Tulsa Law Review

Volume 46
Issue 1 *Symposium: Catharine MacKinnon*

Fall 2010

Symposium Foreword

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Recommended Citation
Catharine A. MacKinnon, *Symposium Foreword*, 46 Tulsa L. Rev. 1 (2013).

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FOREWORD

Catharine A. MacKinnon*

This event was a bit like attending your own funeral without having to die first.

Tulsa Law School, and everyone associated with it, was so generous in envisioning and executing this day. The participants ranged from my oldest friends to the newest. Gerald and I have known each other almost twice as long as we haven't. A new friend like Jo Ann is a precious surprise when you have been made into a persona, instead of the person your old friends know you to be. I am working at being open to this avalanche of being loved by your minds and understood by your hearts.

Apart from long-term scholarly connections, this group shares an engaged politics and activism, making us also comrades in arms. Susanne spoke of our work on pornography.[1] Sheila told you of some of our work together on constitutional litigation and legislation in Canada over years.[2] Karima and I share human rights work, Marc and I have done cases and policy together going way back and continuing into the present, Kim and I have confabulated all over the place since we met decades ago. And Gerald and I have been in so many trenches together beginning in law school that they blur into a maze beneath my feet.

Thinking back, I am struck by shared conversations about our mothers that perhaps illuminate a shared groundedness in our politics. We have spoken about having our mothers, losing them, having them lose and find themselves and parts of themselves — Kim having recently having lost her monumental mother, Jo Ann losing her gifted mother early in both of their lives, Karima's amazing mother surviving her accident under her daughter's devoted care. Susanne has told me of her mother's journey, Lori about hers coming into her own today. My mother was always there for me and for everyone around her but never had the life of the full person she was, in my opinion, and could have become, given lived scope for her remarkable gifts. I will never get over my mother's life. There is a reason we talk about this woman, embodied, archetypal but with her own face, always particular even as everyone has one or a hole in the shape of one, a touchstone to the real that is beyond generalization or sentimentality.

In addition to politics, this group shares many interests — music with Gerald, theater with Karima, dogs with Lori, fragrance with Jo Ann. Some call me Catharine,

* Editor's Note: This Foreword is based on Professor MacKinnon's concluding remarks at the Tulsa Law Review Legal Scholarship Symposium on March 5, 2010. I believe these remarks make for an excellent foreword for the issue honoring her work. Thank you, Professor MacKinnon, for honoring us with your words and wisdom.

1. *See* Susanne Baer, *Traveling Concepts: Substantive Equality on the Road*, 46 TULSA L. REV. 59 (2011).

2. *See* Sheila McIntyre, *Timely Interventions: MacKinnon's Contribution to Canadian Equality Jurisprudence*, 46 TULSA L. REV. 81 (2011).

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some Kitty; there is this new CAM that probably comes from email, and Cat from the younger crowd. Although I was called Catharine in college sometimes, it stuck starting in Canada. Unemployable in my own country, as Americans seeking freedom often are, I fled there, where a people who can be a little more formal called me Catharine, really because they knew me first from my written work, which is a real way of knowing me. It also put Aunt Catharine, my grandmother's closest friend — who, as people put it then, "never married" — into my everyday life. Much admired by my parents, Catharine W. Pierce, an art historian, gave me a piano when I was six and put me through college. I love carrying her name through this world.

Spatial metaphors predominated in many of the talks here. We travel place to place with Susanne, trying to figure out why my ideas travel well.[3] (Here I thought it was because they are right.) Karima creates a personal space she is within.[4] Jo Ann describes a legal room of one's own, asking us to imagine what we will do in it today.[5] Gerald gives us, methodologically, a place to stand.[6] I spoke of a spatial dimension of international law's jurisdiction, increasing women's rights the further away you get from home. The spatial dimension in these talks drew attention to how much I live in time, as if all that matters is a matter of time — time to be and to do, to go and to return, to begin, to end, and to begin again. You are saying it is time to give more room to space: to the where, to placedness, to places, to place.

The many stimulating hooks cast in my direction on this uplifting day inspired a few further thoughts[7] The charge of "unintended consequences" often challenges whoever acts for political transformation. Sometimes what we intend happens as we intended it. Sometimes, actually most of the time, the forces we are up against ensure that it happens incompletely, so we keep going. This is certainly true for opposing prostitution in Sweden, where Andrea's and my proposing to criminalize buyers and decriminalize prostituted people in 1990 stimulated its eventual acceptance in legislation, law enforcement, and public attitudes. It could be more fully carried out both by courts, damage awards, and through government support of prostituted people. That does not mean it had unintended consequences. It means the work is not yet complete. If the question is, have consequences occurred in work I have done that made the original problem worse, or hurt the people I was trying to help, or shot off on a tangent to produce perverse outcomes, or undermined the original initiative or its goals, not that I can think of.

For example, continuing Sheila's discussion of the present legal definition of consent in Canada[8] — a hammer-and-tongs definition reminiscent of the list of nondefenses in our pornography ordinance — that law was not an unintended consequence of losing the *Seaboyer* case.[9] After the Supreme Court of Canada, over our

3. *See* Baer, *supra* note 1.

4. *See* Karima Bennoune, *Why Does It Matter if Women Are Human?: Catharine MacKinnon's Contributions to International Law*, 46 TULSA L. REV. 107 (2011).

5. *See* Jo Ann Palchak, *A Legal Room of One's Own*, 46 TULSA L. REV. 11 (2011).

6. *See* Gerald Torres, *Sex Lex: Creating a Discourse*, 46 TULSA L. REV. 45 (2011).

7. It is possible that, in revision, some of the contributors no longer say in print exactly what was said orally. These remarks still address what was said live.

8. Canada Criminal Code, R.S.C. 1985, c. C-46, § 153(2).

9. R. v. Seaboyer, [1991] 2 S.C.R. 577 (Can.).

opposition, invalidated the rape shield law, opening a rape victim's sexual history to cross-examination in the name of the defendant's fair trial, Canadian women decided to change the rape statute entirely, and did. I think force is enough to define rape, although force has to include forms such as inequality that are not physical, and of course it has to be connected to each individual criminal defendant. But if you think nonconsent is necessary in a rape law, the Canadian definition is a very strong one. It is a lot better than it was, and is consistent with the consequences sought in the *Seaboyer* intervention. That we did not intend to lose and pursue legislative change instead does not make the legislation an unintended consequence of the litigation. We intended the legislation as a further step that losing the original step, which we did not intend but knew can always happen, made necessary. Politics permits few silver bullet interventions, particularly when you work for historically disenfranchised and socially disempowered people.

On the other hand, the reservations I had and expressed about the position we took in the litigation on pornography in Canada, I do see as being responsible for producing precisely the ineffectuality of the victory we wanted, even though we won the case. But is that an unintended consequence? Hardly. It was not even unanticipated. Canadians wanted to defend their criminal obscenity law, one defined around crime, cruelty, horror, and violence.[10] My view was, and is, that domestic criminal law is not going to stop the pornography industry. But that does not mean one allows the pornographers to eviscerate the only barrier there is, however flimsy, particularly if a better solution is uncertain. The Canadians also have their own culture of the relation of the state to the society, one that is more positive than that in the United States. They think the state is more "us," where Americans tend to think the state is "them." It's their law. So we defended their pornography law on equality grounds against pornographers who said it violated their right of freedom of expression. Andrea Dworkin took the view that a law called obscenity should not be defended even if its actual definition is fairly acceptable, and there should be no criminal laws against pornography. I thought that the content of the definition mattered more than the label, and that if the obscenity law was struck down, it would be even harder to get a real law that would actually do something, and besides Canadian women wanted to defend this law. So in *Butler*, we got it upheld largely on the equality grounds we argued.[11] Andrea and I predicted then that if this case was won, Canada would be blizzarded with pornography from the United States; U.S. pimps were not going to take this lying down. And we bet that Canadian criminal authorities would do virtually nothing about the pornography. We were right.

But unintended consequences? The same pornography that was successfully litigated on a harm-to-women theory is available all over Canada today. Meantime, as to the consequences we intended, a law like our pornography ordinance would, it is clear from the *Butler* decision, be constitutional in Canada. But no one will even introduce it. As Andrea used to say, there are problems some people don't want solved. Does the fact that we do not control the actions of pornographers, police, prosecutors, people, and Parliament, so the consequence most desired did not happen, mean that we should not have argued what we won? I don't think so. Our intentions did not control all the

10. Canada Criminal Code, R.S.C. 1985, c. C-46, § 163(8).

11. R. v. Butler, [1992] 1 S.C.R. 452 (Can.).

consequences, but they never do. Had we known then what we know now about the consequences, should we not have done what we did? Not at all. We were blindsided by nothing. And we continued the fight in applying the ruling to gay and lesbian pornography when it harms people based on their sex, even while opposing Canada Customs when on homophobic grounds they stopped materials from entering the country.[12] I continue to hope that Canadian women will fight for laws they actually want and deserve, rather than only not to lose laws they have that are marginally better than nothing. This entire fight is not over yet by a country mile.

The unintended consequences critique, as deployed, seems premised on the view that we can control everything, or should be able to foresee everything, and that if we don't or can't we should do nothing. Of course we need to be serious and careful and strategic. But the spectre of unintended consequences of social action seems crafted by people who have never acted on anything and are trying to keep other people from acting, while looking smart in justifying their own passivity. Acting runs risks. That is one reason that it helps, in acting, to directly represent people who will be affected by what you do, and to be accountable to them. But not acting is safer. Apparently, one is not considered responsible for the consequences of the status quo, in this criticism, at least not intentionally, which is supposed to improve it. Is the status quo an unintended consequence of inaction? Not acting also has consequences, intended and otherwise.

Karima raises the important concern, connected to understanding rape as an act of genocide, that reverting to the community being violated, as opposed to women as such, can deflect from the recognition of violation as gender-based, which is shared with all women all the time.[13] Short of changing the Genocide Convention,[14] or other international law, "groups as such" are not defined on the basis of sex. So the only legal question of genocide in this context can be whether, when a woman is sexually violated in a genocide, is her racial, ethnic, religious, or national community violated. Granting that shortfall, the miracle of *Kadic* is that, when she is *sexually* violated under certain circumstances, her community is seen to be subjected to intentional destruction.[15] It may harbor a down side in the way Karima said, but it is also miraculous in having women's sexuality be part of their humanity, taking a true step in women becoming human — women for once being, as Andrea Dworkin used to put it, human *down there*. Unless and until we have full recognition of the communality of women that includes all women, such that when women are violated say on an ethnic and racial basis together with sex or gender, the community of women is also violated, we will not have our full humanity. Meantime, for instance, women may carry the honor of some peoples, but it is seldom *our* honor. We do have a place in the Rome Statute of the International Criminal Court where, for the first time, an international crime has gender as an explicit element, so we

12. Little Sisters Book & Art Emporium v. Can., [2000] 2 S.C.R. 1120 (Can.). For corrections of various misrepresentations of Andrea Dworkin's and my work on pornography issues in Canada, see our press release at www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html. For excellent commentary, see CHRISTOPHER KENDALL, GAY MALE PORNOGRAPHY: A CASE OF SEX DISCRIMINATION (2004).

13. *See* Bennoune, *supra* note 4.

14. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

15. Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

can be recognized as persecuted based on our gender, pure and simple.[16] This is the kind of recognition for which *Kadic* broke the path.

In all of this, I think that the distinction between individuality and collectivity is something of an illusion. Floating around in the law and commentary on these subjects is a notion that women are raped individually, discriminated against individually, that women are women only one at a time. I am not saying we are not each violated and harmed. I am saying that we are not violated or discriminated against *as* individuals but rather as women, which is a collective whole. If the basis of the harm is collective, then it's a false distinction to say on the one hand, there are women's individual rights and on the other hand there are collective group-based violations, on the one hand there are rapes and on the other hand there is gender crime. The important thing is never to forget the woman who is harmed even as we remember that she is part of all of us, and in some real sense we are her. If women as a whole was not socially defined as it is, did not mean what it does, she would not be targeted for this and would not suffer it as she does. Sexual atrocities are harms of inequalities, harms of status, in a real sense of discrimination, which is collective to begin with. Women are by definition a group comprised of all our commonalities and distinctions, including power differentials among us. Human rights conventionally sees individuals and states as the actors, being less comfortable with express groups. As the Rome Statute repeatedly recognizes in its understanding of gender crime, sexual atrocities are collective injuries.

This is a good moment to note that Lori says John Rawls is already committed to my positions.[17] As a big tent person, I am happy to hear it. She may be right as to outcome, but I don't think he understands the first thing about getting there. And as Lily Tomlin put it, I "got new evidence."[18] His copies of my books are annotated in three colors (red, blue, and black), a series of questions appended to each chapter. (He underlines in red each time I cite him, making me glad I was as respectful as I feel.) After seeing his copy of my introduction, I will never again think that nobody reads introductions. He is the kind of reader you live to write for. At the point in the introduction to *Feminism Unmodified* where I launch into a page and a half on how objectivity is male and why, there is a line all the way down the side to the top of the page, with an asterisk to a comment stating: "I don't understand the rest of this page."[19] He is right. He doesn't. We are different kinds of thinkers. Like most philosophers, especially liberal ones, he is abstract. I am substantive. You argue his abstractions are substantive, he simply does not understand what you are talking about. His way of thinking is how philosophy has been done up to now for the most part. It seemed to me women needed it to be done otherwise, which is why I wrote *Towards a Feminist Theory of the State*.[20] Whenever I hear Lori redo liberalism in light of that book, I think better of liberalism than I did before, which may mean I am going soft in the head or it may mean

16. Rome Statute of the International Criminal Court (2000), art. 7(1)(h).

17. *See* Lori Watson, *Toward a Feminist Theory of Justice: Political Liberalism and Feminist Method*, 46 TULSA L. REV. 35 (2011).

18. JANE WAGNER, THE SEARCH FOR SIGNS OF INTELLIGENT LIFE IN THE UNIVERSE 133 (1986).

19. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 9 (1987) (specific copy on file with author).

20. *See generally* CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

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that Lori is very good at what she does.[21] She should go for it.

Of all the problems we talked about today, we have made serious headway on the inability to think only one thought at a time, something that seems to deeply afflict much of a profession where only one side can win. We have been thinking two thoughts at a time for a while now, including race and sex under Kim's leadership, men and women, peace and justice, sovereignty and security, liberty and equality, culture and rights. Not prematurely staking a claim on one side of these purported oppositions — as Marc shows in his stunning analysis of men, gay and straight[22] — has been highly productive. One result is that we can think and act at the same time.

From my heart, as we all keep on, thank you more than I can say.

21. *See* Watson, *supra* note 17.

22. *See* Marc Spindelman, *Gay Men and Sex Equality*, 46 TULSA L. REV. 123 (2011).