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## Sex Lex: Creating a Discourse

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# SEX LEX: CREATING A DISCOURSE

Gerald Torres\*

*And so greatly can necessity prevail . . . that it made us risk going in this manner and placing ourselves in a sea so treacherous<sup>1</sup>*

## INTRODUCTION

How do you draw a map to a place you have never been? The destination might be a place you have heard of or could imagine, but the map has to offer you a way forward. It has to describe a path, a direction, not simply a goal. Just as important, it has to mark out where you stand in order to provide a sense of where you can get to from where you are. Your map must chart the obstacles in your way. Are there rivers or mountains or deserts to cross? What will you need to sustain yourself? Might you need a raft? To undertake the task of describing the process of getting from here to there is really one of assembling knowledge of the known world. Even those who know little about your destination still have something to contribute to the process of understanding the world you need to traverse. Thus the social world becomes a crucial part of the route that gets mapped. This is especially true if you are headed to a destination of your imagination; connecting to the underlying social knowledge may help you avoid a mapping that is merely the cartography of conjecture or hope.

When Álvaro Núñez Cabeza de Baca wrote the journals of his travel across the unknown territory of the new world he told tales that would later draw people to explore the land he described, although it could not be said that he had first-hand knowledge of all he was describing. He relied on the experience of the indigenous people who helped him survive his shipwreck near Tampa Bay, his launching from Apalachicola, and his prodigious trek to the Pacific and down to inland Mexico. His years among the Indians gave him a vision of the possibility of peaceful coexistence and mutual support between the Spanish colonists and the indigenous people, not because he believed in it, although he did, but because he had experienced it. His survival depended on an appreciation of the social world inhabited by the people he was cast among and an understanding of the ways in which that understanding was superior to his own in the circumstances. Unfortunately, his fellow Spaniards, who had made no “effort to understand the social world of the natives or, for that matter, conceive of them as anything other than potential

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\* Bryant Smith Chair, School of Law, University of Texas at Austin. I want to especially thank Professor Tamara Piety. Her support has been unfailing and she has always been “fair, kind, and true.”

1. ANDRÉS RESENDÉZ, *A LAND SO STRANGE: THE EPIC JOURNEY OF CABEZA DE VACA* 119 (2007) (quoting the journals of Álvaro Núñez Cabeza de Baca).

subjects, captives, porters, guides, or slaves,"<sup>2</sup> could not understand what he was saying or even why he would want it any other way than the way they understood it to be.

The task Professor Catharine MacKinnon set for herself as a legal scholar as she began to theorize the social position of women by understanding the social practices that defined the lived experiences of women was one of mapping an unknown world. Like Cabeza de Baca, Professor MacKinnon's work drew the outlines of a map to an unknown place. To say the place she was describing was unknown is not quite accurate. The place she wanted to get to was clear, just as it was for Cabeza de Baca. But getting from here to there requires understanding where you are standing and its relationship to other places. To get to a place of social equality, the obstacles to equality have to be understood and have to be described in a way that does not take as a given the existing set of social relations but asks critical questions about them from the standpoint of women. By describing the social conditions of women, from the perspective of women, Professor MacKinnon was mapping a known world, but was revealing it as constructed and not natural. The kind of mapping Cabeza de Baca did was not just the cartographic work with which most of us are familiar but the in many ways more difficult mapping of the social world of the Indians with whom he lived. His understanding of the world the Indians inhabited and, importantly, his attempt to understand it from their point of view gave him an advantage over those who could only try and fit what they were encountering into a world that they brought with them like an *idée fixe*.

To begin to map an unknown country with any confidence you need markers and stories that enable you to place what you are observing into a context that makes it real. Moreover, your goal, the thing you believe possible to achieve, would have to be your ultimate lodestar. On some level it would have to exist if what you know to be true could be made real. Cabeza de Baca and his crew had to get from the gulf coast of Florida to the central plains of Mexico by relying on their own knowledge and that they could gain from the tribes they encountered. Virtually none of the tribes from the gulf had any knowledge of the destination dearly wished for by the Spanish, but they had the kind of local knowledge that was essential for the shipwrecked explorers to move forward. By imagining a path with help of the Indians and what they knew and believed in, Cabeza de Baca charted a course that enabled his and his men's survival and also that ultimately yielded a vision of social equality that has still not arrived.

So too, Catharine MacKinnon imagined that sex equality could be true, even if no one has yet inhabited that province. Sex equality is not just an idea, it is a practice. But it is an idea first. It is an idea rooted in the belief of the possibility of social equality. It is like race equality. It is not just a way of talking about race or thinking about race. To get to racial equality we have to reconstruct the *practices* of inequality so that the conditions of equality might emerge, might take root, and might actually exist. Yet, there is the current place we stand and the place we want to be and some treacherous ground between here and there. How do we traverse this unknown territory?

If you know the destination, then the critical first step in getting there is figuring out where you are and what stands between you and where you want to be. What

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2. *Id.* at 113.

Professor MacKinnon saw that to define the social position of women was to say that we were standing in a place where it was impossible for many men *and* women to see women as *in* themselves and *for* themselves rather than as adjuncts to men. Moreover, the methodology of Professor MacKinnon's analysis required a critique of the idea that there was a private realm that was free of the politics that defined the public spaces we inhabit. She argued all social practices were subject to inquiry.

Like the intrepid explorer, fetched up on the shores of a new world with no compass or map, MacKinnon's undertaking took fearlessness, imagination, and a willingness to push forward when others would have said, "Turn back." It required pressing on through a landscape that would become progressively more hostile. And it meant building new relationships and a new discourse of equality in which the unequal "other" was neither captive nor captor.

#### I. UNDERSTANDING THE NECESSITY OF CREATING A NEW DISCOURSE OF EQUALITY THE DISCOURSE OF FEMINISM AND SEX EQUALITY

When Professor MacKinnon published *Feminism Unmodified*,<sup>3</sup> it was a straightforward account of the linkage between the critical practice of consciousness-raising and feminist theory. Because it was embedded in the experience of *women as women*, her arguments about feminist theory unleashed attacks rooted in claims of essentialism.<sup>4</sup> But her argument was simply that feminism as a method begins with the viewpoint of women. This means, of course, real women in the social world and the practices that construct that experience and category. Because this method depends on understanding social practices concretely, it is the opposite of essentialist. By understanding the history of the forces that create the category "woman" in their current instantiation, it resists a resort to biological essentialist explanations for the patterns of social power distribution that are made visible by the method. Women were not kept out of the professions because they were by nature more suited to the domestic realm any more than black people were enslaved because they were more naturally slave-like. The process Professor MacKinnon outlined is bracing, astringent, rigorous, and, most importantly, critical. (I will have more to say about that last point later.) It also challenged the idea that there were fundamentally different brands of feminism — radical, liberal, or conservative — if those theories did not set out a feminist methodology. If they were not *methodologically* feminist they may have been social theories that implicated gender, but they were not *feminist* theories. By basing her inquiries in the lived experiences of women and the expressions of those experiences as social practices, Professor MacKinnon was not creating a discourse about women but was situating women as the measure of the meaning of gender and power in those social practices. According to MacKinnon, there is no biological essence that explains the social conditions that define the position of women. It is the gendered structure of social power that has to be interrogated. Professor MacKinnon's insistence on a methodological approach rooted in social practices could then be applied to the various academic

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

4. See CATHARINE A. MACKINNON, *WOMEN'S LIVES — MEN'S LAWS* 84-90 (2005) (definition and critique of essentialism).

disciplines and practices, including law, and it necessarily implicated discourses within and across the various domains. It was also necessarily unsettling. Let me explain.

The worlds we inhabit function by enforcing a shared, but implicit, set of understandings. (At a trivial level, there are things like the agreement that the red light is always at the top of the traffic signal, or on the left if the signal light is horizontal, or that a thank-you note for a small grace is typically expected.) That much is a common place. Of course there are more complex sets of normative agreements that are implicit. And imagining that everyone we encounter basically agrees with all of the background assumptions that guide our lives is what enables us to get through the day with a minimum of friction. Most of the time we are correct about those shared assumptions or, when we are not, we remain blissfully unaware of the fact because our misunderstandings do not trigger resistance. Most of us also imagine that those understandings capture, in a descriptive way, what the world is really like.

Yet, reliance on shared assumptions, background knowledge of what the world is like, is typically a conservative position because its function is to minimize dissent or disagreement and to confirm social roles that reinforce those understandings. Most of us also assume that the law reflects those shared understandings in a relatively unproblematic way. But the law never really does. It always translates lived reality into legal categories, and, if those legal categories do not yet exist, it is the genius of the law that permits advocates to create them. In some situations the process of creation is easier than others. It is easier when the advocacy is consistent with the dominant understanding of how the world is properly ordered.<sup>5</sup> Yet, until we have a way of challenging those shared understandings we can scarcely know that they are partial. Moreover, deciding to step outside of the agreed-upon understanding of how the world should be or what the appropriate order ought to be is always a risky enterprise and rarely easy, especially if the challenge is fundamentally upsetting.<sup>6</sup>

But how do you begin to appreciate that your own view of things is partial? Imagine that you are staring at the horizon. We all know that we cannot take it all in at once, but it is only when we pivot that it reveals itself as broader, more colorful, more complex than we might have thought it to be; if we scramble up a ridge or ascend to the rooftop of a building, the horizon changes yet again.

In the social world we navigate our lives and the various worlds we inhabit through the creation of discourse. Discourse is a set of practices — not just language or language games, but complex ways of negotiating the social world we occupy and the subsystems that regulate it. Discourse helps construct the practices. Thus, it is only by challenging the dominant discourse that critical change can occur. This of course is the point at which we pivot and recognize the elements of the landscape unfolding around us, both built and unbuilt. It is the point at which we can ask whether things are as they must be or are they the way they are because we made them that way. There was comfort, I suppose, in imagining that North America was a wilderness rather than a managed

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5. See Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 649-56.

6. See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945-1975* (2006).

landscape when the Europeans first arrived. If it were wilderness there would be no necessity to account for what was being taken and the reproduction of European social relations would seem to be “natural” and perhaps inevitable.<sup>7</sup>

The denaturalizing of ways of understanding begins by revealing social practices as not just the way things are or have to be but as a form of regulation in the service of some value or another. MacKinnon insisted that we look at who benefits from social practices that constituted women’s social subordination. When you ask who is extracting value from the social practices as they are it is like looking at a landscape and asking whether you really know what you are looking at. Whether the landscape *needs* to look the way it does. Is that swale I am looking at left by a retreating glacier or by the draining of a wetlands? It requires that the social practice itself be interrogated not just pragmatically but normatively and ideologically.

Professor MacKinnon’s contributions need to be understood in the context of the creation of a new discourse of sex equality. She looked at the landscape of the social practices of sex relations and, beginning with actual practices, the discourse of sex inequality. She first said what sex inequality *is* and observed that there is no sphere of social life free from it. There is no public/private divide that magically converts a discourse of inequality into something else. This approach was experienced as a challenge to liberalism generally and liberal feminism in particular, which was just liberal politics with a formal equality analysis of gender. Liberalism in American political life presumed that certain relationships of social life were *pre*-political or *natural* and others social and that the role of the state was to be neutral with regard to social actors. Thus, in the case of race, Jim Crow was demonstrably wrong because it treated people differently based on illegitimate criteria. But where the criteria were *pre*-political, that is, natural, then any legal distinction built on that natural distinction would itself be legitimate. Within such an analysis, of course, white people and men remain the baseline metric from which the ideal of “equality” is theorized as MacKinnon vividly and originally exposed.

On this level, *Reed* is to *Bradwell* as *Brown* is to *Plessy*: women went from being categorically different to being putatively the same. Such a recognition looks like progress when it enables one to enter liberal humanity. But having to be the same as men to be treated equally remains the standard.<sup>8</sup>

It was the challenge to that baseline that was fundamentally destabilizing because it required those who would engage with her work to rethink the meaning of equal.

Imagining what sex equality would require forces us to rethink all of social reality,

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7. See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 36 (1983) (“In New England, most colonists anticipated that they would be able to live much as they had done in England, in an artisanal and farming community with work rhythms, class relations, and a social order similar to the one they had left behind . . .”). See also RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* (1967).

8. MACKINNON, *supra* note 4, at 123 (referencing *Reed v. Reed*, 404 U.S. 71 (1971); *Bradwell v. Illinois*, 83 U.S. 130 (1873); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The points made here were first made by Professor MacKinnon in her earlier works. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); MACKINNON, *supra* note 3; CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*].

but the idea of social equality itself requires us to rethink all of social reality. Unless, of course, you believe we have already achieved all of the equality that is possible in human society. Yet, if you are participating in the reproduction of hierarchy (and we all are), then each of us needs to understand where we fit within the hierarchy and our role in its reproduction. The sets of relationships that define our life are not independent of the general social practices within which those relationships are nested. The process of recognizing social practices as created means that you need to understand the various discourses that justify the social position you occupy. The implicit rules that govern each of the assorted spheres through which we live out our lives always appear to us as a given and their durability is manifest in ways consistent with the rules which govern the practice. The more resilient or robust of these social practices are what we call institutions, organizations, or traditions.

Challenging a dominant discourse is risky because it calls into question all of the diverse representations of social life. Social practices are forms of discourse. This is an important point for understanding the methodological grounding of Professor MacKinnon's theory. Again, it is crucial to stress that discourse does not refer by any means solely to ways of talking or language games, although it necessarily encompasses those things. Let me give you an example from my own childhood. I was raised in a blue-collar household. My father was a steelworker, my mother was, what was called then, a homemaker. I was one of seven children. Money was tight, but it was never an overriding issue for me, although I was conscious of it perhaps because I was a boy and if I wanted to interrogate it more thoroughly it would undoubtedly be revealing of the gender implications of class and ethnicity. But the story I want to tell is about health care.

This story begins at a swimming party where, in a fit of exuberance, I swam into the side of the swimming pool and sank, so I am told, like a stone to the bottom. I was fished out amidst the laughter of my friends and, besides a headache and a stiff neck, thought little more of it. A few hours later, Mrs. D., the mother of the friend at whose home we were swimming, took hold of my shoulders and brought me into the light. "Your eyes are awfully dilated," she said with some concern. After telling her about the swimming accident, she insisted that I be taken to the emergency room. And so I was. My friends took me to the local county hospital and left. Eight hours later I got to see a doctor. In the meantime I was able to translate for a fellow who came in with internal injuries and, as far as I could discern, with several cracked or fractured ribs as well because his car had fallen on him when the jack the car was sitting on slipped. No one on the staff spoke Spanish and he ultimately left some hours later when he was taken in to see a doctor. That he had to wait several hours with potentially serious internal injuries was sufficiently shocking to me that I remember it to this day. Those with more dramatic injuries got attention, there was little order, and some people were asked to leave (they may have been intoxicated or mentally ill). I suppose some informal triage was occurring but the desideratum being used to make the judgments was obscure. It turned out I had compressed vertebrae in my neck and a severe concussion. I suppose it could have been worse.

The point of this story is fairly simple. How poor people are treated when they go

to an emergency room at a public hospital without being able to produce evidence of insurance is a social practice. Understanding the social practice I have just outlined is a way of understanding the meaning of being poor; that practice is part of the discourse of poverty and health care delivery. It is not a way of talking about it. A simple look around reveals the discourse of class and poverty everywhere. A lot of it is institutionalized, a lot more is merely naturalized into “the way things are.” MacKinnon revealed this in the structure of legal categories and in the practice of male supremacy.

*The Discourse of Sex Equality and the Law*

If we turn now to the ways in which the discourse of sex equality entered the law, we have to understand how the doctrinal structure of the law would both discipline and domesticate the knowledge that feminist methodology had brought to our understanding of social life. Sexual harassment in the workplace as a form of sex discrimination was a legal wrong that emerged from the women’s movement. It was difficult to see because the “[i]ntimate violation of women by men is sufficiently pervasive . . . as to be nearly invisible.”<sup>9</sup> And it is “[c]ontained by internalized and structural forms of power.”<sup>10</sup> Yet once the social relations of sex in the workplace were understood from a woman’s point of view, things that had been “normal” or “expected” could be seen as discrimination based on the social position of women in the economy in general and the paid workforce in particular. I want to be clear, it was not that the assumptions that men made about the significance of their advances, comments, or other behavior in the workplace were all wrong or even that some women did not share them. Their relative powerlessness prevented most women from offering viewpoints that upset the comforting male view of the exchange. So men (or employers) could point to the lack of complaint as evidence of the behavior’s acceptability rather than entertaining the possibility that acceptance was far less widespread than they believed because women could not (or felt inhibited from) complaining. Male power inhibited most feedback that would have belied the supposed shared understanding of the meaning of the social practices within the workplace. But, so long as the legal rules remained epistemologically male, the doctrinal structure within which the claims of discrimination were made would presume a nondiscriminatory baseline against which to assess the claims of the woman who was alleging discrimination. That is, it would presume, for purposes of an equality claim, that men and women start off being similarly situated. But, of course, that is precisely what is at issue, whether men and women are similarly situated in the workplace. Are sexual advances and their resistance supposed to be understood as part of the normal byplay of work life and as an extension of social life in general or are they normalized as a condition of employment that is gender based and thus incapable of situating men and women similarly? As Professor MacKinnon puts it:

Creating and pursuing a legal cause of action for the injury of sexual harassment has revealed that different social circumstances, of which gender is one, tend to produce different stakes, interests, perceptions, and cultural definitions of rationality itself. This

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9. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 8, at 1.

10. *Id.*



awareness neither reduces legal rules to pure relative subjectivity nor principle to whose ox is gored. It does challenge the conception that neutrality, including sex neutrality, with its correlate, objectivity, is adequate to the nonneutral, sexually objectified, social reality women experience.<sup>11</sup>

Yet by applying the experience of women in the workplace to Title VII proscriptions, the idea of discrimination could be moved to encompass the social practices that define gender relations. Put another way, MacKinnon's work helped to develop a new baseline for the discourse of gender in the paid labor force and beyond. Men and women did not start off equal in the workplace; thus the law should not proceed as if men and women are similarly situated. The way poor people were treated in that county hospital emergency room was part of the meaning of being poor. Professor MacKinnon showed that the sexual harassment of women in the workplace is part of the meaning of being a working woman. Importantly, she also showed that feminist legal — meaning a legal practice that is conscious of this reality — can intervene to transform that social practice to change the meaning of being a working woman.

The incorporation of sexual harassment into the doctrine of workplace sex discrimination is now firmly established, even if all of the contours of the doctrine have not been completely worked out.<sup>12</sup> But there the challenge was aided by the inclusion of sex into the protections of Title VII itself.<sup>13</sup> The difficulty was proving that harassment was *discrimination* based on sex. Where things got dicey was where the commitment to sex equality seemed to run afoul of other fundamental commitments. While this normative complexity could be explored in the context of the public/private distinction, its most explosive expression came in what could or ought to be considered a purely public setting: the production and distribution of pornography. While some might argue that the consumption of pornography is a purely private sexual matter, its production and distribution is a matter of the market — the quintessential public sphere — even though there are those who argue it ought to be governed by purely private law.

When Professor MacKinnon and Andrea Dworkin proposed an ordinance that recognized pornography as a form of sex discrimination they ignited a firestorm. The ordinance, first proposed in Minneapolis, defined certain activities involved in the creation of pornography to be forms of sex discrimination and as such fashioned a remedy for the women and other persons injured in its creation.<sup>14</sup> The idea was really quite simple and parallel with other civil rights statutes: if there is a right to equality and you are acting to deny me that right (imagine eating in a restaurant or riding on a bus) and I have been injured by the denial, then I deserve damages and an injunction against further injury. Not a difficult idea to grasp. If you are injuring me, stop. So why then did this proposal inspire death threats to be launched against Professor MacKinnon, Andrea Dworkin, and their supporters? What caused otherwise progressive allies to fail to support her in this effort? The answer is that her opponents, even people who would

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11. MACKINNON, *supra* note 4, at 115.

12. *See id.* at 112, 196-99.

13. 42 U.S.C. § 2000e-2 (2006) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex . . .”).

14. *See id.* at 493-97 (enumerating the full text of the ordinance as proposed).

otherwise characterize themselves as progressive, saw the ordinance as an attack on the right to freedom of speech.

When the ordinance was passed by the City Council in Minneapolis it was vetoed by the Mayor. When it was later passed in Indianapolis it became law, but was quickly challenged in federal court. In *American Booksellers Ass'n. v. Hudnut*, the district court stayed the application of the ordinance and the appeals court ruled that the proof of harm adduced by the proponents of the ordinance merely underscored the importance protecting it as speech.<sup>15</sup>

Let us examine that claim. If we begin with the idea that the First Amendment to the Constitution of the United States bars Congress and, by extension, the states from passing any law restricting the freedom of speech or the press, then any law that does so is, *ipso facto*, unconstitutional. If the ordinance is such a law, then it must be unconstitutional. The critical question is whether it is such a law. If the question is rephrased to ask whether, because pornographers might have to pay damages for the harms they cause and thus there might be less pornography, it is an indirect restraint on the production of speech, such an argument proves too much. Under this formulation any government action that increases the cost of speech production would be suspect and that clearly cannot be the case. So what is the problem?

The problem seems to be that if the continued distribution of specific pornographic material works a continuing legal injury such that an injunction against its distribution is the only appropriate remedy, that remedy is regarded as a violation of the First Amendment. Let us think about this for just a minute. If the harm is sex discrimination and the only way to prevent further injury is to stop the action that constitutes the discrimination, the defense is saying that while you may be harmed the remedy is impermissible because it would produce the greater harm of decreased availability of a specific film or magazine or video. Remember, the ordinance is not requesting a general prohibition on a class of speech but demanding that a specific act be stopped because it is causing an injury. That the action is speech does not insulate it from civil remedy otherwise we would not have claims for libel, slander, or defamation. The procedural and evidentiary hurdles might be high, but they are not insurmountable.<sup>16</sup>

Nonetheless, within the discourse of freedom of expression, once the boundary of speech gets crossed a different ethic seems to take over. Even though the ordinance was clearly aimed at eliminating specific harms from practices that provably were or resulted in sex discrimination, because some of these practices involved the symbolic representation (through photographs or other means) of the sexual subordination of women, whether or not its reality was required to make it, or resulted from it, the fact of symbols or symbolic representation being involved became the operative legal fetish and the actual harm disappeared from view. The question that always got asked was: What

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15. *Am. Booksellers Ass'n. v. Hudnut*, 598 F. Supp. 1316, 1327 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323, 327, 332-34 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

16. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-81 (1964). This case established the standard of *actual malice* in the reporting on public figures before a publication can be considered defamatory or libelous. The standard essentially requires that the publisher act in reckless disregard of the truth or falsity of the published statement or account. *Id.* It is a very high standard to meet as is the standard of proof in the pornography ordinance.

would get swept up in the definition? Instead the question should have been the same one that is still being litigated in the Title VII context: Can the plaintiffs make out a *factual basis* to sustain the cause of action, including proving a harm of discrimination?

Even though it cannot be said that Professor MacKinnon transformed the law in the area of pornography, she did begin to change the discourse both within the legal academy and within the feminist community. What the protracted debate about pornography and sexual harassment illustrated is that because the norms in these examples are embedded in the law they ultimately need to be contested in legal doctrinal terms which take on a logical form, that have at the same time a deeply political structure. It is here that Professor MacKinnon has had a profoundly important impact on discourse within the law. By assiduously hewing to the technically logical requirements of the profession, she has forced those who would like to claim that her methodological feminism has yielded *only* political argument to confront her legal claims, which have often, if not always, been accepted by courts and legislatures. As one of our teachers when we were law students together, Charles Black, might have put it, the experts at the bar require her opponents be technically sound lawyers rather than mere polemicists.<sup>17</sup>

## II. FEMINISM AS CRITICAL DISCOURSE

### *What Makes Feminism Critical?*

If we accept that Professor MacKinnon has defined a form of methodological feminism that is distinct from what others have described as feminism, part of the argument I have been making is that her task has been to create a critical feminist discourse. I say this with some unease, because, of course, Professor MacKinnon has staked out her position as *Feminism Unmodified*. Nevertheless, because of the important relationship of her work to critical race theory, which I will turn to in a minute, I thought it necessary to say a few things about what makes her discourse critical.

Professor MacKinnon's intervention and her use of consciousness-raising as an important methodological tool meant that she did not rely on any theory of false consciousness to explain continued gender inequality. Instead her method relied on a critique of power. She was making a fairly straightforward claim that the normative conceptions that justified social and political arrangements had to be understood with a descriptively adequate empirical understanding of those arrangements. Without that, the normative justifications for the extant distributions of social power were merely empty rationalizations of unexamined *a priori* assumptions about what the social order had *naturally* yielded. MacKinnon argued that gender relations were instead social facts that were not in any sense *natural*, but that they were treated that way in order to justify them as being outside of politics. She argued that things did not necessarily have to be as they were and feminism provided both an empirical and normative critique of the way things were.

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17. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). This sentence is a paraphrase of the claim Professor Black made in defense of *Brown v. Board of Education*, 347 U.S. 483 (1954). If the reasoning were wrong, he said, the experts at the bar would correct the error. The decision had been challenged as lawless and merely political argument, not legal reasoning.

Professor MacKinnon claimed that if there was going to be any legal reform it had to begin with the recognition that the underlying social facts were the foundations upon which the normative claims were premised. Yet if the formal calls for equality were to be taken seriously, they had to start with a critique of subordination rather than assuming that the ordinary conditions of gender subordination were a necessary outgrowth of biological fiat or an organic precipitate of normal social relations. If what passed for acceptable, normal social relations routinely produced systematic inequality then it could no longer be acceptable and the legal rules that supported inequality would have to change in a way that would ultimately destabilize the putatively “non-political” substructure on which the law was based.

Moreover, the critique Professor MacKinnon produced was aimed precisely at those places that were said to be beyond or outside of regulation, either because they exceeded the boundaries of the public sphere and thus were not fit subjects of the regulatory reach of the state or because they were dominated by the ethics of the market and thus should be guided by norms that were said to be external to the law. But it is surely at this point where law is most needed even if it is insufficient. Not allowing separate entrances for blacks and whites even though private market preferences might have suggested otherwise is a case in point. Thus the doctrinal interventions that were promoted by Professor MacKinnon were aimed at making the concrete social changes necessary to reflect the normative justifications that legitimized the legal regime itself. Democratic norms by their nature are externalized and are subject to contestation. As we saw in the pornography fight, the principal attempt by her opponents was to discipline the nature of the challenge and thus control the participants. The argument that private behavior was being regulated was trotted out and became one of the leitmotifs of the political debate, but the legal debate, by shifting “principles” at issue, tried to make the entire debate off limits. In our democracy, because norms ultimately need to be contested in legal terms, the underlying democratic structure — how power is used and controlled and by whom, as against the form of its expression — is where the contest over discourse arises. This is what makes change at the level of discourse so significant. For any transformation in social life to be durable, in the way discussed above, change must happen at the level of discourse not just at the level of policy.

### *Feminism and Critical Race Theory*

Without wanting to rehearse the entire history of Critical Race Theory and its relationship with Critical Legal Studies<sup>18</sup> or to feminism, I want to suggest here that there was a misunderstanding about the critical content of Professor MacKinnon’s methodological intervention. The misunderstanding was rooted in the same critique of essentialism that liberal feminists (and non-feminists) launched. With the publication of Professor Kimberlé Crenshaw’s series of articles on intersectionality,<sup>19</sup> the relationship

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18. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii-xxxii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (especially the introduction that recounts the history and its relationship with CLS).

19. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43

of complex intercategory systems of power, dominance, subordination, and their attendant discourses gained some traction in the legal debate. One of the things that was important about Professor Crenshaw's work was that it was consistent, methodologically, with Professor MacKinnon's. But many readers did not see that. They understood intersectionality as a kind of additive process. Yet it is precisely that kind of misunderstanding that is part of the discourse of disaggregation that prevents political power from being assembled to resist.<sup>20</sup> I will close with a short story that captures the way in which Professor MacKinnon understood this.

When we were law students together two things were true about the composition of the student body. First, there were very few students of color and, second, there were very few women. Efforts to increase representation of members of either group could have produced just the sort of disaggregated infighting that would have resulted in progress for none and permitted those in charge to do what they wanted with a claim that those opposed to their choices could not come up with an alternative. We have all seen that gambit. Instead, Professor MacKinnon with BLSA (Black Law Students Association), the Women's Law Student Group, and the group called LANA (Latino, Asians, Native American Law Students — there were so few of us that we did not each have a separate group) began meeting to discuss the issue. We assembled historical data, data about the profession, data about undergraduate enrollment; I cannot even recall all that we looked at, but rather than deciding that there were a limited number of seats to be apportioned among us we decided on a different tack. First, without using the language of discourse analysis, we asked what the school means when it says it wants to be inclusive. What does it mean when it says it wants to be a leader in transforming the profession? Whose interests are being served by the policies that have been put in place? How flexible are they? Are the rules there for administrative convenience or for substantive ends? After a number of meetings we came up with a proposal to increase the number of people of color in the class by increasing the number of women of color. In fact, we suggested, a class of all women of color would not be a bad start if they were serious about taking a leadership role. Everyone in the coalition we had assembled was on board. We were not suggesting a permanent policy change, just a permanent process to reexamine whether the policies they claimed they were endorsing were really achieving the ends they claimed to be embracing. It was modest, but it embodied and recognized, in a small way, both the concrete insights of what came, theoretically, to be called intersectionality and the politics such an insight might produce.

#### CONCLUSION

To understand the terrain of social inequality Professor MacKinnon began not with theory but with practice, with the lived experience of women. By beginning with the social practices that define or otherwise delimit the conventional lived experience of

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STAN. L. REV. 1241 (1991).

20. See, e.g., Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596 (2003) (discussing construction of coalition of Mexican Americans, African Americans, and poor rural white Texans in the passage of what came to be called the Texas Top Ten Percent Plan to guarantee admission to high-performing high school seniors to the flagship campus of state university).

women, what Professor MacKinnon necessarily had to do was to create a new discourse of sex equality. That many, especially those in power, would react to her ideas with hostility should not be surprising, even if it is disappointing. It is just like the way the conquistadors reacted to Cabeza de Baca when they encountered him coming from the north. Cabeza de Baca was accompanied by Indians who were neither captive nor captors. For the conquistadors such an Indian did not exist. Cabeza de Baca, they thought, must be up to some kind of a trick.

Yet it was not a trick. It was, like the journey of Cabeza de Baca, the outline of a map to the new world; a world where women would be their own measure, where they could be defined in themselves and for themselves rather than just by men's power. The expertise of the indigenous people helped Cabeza de Baca survive a shipwreck and the Indian's local knowledge became an invaluable tool for that journey across unknown territory many centuries ago. Hundreds of years later, MacKinnon's explorations have similarly been dependent on her knowledge of the social world in general and the local knowledge she gained from listening to women within it. With a practitioner's courage and a scholar's tenacity, she mapped a route to new and unfamiliar territory even though she may not have had first-hand knowledge of all that was being described.

In this brief talk I have tried to suggest that, while Professor MacKinnon has made an enormous contribution as a legal scholar and practitioner, in many ways her most lasting contribution is so pervasive and embedded in contemporary understandings that it might be overlooked. She has changed the way we think about and talk about and act about many of the problems she has confronted. She has transformed the social practices in ways large and small. Even when people disagree with her (and many do for reasons honorable and dishonorable), her interventions have shifted the ground. By making them durable, by institutionalizing them, through law, policy, and practice, she has done something for all of us. She has not just have given us a lever and a map. She has given us a place to stand.