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## TRAVELING CONCEPTS: SUBSTANTIVE EQUALITY ON THE ROAD

Susanne Baer\*

Ideas travel. Even legal concepts migrate on the globe. However, it is a contested issue whether migration is a good idea. We may enjoy traveling ourselves, but many people in the world of law are somewhat worried if we take legal baggage along. Some claim that legal baggage never arrives at its destination and challenge the very possibility of what some call a legal transplant. Others claim that we already live in transnational legal contexts, while still others claim that migration occurs, and that modifies each legal concept on the road in rather significant ways, which may render the project futile. Yet others, albeit few indeed, but influential when sitting on the U.S. Supreme Court, simply do not want law to travel, whether it would work or not, and defend some version of parochial nationalism. Before we argue whether travelling concepts in law are a good idea or not, we should know what exactly happens when law hits the road. We need a concept to analyze how law travels.

I will discuss several candidates for this concept which has been developed in **comparative legal studies**, as well as in studies of international relations and other fields of political science and will apply these to a **specific legal idea, substantive equality, as conceived, communicated and litigated by Catharine MacKinnon**. The factors already identified which allow for legal ideas to move beyond the nation-state, including networks of people, institutional and symbolic structures, knowledge-creation strategies, and strategies of government (or more precisely: law makers) do not, as I will demonstrate, sufficiently explain what happened to MacKinnon's idea on the road. Therefore, I propose to add a **quality factor to norm diffusion theories**. I argue that a specific quality of a legal idea contributes significantly to its travelling abilities. With this, I modify concepts of norm diffusion by adding what I take to be a distinctly legal aspect. In short, **political science must take the specificities of the law more seriously**.

Hopefully, this addition to norm diffusion analysis also further illuminates the very nature of the idea MacKinnon applies to inequalities around the globe. I do assume we are in need of such enlightenment, since this is a theory which has been fought, denounced, ignored, or misread, or, the petty case, has been claimed without citation.

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Therefore, a systematic analysis of what happened will add to a genealogy of feminist legal ideas and feminist lawyering, which is otherwise often obscured, appropriated, obliterated or distorted in the course of events.

This analysis is not a view from a scholarly distance born out of sheer curiosity, as I believe is the case with very few studies anyways. Here, the study is driven by a commitment to comparative constitutionalism and fundamental rights and by a dedication to support interdisciplinary, or what I prefer to call critical, studies in the sense of reflexive legal studies. But in addition, I have worked with Catharine MacKinnon, on and off, for more than twenty years. This has been, and continues to be, a truly inspiring and challenging, thus multifaceted encounter. *As a scholar based in Germany and more broadly, Europe, but a recurring visitor to the United States, it is also an experience in how an idea travels in a national context. Initially greeted with polite curiosity for the foreigner, I have had many conversations in the United States come to an abrupt halt when I referred to this collaboration and, not least, this friendship.* Many U.S. colleagues put me in the trenches with the one who they *constructed as the enemy and, turning away, stopped talking.* Soon I learned to tell people what I think first, and then uncover one great source of this way of thinking later. It seems harder to then simply walk away just because a name came up, but it still happens.

In the United States, this polarization has not suited feminism, or any other critical approach to law well. To stop a conversation, to personalize, to demonize, or to glorify, as the other side of the coin, is never a good idea, and often indicates bad scholarship on the side of the speaker too. Therefore, *the following is also meant to bridge some gaps people may falsely associate with MacKinnon's work.* I hope that this attempt to tell a story of how an idea travels beyond national boundaries may thus also inspire a reconsideration of how an idea travels within a nation. *Luckily, others, and Kimberlé Crenshaw is the first who comes to mind,<sup>1</sup> build bridges which allow for such movements, reconciling feminist and antiracist theory and politics which have in fact been a joint force from the beginning.* And if we want to understand what allows and what stops ideas from such travels, we can use the concepts designed to understand transnational norm diffusion, which I will do just now.

In what follows, I discuss how Catharine MacKinnon's ideas have travelled as a case study based on legal material and some conversations with people who have been involved.<sup>2</sup> I seek to understand the factors which ease or hinder such travelling of legal ideas and will discuss several approaches to the issue. Some are used in comparative law — transplants, transnational law, migration — while more holistic understandings have been developed in political science, as in studies of international relations, multi-level governance, and, more recently, transnational interaction in transnational policy networks. These are norm diffusion theories. In particular, and with a noteworthy choice of topic, we have insightful *case studies of transnational feminism.*<sup>3</sup> In addition, gender

1. See Kimberlé Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151.

2. So much said, this is not a systematic empirical study of all the material that one could find. Rather, this article charts the way for such a study, to discuss the concepts of norm diffusion.

3. *Transnational feminism is the term intentionally used to avoid the trap of "global feminism."* See Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, 30 FEMINIST

studies and postcolonial studies allow us to understand knowledge politics that inform such processes, and they are not new either. When combined, norm diffusion theory and such critical approaches offer a rich analytical matrix. Here, I focus on the addition of the legal quality factor. Some work does hint that the very nature of legal ideas has an impact, but there is, to my knowledge, no full-fledged analytical discussion to understand this yet. So what is this quality?

One would think it is substantive equality, sometimes called dominance theory, or subordination, or asymmetrical, depending. Yet I propose that MacKinnon's concept of law reaches deeper than that, to the classic idea which I call radical deconstruction of the public-private ideology. It is as foundational to modern law, liberal fundamentals, and human rights as it is a cornerstone of racism and sexism. Substantive equality à la MacKinnon tackles just that, and this is what she takes beyond the national context, to additional, namely transnational levels. Based on some hesitation to endorse post-modern theory, she would not call it that. But deconstruction, taken seriously, can too be stripped of its depoliticizing pop versions and be used as the radical call for a thorough analysis and reworking of ideologies. Not that reworking the public-private ideology is a new undertaking. One could even argue that radical feminism employed deconstruction as a method before the philosophical and literary studies brand name came along. Whatever we call it, such deconstruction allows for a critical approach to politics, including law, again, in its most reflexive sense.

#### ITINERARIES

Look at the facts first. MacKinnon's ideas travel. Many examples exist to illustrate this point: sexual harassment, pornography, prostitution, rape, gender crime, and the underlying idea of substantive equality.

As one prominent example, the concept of sexual harassment, presented in 1979<sup>4</sup> as a violation of equal rights, made it to the EU. Early in the 1990s, Catharine MacKinnon advised the European Commission on policies against sexual harassment, which at the time did not exist on the level of the EU nor in most member states. However, European efforts to conceptualize sexual harassment as an inequality were not successful at the beginning. The EU, like many other actors, conceived harassment, both on the ground and in a legislative capacity, as an excessive, immoral, distasteful exception to regular interaction at the workplace and tied it to dignity only.<sup>5</sup> Only later,

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REV. 61, 63-4 (1988). See also Inderpal Grewal, HOME AND HAREM: NATION, GENDER, EMPIRE AND THE CULTURES OF TRAVEL (1996). For a seminal study, see Jacqui True & Michael Mintrom, *Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming*, 45 INT'L STUD. Q. 27 (2001). For a historical account, see NITZA BERKOVITCH, FROM MOTHERHOOD TO CITIZENSHIP: WOMEN'S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999).

4. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (consistent analysis of harassment in contexts of gendered employment segregation as sex discrimination in U.S. law). Note that MacKinnon calls sexual harassment the "first legal wrong to be defined by women," not by her. Catharine A. MacKinnon, *Sexual Harassment: The First Five Years, in WOMEN'S LIVES — MEN'S LAWS* 111, 111 (2005). It is inappropriate to discard that as rhetorics if there is empirical data behind such statements.

5. The development is analyzed in the excellent comparative study by Kathrin S. Zippel in THE POLITICS OF SEXUAL HARASSMENT 86-7 (2006), who describes sexual harassment law as an import from the United States. I discuss problems attached to the dignity approach in Susanne Baer, *Dignity or Equality? Responses to*

in the wake of more consistent equality legislation around the year 2000, was harassment firmly established as a violation of equal rights. In today's EU law, harassment is framed in equality law as an inequality (in the section on the "Concept of Discrimination"), and described in forms of individual violations of dignity and a hostile work environment.<sup>6</sup>

As another example, the idea that pornography is a violation of civil rights and not of morals has made it not only to Minneapolis, where the city commissioned MacKinnon and long-time collaborator Andrea Dworkin to draft an ordinance against pornography in 1983, and Indianapolis, where it was passed and litigated, but also travelled to several countries abroad. There is Canadian jurisprudence that MacKinnon was involved in as an expert adviser to a strategic litigation body, LEAF.<sup>7</sup> However, because one later Canadian decision dealt with gay and lesbian pornography,<sup>8</sup> MacKinnon's work has been falsely denounced as anti-gay, beyond anti-sex. Some would therefore tell the story of how her ideas travel as a story of discrimination, here, regarding sexual orientation. This is false and it is also based on an overly broad concept of norm diffusion. Following MacKinnon's equality analysis and her take on gender, the key point which was taken up in the Canadian decision is that pornography which harms people may be banned regardless of whether the people displayed or the audience targeted or the actual users are and appear to be gay or lesbian or heterosexual or anything else, because gender and sex are constructed, as I would call it, in contexts of heteronormativity. This is not discriminatory but equality without caveats for anyone. Certainly, equality also means that law enforcement cannot discriminate against gay or lesbian bookstores.

Regarding norm diffusion, it is also problematic to attach anything that happens in a given context to some initial impulse. Law enforcement activities are very often not in line with legal concepts or leading jurisprudence. To blame a problematic practice on a person with a particular argument, at an earlier point in time, demonizes the person, but is not an adequate account of the facts. Thus, it is superficial, and ultimately false to identify all later practices with the idea, a challenge we return to in our discussion of norm diffusion.

Then, there is also the German experience,<sup>9</sup> in which I literally, after a few hours

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*Workplace Harassment in European, German, and U.S. Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 582, 582-601 (Catherine A. MacKinnon & Reva Siegel eds., 2003).

6. Council Directive 2000/78, art. 2, 2000 O.J. (L 303) 2, 12 (EC). ("Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.")

7. The prime example is the decision against hate speech of the Canadian Supreme Court in *R v. Keegstra*, [1990] 3 S.C.R. 697 (Can.), as well as the pornography decision on *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), informed by LEAF, at a time when MacKinnon was part of the Legal Committee, which Kathleen Mahoney argued. For further discussion, see Sheila McIntyre, *Timely Interventions: MacKinnon's Contribution to Canadian Equality Jurisprudence*, 46 TULSA L. REV. 81.

8. The controversial case is *Little Sisters Book & Art Emporium v. Can. (Can.)*, [2000] 2 S.C.R. 1120, in which Janine Benedet intervened with equality arguments. LEAF took the position of the defendants. For MacKinnon's position, see Catharine A. MacKinnon, *Not a Moral Issue*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 146, 146-62 (1987). See also CHRISTOPHER N. KENDALL, *GAY MALE PORNOGRAPHY: AN ISSUE OF SEX DISCRIMINATION* (2004) (additional discussion of gay pornography and the Canadian Case). Certainly, there is also a mass of mainstream literature that defends pornography, often in the name of (which?) "women" or (whose?) "liberty."

9. See Susanne Baer, *Pornography and Sexual Harassment in the EU*, in *SEXUAL POLITICS AND THE*

of conversation, took the pile of testimony collected in the Minneapolis hearings back home, went through the material, studied the German situation, and sat down to draft a national civil rights ordinance (a concept not known as such in continental civil law, and used again in 2000 in the German domestic violence bill). It was then picked up (and also distorted, in my opinion) by a famous German feminist journalist, and it both failed in national parliament and fueled discussion in a “PorNO”-campaign all over the country. Is this norm diffusion, or simply a failed legislative attempt? I will argue that a concept of travelling in law needs to catch that too.

Yet another example of MacKinnon’s idea on the road is an understanding of prostitution as a violation of fundamental human rights. According to MacKinnon’s position, prostitution is not self-determination or agency or something some call sex-work or the “oldest trade” or a market. Rather, prostitution is an instance of a wide range of abuses based on sex, not in relation to gender, but doing gender.<sup>10</sup> MacKinnon argues that prostitution is not conceptually different from trafficking, and this argument ties well into international policy debates in which trafficking, particularly enslaved women shipped across nation-state borders, is an urgent matter within the fight against organized crime. One may then say that MacKinnon’s concept captures the travelling character of the very problem, and, accordingly, the concept travels too. But one must add that the concept of prostitution as sex discrimination also informs some national policies, namely Sweden’s. In 1999, MacKinnon and Dworkin proposed to criminalize the buyer.<sup>11</sup> The legal response to prostitution, in Sweden, is to criminalize those who buy and those who sell women, but not the women. This is law against sex discrimination, in stark contrast to, for example, German law of sex work, since the Swedish law targets dominant and privileged actors and takes note of the sexualized inequalities on the ground.

Then, the overall claim that equality should be interpreted as a substantive right, rather than a symmetrical exercise in more or less rational differentiation, made it to Canada, at least at some point in time. The Canadian Supreme Court interpreted what, the then new (entered into force in 1985), section 15 of the Charter of Fundamental Rights in Canada to mean substantive equality in *Andrews v. Law Society of British Columbia*.<sup>12</sup> Behind it was the strategic activity of LEAF, in which MacKinnon was involved as member of the National Legal Committee following a talk on “making sex equality real,” and others, including one on the interpretation of a human rights statute to recognize systemic discrimination in 1987.<sup>13</sup> Again, we see NGOs and courts pick up a legal idea, and again, we need to conceptualize not only why that happens, but also take into account that something may happen to travelling ideas which was not intended

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EUROPEAN UNION: THE NEW FEMINIST CHALLENGE 51, 51 (R. Amy Elman ed., 1996). The German draft law is published as Susanne Baer & Vera Slupik, *Entwurf eines Gesetzes gegen Pornographie*, 21 KRITISCHE JUSTIZ 171, 171-81 (1988).

10. “Doing gender” is a concept to describe the micropolitics of gendering, developed in ethnological studies. It can be transferred to law in that it targets the practices of engendering people rather than gender as a fact people act out or not.

11. Other examples may be Norway, Iceland, the United Kingdom, South Africa, and possibly Namibia. For a sex discrimination analysis of prostitution, see Catharine A. MacKinnon, *Prostitution and Civil Rights*, in WOMEN’S LIVES — MEN’S LAWS, *supra* note 4, at 151.

12. [1989] 1 S.C.R. 143 (Can.).

13. See McIntyre, *supra* note 7.



initially, or, influenced by the original source or initial actor. MacKinnon stopped working in Canada years ago, and things developed not on their own, but without her doings. So neither can legal success be attributed to one person alone, although the work of individuals must be recognized regarding its impact, nor can a problematic legal development be attributed to an initial success in court or parliament.

Currently, the claim exists that women are, indeed, human, as MacKinnon has put it.<sup>14</sup> Here, a legal idea developed in U.S. law is applied on another level of law, namely human rights and humanitarian law. Somewhat in between, the concept of rape as a crime in war and as sex discrimination has been litigated in a national court, under the U.S. Alien Tort Claims Act,<sup>15</sup> which was based on work in Bosnia and Croatia, with local as well as international activist groups.<sup>16</sup> Then, the issue moved to international law. MacKinnon was active on the level of the United Nations, with Madeline Albright and others, in constructing the U.N. International Criminal Tribunal for the Former Yugoslavia in 1993, officially created to address sexual abuse as a war crime. Then, the International Criminal Tribunal for Rwanda, established in 1994, actually used a radical feminist analysis to analyze rape in war.<sup>17</sup> Finally, the International Criminal Court works on the basis of the 1998 Rome Statute defining rape<sup>18</sup> and addresses the situation of victims of sexual abuse in its Rules of Procedure and Evidence.<sup>19</sup> Here, the travelling

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14. See generally CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006) (this is the question which serves as the title of the book).

15. 28 U.S.C. § 1350 (2006).

16. See *Kadic v. Karadzic*, 70 F.3d 232, 232 (2d Cir. 1995), rehearing denied, 74 F.3d 377, 378 (2d Cir. 1996), cert. denied, 518 U.S. 1005 (1996). Since 2001, MacKinnon is co-director of the Lawyers Alliance for Women (LAW) Project, an initiative of Equality Now, the U.S. based NGO she collaborates with internationally.

17. See Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940 (2006) [hereinafter MacKinnon, *Defining Rape Internationally*] (regarding the definition of rape in the ICTR and a discussion of developments from there). See also Catharine A. MacKinnon, *Are Women Human? in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY* 171, 171-72 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998) (discussing the definition of women under the Declaration of Human Rights).

18. The definition of rape in the International Criminal Court Statute reads: "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." And: "The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." Preparatory Commission for the Int'l Criminal Court, *Report of the Preparatory Commission for the Int'l. Criminal Court Part II: Finalized Draft Text of the Elements of Crimes*, art. 7(1)(g)-1, PCNICC/2000/1/Add.2 (Nov. 2, 2000).

19. Rule 16(1)(d) obliges the registry: "Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings." International Criminal Court, Rules of Procedure and Evidence, rule 16(1)(d), U.N. Doc. PCNICC/2000/1/Add.1 (2000), available at <http://www1.umn.edu/humanrts/instree/iccrulesofprocedure.html>. Rule 17 calls on the Victims and Witnesses Unit to "[make] available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality." *Id.* at rule 17(2)(a)(iv). Rule 70 states the "Principles of Evidence in Cases of Sexual Violence":

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the

takes a different form since MacKinnon has been visibly empowered as a Special Advisor to the Prosecutor of the International Criminal Court beginning in late 2008.

Now how does all of this happen, and what allows it to happen, exactly?

#### MODES OF TRAVELLING

How should we understand and tell the stories of such itineraries? Which concepts do we have at our disposal to analyze how law moves across borders? I will briefly discuss some ideas from comparative legal studies to then turn to norm diffusion theories.

#### *Transplants?*

In comparative legal studies, Alan Watson developed the concept of transplantation, of “legal transplants.”<sup>20</sup> He discussed it as a particularly productive source of legal development, somewhat grounded in the evolutionary concept of law promulgated by German jurist von Savigny much earlier in the nineteenth century. Today, and more generally, it is used to describe how one legal concept moves to another legal context: it is “transplanted.” But the concept cannot be applied to many legal journeys. For example, when we proposed a civil rights law against pornography in Germany in 1988, we used the ordinance Catharine MacKinnon and Andrea Dworkin had drafted in the United States and passed it on to political parties in the German Federal Parliament, which did, in fact, not agree with us, and the draft never went into effect as law.<sup>21</sup> According to transplantation theory, there was nothing to transplant since the ordinance was not U.S. law at the time. But even if we consider drafts and proposals as objects of transplantation, a concept of legal travels must account for severe modifications, such as the specific type of translation which takes place in such settings. We used the U.S. ordinance, but we actually wrote another one to better account for the structure of German civil law. We took the legal idea that pornography is not a question of taste or morals, but a violation of civil rights, but needed to say this, legally, in German.

The German proposal failed, like its U.S. inspiration, and in transplantation terms, this is a case of rejection. This is also not surprising since, true to the medical metaphor,

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alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness. *Id.* at rule 70.

Rule 71 covers “Evidence of Other Sexual Conduct”: “In the light of the definition and nature of the crimes within the jurisdiction of the Court, . . . a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.” *Id.* at rule 71.

20. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993). See also Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (a study on the effect of transplant laws); Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997) (postmodern perspective of legal transplants); see generally Jörg Fedtke, *Legal Transplants*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 434-37 (Jan M. Smits ed., 2006).

21. Note that in Minneapolis the ordinance passed in a democratic process and was vetoed by elites; while in Germany, it was rejected by a parliamentary majority (and maybe by elites). It is unclear what “the people” thought, but it is plausible to assume that exposure to the realities of pornography make people accept a need of protection against the violence involved, which is exactly what the law focuses on.



transplants are not always successful. The receiving body may ultimately reject that transplant. But with this either/or logic, the metaphor does not encompass all there is to such a process and its effects. Conceptually, there are at least three aspects that force us to eventually leave transplantation to medicine.

First, the idea of the transplant has a narrow focus on law, and travelling ideas may affect politics, social interaction, and framing too.<sup>22</sup> These effects inspire studies of norm diffusion, which I will turn to below.

Second, the medical metaphor is not taken seriously enough. In transplantation medicine, it is well known that all receiving bodies reject the transplant initially, and that one has to dedicate much care to allow a transplant to work. So in the German example of the travels of MacKinnon's anti-pornography ordinance, it was not simply rejection, but there was not enough post-care work done in Germany to prevent rejection. An anti-pornography civil rights bill in Germany is not just an attempt to reframe pornography as an inequality. It was, and still is, an attempt to address harm with tort law. At the time, courts struggled with the very idea of adjudicating damages for immaterial harm, which has eventually been legislated in a modification of the civil code. At the time, there was no explicit civil law legislation against discrimination, different from, say, Britain, or for that matter, the United States. There was only criminal law against hate speech, which was understood to be a "never again" to combat the "Auschwitz lie" after the Holocaust, and anti-Semitism, and which was not designed to address sexism or racism and sexism combined. Thus, much more was needed to allow the anti-pornography civil rights ordinance to travel than just a focus on pornography as sexist harm. As such, legal transplants require a significant amount of care.

Third, the concept of transplantation presupposes distinct bodies. For the longest time we came to think of law as such a distinct national item, and the metaphor of transplantation is based on that. Simultaneously, in comparative legal studies, travelling concepts have long been thought of as rather bad ideas, exactly because law was perceived as utterly national in what is now often called a Westphalian model.<sup>23</sup> It is this tradition of the nation-state, as a legal entity, and sovereign in its law-making powers, that informs the metaphor of transplants and resists the notion of travelling for law. This tradition of national law, proud to be distinct from any other, eventually also inspired the notion of "legal families," which has informed much comparative work in the past. But the idea of "families" resembles the concept of "race" in that both are imaginations of essential similarities, which in fact do not exist. Therefore, the transplantation metaphor is somewhat flawed in itself.

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22. The concept of frames goes back to Erving Goffman, and was used in David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986), and in relation to "norms" in FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989), and AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995).

23. See Jay Reding, *The End of the Westphalian Model?*, JAYREDING.COM (Feb. 18, 2008), <http://jayreding.com/archives/2008/02/18/the-end-of-the-westphalian-model/>.

*Transnational flow?*

Today, the world has been regionalized and globalized. The nation-state is deeply entangled with others, and is not as distinct a body anymore. This does not mean that the nation-state and sovereignty have vanished. They are around and fare rather well indeed — better than many would have thought after the financial crisis of the early twenty-first century, which made people rethink privatization and other libertarian ideas. Yet today, it is a nation-state deeply embedded, entangled in larger contexts, with the region and the world. Some do resist that notion, and insist on a dream of originality or “strict constructivism,” but they are a very small minority and easily identifiable with a specific and particularistic political agenda.<sup>24</sup> In fact, the nation-state, and its law, are, today, transnationalized. The state acts in relation to other states as well as to transnational, regional, and international actors, as do law-makers, including the courts, and private parties in contracts, choice of legal procedure, and the like.

Thus, some argue, we indeed live with travelling ideas in law for rather practical reasons, but may not have fully recognized this yet. There is international law permeating much national legal practice, be it via trade agreements (as in NAFTA) or via international tax treaties or via copyright rules. But maybe more importantly, there is transnational legal practice which calls upon lawyers to know and apply laws from all around the world, or invent their own *lex mercatoria*.<sup>25</sup> Does this mean we now have to take travelling of legal ideas for granted, and my enquiry comes to an end?

Regarding laws governing commercial transaction, there is certainly that transnational trend.<sup>26</sup> So note that we — people living in prosperous nations — tend to like and accept economic transnational law from which we profit. Also note that serious legitimacy concerns exist regarding these developments, which are not raised often enough, and are usually not seen as scandalous deviations from our standards. Put differently, transnational law firm practice does not face the need of, or a serious call for, democratic procedures.

But there is another type of law out there. This *other* type of transnational and international law does and is indeed officially meant to permeate legal practice, namely human rights. Note that these laws are not particularly liked, at least by those in power and on the privileged side — those who have something to lose. Also note that this type of law is subjected to legitimacy challenges as a default position. So we accept transnational legal spheres when it comes to business, but there is a strong trend to reject

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24. This obviously refers to the methodological stance of strict originalism (most prominently held by Justice Scalia on the U.S. Supreme Court), which resists the notion of travelling law. However, it seems to be based in a strong federalist belief, and is utterly flawed with an either naïve or ideological emphasis on a clearly identifiable intent of framers, beyond its national chauvinism. Different from that, the majority of constitutional courts, scholars, and even constitution-making bodies situate national law in more or less explicit terms in a global context. See generally NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2d ed. 2010).

25. Today, the concept is exposed in TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 901 (4th ed. 2009). See also Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 8-14 (Gunther Teubner ed., 1997) (discussion of *lex mercatoria*); Peer Zumbansen, *Transnational Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 740-2 (Jan M. Smits ed., 2006).

26. I am grateful to Gerald Torres for reminding me of this.

transnational law when it comes to our daily lives, fundamental needs, or individual safety.

Overall, our world is not transnationalized. Rather, it is fragmented into transnationalized areas, like trade, and other more contested spheres, like human rather than primarily commercial interaction, addressed by human rights. So it is also not transnationalism we are looking at when legal ideas travel, but something else.

### *Migration?*

In more recent comparative constitutional studies, Sujit Choudry has proposed the metaphor of migration.<sup>27</sup> This is a tempting metaphor indeed. It allows us to think about the processes in which legal ideas are communicated, and eventually taken up in a place where they did not originate. Thus, it is beyond the either/or-logic of a transplant, takes the entangled state of affairs into account, and is compatible with globalization. In addition, I suggest that the metaphor of migration allows us to think about formal, official, legitimate forms as well as informal, illegal forms of mobility. What happens if we apply this to law, and do so in the case of MacKinnon's concept of substantive equality?

Official migration of law occurs in the EU, when secondary EU legislation is transposed into national law by EU member states. This type of migration requires power, or at least empowerment. Another example may be South African constitutional law, where Art. 39 sec. 1 of the Republic of South Africa (RSA) constitution states that the courts, when interpreting the Bill of Rights, "b. must consider international law; and c. may consider foreign law."<sup>28</sup> Also, the European Court of Human Rights is known for a doctrine which requires the Court to take the common constitutional traditions of all contracting states into account, and the EU states that principle in Art. 6 of the new treaty.<sup>29</sup>

In our case at hand, MacKinnon's work is empowered by her status as Special Rapporteur to the International Criminal Court. However, this seems more like an exception than the rule. Generally, migration which is informal, unofficial, or at least not immediately legitimate seems to be much more widespread. You may imagine this to happen when a legal idea stays longer than a visa allows, or travels below a passenger seat, or hidden in some truck or other dark space where border control does not find it. You may think of smuggling too. I actually think some of MacKinnon's work has snuck into several contexts that way. But how and why does that work exactly? The metaphor of migration does not fully answer this.

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27. See Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006).

28. S. Afr. Const. art. XXXIX §1 1996.

29. The Treaty on European Union art. 6, Dec. 29, 2006, 2006 O.J. (C321) ("1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.").

*Norm diffusion in "spirals of contestation"*

To explain how norms travel, some political scientists, namely Kathryn Sikkink and Thomas Risse, have developed a theory of "spirals of contestation."<sup>30</sup> They observe that norms, different from rules, travel, and they claim that there are specific conditions for legal norms to stay in a given domestic area called a process of "socialization." Norm diffusion, according to Risse and Sikkink, occurs in spirals oscillating between rejection and affirmation, endorsement and resistance, and eventually results in a situation in which a norm is taken in, internalized by a given society, and "socialized."<sup>31</sup>

Clearly, a governance perspective informs this concept in that it evaluates interaction among a set of actors, namely the state as well as NGOs,<sup>32</sup> and some

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30. They study what human rights do in the world "because international human rights norms challenge state rule over society and national sovereignty, any impact on domestic change would be counter-intuitive" not necessarily because they are institutionalized or because they are contested. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices, Introduction in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 1-38 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999). See also *INTERNATIONAL INSTITUTIONS AND SOCIALIZATION IN EUROPE* (Jeffrey T. Checkel ed., 2007) (for a different developed model); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L. ORG. FOUND. 887 (1998) (for a review of the field).

31. Risse & Sikkink, *supra* note 30, at 11-12, 17-35. According to them, human rights, 1) put bad states on the international agenda and remind good states of their liberalism, 2) mobilize domestic opposition, and 3) create pressure from up and down. This then inspires three processes: First, instrumental adaptation and strategic bargaining and/or moral consciousness-raising, argumentation, dialogue, persuasion; second, institutionalization and habitualization; and third, an internalization of norms. All of this happens in a spiral development with various boomerangs going back and forth between society, state, and inter/transnational networks, in which the state offers repression, denial, tactical concessions, adopts prescriptions, or shows rule-consistent behavior. *Id.* Transnational NGO networks institutionalize human rights by using "soft power," constructing the state and women-as-citizens, either empowered or silenced, in the process. To understand this, feminism focuses on notions of the private and the state that fails to act there, which reveals the limits of a legalistic approach. For a study of human rights politics, see Karen Brown Thompson, *Women's Rights are Human Rights*, in *RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS* 96, 96-122 (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002) (for a study of human rights politics). Others study whether norms are formally accepted and use this as an indicator of sex equality based on several case studies on the effect of CEDAW. See Mark M. Gray, Miki Caul Kittilson & Wayne Sandholtz, *Women and Globalization: A Study of 180 Countries, 1975-2000*, 60 INT'L ORG. FOUND. 293, 311-27 (2006). See also Anita M. Weiss, *Interpreting Islam and Women's Rights: Implementing CEDAW in Pakistan*, 18 INT'L SOC. 581 (2003) (a case study on Pakistan); Alison Brysk, *Global Good Samaritans? Human Rights Foreign Policy in Costa Rica*, 11 GLOBAL GOVERNANCE 445 (2005) (a case study on Costa Rica). However, note there are signs that authoritarian regimes which do not fear a critical civil society to take them up on ratifying international law may be as fast as democratic regimes to sign treaties like CEDAW. See Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115, 119 (2008). The MUSE project studied twenty states based on a more holistic approach. See generally CHRISTOF HEYNS & FRANS VIJJOEN, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* (2002); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); see also Steven C. Poe, Dierdre Wendel-Blunt & Karl Ho, *Global Patterns in the Achievement of Women's Human Rights to Equality*, 19 HUM. RTS. Q. 813, 815 (1997) (proposing two indicators to measure impact of CEDAW).

32. See CAROLINE E. SCHWITTER MARSIAJ, *THE ROLE OF INTERNATIONAL NGOS IN THE GLOBAL GOVERNANCE OF HUMAN RIGHTS: CHALLENGING THE DEMOCRATIC DEFICIT* 20-27 (2004) (discusses functions of NGOs to be: information, education, advocacy, standard-setting, and linking local with global). NGO is defined in U.N. Econ. & Soc. Council [ECOSOC], *Consultative Relationship Between the United Nations and Non-Governmental Organizations*, res 1996/31 (July 25, 1996), and in, *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, art. 1, Apr. 24, 1986, E.T.S. No. 124. A very particular type of NGO is LEAF in Canada. See McIntyre, *supra* note 7. Another example, enabling work against genocide, is Equality Now, mentioned above, active in supporting Bosnian women. This is the background for the case of *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), an

individuals.<sup>33</sup> This rests on work by Keck and Sikkink on transnational actor networks (TANs).<sup>34</sup> Indeed, there would not be much travelling of MacKinnon's ideas, or other ideas of a feminist, critical race, queer, or similar nature without such actors, namely women's movements and antiracist movements and queer movements, sometimes organized, sometimes not, around the world, as mentioned in the short case studies above. Some of these movements even focus on institutional progress, like the establishment of the War Crime Tribunals by the U.N. with a mandate to address sexual abuse. For example, there was a Women's Caucus formed in 1997 and supported by NGOs and women's organizations from around the world, then succeeded by the Women's Initiatives for Gender Justice, a transnational NGO now based near the International Criminal Court. This may also remind us of the fact that movements or TANs not only fight with states or power, but also fight among themselves, which, at times, places norms to bitter, sometimes hostile and ill-founded, stereotyping and polarizing contestation. Thus, it is never just MacKinnon's idea that travels, but it is an idea which she may bring up, articulate and advocate, and that people organized in movements, then take up, modify (not always to the better), move it, turn it into part of an "-ism" (or against it), a law (or into a critique of it), or their politics (or opposition).

In addition, according to the spirals model, any travelling of legal ideas needs structures in the sense of social and discursive patterns, both institutional and symbolic, to take hold. In particular, Myra Marx Ferree has reminded us of the necessary "institutional anchors" of transnational feminist discursive politics.<sup>35</sup> Thus, ideas of substantive equality travel when there are institutions in which to discuss them — from parliaments to courts to university symposiums or to the streets, if one considers that public space an institution as well. Additionally, legal ideas travel when they make sense in a symbolic order — by using known terms or building on established meanings. For example, in Canada, dominance theory did not just take hold because it is good theory, but also because there were, at the time, institutions willing to read and discuss it, and because there was a jurisprudence and politics which offered the pieces which

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unenforced landmark decision to recognize sexual atrocities as genocide in a domestic tort claim abroad.

33. It is unclear how important individual stances are since there are no micro level studies to date. Note that the common law tradition tends to label jurisprudence personally (e.g., the Dixon court, the Brennan court, etc.). In studies of transnational politics, some use Pierre Bourdieu's notion of personal "capital" as power in certain fields.

34. Advocacy networks do form "structured and structuring" epistemic communities in which they share beliefs and values, different from instrumental networks like corporations or idealist networks like science, believe in activist democracy and strategize accordingly, transcending the boundaries of nation-states, and distribute resources (information, but also reputational capital, money), to change the "frames" of a debate. MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 4, 30 (1998). They do transnational work because national channels may be blocked to produce a "boomerang pattern" via intergovernmental organizations. One example is politics against genital mutilation of girls and women, named FGM in a campaign in 1974 to scandalize a practice known to anthropologists and medical experts. *Id.* at 20. Keck and Sikkink note that issues are often bodily harm to vulnerable individuals, as in anti-slavery movements, *id.* at 41-51, foot binding and circumcision of women in China or Kenya, *id.* at 59-72, violence against women, *id.* at 165-98. *See generally* FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD (Margaret Schuler ed., 1992) (discussing violence); Dorothy E. McBride & Amy G. Mazur, *Measuring Feminist Mobilization: Cross-National Convergences and Transnational Networks in Western Europe*, in *GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS* 219, 219-40 (Myra Marx Ferree & Aili Mari Tripp eds., 2006).

35. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 339 (2003).

dominance theory then puts together.<sup>36</sup> Similarly, MacKinnon did build her approach to international law against sexual abuse upon cites from the Nuremberg trials. Often, such use of building blocks is treated as a congruence or salience requirement, or as compliance. Instead, scholars attentive to legal pluralism and law from below have rightly emphasized that congruence building is a process, and that compliance may look very different for different actors involved.<sup>37</sup> Regarding substantive sex equality and the contexts in which it travelled described above, social and legal and institutional schemes, however, differ rather widely. In addition, radical ideas collide with established norms and ruling institutions much more often than mesh with them. Therefore, congruence cannot fully explain why an idea like substantive equality does or does not take hold.

Therefore, the study of MacKinnon's work urges us to ask who exactly shall agree upon and construct congruence, and what kind of collision rather than congruence impacts travelling.<sup>38</sup> To name what frequently happens to her ideas: Does it stop norm diffusion if an idea is labelled "American," in contexts and at times in which the United States has the reputation of an aggressive colonizer?<sup>39</sup> Does the conservative defamation strategy of "political correctness" work, where, and why? Does it help or hinder the travelling of an idea if it is proposed by a professor, or a lawyer, by invitation of a feminist group, or a bureaucracy, and in what context? When is an idea blocked by a particular version of a "cultural defense" to shield a country or other unit from sex equality demands? For now, it seems plausible to argue that legal concepts travel when, like that developed by MacKinnon to address sexual violence, they give words to experiences out there, allow some people — namely: women of all varieties to articulate the world as they experience it, thus building congruence with lives, rather than just with the law.<sup>40</sup> It seems to be important that the world, rather than just the law, as she found it, which is what Ann Scales called MacKinnon's concepts,<sup>41</sup> can be transformed into a world as someone knows it. This illustrates, very much in line with MacKinnon's epistemological starting point of law forming a (sexist) ontology of sorts,<sup>42</sup> that experience-driven theory matters,<sup>43</sup> but it may also add to our concept of norm diffusion

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36. See McIntyre, *supra* note 7.

37. See Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L ORG. FOUND. 239, 243 (2004); Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y. 127, 130 (2010). See also SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE 1-11 (2007). See generally Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L STUD. REV. 65 (2000) (discussing salience); Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. FOUND. 363 (2005) (discussing an approach based on game theory).

38. There is also the question of what kind of dynamic makes human rights work in domestic contexts. See Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT'L ORG. FOUND. 609, 609-43 (2002) (arguing that combination works best).

39. See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003).

40. Sometimes, this resonance cannot be named, or explicitly described in adequate terms. See Jo Ann Palchak, *A Legal Room of One's Own*, 46 TULSA L. REV. 11.

41. See Anne Scales, *The World As She Found It*, 46 TULSA L. REV. 7 (2011).

42. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 3-12 (1989) [hereinafter TOWARD A FEMINIST THEORY OF THE STATE].

43. See Karima Bennouna, *Why Does it Matter if Women are Human?: Catharine MacKinnon's Contributions to International Law*, 46 TULSA L. REV. 107.



that there needs to be a specific quality to the legal idea to travel.

According to the spirals model of norm diffusion, and the modifications already mentioned, this is about it. When institutions do not take up travelling ideas, socialization does not happen. Others have already shown that actors are not the whole story, but that the political winds must blow for change as well. In rule of law-projects, the political climate may even be more important than the actors involved.<sup>44</sup> Still others have argued that the spiral model may be overly Northern and elitist, and may fail when applied to the Global South.<sup>45</sup> In my German example of law against pornography, this would mean the effort to fight pornography by means of law failed again. But this would also lose sight of all the effects on women's movements, on politicians, on scholars, and on other people. Therefore, I propose to further investigate that other component to our understanding of norm diffusion — the very quality of the legal idea, beyond the processes around it.

#### THE QUALITY FACTOR IN NORM DIFFUSION

When law travels, the distinct quality of a legal idea is an important factor. By quality, I do not mean a value judgment, as in a good idea or a bad idea. Instead, the travelling quality of a legal idea is, I suggest, first its potential to inscribe itself into broader legal traditions, and second its potential to radically alter the conceptual underpinnings of exactly that tradition. I have already mentioned that substantive equality, as a radical idea, is not likely to find congruence or salience on site, in law, but that MacKinnon's ideas find salience in life, particularly the diverse experiences of women with abuse. This already hints at a reconfiguration of the public/private split. However, there is more to that part of the story.

The analysis of MacKinnon-style travelling of "equality thinking" illustrates the relevance of a particular legal quality of a norm to diffuse. It travels because people and institutions take it up. It also travels because there is what we call global communication, despite its elitism and selectivity. But it also travels because of the quality of that very idea. MacKinnon's work is, I suggest, not just some other very interesting and very smart idea of how to think about equality. This is certainly what it is. But there is also a specific way of arguing it, namely: legal, and a specific content that is argued, namely: the private as public.

#### THE FACTOR OF LEGALISM IN NORM DIFFUSION

First, MacKinnon's arguments are utterly legal.<sup>46</sup> In her scholarship, law is a rather complex phenomenon: a "crack in the wall," a propaganda technique, an ontology,

44. Case studies are collected in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., 2006). In particular, see Wade Channell, *Lessons Not Learned About Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD* 137, 137-60 (Thomas Carothers ed., 2006); Thomas Carothers, *Steps Toward Knowledge*, *supra* at 327-37.

45. See Laura K. Landolt, *(Mis)constructing the Third World? Constructivist Analysis of Norm Diffusion*, 25 *THIRD WORLD Q.* 579, 579-91 (2004) (featuring a review of work by Risse, Sikkink, Ropp, and others).

46. See CATHARINE A. MACKINNON, *Law in the Everyday Life of Women*, in *WOMEN'S LIVES — MEN'S LAWS*, *supra* note 4, at 32-43; see also *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 42, at 161-65 (describing the maleness of the state).

politics, words but not just words. But in her legal concepts, she exercises the law. So logical. So meticulously based on the law, as norm and jurisprudence. Dissecting, as a good legal argument, each and every detail of any legal aspect relevant to the discussion. Engaging, as a grand legal argument, the core ideas — namely, equality, in liberal and some egalitarian traditions of fundamental rights — and gently reframing equality, in some ways, as a liberty interest.<sup>47</sup> But even in legalese, MacKinnon's legal theory of equality is deeply political in that it exposes the very politics of mainstream interpretation in each and every detail. In a U.S. context, this renders it "critical,"<sup>48</sup> in the sense of reflexive. What really happens is that law is taken seriously as doing life. Put differently, MacKinnon takes up the classics since she discusses Aristotle (to reject him) and the mainstream tradition of similarity tests (to reject it), but also engages in a discourse well-known in that it "simply" (as MacKinnon often calls it) claims the basics, again and again and again, which is: equality for women too. The arguments are case oriented and doctrinally flawless, with just a different content. This makes it very attractive to judges and other people who tend to like fine legal arguments. It also makes it very unattractive to some theorists who despise this as overly rigid (instead of rigorous). I have argued elsewhere that this may not only confuse law and other spheres of politics, but it may also underestimate the inequality in politics not governed by law.<sup>49</sup> To develop arguments which inform a decision, and not ambivalence, is part of doing legal theory and law, different from philosophy or literary studies or even social science. It is also an element that renders this work, in political and theoretical terms, radical, as in: targeting the roots of a problem. Culturally, this is read as harsh, or rigid, which is, not at least, a stance traditionally associated with a male gaze.<sup>50</sup> But such qualities also give an argument just the edge it needs to be taken up by legal minds, beyond "—isms."

Additionally, the work we look at here is not limited to doctrine and black letter law. It is also visionary in its call for human rights and justice,<sup>51</sup> or in arguments for more precise laws to "simply" (as MacKinnon would label it) eliminate (not "reduce" or

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47. This is particularly relevant in those legal systems that use structurally different tests for liberty rights and for equality rights. Liberty can be violated, if an interference is not justified, e.g., proportionate, and equality can be disregarded if it is wrongly assessed. See generally Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009).

48. This is the way Gerald Torres put it at the symposium. Gerald Torres, *Sex Lex: Creating a Discourse*, 46 TULSA L. REV. 45. In political philosophy, "critical" should be associated with the Frankfurt School formed by Horkheimer and Adorno after 1945, which is a particular version of critique. A key component is an anti-identitarian stance, which also informs MacKinnon's work, despite the often-misleading critique which calls her work "essentialist."

49. This is a critique of arguments by, among others, JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997), and fully developed in Susanne Baer, *Inexcitable Speech: Zum Rechtsverständnis postmoderner feministischer Positionen*, in JUDITH BUTLER, *EXCITABLE SPEECH KRITISCHE DIFFERENZEN* 229 (1998). As an example, the CEDAW committee pursues a policy to "put the law in place" first, since there will be no human rights for women without it. See Savitri Goonesekere, *Universalizing Women's Human Rights through CEDAW*, in *THE CIRCLE OF EMPOWERMENT* 52, 56 (Hanna Beate Schöpp-Schilling & Cees Flinterman eds., 2007).

50. This informs stereotypes, which in turn inform scholarship evaluations of when women are caught between rigidity (no sense of humor, not social, not nice, not a woman, a doomed to fail attempt to copy men) and silence (nice, friendly, a woman). What I see as MacKinnon's stance is a focus, a relentless, somewhat patient, yet always adequately angry position towards the world.

51. Lori Watson attempts to rework it for liberalism, following Rawls concept of political liberalism, seeking fair consideration of diverse views. Lori Watson, *Toward a Feminist Theory of Justice: Political Liberalism and Feminist Method*, 46 TULSA L. REV. 35.

“minimize” but be radical) prostitution or pornography. The vision is mostly called justice, “just human rights,” or “straight-forward sex equality,” as simple as that, and it makes it attractive to lawmakers, useful in regulatory procedures. Again, it is such arguments that give norms just the edge they need to travel.

Not to forget, MacKinnon takes “the classics” up in another way as well. Her work starts with racism and focuses on sex, with attention paid to class, thus theorizing gender as an intersectional materiality. As such, she reiterates the “classic,” at least in 1970’s and 1980’s U.S., as well as European, radical feminism, trio of race-class-gender.<sup>52</sup> Much of this part of her work, as Crenshaw shows, has not received attention or recognition, for a variety of reasons, like the theorizing of the “White Woman.”<sup>53</sup> Note that MacKinnon has theorized “Heterosexual Woman” and “Class Position” as well, yet neither has been read or recognized. In a genealogy attentive to seminal work on heteronormativity by Adrienne Rich, MacKinnon deconstructs sex, which she describes as the very sexualizing dynamics engendering people in ways which are utterly heteronormative, and which can be read as always also entangled in race and class.<sup>54</sup> This might be seen as another quality factor of a traveling legal idea. However, I will now focus on the content factor of attacking the public-private dichotomy so fundamental to law.

#### THE FACTOR OF RADICAL ALTERATION

Second then, and very much in line with the critique of law as such, MacKinnon’s ideas radically alter the public/private ideology, which informs the mainstream. This is transforming law through the back door. It is not only theorizing from below, the ground, real life, but it is a specific “below,” that which was and often is labelled private. It is not just some idea of substantive equality, but it is substantive equality in the anti-public/private-ideology way which is at work here. This may also help to explain why

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52. For example, Chandra Talpade Mohanty does not only not mention MacKinnon in her affirmative genealogy of influential feminist work in the United States in the relevant period (but names *TOWARDS A FEMINIST THEORY OF THE STATE* in the bibliography), but also limits her work to a vision of man-woman, ethnicity, and class. See CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (2003). Her vision of feminism as “pro-sex and [pro]-woman,” a statement which can be seen as binary and heteronormative, although more nuanced concepts are exposed in the book. *Id.* at 3. Otherwise, Mohanty demonstrates the “colonialist move” in analysis of women’s oppression in the Third World. *Id.* at 39. See also *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* xxiv, 53 (Cherrie Moraga & Gloria Anzaldúa eds., 1981) (The categories in question are “cultural, class, and sexuality differences that divide women of color.” However, a list used without further ado is “race, colonialism, and capitalism,” while it should be racism etc.)

53. Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?* 4 YALE J.L. & FEMINISM 13 (1991) (and various reprints).

54. See *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 41, at 57-58 (rejecting what she calls “naturalist” theories of heterosexuality to replace it with a theory of social, thus not inevitable, structure); *id.* at 128 (analysing “sexuality as a social construct of male power . . . constitutive of the meaning of gender,” in that “it identifies sex — that is, the sexuality of dominance and submission — as crucial, as a fundamental, as on some level definitive, in that process”); *id.* at 129 (“The gender issue, in this analysis, becomes the issue of what is taken to be “sexuality”); *id.* at 130 (as “a pervasive dimension of social life,” as “the dynamic of the inequality of the sexes,” in which gender is “a division of power”); *id.* at 131 (and “sexuality equals heterosexuality equals the sexuality of (male) dominance and (female) submission”); *id.* at 132 (with an “ideological axis” around what is “[a]llowed/not allowed”); *id.* at 141 (and with homosexuality not free from a “stake in this gendered sexual system”); *id.* at 142 (“The good news is, it is not biological.”); *id.* at 28-9 (analyzing a class position, in discussing Marx, as derivative from father/husband).

many attempt and fail to make substantive equality work, while substantive sex equality has a particular bite.

The tradition, or ideology, which is under attack here is, as many have demonstrated,<sup>55</sup> the idea of a protected private and a regulated public. This public/private-distinction is in fact a gendered ideology in that it shields a subordinate femininity and a public “good male citizen” — as in patriarchy and, in some ways, colonialism and slavery — from the reach of law.<sup>56</sup> MacKinnon’s work radically shatters that distinction. When you follow her thoughts, there is nothing protected or homey and cozy about the private, and there is nothing inherently just in public. This can be illustrated in all the instances of travelling legal ideas: to conceptualize sexist and racist and heteronormative harassment as a violation of fundamental rights in fact problematizes behavior which has been considered private (i.e. sexual), personal (i.e. color-blind), or just plain normal, desired, great fun etc. (i.e. heteronormative flirtation) — and shatters the line drawn between that and the reach of law. To conceptualize pornography, prostitution, and trafficking as not only a continuum of acts, but as a violation of fundamental rights to liberty (free speech, contract, self determination), of dignity and of equality in fact shatters that very same line: things, or acts, which are called sex — and what image of sex is that? — are not intimate, or private, or somehow complicated out of reach, but become political. Choice and agency become conditional options whether applied to sex, marriage, or living abroad. And dignity is not a moralistic value statement, but a call for mutual recognition. Finally, to conceptualize mass rape in genocide, a strategy and a weapon which has been used for ages, as a violation of fundamental human rights and humanitarian law as a sexist crime,<sup>57</sup> does in fact shatter that line again: It does render formerly private sexual activity (or excess, depending)<sup>58</sup> into an act for which one is publicly accountable. There may be something private about sex, but according to this approach, it does not shield it from being a crime. There is certainly something sexual in violence, but that does not allow us to forget about the violent part just because it is couched in terms used for intimacy.

So this concept of substantive equality does not simply alter a theory. Rather, I suggest, it carries a particular quality in that it targets inequalities along the public/private divide. Targeting sexuality, racism, heteronormativity, and politics, MacKinnon’s approach digs deep into people’s lives, not just their opinions or rhetoric or scholarship or lawyering. It is substantive sex equality, meaning SEX equality, which

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55. See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983).

56. Aida Hurtado, *Relating to Privilege: Seduction and Rejection in the Subordination of White Women and Women of Color*, 14 SIGNS 833, 849-51 (1989) (discussing the public as personally political from the perspective of women of color).

57. Again, Canadian decisions illustrate that MacKinnon did challenge the very basic notion of rape as violence, turning it into sexual violence as discrimination. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (Can.); *R. v. Darrach*, [2000] 2 S.C.R. 443 (Can.) (A case in which Bill C-49 (1992) reintroduced equality and survived a constitutional challenge). Again, the court did not simply transplant MacKinnon’s ideas, but took elements in the decision and omitted others, or implicitly used the analysis but did not explicitly account for equality as a key right. In international law, where the Genocide Convention does not cover sex, the analysis of rape as determining gender as a category in war makes all the difference, and inserts women into the protected classes.

58. There is a similar shift in the law against torture, moving from excess to strategy. See MACKINNON, *supra* note 14, at 17-27; see also Bennoun, *supra* note 43.

turns the formerly private (and gendered female) and the formerly public (gendered male) into a continuum called human. It is not a concept in the abstract (thus not legalistic in that sense) and not applied to anything, but, first and foremost, a concept grounded in accounts of reality which applies substantive equality to sexual inequalities. The idea traveling here is substantive equality in cases of sexist — often sexualizing race — harassment, pornography, prostitution, trafficking, sexual abuse, and rape in genocide. Legally, this list implies equality on the level of national statutory law, primarily Title VII of the U.S. Civil Rights Act, used against sexual harassment; national constitutional law, namely the fundamental rights to equality and free speech in the U.S. constitution; international law, namely human rights and the international law of crimes. Thus, we see a move from harassment at work to rape as genocide, and a move from national to international law. But this is not just development, it is a specific pattern.

What we see, beyond applications of a smart theory of substantive equality, is a particular way of doing theory, with a particular target while doing it. What we really see is a specific way to shatter the taboos and morals and laws which shield the private and expose and question our very basic understandings of who we are and what we do, and what we should not do, with and to each other. Experience otherwise exoticized, orientalized, or othered, is brought home.<sup>59</sup> A move from harassment to rape, abuse in marriage to war crimes, and pornography to torture, calls upon us to rethink where we are in the matrixes of privilege and subordination.<sup>60</sup> After all, MacKinnon's work is not just another idea of equality, although she calls it equality theory, but also known as dominance theory, or a concept of equality as a right against hierarchies, or subordination. Its distinctive feature is its focus on harm, on violence, on what really happens according to those victimized, the focus on clear and, for those with empathy, painfully vivid descriptions of violence, particularly in cases in which it is called sexuality. This theory does not develop a playful version of gender relations. Without such positive images, it is rather unattractive to politicians, and to many academics, and even to some people in emancipatory movements, and politically it is considered hard to win votes by describing pain. By many, it is considered hard to do theory based on what we see in the world. And to many, it is indeed painful to confront these issues head on, so that it seems tempting and an almost rational move to escape. But it does expose the private as a realm of justice requirements. Luckily, MacKinnon is not alone and not the only one who thinks along these lines.<sup>61</sup> But this quality factor of norm diffusion does not cater to any comfort level.

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59. Karima Bennouna discusses examples in MacKinnon's arguments On Torture. Bennouna, *supra* note 43.

60. A similar point has been made by Gerald Torres. Torres, *supra* note 48.

61. See, e.g., Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001) (describes the NGO tribunal to address sexual abuse when there was no official procedure to use). See also Ursula A. O'Hare, *Realizing Human Rights for Women*, 21 HUM. RTS. Q. 364, 366-71 (1999) (the problem of the private). See generally INTERNATIONAL LAW: MODERN FEMINIST APPROACHES (Doris Buss & Ambreena Manji eds., 2005); WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly D. Askin & Doris M. Koenig eds., 1999). For recent German works, see FRAUEN UND VÖLKERRECHT, ZUR EINWIRKUNG VON FRAUENRECHTEN UND FRAUENINTERESSEN AUF DAS VÖLKERRECHT (Beate Rudolf Hrsg., 2006); Gender und Internationales Recht (Andreas Zimmermann, Thomas Giegerich & Ursula Heinz Hrsg., 2007). And the classic which defined the field, see HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

In doing this, her work uses a particular aesthetics, since it is sometimes unnervingly and painfully clear about the harm of inequalities — no fuss, no cover ups, no niceties. And since harm is very real to people, it allows many people to pick up on it. The harm MacKinnon addresses is not just real but very well known to people beyond public media reporting, beyond something happening elsewhere, and they are known on much more than an intellectual or political or some other public level. An account of these harms strikes a chord, personally, as private beings, in what many consider intimate, first and foremost, indeed, recognizing women as human, but most scandalous, provocative, problematic, regarding sex, as SEX.<sup>62</sup>

However, MacKinnon's work is not simply scandalizing victims, oppression, and harm, because it does not use individual suffering to illustrate a theory. It is also not only based on empirical data, although it uses a significant amount compared to most other legal work. It employs "the logic of experience,"<sup>63</sup> which is data often in the qualitative form of narrative on harm, the silenced story, the yet unheard which informs that theory. Again, through the back door, such theorizing shifts the ground. Substantive equality is driven by specific types of data presented in as stark and precise a language as possible. "To be clear: what is sexual is what gives a man an erection,"<sup>64</sup> is but one of many lines used in legal theory or a lawyer's brief. There are many other lines much crueler, violent, and filled with pain. There, MacKinnon employs a specific aesthetics in describing harm and ignoring taboo. This is not just writing about pain, it is also pain put to words.<sup>65</sup>

As such, this norm exposes law and politics from below, driven by recognition of social realities as needs law has to address, but also as experience which deserves empathy, a more immediate reaction by each and every one of us. It turns a theory based on experiences of injustice into a powerful claim to do something about it.<sup>66</sup> There are some problems, mostly due to MacKinnon's frequent use of the term "woman" or "women" without further addition, which implies what some call "essentialism" and is better described as groupism, in referring to a collective experience of women as a homogenous entity.<sup>67</sup> However, the foundational theoretical texts — like *Towards a Feminist Theory of the State* — demonstrate that intersectionality, though not used in the

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62. Marc Spindelman identifies the challenge to "normal" understandings of sex as key to gay men's unwillingness, if not outright rejection of sex equality arguments by MacKinnon. Marc Spindelman, *Gay Men and Sex Equality*, 46 TULSA L. REV. 123 (2011). However, one may discuss whether the core point in MacKinnon's theory is sex or rather the claim that women are indeed, human, as articulated in the book with the title, and reread by Karima Bennouna. Bennouna, *supra* note 43.

63. This is the title of her own take on how ideas travel. Catharine A. MacKinnon, *The Logic of Experience: The Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002), reprinted in WOMEN'S LIVES — MEN'S LAWS, *supra* note 4, at 162.

64. TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 42, at 137.

65. MacKinnon's lectures on pornography and harassment, published as CATHARINE A. MACKINNON, ONLY WORDS (1993), are an example of where she asks and forces readers to "imagine that women's reality is real," while providing descriptions of such. *Id.* at 3, 7. As a translator of this work into German, I have often felt (yet not acted upon) the urge to soften the wording. MacKinnon does not.

66. It may not be as important to name a theory and much more important to define the epistemological starting point. This is why engaging deconstruction in these debates is important, since some theory labeled deconstruction, as well as critical discourse analysis, set out to do exactly that. See Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 688-94 (2000).

67. See Susanne Baer, *A Closer Look at Law: Human Rights as Multi-level Sites of Struggles over Multi-dimensional Equality*, 6 UTRECHT L. REV. 56, 58-61 (2010) (developing a critique of legal groupism, a sociological concept developed by Rogers Brubaker).



sense then proposed by Crenshaw, is present in that writing.<sup>68</sup> MacKinnon's ideas travel because she ties them to the ground of everyday people in all their diversity.

This leaves much room for others to attach their vision. Since MacKinnon's theory is experience driven (she refers to consciousness-raising, a method to critical claim and socially situate one's reality),<sup>69</sup> all kinds of theories of justice — distribution, recognition, deliberation — may be attached. All grand philosophies of justice may kick in, as long as they recognize the pain and vow to do something about it. Theory grounded in pain calls for an inevitable response, but does not define the exact shape of it. To agree with an analysis of sexualized inequalities does not force you to endorse a specific political recipe to fight them. In addition, calls for such an equality cannot count on political majorities or elites, because equality exactly challenges hegemonic, or in a qualitative sense, majoritarian, normality, and privilege. This carries a risk in that such theory may be misappropriated and abused by elites or majorities to actually discriminate against some while equalizing others. One could argue that it is then not the idea anymore that traveled. But I consider it important to also catch that variety of norm diffusion. This is, again, exactly not what happened in Canada around pornography.<sup>70</sup> There is also no data to date whether the Swedish law against prostitution does have problematic effects on non-Swedish or non-EU women, although we know that the German law against prostitution, which does not follow MacKinnon's approach but endorses a sex-work-libertarian rationale, does foster racism.<sup>71</sup> However, legal ideas seem to travel far even if they are radical alterations of majoritarian beliefs, but we need to be very careful to attribute what happens later to them once they arrive.

#### HOW RADICAL NORMS DIFFUSE

MacKinnon's legal ideas travel, and they are not simply transplanted or transnationalized or migrating. Rather, they diffuse as norms, relying on and driven by transnational actor networks, diverse within themselves, use local anchors to take a hold, bounce back and forth, rejected or accepted, and are eventually socialized. However, the study of substantive equality on the road also shows that there is a quality factor in norm diffusion. In this case, it is the specific legal anchors, in fundamental human rights and the grand traditions of liberty and equality, gently modified. It is also the specific deconstruction of a fundamental ideology of law, the public/private-distinction. And this is done with a specific aesthetics in the use of data, grounding law in experience, thereby relating to people's lives from the private realm, to make a public sex equality claim. As

68. TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 42, at 63 (Explicitly discussing the "intersection" of class and sex in feminist work by Hartsock or Kollontai). Note that other feminist theorists have not been criticized as essentialist, despite the same rhetoric, such as Mohanty, who argues "pro-sex and [pro]-woman" If all else fails, one may call this strategic essentialism. MOHANTY, *supra* note 52, at 3.

69. See TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 42, at 83-105; MacKinnon, *Defining Rape Internationally*, *supra* note 17, at 941-44 (Excellent examples of consciousness-raising can be found in MacKinnon's discussion of the meaning of "consent").

70. See *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 (Can.).

71. The German government had to commission various studies to evaluate effects of the law which legalized prostitution if it is based on the free will of the person involved, in 2002, based on a request from the Federal Parliament. See PROF. DR. CORNELIA HELFFERICH, BMFSFJ, UNTERSUCHUNG, AUSWIRKUNGEN DES PROSTITUTIONSGESETZES" ABSCHLUSSBERICHT (2007), available at <http://www.bmfsfj.de/doku/prostitutionsgesetz/pdf/gesamt.pdf> (main report of the commission's findings) (German).

such, radical ideas are always contested and collide rather than allow for congruence. In traditional models of norm diffusion, this would limit traveling. With the additional quality factor discussed here, we may be able to explain why legal ideas travel even if they do not fit established laws or are not congruent with dominant beliefs.

If legal ideas have such specific quality, they seem to travel far even if they do not make it into legal text or mainstream jurisprudence. To be sure, this is not a study of impact or the real life effects of legal ideas. But in the cases studied above, law is taken seriously as doing life, in some ways. Then, the German example of a draft civil rights law against pornography has maybe not been a failure, but can be understood as a specific type of norm diffusion, just like the Canadian equality jurisprudence or the Swedish law against prostitution or the international criminal law against sexual abuse, or gender crimes. Such attempts to change law, and eventually change lives, have not been failures, but specifically successful attempts to diffuse several norms: the right to substantive equality, a justice requirement in public as well as in private, and the norm that all women are indeed human too.

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