

## TOWARD A FEMINIST ORTHODOXY

by Peter Berkowitz

Toward a Feminist Theory of the State  
by Catharine A. MacKinnon  
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In the spring of 1989 Yale Law School students published the first issue of the Yale Journal of Law and Feminism. The cover featured a boldly revised drawing of Justitia, traditional symbol of justice. Still garbed in a simple robe and holding aloft the scales of justice, the new Justitia had lifted the blindfold thought to ensure her impartiality in weighing and measuring grievances and meting out justice. One of the Journal's short introductory manifestos explained that impartial adjudication was essentially unjust and no longer tolerable. Impartiality guaranteed blindness to systemic disadvantage, reflected bias in favor of the powerful and affluent, and served to maintain a male-created status quo.<sup>1</sup> Justice would be best served by restoring to Justitia her sight enabling her to use "all her powers in overseeing the law."<sup>2</sup>

The vision of a wise and good ruler distributing justice intelligently and artfully to fit the needs of each individual soul is an ancient dream, and the essential imperfectibility of the rule of law an ancient insight. The feminist conviction that justice demands the transformation of the judge into a philosopher-queen thus reflects as it adapts a venerable form of political idealism, and for this reason alone, to say nothing of other important considerations, the claims of feminism command the attention of all friends of justice. Yet idealism can be a harsh taskmaster. To take an extreme example, when Plato's Socrates depicted a city constructed in strict accordance with justice he was compelled to imagine the remaking of social life, as it were, from the ground up, including the abolition of the family and the elimination of private property. What would Justitia, conceived in feminist terms, see if she were to remove her blindfold? What reforms would Justitia, freed from the constraints of impartiality and viewing social and political life from a feminist standpoint, institute?

Many believe that feminism is an umbrella term covering a rich variety of contestable histories and theories about women's customary roles and traditional legal disabilities,

exemptions, and entitlements, as well as conflicting views about the meaning of gender equality and government's role in ending sex discrimination, and hence that it is misleading to speak simply of a feminist standpoint. Not so according to Catharine MacKinnon, Professor Law at the University of Michigan Law School, an activist and prominent legal academic, who asserts in her celebrated new book, *Toward a Feminist Theory of the State*, that feminism rightly understood is radical or unmodified feminism.<sup>3</sup> And what justice, unencumbered by conventional constraints, would see from MacKinnon's standpoint is a nightmare world ruled by a "male supremacist structure"<sup>4</sup> at once everywhere and nowhere, shrewd and brutal, invisible and all-encompassing.<sup>5</sup> Though MacKinnon speculates that this male viewpoint is universal and transhistorically enduring<sup>6</sup> she is almost exclusively preoccupied with exposing the colossal injustice she believes men promulgate against women under the cover of American liberal democracy. And lest one think that such chilling reforms as Socrates proposed are the irrelevant fantasies of ancient philosophers, MacKinnon, like Socrates, finds the family and private property, at least under the prevailing conditions of male supremacy, repugnant to justice. What for Socrates, however, was part of a thought experiment destined to shed light on whether justice is choiceworthy for its own sake sometimes seems to be for MacKinnon the core of a potentially revolutionary project of fundamental social transformation.<sup>7</sup>

Nonetheless, and despite MacKinnon's extensive experience as an activist and advocate, *Toward a Feminist Theory of the State* is short not only on concrete proposals for reform, but admittedly lacks a positive feminist theory of the state<sup>8</sup> and feminist account of adjudication.<sup>9</sup> MacKinnon mocks the practice of placing women on pedestals as nothing more than a sly tactic for maintaining male supremacy, MacKinnon herself engages in a form of pedestalization, for she seems to appeal to the victim or inferior status she ascribes to women to establish a special exemption for feminists, herself in particular, from living up to the professed aspiration to advance a positive theory of the state.

MacKinnon's essay is an epic accusation<sup>10</sup> primarily leveled against American liberal democracy (but by persistent innuendo implicating human civilization from time immemorial) for sustaining "a reign of sexual terror and abasement and silence and misrepresentation continuing to the present day."<sup>11</sup> MacKinnon marshals considerable empirical evidence and excoriates existing legal doctrine in an attempt to establish that sex discrimination is endemic to the organization, preservation, and reproduction of the liberal state. Her argument, driven by a high sense of purpose and fierce moral indignation, crackles with outrage as she relentlessly seeks to expose the mechanisms by which the protection of individual rights necessarily results in the subjugation of women as a class. Since distinguishing liberty from license, or determining the elusive line beyond which the exercise of my freedom impermissibly infringes upon your

protected liberties is a traditional liberal dilemma, one which has preoccupied thoughtful liberals and served as point of attack for conservatives as well as Marxist critics of liberalism, MacKinnon's epic accusation builds upon a widely recognized weakness of liberalism. It also speaks to a sense of justice, fair play, and concern for the disadvantaged cultivated by many liberals.

MacKinnon's accusation consists of three major parts. The first, "Marxism and Feminism," takes as its point of departure of the Marxist thesis that relations of economic production constitute and permeate culture, politics, and religious practice and belief and proceeds to criticize Marxist and liberal feminist understandings of sex inequality, striving to ride each of the vestiges of liberalism within. Rejecting the substance of Marx's extraordinary reductivism, but retaining its form, MacKinnon asserts that more fundamental than economic relations are the sexual relations which underlie "the totality of social relations,"<sup>12</sup> and seeks with this new key to unlock the mysteries of social and political life ranging from the basic structure of government to the intimacies of romantic love, marriage and motherhood. The second part of MacKinnon's accusation, entitled "Method," expounds the "way of Knowing" - "consciousness raising" - which enables feminism to lift the veil on relations between the sexes and see them as they really are: brute relations of power. The third part, appearing under the general rubric, "The State," aims to show how constitutional adjudication in general and legal doctrine governing rape, abortion, pornography, and sex inequality in particular reinforce the pervasive subjugation of women. As MacKinnon herself acknowledges,<sup>13</sup> accusations or indictments presuppose laws, rules of right conduct, or standards of justice. To what vision of justice does MacKinnon appeal?

Initially, MacKinnon expressly disavows the intention and responsibility of dealing with this fundamental question. Surprisingly, since her book explores the social construction of gender and self,<sup>14</sup> a process which MacKinnon emphasizes is weighted with moral and political significance, MacKinnon invokes a distinction familiar to students of positivist social science, stressing that her book is "not a moral tract. It is not about right and wrong or what I think is good and bad to think or to do. It is a book about what is, the meaning of what is, and the way what is, is enforced."<sup>15</sup> Accordingly, MacKinnon announces that her novel theoretical argument "does not advance an ideal (sex equality is taken, at least nominally, as an agreed-upon social ideal) or a blueprint for the future."<sup>16</sup> Yet those who adhere less rigorously to the blue-chip distinction between facts and values MacKinnon momentarily endorses, and have a keener interest in the sociology of knowledge than MacKinnon here evinces will undoubtedly be stirred to wonder how it came to be that sex equality, even nominally - and dispute over the government's role in combatting sex discrimination notwithstanding- has won widespread support across the political spectrum. Since

MacKinnon defiantly declares that her book eschews the constraints of "academic literatures or trends or discourses," and instead relies on "works that are useful"<sup>17</sup> the question arises: what use or interest does it serve for MacKinnon to refrain entirely from examining her own important observation that sex equality is a pervasive social ideal in the liberal state?

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Much like Descartes, who helped establish the foundations for modern philosophy, MacKinnon introduces new rules of right method for understanding human affairs. Consciousness raising, MacKinnon announces is the feminist method of knowing.<sup>18</sup> This new method of right knowing<sup>19</sup> involves the formation of small, supportive groups of women meeting to discuss their common experiences. MacKinnon's disclaimer notwithstanding,<sup>20</sup> it would be a mistake to conceive of consciousness raising, as MacKinnon presents it, as a group exploration of richly complicated and conflicting ways of experiencing and understanding women's lives. This is because regardless of the feelings, memories, injuries, desires, and hopes that women bring to consciousness raising, MacKinnon lays down an apparently binding interpretation of women's experience, namely "the substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstructed daily as sexuality."<sup>21</sup>

Unlike conventional versions of philosophical, scientific or judicial method which aim to formulate neutral, independent procedures, the observance of which is thought to guarantee the validity of the results, consciousness raising as interpreted and used by MacKinnon seems to be designed to provide a forum for showcasing an independently established and authoritative truth about women's pervasive subjugation to men. Like some forms of psychoanalysis, MacKinnon's version of consciousness raising presupposes a reality unmasked in the light of which it endeavors to impel participants to reinterpret their experience. One can fully accept the truth of the stories of frustration, despair, and cruel abuse women tell in consciousness-raising groups and still wonder whether MacKinnon's consciousness raising produces "one horror story after another,"<sup>22</sup> because it systematically excludes the voices of women who find a measure of contentment in the precarious, embattled institution of marriage and, along with hardship, pleasure amid the tangled responsibilities of motherhood. What, for example, does MacKinnon's consciousness raising imply for women such as Blu Greenberg, by her own lights a feminist and Orthodox Jewish wife and mother, whose *On Women and Judaism: A View from Tradition*<sup>23</sup> describes her struggle to respect and preserve the wisdom, beauty, and joy she experiences in her traditional Jewish role while embracing the challenges of feminism and striving to face up to the

questionable ways in which traditional Judaism has excluded women from positions of power? And doesn't MacKinnon's "substantive principle" make Jannie Crawford's first kiss across the gatepost, like her mature love for Tea Cake, seem, in Nanny's words, "like a manure pile after a rain"?<sup>24</sup> Can MacKinnon recognize the validity of consciousness raising as a "method of knowing" if it does not issue in agreement about MacKinnon's orthodoxy regarding the pervasive powerlessness of women, the unremitting bleakness of their lives, and the monstrous evils of liberalism? It is revealing that MacKinnon scarcely even acknowledges the possibility that consciousness raising, correctly conducted, produces anything but horror stories.

The sole rival to consciousness raising as a method of knowing which MacKinnon recognizes is "scientific epistemology." And scientific epistemology, defined by MacKinnon as the quest for neutral, objective and perspective free knowledge is, MacKinnon believes, the distinctively male viewpoint.<sup>25</sup> Or does she? Early on MacKinnon invoked the distinction between what is, and what is right and wrong,<sup>26</sup> that is the good old fashioned, garden variety positivism widely thought to underlie the scientific outlook to define the approach her book takes and excuse her reluctance to explore the rise of prominence of sex equality as a well-accepted social ideal. MacKinnon now proceeds to explain that rigid adherence to the norm of objectivity characterizes the method of the social sciences and the physical sciences.<sup>27</sup> Drawing upon the authority of men such as Richard Rorty and Karl Popper, MacKinnon furthermore finds the norm of objectivity at the root of the state and liberal legalism.<sup>28</sup> The norm of objectivity in all its diverse manifestations, MacKinnon declares, essentially serves to maintain and extend male domination of women.<sup>29</sup>

Few today would deny that the unqualified quest for scientific objectivity, whether in the social sciences or in the liberal legalism, has a powerful tendency to distort the human conduct it purports to explain or adjudicate.<sup>30</sup> How then does MacKinnon establish the hegemonic and ruthless reign of the ideal of scientific objectivity in jurisprudence and the study of society and politics? First, she finds it useful to write as if the debates that have raged within Anglo-American social science over the last thirty years about the severe limitations on the scientific study of politics (in the work of men and women such as L. Strauss, A. MacIntyre, C. Taylor and H. Arendt, among others) have never happened. Moreover, MacKinnon finds it expedient to ignore such classic reflections on the irreparable defects of scientific knowledge as Weber's melancholy meditation on the incapacity of scientific knowledge to yield insight about right and wrong,<sup>31</sup> Pascal's famous reflections on the tension between the spirit of geometry and the spirit of finesse,<sup>32</sup> and Plato's enduring preoccupation with the "old quarrel between philosophy and poetry."<sup>33</sup>

Second, MacKinnon falsely implies that Langdell's aspiration to create a science of the law modelled on geometry has defined the American legal mind since the 1870s.<sup>34</sup> MacKinnon, good to her word that her argument "uses books that are useful"<sup>35</sup> entirely omits to mention the inconvenient and voluminous articles, studies, treatises and cases that document the rise of sociological jurisprudence and legal realism, vastly influential episodes in the history of the American legal academy marking the revolt against Langdell's impoverished legal formalism. This revolt, almost as old as the Langdellian orthodoxy it successfully discredited and associated with such legendary names as Pound, Holmes, Cardozo, Frank, Llewellyn, and Arnold, challenged the idea of the judge as a neutral observer, insisted that experience, not logic, was the life of the law, denied the law's autonomy, and sought to transform law into an instrument for serving correct public policy as determined through study of economics, political science, psychoanalysis, history and the other disciplines.<sup>36</sup> Indeed, contrary to MacKinnon, Langdellianism, at least in the pure or unmodified form MacKinnon attacks, has long been dead and buried, and rare is the law student who fails to absorb the realist lessons permeating the first year curriculum.

Third, MacKinnon sadly misrepresents recent constitutional history. For example, MacKinnon asserts that under American constitutional law, "those who have freedoms like equality, liberty, privacy, and speech socially keep them legally, free of governmental intrusion. No one who does not already have them socially is granted them legally."<sup>37</sup> It is undeniably true that liberal democracies permit disparities in wealth and social well being that, for the poor and disadvantaged, impair and even cripple the effective exercise of political rights.<sup>38</sup> Yet is that, as MacKinnon implies, the whole story about American liberalism's promise of equal liberty? What of the oft retold fifty year history of judicial activism in the protection of "discrete and insular" minorities,<sup>39</sup> and the variety of heightened standards of judicial review which have emerged in the fields of due process, equal protection, and free exercise adjudication to scrutinize legislation dealing with vulnerable minority groups - including women, who formally of course are not a minority - cut off from majoritarian political processes or ill-equipped to exercise their political rights?<sup>40</sup> Here MacKinnon falls strangely silent.

MacKinnon succeeds in reaffirming that "scientific epistemology" is a grossly inadequate theoretical framework for understanding human affairs. What she fails to show is that "scientific epistemology" is the sole or even primary lens through which social scientists, jurists, and citizens view themselves and the world.

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MacKinnon pursues her attack on male supremacist ideology in discussions of rape, abortion, pornography, and sex discrimination. Though MacKinnon's scathing indictment will awaken some from complacency and galvanize others for productive political action, her theoretical extremism combined with a stunning rhetorical power are, I believe, at bottom profoundly counterproductive. To insist on understanding the ordinary in terms of the extreme, indeed to hammer away relentlessly at the distinction between the ordinary and the extreme, to efface the differences between homemakers and prostitutes, wives and concubines, mothers and slaves more than runs the risk of levelling and homogenizing the variety of injuries women incur.<sup>41</sup> It also sullies all pleasures women experience as illusory, or worse, the irredeemably tainted gifts of a corrupt status quo.

Consider rape. Since MacKinnon insinuates that under conditions of sex inequality there is no fundamental difference between sex and rape<sup>42</sup> and doubts whether women can meaningfully consent to sex,<sup>43</sup> it is unsurprising that she finds present rape law, which generally speaking requires women alleging rape to show lack of consent, essentially unsatisfactory. MacKinnon justly wonders how the law may determine what is going on in a woman's mind.<sup>44</sup> Instead of concluding, along with the criminal justice system, that the law must unfortunately resort to crude external indications such as evidence of physical force or signs of resistance to establish nonconsensual intercourse, MacKinnon insists that rape ought to be determined from the perspective of the woman alleging a crime. "Rape should be defined as sex by compulsion, of which physical force is one form."<sup>45</sup> Few would wish to quarrel with MacKinnon's view that physical force is but one of the many and varied forms of compulsion. What insight does MacKinnon offer, however, is enabling jurors and jurists to draw the fine discriminations between the forms of compulsion susceptible to legal action and the forms of compulsion beyond the reach of law? When one interprets compulsion as broadly as MacKinnon advocates, when one holds that social roles and legal structures are gendered to the ground and work a massive and pervasive disadvantaging of women, when one insists that relations between men and women are fundamentally defined by unjust structures of domination and dependence, then the very fact of intercourse seems to give rise to an all but irrebuttable presumption of forced sex, or rape. Translated into legal terms, this would seem to require shifting the burden of proof, compelling a rape defendant who was shown to have had intercourse to prove the presence of consent in order to avoid conviction. MacKinnon, I think, believes that a presumption of guilt ought to attach to defendants in rape cases.

As MacKinnon advances an extremely expansive definition of rape she blurs what is distinctively ugly and repellent in rape ordinarily understood. And her theory subverts her facts. For example, MacKinnon reports that "Almost half of all women. . .are

raped or victims of sexual abuse in childhood."<sup>46</sup> Ironically, MacKinnon's own ground - that it is difficult for women to distinguish rape from intercourse under conditions of male dominance<sup>47</sup> - tends to trivialize this appalling finding as a drastic underestimation. And does not MacKinnon teach us to scoff at social science results? Furthermore, it should be pointed out that MacKinnon bases her numbers on an empirical study involving fewer than a thousand women in San Francisco which specifically restricted its statistical conclusions to San Francisco.<sup>48</sup> In sum, by advancing, in disregard of the cited study's carefully formulated conclusion, sweeping generalizations about "all women" based on a small sample in a single city MacKinnon needlessly squanders precious credibility; she deflects attention away from odious crimes against women and onto her own dubious methodological and rhetorical procedures.

MacKinnon subsequently undertakes to show that a woman's right to abortion found in *Roe v. Wade*<sup>49</sup> represents yet another surreptitious measure by which men in the liberal state increase their power over women. For MacKinnon the central meaning of *Roe* is an increase in men's access to women's bodies, owing to a diminished fear of unwanted children.<sup>50</sup> The crux of the problem, according to MacKinnon, is that *Roe* confers a right of privacy and thereby "reaffirms and reinforces what the feminist criticize of sexuality criticizes the public private split for the lives of women."<sup>51</sup> The distinction between public and private, which MacKinnon with some justice believes to be at the heart of liberalism, is pernicious on MacKinnon's account, because "[w]omen share isolation in the home and degradation in intimacy."<sup>52</sup> MacKinnon glosses over the unfortunate fact that degradation in the home comes in many forms, from violent physical abuse to the quiet contempt born of familiarity and fatigue. Should all forms of degradation become subject to judicial oversight? Sometimes MacKinnon writes as if the general commitment to protect privacy or intimacy - never, contrary to MacKinnon, as a matter of law or fact - is the root of the problem: "When the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law."<sup>53</sup> Regardless of whether some flesh and blood women believed that they enjoyed increased personal freedom thanks to the right to privacy found in *Roe*, from MacKinnon's perspective *Roe*, because it relies upon and perpetuates a distinction between spheres of legitimate and illegitimate state involvement, sets up one more obstacle to harnessing the force of law for the task of remaking intimate personal relations.

Just as the premise that intercourse is indistinguishable from rape underlies MacKinnon's attack on the law of rape and animates her criticism of the constitutional right to abortion, so too it serves as the point of departure for her analysis of pornography. MacKinnon's charge that the pornography industry regularly abducts, beats, and violently compels women to work as porn models describes outrageous

crimes. Why these reprehensible acts cannot be combatted within the prevailing liberal framework by better education, more effective precautions and more thorough preventative measure, and a more determined, vigorous, and vigilant law enforcement MacKinnon does not clearly say. MacKinnon's argument that the consumption of pornography reinforces degrading stereotypes about women is shared by many who would dispute MacKinnon's conclusion that the proper response is to impose a far-reaching ban. MacKinnon's original contribution to the debate over pornography lies in her assertion that far from being a deviant genre in the liberal state, "pornography is the essence of a sexist social order, its quintessential social act."<sup>54</sup> MacKinnon affirms, as a simple, unadulterated truth, that pornography "is not a distortion, reflection, projection, expression, fantasy, representation, or symbol either. It is sexual reality."<sup>55</sup> Of course, if sex is pornography, then banning pornography, as MacKinnon expressly advocates, would seem to entail, at least under the prevailing conditions of male dominance, the criminalization of sexual intercourse.

MacKinnon fervently believes that state power ought to be directed to eradicating the pervasive sex inequality which "defines and situates women as women."<sup>56</sup> Remarkably, and despite her insistence on the force of Marxist analysis, MacKinnon never identifies the material (or any other) interest that might induce men to cooperate in her revolution. And inasmuch as MacKinnon contends that morality is a socially constructed web of meaning designed to maintain male supremacy, and proudly boasts that the one true form of feminism, her radical feminism,<sup>57</sup> relinquishes "all instinctual, natural, transcendental, and divine authority",<sup>58</sup> it is a mystery why men ought to cooperate in the dismantling of their far-flung empire. How, one wonders, in MacKinnon's black and white universe, rigidly segregated into victims and villains, peopled with battered women and faceless men made of straw, and dominated by a legal system that is a fatally twisted tool of male power,<sup>59</sup> did sex equality ever emerge as MacKinnon suggests it has,<sup>60</sup> even nominally, as a standard of justice?

While MacKinnon acknowledges that "[o]n the level of the state, legal guarantees of equality in liberal regimes provide an opening" for fighting sex inequality, she treats this fact as an inexplicable aberration.<sup>61</sup> There is excellent reason for MacKinnon to expressly refuse to explore this conspicuous feature of our political landscape. When one ponders, for example, the significance of the Biblical teaching that God made male and female in His image,<sup>62</sup> or to turn to a very different and vastly less pious quarter, Hobbes' early liberal view that equality based on like vulnerability to violent death outweighed any forms of human inequality, or the later Kantian notion of a noumenal self entitled to respect and dignity irrespective of empirical determinations (including gender), the opinions about social justice underlying the rise of the welfare state, the civil rights movement and the Warren Court's elaboration of due process and equal protection guarantees, indeed MacKinnon's own dramatic success over the past

decade in helping establish sexual harassment as an actionable offense, and a host of other practices, beliefs, and fundamental teachings, it becomes evident that the ideal of equality has a long history and deep roots in our religious, philosophical, and political traditions.<sup>63</sup> To realize that MacKinnon's argument derives much of its force from an appeal to a sense of justice powerfully inculcated (though, needless to say, all too often unrealized to an excruciating degree) by a multifaceted tradition she persistently caricatures, and to grasp that her theory is fundamentally dependent upon an extraordinarily rich cultural inheritance which she tirelessly and tediously denounces is to perceive the spirited obscurantism fueling her "theoretical argument in critical form."

Yet the genuine challenge MacKinnon poses does not end here. Especially one who wishes to heed the claims of justice is compelled to go beyond MacKinnon's flawed theorizing and theoretical excesses and listen to her angry, impassioned, sometimes eloquent, and deliberately jarring insistence that in myriad ways women, as a class, suffer wrongs invisible to the law. Where bruised bodies and wounded spines are at stake the formulation and criticism of theory ought, for more than a moment, to be moved to the sideline. MacKinnon compels us to confront afresh and along a volatile dimension the discrepancy between the promise of the liberal state and the often harsh reality. Because the law in the liberal state (and not only in the liberal state) is an imprecise, cumbersome instrument, rape is often likely to go undetected and unpunished; the protection of privacy, reinforced by Roe, too easily creates shelter for license and cruelty, the prosperous pornography industry reveals a frightening side of our political and sexual life. Stifling customs and practices which degrade women, stretching from the family to the marketplace, are within the ken (and should be a central concern) of defenders of the family and proponents of limited government. Because MacKinnon turns a blind eye to the precarious achievements of liberal constitutionalism, one is not entitled to turn a deaf ear to the anguished easily muffled cry of the injured and the oppressed.

Still, these observations and the demands for prompt and sustained action to which they give rise do not change the fact that MacKinnon's popular slogan - "the personal is the political" - carries with it the practical mandate for state supervision of conscience and thought in order to wipe the slate clean and effect a radical revision of social relations starting with sexual relations. MacKinnon flatters herself in supposing the originality of radical feminism's repudiation of the distinction between the public realm and private life.<sup>64</sup> In order to give credit where credit is due, it is necessary to restate the hard truth that in this century it was not MacKinnon's feminism unmodified, but rather the theorists of European fascism who spearheaded the assault on the notion of protected liberties or a private sphere generally speaking off-limits to government supervision.<sup>65</sup>

MacKinnon's feminism unmodified is fundamentalist in letter and spirit. MacKinnon recognizes no respectable reasons for disagreeing with her version of the facts or the moral and political implications she draws from those facts. To assert as she does that feminism is radical feminism<sup>66</sup> and antifeminism is misogyny<sup>67</sup> is to transform dissent into heresy or moral bankruptcy. A feminism unmodified by the freedom to doubt, question, or qualify the article of faith that sex discrimination reaches "down to the somatic level"<sup>68</sup> is a dogmatic feminism. Like other secular faiths, MacKinnon's feminism unmodified displays a zealous intolerance of diversity, dissent and independence of mind.

Toward a Feminist Theory of the State is often mean-spirited and (by self-proclaimed intention) a one-dimensional book. Worse, MacKinnon has played into the hands of the smug, the indifferent, and the callous by providing excellent reasons to dismiss her fervently argued contention that men, aided and abetted by liberal democratic political institutions, routinely and violently degrade women. It is ironic and regrettable that, to the extent that MacKinnon is correct about the prevalence, depth, and harm of sex discrimination, the indirect victims of her speculative extremism, irresponsible scholarship, and contempt for "what is," are the battered wives, the exploited porn models, the raped women, and the sexually abused children whose plight is lost amid MacKinnon's polemical extravaganza. And that is a grave objection, "on its own terms,"<sup>69</sup> to a feminism unmodified.

## NOTES:

1. Werner, *Dis-Covering Our Cover*. 1 *Yale J. L. & Feminism* 1 (1989).
2. *Id.*, at 2.
3. C. MacKinnon, *Toward a Feminist Theory of the State* 117 (1989) [hereafter cited by page number only]. Related to MacKinnon's thesis that feminism is radical feminism is her belief that what unites women as women is more basic than bonds of race, ethnicity, shared values and a common way of life, or religious belief and practice. Indeed, MacKinnon seems to believe that what unites all women as women is more basic than what men and women share as human beings. This basic substratum, according to MacKinnon, comprises inequality, powerlessness, subjugation, and victimization. Pp. 37, 116, 120.
4. p. 119. For additional examples of this usage see pp. 36, 51, 104, 115, 137, 151, 172, 180, 238. Is MacKinnon's aim to suggest that women's current legal, social, and political status is in fundamental respects like that of blacks under white supremacist systems such as black chattel slavery, Jim Crow laws, or the regime of apartheid in South Africa? If this is her intention, it is incumbent upon MacKinnon, particularly in regard to so grave a charge, to move beyond lurid insinuation and undertake some comparative study.
5. pp. 94, 119, 125, 170.
6. pp. 94, 105.
7. pp. 6, 11.
8. p. 157.
9. p. 159.
10. pp. x, xi.
11. p. 238.
12. p. 3.
13. pp. 4, 106-109.
14. p. 46.
15. p. xii.
16. p. xii.

17. pp. xiv, xv.

18. p. 84. The focus on method is characteristically modern. Consider some of MacKinnon's distinguished recent predecessors in the attempt to enhance knowledge by innovating in regard to method. Marx introduces the method of historical materialism. See e.g. K. Marx, *The German Ideology: Part I*, in *The Marx-Engels Reader* (R. Tucker ed. 1978). Nietzsche inaugurates genealogy. See F. Nietzsche, *On the Genealogy of Morals* (W. Kaufmann trans. 1968). Heidegger proclaims the unique advantage of phenomenological method. See M. Heidegger, *Being and Time Introduction*, pt. 7 (J. Macquarrie and E. Robinson trans. 1962). MacKinnon's ambition to innovate in regard to method is at home in a long immensely influential tradition. MacKinnon's silence about rival critics of positivism and liberal legalism makes it difficult to determine whether and in what respects consciousness raising marks an advance as a method of knowing.

19. p. 106.

20. pp. 115, 116.

21. p. 120, see also pp. 37, 116.

22. p. 92.

23. See generally B. Greenberg, *On Women and Judaism: A View From Tradition*, (1981).

24. Z. Hurston, *Their Eyes were Watching God* 12 (1937).

25. "A perspectivity is revealed as a strategy of male hegemony. . . ."

". . . The male epistemological stances, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality. . . . What is objectively know corresponds to the world and can be verified by being pointed to (as science does) because the world itself is controlled from the same point of view." pp. 121, 122.

26. p. xii.

27. p. 97.

28. pp. 107 n.2, 162, 163.

29. p. 162.

30. More than twenty five years ago Judith Shklar argued that liberal legalism was a form of political ideology - worth understanding properly and defending intelligently. See generally J. Shklar, *Legalism* (1964).

31. See M. Weber, Science as a Vocation, in *From Max Weber: Essays in Sociology* 129-156 (H. H. Gerth and C. W. Mills trans. and eds. 1946).

32. B. Pascal, *Pensées*, No.1 (L. Brunschvicg ed. 1897 & photo. reprint 1976).

33. Plato, *The Republic* 607b.

34. p. 162.

35. p. xv.

36. See generally L. Kalman, *Legal Realism at Yale, 1927-1960* (1986).

37. p. 163.

38. See Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *Reading Rawls* 253-83 (N. Daniels ed. 1989).

39. For an instructive introduction to this important subject see Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *Yale L. J.* 1287 (1982).

40. MacKinnon does allude to the judicial standard called "intermediate scrutiny," in order to mock it as "a judicial standard of care for women only." p. 217. This is an application of the old principle "damned if you do and damned if you don't." MacKinnon manages to denounce constitutional law both for refusing to recognize that women have been disadvantaged as a class, and for according women such recognition.

41. For example, comparing women's status in capitalist and socialist countries, MacKinnon indicates that the latter do no better than the former in recognizing "the work that remains women's distinctive service to men, regardless of the politics of those men: housework, prostitution, and other sexual servicing, childbearing, childrearing." p. 10.

42. For example: "To know what is wrong with rape, know what is right about sex. If this, in turn, proves difficult, the difficulty is as instructive as the difficulty meant have in telling the difference when women see one. Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." p. 174.

43. For example: "If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept." p. 178.

44. p. 177.

45. p. 245.

46. p. 176, n. 19.

47. p. 174.

48. p. 174, n. 19 citing Russell and Howe, *The Prevalence of Rape in the United States Revisited*, 8 *Signs: Journal of Women in culture and Society* 668-695. Russell and Howell emphasize that while their numbers apply only to San Francisco, their findings do support the general thesis that "sexual violence against women is part of the everyday fabric of American life." Russell and Howell, p. 695.

49. 410 U.S. 113 (1973).

50. The abortion right frames the ways men arrange among themselves to control the reproductive consequences of intercourse. The availability of abortion enhances the availability of intercourse." p. 188.

51. p. 191.

52. p. 192.

53. p. 193.

54. p. 204.

55. p. 198.

56. p. 215.

57. p. 117.

58. p. 119.

59. p. 160.

60. p. xii.

61. pp. 242, 244.

62. Genesis 1:27.

63. Charles Taylor, in his remarkable study of the making of the modern identity, massively documents the rise to prominence of the principle of equality or universal respect as axiomatic for the modern mind. See C. Taylor, *Sources of the Self: The Making of the Modern Identity* (1989), particularly at 8-11.

64. pp. 120-121, 191.

65. See Holmes, *The Permanent Structure of Antiliberal Thought*, in *Liberalism and the Moral Life* (N. Rosenbaum ed. 1989). Nor is MacKinnon the first to attack the alleged pernicious moral and political implications of the distinction between subject and object. In his 1946 "Letter on Humanism" Heidegger blames the forgetfulness of being on a grievous division between the public realm and private existence which in turn arises out of an erroneous metaphysical distinction between subject and object. See M. Heidegger, *Letter on Humanism*, in *Basic Writings*, (D. Krell ed. 1977). Before Heidegger, Nietzsche asserted that the distinction between subject and object is a seduction of language; however, this seduction is, on Nietzsche's view, devised by the weak to confound and ensnare the strong. See Nietzsche, *supra* note 18, pt. 1, § 13. Perhaps this fascinating and as yet unexplored convergence of opinion about the evils inhering in the distinction between subject and object can be explained by thinking of Heidegger and Nietzsche as proto-feminists.

66. p. 117.

67. p. 249.

68. p. 46.

69. pp. xv, 129.