

## REVIEW ESSAY

### THE NATURE OF DOMINATION AND THE NATURE OF WOMEN: REFLECTIONS ON FEMINISM UNMODIFIED

#### A REVIEW OF

FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW. By Catherine A. MacKinnon.\* Cambridge, Massachusetts: Harvard University Press, 1987. Pp. 1, 228. \$25.00.

Lucinda M. Finley\*\*

#### I. INTRODUCTION

There has been a recent explosion in feminist jurisprudence and in legal scholarship inspired by feminist concerns. Feminism is one of the most important movements in legal scholarship today,<sup>1</sup> and one of the most potentially transformative, because it challenges the definitions, assumptions, ideals, and epistemological notions of a universal, objective rationality that underlie our legal system.

Although feminist theory is diverse, with liberal, radical, Marxist, and socialist strands,<sup>2</sup> most feminist theories share some key attributes. Feminist theory starts from the perspective of women, and examines and critiques existing doctrines, practices and structures in light of women's experiences and needs. By taking seriously the idea that women's per-

---

\* Professor of Law, Osgoode Hall Law School; Visiting Professor of Law, Yale Law School.

\*\* Associate Professor of Law, Yale Law School. I would like to thank the students in my seminar on "Feminist Theory and the Law," whose challenging discussions of feminist theory, MacKinnon, pornography, sexuality, models of legal intervention, and the nature of law have helped shape my ideas.

<sup>1</sup> I make this assertion on the basis of the proliferation of feminist scholarship, its increased appearance in mainstream legal periodicals, the huge and eagerly interested attendance at workshops on the subject sponsored at legal academic conferences such as various meetings and workshops of the Association of American Law Schools and the Law and Society Association, and the fact that now even a few prominent male legal academics are proclaiming the importance of feminism. See, e.g., Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Perry, *Preface*, 81 NW. U.L. REV. 589, 591 (1987); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589 [hereinafter *Pornography*]; Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988).

<sup>2</sup> For a description and analysis of these various strands of feminist theory, see A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

spectives differ from and call into question men's values and perceptions, feminist theory casts doubt on the possibility of a universal, aperspectived objective reality. The purpose and the practice of feminist theory is to name, expose, and eliminate the unequal position of women in society. While there is much debate among those who embrace the various strands of feminist theory about the appropriate vision of equality and the best ways to achieve it,<sup>3</sup> all feminist theorists share the underlying goal of eradicating the socially and economically inferior position of women.

Catherine MacKinnon is one of the leading voices in the feminist legal movement. Her work has been profoundly important, because in naming women's experiences and injuries—as, for example, in her book *Sexual Harassment of Working Women*<sup>4</sup>—she has forced the legal system to recognize these injuries as systematic products of male domination and as instances of discrimination. Her theories and their applications in diverse contexts have now been collected in *Feminism Unmodified: Discourses on Life and Law*,<sup>5</sup> a compendium of speeches she gave during the 1980s. The diversity of subjects covered in this collection—ranging from visions of equality, sexual harassment, battering, rape, privacy doctrine, abortion, women in sport, conflicts between cultural integrity and women's self-determination, images of women in law, to pornography—affords an opportunity to absorb her theory in its full richness, and to appreciate the connections among the subjects she analyzes. In the process, one comes to understand how broadly her theory applies and how deeply it challenges existing arrangements. Her ideas challenge us to look in new ways at everything about men and women that we may currently take for granted, and to stop accepting as natural or inevitable assumptions that—as she often powerfully demonstrates—harm women and lead to gender hierarchy.

There are many advantages to the speech format used in *Feminism Unmodified*. One is that the language has the immediacy and accessibility of the spoken word. The book is truly in MacKinnon's voice, unmediated by the distancing formality often imposed on us by the conventions of writing; her full passion and involvement with her subject come through, helping the reader engage directly with her ideas. The presentation also has a lucidity that is lacking in some of MacKinnon's other written works, and this makes *Feminism Unmodified* the best starting point available for acquainting oneself with MacKinnon's ideas. By collecting the speeches within each section in chronological order, the

---

<sup>3</sup> For a description of the competing visions of equality that led to the recent feminist debate over maternity leave policies, known as the special treatment/equal treatment debate, see Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

<sup>4</sup> C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1983).

<sup>5</sup> C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

book allows us to see the development in her thought—how an idea advanced tentatively in one year as a possible implication following from her theory is later developed into a full application or refining enrichment. The speech format has some minor drawbacks—for example, there are instances of repetition (although, because many of her ideas so radically challenge existing ways of thinking, repetition often enhances understanding), occasional tendentiousness or polemic, and failure at times to develop arguments fully or to acknowledge counterarguments thoroughly. But these drawbacks hardly detract from the brilliance and excitement of her ideas: whether one eventually agrees with all, some, or none of what MacKinnon has to say, she will certainly challenge you to examine deeply—and often in unsettling but productive ways—your reactions, your perceptions of reality, your conceptions of equality and discrimination, your feelings about your own sexuality and its expression, and your beliefs about gender roles and possibilities. If your reaction is to defensively or angrily disagree with some of what she says, especially about sexuality and pornography, I encourage you to wrestle with the reactions her ideas produce in you, to try to understand what nerve she has hit and why. The fact that her work so often hits a very sensitive nerve might be an indication that a lot of what she has to say is fundamentally important and crucially correct. At the very least you will have a profound learning experience.

What I have just said suggests that MacKinnon's work is highly controversial, often virulently so, among feminists and nonfeminists alike. After briefly summarizing her essential ideas, I will analyze the nature of this controversy. As I find myself agreeing more and more with her theories, I am increasingly perturbed by the controversy they generate, because I think that implicated in the conflict is a fundamental question about the nature of male power and its control over what counts as knowledge in our society. I also want to examine the debate among feminists over MacKinnon's position on pornography, in the context of my own divided reaction, which includes simultaneous profound agreement with much of what she says about pornography, and yet qualms about her theory regarding the root of gender subordination and about the vision of women it implies. Ultimately, the debate over pornography suggests that legal language and constructs as presently conceived are inherently inadequate for comprehending and validating women's reality. Indeed, because of these limitations, even when laws are defined and drafted by women, the law will remain a limited tool for eliminating women's subordination.

## II. THE BASIC THEORIES SUMMARIZED

The speeches in this book are persistently, as MacKinnon says, "looking for answers to the big questions of the subordination of women to men: its roots, damage [to women], pervasiveness, tenacity, enforce-

ment, and capacity for change.”<sup>6</sup> The first theme, or answer, is that inequality is sexualized; the relation of men and women is one of dominance and submission, and this relationship is constantly played out in sex, in a way that defines sex as a man taking, or possessing, or dominating a woman, and a woman being taken by, accepting, or submitting to a man.<sup>7</sup> The second theme is that dominance, and not difference, is the key component of gender. Gender is not simply a bipolar distinction, but is a system of power relations that make the very fact of difference seem to matter so much. Underlying the view of gender as a difference, a view that our equality jurisprudence has been built upon, is the notion that what is associated with the male is the norm to be aspired to or assimilated into, and that what is female is the difference, the aberration to be overcome. Thus, “[t]he idea of gender difference helps keep the reality of male dominance in place.”<sup>8</sup> Her third response to the big questions, the focus of the final third of the book, is that “pornography in America [is] a key means of actualizing [the] two dynamics”<sup>9</sup> of sexualized inequality and gender as a relation of dominance. Because pornography contributes to, and indeed causes the objectification and the domination of women, it is a form of sex discrimination and thus should be actionable as a civil rights violation:

Pornography turns sex inequality into sexuality and turns male dominance into the sex difference. . . . By packaging the resulting product as pictures and words, pornography turns gendered and sexualized inequality into “speech,” which has made it a right. Thus does pornography, cloaked as the essence of nature and the index of freedom, turn the inequality between women and men into those twin icons of male supremacy, sex and speech, and a practice of sex discrimination into a legal entitlement.<sup>10</sup>

Underlying these three principle themes is an important set of ideas about power to control and define knowledge, and thus about the relationship between prevailing epistemology— notions of objectivity, credibility, and reality—and male dominance. Men have defined their point of view as objective truth, so that women’s assertions of a contrary experience are labeled incredible, or are rendered completely invisible. This power to define has been used to define sex and sexuality as what men want; it has been used to define as normal and consensual sex what many women perceive to be harmful, or coercive, or violative.<sup>11</sup> Throughout the book, by giving voice to the experiences of women, by breaking women’s silence, MacKinnon constantly challenges male-defined conceptions of reality, and demands that women’s reality be acknowledged and credited and used to redefine.

---

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 2-3, 46-62.

<sup>8</sup> *Id.* at 3; *see also* 32-45.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 53-54, 58-59.

Also underlying the three principal themes is a set of implicit normative visions about people and society. Inequality and disparate conditions of power are bad. They make dominance and submission possible, and submission due to powerlessness is incompatible with self-determination and self-realization. No person, in the absence of the coercion of power imbalances, could choose submission to another, particularly as a means of sexual fulfillment and expression. Those women who do say they enjoy subordination or submission in sex are simply demonstrating how deeply we have all internalized the harmful values of dominance. Or they are announcing an adaptive strategy for survival in a world where they are systematically unequal, and where that inequality is fundamentally expressed through sex; thus they are displaying something akin to false consciousness. These views seem to suggest a conception of autonomy as self-determination, a self-determination conceived not in relation to others, but only as an opportunity to discover what one really wants free of the constraints that come from social relations. If this is so, then MacKinnon's conception of the ideal society and personhood actually shares a lot with classic liberalism.

The implications of these basic themes are numerous. Perhaps the most important implication is that she broadens the definition of discrimination, teaching us that sex discrimination comprises much more than the traditional legal theories of individual sameness/difference equality would admit. Her conceptualization of inequality as a matter of dominance—and of the traditional emphasis on difference as a mere by-product of dominance—leads to a broader conclusion: that all practices and social relations that contribute to the subordination of women, or that result from women's subordinate status, are and should be legally actionable forms of sex discrimination. Sexual harassment, battering, legally recognized rape, and other forms of coercive sex, job segregation, the low economic value assigned to women's work, the lack of reproductive freedom for women (including the lack of financially available abortion), the conflation of sex with violence and with subjugating objectification in pornography—all can be understood as sex discrimination.<sup>12</sup> Inevitably, there can be arguments, even from women's perspectives, about what practices actually subordinate and what reform strategies will best alleviate subordination. However, this aspect of MacKinnon's theory is powerfully compelling, and challenges us to reexamine basic structures and institutional practices in a way that traditional equality theory simply can not, because traditional theory accepts most structural aspects of the status quo as given—or as the norm against which things should be measured.<sup>13</sup> Thus, the dominance approach promises to do much more for reducing gender hierarchy and the subordination of women than traditional antidiscrimination equality law.

---

<sup>12</sup> *Id.* at 40-41, 93-102.

<sup>13</sup> *Id.* at 43.

Women have learned in far too many contexts of the limitations of traditional equality analysis, with its focus on the differences between men and women, to have much faith in it as a socially transformative strategy. While it is well suited to gaining women access to certain male privileges,<sup>14</sup> it is based on a male norm and hence leaves that norm unquestioned. Thus whenever it is the male norm itself that is operating to disadvantage women, the difference approach does not even perceive the disadvantage, much less do anything about it. Comparable worth cases, for example, may legally fail because of the fact that there are few men, and thus no male pay rates, in traditionally female jobs to provide a standard for comparison with women's pay rates. The legal focus on comparison with men obscures the fact that it is precisely because a job is perceived as a "woman's job" requiring "female skills" that the pay is low. In the workplace, pregnancy leave is viewed as "special"—somehow preferential and thus suspect—treatment for women, because women become pregnant while men do not. This obscures the fact that employers' notions of what to give leave for (disabilities, but not family responsibilities) and how much leave to give (usually much less than required by the demands of normal pregnancy and childrearing) have been developed with reference to an assumption that the typical worker is a man.<sup>15</sup> In divorce law, the reform movement to institute formal equal treatment, or gender-neutral property division and custody laws, has had drastic adverse consequences on the economic well-being of women and children, because women and men are not equally situated in terms of marketable skills, economic resources, access to affordable childcare and high paying jobs.<sup>16</sup> Until very recently, the law did not perceive a gender discrimination problem in the police response to battered women, which was to classify the problem as one of "domestic" violence and thus of low priority.<sup>17</sup> Domestic violence was something that happened primarily,

---

<sup>14</sup> And, as MacKinnon notes,

the sameness standard has mostly gotten men the benefit of those few things women have historically had—for all the good they did us. Almost every sex discrimination case that has been won at the Supreme Court has been brought by a man. Under the rule of gender neutrality, the law of custody and divorce has been transformed, giving men an equal chance at custody of children and at alimony. Men often look like better "parents" under gender neutral rules like level of income and presence of nuclear family, because men make more money and (as they say) initiate the building of family units. In effect, they get preferred because society advantages them before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account.

*Id.* at 35.

<sup>15</sup> See Finley, *supra* note 3.

<sup>16</sup> See, e.g., L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

<sup>17</sup> See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (woman permanently disabled from her husband's beatings, despite continued complaints to police, can recover damages award against police department because its policy of giving domestic violence a low priority violated her right to equal protection of the laws).

often invisibly, to women; under equality analysis there was no discrimination because there was no disparity in enforcement efforts toward male and female victims of “domestic” violence. At the same time, most forms of violence against men in this society were not even classified as domestic, and thus automatically fell into higher priority enforcement categories.

MacKinnon helps us to see both the pervasiveness of the male norm and its adverse—and thus discriminatory—consequences for women. As she explains,

[V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society. But whenever women are, by this standard, “different” from men and insist on not having it held against us, whenever a difference is used to keep us second class and we refuse to smile about it, equality law has a paradigm trauma and it’s crisis time for the doctrine.<sup>18</sup>

Traditional equality law fails to take power differentials into account; it fails to see that in many pervasive and fundamental ways the sexes are not socially equal, despite the removal of overt barriers. MacKinnon is concerned with power differentials, and the many structural, seemingly “normal” ways they operate and entrench themselves. And she makes a thoroughly convincing argument that discrimination law, if it is going to improve the social position of women, must also be fundamentally concerned with power differentials. Thus the law must listen to those who have been labelled “different” to understand how their perspectives actually call into question the norm used to measure the difference.

It is her focus on power and its many deeply gendered manifestations in our society that leads MacKinnon to focus on sex and sexuality. And it is this focus on the many ways women are dominated, deprived of their will, rendered fearful, and harmed through sex or as part of sexually intimate relationships that is itself convincing about the interrelationship between sexuality and male power in this society. Sexual harassment, rape, unwanted sex and the struggle to say no and be believed, battering, unwanted pregnancy, incest, childhood sexual abuse, violent pornography and the chilling cases in which it is acted out against women—the list alone is shocking, but what is more shocking is how

---

<sup>18</sup> C. MACKINNON, *supra* note 5, at 36.

common many of these experiences are for women and how strongly many of us, men and women, try to deny their commonness. One of the tremendously important contributions of MacKinnon and other feminists is that they have broken the silence about these issues and helped to get women's accounts believed and taken seriously. But still, the statistics about the frequency of these offenses against women continue to be met with shock and disbelief, mostly by men. I've been in many conversations or read about exchanges where men express disbelief at reports of sexual harassment or rape or incest because they cannot believe the incidence is so high, while women express disbelief at the same statistics because they suspect the reported incidence is too low. And I've also been in conversations with close women friends in which we try to joke about whether we have really lived a woman's experience because we haven't been raped (by a stranger in what the law would define to be rape),<sup>19</sup> or weren't incest victims, and so on (but the other things on the list did happen to us). And then sometimes we relay these conversations to close men friends and they either say they don't believe all those things have happened to us, or ask us how we can not all be stark raving mad after going through all that. And we laugh and say, "Oh, it's all a normal part of being a woman. You learn how to cope, to adapt."

MacKinnon helps reveal how all these things are, unfortunately, a normal part of being a woman, and too often a normal part of sex, and thus part of woman's subordination in this society. Their very normalcy is what contributes to the subordination, because men's perspectives have controlled the definitions of what is normal and what is deviant, what is acceptable and what is harmful:

The point of view of men up to this time, called objective, has been to distinguish sharply between rape on the one hand and intercourse on the other; sexual harassment on the one hand and normal, ordinary sexual initiation on the other; pornography or obscenity on the one hand and eroticism on the other. The male point of view defines them by distinction. What women experience does not so clearly distinguish the normal, everyday things from those abuses from which they have been defined by distinction. . . . What we are saying is that sexuality in exactly these normal forms often *does* violate us. So long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of sex, what has been done to us *through* sex, because we leave the line between rape and intercourse, sexual harassment and sex roles, pornography and eroticism, right where it is.<sup>20</sup>

MacKinnon also analyzes how, even in normal, consensual, sexual relations, the man's wishes and needs, and the woman's desire to meet them (perhaps out of fear, perhaps out of acceptance of the invisibility of her own desires or needs), rather than the woman's wishes or needs, con-

<sup>19</sup> See S. ESTRICH, *REAL RAPE* (1987).

<sup>20</sup> C. MACKINNON, *supra* note 5, at 86-87 (emphasis in original).

struct the sex. This dominance of the male's needs is related to unwanted pregnancy because it makes it very difficult for women to think about, or assert, their birth control needs. This is one of the reasons, MacKinnon asserts, that access to abortion should be understood as an equality issue:

I wonder if a woman can be presumed to control access to her sexuality if she feels unable to interrupt intercourse to insert a diaphragm, or worse, cannot even want to, aware that she risks a pregnancy she knows she does not want. Do you think she would stop the man for any other reason, such as, for instance, the real taboo—lack of desire? If she would not, how is sex, hence its consequences, meaningfully voluntary for women? Norms of sexual rhythm and romance that are felt interrupted by women's needs are constructed against women's interests. Sex doesn't look a whole lot like freedom when it appears normatively less costly for women to risk an undesired, often painful, traumatic, dangerous, sometimes illegal, and potentially life-threatening procedure than to protect themselves in advance. Yet abortion policy has never been explicitly approached in the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality.<sup>21</sup>

Much of MacKinnon's analysis of the fine, often indistinguishable line between what is socially accepted as normal, "healthy" sex and what is harmful to women—or deaf to their needs and wishes—resonates with my personal experience and with that of numerous women I know well enough to talk about these things with. And so I find her analysis of the interaction between male power and the construction of sex, and the constriction of options for women and harm to women through sex—and thus the connection between sexuality and the social subordination of women—powerful and convincing in significant respects. I started out inclined to be somewhat resistant to her idea that gender is sexualized and that sexuality is permeated with domination of women, because it seems to sweep so far against the grain of the liberal values that are deeply imbedded in people like me, who are educated and given access to opportunities according to male-defined values and standards in America. But I found more and more of her analysis compelling as I started to test her assertions against my experience and the experience of other women I knew, and I started to examine the root of some of my discomfort (which sometimes stemmed from a reluctance to admit that what she was saying struck me as too accurate). It is this aspect of her work that makes it so controversial. Even many who accept the basic insights of the "dominance, not difference" critique do not readily accept its logical extension into the realm of sexuality. In part, this is so controversial because sex and sexuality are deep and troubling subjects that affect people's senses of self. Thus we cannot avoid feeling personally implicated in our ideas about sexuality; these are not neutral ideas from which we can easily keep a safe distance. Some of the controversy gener-

---

<sup>21</sup> *Id.* at 95-96.

ated by feminism, and in particular by MacKinnon's theories about the role of sexuality in the system of gender dominance, actually demonstrates the relation she and other feminist theorists postulate between the power to define standards, truth, and objective reality, and the silencing of and subordination of women.

### III. POWER AND KNOWLEDGE: BY WHOSE STANDARDS ARE MACKINNON AND WOMEN'S EXPERIENCES TO BE JUDGED?

As MacKinnon herself acknowledges, her work has been condemned as "not law by lawyers, not scholarship by academics, too practical by intellectuals, too intellectual by practitioners, and neither politics nor science by political scientists."<sup>22</sup> She has also been branded too polemical, too much of an advocate or an ideologue to be a scholar, or too angry to be taken seriously. These critiques are undermined by very limited conceptualizations of the categories invoked. Her critics see law as only what the system now recognizes as legal or illegal, with no recognition of the constant necessity for new understandings to influence and change the legal system. They see practice as completely divorced from theory, or from ideas about how the world works (and thus about how the laws one uses in practice are shaped by—and in turn shape—social relations). Scholarship is supposed to be dispassionate, something that one shouldn't care too much about, because caring about one's subject might remove distance and hence objectivity. Scholarship is thus something divorced from concrete issues of passionate importance to real people's lives, and is uninfluenced by a scholar's deeply held beliefs and world view (that is, it exists apart from ideology). Emotions such as anger are regarded as somehow divorced from reason or the capacity to think, rather than as a part of thinking, or as influences that can empower thinking by giving thinkers the conviction to pursue new lines of inquiry. Of those who see MacKinnon as angry and somehow therefore not to be taken seriously, I ask what is wrong with you that you are not angry about sexual subordination; about the appallingly widespread incidences of rape, battering, and harassment; about the torture of women to produce pornography? Of those who say that MacKinnon is not a scholar, while ferociously debating the pros and cons of her ideas, I ask why can you not admit the way that her ideas have stimulated you to think—even if it is to articulate why you disagree with her? And why do you define as scholarship only that which comfortably comports with your conception of reality, rather than that which, from the pens of women, profoundly shakes it? Of those who say that MacKinnon is an ideologue, and that feminism is merely an ideology, I ask what disqualifies a systematic body of ideas focusing on gendered forms of domination that masquerade as nondiscriminatory, neutral, and natural? Are these ideas

---

<sup>22</sup> *Id.* at 132.

branded with the disqualifying epithet “ideology” precisely because they so fundamentally challenge the notion of neutrality set up by male-dominated thought?<sup>23</sup>

These criticisms of MacKinnon, and the questions I pose in response, suggest that much of the controversy surrounding MacKinnon’s work—at least among male academics and lawyers—derives from the pervasive and unquestioned set of male-defined norms that have influenced what counts as knowledge, as valid ideas, as worth listening to and thinking about. Some of the resistance to MacKinnon’s ideas, particularly about sexuality, comes simply because widely accepted and previously unquestioned versions of reality are being so starkly challenged. Confronting women’s reality is hard for all of us—partly because we have all subtly been taught that it is marginal, not important; partly because some of it is not like men’s reality, which is what we have been taught *is* reality; and partly because some of women’s reality, especially the violently sexual aspects of which MacKinnon speaks, is very unpleasant and unsettling to confront. And if what she gives voice to is prevalent, then some of the defensive denial of MacKinnon’s views, and some of the refusal to believe the women’s stories she builds upon, may reflect the fact that she is addressing men who recognize themselves in some of what she writes about (just as many women recognize their experiences in her analysis). These men are being confronted with an analysis that says that what they have always thought was all right, harmless, clearly consensual, deserved by the woman, not an abuse of power, is not any of those things. And it is being said by a woman, a type of person men have rarely regarded as worth listening to, or as entitled to contradict them.

The power to define what does and does not count as an idea, who does and does not count as a speaker, what does and does not count as a credible or valid experience, what does and does not count as real, has largely been controlled by men and denied to women. Thus, it is another form of gender hierarchy, a factor in the subordination of women. Until the development of feminist theory, and until some women had the courage or the anger to break their silence, this power of men was not even recognized as power; it was just the way things were. As MacKinnon says,

[h]aving power means, among other things, that when someone says, “This is how it is,” it is taken as being that way. . . . Speaking socially, the beliefs of the powerful become proof, in part because the world actually arranges itself to affirm what the powerful want to see. If you perceive this as a process, you might call it force, or at least pressure or socialization or what

---

<sup>23</sup> These criticisms, and these questions, are of great political significance at the moment in legal academia. Because of such criticisms, MacKinnon, despite her significant contributions to the law and the prominence of her ideas, has been unable to find a permanent home in academia—while numerous feminist legal scholars are running into difficulty, for similar reasons, in finding or retaining academic jobs.

money can buy. If it is imperceptible as a process, you may consider it voluntary or consensual or free will or human nature, or just the way things are. Beneath this, though, the world is not entirely the way the powerful say it is or want to believe it is. If it appears to be, it is because power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse. Powerlessness means that when you say "This is how it is," it is *not* taken as being that way. This makes articulating silence, perceiving the presence of absence, believing those who have been socially stripped of credibility, critically contextualizing what passes for simple fact, necessary to the epistemology of a politics of the powerless.<sup>24</sup>

This is why one of the fundamental contributions of feminism is to articulate women's experiences, to show men in as many ways possible that their view of the world is not the totality—that their efforts to devise a universal rationality are partial, are blind to the reality of women, and are indeed subordinating of women because they deny the validity of the contradicting reality. The more women's experiences are asserted, the more credibility they will acquire—and the more MacKinnon's essential insights will be accepted as accurate, as challenges that the legal system must rise to meet, rather than as angry rantings that can be easily dismissed by appeal to the first amendment and existing conceptions of equality.

It must be asked, however, which women's experiences inform *Feminism Unmodified*, and which are lacking—or dismissed by the feminist author as not credible? Is MacKinnon or any other single feminist any more reliable a judge of what all women experience than are men of what constitutes neutral reality? Part of the controversy surrounding MacKinnon's writings undoubtedly stems from the uncomfortable challenge they pose to men's accepted canons for organizing their experience. However, some of the controversy, particularly the debate engendered by MacKinnon's position on pornography, is due to the position connoted by the title *Feminism Unmodified*—that her brand of feminism is the only true feminism because it alone grows out of women's actual experiences, redefining issues in light of women's reality rather than embellishing a theory developed without reference to women—such as liberalism or marxism or socialism.<sup>25</sup> Under her "methodologically postmarxist" theory,<sup>26</sup> women are to be treated as a social group, inevitably defined by their membership in the powerless, gendered social group female, their experiences constructed by this identity. For example, she applies this postmarxist feminism to the

often-raised question of whether "all women" are oppressed by heterosexuality. . . . If heterosexuality is the dominant gendered form of sexuality in a society where gender oppresses women through sex, sexuality and hetero-

---

<sup>24</sup> C. MACKINNON, *supra* note 5, at 164 (emphasis in original).

<sup>25</sup> *Id.* at 16, 60, 205.

<sup>26</sup> *Id.* at 60.

sexuality are essentially the same thing. This does not erase homosexuality, it merely means that sexuality in that form may be no less gendered. Either heterosexuality is the structure of the oppression of women or it is not. Most people see sexuality as individual and biological and voluntary; that is, they see it in terms of the politically and formally liberal myth structure. If you applied such an analysis to the issue of work . . . would you agree, as people say about heterosexuality, that a worker chooses to work? . . . Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or why the word choice can be meaningful here. And I would like you to address a question that I think few here would apply to the workplace, to work, or to workers: whether a good fuck is any compensation for getting fucked.<sup>27</sup>

While I agree that in our society women are defined and shaped by our membership in the social group "women," this does not mean that there is a universally true women's experience—or that women who do not share this experience have internalized oppression or have false consciousness. "Getting fucked," good or bad, is not the only option or experience available to women, even in this society where domination through sex is one of the forms in which male domination is exercised. What about women for whom sex involves sharing, giving, being wanted—and enjoying and deriving self-fulfillment in the giving and desiring and being desired? Is seeking liberation and fulfillment through sexual expression something that only men can do? Or can we believe the testimony of women who feel that they have found fulfillment through various forms of sexual expression, sexual expression that they would say they wanted and helped to shape? Is their experience false, not credible, a mere reflection of the deep influence upon women of male conceptions of sex and sexuality? How can we know with any confidence that their experience is false; and if we proclaim it to be false, how does our proclamation differ from men's denial of women's experiences that conflict with their own? I will return to this point in the next section, on the debate over pornography. But I raise these questions here to suggest that women's experience is diverse, and that feminism must be open to, and able to learn from and validate, all of them—not only those that correspond with and support a particular feminist theory, but also those that do not. This must be done if we are to resist notions of universality that have oppressed women precisely by denying their experiences. And it also must be done because by recognizing and validating the full range of women's experiences, feminism can envision new possibilities for human interaction, and reduce the predominance of oppressive interactions between people.

#### IV. PORNOGRAPHY, SEXUALITY AND DOMINATION

In most fundamental respects, after starting out skeptical and filled

---

<sup>27</sup> *Id.* at 60-61.

with first amendment angst derived from the stirring and idealistic words of Justices Brandeis, Black, and Douglas that I learned in law school, I have come to be quite convinced by MacKinnon's theory about pornography—at least violent pornography—and by her insistence that understanding pornography as a form of sex discrimination, and as an actionable civil rights violation, is very important in ending gender domination. What has moved me and helped me to see pornography as a harm, and as contributing to male dominance, is my own personal experience with pornography; so my analysis of MacKinnon's ideas must, as feminist methodology teaches, proceed out of an analysis of my experience.

But first, her theory, in her words. Her definition does not focus on tangible words, pictures, or acts, but on systemic effects: "Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography is not harmless fantasy or a corrupt and confused misrepresentation of an otherwise natural and healthy sexuality."<sup>28</sup> She argues convincingly that pornography not only contributes to, but is part of the sexual abuse of women. "In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all."<sup>29</sup>

It is this construction of sex as male domination of women that makes pornography a form of sex discrimination. "What pornography does goes beyond its content: it eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission into sex. . . . To the extent that gender is sexual, pornography is part of constituting the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way."<sup>30</sup> "Pornography . . . is not a question of good or bad, false or true, edifying or tawdry, but of power and powerlessness. It is first a political question, a question of sexual politics. . . . [It is] sex discrimination . . . meaning that it is part of the violation and exploitation of women as a class."<sup>31</sup>

The feminist critique of pornography is unlike any other critique,

---

<sup>28</sup> *Id.* at 148.

<sup>29</sup> *Id.* at 171 (emphasis in original).

<sup>30</sup> *Id.* at 172 (emphasis in original).

<sup>31</sup> *Id.* at 225.

because it alone focuses on what pornography does to women, how it harms women, how it constitutes women, and thus how it constitutes sex discrimination.

When I first heard about the feminist critique of pornography, I was inclined to think it was overblown because I did not think that pornography had much influence on how I was defined or seen by men, or on how I defined myself. I had not thought much about it, and, having seen only three porn flicks in my life (the ubiquitous “Deep Throat,” “The Story of O,” and “Emmanuelle”) and only rarely having looked at *Playboy* or *Penthouse* (and never having looked at *Hustler* or worse), I could simultaneously think that I did not know much about what porn was and that it did not affect me. But when I read some of MacKinnon’s articles on pornography, which are reflected in speeches in the book such as *Not a Moral Issue* and *Francis Biddle’s Sister*, the shock of recognition hit me. I remembered the men with whom I had been involved who had compared me to pictures in *Playboy* and had asked why my body wasn’t like that or had admired the ways that it was, leaving me feeling inadequate, insecure, objectified, not real to them. I remembered feeling physically ill as I watched “Deep Throat,” having to suppress my own gagging reaction while simply watching Linda Lovelace, and feeling terrified that the man who took me to see the movie<sup>32</sup> would try to make me do that—and the sense of release from great danger I felt when he said after the movie that it was really unrealistic, that no one could really do that. I remembered my friend who wound up in the emergency room because her boyfriend did not see it that way and tried to make her deep throat him; we didn’t know to call it throat rape then, all we knew was that she had almost suffocated, and that she wondered whether her inability to do what Linda Lovelace could do (and what her boyfriend wanted her to do) meant she was sexually inadequate.

Then, my curiosity enlivened by my early encounters with MacKinnon, at my students’ suggestion I showed the film “Not A Love Story” as part of my seminar on “Feminist Theory and the Law.” This anti-pornography film provides a guided tour through the world of pornography—in pictures, peep shows, live sex acts, and prostitution. Watching this film was my first encounter with the widespread violent and degrading nature of pornography, including slasher and snuff films. The film was horrifying, and deeply disturbing. The experience of viewing it left the women in the room feeling very real empathetic physical pain from having watched some of the forms of torture. We stayed together for

---

<sup>32</sup> I never would have gone other than on a date, and I didn’t want to seem prudish when he suggested it so I never registered my objections. So much for free choice—my peer groups’ standards of “with it” behavior and “hot” movies, as well as my socialization to defer to the man’s choice of entertainment on a date he was paying for, made me feel that loss of social stature and perhaps even loss of the man’s attentions were the inevitable consequences of objecting to going to the movie.

quite a while after the film, because we did not want to be alone with the terror and complicated feelings of degradation that were engendered simply from having watched what is done to women in the name of sex. But it was also disturbingly arousing at times, and I found myself appalled at the capacity for sexual arousal which violence towards women can have at times. I also came away convinced that this kind of pornography was not about the first amendment or any freedom we should cherish—it was simply about violent subjugation of women. It is demeaning to the first amendment to suggest that these sorts of acts and displays are the bulwark of freedom of thought in our society. Freedom for whom, at whose expense?

To complete my education about what pornography is and what it does to normal men and women, I attended a protest over the showing of the film “Wanda Whips Wall Street” on the Yale Law School campus. As the audience waited to enter the auditorium where the film was being shown, silent protesters holding posters lined the hall where the viewers waited. Rather than accede to protesters’ demands to cancel the film, the organizers of the event compromised by agreeing to show the anti-porn short film “Raw Images” before “Wanda.” I stood quietly at the back of the auditorium during “Raw Images,” a film which consists largely of a montage of images from pornography. The level of violence in the pictures escalates, from bondage to trussing to rape to torture to dismemberment to death. The largely male college-age audience hooted and yelled throughout, often laughing and encouraging the men in the pictures. As one shot of a woman tied and gagged appeared on screen, a man yelled out, “Oh boy, now I know what to do to my baby tonight!” Approving catcalls and whistles greeted this remark. As a photo montage from *Hustler* of a woman being gang raped on a pool table (released shortly before the pool hall gang rape in New Bedford, Massachusetts) appeared on the screen, several men started chanting, “Go, go, get her, fuck the bitch, harder!” A shot of a woman hanging from a meat hook, bleeding, produced the loudest round of applause yet. I couldn’t stay to watch “Wanda;” what I had just been subjected to, and the hissing of the whips that members of the audience had brought in with them accompanied by their cries of “Let’s whip Wanda!” were more than enough for me. I stumbled out of the auditorium sickened, feeling as if I had just been assaulted, and that I could no longer feel confident, or safe, about the attitudes toward women of any man on campus. I have been left wondering as I walk across campus whether the men I pass are among those who could cheer the sight of a woman being raped or tortured, and if so, how they relate to the women they are intimate with, and what they think of as they look at me, a woman. My peace of mind, my sense of bodily integrity, my sense of how others, of how men, relate to me has forever been altered. Because if these “perfectly normal,” Ivy League educated men hold these attitudes, who doesn’t?

MacKinnon's analysis of pornography's role in portraying women as creatures who enjoy violent degradation or torture—in portraying this as sex, as something that men should want to do to women—resonates with my experience. And that makes it very real and convincing to me. Women don't have to be the victims of pornographic practices to be harmed and demeaned and objectified by pornography. The attitude towards women that is conveyed by most male-produced and -consumed pornography, and the way many men internalize this attitude, harms women, robs them of a sense of security, of subjectivity, of personhood.

Whether one agrees with MacKinnon's analysis of pornography or not, it must be acknowledged that she has made a number of important, enduring contributions that have helped to redefine the debate. In the first place, she has helped to put consideration of women into the debate. While previously the debate was solely about the producers and consumers and our abstract freedoms of privacy and thought, posed against notions of virtue and decency,<sup>33</sup> now the effects of pornography on women, how women feel about it, and how it shapes attitudes about women are very much part of the social policy debate. Indeed, consideration of pornography's impact on women informed the 1986 Attorney General's Commission on Pornography Report, in sharp contrast to the similar 1970 Report.<sup>34</sup> The traditional liberal argument that pornography is victimless, and therefore solely a matter of personal privacy, has largely been taken away. Thus MacKinnon's work shows how including and validating the voices of women can make a difference, changing perceptions of problems in ways that may eventually help women.

Her work also urges us to think constantly about the distribution of power in our society, demonstrating that things look very different when understood in the context of social power than they do when viewed abstractly. This has two implications for the pornography debate. First, when we examine pornography—with its depictions of the often violent domination of women through sex—against the backdrop of the unequal power distribution between men and women, we can clearly understand that pornography is sex discrimination: images and practices of subordination that reflect and reinforce the subordinate position of women in society. In its focus on dominance rather than on difference as the gist of discrimination, MacKinnon's theory challenges us to think about how the devaluation of women in pornography may be related to other discriminatory practices, such as the economic devaluation of women.

Taking power into account also undermines our perception that the first amendment is neutral. The entire marketplace-of-ideas premise of the first amendment presumes an equal starting point, an equal ability to

---

<sup>33</sup> C. MACKINNON, *supra* note 5, at 157. See also West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. BAR FOUND. RES. J. 681, 681-83.

<sup>34</sup> See West, *supra* note 33, at 685-90, 698-99.

speak, to be heard, to have one's views credited, one's reality visible. But if, because of the interrelationship of male power and men's ability to define and construct knowledge, women's perspectives are not valued—their voices are silenced or not even heard, what they think is deemed not “real theory” but mere ideology or emotion or experience, their experiences are viewed as not credible or as too individually subjective to offer any larger learning—then women in reality have little access to the marketplace.<sup>35</sup> As MacKinnon explains,

Laissez faire might be an adequate theory of the social preconditions for knowledge in a nonhierarchical society. But in a society of gender inequality, the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under that despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare.<sup>36</sup>

Because those who invent pornography have the power to make their vision into a reality, pornography helps to define women in a way that renders women's contrary assertions mute—or disbelieved precisely because they conflict with the prevailing ideology.<sup>37</sup> Thus a “neutral” doctrine protecting all speech actually protects only speech that is defined by the prevailing discourse as worthy of protection. And the speech of the more powerful, when given free rein under the apparently neutral doctrine protecting all speech, further entrenches prevailing views of reality and standards for judging the world. This in turn has the effect of further silencing or devalidating the dissenting voices:

Liberalism has never understood that the free speech of men silences the free speech of women. . . . The law of the First Amendment comprehends that freedom of expression, in the abstract, is a system, but it fails to comprehend that sexism (and racism), *in the concrete*, are also systems. That pornography chills women's expression is difficult to demonstrate empirically because silence is not eloquent.<sup>38</sup>

Similarly, MacKinnon tells us that “[T]he point is also that the assumptions the law of the First Amendment makes about adults—that adults are autonomous, self-defining, freely acting, *equal* individuals—are exactly those qualities that pornography systematically denies and undermines for women.”<sup>39</sup> MacKinnon's analysis reveals that when the law decides to protect the discourse of those with greater power as speech, it is actually choosing to promote one view, one kind of speech, over another. Thus continued protection for all kinds of pornography makes it harder for men and women to think of women as anything but demeaned objects who find pleasure in submission to violence. If it is difficult to

---

<sup>35</sup> See Finley, *A Vocal (Written) Essay on Silence, in a Bilingual Voice*, 2.5 REPTILE (Newsletter of the Conference on Critical Legal Studies) 5 (1987).

<sup>36</sup> C. MACKINNON, *supra* note 5, at 155.

<sup>37</sup> *Id.* at 155-56.

<sup>38</sup> *Id.* at 156 (emphasis in original).

<sup>39</sup> *Id.* at 181 (emphasis in original).

even think or envision a contrary possibility, then it is still harder for the contrary voice to speak, or to be believed when it does manage to break silence.

Another important aspect of MacKinnon's theory is the way she uses women's perspectives to challenge the existing legal construction of the problem. She challenges both the law's line-drawing fixation in the area of obscenity, and the values the law has chosen to promote or define as in some way implicated. Demonstrating how feminism requires us to ask questions that people have not dared ask before, MacKinnon criticizes the prevailing obscenity standard, which turns on "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . [and] lacks serious literary, artistic, political, or scientific value."<sup>40</sup> The questions feminism raises about this standard are many:

Feminism doubts whether the average person, gender neutral, exists; has more questions about the content and process of definition of community standards than about deviations from them; wonders why prurience counts but powerlessness doesn't; why sensibilities are better protected from offense than women are from exploitation; defines sexuality, hence its violation and expropriation, more broadly than does any state law and wonders why a body of law that can't in practice tell rape from intercourse should be trusted with telling pornography with anything less.<sup>41</sup>

In other words, the law has defined the obscenity problem as a matter of guarding the consumers and their communities against material that may be too arousing. Women are absent from the definition of the problem and thus from the legal standard designed to deal with the problem. MacKinnon's powerful analysis puts women, and the effects of pornography on women, into the definition of the problem, in a way that profoundly changes our conception of the problem. It also reveals why the current legal obscenity standard cannot deal adequately with material that turns women into objects who enjoy violent degradation and domination:

The difficulties courts have in framing workable standards to separate "prurient" from other sexual interest, commercial exploitation from art or advertising, sexual speech from sexual conduct, and obscenity from great literature make the feminist point. These lines have proven elusive in law because they do not exist in life. Commercial sex resembles art because both exploit women's sexuality. The liberal's slippery slope is the feminist totality. Whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions just as rape converges with intercourse because both express the same power relation. Just as it is difficult to distinguish literature or art against a background, a standard, of objectification, it is difficult to discern sexual freedom against a background, a standard, of sexual coercion. This does not mean it cannot be done. It

---

<sup>40</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>41</sup> C. MACKINNON, *supra* note 5, at 152.

means that legal standards will be practically unenforceable, will reproduce this problem rather than solve it, until they address its fundamental issue—gender inequality—directly.<sup>42</sup>

MacKinnon thus poses a stark challenge to the law: given the mounting evidence<sup>43</sup> that many forms of pornography, especially violent pornography, harm women and contribute to an atmosphere of tolerance for—indeed acceptance of—the objectification and subordination of women, will the law take this harm seriously and change the obscenity approach, adopting instead a discrimination approach sensitive to the needs and situation of women?

The initial legal responses to this question are disheartening, to say the least. In *American Booksellers Association v. Hudnut*,<sup>44</sup> the U.S. Court of Appeals for the Seventh Circuit struck down a civil rights anti-pornography ordinance drafted by MacKinnon and Andrea Dworkin and adopted by Indianapolis, precisely because its definition of pornography<sup>45</sup> departed from the accepted definition of obscenity. And, because it is “obscenity,” narrowly-defined, that the Supreme Court has exempted from first amendment protection, it is only “obscenity” that can be regulated, regardless of the harm to women caused by pornography. Indeed, the court accepted the premises of the legislation, that pornography harms women and contributes to their subordination:

Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].”<sup>46</sup>

Writing as if the ordinance were a direct regulation or censorship of

<sup>42</sup> *Id.* at 154.

<sup>43</sup> See 1986 Report of Attorney General’s Commission on Pornography; see also Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Minneapolis City Council, Gov’t Operations Comm., Dec. 12-13, 1983.

<sup>44</sup> 771 F.2d 323 (7th Cir. 1985), *summ. aff’d*, 475 U.S. 1001, *reh’g den.*, 475 U.S. 1132 (1986).

<sup>45</sup> The ordinance defined pornography as “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”

Indianapolis Code, § 16-3(q).

<sup>46</sup> 771 F.2d at 329.

speech, rather than a provision for a civil rights damages action by victims, the court regarded the ordinance as fatally flawed because it discriminated on the basis of viewpoint. Because the ordinance defined pornography to be "graphic sexually explicit subordination of women" inasmuch as it shows women as "sexual objects who enjoy pain and humiliation; or . . . sexual objects who experience sexual pleasure in being raped; or . . . as sexual objects for domination, conquest, violation, exploitation, possession, or use,"<sup>47</sup> the court held that the ordinance

discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality" . . .—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.<sup>48</sup>

In other words, the view that women are objects for domination and degradation who enjoy being raped and brutalized sexually is so clearly socially acceptable that a governmental entity cannot even allow the victims of such a view to seek redress for their injuries. This starts to sound startlingly like "it is O.K. to harm women—the abstract principle of free speech is more important."<sup>49</sup> Such a conclusion is underscored when we contrast the Supreme Court ruling in *New York v. Ferber*,<sup>50</sup> where the Court upheld a statute prohibiting child pornography over a first amendment challenge. The Court reasoned that the state's interest in preventing harm to children by forbidding the conduct shown in the films was sufficiently strong to justify restrictions on speech.<sup>51</sup>

Reading *MacKinnon*, and then reading the court's decision in *Hudnut*, one has to ask why women who are harmed by pornography can't bring a damages action against producers and traffickers in pornography—when victims of racial epithets, or statements portraying blacks as a group as subordinate or contemptible, can bring damages actions, even when the speech or viewpoint is not directed at them individually but at them as members of a racial group;<sup>52</sup> when victims of defamatory words that injure reputation or feelings can bring damages actions in most situ-

---

<sup>47</sup> Indianapolis Code § 16-3(q).

<sup>48</sup> 771 F.2d at 325.

<sup>49</sup> A case that chillingly demonstrates this view is *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), cert. denied, 458 U.S. 1108 (1982) (holding that woman victim of acts imitative of violent sex scene in television show could not maintain action for negligence because action would chill first amendment values and would thus be inconsistent with free speech doctrine).

<sup>50</sup> 458 U.S. 747 (1982).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (principle of group libel). The Seventh Circuit in *Hudnut* distinguished this case by noting that "It is not clear that depicting women as subordinate in sexually explicit ways, even combined with a depiction of pleasure in rape, would fit

ations; when victims of misleading advertisements can bring damages actions?<sup>53</sup> Is the answer that pornography does not really cause harm to women, or that no woman could ever prove that she was harmed by pornography? Even the Seventh Circuit clearly rejected these answers. Is the answer, then, that society and the courts do not think the kind of harm women suffer from pornography is so important when compared with the harm of deterring the expression of certain views about women (even though these views are condemned in other federal statutes such as the antidiscrimination laws)?

These questions suggest that neither the Seventh Circuit nor other first amendment defenders in the pornography debate have adequately understood what MacKinnon's proposed ordinance actually is: It is a civil rights action, to be added to our panoply of antidiscrimination laws, enabling victims of a harmful practice (or a harmful viewpoint), to seek damages from those who profit from making, doing, and purveying pornography. It is not a prior restraint or a regulation of speech except to the extent that it makes the speech less profitable for those who engage in it. The ordinance was drafted as a civil rights action because it was an attempt to empower women, to let women define when they have been harmed and by whom, rather than leaving women the passive and invisible interested persons in a state-controlled and -defined prosecution.<sup>54</sup> MacKinnon recognizes that seeking legal intervention can often be further disempowering for women, because most models of legal intervention—criminalizing certain practices and letting the state enforce the laws; or forcing women to fit their harms, such as sexual harassment, into statutes such as Title VII, defined without their experiences in mind—do not enable women to define the problem or the injury or to control the bringing of the action. Her antipornography ordinance is an effort to break out of the trap; if women are to be empowered, it is essential that pornography be defined in terms of how it portrays women, and that the action be brought by the victims. The very fact that the Seventh Circuit faulted the statute for not conforming to the accepted legal definition of obscenity, a definition drawn wholly without reference to women's experiences, underscores how important it is to redefine the existing legal conception of harms if the law is to be a promising route to empowerment for women.

MacKinnon's theory of sexuality and dominance, and of the way in which sexual domination is carried out through pornography, makes an additional important contribution; it draws our attention to how pervasively popular culture is influenced by and in turn conveys the message

---

within the definition of a group libel . . . . Work must be an insult or slur for its own sake to come within the ambit of *Beauharnais*. . . ." 771 F.2d 332 n.3.

<sup>53</sup> See generally W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS §§ 105-10 (5th ed. 1984).

<sup>54</sup> C. MACKINNON, *supra* note 5, at 175-77; 196-97.

that women are sexual objects who exist for or enjoy male domination, often brutal domination. I have heard criticisms of MacKinnon that suggest her theory about pornography proves too much, or goes too far, because popular advertisements are filled with objectifying images of women's body parts, or use women as sexual objects, or show women being stepped on or tied up or otherwise physically dominated by men—and popular films, ranging from “Swept Away” to “Dressed to Kill” to “Fatal Attraction,” are filled with sexualized violence against women. Surely, these critics ask, MacKinnon doesn't mean to condemn widely accepted popular culture; surely she wouldn't have “Swept Away” or “Fatal Attraction” fall under the censor's knife? Such criticisms in a sense both miss and reinforce MacKinnon's point. The observation that our popular culture is rife with images of women as sex objects, as willing or deserving victims of rape or sexualized murder, shows how pervasive the male-constructed image of women actually is. The image of women conveyed by pornography is also conveyed everyday—in sometimes more subtle, less shocking, seemingly natural and acceptable form—in magazines, on billboards, in films.<sup>55</sup> What MacKinnon says about the conventional understanding of pornography is no less applicable to popular media images of women; however, this is an indictment of the image of women in popular culture and of the effect that image has in shaping women's lives—and not a complaint about MacKinnon's theory. As she explains,

Pornography codes how to look at women, so you know what you can do with one when you see one. . . . A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself. This is what the feminist concept ‘sex object’ means. In this sense, sex in life is no less mediated than it is in art. . . . It is not that life and art imitate each other; in this sexuality, they *are* each other.<sup>56</sup>

## V. THE INTERNAL FEMINIST DEBATE ON PORNOGRAPHY: WOMEN AS VICTIMS AND SEX AS VICTIMIZATION

MacKinnon's theory of the role of sexuality and the function of por-

---

<sup>55</sup> Indeed, it is worth contemplating why much more violence against women appears in films deemed acceptable for widespread consumption—in teenage slasher films or misogynist films like “Fatal Attraction,” in which women are brutalized—than appears in sexually explicit X-rated films. See Linz, Penrod, and Donnerstein, *The Attorney General's Commission on Pornography: The Gap Between “Findings” and Facts*, 1987 AM. BAR FOUND. RES. J. 713. The authors discuss their research work in the area of mass media sexualized violence and attitudes accepting or desensitized to violence against women. They also note that adult videos considered nonpornographic, as well as teen slasher films and many mass audience films, often use sexualized violence, sexualized aggression, and domination to arouse, while X-rated adult videos, although they are sexually explicit, often show the participants freely and mutually engaging in sex. *Id.* at 719-36.

<sup>56</sup> C. MACKINNON, *supra* note 5, at 173 (emphasis in original).

nography has generated much controversy. While much of this controversy is about the first amendment,<sup>57</sup> it is the controversy her work has generated among feminists that intrigues and concerns me more.<sup>58</sup> Some of the feminist concern about regulating pornography comes from the lesson of history—that obscenity laws and other laws regulating sexual expression have more often been used against women, as in the case of the prosecution of birth control advocate Margaret Sanger for violating obscenity laws, than they have been used to help women. This historically-based concern recognizes that women have rarely had the power to affect the definition of sexually harmful material or the choice of targets for prosecution. Thus some women fear that women-oriented expressions of sexuality, such as depictions of lesbian sex or of lesbian sadomasochism, will be the first to be regulated under a law striking out at pornography. While such a fear is reduced under a woman-initiated civil rights act such as the MacKinnon ordinance, the eagerness of moralistic conservative forces to join the feminist anti-pornography bandwagon certainly provides grounds for concern about how long the definition of pornography will remain women-defined in the current political climate.<sup>59</sup>

However, I think that something more fundamental than strategy underlies the discomfort some feminists have in wholly accepting MacKinnon's theory or ordinance. These concerns, which I share although I simultaneously find MacKinnon's theory tremendously compelling and important, include the centrality that she assigns to sexuality as the sole root cause of women's oppression, the view of women and women's nature that underlies MacKinnon's shift from focusing upon violent pornography alone to including all depictions of subordination or submissiveness, and ultimately her view of sex and human fulfillment. MacKinnon may not be grasping the root of the concern, or may be underestimating it, when she harshly castigates women who do not agree with her view on pornography as collaborators with pornographers.<sup>60</sup>

A persistent theme running through the speeches in *Feminism Unmodified* is that sexuality or what a society chooses to eroticize,<sup>61</sup> and the male control of sexuality, are the key to gender hierarchy. While sexuality has far too often been a category missing from other feminist analyses, the world and gender hierarchy have always struck me as too complex,

<sup>57</sup> See Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1984); Hoffman, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497 (1985); Sunstein, *Pornography*, *supra* note 1.

<sup>58</sup> For a statement of the anti anti-pornography feminists, see Amicus Brief of Feminist Anti-Censorship Taskforce (FACT), *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). The position of the anti-censorship feminists is described and discussed in West, *supra* note 33, 690-98; and in Tong, *The Minneapolis Ordinance and the FACT Brief*, III WOMEN'S REV. OF BOOKS 7 (1986).

<sup>59</sup> See West, *supra* note 33, at 698-711.

<sup>60</sup> C. MACKINNON, *supra* note 5, at 198-205.

<sup>61</sup> *Id.* at 53.

based on too many interactive, dialectically-related factors, to be reduced to any one explanatory phenomenon. I am left puzzled, after reading MacKinnon, about how her theory of sexuality and dominance might explain the perceived distinction between the public realm and the private realm, with its powerful consequences for women's lives: a lack of legal protection for women in the central areas of their lives, and a lack of accommodation for women in the world of the workplace. I am left wondering how sexuality might explain why the activities associated with reproduction are considered separate from—and less socially important or less economically valuable or less about politics than—the activities labelled production. How does her theory of sexuality explain the double oppression many women experience because of their race, ethnicity, or class—an oppression that women of the dominant race often contribute to? How would her theory explain sex segregation in the workplace, and the systematic devaluation of skills associated with women and the consequent inability of women to earn as much as men? How might her theory address the growing impoverishment of women—especially women of color? I am left ruminating over the wide array of laws that presume economic and personal dependency on the part of women, so that women are often reduced to choosing between dependency on a man, either father or husband, or dependency on the paternalistic state—with neither option providing much of a route to self-fulfillment or -determination.<sup>62</sup> How does her theory deal with the pervasive cultural definition of women in terms of motherhood and the potential for motherhood, with its concomitant view of women as asexual, self-sacrificing, and living solely for others?<sup>63</sup> What role does human psychological development, and the different developmental influences on men and women, play in explaining the pervasive dominance of women by men?<sup>64</sup> How would her theory explain racism, and the particular interactions of race and gender that make up the life experience of women of color?

I can imagine powerful arguments that a relationship exists between male definition and control of sexuality, with the consequent objectification, devaluation, and domination of women, and these other aspects of the seemingly seamless web of genderized oppression. However, any attempt to comprehensively understand women's social situation should involve an examination of the relationship between sexuality, production and reproduction, the public/private ideology and thus family and work,

---

<sup>62</sup> Feminist theorist and activist Charlotte Bunch labels this as "heterosexism," or the assumption of men first and foremost. She identifies heterosexism as an ideology and institutions as the cornerstone of women's oppression. C. BUNCH, *Not for Lesbians Only*, in *PASSIONATE POLITICS* 174, 176-77 (1987).

<sup>63</sup> One of the best explorations of this ideology of motherhood occurs in the novel by Sue Miller entitled *THE GOOD MOTHER* (1986). See also A. RICH, *OF WOMAN BORN* (10th anniversary ed. 1986).

<sup>64</sup> See, e.g., N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); J. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976).

the interaction of racism and sexism and other forms of oppression, the conception of women as fundamentally dependent on men, and the ideological tensions between the image of woman as sex object and as self-sacrificing asexual mother.<sup>65</sup> Even accomplishing the goal that MacKinnon would no doubt like to achieve—making sexual relations between men and women more equal, more truly consensual, not relations of domination; making it possible for women to define their own sexuality without constant reference to what they think men want or expect of them—would seem to require examining and working to change many more of the interactive social aspects of gender inequality than just the male dominance of sexuality. Can there be sexual equality without economic equality? Can there be sexual equality in a racist world? Can there be sexual equality in a world in which sexual interaction, including its violent forms, is regarded as exclusively a private problem? Can there be sexual equality when reproduction, in the immediate and ongoing developmental sense, is regarded as primarily the province of women and as a private problem, a problem for women to control, or to somehow handle if control fails? Can there be sexual equality where the set of tasks associated with reproduction is devalued in the public economic realm? In her earlier speeches and work, MacKinnon pays more attention to these interconnections, and starts to tease out the connection between sexuality and other forms of women's oppression. For example, in "Desire and Power," a 1983 speech recounted in *Feminism Unmodified*, MacKinnon describes as an urgent question

consideration of the connections between the theory of sexuality . . . and the forms of property possession and ownership *and* the eroticization of racial degradation and money. [Another] urgent issue is the relation between everything I've said and all forms of inequality. . . . We cannot do or criticize science without talking about the masculinity of its premises. We cannot talk about everyday life without understanding male dominance as a form of it. We cannot talk about production without pointing out that its sex division, as well as sexual harassment and prostitution (and housework), underpins and constitutes the labor market.<sup>66</sup>

Yet as her theory develops, and focuses more and more exclusively on sexuality and violence, one suspects that MacKinnon has forgotten the urgent questions she posed in 1983. The concern I am expressing about the comprehensive explanatory power of MacKinnon's theory differs from another criticism I have sometimes heard expressed about her position on pornography. I have heard the complaint stated as, "If we eliminated pornography tomorrow, the situation of women would not improve a whole lot." That may be true, but that is hardly a reason not to work against a systematic practice that harms women. The lives of

---

<sup>65</sup> Examples of feminist theories that attempt to examine the interactions among many of these categories include J. MITCHELL, *WOMAN'S ESTATE* (1971); and A. JAGGAR, *supra* note 2.

<sup>66</sup> C. MACKINNON, *supra* note 5, at 61 (emphasis in original).

many women would be immediately improved, and the self-image and sense of security of others could start to change, and the image men have of women could start to change. That would be accomplishing a lot, even if it can only be accomplished incrementally.

My first criticism may not exactly be a criticism, but rather is a call to MacKinnon to deepen her theory, or to spin out its implications and its connections with areas of women's inequality that do not seem obviously tied to sexuality and the sexualization of violence. However, I also remain concerned about the image of women and of human fulfillment underlying MacKinnon's theory.

MacKinnon seems to view women as inherently victimized, and as inherently victims. She portrays being dominated or victimized in sex as the only options open to women, given the current power distribution between men and women and its expression through sexuality. Her view of women and sexuality conveys the idea that women can be nothing but victims when we're being sexual in a heterosexual male-dominated society. MacKinnon says: "Looking at the facts of the abuses of women all at once, you see that a woman is socially defined as a person who, whether or not she is or has been, can be treated in these ways by men at any time, and little, if anything, will be done about it."<sup>67</sup> In pornography, "[s]ubjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability."<sup>68</sup> And, since pornography defines women, this is what women become. "Sexualized objectification is what defines women as sexual and as women under male supremacy."<sup>69</sup> And, this victimized objectification reduces the ability of women to have a healthy sense of themselves or of their sexuality. "[S]exual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self-annihilation. That is, our subordination is eroticized in and as female; in fact, we get off on it to a degree, if nowhere near as much as men do."<sup>70</sup> "What I've learned from women's experience with sexuality is that exploitation and degradation produce grateful complicity in exchange for survival. They produce self-loathing to the point of extinction of self, and it is respect for self that makes resistance conceivable."<sup>71</sup>

My concern about the image of women revealed in these quotes is different from the usual criticism, which complains that in her emphasis on the way women have been victimized by sexualized repression, MacKinnon perpetuates the stereotype of women as victims. MacKinnon's response to this criticism is that she is just telling it like it is:

[T]he parade of horrors demonstrating the systematic victimization of wo-

---

<sup>67</sup> *Id.* at 170.

<sup>68</sup> *Id.* at 172.

<sup>69</sup> *Id.* at 50.

<sup>70</sup> *Id.* at 54.

<sup>71</sup> *Id.* at 70.

men often produces the criticism that for me to say women are victimized reinforces the stereotype that women "are" victims, which in turn contributes to their victimization. If this stereotype is a stereotype, it has already been accomplished, and I come after. To those who think "it isn't good for women to think of themselves as victims," and thus seek to deny the reality of their victimization, how can it be good for women to deny what is happening to them?<sup>72</sup>

But what lies at the bottom of my criticism is a problem that MacKinnon's response does not acknowledge: It is a big leap from pointing out the ways in which women are the victims of sexual violence to implying that women are victims in all sexual relations, and that that is all women are in a male dominated society.

Because MacKinnon thinks that women are inherently victims in the current social context, she comes to view all women's qualities as suspect because they are the products of subordination. Thus MacKinnon criticizes the approach of Carol Gilligan, who seeks to validate the perspectives and experiences of women that lead to a moral orientation of connectedness and care rather than to abstract individualism. In MacKinnon's opinion, Gilligan

achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.<sup>73</sup>

But here MacKinnon's criticism sounds a lot like devaluing women—when women seek to claim what might be their own, it is only really the product of powerlessness, and thus should be suspect. What may have been developed as a survival strategy, in a world in which women must constantly think about the needs and interests of others because they have no choice, can nonetheless be a valuable orientation that could benefit us all. What women may have developed from a perspective of powerlessness may be worth pursuing in a world where we are all interdependent and constructed out of our social relations. Perhaps women have been better able to realize this than men because women needed to understand it more, but what women may be offering the human race is an important reconception of self and other that can lead us to a new understanding of power as the ability to facilitate and support rather than simply to dominate.<sup>74</sup>

MacKinnon's focus on the abject powerlessness and degradation of women's victimization also overlooks the incredible strength, and creative ability to nurture hope, to survive, and sometimes to prosper that

---

<sup>72</sup> *Id.* at 220.

<sup>73</sup> *Id.* at 38-39.

<sup>74</sup> See, e.g., M. FRENCH, *BEYOND POWER* (1985).

women have displayed throughout history. The ways in which women have learned to survive and find strength and self-dignity despite being victims can provide important lessons in how to overcome oppression, at least on an individual basis. The history of women is not only a history of victimization, but is also a history of coping, of struggling, of nurturing, of achieving dignity and peace against great odds: from the slave women who found ways commensurate with their own sense of justice and right to maintain a sense of family or to spare their children a soul-killing life in slavery;<sup>75</sup> to the women who managed to write and to create art and poetry despite the barriers thrown in their paths; to the women who worked their way into jobs previously closed to them and proved their abilities despite being harassed and lonely tokens; to the women who have survived incest and rape and battering, and been able to reconstruct their own sense of self; to Linda Marchiano (aka Lovelace) who, despite the torturous conditions of her bondage, found the courage to keep planning her escape, to escape, to find her voice, and to tell her story.<sup>76</sup> From examining this full range of women's experience—those who have transcended victimization and those who have not—we can learn about the conditions that make it possible to maintain dignity and the courage to struggle, and, in contrast, about the conditions under which the harm and pain become so great that they snuff out the spirit of survival. This lesson can not only teach us more about and make us more appreciative of women, but it can provide instruction for all oppressed people.

MacKinnon's view of women's experience as fundamentally shaped by powerlessness—and thus of women's traits as reflections of their domination—leads her to view women's sexuality as not their own, but as the product of domination by men. She asserts her view with confidence born of a belief that she has arrived at the one true theory. This prompts her to dismiss as false—or as the internalization of subordination—any woman's experiences with sex, or with erotica or pornography, that differ from her own. For example, under MacKinnon's theory, women in a state of sexual equality could not want submissiveness or domination in their sexual relationships, because that inherently means subordination. But, as Robin West revealed in her essay "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory,"<sup>77</sup> women's sexual lives and routes to sexual fulfillment are complex—often depending on complicated, multidimensional relationships with others in which the desire to be taken care of may blend with the desire to be dominated; in which the desire for absolute trust may blend in to finding pleasure in rendering one self up to another's capacity to give pain; in which women may want to lose themselves in another person.

---

<sup>75</sup> T. MORRISON, *BELOVED* (1987).

<sup>76</sup> L. MARCHIANO & M. MCGRADY, *ORDEAL* (1980).

<sup>77</sup> 3 *WIS. WOMEN'S L. J.* 81 (1987).

What MacKinnon denigrates as “[s]ubjection itself, with self-determination ecstatically relinquished,”<sup>78</sup> may be for some women simply and wholly “self-determination ecstatically relinquished.” As West points out,

[t]he lesson—the truth—of the erotic pleasure many feel in controlled submission may be this: while we crave liberal autonomy and radical equality, while we crave the freedom which the liberal feminist pursues and the equality the radical feminist envisions, *at least in this society as it is presently constituted, we also crave—because we also need—the capacity to trust one another, including those who are stronger than we are.* The weak and the strong are in fact interdependent in this society—we *aren't* equally autonomous individuals—and what that means is that the weak need to be able to depend on the strong. The capacity to safely depend on another, to look after one's own well-being, is a desirable state, and it is no great mystery that it is pursued as pleasure. When we test the limits of our capacity to trust, of our willingness to embrace absolute dependency, and when we discover erotic pleasure lurking at that limit, we give expression to our desire to be able to trust someone who is strong and trustworthy—which may be a fully human, and not just female, need.<sup>79</sup>

And there are many women, including myself, for whom both MacKinnon's and West's descriptions of sex feel false. For some women sex can be an assertion of self, an enjoyable act free of pain, free of submission, interdependent rather than simply the trusting dependence of the weak upon the strong. I think of my own journey from my young adulthood, when sex was confusing and I had no idea whether I was doing what I “wanted” or whether I “wanted” only what he “wanted,” and I felt unable to even know whether to say “no” much less say it. At this stage in my life MacKinnon's description of sex as constructed solely around the man<sup>80</sup> matched my experience. But as I, and other women I know, have matured and gained a greater sense of self in all areas of our lives, we have learned more about what we want in sex, too. Sometimes we can affirmatively want only to please another; sometimes a woman can selfishly want and take only pleasure for herself; other times sex can involve mutual pleasurable interaction, an important form of sharing that doesn't feel at all like domination and involves no pain.

The point is that sex for women is never just one thing at all times. Sometimes it can involve the pain, uncertainty, and nagging doubts about lack of free will described by MacKinnon. Other times it can feel so different from that—and the accusation that our consciousness may be false at those times, but not at the painful times, is deeply insulting. In recognizing and learning from the multiple sexual experiences of women we can learn more about the interaction between sexuality and domina-

---

<sup>78</sup> C. MACKINNON, *supra* note 5, at 172.

<sup>79</sup> West, *supra* note 77, at 132.

<sup>80</sup> C. MACKINNON, *supra* note 5, at 95-96.

tion, as well as about how women can achieve a sense of self that includes equal sex, on their terms.

Underlying MacKinnon's inability to imagine either the possibility of interactive, self-assertive sex, or "self-determination ecstatically relinquished" as something anyone might desire, in the absence of domination, is a fundamental privileging of an autonomous self that can be constituted and determined without reference to, or need for, anyone else. However, if one doesn't view human beings as disconnected, competing, autonomous selves, but rather as interdependent social beings, then it becomes possible to imagine that one route to self-fulfillment and self-determination can be a consuming effort to please another—a desire to give or to give in or to give oneself up to another, to be desired by another and to conform to another's wishes. Another route can include affirmatively desiring another, and being confident of the genuineness of that desire. Blurring the boundaries between oneself and another, including by submitting to another, or by leading the sexual interaction and being responded to, can be both a deeply erotic experience and a deeply affirming experience. Forms of sexual desire by women that MacKinnon labels "self-annihilation"<sup>81</sup> might very authentically be regarded by some women as self-defining in a positive way, and by other women as self-affirming. When MacKinnon condemns pornography in the definitional section of the ordinance as, among other things, the presentation of women as sexual objects "through postures or positions of servility or submission,"<sup>82</sup> she may be condemning an important route of erotic expression for some women. For some women, the feeling that this is what they want sexually may be an internalization or acceptance of male domination. However, it may also be an empowering conception of human interaction in an interdependent world where we need to take care of each other and sometimes trust each other and desire each other enough to surrender ourselves.

The point is that there are many authentic women's experiences. It is hard to say conclusively that some are right or represent correct understandings of sexuality and domination, while others are false or represent collaboration or are merely survival strategies in a world of domination. As MacKinnon's theory develops through the progressive speeches in *Feminism Unmodified*, her confidence in the explanatory power of her theory increases, and along with it, her tendency to proclaim what is—or should be—the experience of all women. This is a departure from the insight of feminist methodology, which is to explore and see what we can learn from the diverse experiences of women. Some of the controversy among feminists over MacKinnon's theory comes from her proclamation that only her theory is feminism unmodified by, or unadulterated by,

---

<sup>81</sup> C. MACKINNON, *supra* note 5, at 54.

<sup>82</sup> Indianapolis Code § 16-3(q)(6).

some male-influenced theory. This sounds dismissive of the experiences of women who do not agree with her. By respecting and seeking to understand the reasons for the diversity of women's experiences with sexuality, and pornography, we can learn a great deal. We can learn, as MacKinnon has, that far too often in a world of gender hierarchy, sex for women is a dominating, subjugating experience in which "consent" and "free choice" are meaningless terms. We can also learn, however, that human beings, because they are socially-constructed and -situated, might desire and strive for a form of sexual interaction that involves forms of submission—giving oneself up or giving oneself over to another, being enveloped by another until your identity merges with the other's, being possessed and directed by another. We can learn that one possible vision of autonomy and self-fulfillment might be to want or to be wanted by or to want to satisfy another person. We might also learn that for some people, this experience might involve pushing the limits of surrender and trust to include physical pain and violence as elements of pleasure. The important goal is for each person in the sexual interaction to be sufficiently empowered to be able to say—and to be heard and respected when saying—stop, that's enough, let me have myself back, it has gone from pleasure to pain, from joyful submission to plain domination.

The distrust of some women's voices, of some women's experiences with sexuality, and the elevation of others to represent the experience of all women, is one of the principal reasons MacKinnon is controversial among other feminists. Many of us can see aspects of our own experience powerfully explained by MacKinnon's analysis, while other aspects of our experience or desires simply do not fit with her proclamations about sexuality, submission, and domination. And we find her attribution of false consciousness or cooptation too glib, her approach too unwilling to hear other women's voices. She has not been willing to constantly hold her theory up for reexamination and refinement based on the diversity of women's experiences.

But there remains much common ground between so-called anticensorship and antipornography feminists, and conflicted waverers such as myself, that can be developed. Many would agree that whether or not it is sexually explicit, pornography or popular mass media that sexualizes violence against women contributes significantly to actual harm to women, in the form both of practices and of attitudes that often wind up constituting relationships or defining women's possibilities. There is a growing body of social science research and personal lived experience that shores up this connection.<sup>83</sup> Instead of hurling invective at each other, women who are concerned about the widespread depiction and

---

<sup>83</sup> The social science research is summarized in Linz, Penrod, & Donnerstein, *supra* note 55; empirical research and personal testimony are summarized in the section called "Harms" of the 1986 report of the Attorney General's Commission on Pornography, *supra* note 43, and in the hearings on the proposed Minneapolis ordinance, *supra* note 43.

glorification of violence against women, and about the widespread instances of violence against women, should work together to iron out the definitional difficulties in any proposed statute. Only working together will they get lawmakers, law interpreters, and law enforcers to take seriously the harm to women, as women see it.

## VI. THE NATURE OF LAW: CAN IT HELP WOMEN?

My observations—about the need for women to have a role in defining legal harms and in controlling the initiation of legal intervention, and about the tendency of the law to reassert its male-referenced definitions of harm (as it did in *Hudnut* when the women-defined harm of pornography was declared inconsistent with the law of obscenity)—suggests an urgent project for MacKinnon, or other feminist legal theorists. We must start to grapple with the nature of law itself, to understand the extent to which it is male defined, and the extent to which its language and its process of reasoning are built on male conceptions of problems and of harms—and on male, or epistemologically “objective” and “neutral,” methods of analysis. If the law has been defined largely by men, and if its definitions, which are presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women’s experiences of harm? Tackling this question is crucial to figuring out when—and in what form—legal intervention can be empowering for women, and when it exacerbates state definition of and control over redress of women’s injuries.

In her *Signs* articles, “Feminism, Marxism, Method and the State: Toward an Agenda for Theory,” and “Toward a Feminist Jurisprudence,”<sup>84</sup> MacKinnon posited that the law sees women as men see women, because it is men who have shaped, defined, and interpreted the law. One of our problems in using law as a tool for social change is that invoking law usually means having to fit a woman’s complaint, or understanding of an interaction or of an injury, into the legal definitions. But the legal definitions have rarely been crafted with women’s experience in mind, and they do not often match women’s experiences of the harm. Women’s experience can get distorted and misunderstood or miscategorized when it must be fit into the procrustean bed of existing legal categories. For example, the law says that nonconsent, often as perceived by the perpetrator, and penetration, are crucial to the definition of rape. Yet these may not be key to a woman’s sense of violation. The law defines nondiscrimination as treating likes alike, so that an employer who gives inadequate leave to all workers is not discriminating against women when the amount of leave offered is inadequate to deal with the demands

---

<sup>84</sup> 7 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 515 (1982); and 8 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 635 (1983).

and consequences of pregnancy. So the woman who feels that the difficulties she faces in being a worker and a parent too are a form of discrimination must try to argue endlessly about the appropriate classification of samenesses and differences, while the structural nature of the barriers facing women from the interaction of the work and family spheres remains elusively unexamined. The woman who knows her skills are invisible, undervalued, and underpaid because she is a woman and her job is done largely by women—and that this is a form of discrimination—is left floundering in comparative arguments about nurses and truckdrivers, apples and oranges, when the very problem is that there are no men in her job category, either for comparison or for improving the recognition accorded the work.

Too often, the consequence of the misfit is that the law proclaims that there was no injury, there was no harm, there was no rape, there was no discrimination. Society often accepts this pronouncement, and the woman who feels she was harmed, or that the rape did happen and it was rape, or that what happened to her is an example of discrimination, is left struggling to reconcile what happened to her with the societal pronouncement—or struggling with the sense that maybe she is wrong or crazy to have ever thought that it happened. Often, the woman accepts or internalizes the societal judgment shaped by the legal language, and she learns either to remain silent and to accept, or that it really wasn't discrimination after all, or that it really wasn't rape. These forms of silencing or acquiescence make changing understandings, and thus changing legal responses and practices, that much harder.

MacKinnon's work has drawn our attention to the need for women to shape the definitions of harms, to make the law fit women's experience. But we must go beyond expanding statutory or common law definitions, and crafting causes of action that women can initiate instead of always looking to more direct state intervention and control. We must challenge notions of relevance that may accept at the abstract level that something like sexual harassment can be sex discrimination, but then make a woman's personal dress and behavior relevant in a way that leaves unchallenged the idea that sexual harassment is something that women ask for, really want, or deserve.<sup>85</sup> We must challenge standards of credibility that often make women's accounts suspect because they do not comport with a conventional wisdom that was based on the invisibility of women's experience,<sup>86</sup> and we must question the inclusiveness of

---

<sup>85</sup> For example, one of the issues in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) was whether Mechelle Vinson's dress and discussion of her sex life were relevant to determining whether the sexual advances of her supervisor were welcomed.

<sup>86</sup> The struggle of feminist litigators to have courts accept evidence about the battered woman's syndrome as relevant to the self-defense issue when a battered woman is being prosecuted for the murder of her batterer is an example. See, e.g., *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testi-*

the stance of legal reasoning. We must work to understand how legal language—ranging from the limited definition of discrimination to the broad definition of speech—and legal reasoning—which insists that proposed legal changes be measured against existing definitions that may not have taken women into consideration at all, and which privileges abstract analogic reasoning over experiential understandings—construct our conceptions of harm and acceptable behavior. To make the law into a promising tool for the empowerment of women, feminist legal actors are going to have to embark on a project of rethinking and reconstructing our conceptions of law and the law's conceptions of women.

## VII. CONCLUSION

MacKinnon's ideas are provocative and challenging, because they demand that we rethink many things accepted as natural or desirable, and that we question virtually every aspect of existing practices, institutions, and ideas. She encourages us to embark on the intellectually exciting task of examining why we think certain things about men and women, and about sexuality and desire—and of examining how power held disproportionately by men has constructed our ideas, and our conceptions of what counts as knowledge, in ways that ignore women's experiences or cause them harm. Whether you ultimately agree with any or most of her theory or her conception of women, it is inevitable that you will come away from a close and open minded reading of *Feminism Unmodified* with your conceptions of the "neutrality" of law and its limitations for achieving social reform, of gender relations and the situation of women, of why things are the way they are, deeply challenged and reexamined.

---

mony on Battering, 9 WOMEN'S RTS. L. REP. 195 (1986); see also Schneider, *The Dialectic of Rights and Politics*, 61 N.Y.U. L. REV. 589, 608-09 (1986).