FEMINIST JURISPRUDENCE — THE NEW LEGAL EDUCATION

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[*This article reviews some recent significant feminist jurisprudence. It is contended that the extensive works surveyed reveal not only the inadequacies of the law, but also, more specifically, the narrowness of legal education. The central thesis of the works under examination is women's exclusion from law and their exclusion, in particular, from legal education, formal texts and categories, and most importantly from protection by the law. Discrimination within the law has arguably been rectified by a new emphasis on equality. However, the protection of the law against discrimination is, according to many feminist theorists, undermined by a male-constructed emphasis on 'sameness' which subverts the very principle of equality. The paper concludes with a review of Rosemary Hunter's recent book,* Indirect Discrimination in the Workplace.]

(i) *Introduction*

In recent years there has been an enormous output of feminist writings on political change which includes a range of legal scholarship that has brought validity and credibility to feminist legal theory in the Law School. Several major Australian texts reflect the scholarly diversity of this recent development and prove the inconsistency and inaccuracy of the critical claim that courses in feminist jurisprudence are biased and polemical. These works have identified something missing not only in the law but in legal education. Their central thesis is women's exclusion from law.

The diffusion and extent of this exclusion can be demonstrated with reference to just some of the issues addressed in the literature: exclusion from legal education,[1] exclusion from doctrinal texts dealing with labour law,[2] the absence of intervention in the domestic sphere,[3] and exclusion from the full impact of legal defences to particular crimes.[4] Rosemary Hunter's recent addition to the literature on anti-discrimination law in Australia[5] charts the hitherto under-utilized yet potentially dynamic indirect discrimination provisions for dealing with certain institutional aspects of women's workplace exclusion.

This review commences with a summary of some of the relevant debates in this vital area of legal thought. This summary is advanced as a means of

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1 Mossman, M. J., 'Women and the (Legal) Academy: A Paradigm Shift?' (1992) 6 *Socio-Legal Bulletin* 11.

2 Hunter, R., 'Review Article: Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' (1991) 18 M.U.L.R. 305.

3 Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990).

4 Tarrant, S., 'Something is pushing them to the side of their own lives: a Critique of Law and Laws' (1990) 20 *University of Western Australian Law Review* 573.

5 Hunter, R., *Indirect Discrimination in the Workplace* (1992).

harnessing the current arguments and debates within legal scholarship and suggesting new avenues of challenge. The central contention to emerge from this summary is that women have been written out of a range of political and legal analyses. This is illustrated with reference to two theories in particular; those concerning moral panics and the rule of law. Moral panics have formed a lynch-pin to the critical arguments which have attempted to situate law more widely within a class and ideological framework, while the rule of law has provided an equally pivotal lynch-pin to traditional doctrinal analysis.

In this review, an attempt is made to distil some of the major arguments that have been formulated by feminist legal theorists as a means of illustrating the breadth of the material and contextual background to our anti-discrimination law. That context can be encapsulated by MacKinnon's observation that feminists in law have not only begun to develop a critique of existing legal theories and black letter law, but have also commenced the reconstruction of legal tools to intervene in the practical realities of women's situation.'[6] Following the overview of the feminist literature, the article concludes with a review of Rosemary Hunter's recent book, *Indirect Discrimination in the Workplace*, which clearly indicates the potential provided by the legal mechanisms that have been set in place to deal with those aspects of equal opportunity which are framed as indirectly discriminatory.

(ii) *Background: Feminist Jurisprudence: The New Legal Education*

Underpinning Jocelynne Scutt's book *Women and the Law*[7] is the concept of women's appropriate 'place' and the structures that have contrived to keep them in that place. Contending that women have fought, 'initially from outside the legal system and later within it, for recognition of basic human rights',[8] Scutt details the extent to which women have had no place as autonomous individuals in either the public or private sphere. Through a specific analysis of issues affecting women, Scutt demonstrates their inequality before the law and the extent to which the legal processes designed specifically to benefit women are not, in themselves, ideologically neutral.

For example, by synthesizing issues such as maternity and childcare, Scutt convincingly argues that as a result of their interconnections, when it comes to women, the (purportedly neutral) concept of workplace 'merit' has 'never been unproblematic.'[9] Scutt examines cases and leading authoritative comment that illustrate her thesis in a range of legal areas including equal pay, affirmative action, harassment in the workplace, abortion, property ownership and division, maintenance, and unlawful killing. The boundaries of the argument are expanded by inter-connecting issues such as equal pay and affirmative action and discussions of stereotyping as a form of discrimination.

6 MacKinnon, C., 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85, 87.
7 Scutt, J., Women and the Law (1990).
8 *Ibid.* 1.
9 *Ibid.* 120.

In *The Hidden Gender of Law*, Regina Graycar and Jenny Morgan[10] also dissect the use of the law and in particular the judicial apparatus as a means of addressing women's exclusion from law. They suggest through their analysis of work, dependence on men, dependence on the state, law and relationships, reproductive choices, motherhood and gendered harms, that the boundaries of traditional legal method simply fail to engage women's lives and encompass women within legal definitions.

In formulating their work around these preferred categories, Graycar and Morgan expose the inadequacy of the categories drawn in traditional doctrine, which are 'fundamentally structured around men's perspectives and experiences.'[11] Their work therefore integrates feminist legal scholarship with 'important aspects of women's lives and traditional legal doctrine.'[12] Drawing upon de Beauvoir's famous analysis,[13] Graycar and Morgan's central theme is that the law treats women as 'Other'. The related theme of the invisibility of women within legal discourse provides the legal thread to a work that both examines concrete areas of law and is essentially jurisprudential. Within this framework, the legal context requires a rewriting that recognizes the diversity of women's lives.

For Thornton,[14] whose work has exhaustively[15] challenged prevailing legal discourses, not only in doctrinal areas but in analyses of anti-discrimination legislation itself, law is integral to and reproduces the prevailing economic orthodoxy. At the narrower public level, concepts of merit and potential take as their bench-mark male concepts of excellence, thus implicitly undermining legislation which purports to deal with inequality. The inherently limiting factor in the legislation is that its concept of comparability requires comparisons of like with unlike.

This sameness/difference tension characterizes and restricts the legislation. Thornton reviews the current trend towards enactment of anti-discrimination legislation in Australia against the background of the ideal of equality as a central tenet of liberalism, the dominant political discourse in Australia and the contemporary western world. Yet inequality is the very essence of the tenets of our economic orthodoxy and ideology of merit. Thornton's analysis exposes the myth that the law is neutral, arguing that the law masks the inequalities while, somewhat schizophrenically, acknowledging individual instances of structural inequality. The place for anti-

10 Graycar and Morgan, *op. cit.* n. 3.

11 *Ibid.* 3, quoting Finley, L., 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 898.

12 *Ibid.* 29.

13 de Beauvoir, S., *The Second Sex* (1953).

14 Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

15 Thornton, M., 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law and Society* 28; 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5; 'Discrimination Law/Industrial Law: are they compatible?' (1987) 59 *Australian Quarterly* 162; 'Hegemonic Masculinity and the Academy' (1989) 17 *International Journal of the Sociology of Law* 115; 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733; 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448.

discrimination law is one uneasily accomodated by the workplace, the law and the judiciary.

> Nevertheless, the voices of women and oppressed groups, hitherto virtually unheard in judicial discourse, have been formally accorded a space within anti-discrimination legislation.[16]

Naffine[17] partitions feminist legal scholarship into three distinct phases. The writers of the first phase were concerned with the 'male monopoly of law'.[18] Writers of this first phase identified the law as a whole with the interests of the men running the system while asserting women's capacity to fight against legal restraints. The second phase exposed law as a symbol and vehicle of male authority. In treating the subordination of women as axiomatic, the law was seen as 'culturally a male institution which serves to ensure that men remain the dominant sex.'[19] The major writer of this period is MacKinnon,[20] who indicts the maleness of law and condemns its reproduction of male power over women. The very concepts relied upon are challenged: law's objectivity and impartiality are invoked in order to obscure the 'masculinity of law's bias.'[21] The shortcomings of the concept of legal objectivity underpin MacKinnon's analysis: legal substance, procedure and content are inherently 'male-biased.'[22]

In analysing the third phase feminist legal writers, Naffine points out that they hark back, to some extent, to the writers of the first phase, asserting women's power to resist the forces and constraints of law. Major third phase writers, such as Smart[23] and Olsen,[24] deconstruct the notion of law as a monolithic, unified whole, identifying instead its uneven, unsystematic treatment of the sexes. They perceive through this disunity 'moments in legal history when the law has positively benefited women'[25] while asserting the specificity of women's oppression.

Naffine's own perspective is one of 'kinship with all three feminisms.'[26] It is in essence an analysis of law's conception of 'man' and of society which 'brings together two fundamental social categories, class and gender, which have largely been kept apart in legal criticism.'[27] Naffine links the legal concept of the reasonable man with the prevailing ethos of economic rationalism to critically analyse the dominant legal model of 'person' and the legal view of humankind.

16 Thornton, *The Liberal Promise*, *supra* n. 14, 216.
17 Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990).
18 *Ibid.* 2.
19 *Ibid.* 8.
20 MacKinnon, C., *Toward a Feminist Theory of the State* (1989).
21 Naffine, *op. cit.* n. 17, 10.
22 *Ibid.* quoting Cole, D., 'Strategies of Difference: Litigating for Women's Rights in a Man's World' (1984) 2 *Law and Inequality* 33, 51.
23 Smart, C., *Feminism and the Power of Law* (1989).
24 Olsen, F., 'Feminist Theory in Grand Style' (1989) 89 *Columbia Law Review* 1147; 'Feminism and Critical Legal Theory: An American Perspective' (1990) 18 *International Journal of the Sociology of Law* 199.
25 Naffine, *op. cit.* n. 17, 15.
26 *Ibid.* 21.
27 *Ibid.* 22.

> Specifically, the argument to be developed below is that while law purports to deal in abstract individuals, in truth it has a preferred person: the man of law, the individual who flourishes in, and dominates, the type of society conceived by law. This person is preferred in the sense that the law reflects his priorities and concerns and conducts itself in a manner which is considered by him, to be both desirable and natural. This being is both a creature of class and a gendered subject. He is one of the possessing classes. His gender takes the form of a certain exaggerated style of middle-class masculinity: he is assertive, articulate, independent, calculating, competitive and competent. And these are precisely the qualities valued in the sort of society which law has in mind: a society which is fiercely competitive and composed of similarly self-interested and able individuals; a society which looks very much like the modern free market.[28]

The central tenet of these works is that the essentially artificial assembly-line classifications in law must be replaced by a new doctrinal framework which includes the social and legal problems experienced by women. The works are concerned with the impact of the range of anti-discrimination law enacted in Australia and with a broader theoretical analysis of women's place within legal discourse and legal scholarship. They also form an integral part of the on-going process of reform of legal education in Australia, representing partly a response to the inertia of traditional legal teaching and practice and partly a reaction to the challenge to doctrinal legal scholarship that has also been posed by criminological and socio-legal scholarship.

Sampford and Wood suggested the interjection of that 'extra', a range of jurisprudential theories which place legal rules in context, into law school training.[29] Feminist jurisprudence enters these debates and crosses the boundaries between Critical Legal Studies and other academic analyses of legal education. Most significantly, it provides for that critical 'intervention of thought' which has often been defined as lacking. It does so in broadening the boundaries of jurisprudential analysis. As the next section seeks to prove, not even political and criminological analyses of law have allowed a comprehensive framework for women's rights. Equality, like other concepts, has been exposed as gender-specific.

(iii) *Moral Panics and The Rule of Law: Reflecting Gender Biased Political and Public Power*

This sketch of major Australian feminist legal scholarship indicates the extent to which women have been written, through these writings, into the legal context. For the purposes of this review, it is necessary at this point to assert the significance of an examination of two seemingly unrelated concepts in a review of feminist jurisprudence. It is suggested that these two concepts, moral panics and the rule of law, interconnect at precisely the point at which feminist jurisprudence begins: with the exercise of public power that excludes women.

Both these phrases are commonly used concepts within legal terminology: the former within the dialogue of the Critical Legal Studies movement, the

28 *Ibid.*

29 Sampford, C. and Wood, D., '"Theoretical Dimensions" of Legal Education — A Response to the Pearce Report' (1988) 62 *Australian Law Journal* 32, 52.

latter within the framework of traditional legal analyses. Where law does break with traditional doctrinal classifications it does so because its connections with the 'political' require clarification. Feminist jurisprudence is essentially an attempt at injecting gender into the political. Notwithstanding the acknowledgment of the political in the Critical Legal Studies movement, the concepts of moral panics and the rule of law remain important because both belong to a tradition that attempts to explain public power and its legitimate exercise without allowing for the systematic exclusion of women.

> The notion of mapping or describing public activities is inspired not just by idle curiosity but because public power is a phenomenon with which all citizens by definition have a right to be concerned: it is power exercised on their behalf.[30]

(iv) *Moral Panics — Around Whose Universal Consensus?*

The State plays a central part in formulating concepts of criminality and in determining the boundaries of legitimate political activity. This fact forms a central thread throughout much left-wing theoretical debate concerning police and law enforcement. The first real break with doctrinal teaching of law really belongs within the discipline of criminology, which encompassed so called 'socio-legal' approaches and Marxist theory, which consistently questioned the class function of law. The question of 'whose law, whose order?', is particularly pertinent in relation to women but is not asked in relation to women in Marxist analyses of the state: women's invisibility and otherness remain implicit in these works.

> Because of their capacity to symbolize other relations and conflicts, images of crime and law-breaking have had a special ideological importance since the dawn of capitalism. If the potential for organized political struggle towards social transformation offered by criminality has often been low, images of particular crimes and criminal classes have frequently borne symbolic meanings and even signified powerful threats to the social order. This means that 'crime' can have political implications which extend beyond the political consciousness of criminals. The boundaries of what is considered criminal or illegal are elastic and the limits of the law have been repeatedly altered by intense class conflict. It is often forgotten that the political formation of the working-class movement in this country is saturated with illegality. The relationship of politics to 'crime' is therefore complex. These points should be borne in mind if socialists are not to rush into the arms of the right in their bid to 'take crime seriously'.[31]

Notwithstanding the extent of the Marxist criticism of law, it has exerted a 'limited' impact on feminist analyses of law,[32] as Marxist theory has accorded limited recognition of women in analyses of law. Where feminism has confronted Marxism it has done so in challenging the uni-dimensional elements of left-wing analyses of the State. Feminist analysis raises the parallel assertion to Marxism that both 'Marxism and feminism are theories of power and its distribution: inequality.'[33] Nevertheless, Marxism, through

30 Harden, I. and Lewis, N., *The Noble Lie: The British constitution and the rule of law* (1986) 8; see too French, M., *The War Against Women* (1992).

31 Gilroy, P., 'The Myth of Black Criminality' in Scraton, P. (ed.), *Law, Order and the Authoritarian State: Readings in Critical Criminology* (1987) 107, 107-8.

32 Naffine, *op. cit.* n. 17, 20.

33 MacKinnon, C., 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 *Signs* 515, 516.

its concentration on work, excludes the wider feminist political question advanced by MacKinnon: 'Is male dominance a creation of capitalism or is capitalism one expression of male dominance?'[34]

The focus in the influential left-wing debate, associated with the work of Hall *et al.*[35] in particular, is upon de-constructing the elements of the perceived 'authoritarian consensus' of late twentieth century capitalism. However, the identification of a 'universal' morality about which the State panics denies the reality of most women's lives; public morality for women is the neglect of private immorality. It is a problematic reality that this critical difference has been more the province of right-wing and not left-wing analysts. Analyses from the left exemplified in the work of Hall *et al.* have been immobilized by notions of instrumentalism and class conflict. They have concentrated, ironically, upon relations of domination and sub-ordination in their analyses of State institutions such as the police. The fact that this is the very reality of women's legal situation has been ignored.

The perspective adopted therefore denies and continues to obscure the very male construction and focus of the consensus, which has seen the 'strong state' increasingly weaken its policing of women and relegate women to the private sphere. The very over-policing which is the critical subject of analysis and de-construction is precisely what feminist legal theorists call for as a means of allocating realistic social liability.[36] So, for women, as for the mooted 'working class', the debate requires redefinition. As noted by Sim:

> What the New Right has understood, certainly more sharply than the romanticized versions of a united homogeneous working class implicit in a broad range of left analyses, is the significance and depth of the political and ideological differences within working-class experiences.[37]

(v) *The Rule of Law — An Attempt at a Definition*

Sim's observation leads us to the central tenet of any concept of the rule of law: that there is no one unifying concept. Rather, there are a range of constitutional precepts and normative arrangements that collectively make up some formula that can be contained within the phrase 'the rule of law'. Why is there such a consistent emphasis upon the rule of law? What is its meaning? What theoretical confines can be discerned from the range of material and reference to this concept? And what is its relevance to feminist jurisprudence?

34 *Ibid.* 517.

35 Hall, S. *et al.*, *Policing the Crisis: Mugging, the State and Law and Order* (1982).

36 It is interesting to note that certain London borough council police monitoring groups set up in the 1980s increasingly incorporated women's policing priorities in their agendas.

37 Sim, P., Scraton, P. and Gordon, P., 'Introduction: Crime, the State and Critical Analysis' in Scraton, P. (ed.), *Law, Order and the Authoritarian State: Readings in Critical Criminology* (1987) 61.

> The rule of law, elastic though it may be, comes as close as anything to signposting our expectations about the nature of our unique compact. Even the now traditional concern with constitutional conventions springs to our aid for, whether they are regarded as law or positive morality or classifiable in some other way, they are an [*sic*] earnest that there is a proper and legitimate way to conduct public life.[38]

But the legitimacy of that public life and therefore the legitimacy of this positive morality excludes most women and it is this exclusion that feminist jurisprudence seeks to redress. Even within the framework of attempts to re-cast the argument, the silence remains.

The work of Harden and Lewis asserts by way of introduction the need for a recasting of the argument concerning those 'enduringly influential chimerae',[39] the rule of law and the 'British constitution': '[w]e are convinced that discourse surrounding these two powerful ideas has become hidebound by dated concepts and outmoded political theory.'[40] In their reappraisal, reference is made to the failure in traditional discourse to examine 'the finer details of public/private intercourse'[41] and to the questions raised in Atiyah's work in particular.[42]

> At the more basic, if crucial, level there has been relatively little analysis of the role of the state in securing the enforcement of commercial agreements. Atiyah has pointed out, that with the exception of J.S. Mill, none of the classical economists even stopped to inquire what was involved in the enforcement of contracts, and why such enforcement was not itself a form of government intervention. There is, after all, arguably nothing 'natural' about laws for the enforcement of contracts.[43]

An interesting cross current in theoretical approaches can be conceptualized here: the approach appears to border on that adopted within the framework of those feminist legal works that reformulate areas of law such as contract.[44] The point at which the approaches differ lies in the distinction drawn in feminist analysis between the rule of law and the rule of men. This difference is crystallized in Harden's and Lewis's analysis of the processes which led to the central position occupied by the courts of common law in the modern constitution.

> This process was the touchstone of the rule of law in that an independent judiciary was simultaneously able to protect the sacred liberties of the subject, to inculcate a law-abiding habit in the nation by dint of their impartiality, and to ground the authority of the state in the rule of law as opposed to the rule of men.[45]

Yet Harden and Lewis recognize the extent to which the common law's power was symbolic, and acknowledge that public legitimacy only really 'began to be provided by universal suffrage and a universal franchise.'[46] The central issue missing from this challenge to the orthodoxy of public/private divide is that, arguably, there is nothing natural about institutionalized

38 Harden and Lewis, *op. cit.* n. 30, 9-10.
39 *Ibid.* 3.
40 *Ibid.*
41 *Ibid.* 59.
42 Atiyah, P. S., *The Rise and Fall of Freedom of Contract* (1979).
43 Harden and Lewis, *op. cit.* n. 30, 58.
44 One of the most influential feminist works in this vein is Frug, M. J., 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American University Law Review* 1065.
45 Harden and Lewis, *op. cit.* n. 30, 38.
46 *Ibid.* 39.

inequality and the silencing of certain groups within legal discourse and practice.

Although the works of Hall *et al.* and Harden and Lewis have been deservedly influential in their recasting of the argument concerning the precise areas of law with which they are concerned, both the forms of political analysis referred to above exclude women. The study of the 'law and order' society is a study in masculine ideology simply because it is a theoretical counterpart to the 'proper and legitimate way to conduct public life' that forms the rule of law. Each is a legitimate theory of political ordering, but within this theoretical framework most women, whose lives cut through these ordered political boundaries, have no place.

(vi) *Case Studies: Writing Out Women through Contracts and Concepts*

The decision in *Balfour v. Balfour*[47] is a familiar component of a commercial law course. The case illustrates a simple principle of contract law: that the law will not enforce an agreement unless it is of a particular class. To be of that class, legal consequences must have been intended. When the agreement is between husband and wife, no such consequences are intended. Graycar and Morgan note that the case is often cited as authority for the proposition that 'the law or the state is reluctant to intervene in domestic relations, constructing them as "private".'[48] Further, they assert the pervasiveness of this reluctance: '[t]he resort to privacy in legal doctrine crosses a wide array of subject areas.'[49]

While conceding the dichotomous nature of the reasoning involved in asserting that law creates the family as a private zone and indirectly regulates its functioning, Graycar and Morgan synthesize the means by which the judgments in this case illustrate that dichotomy. The significant departure is simply the recognition that the case can be lifted out of the 'malestream'[50] contractual realm once it is recognized that the public/private distinction is pivotal to the judicial analysis. Such an approach illustrates the means by which the whole framework to contract law can be reconceptualized. Frug[51] has advanced the argument further by specifically asserting that re-definition within the framework of a feminist analysis of contract law: the failure to enforce domestic relations contracts with the same degree of concern as commercial contracts illustrates the bias inherent in 'malestream' law. As MacKinnon notes, feminists in law have begun to develop not only a critique of existing legal theories and of black letter law but seek also to 'reconstruct legal tools to intervene in the practical realities of women's situation.'[52]

47 [1919] 2 K.B. 571.
48 Graycar and Morgan, *op. cit.* n. 3, 36.
49 *Ibid.* 37.
50 *Ibid.* 6.
51 Frug, *op. cit.* n. 44.
52 Mackinnon, 'Legal Education', *supra* n. 6, 87.

A similar point is made by Bennett[53] with reference to the very concepts upon which judges draw in approaching and conceptualizing their legal arguments. As a result of disproportionate over-reliance upon traditional common law doctrines such as contract and property, conservative ideologies become written into new areas of law just as they underwrite old areas. Furthermore, as noted in relation to contract law,[54] the conceptual apparatus the judiciary bring to bear upon new situations in the area of property and equity is often completely inappropriate.

Bennett cites the case of *Calverley v. Green*,[55] in which the High Court decided that despite a joint legal title, a *de facto* wife could share only in direct proportion to her contribution to the property. The majority of the judges in *Calverley v. Green*[56] do not apply concepts of family law and anti-discrimination law. Murphy J., however, in his dissent, conceptualizes the issue in different terms, arguing by way of analogy with the principles of family law and allowing for alterations of the respective interests of the parties according to needs, contributions and family responsibilities. Legal analysis in the majority judgments in the case is carried out in terms of traditional concepts of property law and equity: as a result, gender biased elements are reproduced and unchallenged.

At times, therefore, the conceptual apparatus employed by the judiciary has 'marked disaffinities' with the ideology upon which the legislation is based. Bennett cites the example of the Victorian Supreme Court decision in *Chief General Manager, Department of Health v. Arumugum*,[57] in which the Court incorporated the criminal concept of intent in deciding that unconscious racism did not fall within the Equal Opportunity Act 1984 (Vic.) The Act proscribed discrimination which was consciously racist or sexist: the decision effectively narrowed the scope of the legislation.

An equally compelling argument has recently been advanced by Shultz,[58] in her analysis of the New Jersey Supreme Court's decision in the *Baby M* case.[59] For Shultz, one of the core issues which confronted the New Jersey Supreme Court in the case was 'whether contracts or family law should provide the template for analysis.'[60] The Court conceptualized the matter in terms of 'the publicly-regulated family category'[61] and in so doing, 'not only devalued intention, expectation and reliance, it also reinforced the gendered spheres of influence that undergird the public-private dichotomy.'[62] For Shultz, the decision provides 'another useful illustration of the conceptual

53 Bennett, L., 'Ideology in Australian Judicial Practice: A Non-Reductionist Account of a Jurisdictional Issue in Labour Law' (1989) 17 *International Journal of the Sociology of Law* 207.
54 Frug, *op. cit.* n. 44.
55 (1984) 155 C.L.R. 242.
56 *Per* Gibbs C.J., Mason, Brennan and Deane JJ.
57 [1987] E.O.C. 92-195.
58 Schultz, M. M., 'The Gendered Curriculum of Contracts and Careers' (1991) 77 *Iowa Law Review* 55.
59 *In Re Baby M* 537 A. 2d 1227 (1988).
60 Schultz, *op. cit.* n. 58, 61.
61 *Ibid.* 63.
62 *Ibid.*

and curricular dichotomy between contracts and family life, this time in the context of parents and children.'[63] Through the adoption of this conceptual framework the Court 'reinforced biology as female destiny.'[64]

Graycar and Morgan take as their starting point women's lives and not legal definitions.[65] In their examination of labour law, for example, reference is made to the crucial 'invisibility' of women within the traditional labour law framework. With the exception of areas such as sex discrimination, maternity rights and equal pay, women have no place in labour law because of the male breadwinner concept, a concept which is seen in doctrinal texts as gender neutral. Yet this supposedly neutral figure, the tort law equivalent of the reasonable man, excludes consideration of a range of issues connected with, for example, anti-discrimination legislation. A related approach has been adopted by Hunter in her work on indirect discrimination in Australia and in her analytical deconstruction of significant labour law texts.[66] A crucial legal link in this respect is drawn by Graycar and Morgan, who recognize the restrictive and limiting effect of women's labour market participation on the interpretation and effectiveness of the legislative provisions which deal with discrimination.

> [T]he pervasive impact of sex segmentation in the labour market not only limits the industrial tribunals' capacity to overcome the wage gap, but also has a significant effect on anti-discrimination laws which limit the scope of the inquiry to contexts where men and women are similarly situated.[67]

(vii) *Women Should Know Their Place*

Within the framework of traditional doctrinal legal analysis, women exist within the framework not of public power but of public order. They are, for example, the objects of law enforcement in relation to prostitution offences. This particular class of women, prostitutes, belong to that class of persons 'closest to the moral boundary'[68] which differentiates the 'respectable law abiding majority from the despised criminal rabble.'[69] Prostitution exemplifies women's place within the system of public law and order and illustrates another aspect of the dichotomy referred to previously between legal intervention in the public and private spheres. Law does not protect harms most commonly suffered by women: '[t]he law does not serve to protect women from exploitation and abuse, rather it punishes their behaviour.'[70]

Herein lies the central difference between men's and women's experiences of law. Doctrinal areas of the law are a reflection of, and structured

63 *Ibid.* 61.
64 *Ibid.* 63.
65 Graycar and Morgan, *op. cit.* n. 3, 3.
66 Hunter, 'Review', *supra* n. 2.
67 Graycar and Morgan, *op. cit.* n. 3, 96.
68 Snider, L., 'Ideology and Relative Autonomy in Anglo-Canadian Criminology' (1989) 1 *The Journal of Human Justice* 33.
69 *Ibid.*
70 Chadwick, K. and Little, C., 'The Criminalization of Women' in Scraton *op. cit.* n. 37, 254, 265.

around, men's perspectives and experiences. Thus, women enter legal discourse through the development of protective discrimination legislation side by side with the penalization of prostitution. The distinction between public and private facilitates the elevation of the 'concept of the private to create a zone of non-interference by law.'[71] Put simply, in the public world actions are, at least in theory, accountable, in the private world they are not. Feminist jurisprudence approaches these matters differently from traditional legal analyses through the recognition that women 'work' in a range of capacities and that non-intervention is equally political. The theoretical approaches challenge the processes by which 'the law reproduces exclusion of women's experience.'[72] Law within the framework offered by these works is not only radically reassessed but is reconceptualized in order to assert the relevance of the 'Other' that has been invisible and excluded. Workplace exclusion has been one of the more visible aspects of this process.

(viii) *Indirect Discrimination: Offering a Way Forward?*

In her recent work on indirect discrimination,[73] Rosemary Hunter contends that three main theories of discrimination and equality have emerged from the equal opportunity literature. The first is direct discrimination/equal treatment, the second indirect discrimination/substantive equality and the third is the subordination principle.[74] Australian anti-discrimination laws are based, at least in part, on an interpretation of the first theory which accommodates 'equal treatment with biological exceptions.'[75] The Australian law has also incorporated the second theory, which concerns the notion of 'institutional' or 'structural' discrimination. This theory, with which Hunter's most recent work is concerned, involves questioning dominant norms and challenging the extent to which those norms are in fact patterned into the workplace and organizational structural apparatus.

> It is now well recognised that the phenomenon of structural discrimination arises from the fact that organisational norms, rules and procedures, used to determine the allocation of positions and benefits, have generally been designed, whether deliberately or unreflectively, around the behaviour patterns and attributes of the historically dominant group in public life.[76]

The third main theory, the subordination principle, focuses on 'actual social dynamics', that is, the 'possession and deployment of power by dominant groups'.[77] As such, this theory is concerned with the consideration of the subordinate status of women and minority groups in public life. Hunter notes that this theory has not as yet become established as an 'approach to remedying employment disadvantage.'[78] Therefore, the subor-

71 Graycar and Morgan, *op. cit.* n. 3, 34.
72 Tarrant, *op. cit.* n. 4, 573.
73 Hunter, *Indirect Discrimination, supra* n. 5.
74 *Ibid.* 3.
75 *Ibid.* 4.
76 *Ibid.* 5.
77 *Ibid.* 9.
78 *Ibid.*

dination principle has provided only minimal influence over the patterns and conceptual structures of Australian anti-discrimination law, although Hunter considers it appropriate as an interpretive adjunct. A persuasive argument in relation to the subordination principle has been made elsewhere, calling for the legislation dealing with discrimination to ask 'appropriate questions' about gender relations rather than concentrating on technical compliance with statutory proscriptions.

> If anti-discrimination law enshrined the subordination principle we would simply need to ask whether a particular practice operated to maintain women's subordination. If it did it should be changed.[79]

Hunter constructs a picture of the operations and procedures concerning indirect discrimination law in Australia despite the considerable absence of case law dealing with this central tenet of the law. Although the concern in the book is with indirect discrimination, the area of inquiry is broadly based in order to provide full illustration of the scope and potential of the law. The initial analysis of the three major strands of equal opportunity theory leads into a series of detailed and analytical practical chapters dealing with the technical requirements and means of compliance with the law in this area.

Convincing conclusions are advanced in *Indirect Discrimination in the Workplace* concerning the effect of corporate culture and the dynamics of organizational behaviour on patterns of discrimination. Hunter reveals the inappropriateness of individually based direct discrimination as a means of remedying workplace practices that have an inbuilt discriminatory effect. In discussing the corporate cultures and ideologies that have shaped our anti-discrimination law, Hunter refers broadly to the dominant thinking behind employment criteria; that is that work is the 'primary structuring principle of people's lives.'[80] Such a view in itself discriminates against women.

More specifically, applying the indirect discrimination framework of analysis means questioning 'methods of selection, work organisation and career progression that require workers to have private lives that conform to the dominant "norm".'[81] Another significant contribution to the corporate culture debate in discrimination law lies in Hunter's identification of women's exclusion from the contentious realm of 'power politics'. In a chapter entitled 'The Perpetuation of Corporate Cultures' Hunter expands upon Burton's arguments in this respect. She notes the extent to which the empirical material collected in *Indirect Discrimination in the Workplace* illustrates the saturation of most workplaces with not only masculine but racial, political and sexual values.

> Because men have been playing internal organisation politics through both formal and informal structures since their very foundation, most organisations are saturated with masculine values. These values, derived from men's experience, massively contribute to women's inequality in the workplace.[82]

79 Hunter, R., '*Women v. AIS*' (1990) 15 *Legal Service Bulletin* 40, 41.
80 Hunter, *Indirect Discrimination, supra* n. 5, 150.
81 *Ibid.*
82 Burton, C., *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (1991) 3.

Hunter points out the extent to which organizational structures reward, respect and value more highly 'sameness' rather than 'difference'. She notes that this will inevitably have an adverse impact on 'workers who have not traditionally been in a position to define organisational culture, and who are thus organisationally defined as "different".'[83] This points to MacKinnon's argument that equality under the law is 'intrinsically linked to sameness.'[84] For MacKinnon, however, equal opportunity is almost inevitably undermined by the purported neutrality of the rule of law which denies the reality of sex inequality: sex equality 'is conceptually designed in law never to be achieved.'[85]

Hunter does not claim that indirect discrimination measures will, in themselves, provide the legislative palliative for the institutionalization and perpetuation of our entrenched patterns of discrimination. Nevertheless, her book indicates, through its detailed comparative analysis of the judicial interpretations of the relevant provisions, that the law is at least being actively used in the discrimination context. Consequently, Australia is witnessing an increasing refinement of the concept of indirect discrimination, the grounds of discrimination, as well as the development of a range of measures to deal with it. Hunter recognizes the extent to which her own research revealed 'many examples of potentially indirectly discriminatory employment practices and policies' side by side with 'a notable dearth of interpretative activity around the statutory provisions.'[86] That dearth of activity only serves to illustrate the need for the provisions to be activated and realized as a means of combating the workplace exclusion which is the most public aspect of women's silence in law.

83 Hunter, *Indirect Discrimination, supra* n. 5, 165.

84 Jackson, E., 'Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal' (1992) 19 *Journal of Law and Society* 195, 208.

85 *Ibid.* 2, quoting MacKinnon, C., *Feminism Unmodified: Discourses in Life and Law* (1987) 44.

86 Hunter, *Indirect Discrimination, supra* n. 5, xxii.