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A MIND OF ONE'S OWN

*Feminist Essays
on Reason and Objectivity*

edited by

LOUISE M. ANTONY
CHARLOTTE WITT



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Feminist Theory and Politics

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Generalizing Gender: Reason and Essence in the Legal Thought of Catharine MacKinnon

ELIZABETH RAPAPORT

Catharine MacKinnon's work has been a shaping force in the development of feminist legal theory as well as on the course of legal reform. Although few feminist scholars accept her views on gender and sexuality in their entirety, her preeminent contribution to feminist legal theory is generally acknowledged.¹ MacKinnon's most signal legal reform success has been in identifying sexual harassment as a form of sex discrimination prohibited by federal employment law. More recently, attended by greater controversy and less material success, she has been active in the feminist antipornography campaign. This chapter has two objectives. The first is simply the journeywoman task of understanding MacKinnon's theory of gender and especially the methodology she employs. The second objective is to defend an aspect of MacKinnon's methodology that has of late come under political and philosophical attack. She has been accused of gender essentialism, a vice that is variously defined but is most commonly understood to mean treating the concept of gender as a transcultural and transhistorical universal.

The price of gender essentialism, according to its critics, is the imposition of false uniformity on the disparate experience of women of different classes, races, ethnicities, and sexual orientations. Privileged white intellectuals read their own experience as that of women as such. In doing so we falsify the experience of those whom we call sisters but whose voices we ignore. In my view, these deplorable consequences do not necessarily overtake the theorist who seeks to generalize about gender. The impulse that animates MacKinnon's work, the desire to formulate a theory that speaks from and to the experience of all women, should not be easily relinquished. Generalizing about gender, at least in the modest form in which it is done by this bold theorist, need not be philosophically or politically pernicious.

I

There are at least three well-established models of the interplay among reason, gender, and the law in the work of various contributors to the rich, variegated, and

burgeoning field of feminist jurisprudence.² I will briefly characterize two in order to situate and discuss a third—that of Catharine MacKinnon. No feminist legal theorist would resist the characterization of the law as male if what is meant by the masculinity of the law is that it systematically reflects and advances the interests of men at the expense of women. There are, however, distinct feminist orientations toward the nature and uses of reason in the law.

Liberal feminist legal theorists treat reason as unproblematic (that is, ungendered), a neutral tool well adapted to pressing demands for legal reform. Liberal feminist strategy relies heavily on pressing for vindication of the legal system's own norms of rational adjudication. Chief among these is the principle of formal equality: Like cases should be treated alike; differences of treatment should reflect genuine and relevant, as opposed to mythic-stereotypical or irrelevant, differences between the sexes. Significant victories can be credited to the ability of feminist lawyers to expose the irrationality, when measured against the legal system's own norms, of sexist legal doctrines.

Consider an example, or set of examples, from the important domain of constitutional equal protection adjudication. In a series of cases beginning in 1971, liberal feminists were encouraged in their reliance on appeals to accepted norms of legal rationality by the action of the Supreme Court. The Court embarked upon a course of striking down legislation that relied upon gender stereotypes as a basis for conferring or withholding benefits and burdens. Thus the Court sustained a challenge to federal law that allowed male members of the armed forces an automatic dependency allowance for their wives but required servicewomen to prove that their husbands were in fact dependent.³ In 1976 it announced the standard to be applied in determining whether gender classifications were consonant with the Fourteenth Amendment's equal protection guarantees: Government was barred from relying on gender classifications unless they served important government objectives and were substantially related to the achievement of those objectives.⁴ The Court would no longer allow traditional gender stereotypes to stand proxy for germane bases of classification.⁵

It may be important to note that although liberal feminists have no quarrel with the principles of rationality at work in the legal system, they do not necessarily look to the courts with great hope of achieving further significant reforms. Wendy Williams, a leading liberal feminist litigator and theorist, expresses skepticism about the ability of courts to engage in stereotype-discarding analysis in areas that go beyond what was achieved in the first decade of equal protection cases. By 1980, issues were reaching the Supreme Court that went beyond challenging the separate spheres of male and female activity, home, and the wider world. When confronted with equal protection challenges to a male-only draft registration law and a statutory rape law making sex with an underage partner criminal for a male but not a female, the Court reached what Williams called its "cultural limits."⁶ It was not prepared to scrutinize the basis for treating men as inherently aggressive and women as unsuitable for war or unlikely to initiate sex. Williams does not expect the courts to be precocious wielders of rationality in exploding such basic cultural stereotypes. Change at so fundamental a level, if it comes, will, she believes, come as a result of legislative enactment responsive to feminist political success.

Other feminist legal scholars, applying the work of Carol Gilligan to law, argue that the feminine voice has been devalued in and excluded from the legal system.

They see the influx of women into the legal profession in the past two decades as creating an opportunity to introduce female styles of lawyering and adjudication into legal institutions.⁷ These feminists regard legal rationality as male in the sense that it embodies norms of deliberation and judgment that are characteristic of men but not women. Carol Gilligan's germinal work in psychology criticized Lawrence Kohlberg for offering as a universal model of moral development one that was derived from the study of male subjects and (at best) applied only to men.⁸ Measured on the Kohlbergian scale, females as a class proved to be deficient in mature moral reasoning capacity.⁹ Gilligan became persuaded that Kohlberg's model was yet another in a long Western tradition that privileges predominantly male styles of deliberation and judgment as at once male and practical reasoning as such. The result has been not only the denigration of women but also the loss to society (in spheres wider than that to which women have been consigned) of the advantages of women's distinctive styles of analysis and judgment. Gilligan's own work seeks to uncover the distinctive characteristics of female moral experience and reasoning.

Feminist legal scholars who have been influenced by Gilligan's work argue for the reception into legal institutions of female styles of lawyering and adjudication. Some argue for female reasoning styles as supplementation and enrichment; others regard Gilligan's work as illuminating the road to models of legal reasoning superior to those that seek to capture the virtues of male rationality. The programmatic implications of the Gilligan critique of law are largely still to be worked out and are in any case more encompassing than the present focus on legal rationality. Writing explicitly about legal reasoning, both Katharine Bartlett and Suzanna Sherry have argued that feminist practical reasoning pays more attention to context and is likely to be suspicious of the vices of excessive abstraction and generalization.¹⁰ Judith Resnik has been critical of impartiality as a judicial virtue. She argues that monitoring interest and cultivating empathy with the parties at risk and in the toils of the law can be seen from a feminist perspective to be not only a different but also a superior model of the virtue of the judicial stance.¹¹

Catharine MacKinnon does not take rationality in the law as she finds it, as do liberal theorists; nor does she seek to enrich or improve legal institutions by legitimating female styles of adjudication and lawyering. Her interest in rationality, which for her is the central legitimizing norm of liberal legalism, is entirely critical.¹² For MacKinnon, rationality is an enemy to be unmasked and destroyed. In what follows I will first articulate her critique of liberal legalism's male concept of rationality. I will then present her account of gender, which seeks to explain what legal rationality works to conceal. Finally, I will defend MacKinnon's methodology, insofar as she treats generalizing about gender as a legitimate conceptual tool of feminist theory.

MacKinnon's critique of legal rationality, as well as her theory of gender, can probably best be understood as an effort to come to terms with Marxism, to retain what is sound or can be turned to the uses of feminism, and to discover what needs to be discarded in the interest of furthering feminist theory and practice. MacKinnon's critique of rationality has two intimately related aspects targeted at the epistemological stance of liberal legalism and the basic substantive norms, especially the constitutional norms, that are paradigmatically virtuous, true, or correct from the liberal point of view.

Rationality—or in MacKinnon's usage, its synonym, objectivity—is the central epistemological norm of liberal legalism. In her words: "Objectivity is liberal legal-

ism's conception of itself. It legitimates itself by reflecting its view of society, a society it helps to make by so seeing it, and calling that view, that relation, rationality. Since rationality is measured by point-of-viewlessness, what counts as reason is that which corresponds to the way things are."¹³ MacKinnon has two criticisms of liberal legalism's "objectivism." First, MacKinnon, following Marx, denies that there can be theory that escapes (1) historical determination and limitation or (2) perspective—that is, partiality for the social interest the theory expresses.¹⁴ All thought is in this sense ideological. The epistemological error of liberal legalism is to suppose that its own or any other thought could transcend its historical situation and partiality.

Second, liberal legalism claims objectivity for norms that foster, reflect, impose, and sanction male supremacy. But again, just as the bourgeois political philosophy—democratic republicanism—dissimulates its relationship to capitalism, and is innocent of the deception, liberal legalism believes itself to be committed to gender neutrality.¹⁵ For MacKinnon, the liberal state—like all states, including the socialist state—is male in that it "authoritatively constitutes the social order in the interests of men as a gender."¹⁶ The state is "jurisprudentially male": It conceals and legitimizes male power by presenting gender inequality as occurring despite, not in part because of, the legal regime.¹⁷ MacKinnon finds this to be "especially vivid" in constitutional law.¹⁸ Her critique of the neutrality of constitutional law resembles Marxist critiques of such supposedly neutral legal regimes as contract before wage and hour legislation were permitted.¹⁹ She finds formal equality or equal liberty concealing and maintaining substantive inequality, replacing, *mutatis mutandis*, "class" with "gender."

MacKinnon's criticism of the accepted interpretation of the First Amendment's protection of freedom of speech can serve as an example of her constitutional critique. The First Amendment has occupied her in connection with her efforts to brand pornography as a form of legally redressable gender discrimination.²⁰ MacKinnon was in the forefront of a movement to enact municipal ordinances that make pornography a discriminatory practice amenable to redress as a civil rights violation. She was the principal author of the first and model ordinance enacted in Minneapolis in 1983. MacKinnon defines pornography as "the graphic sexually explicit subordination of women, whether in words or pictures."²¹

Among the several harms pornography causes, in MacKinnon's view, is the harm to all women that results from its propagation of the idea that women are only fit for, and enjoy, subordination. Pornography, MacKinnon argues, is a central practice of male domination through which both men and women learn to regard women as fit only for exploitation and abuse and to hone and deepen the sadomasochism that—increasingly, due to the good offices of pornography—is the specific content of sexuality in our culture. Pornography is the site at which gender identity and a sexuality of dominance and submission are fused.²²

MacKinnon's indictment of pornography is controversial in all its details among feminists. Yet, as one of MacKinnon's critics among feminist legal theorists, Robin West, has noted, most women experience pornography as primarily "victimizing, threatening and oppressive."²³ Because of the chord struck, she has been able to bring yet another aspect of sexual exploitation from the trivialized margin to the center of cultural discussion and political debate.

Indianapolis enacted a version of the antipornography ordinance in 1984. The Federal Court of Appeals held that the Indianapolis ordinance violated the First

Amendment. Judge Easterbrook's opinion concedes much to antipornography feminism.²⁴ He concedes that pornography is a practice that socializes both sexes to accept and relish male supremacy, that it produces "bigotry and contempt" as well as "acts of aggression" against women. Easterbrook refuses to engage in facile and implausible distinctions between mere impotent ideas of a reprehensible nature and socially undesirable or criminal action. He insists that beliefs are potent, that they cause and shape behavior. However, having conceded that pornography is political speech, Easterbrook then accords it the dignity constitutionally mandated for the expression of any political viewpoint, none of which may be proscribed. Antipornography feminism must confront male supremacy in the arena of the marketplace of ideas. On pain of extinguishing freedom of speech and setting itself up as an arbiter of truth, the government may not take the part of what appears to be embattled enlightenment against pernicious error.

MacKinnon's critique of pornographic expression as protected speech mobilizes well-known arguments against the futility of legal formalism. Her argument is premised upon the claim that the free speech of pornographers can only be protected at the price of silencing women. When women rise to protest pornography, the contempt in which pornography helps to hold them prevents them from being heard. Judge Easterbrook reasons that the Constitution requires the government to be neutral with respect to the political expression of male supremacists and antipornography feminists. For MacKinnon, this neutrality is specious. Easterbrook's analysis requires that we assume that absent unjustified government regulation, all social groups enjoy free speech. But once the profound and pervasive powerlessness of women in the social status quo is acknowledged, governmental abstention is exposed as reinforcing the lack of free speech and lack of access to other channels of political action for women. From MacKinnon's point of view, Easterbrook's interpretation of the protection the Constitution grants to pornography affords but one more instance of the invisibility and unreachability of gender oppression from the standpoint of legal liberal rationality. Thus does formal equality conceal and justify substantive inequality.²⁵ The invalidation of an ordinance aimed at redressing the inequality must be seen not as maintaining governmental neutrality but as siding with the status quo of male supremacy.²⁶

MacKinnon's epistemological critique, like liberal feminist critique, addresses itself to specious generalizations about gender. She aims to expose the substantive content of pseudo-formal principles and the overweening claims to an unattainable objectivity of authoritative male law, morality, and science. For liberal theorists, the target of critique is bad science; for MacKinnon, it is also what critical Marxists sometimes call scientism—that is, ideology tricked out as timeless universal truth.

MacKinnon, critic of the specious universality of liberal legalism, has been in turn accused of trafficking in universals: She is charged with purveying a theory of gender that distorts and ignores the disparate experience of women unlike herself. It is to MacKinnon's theory of gender that I now turn.

II

For MacKinnon, the baseline theory with which she begins is not liberalism but Marxism. It is of Marxism that she asks, Is it adequate to the project of feminist critique of society in general and law in particular? MacKinnon finds Marxist methodology inadequate for the task of feminist theory construction in three respects:

1. MacKinnon rejects the proposition that class is more fundamental than gender. Therefore, she denies that the best accounts of gender oppression explain it reductively by reference to class phenomena and that a politics dedicated to class struggle on behalf of workers will encompass an adequate address to gender oppression. Gender is for MacKinnon the fundamental theoretical term in autonomous feminist theory.²⁷

2. MacKinnon rejects the temptation to engage in feminist reductionism, to treat gender as the fundamental social division that underlies and illuminates all other social antagonisms. In addition to rejecting the primacy of class analysis, she rejects the search for an all-encompassing theory of social conflict. She does not reduce class to gender, and she regards other forms of social oppression, notably racism, as also requiring autonomous theoretical explanation and political mobilization. She is consistently Marxist, as she herself describes Marx's own work, in claiming no objectivity or transcendence of standpoint for feminism. All that feminism claims for itself is to uniquely represent women's point of view, a point of view neither derivable from nor reducible to that of any other social category—for example, the human individual of liberal theory or Marxism's working class. It is a point of view that claims epistemologically privileged access to that which it represents—women's experience—and that is dedicated to furthering the interests of women as a class.²⁸

3. MacKinnon also distinguishes feminism from Marxism on the grounds that feminism employs—and, because of the profoundly isolating and mystified conditions of women's oppression, had to invent—a distinctive method. Its method is consciousness raising and its derivatives, all of which center on women sharing their experience with other women. The theory of gender emerges from and is tested against the experience of women as we have come to understand it in listening to and talking to each other.²⁹

MacKinnon, who with succinct audacity calls her theory of gender simply "feminism," adopts as her own the Marxist conception of the work of theory, the uncovering of the hidden roots of power in social relations. Although she renounces the goal of one all-encompassing theory of social conflict, she aspires to a comprehensive theory of gender as a system of social oppression. The secret of gender relations that feminism reveals is the sexual dominance of women by men. "Sexuality is to feminism," MacKinnon hypothesizes, "what work is to marxism."³⁰ "Sexuality is the social process that creates, organizes, expresses, and directs desire," and in so doing it socially constructs men and women.³¹ The nature of woman as constructed is the gratification of male desire, although there are as many variations in the meaning of erotic gratification as there are distinct cultures: "As the organized expropriation of the work of some for the use of others defines the class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman."³²

I would like to focus attention on six aspects of MacKinnon's sexual-domination-based account of gender.

1. Gender distinctions, like class distinctions, are hierarchical; to be gendered is to be socially assigned to one of a pair of complementary superior and inferior groups.

2. Gender embodies as it serves the sexual domination of men over women. Crucial to MacKinnon's theory of gender is the claim that socially constructed female nature—that is, gender as distinct from the biological substratum that for MacKinnon has no interesting social effects—is nothing but the projection of that which answers male desire, always including the subordination and inferiority of the female object of desire to the male sexual subject. MacKinnon theorizes that sexual exploitation—men's invidious pursuit of sexual pleasure—is the dynamic force that drives and sustains the subordination of women in all its facets. Female gender is an artefact of male lust and power.³³

3. Therefore, women exist for men. Traits common to us as a class bespeak our subordination rather than our authentic interest or volition.³⁴ MacKinnon's work is profoundly anti-utopian. For MacKinnon, feminism is an engine of critique and resistance to women's victimization. Feminist theory reveals that currently there is no well-founded basis for projecting positive values for women to aspire to live by, either counterculturally, in zones or pockets of resistance to male supremacy, or as an attractive vision of a post-male supremacist world to strive to bring into being. In her view, the positive traits, the distinctively female values and culture around which feminists such as Gilligan would center an affirmation of female worth, are nothing more than the traits assigned to women in order to serve men. Here is MacKinnon's description of Gilligan's mistake:

I do not think that the way women reason morally is morality "in a different voice." I think it is morality in a higher register, in a feminine voice. Women value care because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men.³⁵

Further, the powerlessness of women in male supremacist society produces a profound silence; it prevents women not just from "being heard" but also from "having anything to say."³⁶ Women's speech in more ample sense requires that women acquire more power than we have now. The liberatory work of feminist criticism is purely destructive; the positive work of social transformation would begin when there is a critical mass of awareness of the systemically exploitative nature of gender relations.

4. Just as MacKinnon sees women as victims of the male supremacist order, she sees men as its beneficiaries. Individual men may choose to renounce male power and privilege because they disdain to be oppressors and wish to enlist in the forces of liberation. However, MacKinnon offers men *qua* men no inducement to do so.

5. MacKinnon hypothesizes that both men and women in contemporary society experience male domination and female subordination as sexual, indeed, as the *sine qua non* of sex. The dominance and submission structure of sexual desire is a defining feature of male dominance in contemporary culture.³⁷ Absent sexual domination, our culture would know no sexual desire.

6. MacKinnon proposes "a new paradigm" of the social experience of sex in our civilization, one in which coercion is the norm and genuine consent and mutuality the exception.³⁸ The new paradigm follows from MacKinnon's sexual-domination-based theory of gender: If women exist in order to serve male desire, and sex is enjoyed as a consummation of domination, then it follows that the typical man in a typical sexual encounter will either tend to presume his "partner's" consent, be

indifferent to her wishes, or actively seek to impose himself upon her. Although MacKinnon is often erroneously understood to be arguing that all sex is rapelike, she does not regard all men as rapists or all sex as coerced. On her view, some of us lead atypical lives and some who lead typical lives experience atypical interludes of sex unmarred by domination. Most of us do not.³⁹

MacKinnon's blurring of the distinction between consensual sex and rape is controversial among feminists and anathema to nonfeminists. Yet one need not share her vision in order to recognize that it has enabled her to identify coercive sexuality as endemic in a broad range of circumstances that were until recently all but culturally invisible and whose victims have been outside the bourn of the law's protection. In no small part due to her theoretical and reform efforts, coercive sexuality and the law's tolerance of it have gained recognition as critical problems for the feminist agenda. We can no longer think of rape by the unknown assailant as an experience radically distinct from everyday intimacy; the realm of the sexually ordinary has been revealed to include marital, date, and acquaintance rape, incest and child abuse, workplace and schoolhouse sexual harassment.⁴⁰

MacKinnon's coercion paradigm can be seen as an elegant but terrible application of the central insight of feminist legal theory to the arena of sexuality. Feminist legal theorists have argued that the law both reflects and is constitutive of a fundamental social division between the public and the private realms, a division injurious to women in a myriad of ways. The private realm of family and intimate relationships has been left largely unregulated by law—in contrast to the public sphere—as a matter of deep structural social policy. The presumptions underlying the private/public distinction include, as the current law reflects, the (male) supposition that sexual relations are normally governed by free and mutual consent. The coercion paradigm of sexual relations provides a powerful means of challenging the privileging of the private realm as a domain in which mutuality and harmony of interests make regulation unnecessary. If women experience coerced sex as either typical or even substantially more common than the male view of social reality supposes it to be, then through maintenance of the private realm the law helps to render female gender a status of sexual victimhood.

I do not myself find MacKinnon's thesis that sexual exploitation is the life force or linchpin of gender inequality persuasive. Although sexual relations may commonly exhibit the dominance and submission patterning she describes, MacKinnon has not shown why sexual exploitation should be regarded as the primary cause rather than an effect of gender hierarchy. In my view, sexuality is also a domain of great variety and fluidity, as well as an area of life where men and women experience each other as peers in vulnerability and power—an equality that tends to be eroded as sexual relationships are folded into social and economic institutions that support male dominance. However, one need not accept MacKinnon's general theory of gender in its entirety to learn from what she has used it to bring into high relief: that women in our society share the experience of vulnerability to sexual victimization in a wide range of circumstances that the current legal order either ignores or condones. One need not hold with MacKinnon that to be a woman is to be a sexual victim *and nothing else* in order to accept that susceptibility to legally invisible or unreachable sexual victimization is a defining feature of female gender in our society. Further, the coercion paradigm can be explored and developed and its utility

tested independent of the general theory by the standard feminist methods endorsed by MacKinnon, searching for commonalities in the self-reported experience women share with each other, as well as by conventional social science.

III

MacKinnon has pursued a style of theorizing that has come increasingly into disfavor among feminist scholars. She has striven to develop a "linchpin" theory, a comprehensive explanation of gender exploitation in an era in which postmodernist trends in philosophy, social theory, and jurisprudence have led to skepticism about the legitimacy of theorizing on such an ambitious scale.⁴¹ Feminist theorists in particular have become increasingly critical of claims to discern transhistorical and transcultural universality, of claims to find a concept of gender, whether rooted in biology or cultural universals, that serves to explain the condition of all women.⁴² Even more urgently, because of its immediate relevance to contemporary feminist politics, feminist theorists have resisted efforts to develop and impose a unitary feminism that speaks for women of every class, race, ethnicity, and sexual orientation. The weight of feminist opinion today rests with those who have cautioned that feminism must be pluralistic. These critics have argued that the quest for the essentially female has led to the privileging of white middle-class women's experience as women's experience as such and the silencing—yet again, but this time by their elite sisters—of the voices of women of color and working-class women. I will below defend the value of MacKinnon's approach against excessively pluralizing tendencies in feminist theory.

I understand *strong* gender essentialism to hold that women share certain characteristics that have been invariant in all the historically and culturally diverse manifestations of human society and that either (1) account for women's distinctive moral (in the broadest sense) traits, or (2) explain women's subordination by men, or (3) both. Biologically based accounts that interpret women's social existence as elaborations of our reproductive role—whether narrowly construed (as by Shulamith Firestone) or broadly construed (as by Nancy Chodorow)—are clearly of this type.⁴³ MacKinnon eschews biologism, insisting that men and women are pure social constructs and that there is no well-founded reason to suppose that purely biological gender would map on to traits that have social significance in the absence of a system of male domination.

There are passages in her work where MacKinnon speaks the language of strong essentialism.⁴⁴ If MacKinnon is to be consistent, however, strong essentialism is barred to her by her method. MacKinnon's method requires that we begin with and test theory against the experience of women. She asserts that feminist method is a historical advance in that it democratizes social theory; it gives at least a portion of control over the problems focused upon and the content of theory to those whose interests social theory seeks to advance. This grounding in women's experience is a constraint that prohibits social theory from sweeping too broadly to employ feminist method. A feminist may speculate about the grand sweep of history, but she cannot theorize about it without violating the canons of feminist method. Moreover, MacKinnon has no need to make transhistorical claims for her theory of gender domination. Her goals require only what might be called *weak* essentialism, or less paradoxically, the search for (warranted, not underinclusive) generalizations about

the experience and condition of women in our society. The principle of parsimony urges suitable restraint. I understand MacKinnon, then, to be asserting that, within the frame of modern European industrial culture and despite the varieties and particularities of experience of women of different social classes, races, or ethnicities, the concept of gender yet powerfully helps recover, focus, and organize common experience of self-identity and moral outlook, or of oppression, or both.

However, of late, MacKinnon's commitment to constructing genderwide theory, even though pursued within a methodological framework that countenances only socially and historically contextualized generalizations, has been enough to call forth criticism from feminists persuaded that the attempt to generalize about the experience of all women is doomed to failure for at least two reasons. First, theories about gender such as MacKinnon's invariably treat the experience of some women—the white middle-class women from whose ranks theorists typically come—as the experience of all women. Such “white solipsism” is self-defeating and offensive to those whom it excludes.⁴⁵ Second, MacKinnon supposes that it is possible to extract without distortion or falsification from the complex experience of, for example, a black woman, that portion of experience of self and of victimization attributable to her gender rather than to her race. This supposition is not borne out by black women's accounts of their own experience. Black legal feminist theorist Angela Harris and other feminists of color contend that their experience cannot be so fragmented without fatal loss of meaning; race and gender oppression are experienced as fused and inseparable.⁴⁶ They argue that the experience of gender by white women is profoundly different from that of women of color. White middle-class women do not suffer from multiple sources of oppression; indeed, as whites we are beneficiaries of and often participate in racism. MacKinnon's unconscious expression of racism is to ignore, in violation of the strictures of feminist method, black women's own accounts of their experience.

In a powerfully instructive article exposing the poverty of white solipsism, Angela Harris rejects MacKinnon's coercion paradigm; she finds that MacKinnon's universalizing reading of rape ignores and distorts the experience of women of color: “This . . . is an analysis of what rape means to white women masquerading as a general account; it has nothing to do with the experience of rape of black women. For black women, rape is a far more complex experience, and an experience as deeply rooted in color as in gender.”⁴⁷

The crux of MacKinnon's analysis of rape is that legally redressable rape is but one—relatively infrequent at that—form of coerced sex. Sex seen as consensual from the male perspective is often, even usually, coerced sex from the feminist perspective. We may here include forced sex that is indistinguishable from rape except that the man has a privilege that blocks legal responsibility (marital rape) and acquaintance rape, which is usually legally unreachable because the prosecution cannot establish lack of consent in a court of law. Child abuse and incest are similarly legally invisible when victims are unable to see redress or are incompetent to give testimony. We may also include sex that does not involve force but is more rapelike than consensual in that the woman's compliance is induced by her dependence rather than by sexual desire.

Harris criticizes MacKinnon for failing to recognize—because she failed to listen to the voices of black women themselves—that black women's experience is qualitatively different from that of white women: MacKinnon, writes Harris, treats “‘black,’ applied to women [as] an intensifier. . . . If things are bad for everybody

(meaning white women), then they're even worse for black women."⁴⁸ Harris discusses three features of black women's experience of rape that illustrate the distortion wrought by the leaching out of color and the application of MacKinnon's paradigm: (1) If whites think of stranger rape first when they think of rape, black women's historical experience focuses as much on rape by white owners and domestic employers. (2) The rape of a black woman in slavery was not a crime. Even after emancipation the law was seldom used to protect black women from the depredations of men, black or white. Criminal rape only happened to white women; "what happened to black women was simply life."⁴⁹ (3) Finally, a primary signification of rape for black men and black women is the brutalization of black men accused of raping white women, a brutalization in which white women were complicit when they failed to acknowledge their willing roles. Harris summarizes as follows:

Thus, the experience of rape for black women includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white women, but also a unique ambivalence. Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetuating it against men. The complexity and depth of this experience is not captured, or even acknowledged, by MacKinnon's account.⁵⁰

There are two questions that I would like to raise about Harris's analysis of the black rape experience and her critique of MacKinnon. I will proceed from the premise that Harris's analysis of the cultural meaning of rape to black women is completely accurate.⁵¹

(1) It appears to me that the validity of Harris's analysis of the black rape experience and MacKinnon's coercion paradigm are entirely compatible. MacKinnon need not, and I think would not, deny that black female experience is unique and qualitatively distinctive in just the ways that Harris claims it to be. MacKinnon denies over and over again any desire to homogenize the experience of oppression: "What we have in common is not that our conditions have no particularity in ways that matter."⁵² MacKinnon claims only that along with the particularity of distinctness there is common experience of rape, common experience of various forms of coerced sex that the male paradigm of stranger rape obscures. The first question I would like to ask black women is this: Do you recognize the commonality of experience of powerlessness and of legal invisibility in black and white marital rape, or in sex forced on an Irish domestic servant in Boston with nowhere to go except to another potentially equally dangerous household, or in sex forced on a black domestic in Atlanta or New York? MacKinnon, I believe, helps us to understand what these varieties of otherwise culturally and historically differently conditioned experience share: Although from the point of view of feminism they are varieties of rape, from the point of view of the law they are cases where consent is presumed and where the law does not concern itself with whether or not consent was in fact withheld.

(2) Harris has explained that for black women rape has as a primary signification "the terrorism of black men by white men, aided and abetted . . . by white women."⁵³ The question I would ask my black sisters is this: Does Harris here conflate the *experience* of rape with the *politics* of rape? I believe this may be the case. Let me amplify. I suspect that what may be of fundamental concern to Harris

is resisting white feminist demands that she choose her gender over her race in circumstances in which Harris and other women of color are torn by the conflicting pulls of facets of their multiplicitous identity. Commitment to the struggle against racism as well as the experience of unredressable rape by whites in a white supremacist system surely impel black women to refuse to lend legitimacy to any antirape campaign that is insensitive to the need to challenge the white paradigm of rape—that is, the strange black man who jumps out of the bushes. Here I must say I see no in-principle division of political interests between black and white women. All women have an interest in challenging the stereotypical notion that rape is something that men of an alien and despised social group inflict on our (fill in the blank) women. Rape is predominantly a same-race, not a racial crossover, crime.⁵⁴

Nonetheless, MacKinnon and other white feminists may be guilty of blithely presuming that the form of oppression from which we suffer makes the most powerful claim in all circumstances on the political loyalties of all our sisters. Harris takes MacKinnon to task for her analysis of the case of a Pueblo woman who married a Navajo man and whose children were denied inheritance rights in communal Pueblo land.⁵⁵ The Pueblo ordinance granted such rights to children of mixed marriages when the father was Pueblo but not when the Pueblo parent was the mother. MacKinnon condemns the tribal ordinance because it forces female but not male Pueblos to choose between their gender and tribal identity. Harris criticizes MacKinnon for making the assumption that a woman of color should always choose her gender over her race and therefore analyzing Julia Martinez's case without finding it necessary to inform herself concretely about the specifics of the issues as understood by the Pueblos of Santa Clara.⁵⁶

The defects of MacKinnon's analysis of the Santa Clara Pueblo case are not properly attributed to her feminist theory. MacKinnon's feminism is not reductionist. She is not committed to the view that gender identity or gender oppression has political primacy. MacKinnon can maintain with perfect consistency that all women share as women certain common traits or experiences; that the proper tactical or strategic response to multiple oppression cannot be determined a priori and should not be presumed to be the same in every context; and that it is not for white women to tell black or Native American women where their duty or interest lies in circumstances of conflict. MacKinnon is committed by her standpoint epistemology to recognize that blacks and other oppressed groups must in turn ground social theory and political choice in their own experience and interests as they understand them. MacKinnon's feminism claims neither to be the only nor to be the fundamental theory of the oppressed.

Despite MacKinnon's theoretical boldness and ambition, her gender generalizing is actually of a quite modest variety. She is best read as seeking warranted generalizations about women's lives in modern industrial society rather than speaking for all ages. Further, she does not hold that women's oppression is more fundamental than that suffered by others; nor does she hold that addressing gender oppression should necessarily take priority over other social issues. She apparently regards the generalizing theorist—herself—as bearing the burden of proof that her theory is sufficiently inclusive to describe the experience of all women. Finally, MacKinnon acknowledges that even if gender has common meaning, it also has distinctively contextualized meanings for women with different cultural histories, one among

which is that of the white middle class. Should this modestly framed insistence on the possibility of making genderwide generalizations be rejected? In her recent extended philosophical critique of essentialism, Elizabeth Spelman argues that any instance of what might be called "pure feminist theory" falsifies and distorts as it attempts to abstract gender traits from the particularities of women of diverse races and classes. I would like to briefly consider two arguments that Spelman makes in her refutation of essentialism.

(1) Spelman argues that essentialists, whether mainstream apologists or dissonant critical theorists like MacKinnon, confound the categories employed by their theories to describe or explain the social world with reality itself; essentialists reify the social categories of whatever conceptual scheme has them in its sway. Spelman argues that classifying people may be done in an indefinite number of ways that reflect the purposes and interests of those doing the classifying. The criteria used to sort people into social groupings reflect the varied and often antagonistic purposes theory serves rather than the essential racial, gender, or class properties of the people classified.⁵⁷ Spelman's argument brings to bear against essentialism a watershed insight common to several overlapping philosophical traditions whose progenitors include John Dewey, Ludwig Wittgenstein, and Rudolf Carnap: The world can be described in alternative ways bespeaking distinctive theoretic purposes. We confuse the social ontology of our theories with the way the world really is only to the detriment of our understanding of both theory and the world.

For those of us who share enough philosophical common ground with Spelman, her argument is irresistible against (strong) gender essentialism, clearly the doctrine she had in view in making the argument. It does not address the gender generalizing of a theorist like MacKinnon, who does not claim to describe fundamental or unchanging reality and who acknowledges and wants to learn from other perspectives. MacKinnon is not susceptible to the criticism that she confuses the social ontology of a favored viewpoint with an objective and uniquely accurate view of obdurate reality.

(2) Spelman also argues that essentialists are proponents of what she calls "additive analysis" or "a version of personal identity we might call tootsie roll metaphysics":

Each part of my identity is separable from every other part, and the significance of each part is unaffected by the other parts. On this view of personal identity (which might also be called pop-bead metaphysics), my being a woman means the same whether I am white or Black, rich or poor, French or Jamaican, Jewish or Muslim. As a woman, I'm like other women; my difference from other women is only along the other dimensions of my identity. Hence it is possible on this view to imagine my being the same woman even if my race were different—the pop-bead or tootsie roll section labeled "woman" is just inserted into a different strand or roll.⁵⁸

Spelman's philosophical critique of additive analysis, like Harris's critique of white ignorance of and indifference to black women's experience, provides a wealth of insight into the pitfalls—and pratfalls—of white solipsism. Nevertheless, Spelman's uses her critique of "additive analysis" too extravagantly: In forbidding any generalization along purely gender lines, Spelman has lost the thread of her first argument considered above. She is treating a useful theory or generalization (ad-

ditive analysis distorts) as a uniquely correct description of social reality (it is never useful to, it is always a distortion to, generalize along purely gender lines). Spelman's critique is a potent tool to accomplish certain purposes: to expose white solipsism, to insist on proper attention to the voices of all women, to call attention to the interplay among race, class, and gender in the formation of personal identity or the way in which people are treated. But there are other purposes. One such is *to attempt* to abstract commonalities from the diversity of women's experience for the sake of better understanding and pursuing common objectives. Attention to common experience—if such there be—like attention to diversity, is a methodological virtue worth cultivating.⁵⁹ Kaleidoscopic pluralism, like excessive abstraction, poses dangers to feminist theory and effective political action on behalf of the interests of women.

The search for a "total" theory of gender such as MacKinnon seeks may prove elusive or even illusory. This eventuality would not detract from the utility of theoretical illuminations of aspects of women's common experience. I submit that MacKinnon's coercion paradigm is just such an illumination of women's common experience and its encounter with the dissonant stance of the law.

Notes

I would like to thank Katharine Bartlett, Sally Haslanger, Christine Littleton, and Charlotte Witt for their illuminating comments on earlier drafts of this paper.

1. See MacKinnon's *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press, 1979), *Feminism Unmodified* (Cambridge, Mass.: Harvard, 1987), and *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard, 1989). The latter two collections make MacKinnon's essays and speeches of the past decade readily available. Her influence, as well as the critical assessment of her role in the development of feminist jurisprudence, can be traced in Katharine Bartlett, "MacKinnon's Feminism: Power on Whose Terms?" 75 *California Law Review* (1986); Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes," 41 *Stanford Law Review* (1989); and Frances Olsen, "Feminist Theory in the Grand Style," 89 *Columbia Law Review* (1989).

2. A fourth approach, postmodernism, will be discussed in part III of this chapter. I make no claims to an exhaustive or definitive discussion of the strands that contribute to contemporary feminist legal theory. See Katharine Bartlett, "Feminist Legal Methods," 103 *Harvard Law Review* (1990), on the development of feminist legal theory during the past decade. See also Susan Okin, "Sexual Difference, Feminism, and the Law," 16 *Law and Social Inquiry* (1991).

3. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

4. *Craig v. Boren*, 429 U.S. 190 (1976).

5. See Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," 7 *Women's Rights Law Reporter* (1982).

6. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Michael M. v. Superior Court*, 450 U.S. 464 (1981), respectively. See Williams, "Equality Crisis," p. 183.

7. Carrie Menkel-Meadow, "Portia in a Different Voice: Speculation on a Women's Lawyering Process," 1 *Berkeley Women's Law Journal* (1985).

8. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard, 1982), p. 18.

9. *Ibid.*

10. Bartlett, "Feminist Legal Methods," p. 849; Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication," 72 *Virginia Law Review* (1986), p. 605.

11. Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges," 61 *Southern California Law Review* (1988).

12. The term *liberal legalism* is Karl Klare's. See his "Lawmaking as Practice," 40 *Telos* (1979). MacKinnon, like writers associated with the critical legal studies movement, uses it as a convenient label for both the legal system we have and liberal jurisprudential understandings of it.

13. MacKinnon, *Towards a Feminist Theory of the State*, p. 162.

14. MacKinnon distinguishes between the theory of ideology of Marx, which she accepts, and the Marxism of Engels and the Second International, which lapsed into objectivism, claiming that dialectical materialism could yield transcendent truths (*ibid.*, pp. 107-108).

15. See Karl Marx, "On the Jewish Question," in David McLellen, ed., *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977).

16. MacKinnon, *Towards a Feminist Theory of the State*, p. 162.

17. *Ibid.*, p. 163.

18. *Ibid.*

19. One need not be a Marxist to motivate this style of critique. Justice Holmes, for example, makes the same kind of critique in his dissent in *Lochner v. New York*, 198 U.S. 45 (1905). Of course, some Marxists would argue that wage and hour legislation provides merely the illusion of reform, further disguising while perpetuating capitalist exploitation. MacKinnon apparently regards genuine legal reform as a legitimate goal of the feminist movement.

20. See "Pornography," chaps. 11-16 of *Feminism Unmodified*, pp. 127-205.

21. *Feminism Unmodified*, p. 262.

22. *Ibid.*, p. 148.

23. Robin West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission Report on Pornography," 1987 *American Bar Foundation Research Journal*, p. 686.

24. *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* *Hudnut v. American Booksellers*, 475 U.S. 1001 (1986).

25. MacKinnon applies to the arena of gender an argument against the possibility of government neutrality in the marketplace of ideas that has been the subject of debate among legal scholars, philosophers, and political scientists for some time. The classic defense of the value of neutrality in constitutional law is Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Columbia Law Review* (1959). See also Eric Hoffman, "Feminism, Pornography, and the Law," 133 *University of Pennsylvania Law Review* (1985); Robert Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," 76 *California Law Review* (1988); and Cass Sunstein, "Pornography and the First Amendment," 1986 *Duke Law Journal*.

26. MacKinnon's critique of the specious gender neutrality of the law does not settle, but rather sets the stage for, the intrafeminist controversy about the wisdom of pressing for legal regulation of pornography. At the strategic level, the most important division among feminists with respect to pornography is between those who hold the harms of pornography to be sufficiently great, and sufficiently reachable through regulation, to outweigh the potential harms of regulation, and those who do not. Critics of regulation argue that to invite the state to suppress pornography will result in the use of state power to reinforce conservative gender stereotypes to the detriment of women and the fragile progress we have made. See "Feminist Anti-Censorship Taskforce Brief in *American Booksellers v. Hudnut*," 21 *Michigan Journal of Law Reform* (1987-88); and West, "Feminist-Conservative Anti-Pornography Alliance."

27. See MacKinnon, *Towards a Feminist Theory of the State*, "A Critique of Marx and Engels," pp. 13-36.

28. MacKinnon, *Towards a Feminist Theory of the State*, "Methods and Politics," pp. 106-125, esp. 115-116. See Bartlett, "Feminist Legal Methods," pp. 872-877, on the need for a feminist critique of feminist standpoint epistemology.

29. See MacKinnon, *Towards a Feminist Theory of the State*, "Consciousness Raising,"

pp. 83–105. "Experience" is, of course, a problematic and theory-laden category; I make no attempt to analyze it here.

30. MacKinnon, *Feminism Unmodified*, p. 48.

31. *Ibid.*, p. 49.

32. *Ibid.*

33. MacKinnon's theory lacks a genetic or etiological dimension. MacKinnon does not attempt to account for how it is that there are men and women or how men came to dominate women.

34. Misogynist art provides some rich examples that can serve to illustrate MacKinnon's notion of female gender as the objectification of male sexual desire. Recall that in D. H. Lawrence's celebration of sexuality, *Lady Chatterley's Lover*, Mellors, the gamekeeper, instructs his paramour that the completely feminine sexual partner ought not to achieve orgasm; she should be solely engrossed in her lover's satisfaction. Or consider Fellini's *8 1/2*—in the hero's fantasy, the women of his household have to "go upstairs" at the age of 30; when they are no longer sexually interesting to him they disappear or perhaps cease to exist.

MacKinnon makes it clear that although the dominance of men over women has established the social meanings of male and female gender, biological males and females can play either gender role. Gender hierarchy patterned on heterosexual relations is for her typical of homosexual and lesbian life. Similarly, women sometimes assume the male role in intimate relationships with men or in society's range of hierarchical institutions. Far more unusual than decoupling the standard combination of biological sex and social gender is the achievement of unexploitative sexual and other social relationships.

35. MacKinnon, *Feminism Unmodified*, p. 39.

36. *Ibid.*

37. *Ibid.*, p. 148.

38. *Ibid.*, p. 6.

39. On this point, see Littleton, "Feminist Jurisprudence," p. 777, and Olsen, "Feminist Theory in the Grand Style," pp. 1156–1157.

40. Substantially more women are raped by persons known to them than by strangers. Based on survey interviews collected from a sample of 60,000 households, the National Crime Survey (NCS) finds the following incidence of rape in 1988 among women over 12:

Relationship to victim:	
Stranger	53,310
Nonstranger	74,050
spouse	8,145
other relative (not parent)	4,443
well known but unrelated	33,322
casual acquaintance	26,140

See U.S. Department of Justice, *Criminal Victimization in the U.S. in 1988* (Washington, D.C.: GPO, 1990).

Authoritative estimates on the prevalence of rape are difficult to obtain. The NCS also estimates that 8 percent of American women are raped in the course of their lives. We can probably take this estimate as a lower bound: Women surveyed may well not have appreciated that various forms of coercive sex they had experienced would count as rape and/or they may not have been willing to report such incidents to the interviewers. In *Rape in Marriage* (Bloomington: Indiana University Press, 1990), Diana Russell finds, based on a sample of 930 women in San Francisco, that 44 percent of women are raped at least once during their lifetime. This estimate in Russell's controversial study could be taken, at the current juncture of inquiry, as an upper bound.

41. "Sexuality," writes MacKinnon, in summarizing her theory, "is the linchpin of gender inequality" (*Towards a Feminist Theory of the State*, p. 113).

42. See Bartlett, "Feminist Legal Methods," pp. 847–849; and Nancy Fraser and Linda Nicol-

son, "Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism," in *Universal Abandon?* ed. Andrew Ross (Minneapolis: University of Minnesota Press, 1988).

43. See Shulamith Firestone, *The Dialectic of Sex* (New York: Morrow, 1970); and Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

44. See, for example, MacKinnon, *Towards a Feminist Theory of the State*, p. 105; or *Feminism Unmodified*, pp. 166–167.

45. The phrase is Adrienne Rich's; see "Disloyal to Civilization: Feminism, Racism, Gynephobia," in *On Lies, Secrets, and Silence* (New York: W. W. Norton, 1979), quoted by Angela Harris, "Race and Essentialism in Feminist Legal Theory," 42 *Stanford Law Review* 588 (1990).

46. Harris, "Race and Essentialism," p. 588.

47. *Ibid.*, p. 598.

48. *Ibid.*, p. 596.

49. *Ibid.*, p. 599.

50. *Ibid.*, p. 601.

51. There are other important critiques of the inattention to women of color in mainstream feminist theory, including that of Kimberle Crenshaw. In her "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" in 1989 *University of Chicago Legal Forum*, Crenshaw argues persuasively that women of color experience distinctive forms of oppression because of their membership in two subordinated groups. She argues that their oppression has been ignored by both antisexist and antiracist movements, neither of which can achieve its formal objectives until the interaction between race and gender subordination is acknowledged, understood, and addressed.

52. MacKinnon, *Feminism Unmodified*, p. 76. See also MacKinnon's "Feminism, Marxism, Method, and the State," 8 *Signs* 520(n7) (1983), in which MacKinnon draws out the implications of her conception of feminist method with respect to reports of their experience by women of color that differ from those of whites: "I aspire to include all women in the term 'women' in some way, without violating the particularity of any woman's experience. Whenever this fails, the statement is simply wrong and will have to be qualified or the aspiration (or the theory) abandoned."

53. Harris, "Race and Essentialism," p. 599.

54. In 1987 more than 70 percent of black rape victims reported that the men who raped them were black; more than 78 percent of white victims reported that the men who raped them were white. U.S. Department of Justice, *Criminal Victimization in the United States in 1987* (Washington, D.C.: GPO, 1989).

55. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

56. See "Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo," in MacKinnon, *Feminism Unmodified*, pp. 63–69; and Harris, "Race and Essentialism," p. 594.

57. Elizabeth V. Spelman, *Inessential Woman* (Boston: Beacon Press, 1988), p. 148.

58. *Ibid.*, pp. 136–137. See, generally, chs. 5 and 6, pp. 114–159.

59. See Susan Bordo, "Feminist Skepticism and the 'Maleness' of Philosophy," 85 *Journal of Philosophy* (1988), who, working largely from within the perspective of continental philosophy, expresses similar concerns.