

Law Without Tears

DIANE KIRKBY (ED), *SEX POWER AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA*

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What chance could the less favoured male counsel have despite his erudition against an adversary with smiles and tears, and blushes at her command wherewith to enlist the sympathies of the intelligent Jury? The whole of the law reports would not outweigh a single sigh from ruby lips, a simple pearly tear from deep grey eyes.¹

In the introduction to this collection of 17 essays, Diane Kirkby describes her scepticism about the law's potential as a mechanism for social change. Like Carol Smart warning us of the seductive power of law (Smart 1989:160) Kirkby describes her ambivalence about a reliance on law's power to right wrongs and bring about justice. But she sees the essays in this collection as sharing a commitment to social justice and expresses a hope that the collection may itself provide an impetus for change. By situating legal practice in its social and historical contexts these contributions to the historiography of law may be capable of subverting law's claims to universality and timeless validity. Kirkby sees the book as providing a resource for the new, broadened legal education in Australia and at the very least the essays, divided into the catch-all themes of Sexuality, Punishment, Family and Citizenship and the State, provide the reader with a starting point for further research or a useful overview of areas of law and legal history in Australia. The chapters that perhaps go further than this are those that articulate more clearly Kirkby's disquiet. These are the chapters that describe the uneasy alliances between feminists and moral campaigners, the difficulty feminist activists have had in deal-

ing with the implications of intersectional identity, the inability of (legislative) reform to provide benefits for all women and the sometimes unexpected results of feminist campaigns for change.

The selection of the essays in this collection explicitly places colonialism at the centre of the formation of “law” in Australia, encompassing not only the significance of imperial ties but also the development of the White Australia Policy. So we have Andrew Markus’ description of the legislative regimes of White Australia from 1900-1970 and Ann-Mari Jordens’ rather disparate collection of information about people excluded from the welfare state and thus from participation as citizens (‘Aliens, marginalised citizens and the Australian welfare state, 1945-1975’). Interesting to me, who had always thought of the White Australia Policy in relation to immigration, is that much of the discussion focuses on the impact of that policy on the Aboriginal population of Australia. There are chapters ranging from Peggy Brock’s description of the strange tangle of policies and laws that attempted to classify, segregate and assimilate the Aboriginal population (‘Aboriginal families and the law in the era of assimilation and segregation, 1890s-1980s’) to one of the most interesting chapters, Fiona Paisley’s ‘Feminist challenges to White Australia, 1900-1930s’. Paisley looks at the campaigns that were conducted by white feminists drawing attention to the appalling and discriminatory conditions endured by Aboriginal women and particularly Aboriginal mothers. While the white women’s enchantment with Aboriginal motherhood was perhaps problematic it was a campaign remarkable for its clear recognition of the ‘endemic sexual exploitation of Aboriginal women’ (Paisley:259) by white men.

As Kay Saunders makes clear in her chapter (‘Controlling (hetero)sexuality: The implementation and operation of contagious diseases legislation in Australia, 1868-1945’) the behaviour of men was the issue most side-stepped in dealing the regulation of prostitution and women perceived to be prostitutes. Like Cathy Coleborne’s chapter dealing with the legislation of lunacy in nineteenth century Victoria, Saunders’ chapter is interesting in its discussion of the intersection of medical and legal discourses in attempts to contain sexed (female) bodies. In a chapter that deals also with the control of sexuality, Jill Bavin-Mizzi provides an overview of the some of the laws governing sexual assault from 1876 - 1924. This period saw changes in the age of consent for girls and thus a rise in carnal knowledge prosecutions, though Bavin-Mizzi’s interpretation of the numbers of (un)successful prosecutions seems occasionally strained. On the same theme, in a chapter drawing on works such as *Sex and Secrets* (Allen 1990), Suzanne Davies (‘Captives of their bodies: women, law and pun-

ishment, 1880s-1980s') provides an introduction to feminist criminology and outlines how perceptions of the female body and its capabilities have been implicated in the construction of female criminality and have shaped women's encounters with the criminal justice system. Similarly, Lyndall Ryan ('From stridency to silence: The policing of convict women, 1803-1853'), who describes the shifts in the treatment of convict women, sees the early punishment regimes as instrumental as producing the types of offences committed by women.

For me, perhaps the frustrating thing about reading a collection such as this is that often you get at once too much detail and yet not enough. Several of the chapters cover many decades and while it is helpful to get a sense of an overall pattern there is often so much legislative and social change to deal with that we only get glimpses of the colonial Houses of Correction and perhaps not enough of a sense of the people who inhabited them. For me the more interesting chapters are those that discuss in more depth the actual campaigns that led to legal change rather than simply the changes themselves. These are the chapters that open up the ambivalent and ambiguous relationship that feminist reformers have had with legal institutions and provide an understanding of the successes and failures of feminist interventions in law. Gail Mason's thematic overview of the feminist campaigns to reform the laws of rape is a good example of a chapter that highlights this ambivalence. By placing this feminist activism in its theoretical as well as historical context she reminds us of the ways law, lawyers and legal institutions can evade and frustrate attempts at reform.

Similarly, Margaret Thornton's chapter ('Women as fringe dwellers of the jurisprudential community') demonstrates the pervasive and persuasive quality of law's image of itself as a neutral, disembodied discipline. The story of Mary Kitson, the woman at the centre of one of South Australia's legal personhood cases,² declaring that she had 'personally never ... come up against sex discrimination in any walk of life' (Thornton: 1996 200), a testament to the power of this image. Drawing on the material developed in her recent book (Thornton 1996), Thornton discusses the attempts to exclude women from law schools and the legal profession. She highlights the almost hysterical fear of the chaotic, disruptive feminine as central to the desire to preserve law and legal institutions from women who would all, inevitably, combine the persuasion of Portia with the seductive charm of Olivia. As one impassioned opponent of the admission of women into the law cried, 'Are you blind to the disaster and ruin that not only confronts you, but which threatens you with imminent extermination?' (Thornton 1996: 191). A fear of loss of control, though in this case over the behav-

ious of wives and children, was central also to the attempts to preserve testamentary freedom on the face of the push for testator's family maintenance legislation. Rosalind Atherton's description of this campaign, 'Feminists and legal change in New South Wales 1890 - 1916: Husbands, widows and "family property"' gives the reader a sense of the complex and problematic motivations behind the push for a type of 'family property', making clear how the campaign became infused with the ideology of (good) motherhood and thus was unable ultimately to displace the treasured principle of testamentary freedom. Read in conjunction with Paisley's description of the idealised Aboriginal mother at the centre of feminist challenges to aspects of the White Australia Policy, Atherton's discussion of the troubling implications of relying on ideas about moral entitlements to assistance is particularly interesting.

I think this book certainly does provide an excellent resource for legal education and while it is perhaps inevitable that with a collection of essays such as this one that you can't, despite the title, have it all, you will always learn something new.

Did you know that in the 1890s the New South Wales Divorce Court produced printed do-it-yourself divorce forms for pauper petitioners?³

REFERENCES

- Judith Allen *Sex and Secrets: crimes involving Australian women since 1880* Oxford University Press Melbourne 1990.
- Carol Smart *Feminism and the Power of Law* Routledge London 1989
- Margaret Thornton *Dissonance and distrust: women and the legal profession* Oxford University Press Melbourne 1996