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## BOOK NOTE

### FORCED SEX IN THE WORKPLACE AS RAPE: APPLYING SEX EQUALITY TO CRIMINAL REMEDIES

WOMEN'S LIVES, MEN'S LAWS. By Catharine A. MacKinnon.<sup>1</sup> Cambridge, Mass.: The Belknap Press of Harvard University Press. Paperback ed. 2007. Pp. vii, 558. \$19.95.

*Women's Lives, Men's Laws* tracks Professor Catharine MacKinnon's academic work in a collection of essays and speeches spanning most of her public career. Although the book focuses primarily on civil remedies for sex inequality, it acknowledges the disturbing lack of progress in the achievement of sex equality in criminal law. Professor MacKinnon argues that American rape law, where the focus remains on demonstrating evidence of physical coercion to prove non-consensual sex, must be reconceptualized in line with an equality standard that would redefine force to reflect social hierarchy and consent to reflect welcomeness. She does not, however, elaborate upon the specific applications of this theory. One such application — viewing forced sex in the workplace as rape — is an important step in reforming the criminal justice system. Sexual harassment law already recognizes that there is more than one way in a hierarchical society to force women into unwelcome sex, and it gives victims of economically coerced sex a civil remedy for their injury. To ensure legal equality between the sexes, states should criminalize some conduct that is already actionable under civil sexual harassment law, thereby expanding rape law to incorporate unwelcome sex in the context of employment.

*Women's Lives, Men's Laws* presents a sex equality theory that unifies the book's twenty-nine essays across time and substance. In this theory, Professor MacKinnon repudiates the "sameness/difference equality concept" (p. 46) that defines equality as "treating likes alike and unlikes unlike" (p. 45). She argues that the sameness/difference theory cannot distinguish between those who are unlike because of social subordination and those who are unlike for "natural" reasons. The theory thus both justifies and normalizes the subjugation of already disadvantaged groups on the basis of "socially constructed" differences (p. 48).<sup>2</sup> Because the sameness/difference approach cannot account for differences between the sexes that arise from social and economic subordination, debates over whether men and women are

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<sup>1</sup> Elizabeth A. Long Professor of Law, University of Michigan Law School.

<sup>2</sup> For example, Professor MacKinnon argues that the sameness/difference approach justified segregation in the United States and the treatment of minority groups in Nazi Germany (p. 48).

the same or different have neither identified the source of nor provided a meaningful solution to the problem of unequal power between the sexes. Professor MacKinnon contends that the solution to this problem is to abandon the sameness/difference approach and reconceptualize sex inequality as a reflection of hierarchy between the sexes (pp. 52–54).

The book is divided into two parts. Part One, “Equality Re-envisioned,” outlines Professor MacKinnon’s hierarchy-based theory of sexual discrimination, its relationship to real women’s lives, and its role in constitutional interpretation. It then applies the theory to sexual harassment, sexual abuse, and prostitution. Part Two, “Sexuality, Inequality, and Speech,” applies the sex equality theory from Part One to develop a civil rights approach to sexuality and pornography.

The essays in Part One, Section A, “Women’s Lives Under Men’s Laws,” establish Professor MacKinnon’s sex equality project as grounded in, and responsive to, the realities that women confront in their daily lives. Her discussion of the tactical reasons for the failure of the Equal Rights Amendment (pp. 13–21), the social manifestations of the relationship between race and gender (pp. 22–31), and the disconnect between male-centric laws and women’s everyday lives (pp. 32–43) precedes her essays presenting a theory of sex equality, highlighting how theory should stem from actual experiences of real women. To those who criticize the feminist theories that arise from real experiences as being “essentialist” (p. 85), she retorts that such criticism needlessly divides women and “undercut[s] resistance to sexual oppression” (p. 88). Also in Section A, Professor MacKinnon explores the role of the law in the sex equality movement as alternately “a wall,” “a tool,” and “a door” (p. 103). She poses the question of whether the Constitution deserves Americans’ fidelity (p. 65) given the lack of female participation in its writing and interpretation and the oppressive consequences of that exclusion (pp. 66, 103). She answers this question affirmatively, but she adds a caveat: the fidelity it deserves depends on the degree to which it protects and promotes equality (pp. 69–70). This perspective invites women to use the law “as women” and “go public” to fight sex discrimination (p. 107).

Having explained the foundational theory for sex equality, Professor MacKinnon proceeds to apply it to social issues. Section B of Part One, “Sexual Abuse as Sex Inequality,” presents sexual harassment, prostitution, and rape as part of the greater problem of sexual hierarchy. Professor MacKinnon challenges her readers to think of these issues as manifestations of sex discrimination — as men injuring women because they are women — rather than as individual, unrelated instances of aggression by *one* man against *one* woman (pp. 124, 129). Seen in this light, these problems are akin to acts of violence by white supremacists against racial or religious minority groups; they are “violent humiliation ritual[s] . . . in which the victims are often murdered”

(p. 130). Professor MacKinnon then outlines the sex discrimination approach to sexual abuse, arguing that sexual abuse occurs because “[s]exual aggression by men against women is normalized” (p. 130). She argues that a world of sex equality would counter sexual aggression with more protection for rape victims in court (p. 134), reproductive freedom for women (p. 135), and application of the Thirteenth Amendment to oppose prostitution as sexual slavery (pp. 155–56).

Turning to sexual harassment law, Professor MacKinnon describes the development of the tort of sexual harassment as a battle against the sameness/difference approach to equality (p. 174).<sup>3</sup> In the beginning, the challenge was to convince judges that the sexual aggression at issue was based on *sex*, not just *sexuality* — a distinction at the heart of the theory of discrimination (p. 167). Assessing the future of sexual harassment law, Professor MacKinnon explains that its path can move in one of two directions: backward, with “sexual harassment law trivialized and distorted and invalidated into a hysteria and a witch hunt,” or forward, with its protections extended to women outside of the workplace (p. 205).

From the discussion of sexual harassment, Professor MacKinnon shifts (only slightly) to a discussion of violent sexual abuse. She expresses her support for the Violence Against Women Act<sup>4</sup> (VAWA), a federal law that gave sexually abused women the power to file suit against their aggressors for sexual discrimination. Reflecting on VAWA’s positive impact, she observes that “[l]ocating acts of gender-based violence under the rubric of civil rights . . . placed the power of the state in the hands of those victimized by sex-based violence” (p. 208). She argues that by partially invalidating the Act, the Supreme Court in *United States v. Morrison*<sup>5</sup> struck down the right to be free from sexual violence and took away a critical legal tool for which women had fought with the support of most states (pp. 208–09, 215, 234).

The essays on sexual abuse end Part One and lead directly into Part Two. Section A, “Theory and Practice,” offers a passionate rebuttal to liberal attacks on Professor MacKinnon’s and Andrea Dworkin’s

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<sup>3</sup> Professor MacKinnon was herself a principal force behind the tort’s introduction into American law; she developed the theory in CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979), and helped litigate the first sexual harassment case to reach the Supreme Court, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>4</sup> Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.), *invalidated in part by* *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>5</sup> 529 U.S. 598. The Supreme Court invalidated VAWA’s civil remedy provision, holding that neither the Commerce Clause nor the Fourteenth Amendment authorized its enactment. *Id.* at 627.

proposed ordinance against violent pornography (p. 265).<sup>6</sup> Ever cognizant of placing theory in context, she focuses on real men's and women's harmful experiences of pornography (pp. 301–04, 313–15). She distinguishes the discrimination approach to fighting pornography from the group defamation approach, arguing that because pornography has very little speech content for the harm that it does in subjugating women, “[t]he deepest injury in pornography is not what it says but what it does” (p. 317).

Bringing the book full circle to its opening essays, Section B of Part Two, “Pornography as Sex Inequality,” echoes the call for theorists and public figures to listen to real women's accounts of the violence they experience. Professor MacKinnon fervently criticizes those who silence and ignore the victims of pornography-inspired violence who speak out against pornography's harms.<sup>7</sup> She ends the book on a somber note, describing pornography's increasing popularity and pervasiveness and the law's complete ineffectiveness against it (p. 372). In her final sentence, she portrays the battle against pornography as a linchpin of achieving substantive equality: “When women can assert human rights against [pornographers], through a law the victims can use themselves, women will have a right to a place in the world” (p. 372).

While *Women's Lives, Men's Laws* reflects Professor MacKinnon's tendency to advocate for civil remedies over criminal remedies to attain sex equality,<sup>8</sup> her theories illuminate an important and as-yet-unavailable criminal remedy for injured women: to promote the equality and dignity of women, the law should criminalize coerced sex in the workplace. In *Unequal Sex: A Sex Equality Approach to Sexual Assault* (pp. 240–48), Professor MacKinnon notes that the consent standard in American rape law, by ignoring many instances when sex is unwelcome, “presuppose[s] and enforce[s] inequality between women and men in sex” (p. 242).<sup>9</sup> Indeed, in most states, rape statutes predicate nonconsent on coercion through “duress, intimidation, or fear,”

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<sup>6</sup> The model ordinance provides a civil cause of action for those injured in the use or production of pornography (p. 493 n.22). It defines pornography as “the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more” of a number of specified acts (p. 494 n.22).

<sup>7</sup> For example, Professor MacKinnon discusses the “very real danger that the sexually violated are being resubmerged in the silence of disbelief, blame, [and] ignorance” (p. 345) and the media's self-censorship of reports of sexual abuse and harm from pornography (p. 346). She also notes that “[f]or those who survived pornography, the hearings [first-hand accounts of how pornography harmed individual lives] were like coming up for air. Then the water closed over their heads once again. . . . The victims have been betrayed” (p. 368).

<sup>8</sup> Professor MacKinnon argues that civil remedies such as VAWA give state power to the victims of sexual aggression and “interven[e] in the balance of power between the sexes by empowering rather than protecting the victims of sex-based violence” (pp. 208–09).

<sup>9</sup> This comment refers to rape and sexual harassment as acts perpetrated by a man against a woman to reflect the most common factual situation.

usually involving proof of physical threats and “forcible compulsion.”<sup>10</sup> This emphasis on physical force and violence allows a broad range of unwelcome sex to be deemed consensual for the purposes of criminal prosecution (pp. 246–47).<sup>11</sup>

For women to achieve legal equality and fair treatment, rape laws must reflect the reality of sexual abuse as the result of power differentials, not the false perception of sexual abuse as the result solely of physical coercion. Professor MacKinnon proposes that sexual assault reform respond to rape as a “practice of inequality” (p. 247) that occurs when a powerful person, such as an employer, forces a vulnerable person, such as an employee, into sex (pp. 243, 247). Focusing on the broad theoretical arguments behind changing rape law so that “force [would] include inequalities of power” and “consent [would be] replaced with a welcomeness standard” (p. 247), she does not explore the specifics of applying rape law to forced sex in the workplace. Professor MacKinnon’s framework for rethinking rape law does, however, illuminate why forced sex in the workplace is an act of sexual assault that deserves criminal sanctions. The law already recognizes unwelcome sex within the context of employment as sexual discrimination actionable under sexual harassment law. The next logical step is for the law to criminalize as rape the behavior it already condemns as sexual harassment.

The tort of sexual harassment arose from Title VII’s prohibition against sex discrimination in the workplace.<sup>12</sup> Among other remedies, sexual harassment law gives an employee a cause of action against her employer when she has been coerced into an unwanted sexual relationship out of fear of losing her job or being damaged in her employment.<sup>13</sup> Sexual harassment law recognizes that the physical coercion framework fails to identify the presence or absence of real consent,

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<sup>10</sup> NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY* 182 (2006); see also STEPHEN J. SCHULHOFER, *UNWANTED SEX* 3 (1998) (noting that a woman’s “unwillingness is not enough” to establish rape because “[i]n the face of clearly expressed objections, intercourse still is not considered rape . . . unless the assailant used physical force or threatened bodily injury”).

<sup>11</sup> See, e.g., *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (holding that a high school student’s submission to sex with her principal after he threatened to prevent her from graduating unless she submitted was consensual under the law at the time).

<sup>12</sup> Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex, race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a) (2000).

<sup>13</sup> The welcomeness standard in sexual harassment law, first embraced by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), recognizes that a socially and economically vulnerable woman may stay in her job despite unwelcome sexual advances because she believes that she has no choice but to submit to such treatment. In *Meritor*, the Court held that the inquiry under Title VII discrimination claims is whether the sex acts were welcome, not whether they were voluntary. *Id.* at 68. This empowered Mechelle Vinson to bring a civil claim based on a sexual relationship to which she acquiesced out of a “fear of losing her job.” *Id.* at 60.

particularly in the employment context where many “women are employed at men’s will and pleasure” and are “more likely to be damaged in their employment if they . . . fight openly” against sexual advances (p. 281). Under Professor MacKinnon’s theoretical framework for reconceptualizing rape law to reflect power differentials, sexual acts under these circumstances reflect the hierarchical relationship between the sexes: since men (as a group) are wealthier and more powerful than women (as a group),<sup>14</sup> it is not surprising that men (in particular) can use economic threats to coerce women into sex.

The impetus behind sexual harassment law is the intuitive understanding that coerced sex in the employment context is wrong and harmful. Although states do not criminalize all behavior that is wrong and harmful, they do recognize forced sex as sufficiently serious to warrant criminal sanctions. The question should not be whether women are freer to refuse sex if they are threatened with the loss of a job than if they are threatened with physical violence, but rather whether they should ever have to face either circumstance. Should the state fail to punish someone who *forces sex* because he prefers the weapon of economic power to that of physical strength? In a society where women are independent, free, and equal, the answer to this question should be “no.” When a man requires that a woman submit to sexual relations in order to preserve her job security or retain her compensation or benefits, he equates her value as an employee with the value of her sex organs, subordinates and diminishes her, discriminates against her on the basis of sex, deprives her of personal dignity, and violates her physically. His harmful action is rape and should be criminalized.<sup>15</sup> This definition would reflect Professor MacKinnon’s conception of rape under an “equality standard” (p. 244) — “a physical attack of a sexual nature under coercive conditions” (p. 247).

The reality is that the current legal framework, while prohibiting coerced sex in the employment context, does not provide an adequate remedy to injured women. Like sexual abuse at home, sexual abuse at work is a personal violation. Women experience the same kind of

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<sup>14</sup> Consider, for example, the rampant sex inequality within the legal profession: Female lawyers receive an average of seventy-six percent of the compensation of their male counterparts. COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 5 (2006), available at <http://www.abanet.org/women/ChartingOurProgress.pdf>. Women are also underrepresented in positions of power; they represent sixteen percent of partners at major law firms, fifteen percent of general counsels at Fortune 500 companies, and sixteen percent of federal district court judges. *Id.*

<sup>15</sup> This extension of rape law would cover the “classic harassment scenario” in which “a woman is forced to participate in sexual relations she does not want in order to keep her job.” Reva B. Siegel, *Introduction* to DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 22 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). However, it would not define rape to include other acts prohibited under sexual harassment law — namely, discriminatory words and fondling.

emotional, physical, and psychological injury after economically coerced sex as they experience after physically coerced sex. Just as victims of rape or assault or theft have remedies in both the criminal law and the law of intentional torts, so too should victims of coerced sex in the context of employment have remedies in both areas. By allowing this form of personal violation to go criminally unpunished, the law trivializes the damage that coerced sex in the context of employment does to women in the workforce.

To those who would argue that sexual harassment law provides a sufficient remedy for this violation, it is important to note that because sexual harassment law is based on Title VII, many courts have refused to hold the harasser individually liable.<sup>16</sup> When courts hold the institutional employer accountable to eliminate sexually coercive behavior in the workplace, they implicitly acknowledge that the behavior itself is harmful. But by simultaneously prohibiting individual liability, they detract from that condemnation and weaken deterrence of potential perpetrators. They also fail to place blame for the harm in all places where blame is due. Simply extending individual civil liability to the aggressor, while perhaps providing greater deterrence, would be insufficient to recognize the gravity of the harm. Holding the aggressor criminally liable would expand the available options for punishment, thereby recognizing both the aggressor's particular culpability and the severity of the inflicted harm. Moreover, holding the aggressor criminally liable would provide the only source of remedy available to women who do not have the resources to address their injuries in the civil system. Criminal liability in this area is the next logical step from the law's current position that coerced sex in employment victimizes women and should be actionable.

This is not a standardless, ambiguous approach to rape law. Similarly to sexual harassment law, it would apply only when the state could prove that the man and woman had a professional relationship, that the man conditioned employment or advancement upon sexual relations, and that, believing that her only option to remain or advance at her job was to comply, the woman submitted to those demands. The inquiry would be not into consent as traditionally defined — not

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<sup>16</sup> See CATHARINE A. MACKINNON, *SEX EQUALITY* ch. 7, at 913 n.47 (2d ed. 2007) (noting the "increasingly prevalent holding that individual perpetrators are not liable under Title VII because it applies to 'employers' only"); see also *Wilson v. Wayne County*, 856 F. Supp. 1254, 1261 (M.D. Tenn. 1994) (noting that the Fifth, Ninth, Tenth, and Eleventh Circuits deny individual liability). Moreover, it is very difficult for sexual harassment plaintiffs to obtain punitive damage awards under Title VII. See *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 545 (1999) ("[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" (quoting *Kolstad v. Am. Dental Assoc.*, 139 F.3d. 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting))).

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into whether she complied out of a response to physical force or threats of physical force — but into welcomeness as understood under sexual harassment law. While “the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact,”<sup>17</sup> this standard is no more ambiguous than that which juries are currently expected to apply in sexual harassment cases and even in rape cases, where questions about the nature, scope, and significance of physical threats or force already invite jurors to inquire into the relevant states of mind of the defendant and victim. Jurors would further take into account the shift in standard from preponderance of the evidence to beyond a reasonable doubt, just as they do when comparing intentional tort cases to criminal prosecutions.

Nor is this approach unfair to people in the workplace. Just as sexual harassment law does not hold employers liable where the sexual activity was welcome, this rubric for rape law would not hold men liable where their advances were welcome. If fear of criminal action makes men and women more cautious, then this would begin to correct for the effect that hierarchical relationships between the sexes have on women’s ability to say no to sex in the workplace. Sexual activity is at its freest and most consensual where men and women are not in obviously hierarchical relationships with each other, and thus the law should perceive as inherently suspect sexual activity that occurs between two people in a hierarchical employment relationship.

At its base, understanding unwanted sex in the workplace as criminal sex is an equality issue. As Professor MacKinnon points out, “an equality standard requires that sex be welcome” (p. 244). Just as women have the same right as men do to live their lives without being physically forced to have sex against their will, women have the same right as men do to obtain, enjoy, and progress in employment without having to submit to unwanted, personally violating sexual acts. Although civil remedies are a valuable tool for women, they do not absolve the states of their responsibility to use the power of the police and prosecutor to combat forced sex. The extension of rape law to incorporate unwelcome sex in the context of employment would not eliminate the problem of coerced sex, nor would it completely replace the coercion-based consent standard with an equality-based welcome-ness standard. It would, however, create a safer environment for employed women and change rape law to better support equality between the sexes. So long as the state trivializes the harm women experience and refuses to place the full weight of the criminal law behind them, they will remain powerless victims.

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<sup>17</sup> *Meritor*, 477 U.S. at 68.