BOOK REVIEW

FEMINISM AND LEGAL THEORY

FEMINISM UNMODIFIED. By Catharine A. MacKinnon.[1] Cambridge, Massachusetts: Harvard University Press. 1987. Pp. 315. $25.00.

Reviewed by Cass R. Sunstein[2]

I. INTRODUCTION

Occasionally an intellectual or political movement disrupts existing categories, throws into question practices and conceptual structures that had previously been accepted or even invisible, and eventually produces substantial changes in legal rules. How and why this happens is quite mysterious. The abolitionist movement of the 1850's is one example. Another is the New Deal, which grew out of an understanding that the common law was neither natural nor prepolitical and failed to provide a neutral baseline for decision.[3] The most prominent recent illustration is the civil rights movement of the 1950's and 1960's, which challenged practices of racial exclusion. Thus the Supreme Court rejected *Plessy v. Ferguson*[4] on the ground that an understanding of the purposes and effects of school segregation revealed that racial separation was hardly neutral. In all of these contexts, practices that had for a long period been taken as natural and inviolate, sometimes even as based on biological differences, were revealed as socially created and subject to criticism and change.

The women's movement is the most powerful contemporary development of this sort; feminism provides its theoretical foundation. Despite its longevity[5] and its recent impact on the law, the feminist movement has hardly run its course. Nonetheless, the basic claims of feminist theory are in many circles denied credibility and respect, or even a fair hearing. Ironically, those circles include many observers

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[3] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 6–8 (2d ed. 1988); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

[4] 163 U.S. 537 (1896).

[5] "The first unmistakably feminist voices were heard in England in the 17th century." A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 3 (1983).

strongly committed to perceptions associated with the New Deal and the civil rights movement.

Feminist legal theory has had three principal strands, which for convenience may be called the "difference," "different voice," and "dominance" approaches.[6] The least controversial, associated with the movement for the Equal Rights Amendment, is the "difference" approach, which argues that women should be permitted to compete on equal terms with men in the public world. In this view, characteristics legally and socially attributed to women — passivity, weakness, irrationality — are inaccurate or overbroad generalizations and at most the product of anachronistic social practices. Thus, feminists attack distinctions on the basis of gender — for example, laws excluding women from "male" jobs — as reflecting prejudice rather than reality and as perpetuating women's second-class citizenship.[7] This strand of feminism, sometimes represented by the National Organization for Women, has achieved widespread acceptance in legal doctrine.[8] A more controversial aspect of the same strand is the claim that, just as women should participate on equal terms with men in the professional world, so too should men participate on equal terms with women in the domestic sphere. A basic point here is that the domestic sphere has been devalued and used as a major arena for the subordination of women. The difference approach, if accepted, would produce significant changes in the employment market and in the care of children.

The "different voice" strand of feminist theory, associated most visibly with the work of Carol Gilligan,[9] asserts that there is a distinctly female way of approaching moral and legal dilemmas and that that way has been ignored or downplayed in legal doctrine and scholarship.[10] In this view, women tend to value relationships and con-

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[6] Other strands exist outside of law. *See, e.g.*, M. DALY, PURE LUST: ELEMENTAL FEMINIST PHILOSOPHY (1984); M. DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978); A. JAGGAR, *supra* note 5.

[7] *See generally* Brown, Emerson, Falk & Friedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 888–91 (1971) (arguing for an equal rights amendment to eliminate most classifications on the basis of sex). Some of the most important work here was done, in and out of the courts, by then Prof. Ruth Bader Ginsburg. *See, e.g.*, Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

[8] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (social security benefits); Frontiero v. Richardson, 411 U.S. 677 (1973) (military dependance allowances).

[9] *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982).

[10] *See, e.g.*, Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480–508 (discussing the possible consequence of reconstructing constitutional law to include women's distinctive morality); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (applying a feminist conception of dispute resolution and transaction planning to negotiation); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (arguing that the feminist jurisprudence abandons prescribed legalistic terms); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (arguing that the feminine jurisprudence that relies on a vision closely aligned with classical republicanism is unlike any other contemporary jurisprudence).

nections — an "ethic of care" — whereas men tend to place a higher premium on abstraction, rights, autonomy, separation, formality, and neutrality — an "ethic of justice."[11] A centerpiece of this position is that prevailing theories of moral development and morality in general have taken a partial perspective and supposed it to be universal, ignoring alternative perspectives or treating them as primitive.[12] The "different voice" approach assumes both descriptive and normative form, often contending that the legal system unduly emphasizes rules and abstraction and attends insufficiently to context and reciprocal responsibility.[13] Sometimes this approach draws on psychoanalytic theory.[14] The approach has significant consequences for a wide range of legal rules and practices, as well as for legal and social theory, both inside and outside the area of sex discrimination.[15]

A third strand of feminist theory — the "dominance" approach — describes gender inequality not in terms of arbitrary or irrational differentiation but in terms of the social subordination of women. The problem is not that those similarly situated have been treated differently; it is instead that one group has dominated the other, in part through sexual practices. A wide range of issues that are not normally thought to involve sex discrimination — including sexual harassment, prostitution, reproductive freedom, rape, and pornography — thus raise questions of inequality. More broadly, these feminists see inequality in patterns of interaction between men and women that are normally taken as unobjectionable and even as intrinsic to traditional gender roles. Rape and prostitution are, in this view, not isolated deviations from social norms; they are extreme examples of the subordination of women that occurs in many places.[16] The dominance approach joins the different voice approach's critique of partial perspective, but whereas the different voice approach embraces wom-

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[11] Gilligan does not attribute these characteristics to any particular biological or social source. *See* C. GILLIGAN, *supra* note 9. Okin attempts to dissolve the distinction between an ethic of care and an ethic of justice by incorporating empathy into Rawls' theory of justice. *See* Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS — (forthcoming Jan. 1989).

[12] *See* C. GILLIGAN, *supra* note 9.

[13] *See* Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

[14] *See, e.g.*, N. CHODOROW, THE REPRODUCTION OF MOTHERING (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976).

[15] *See, e.g.*, Menkel-Meadow, *supra* note 10; Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17 n.68 (1986); Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

[16] Examples can be found throughout popular culture. Consider, for example, the familiar forcible taking of women in movies and television; the scenario in which a woman initially resists aggressive overtures and then relents; the plot in which a woman falls in love with her rapist.

en's need for relationship and connectedness, the dominance approach claims that women need to be freed from practices that subordinate and invade them. The dominance view is thus sometimes skeptical of the different voice approach, claiming that women's capacity for empathy and need for relationship is in part the product of the social subordination of women.

Catharine MacKinnon is the most prominent and persistent advocate for the dominance strand of feminist theory. She is also the most important force behind the claim that sexual harassment is a form of sex discrimination.[17] That notion, for which MacKinnon is given too little credit, seemed bizarre and radical to many when initially put forward. Remarkably, MacKinnon's basic position was accepted in 1986 by every member of the Supreme Court — with a majority opinion written by then Justice Rehnquist.[18] This development must count as one of the more dramatic and rapid changes in legal and social understanding in recent years. In addition, MacKinnon has supplied much of the underpinning for the current rethinking of both rape and prostitution; her criticisms focus on the systemic effects of these practices, their parallels in more conventional forms of gender relations, and the partial perspectives found in the legal treatment of both.[19] MacKinnon has been perhaps the most important force behind the burgeoning theoretical literature in law on sex discrimination and feminist theory.[20] With Andrea Dworkin, MacKinnon has developed what is probably her most controversial thesis: the idea that pornography is a form of sex discrimination.[21] In these and other areas, MacKinnon's work has generated a dramatic shift in legal thinking and reoriented the terms of debate.

In all of these settings, MacKinnon's basic position is that the social and legal treatment of gender should be challenged today just as common law categories and racial exclusion were challenged during the New Deal period and the 1950's, respectively. MacKinnon claims that gender relations, like the common law and racial practices, are

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[17] *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[18] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). Justice Marshall wrote a concurrence joined by Justices Brennan, Blackmun, and Stevens. Justice Stevens also wrote a separate concurrence.

[19] *See* MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635, 643–55 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 529–42 (1982); *see also* S. ESTRICH, REAL RAPE (1987).

[20] *See* sources cited *supra* note 14; Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Scales, *supra* note 10, at 1374–75.

[21] *See infra* pp. 840–42; *see also* A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981).

regarded as natural or prepolitical but are actually socially constructed, alterable, and unjust. Although few recent writers in law have been so creative or influential, there are important arenas in which her work is ignored and even ridiculed.

Feminism Unmodified is a collection of MacKinnon's speeches on sex discrimination over a six-year period, some of which have been published previously. The book is divided into three parts. The first is theoretical and general, setting out MacKinnon's distinctive approach to sex discrimination. The second, called "Applications," deals with rape, abortion, sexual harassment, and athletics. The third part of the book consists of six essays on pornography.

Each of the essays published in *Feminism Unmodified* stands on its own, making the book a collection of separate entries rather than one sustained argument. Because each essay was originally a speech, the discussions are lucid and dramatic, with the dynamism, immediacy, and sense of discovery of a live presentation; they are also filled with irony, wit, and humor. On the other hand, the book has considerable repetition and overlap. The arguments are less tight, analytic, and systematic than they might be; some of MacKinnon's other work is more careful and sustained.[22] MacKinnon anticipates counterarguments only occasionally, and careful elaboration of implications is not one of the book's strengths; the discussion is sometimes too polemical. Nevertheless, the book contains brilliant insights, genuine creativity, and rare originality. It should have a significant impact on thinking about sex discrimination and on social and legal thought more generally.

II. Sex Discrimination: Differences and Dominance

MacKinnon's general treatment of sex discrimination, first set out in *Sexual Harassment of Working Women*,[23] derives from her description and critique of the difference approach, which she claims is the most prominent in current law. The difference approach holds that the purpose of constitutional and statutory proscriptions is to ensure that laws reflect both real similarities and real differences and thus "track reality."

The difference approach endorses two paths to equality. The first is rooted in strict gender neutrality and insists that women are and should be treated "the same as men" (p. 33). Distinctions on the basis of gender, especially those that deny women opportunities available to men, are presumptively unlawful. Much of modern law under the

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[22] *See* C. MacKinnon, Feminism, Marxism, Method, and the State (unpublished manuscript, May 1987); sources cited *supra* note 19.

[23] C. MacKinnon, *supra* note 17.

equal protection clause and title VII reflects this understanding.[24] The central premise is freedom of choice, often expressed in terms of equality of opportunity: people should be permitted to choose jobs and social roles in ways unaffected by irrelevant characteristics like gender.

The second path to equality under the difference approach qualifies this basic theme of sameness, recognizing that in some respects women are not similarly situated to men. This path is designed for "women who want equality yet find that [they] are different" (p. 33) and culminates in "the special benefit rule," which authorizes the state to recognize "real differences" between men and women. Thus, for example, courts will uphold laws or practices that recognize the distinctive physical characteristics of women. Sometimes such laws impose burdens on women, as in reproduction-related restrictions of employment opportunities; sometimes they create "special benefits," as in leave policies for pregnant women.

MacKinnon is not entirely hostile to the difference approach; she acknowledges that it has accomplished considerable good. In her view, however, it is inadequate for two reasons. First, the difference approach — precisely because it is based on a norm of formal equality or sex-blindness — does nothing about many existing structural inequalities between men and women. Those inequalities in wealth and power are taken for granted; they are treated as the inevitable background conditions against which legal disputes must be resolved. "A gender-neutral approach . . . obscures . . . the fact that women's poverty, financial dependency, motherhood, and sexual accessibility . . . substantively make up women's status *as women*" (p. 73) (emphasis in original). For a variety of reasons, women are not in fact situated similarly to men, and legal rules pretending that they are will sometimes reduce rather than increase the likelihood of obtaining equality. For example, the recent transformation of the law of custody and divorce, embodying a norm of formal equality, has harmed women and helped men.[25] Under the difference approach, "society advantages [men] before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account" (p. 35).

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[24] *See supra* note 8; *see also* D. KIRP, M. YUDOF & M. FRANKS, GENDER JUSTICE (1986) [hereinafter GENDER JUSTICE] (arguing for equal liberty as the benchmark in governmental treatment of gender).

[25] *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981); *see also* M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 86 n.67 (1987) (noting that post-divorce economic burdens fall disproportionately on women). *See generally* Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. — (forthcoming 1988) (criticizing formal equality as a constitutional standard).

The difference approach is also inadequate because it uses men as the baseline from which to measure difference. According to MacKinnon, legal rules that use men as the referent, and allow differential treatment of women when it is based on real differences from men, do not enshrine any obvious conception of gender equality. Instead, they amount to a false universalization that depends on a particular standpoint — men's biology and career patterns — from which to assess "difference." Consider the legal treatment of women's distinctive reproductive capacities: to understand rules that accommodate those capacities as a "special benefit" is to apply a male baseline. "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. . . . For each of their differences from women, what amounts to an affirmative action plan is in effect" (p. 36). The use of male practices as the norm thus produces an inadequate law of sex discrimination; for MacKinnon, the problem is not one of abstract differences at all.

Of recent cases addressing states' attempts to provide pregnancy leave and related job security,[26] MacKinnon remarks, "Difference doctrine says it is sex discrimination to give women what we need, because only women need it. It is not sex discrimination not to give women what we need because then only women will not get what we need" (p. 36). Under the difference approach, the legal system does nothing about preexisting legal and social disabilities brought about by past discrimination and women's reproductive roles. Examples include public or private rules that forbid employees from being the primary caretaker of a preschool child, rules that prohibit fertile women from taking certain jobs,[27] and the concentration of women in low-paying jobs.[28] None of these practices is unlawful under the difference approach. The claim of inequality underlying *Feminism Unmodified* is not the relatively narrow argument that women have been treated "unequally to men"; it is instead that there is a system of sexual subordination of women that should be altered. For MacKinnon, the notion that the similarly situated must be treated similarly is an inadequate way to approach issues of sex discrimination.

Under MacKinnon's alternative — the dominance approach — the goal of sex discrimination law "is not to make legal categories trace

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[26] *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). *But see* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) (adopting a perspective similar to MacKinnon's).

[27] *See* Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

[28] *See* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

and trap the way things are. It is not to make rules that fit reality. It is critical of reality" (p. 40).[29] The problem is not whether and how much difference there is between men and women; it is instead how the legal system should respond to these differences. "The difference approach tries to map reality; the dominance approach tries to challenge and change it" (p. 44). "[S]ex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake" (p. 42).

MacKinnon is impatient with biological explanations of gender inequality. The question is not whether such differences exist, but what society does with them — in short, their legal and social consequences. For the situations relevant here, it is the legal system that decides when and how biological differences are relevant, turning differences, which might be treated as immaterial, into legal disadvantages.[30] The dominance approach thus reads difference as "inequality's post hoc excuse, its conclusory artifact, its outcome presented as its origin" (p. 8).

In some circumstances, the dominance approach might yield results that are identical to current law — for example, by invalidating statutes that make employment of a particular sort more attractive for men than for women.[31] Some laws would be upheld under both approaches but with divergent rationales. A law establishing different ages for statutory rape of men and women might be upheld not on the biological ground invoked by the Supreme Court in the *Michael M.* case[32] but on the theory that rape of young girls by men is far more common than rape of young boys by women. Gender-specific statutory rape laws are thus sensible safeguards rather than underinclusive reflections of prejudice.

At the same time, the dominance approach would challenge many legal practices that current law takes for granted. It would, for example, treat as issues of sex discrimination questions that are not so regarded by current law, including reproductive rights and abortion, battery of women, rape, prostitution, sexual assault of girls, the disproportionate presence of women in low-paying occupations, and female poverty. In all of these areas, the dominance approach would not treat current practices as the inevitable background conditions against which questions of sexual equality must be measured; it would instead require changes in those practices in order to bring about equality.

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[29] Here the analogy to the New Deal critique of the common law is particularly clear. *See* Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Sunstein, *supra* note 3.

[30] *See* C. MACKINNON, *supra* note 17.

[31] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating a Social Security Act provision that made survivors' benefits payable to widows but not to widowers).

[32] Michael M. v. Superior Court, 450 U.S. 464 (1981).

MacKinnon's critique addresses the same problem that underlay the controversy over *Lochner v. New York*:[33] legal formality that assumes a particular and unarticulated baseline. Assumptions about baselines produce understandings of what is natural or constructed, neutral or partisan, and action or inaction. MacKinnon is in a long tradition of critics of social practices premised on status quo baselines, and her discussion here has implications not only for sex discrimination but also for legal and social theory more generally.

MacKinnon's attack on unarticulated baselines challenges some familiar analytic strategies in law. Her discussion of legal abstraction, formality, principle, and neutrality suggests that these terms often conceal a contested substantive understanding that denies its status as such.[34] MacKinnon argues that the idea that justice is neutrality between abstract categories ignores social distinctions between those categories, as the Court did in *Plessy v. Ferguson*[35] (pp. 165–66). In MacKinnon's view, similar understandings are at work in current law, including the attack on affirmative action: "[i]n the view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not" (p. 42). Indeed, the very term "affirmative action" suggests that use of the market represents inaction and that efforts to compensate for the existing distribution of benefits and burdens between blacks and whites or women and men should be regarded as "affirmative." MacKinnon's claim also challenges one understanding of "neutral principles"[36] — an understanding that was initially deployed to question the Court's reasoning in *Brown v. Board of Education*[37] on the grounds that the case did not involve discrimination at all and that the Court had failed to show why the associational preferences of blacks should be favored over those of whites.[38]

Although aspects of the general approach to sex discrimination in *Feminism Unmodified* were first set out in *Sexual Harassment of Working Women*, the emphasis has changed. *Feminism Unmodified* attributes gender inequality above all to sexuality and sexual practices: "I think the fatal error of the legal arm of feminism has been its failure to understand that the mainspring of sex inequality is misogyny and

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[33] 198 U.S. 45 (1905).

[34] Consider, for example, the "state action" doctrine in current constitutional law, which is not in fact a search for state action, but instead depends on background understandings about what government ordinarily or naturally does. *See* Sunstein, *supra* note 3, at 886–88.

[35] 163 U.S. 537 (1896).

[36] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[37] 347 U.S. 483 (1954).

[38] *See* Wechsler, *supra* note 36, at 33–34; *cf.* Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that affirmative action is logically continuous with the prohibition of discrimination as established in *Brown v. Board of Education*).

the mainspring of misogyny is sexual sadism" (p. 5). MacKinnon takes the sexual objectification of women, and current sexuality in general, as a central cause of sexual subordination — an issue I take up below. It is for this reason that pornography, rather than, for example, occupational segregation or childcare responsibility, is MacKinnon's central target. And it is no doubt in part this aspect of MacKinnon's critique that has made her views so controversial. Her claims threaten areas thought to be personal and private, attack the neo-Freudian orthodoxy that urges the liberation of sexual drives from repression, and pointedly part company with certain aspects of mainstream liberalism.[39]

To summarize, MacKinnon's basic criticism is an attack on the understanding of sex discrimination as a problem of irrational differentiation. In her view, sexual harassment is a form of sex discrimination. Pornography is a participant in the construction and perpetuation of sexual hierarchy. *Roe v. Wade*[40] turns out to be a case involving sex discrimination.[41] MacKinnon's argument cuts deeper still: state action limits, at least as conventionally conceived, become subject to challenge. The private sphere, in which widespread sex discrimination takes place, is hardly prepolitical and sacrosanct, as recent developments in family law have demonstrated.[42] It should be plain that MacKinnon's approach, because it expands and recasts the prohibition on sex discrimination, is radically different from much of current law. Hence MacKinnon's proposed substitute for the Equal Rights Amendment is a women's rights amendment providing: "the subordination of women to men is hereby abolished" (p. 28).

A. The Problem of Ends

Challenges to MacKinnon's approach come from several directions. The first challenge involves MacKinnon's ends. Many women today do not perceive the world in MacKinnon's terms; indeed, not a few are hostile to her depiction, and many do not seek the sorts of changes proposed in *Feminism Unmodified*. For these women, the problem

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[39] In *Feminism Unmodified*, MacKinnon identifies liberalism with conceptions of politics that see threats as coming exclusively from the public sphere or that take the existing set of preferences and the existing distribution of power as exogenous and natural. These ideas represent, however, a quite narrow aspect of the liberal tradition. *See* S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM (1984). It is a mistake to reject the liberal tradition entirely simply because it has been distorted by some of its purported opponents. MacKinnon's remarks about "liberalism" are too casual in this regard.

[40] 410 U.S. 113 (1973).

[41] *See infra* pp. 839–40; *see also* Ginsburg, *Some Thought on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375, 382–83 (1985) (discussing *Roe* as a sex discrimination case).

[42] *See* sources cited *supra* note 25.

of sex discrimination has neither the nature nor the magnitude that MacKinnon suggests, and the world she describes — one of widespread and objectionable gender hierarchy — is not the world in which they live. The forms of discrimination MacKinnon challenges are, in this view, largely a product of free choice or biology; other, more invidious inequalities are already addressed or can be remedied by contemporary law. For such skeptics, the difference approach, the overriding goal of which is to free people to seek their own disparate goals, is preferable.[43] Many women who find traditional roles satisfying and rewarding would find it intrusive and counterproductive for government to try to bring about MacKinnon's version of substantive equality.[44]

This critique of MacKinnon replicates earlier invocations of freedom of choice that have been roundly repudiated in modern law, including the attack on the New Deal (especially minimum wage and maximum hour legislation),[45] and the critique of modern civil rights legislation.[46] Such critiques ignore both problems of collective action and the ways in which apparently free choices are the product of the existing legal regime. Collective action problems make it extremely difficult for a dispersed and diffuse group to organize and seek reform. In the context of sex discrimination, moreover, the phenomenon of adaptive preferences — emphasized in recent rational choice theory[47] — is especially important, for it undermines conventional understandings of free choice.[48] Private preferences are not always autonomous; they are in part a product of existing social practice, including social pressures and the absence of opportunities.[49] If opportunities are unavailable, people often try to reduce cognitive dissonance[50] by scal-

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[43] *See* GENDER JUSTICE, *supra* note 24, at 12.

[44] *See id.* at 13–28.

[45] For a recent example, see R. EPSTEIN, TAKINGS 274–82 (1985).

[46] *See* Bork, *Civil Rights — A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21.

[47] *See* J. ELSTER, SOUR GRAPES 109–40 (1983); J. Roemer, Optimal Endogenous Preferences (1985) (unpublished manuscript on file with the author); MacPherson, *Want Formation, Morality, and Some 'Interpretive' Aspects of Economic Inquiry*, in SOCIAL SCIENCE AS MORAL INQUIRY 96 (N. Haan, R. Bellah, P. Rabinow & W. Sullivan eds. 1983). The term "adaptive preferences" is preferable to "false consciousness," because the latter has a tendency to tautology and lacks cognitive foundations.

[48] Serious collective action problems also arise here; the individual costs of organization may be quite high in comparison to the individual benefits, but the aggregate benefits may outweigh the aggregate costs.

[49] Sometimes the phenomenon of adaptive preferences is treated as a preference change through learning. In practice, it is difficult to distinguish between adaptive preferences and preferences modified by greater information; for present purposes, we may treat them as equivalent.

[50] *See generally* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1958) (describing cognitive dissonance and attempts to reduce it).

ing back their aspirations. More generally, the phenomenon of adaptive preferences makes it difficult to contend that legal rules should always or necessarily be based on current preferences.[51] If preferences are a function of legal rules and social practices, those rules and practices cannot be defended by reference to the preferences without circularity.[52]

This basic point has especially powerful implications in the area of sexual inequality.[53] Women's preferences have been formed against a background of limited opportunities. In these circumstances, the fact that many women are or seem content with the status quo is not a dispositive argument against social change. A system of formal equality leaves in place preferences and opportunities that are products of past discrimination.[54] It is a significant advantage of MacKinnon's approach that, unlike many purportedly feminist critiques, it does not evade the "freedom of choice" question but challenges it head on.

Although MacKinnon's argument responds persuasively to a familiar argument in favor of the difference approach, it does not supply a complete affirmative case for the dominance approach. That approach is difficult to evaluate in the abstract, and it is not fully elaborated in *Feminism Unmodified*. Moreover, the notion of "dominance" is somewhat ambiguous and itself depends on some sort of baseline. Any judgment about the dominance approach calls for an evaluation of both the context and the practical impact of that approach on the lives of women and men.[55] Such an evaluation will also depend on the prospects for change in light of the fact that preferences and practices are already in place and may be difficult to alter. Indeed, sometimes efforts at alteration are counterproductive, and *Feminism Unmodified* does not examine the problem of transition.

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[51] Consider Montesquieu's discussion of adaptive preferences on the part of women in the harem, Montesquieu, *Letter XXVI: Usbek to Roxana, at the Seraglio at Ispahan*, in 1 THE PERSIAN AND CHINESE LETTERS 61 (J. Davidson trans. 1892) (1721), and the ambivalent reactions of the newly freed slaves as discussed in L. LITWACK, BEEN IN THE STORM SO LONG (1979).

[52] *See* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). Of course, it is important to be careful and precise with rationales of this sort, for there are risks of tyranny in approaches that tend to disregard private preferences.

[53] Analogues exist in the racial area, *see* L. LITWACK, *supra* note 51, and in the judicial reception of so-called "freedom of choice" plans in school desegregation, discussed in Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

[54] The Supreme Court has recognized this point in the context of school segregation. *See* Green v. County School Bd., 391 U.S. 430, 441–42 (1968); *see also* Gewirtz, *supra* note 53, at 748–54.

[55] Of course, difficult epistemological questions lurk here on the issue of cultural criticism. *See* P. RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA (1986); M. WALZER, INTERPRETATION AND SOCIAL CRITICISM ch. 2 (1987).

It is an advantage of MacKinnon's argument, however, that she tends to be highly contextual in her discussion, particularly in the areas of reproductive freedom, sexual harassment, and pornography.

MacKinnon proposes that statutes restricting reproductive rights be treated as forms of sex discrimination. Such laws are discriminatory, both in purpose and effect, because they are a product of traditional understandings of the role of women in bearing and raising children. Seen in this light, laws prohibiting public funding of abortions should be understood as grounded in the same discrimination that motivates laws forbidding abortion altogether.[56]

Sexual harassment and pornography present somewhat different problems, but their cultural context and practical effects also raise issues of discrimination. It is fanciful to deny that women are the principal victims of sexual harassment or that they are the principal objects of abuse in and as a result of pornography. Comparable worth raises still different issues.[57] By increasing salaries in traditional female jobs, comparable worth remedies might reinforce women's preferences for those jobs or distort the employment market. These possibilities argue against such remedial proposals, even if countervailing factors make them justifiable. Practical considerations of this sort suggest that substantial work will be necessary to apply the dominance approach in particular contexts. Whatever the precise meaning of the approach, however, it is clear that its application would move the law further in the direction of gender equality.

B. The Problem of Means

Another challenge to MacKinnon's approach emphasizes the problem of means. MacKinnon does not specify which institutions would provide the locus for the changes she advocates. It is difficult to expect courts to undertake the relevant tasks; there is no real parallel in public or private law for the sorts of departures MacKinnon seeks. Even in the area of racial discrimination, the judiciary has played a relatively narrow role. The lack of an available institution for implementing MacKinnon's proposals thus might argue against the dominance approach.

The institutional objections, however, are hardly insurmountable. Even if courts are inapt initiators, they might assist in achieving the measures sought by MacKinnon — for example, by recognizing sexual harassment as a form of sex discrimination, upholding at least some forms of antipornography regulation, or requiring the legislature to fund abortions if it funds the expenses of bringing a child to term. Consider also the possibility of constitutional or statutory attacks on

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[56] *See* L. TRIBE, *supra* note 3, at 1345–47.

[57] *See* Weiler, *supra* note 28.

criminal enforcement policies that permit differential risks of violence to be faced by men and women, both in and out of the home. Most measures directed toward what is currently conceived of as the private sphere would require executive or legislative action. In still other areas, coercive action in the form of legal requirements might be counterproductive or otherwise undesirable,[58] in which case private efforts would be preferable.

It is important to recognize that the dominance approach is not self-applying. In some settings, it is not clear whether a law subordinates women — or, more importantly, whether a change in the law would reduce social subordination or reinforce it. These considerations suggest that MacKinnon's approach needs to be deepened and supplemented. But her basic critique of the law of sex discrimination is quite powerful in its exposure of issues that have traditionally been understood in gender-neutral terms. It points in the right directions.

III. Applications of the Dominance Approach: Abortion, Pornography, and Other Problems

A large portion of *Feminism Unmodified* is devoted to the exploration of particular topics. MacKinnon points out that the extent and nature of rape and sexual harassment are relatively recent discoveries (p. 5); the same is true of pornography. These topics were hardly on the legal agenda just a decade ago. Courts and commentators have begun to rethink all of them, and MacKinnon, who helped initiate that process, offers a number of useful observations in *Feminism Unmodified.*

In a provocative essay on abortion, MacKinnon applies her general critique of the notion of a prepolitical and noncoercive private sphere of gender relations into which government must not enter. She argues that the Court's decision to approach *Roe v. Wade*[59] as a case involving privacy rather than equality was a mistake, based on a disregard for the sex-based character of reproduction and the tacit assumption that women have equal control over sex. In MacKinnon's view, "[s]exual intercourse, still the most common cause of pregnancy, cannot simply be presumed coequally determined" (p. 94–95). Women often fail to use contraception because to do so "means acknowledging and planning the possibility of intercourse, accepting one's sexual availability, and appearing nonspontaneous" (p. 95). In light of these overlooked facts, MacKinnon argues that *Roe* was myopic in treating

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[58] This is the view of some in the area of pornography. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv. J.L. & Pub. Pol'y 461 (1986). For a discussion of this view, see pages 842–46 below.

[59] 410 U.S. 113 (1973).

the issue as one involving privacy. That formulation suggests that the decision was partly responsive to "the interests of men as a group" (p. 97) in making women sexually available to men.[60] MacKinnon argues that "under conditions of gender inequality, sexual liberation [as promoted by the *Roe* reasoning] does not free women; it frees male sexual aggression" (p. 99).

MacKinnon speculates about why the legal system has structured the abortion issue in terms of privacy: "if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change. It is not even thought to require any social preconditions, other than nonintervention by the public" (p. 100). If the Court had structured the issue in terms of gender inequality and resolved it under the dominance approach, the issue of federal funding[61] might have come out differently. "[F]ramed as a privacy right, a woman's decision to abort would have no claim on public support" (p. 101); but as a right to equality, such a claim would be much harder to deny.

MacKinnon's principal application of the dominance approach is in the area of pornography — defined not as sexually explicit materials but as those that associate sex with violence.[62] There is some repetition in the six relevant chapters, but the reader is given a good sense of the development of MacKinnon's thought. The early essays are tentative. The middle ones have a sense of discovery, developing MacKinnon's now well-known approach to the subject. The later essays deal harshly with the objections of some women to the anti-pornography campaign and with the judicial treatment of the subject.[63]

MacKinnon's discussion of pornography is likely to be the most controversial part of *Feminism Unmodified*. It is important to understand the treatment within the context of her broader argument

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[60] *See* A. DWORKIN, RIGHT WING WOMEN 95 (1983) ("Getting laid was at stake."), *quoted in* FEMINISM UNMODIFIED at 99.

[61] *See* Harris v. McRae, 448 U.S. 297 (1980); *see also* Ginsburg, *supra* note 41, at 383–86 (criticizing the Supreme Court's abortion funding decisions).

[62] *See American Booksellers*, 771 F.2d 323; Indianapolis Code § 16-3(q).

[63] Of female opponents of pornography, MacKinnon writes:

> Women who defend the pornographers are defending a source of their relatively high position among women under male supremacy, keeping all women, including them, an inferior class on the basis of sex, enforced by sexual force . . . . I want you to stop claiming that your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism (p. 205).

Of the judiciary, she argues:

> The Supreme Court just told us that it is a constitutional right to traffic in our flesh, so long as it is done through pictures and words, and a legislature may not give us access to court to contest it . . . . The struggle against pornography is an abolitionist struggle to establish that just as buying and selling human beings never was anyone's property right, buying and selling women and children is no one's civil liberty (p. 213).

about sex discrimination and her general strategy for reform. A focus on the antipornography movement isolated from these broader themes will miss the basic point, regardless of one's ultimate conclusion about the issue of government control of pornography.

"What you are hearing tonight," MacKinnon asserts, "is something that has not been said before" (p. 127). She believes that feminist claims about the meaning and effects of pornography have been obscured by the sexual revolution of the 1960's and by the power of Freudian and associated antirepression theories of sexuality in intellectual and popular circles. MacKinnon's argument differs sharply from other, far less persuasive arguments for the regulation of sexually explicit speech.[64]

MacKinnon makes three basic claims. First, she suggests that severe harms are done to women in the production of pornography and that regulation of the resulting material is necessary to prevent those harms. Second, MacKinnon contends that pornography has a causal connection to acts of sexual violence against women. Third, and most generally, MacKinnon claims that pornography influences the attitudes of both men and women in gender relations, attitudes that help produce unlawful discrimination and foster gender inequality. Her basic argument is that the creation of a cause of action on behalf of women harmed by pornography would reduce the amount of pornography, give relief to those directly harmed by it, and at the same time affect male and female attitudes toward it.

In MacKinnon's view,

> Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimates them. More generally, it eroticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that "the truth about sex" or just a mirror of reality (p. 171) (citations omitted).

MacKinnon claims that "pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female" (p. 172). MacKinnon continues: "What in the pornographic view is love and romance looks a great deal like hatred and torture to the feminist" (p. 174). The law

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[64] The argument has also been made by other feminists, including Andrea Dworkin, with whom MacKinnon has worked closely. *See, e.g.*, A. DWORKIN, *supra* note 21. Similar arguments have been accepted in West Germany since the early 1970's, and West German courts have concluded that pornography is inconsistent with constitutionally guaranteed human dignity. *See* Rieman, *Pornography and Human Dignity: A West German Perspective*, MICH. L. QUADRANGLE NOTES, Fall 1986, at 1–2.

of obscenity[65] misconceives the problem because it is indifferent to the issue of harm — depending instead on offensiveness — and because it is gender-neutral.

The recognition that many categories of speech are currently regulable adds power to MacKinnon's argument, as do her description of the abuses that are sexualized in pornography, her discussion of the harms to women in and as a result of pornography, and her highly plausible claims of a causal connection between pornography and violence. Having absorbed MacKinnon's point, one notices sexualized violence against women in numerous places in modern culture, severely weakening one's initial instincts against control of at least some speech that merges sex with violence.

This analysis produced the well-known ordinance drafted by MacKinnon and Andrea Dworkin, which defines pornography as discrimination based on sex — a civil rights violation. The ordinance defines pornography in part as "the graphic sexually explicit subordination of women, whether in pictures or in words" (p. 262). The ordinance is not aimed at sexually explicit materials in themselves. Its principal target is sexually explicit materials that also involve violence, either in their making or their use. Most of the provisions are directed at the production of pornography or abusive practices in or as a result of pornography; the most controversial provision authorizes women to sue traffickers in pornography. The ordinance denominates this general right to relief from pornographic practices a civil rights action.

It is important to distinguish positions with which MacKinnon's approach is sometimes confused. MacKinnon does not argue that pornography should be regulated because it is offensive. She does not claim that the community has a right to censor speech that does not conform to its moral position. Nor, on the other hand, does she draw a sharp distinction between pornography and erotica. MacKinnon's highly controversial claim is not that pornography is a perversion of sexuality; it is instead that pornography helps to constitute sexuality.

MacKinnon's analysis raises two distinct questions. First, is her description of the problem posed by pornography persuasive? Second, is her remedy for the problem — a civil rights action — a desirable one? One could accept her view about the social meaning of pornography but simultaneously oppose control of pornographic speech.[66]

With respect to the first question, MacKinnon's diagnosis of pornography as a form of sex discrimination has been criticized from two perspectives. Some critics deny that pornography is harmful. Others

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[65] *See* Miller v. California, 413 U.S. 15 (1973).

[66] *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); Stone, *supra* note 58.

claim that feminism and pornography are compatible, that women enjoy (at least some forms of) pornography, and that the harms of pornography are gender-neutral. But these objections seem weak. There is mounting evidence that sexual violence occurs both in and as a result of pornography. Abuses within the pornography industry appear widespread.[67] Considerable evidence from laboratory experiments and the real world also suggests a link between pornography and sexual violence.[68] Of course, both laboratory and real world evidence suffer from serious methodological defects — the former because of the enormous difficulty of extrapolation, the latter because of possible confounding variables. Even if causation were clear and overwhelming, however, it would be hard to demonstrate, and in other areas of law, regulation is permitted on the basis of suggestive — but inconclusive — evidence.[69] It would be absurd to suggest that most sexual violence is a result of pornography or that sexual violence would disappear if pornography were eliminated. Moreover, some of MacKinnon's rhetoric is overstated. The evidence with respect to the harmful effects of pornography is, however, sufficiently powerful to justify regulation.

It is true that some women enjoy pornography, even if it is narrowly defined to include work that merges sex with violence. It is sometimes urged in this connection that female sexuality has only begun to express itself openly and voluntarily and that regulation of pornography, even when violent, would prevent the free development and expression of women's sexuality.[70] MacKinnon responds that sexuality is to a large degree socially constructed for both men and women. In her view, it is entirely unsurprising that some women find cultural symbols that mesh violence with sexuality to be sexually arousing. We have seen that preferences and beliefs are socially formed.[71] In light of the harmful effects of pornography as defined here — with its focus on violence — the fact that some women enjoy it is not a reason to do nothing about it.[72] One need not take a position on MacKinnon's broadest claims about the relationship between sexuality and sexual inequality in order to agree that the fact

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[67] *See* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 767–835 (1986).

[68] *See, e.g.*, PORNOGRAPHY AND SEXUAL AGGRESSION (N. Malamuth & E. Donnerstein eds. 1984).

[69] Consider, for example, the uncertainties involved in the regulation of carcinogens. *See* S. BREGER, REGULATION AND ITS REFORMS 135–40 (1982).

[70] *See* Brief Amici Curie of the Feminist Anti-Censorship Taskforce at 27–32, *American Booksellers*, 475 U.S. 1001 (1986) (No. 85-1090).

[71] *See supra* pp. 836–37.

[72] "[T]he defense of lesbian sadomasochism would sacrifice all women's ability to walk down the street in safety for the freedom to torture a woman in the privacy of one's basement without fear of intervention, in the name of everyone's freedom of choice" (p. 15).

that some women associate sexuality and violence is not a sufficient reason to permit the distribution of every film that merges sexuality and violence.

Other critics claim that pornography cannot be a form of sex discrimination because it harms and degrades both women and men. This argument, reflecting fundamental resistance to MacKinnon's basic point, is difficult to take seriously: whether or not women are nominal victims, pornography generally treats them as the ultimate target of sexual violence and objectification. Indeed, the persistence of such claims reveals the strength of MacKinnon's critique, especially insofar as she suggests that pornography renders some forms of sexual inequality invisible.[73]

All of this suggests that MacKinnon's analysis of the social meaning of pornography is persuasive. The question of legal control, however, is trickier. The conventional criticisms are that the problem of defining pornography is insurmountable and that the risks to freedom of speech outweigh any gains that would come from regulation. In these circumstances, the remedy, opponents claim, is "more speech," not government regulation.[74] From a strategic perspective, critics argue that other problems facing women — also emphasized in *Feminism Unmodified* — are much higher priorities than government regulation of pornography.

The problems of definition are indeed considerable — especially in light of the fact that materials with some of the characteristics of pornography can be found throughout modern culture. Moreover, parts of MacKinnon's own effort at definition might be faulted for overbreadth.[75] The problems of definition are not, however, insurmountable.

First amendment doctrine furnishes the building blocks for a quite conventional argument for regulation of pornography. First, most of the speech at issue is far afield from the central purposes of the first amendment under almost any view. Distinctions among categories of speech in terms of their centrality to first amendment purposes are well established in constitutional law, and a system of free expression could not sensibly ignore them.[76] For example, conspiracies, bribes,

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[73] "The harm of pornography, broadly speaking, is the harm of the civil inequality of the sexes made invisible as harm because it has become accepted as the sex difference" (p. 178).

[74] The roots of the "more speech" approach are found in Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[75] For example, it might be desirable to exempt at least some pornographic material having significant social value, at least when there was no illegality in the production. *See generally* Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 624–26 (arguing that pornography is generally "low-value" speech entitled to less protection).

[76] *See* Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889 (1986); Sunstein, *supra* note 75. MacKinnon attacks the first amendment logic that distinguishes between harmful

unlawful contracts, false statements of fact, private libel, misleading commercial advertising, and child pornography are regulable,[77] largely because they do not promote the purposes associated with free speech, which involve public deliberation, broadly understood.[78] The harms of pornography, canvassed above, are sufficient to justify regulation under the standards applied to low-value speech.[79] Pornography, narrowly defined, does not present a weaker claim for regulation than many similar types of speech that are regulable under current law.

Those skeptical of MacKinnon's approach are undoubtedly concerned about the dangers of overinclusion and misapplication. These concerns are persuasive when the underlying harms are minimal and the risks of overinclusiveness or misapplication quite large. In the context of pornography, however, the risks of what some might see as "inaction" — involving harms to women in and as a result of pornography — are considerable. Further, there is little reason to doubt that a carefully worded statute, posing no greater threat to free expression than the other categories of regulable speech, could be drawn.

The final set of objections to MacKinnon's approach is largely strategic. Opponents suggest that pornography is a relatively minor factor in gender inequality[80] compared to economic and other factors. The antipornography campaign is said to create an odd alliance with groups whose concerns conflict with feminism. And to the extent that the merger of violence and sexuality is a social problem, it is also severe in mainstream advertising, television, and popular culture — all of which sexualize violence, but none of which would be reached by the ordinance written by Dworkin and MacKinnon. Seen in this

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words and acts. Thus, she asks, is a "Whites Only" sign the idea or the practice of segregation? (p. 156).

[77] For an overview, see G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW ch. 7 (1986).

[78] This is of course a controversial view, associated with Alexander Meiklejohn. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). But on any plausible view of the central function of free expression, pornography, if narrowly defined, is likely to qualify as low-value speech.

[79] *See* Sunstein, *supra* note 75, at 609–17 (rejecting the claim that antipornography legislation is viewpoint based).

[80] MacKinnon responds:

> Some of the social theorists in my audiences are not convinced that pornography can be part of the subordination of women because the subordination of women happens in places where, they say, there is no pornography. . . . Pornography, they say, is effect and not cause because the oppression of women predates pornography, so anything done about pornography will do nothing about the oppression of women. It does not matter that racism happens in specific forms all over the world without ceasing to be racist. It does not matter that these people think something should be done about the Ku Klux Klan even though white racists in South Africa do not wear sheets and burn crosses. . . . They do not say apartheid should be ignored as effect rather than cause because white racism precedes it and happens elsewhere in different forms (p. 222).

context, the attack on the pornography industry might be thought misdirected.[81]

Such an attack would, however, do some good for some women, and — a central point — discussion and identification of the problem is likely to contribute to efforts to address the other problems as well. The fact that control of pornography would not bring about sexual equality by itself is hardly a persuasive reason not to initiate a measure that might do considerable good. In some circles, moreover, the antipornography movement has served as a powerful spur to changed attitudes on the part of both men and women.

MacKinnon's discussion of sexuality, however, has a deeper point, and this point underlies some of the resistance to the antipornography movement. Some observers suggest that MacKinnon's objections are in fact threatening to sexuality itself. MacKinnon's critics are correct here, for her argument bears on sexuality quite generally, even though it is possible to generate a defense of antipornography legislation that does not go so deep. In brief, MacKinnon suggests that we must reformulate "the problem of sexuality from the repression of drives by civilization to the oppression of women by men" (p. 98). In her view, the sexual revolution of the 1960's and neo-Freudian arguments in favor of removal of repression[82] are part of the problem rather than its solution. Hence MacKinnon is reluctant to distinguish sharply between erotica and pornography.[83] Her central claim is that "[s]exuality itself is a social construct gendered to the ground. Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being" (p. 173). In short, there is no prepolitical, unmediated "sexuality" that law, or feminists, should attempt to uncover and translate into actual practice. Sexuality, as practiced currently and generally, is itself enmeshed in, a cause and a product of, sexual inequality. It is in this view that pornography, sexual harassment, rape, and prostitution are not marginal issues but instead at the core of the problem. In her emphasis on the centrality of sexuality, moreover, MacKinnon is in agreement with Freud — although her conception of the purposes and effects of sexuality is of course entirely different, because Freud treats sexuality

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[81] *See Flogging Underwear: The New Raunchiness of American Advertising*, THE NEW REPUBLIC, Jan. 18, 1988, at 20.

[82] *Cf.* 1 M. FOUCAULT, THE HISTORY OF SEXUALITY (R. Hurley trans. 1978) (discussing different social attitudes toward sexuality). Astonishingly, Foucault fails to discuss problems of sex discrimination and gender hierarchy.

[83] MacKinnon writes:

> What pornography says about us is that we enjoy degradation, that we are sexually turned on by being degraded. For me that obliterates the line, as a line at all, between pornography on one hand and erotica on the other, if what turns men on, what men find beautiful, is what degrades women. It is pervasively present in art, also, and advertising. But it is definitely present in eroticism, if that is what it is (p. 91).

as essentially natural rather than socially constructed and does not regard it as a source of unjustified subordination of women.

MacKinnon's claims about sexuality raise large and difficult issues that cannot be properly evaluated in this space. The skepticism that has greeted some of MacKinnon's work is surely in part a product of the threat that this critique poses to practices that many think of as deeply personal and private. It is here that MacKinnon's claims sharply differ from other forms of social criticism, such as the New Deal and the civil rights movement: despite the analytic parallel, MacKinnon's argument enters an area that many men and women perceive as far more threatening and even dangerous. Moreover, the critique of sexuality is distinct from the dominance approach to sex discrimination, although in MacKinnon's formulation the two are merged. One might, for example, believe that issues of sex discrimination should be approached in terms of dominance rather than irrational differentiation without believing that sexuality itself is the source of the problem.

How would one evaluate MacKinnon's approach to sexuality? An enormous amount of theoretical and empirical work would be necessary to convince skeptics of her basic claim. The arguments that sexuality is a social construct, that sexual sadism is the mainspring of sexual inequality (p. 5), and that sexuality is built on male dominance raise several questions. First, the connections among sexuality, nature, law, and culture are extraordinarily complex; indeed, it is not altogether clear what the claim that "sexuality" is "a social construct" means. Second, the relationship between sex discrimination and sexual sadism is hardly simple and clear cut. The term "sadism" is perhaps misleading in this context, for it connotes a kind of pleasure from pain that captures only a part of sexual inequality. Moreover, sexual inequality is sometimes rooted in things other than sexual sadism; economic, domestic, and other advantages are also important. Women have been oppressed in nonsexual ways, and men receive much more from gender inequality than sex on their own terms. Third, the claim that sexuality is based on male dominance is in some tension with the presence of affirmative descriptions of sexuality from women, descriptions that are true to subjective experience. Indeed, MacKinnon herself emphasizes that unremittingly bleak depictions of sexuality are inconsistent with important elements of female as well as male experience.[84]

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[84] MacKinnon states:

> In serious political analyses, say marxism, a worker can sometimes have a good day or even a good job. That does not mean the worker has false consciousness or the work is not exploited labor, structurally speaking . . . . Because sexism is basic and has been impervious to basic change, it makes sense that it would live in something socially considered basic, deceptively a part of the given, enshrouded with celebratory myth and ritual. Sex feeling good may mean that one is enjoying one's subordination; it would not

Nevertheless, notions of sexual liberation and the removal of repression often have as their underlying purpose and effect the increased sexual availability of women to men. Elements of sexual sadism form an ingredient in sexual inequality; MacKinnon's position here is both original and confirmed by unmistakable aspects of modern culture. Moreover, the case for regulation of at least some pornographic materials is quite persuasive. Equally important, the anti-pornography movement has begun to affect both male and female thinking about sexuality, rendering visible many practices and issues formerly taken for granted. Sexualized violence toward women is pervasive in advertising, popular culture, and everyday life. It is difficult to see much of popular culture — and some high art as well — in quite the same way after reading *Feminism Unmodified*. MacKinnon's arguments furnish the tools with which to understand all of this and eventually to do something about it. This is in itself a considerable achievement.

IV. Conclusion

Feminism Unmodified is filled with novel, sometimes brilliant insights carrying broad implications for sex discrimination in particular and legal theory in general. Insights of this sort have begun to reorient legal understanding and social practices — especially in the area of sexual harassment, where a minor revolution has already occurred. *Feminism Unmodified* is reminiscent — and deliberately so — of some of the arguments associated with the New Deal attack on the common law, the downfall of *Lochner v. New York*, and the civil rights movement.

At the same time, *Feminism Unmodified* will be hard for skeptics to take; parts of it will appear polemical, one-sided, insufficiently empirical, and at times conclusory. Controversy will continue about the proper legal approach to pornography, comparable worth, abortion, and sexual violence — and even more about the relationship between sexuality and sex discrimination. My suspicion, however, is that a decade from now, the central insights of *Feminism Unmodified*, and of MacKinnon's work generally, will be taken as substantially correct in the legal culture. If they are not, the fault will lie with the legal culture, not with the insights themselves.

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be the first time. Or it may mean that one has glimpsed freedom, a rare and valuable and contradictory event. . . . The point is, the possible varieties of interpersonal engagement, including the pleasure of sensation or the experience of intimacy, does not, things being as they are, make sex empowering for women (p. 218).