Assembly has had the question of Antarctica on its agenda since 1982. After 1985 it was no longer possible to proceed by consensus and contentious resolutions were put to the vote, including one which affirmed that the exploitation of resources in Antarctica should ensure the "non-appropriation and conservation of its resources and the international management and equitable sharing of the benefits." Malaysia has played a leading role in promoting the debate in the United Nations on the 1959 Antarctic Treaty regime. In November 1986 its Representative said that the Treaty was not fair, nor universal, neither was it compatible with its declared objective of promoting the interest of mankind. The Treaty's consultative Parties had defended their monopoly on decision-making by regulating access to Consultative status. They had also worked to circumvent the Treaty by negotiating a minerals regime, ignoring the fact that the Treaty had no legal order for the exploitation of resources. The state of law in Antarctica