

Feminism UNMODIFIED

Discourses on Life and Law

CATHARINE A. MACKINNON

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England

For Andrea Dworkin

Copyright © 1987 by the President and Fellows
of Harvard College

All rights reserved

Printed in the United States of America

10 9 8

Library of Congress Cataloging-in-Publication Data

MacKinnon, Catharine A.

Feminism unmodified.

Bibliography: p.

Includes index.

1. Women—Legal status, laws, etc.—United States.

2. Feminism—United States. I. Title.

KF478.M25 1987 346.7301'34 86-25694

ISBN 0-674-29873-X (alk. paper) (cloth) 347.306134

ISBN 0-674-29874-8 (paper)

four

Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo* (1983)

We made the fires. We are the fire-tenders. We are the ones who do not allow anyone to speak for us *but* us.

Beth Brant, *Sinister Wisdom* (1983)

The white man's law, recognizing what he calls equality, has since the late 1950s prohibited discrimination. Under this law, equal treatment, without regard to race, ethnicity, and sex (among other characteristics) is thought to be secured in many areas of social life. The idea is that people should be free from arbitrary and unreasonable treatment on the basis of qualities that have no fair or reasonable or just relation to the purpose for which they are being used. People shouldn't encounter built-in bias everywhere they go. In this idea of equality, group characteristics have no necessary relation to one's ability to perform tasks, to merit, to potential contributions to society, or to needs for particular benefits.

I am sure it will surprise no one at the Survival School when I say that the white man has kept the meaning of this principle in his own hands. Or, he has placed it in the hands of people who may not be white or male but adopt and agree with the point of view of the white man's culture, which is the dominant culture. This has tended to mean that the principle of equality has been interpreted to affirm specific white and male cultural values as "the standard." Arbitrariness is measured as deviance from this standard. Equality has come to mean a right to be treated like the white man when you can show you are like him. Other rules for interpreting the equality principle include the intent requirement: something is discriminatory only if the person doing it meant it to be.¹ The white man has to know what

This talk was given at the request of Native American women at the North American Survival School, Red Earth, St. Paul, Minnesota, March 12, 1983. It grew considerably from the dialogue that followed the presentation. I dedicate these thoughts to Glenn Morris.

he's doing. That certainly keeps the definition of victimization in the victimizer's hands. If a whole set of people who, as they put it, "just happen to be" women or "just happen to be" Black or Chicano or Native are hurt, if it wasn't intentional or can't be proved to be intentional then it's just too bad. It doesn't count as discrimination. Given such notions, it makes sense that to date most of the cases that have shaped the highest law against sex discrimination have been brought and won by white men.²

Also consistent with this is that laws guaranteeing equality tend not to apply to some of the most extreme instances of enforced inequality. For example, most women work in jobs that mostly women work in.³ If there is no man around who is being treated better than you to compare yourself with, to set the standard, the fact that you're segregated into an entire category of occupation, and that the whole occupation pays very little, has not been seen as a problem to be addressed by the law against sex inequality. You're just in a "different" situation, even though what makes it different is segregation.

There has been a similar circularity to the way the laws against racial and ethnic discrimination have been applied in the white man's courts. When discrimination in one area of society creates inequality in other areas, that has often been seen as just the way it happens to be, as just *facts*, not as discrimination.⁴ The courts limit the scope of the issues they are willing to recognize in each case; in this way segregation in housing can become a reason that schools are not found to be segregated. It's just that only certain people live in these communities, so the fact that the schools are segregated just reflects the local community. The school boards are not segregating anyone. Why is the housing segregated? It just happens that some folks who just happen not to be white don't happen to make so much money, so they can't afford this housing, so they don't live here. Why don't these folks happen to make enough money to live here? That is not really discrimination, it's just that the jobs they do just happen to pay a lot less than other jobs because those people don't happen to have the educational qualifications that would enable them to get the higher-paying jobs. Why don't they have the educational qualifications? They just didn't happen to go to such good schools. Why? Because they live in poor communities that tend to have the less good schools. Everything is seen as if it were happenstance, at each step. Nobody discriminates, everybody just takes things as they really are, as they just happen to be. Whenever it's real, whenever it's a trap,

whenever it's a closed system, it isn't discrimination. The more unequal it is in life, the less discriminatory it looks to the law.

In a society that is anything but sex-blind and color-blind, courts insist on color blindness and sex blindness as the rule for discerning inequality and enforcing equality.⁵ The moment you complain in court about discrimination is probably the first moment in your life when your color, your race, your ethnicity, or your sex becomes "irrelevant." This is supposed to be a principled and neutral stance. But the white man's standard for equality is: are you equal to *him*? That is hardly a neutral standard. It is a racist, sexist standard. If you can prove that you have what are socially white and male qualifications—money, education, credibility—and that you are basically white and male in every cultural way but were oddly mistaken for, say, a Third World woman and so were turned down for some benefit, at that moment the white man may see that you have not been treated equally. But if you present yourself as affirmatively and self-respectingly a member of your own culture or sex, deprived or damaged or contributing as such, if you insist that *your* cultural diversity be affirmatively accommodated and recognized in ways equal to the ways *theirs* has been, that's not seen to be an equality challenge at all. If you say: I am a woman; I insist that what it is and what it means to be a woman—for example, the fact that I am pregnant or the fact that I need an abortion—shall not be a reason to deny employment or health benefits when you cover all the employment or health needs that men have, they say: that's not an equality right. You're *different*. You're asking for special treatment for your differences. The white man's meaning of equality is being equal to him, which is the same as being the same as him. This meaning of equality has not valued any cultural or sexual distinctiveness except his own.

In this context, I want to raise and consider, far from resolve, some of the issues from the case of Julia Martinez against the Santa Clara Pueblo,⁶ a lawsuit a Native American woman brought against her tribe. This case is important not because the most pressing inequalities involve discriminations against Native women by Native tribes. Genocide in all its forms is a massive imposition of inequality on Native peoples and Native cultures by white people and white culture. I raise this case because it poses difficult tensions, even conflicts, between equality of the sexes, on the one hand, and the need to approach those questions within their particular cultural meanings, in an awareness of history and out of respect for cultural diversity and

the need for cultural survival, on the other. If questions of sex and sexism are not to be separated from questions of race and racism under the specific cultural and historical conditions in which both arise, as I think they cannot be, we need to ask: who will define what equality means? White man's equality law has largely defined it the way I have sketched. The issue I want to raise, which the *Martinez* case in the end leaves open, is how Native people will define it.

Julia Martinez sued her tribe in United States federal court over a tribal rule. The rule said that if Native women married outside the tribe, the children of that union were not full tribal members; if Native men married out, there were no such consequences. Julia Martinez married a Navaho man. Her children, who sued with her, could therefore not be full members of her Santa Clara tribe. They could not vote or inherit her rights in communal land, for example. Children of men who married non-Santa Clara women remained full members of the tribe and succeeded to all their rights. When men marry outside the tribe, the families they create become families of the tribe; when women marry outside the tribe, the families they create are not families of the tribe. Julia Martinez apparently tried to get the tribe to change this rule. When she was unsuccessful, she went to federal court—the white man's court—and argued that this was discrimination under the Indian Civil Rights Act, which has a provision against denying equal protection of the laws.

The United States Supreme Court, in a departure from its more common posture toward Indian tribal rights, said that this was a question of Indian sovereignty to be resolved by the tribe.⁷ In this, the United States Supreme Court will respect tribal sovereignty. Perhaps the control of Indian women matters less to the United States than does the control of land, fish, minerals, and foreign relations, as to which tribes are not as sovereign.⁸ Whatever you think of the reasons, the result is that the tribes will define what equality of the sexes is going to mean, at least on the question of who is an Indian.

I find *Martinez* a difficult case on a lot of levels, and I don't usually find cases difficult. Missing from the Supreme Court's account of the case is the history of the tribal rule. I am told that the rule was made in 1939 after the General Allotment Act⁹ divided up communal lands into individually held parcels, in something like an attempt to make Indians into proper agrarians. Although this law did not apply to the Pueblos, they recognized that Congress could apply it to them at any time. In the experience of tribes it did apply to, lands were being

taken away by white men marrying Native women. The Santa Clara rule was passed to prevent women who married out from passing land out, in an attempt to secure the survival of a culture for which land is life. Without knowing this, which I have by word of mouth, it is hard to understand what the Supreme Court meant when it said that this rule was "no more or less than a mechanism of social . . . self-definition," and as such [was] basic to the tribes' survival as a cultural and economic entity."¹⁰ The rule was seen as basic to survival because it discouraged Native women from marrying white men—or white men from marrying Native women, depending on how you see who does what—because that was taking away Native land. When Native men married white women, the experience apparently had been that white women more often integrated with the tribe.

Given this history, which the tribe did not choose or make, I imagine the tribe saying, we need this rule. I imagine Julia Martinez replying: I understand that history, it is also my history, but this is a male supremacist solution to a problem male supremacy created. The rule keeps Indian women for Indian men at the price of loss of tribal rights, from a time when Native women did not have formal power in rule-making. What would be wrong with preventing *any* child from inheriting land from parents who were not both tribal members? Whose system is it that ties ownership of land to ownership of women? Is that *our* tradition? Why is it seen as a matter of cultural survival when men guarantee exclusive access to Indian women as a requirement of tribal membership, but when an Indian woman attempts to claim that her family is an Indian family, to choose who to make a family with, it's called a *threat* to cultural survival? Whose culture is this culture? Is male supremacy sacred because it has become a tribal tradition? Under what conditions?

The tribe says: how can you apply the white cultural idea of equality to take us into this foreign court that has historically justified the atrocities that have subjected our people? Julia Martinez responds, how can you say that my desire for equality is not an Indian idea? When I say I am the equal of an Indian man, why do you say that I do not speak as an Indian woman? Why do you make me choose between my equality as woman and my cultural identity? The tribe says: because of the white man's history of racism and genocide, this is not an issue of sex discrimination. Your claim cannot be separated from either our history or your forum. How can you go to them for justice? Julia Martinez replies, how could the tribe make this rule?

Why have you made me go to them for justice? Directly to me, I hear her say: since when is the way a woman is treated *anywhere* strictly an internal or national matter for you? If your country treated *you* this way, wouldn't you want somewhere else to go for justice?

As I said, the Supreme Court decided to stay out of this. I want to suggest that cultural survival is as contingent upon equality between women and men as it is upon equality among peoples. The sex division in this case undermined the ability of Native Americans to survive as autonomous cultures. It was certainly not a means of promoting that survival. This is not the case because Julia Martinez fought over it, and not because she fought it in the white man's court, but because the tribe was willing to sacrifice *her tribal connection*, her full membership in the tribal community, in the face of a white male supremacist threat. Their rule did nothing to address or counteract the reasons why Native women were vulnerable to white male land imperialism through marriage—it gave in to them, by punishing the *woman*, the Native person. Sex inequality, looked at close up, may threaten the cultural survival of Native peoples just as going outside the culture to resolve it threatens tribal sovereignty. But this only appears if one recognizes that the systematic vulnerability of Native women to marriages that can destroy the tribe indicates the *tribe* has a problem—and not a problem to be solved by punishing Native women through their children to provide a disincentive. Why is excluding women always an option for solving problems men create between men? Maybe women's loyalty would be more reliable if their communities were more equitable.

In the *Martinez* case, the Supreme Court allowed the tribe to make its own rules, allowing—even if for some reasons I might criticize—that the most important meanings of equality are the meanings communities make for themselves. The question now is, what will the tribes make equality mean, and whose voice will speak for them? When I discuss this issue, I find that some people consider equality to be a white idea. If you think equality means what the white man has made it mean—being the same as him—it definitely is a white idea. But the aspiration of women to be no less than men—not to be punished where a man is glorified, not to be considered damaged or disloyal where a man is rewarded or left in peace, not to lead a derivative life, but to do everything and be anybody at all—is an aspiration indigenous to women across place and across time. I think the tribal rule in the *Martinez* case is male supremacist, not just sex dif-

ferentiated. Since when is male supremacy a tribal tradition? For at least some tribes, since *contact* with European whites.¹¹ At that point, it looks more like *inequality* is the white idea. And what women like Julia Martinez might make equality mean, no white man invented.