

Book Review

Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's *Toward a Feminist Theory of the State*

Toward a Feminist Theory of the State. By Catharine A. MacKinnon.*
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I. INTRODUCTION

Catharine MacKinnon's *Toward a Feminist Theory of the State*¹ is a provocative challenge to both conceptions of liberal jurisprudence and to the tradi-

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† Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. This review is dedicated to Eleanor Galenson for her path-breaking work into sexual difference, her example of a woman's life well-lived, and her friendship. I want to thank Mindy Friedman whose careful editorial attention influenced the rewriting of this review throughout. She played a crucial role in getting me to think about exactly what the center of my argument was. I also want to thank my other two research assistants, A. Collin Biddle and Deborah Garfield, for their unflagging intellectual engagement and technical support. My research assistants have taught me to think again about "luck" and its role in moral and intellectual life because I have been lucky enough to have them. I must also say that this review could never have reached its present form without the endless questioning of what equality means and does not mean that takes place every week in the fall semester in the Colloquium in Law, Philosophy, and Political Theory at New York University Law School. For making me think and rethink my own feminist position, I owe special thanks to Ronald Dworkin, Thomas Nagel, David Richards, and Lawrence Sager.

1. C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter cited by page number only].

tional Marxist critique of liberalism. Each stands accused of erasing the centrality of gender, sex, and sexuality in the development of a modern legal system. This erasure, MacKinnon believes, can only perpetuate injustice at its base through the pretense that equality has already been achieved—as in the case of her version of liberalism—or reduce it to a category of class domination which makes gender a secondary form of subordination—as in the case of her interpretation of Marxism. Before turning to my critique of MacKinnon, I want to pay her the tribute she clearly deserves for her relentless insistence that any theory of equality for women will fall short of its own aspirations if it neglects the question of how sexual identity, and more specifically femininity, is constructed through a gender hierarchy in which women are subordinated and subjected. I share her insistence that we cannot begin to conceptualize a theory of equality that truly envisions the end of female domination without confronting the relationship between sex and sexuality as these have become constitutive of the gender identity imposed upon women by patriarchy. Her contribution has not been merely to criticize existing theories; she has been a proponent of specific doctrinal changes and played a key role, for example, in justifying the recognition of sexual harassment as a matter of sex discrimination and gender inequality.² This is one of many examples of how her understanding of the constitutive role of sexuality in the creation and perpetuation of male dominance has led to advocacy for legal and doctrinal reform.

My critique of MacKinnon, however, is that ultimately she does not fully develop her program, which attempts to justify positive intervention by the state into current social arrangements of gender hierarchy and identity. I will argue that she cannot successfully develop her own feminist theory of the state because she is unable to affirm feminine sexual difference as other than victimization.³ Of course, we need a program that legally delegitimizes the gender hierarchy and exposes the seriousness of sexual abuse. But we also need a more expansive, positive program, for the reduction of feminine sexual difference to victimization ultimately cannot sustain a feminist theory of the state. I propose a program which recognizes and incorporates equivalent rights.⁴ Such a program would be irreducible to an intermediary set of privileges like affirma-

2. See C. MACKINNON, *SEXUAL HARASSMENT AND THE WORKING WOMAN: A CASE OF WORKING WOMEN* (1979); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (argued by Catharine MacKinnon).

3. Other writers have voiced similar concerns and have noted the way in which MacKinnon not only disparages women's sexuality but also how she portrays it in such a way as to increase the very problem of sexual abuse that she so desperately seeks to correct. See, e.g., Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV 1135 (1990); J. Schroeder, *Abduction from the Seraglio* (1991) (unpublished manuscript on file with author).

4. I first developed this concept of equivalent rights in *Sex Discrimination Law and Equivalent Rights*, published as *Gender, Sex and Equivalent Rights*, in *FEMINISTS THEORIZE THE POLITICAL* (J. Butler & J. Scott eds. 1991).

tive action—as important as these steps may be⁵—and would go beyond addressing inequality in the name of making it possible for women to be more like men.

I do not deny the horror and the reality of the story MacKinnon tells us about the extent to which sexual abuse perpetuated against women gets taken as the way of the world,⁶ but I do want to argue against the reduction of woman to the figure of the victim. The result of this reduction is not only that MacKinnon cannot develop useful programs of reform, but that she cannot account for the very feminist point of view that she argues must be incorporated if we are to reach for a state in which equality between the sexes would be more than mere pretense for the perpetuation of masculine privilege and female subordination.

Equivalent rights, although meant to challenge gender hierarchy, do not do so by erasing sexual difference. Further, equivalent rights should not be understood as only a means to the end of sexual difference. Instead, a program of equivalent rights seeks to value the specificity of feminine⁷ sexual difference. MacKinnon cannot take us beyond a “negative” program without the affirmation of the feminine difference which is irreducible to the current patriarchal trappings of her own understanding of femininity.

Crucial to my disagreement with MacKinnon is her reading of women’s sexuality as constituted only by and for men and, therefore, as contrary to women’s freedom from the chains of an imposed femininity, a femininity which constitutes “our” sex and that can only justify women’s domination.⁸ Thus, even if I agree with her that rape, battery, sexual abuse, and pornography must be seen not only as questions of criminal law but as barriers to the equality of women where the law has the ideological capacity to reinforce the devaluation of the feminine “sex,” I disagree with her structural analysis of feminine sexual difference and of feminine sexuality. As I already have indicated, it is not

5. While affirmative action is inadequate to address the inequalities that a program of equivalent rights can, as I will argue, remedy, it nevertheless remains an important means to address broad notions of inequality. For a comprehensive discussion of affirmative action programs as they relate to women’s issues, see M. ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE* 197-204 (1991).

6. P. 127 n.2; C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 5-6 (1987) [hereinafter C. MACKINNON, *FEMINISM UNMODIFIED*].

7. The term feminine is normally used in a pejorative sense in feminist circles to refer to societally constructed notions of the ideal woman. Here, I use it as an imaginative, universal, irreducible to any conception or empirical designation of the characteristics of actual women. In this sense, the feminine is separated from both sociological knowledge of women as objects of study and from conventional, popular notions of what the “feminine woman” should be.

8. Because MacKinnon conflates sex, sexuality, and gender identity, she can speak of a simple division between men and women and the masculine and the feminine in a way that I do not accept. Because this conflation is an impossibility for me, I would not speak so simply of the “us” and the “them” as MacKinnon does. This does not mean that I deny specificity of feminine sexual difference—far from it. But I do argue against the us/them dichotomy as a material unshakable reality. See generally D. CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW* (forthcoming 1991) [hereinafter D. CORNELL, *BEYOND ACCOMMODATION*]; Cornell & Thurschwell, *Feminism, Negativity, Intersubjectivity*, in *FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER* 143 (S. Benhabib & D. Cornell eds. 1987).

simply that MacKinnon's analysis cannot sustain a positive program for intervention on the part of the state into gender arrangements. MacKinnon's own stance toward the feminine reflects the very "sexual shame"⁹ of women's "sex" that keeps the feminine from being valued and, more specifically, legally affirmed in a program of equivalent rights. My criticism of the division she creates between freedom and sexuality assumes a conception of the self as a being of the flesh, in which sexual expression cannot be easily separated from freedom.¹⁰ For women, the concept of freedom cannot be separated from the struggle against the devalorization of the feminine. Consciousness-raising, essential to fostering the dream of women's freedom, involves more than the exposure of the "truth" of our victimization. It demands the re-figuration of what has been constituted "to be" within patriarchy. It also demands that we think through the conditions of women's equality of well-being and capability in light of the recognition and value of feminine sexual differences.

Simply put, I will argue that women's sexuality cannot be reduced to women's "sex," as sex has been currently defined, once we understand both the limit to institutionalized meaning and the possibility of re-metaphorization which inheres in the rule of metaphor.¹¹ MacKinnon's understanding of feminine sexuality accepts what Irigaray has called the "old dream of symmetry."¹² Irigaray uses the concept of symmetry to explain the masculine fantasy that our sexuality is symmetrical to that of men. In other words, what men fantasize women want is what they want us to want. In fact, women's sexuality is irreducible to the fantasy that we are only "fuckees." MacKinnon's reduction of feminine sexuality to being a "fuckee" endorses this fantasy as "truth" and thereby promotes the prohibition against the exploration of women's sexuality and "sex" as we live it and not as men fantasize about it.

Men, defined by MacKinnon as sexual beings, may imagine that what they think women want, what they want women to desire, *is* what women desire. However, feminine writing on feminine sexuality has recognized the "old dream of symmetry" as just that: a dream and, more specifically, a masculine dream. I want to emphasize the political and personal significance for women of challenging MacKinnon's view of feminine sexuality. The possibility of celebrating women's "sex" and sexuality can keep us from the tragic disjuncture between sex, sexuality, and freedom that MacKinnon's analysis leads us to.

In terms of a theory of equality, her critique cannot meet its own aspiration to legitimate and recognize the feminine point of view in law in the name of equality and not by appeal to special privilege. Her analysis cannot achieve this

9. For an analysis of sexual shame in women, see Galenson & Roiphe, *The Impact of Early Sexual Discovery on Mood, Defensive Organization, and Symbolization*, 26 THE PSYCHOANALYTIC STUDY OF THE CHILD 195 (1972).

10. See Pp. 153-54.

11. See Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988).

12. See L. IRIGARAY, *SPECULUM OF THE OTHER WOMAN* 11-129 (G. Gill trans. 1985).

if it denies the equivalent value of the two sexes. Equivalent rights do not repeat the "separate but equal" argument, but challenge the idea that sexual difference can or should be eradicated through the pretense that the human race is currently constituted as sex-neutral, or as if man is the equivalent of human. The view of equality I rely on to justify my understanding is Amartya Sen's equality of capability and well-being.¹³ As Sen reminds us, "[c]apability reflects a person's freedom to choose between different ways of living."¹⁴ Sen's view of equality is valuable to feminists precisely because it allows for a "positive" program to guarantee women's equality of well-being and capability. Capability of well-being implies the affirmation of sex and sexuality and, in the case of women more specifically, of living without shame of our sex.

II. THE SOCIAL CONSTRUCTION OF WOMEN'S SEXUALITY

Let me begin with MacKinnon's analysis of the social construction of femininity as an expression of male dominance and, more specifically, of male sexual desire. To quote MacKinnon: "Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy; gender is one. As much a sexual theory of gender as a gendered theory of sex, this is the theory of sexuality that has grown out of consciousness raising."¹⁵ Thus, for MacKinnon, inequality is sexual, and sexuality and the engagement in "sex" perpetuates that inequality. An analysis of inequality that does not focus on inequality as a sexual dynamic in which male domination reduces women to their sex will ultimately "limit feminism to correcting sex bias by acting in theory as if male power did not exist in fact."¹⁶ It will "limit feminist theory the way sexism limits women's lives: to a response to terms men set."¹⁷ As a result, MacKinnon argues:

A distinctively feminist theory conceptualizes social reality, including sexual reality, on its own terms. The question is, what are they? If women have been substantially deprived not only of their own experience but of terms of their own in which to view it, then a feminist theory of sexuality which seeks to understand women's situation in order to change it must first identify and criticize the construct "sexuality" as a construct that has circumscribed and defined experience as well as theory. This requires capturing it in the world, in its situated social meanings, as it is being constructed in life on a daily basis.¹⁸

13. See A. Sen, *Inequality Reexamined: Capability and Well-Being 5-6* (paper delivered at Conference on Quality of Life, Helsinki, Fin. July 1988, on file with author).

14. *Id.* at 5.

15. P. 127.

16. P. 128.

17. *Id.*

18. P. 129.

The study of the construct of sexuality is, for MacKinnon, the examination of how women come to have a "sex." Women are, very simply put, defined as women because "we get fucked."

First sexual intercourse is a commonly definitive experience of gender definition. For many women, it is a rape. It may occur in the family, instigated by a father or older brother who decided to "make a lady out of my sister." Women's sex/gender initiation may be abrupt and anomic: "When she was 15 she had an affair with a painter. He fucked her and she became a woman." Simone de Beauvoir implied a similar point when she said: "It is at her first abortion that a woman begins to 'know.'" What women learn in order to "have sex," in order to "become women"—women as gender—comes through the experience of, and is a condition for, "having sex"—woman as sexual object for man, the use of women's sexuality by men. Indeed, to the extent sexuality is social, women's sexuality is its use, just as femaleness is its alterity.¹⁹

Femininity is the sex imposed on us by a world of male power in which men seek the fulfillment of their desire through us. Feminine gender identity is this imposed sexuality, reinforced in all gendered social arrangements and through the state, which reflects male sexual desire and legitimates sexual dominance as the rule of law. The challenge then to femininity as imposed sexuality, as the subjection of our "selves" to our "sex," is feminism, and ultimately this forms the basis of the feminist theory of the state.

In feminist terms, the fact that male power has power means that the interests of male sexuality construct what sexuality as such means, including the standard way it is allowed and recognized to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones. Existing theories, until they grasp this, will not only misattribute what they call female sexuality to women as such, as if it were not imposed on women daily; they will also participate in enforcing hegemony of the social construct "desire," hence its product, "sexuality," hence its construct "woman," on the world.

The gender issue, in this analysis, becomes the issue of what is taken to be "sexuality"; what sex means and what is meant by sex, when, how, with whom, and with what consequences to whom.²⁰

"Sex" difference is the consequence of this imposed sexuality. To celebrate women's difference is a form of "false consciousness," because women's so-called difference is only women's lives as "fuckees," and the affirmation of difference is only an excuse for reducing women to those who "get fucked" in whatever way men want to do it to us. This reduction of women to "fuck-

19. P. 111 (citations omitted).

20. P. 129.

ees” is what MacKinnon means when she argues that our social reality is fundamentally pornographic.

We can now begin to understand why, according to MacKinnon, pornography is absolutely central to the way in which the state enforces the male viewpoint and particularly the male vision of women as sexual objects. The representation of having men forced down women’s throats is not just men’s masturbatory fantasy but the truth of women’s reality. *Deep Throat*, in other words, gives us a depiction of what we are forced to become under our current system of gender domination. This is why MacKinnon can say in all seriousness that we are all Linda Lovelace,²¹ with oral sex being the essence of women’s subordination.

Yet this reality of subordination is not only ignored by the state, it is protected as a matter of right—the right of free speech under the First Amendment.²² Pornography, for MacKinnon, is not a matter of speech at all, but a matter of the systematic silencing of women. The image of men being shoved down women’s throats is the very symbol of shutting us up.

Thus the question Freud never asked is the question that defines sexuality in a feminist perspective: what do men want? Pornography provides an answer. Pornography permits men to have whatever they want sexually. It is their “truth about sex.” It connects the centrality of visual objectification to both male sexual arousal and male models of knowledge and verification, objectivity with objectification. It shows how men see the world, how in seeing it they access and possess it, and how this is an act of dominance over it. It shows what men want and gives it to them. From the testimony of the pornography, what men want is: women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed. Or, to be fair to the soft core, women sexually accessible, have-able, there for them, wanting to be taken and used, with perhaps just a little light bondage. Each violation of women—rape, battery, prostitution, child sexual abuse, sexual harassment—is made sexuality, made sexy, fun, and liberating of women’s true nature in the pornography.²³

That pornography is seen as the “right to speak” is another sign of the way in which the state and the law simply reflect the male point of view and the right of men to subordinate women to their sexual desires. As MacKinnon explains:

The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and

21. See C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 6, at 127, 129.

22. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

23. P. 138 (footnote omitted).

substantive policies. The state's formal norms recapitulate the male point of view on the level of design.²⁴

The feminist point of view, on the other hand, is impossible, because, according to MacKinnon, the male "point of view" enforces itself as true and as the totality of a pornographic social reality. As MacKinnon tells us:

Feminism criticizes this male totality without an account of women's capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view, in large part, by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.²⁵

For MacKinnon, the impossibility of a woman's point of view is constantly reinforced by the state, which reflects the male point of view as the rule of law and which erases what it has done in the name of neutrality. The rule of law is then transformed into ideology, further enforcing the male viewpoint not just as perspective but as the definitive interpretation of the Constitution.

III. MACKINNON'S MARXISM SUMMARIZED

We can now turn to MacKinnon's unique transposition of the Marxist critique into her analysis of imposed sexuality as the basis of feminine gender identity.²⁶ For MacKinnon, law is clearly not neutral vis-à-vis the gender divide. Instead, law reinforces the legitimacy of the male viewpoint as the standard upon which the law is based and is bolstered by the myth of the legal person. The myth of the legal person erases the continuing reality of the gender hierarchy and the terrible suffering imposed by male domination. By so doing, the myth is itself a form of domination. The Marxist application here turns on MacKinnon's argument that the liberal state is based on a pretense of gender equality in the name of a legal person when, in reality, the underlying social stratum of gender inequality remains as the truth of woman's condition. It is precisely in its perpetuation of the myth of equality as a reality that the liberal state further silences women who try to challenge it as a reflection of its masculine *constitution*. For this is exactly what our Constitution is for MacKinnon: the protection of the right of men to silence and to subordinate women. The so-called abstract equality of the individual must, therefore, be

24. Pp. 161-62 (footnote omitted).

25. P. 115.

26. MacKinnon first developed this Marxist critique in a two-part essay published as *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) and *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

challenged by feminism. This is one interpretation of a Marxist analysis transposed into the context of gender. As Marx argued that the establishment of bourgeois rights hides the continuing reality of class subordination, so MacKinnon argues that the constitution of "the rights of man" erases the subordination of women as the basis of social life.

In Anglo-American jurisprudence, morals (value judgments) are deemed separable and separated from politics (power contests), and both from adjudication (interpretation). Neutrality, including judicial decision making that is dispassionate, impersonal, disinterested, and precedential, is considered desirable and descriptive. Courts, forums without predisposition among parties and with no interest of their own, reflect society back to itself resolved. Government of laws, not of men, limits partiality with written constraints and tempers force with reasonable rule-following.²⁷

As a result, MacKinnon identifies the so-called neutrality of the liberal state not only as a *prop* to the male point of view but as its fundamental expression. Thus, she can argue that

[t]he state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society. This stance is especially vivid in constitutional adjudication, thought legitimate to the degree it is neutral on the policy content of legislation. The foundation for its neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well—that is, the assumption that sex inequality does not really exist in society. The Constitution—the constituting document of this state society—with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general, reflect that; and that government need and should right only what government has previously wronged. This posture is structural to a constitution of abstinence: for example, "Congress shall make no law abridging the freedom of . . . speech." 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.²⁸

Before turning to my own story of the constitution of feminine "sex," sexuality, and gender difference, which I will use to counter MacKinnon, I want to demonstrate some of the contradictions within her analysis.

27. P. 162 (footnote omitted).

28. P. 163.

IV. THE CONTRADICTIONS INHERENT IN MACKINNON'S DEVALUATION OF THE FEMININE

The first and most important criticism is that MacKinnon is mistaken when she says that it does not matter whether and how the feminine sex is affirmed or disparaged. As she puts it:

Difference is the velvet glove on the iron fist of domination. The problem then is not that differences are not valued; the problem is that they are defined by power. This is as true when difference is affirmed as when it is denied, when its substance is applauded or disparaged, when women are punished or protected in its name.²⁹

In MacKinnon's own terms, this difference matters precisely in relation to what it might mean to incorporate the feminist point of view into the state—MacKinnon's stated program.

Law that does not dominate life is as difficult to envision as a society in which men do not dominate women, and for the same reasons. To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. But existing law is not neutral. It will be said that it undermines the legitimacy of the legal system. But the legitimacy of existing law is based on force at women's expense. Women have never consented to its rule—suggesting that the system's legitimacy needs repair that women are in a position to provide.³⁰

How can one incorporate the feminist point of view into the state if sexual difference is not recognized? More specifically, in MacKinnon's own terms, how could women provide the needed repair? If women as a gender are defined as victims, as fuckees, as voiceless, and if, as MacKinnon argues, the feminist "point of view" is an impossibility within our system of male dominance, then it would be impossible to provide the condition for repair. Thus, women, defined as we are by MacKinnon, cannot possibly play the role she allots to them.

The second contradiction in MacKinnon's analysis is that she advocates a positive program of state intervention into gender arrangements, and yet her own political slogan, "Out now!," is, and must remain, negative. Positive rights for women should not just involve the end of sexual abuse or even restrictions on pornography. MacKinnon has advocated and successfully fought to pass a city ordinance that makes the propagation of pornography actionable as a matter of sex inequality. In *Virginia v. American Bookseller Association, Inc.*,³¹ the

29. P. 219.

30. P. 249.

31. 488 U.S. 905 (1988).

harm to women was recognized by the Court, yet pornography was protected as speech. As she has argued, the "law of the First Amendment secures freedom of speech only from governmental deprivation."³² For MacKinnon, the limit on governmental intervention not only applies to the First Amendment, but also to the concept of law. As a result, we do not have what MacKinnon calls a "negative" state, but rather a social reality which guarantees the positive "freedom" of women precisely through the limit on state intervention. MacKinnon argues that "the offspring of proper passivity is substanceless. Law produces its progeny immaculately, without messy political intercourse."³³

I agree with MacKinnon that the harm to women caused by pornography should be legally recognized, even if I do not accept her own legal solution. But my point here is that without the affirmation of femininity we cannot develop a concept of "positive" freedom for women which MacKinnon herself recognizes we need to rectify the inequality of women. As MacKinnon herself has said, the negative state has specific implications: "For women this has meant that civil society, the domain in which women are distinctively subordinated and deprived of power has been placed beyond reach of legal guarantees."³⁴ But if we are to truly intervene in civil society to restructure the gender hierarchy, we must legally insist that the specificity of feminine sexual difference be valued. MacKinnon's analysis, in other words, can criticize the negative state, but she cannot successfully justify the move beyond it given her own repudiation of the feminine. I agree with her, however, that the negative state is not enough to end the inequality of women.

We need a full program of rights that will provide women with the conditions for equality of well-being and capability. I advocate Sen's theory of equality for two reasons. First, the emphasis on well-being allows us to take sexuality and its expression into consideration when thinking about equality for women. Second, such a view of equality allows for "positive" legal intervention on the part of the state to guarantee "well-being." In other words, this view of equality allows us to move beyond the negative state that MacKinnon describes as inadequate to provide equality for women. Equality of well-being and capability also prevents the recognition of sexual difference from degenerating into the justification of special privilege for women. Equivalent rights are necessary for equality. They should not be seen as special privileges. This vision of equality has the substance that allows for positive intervention and does more than just perpetuate stereotypes. The rhetoric that fits equivalent rights into a view of equality is important because, in the end, the rhetoric provides us not only with philosophical justification for the conditions of women's equal well-being, but also provides a cultural framework in which recognition of feminine sexual difference need not be reduced to an appeal to "special" treatment.

32. P. 164.

33. P. 164.

34. Pp. 164-65.

To summarize, MacKinnon's refusal to affirm feminine sexual difference means that her negative political program cannot be turned into "positive" affirmative legal reform. Her example of Nicaragua, in *Feminism Unmodified*,³⁵ does not provide a blueprint for a legal program for women. The Nicaraguans were fighting for socialism and for national independence. They were not fighting to keep the United States out, but to realize a dream of a different social order. The slogan "Out now!" was addressed to a nation that was intervening against that dream and against that fight. If our dream is to recognize women as full human beings, then the negative program MacKinnon offers is not and cannot be enough.

V. THE CRITIQUE OF MACKINNON'S CONCEPTION OF LIBERALISM

MacKinnon's analysis of liberalism is limited to a conception of neutrality that even many liberal thinkers reject. Thinkers as diverse as Bruce Ackerman, C. Edwin Baker, Ronald Dworkin, Sylvia Law, Thomas Nagel, John Rawls, Steven Shiffrin, and Wendy Williams,³⁶ all of whom would continue to designate themselves as liberals, have long since abandoned the traditional concept of neutrality defined by Robert Bork and Herbert Wechsler.³⁷ However, I do agree that none of these scholars have adequately addressed the significance of the gender hierarchy as it continues to limit our thinking on equality. This is important because even within their own terms of analysis it would be possible to reach very different conclusions on, for example, the question of pornography. At the very least, I believe this disjuncture between argument and conclusion is more than a coincidence. Indeed, this disjuncture is itself a reflection of the devalorization of the feminine that I describe in the second half of this review.³⁸ I am suggesting, in other words, that the feminist argument, regardless of how one ultimately comes out on the difficult question of legal censorship, is not given the weight it deserves because the harm to women is taken lightly if it is seen at all. To see the harm to women as relevant to a theory of equality, we do need an account of the relationship of inequality, the gender hierarchy, and the feminine "sex." Rae Langton, for example, has argued that Ronald Dworkin's own principles, as he has developed them most recently in *Law's Empire*, could be used to justify at least some limited time

35. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 6, at 219.

36. See generally B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); R. DWORIN, *LAW'S EMPIRE* (1986); T. NAGEL, *EQUALITY AND PARTIALITY* (forthcoming 1990); J. RAWLS, *A THEORY OF JUSTICE* (1971); S. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990); Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 *TEX. L. REV.* 1029 (1980); Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment-Special Treatment Debate*, 14 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1985).

37. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

38. See *infra* Parts VII.B and VII.C.

and place restrictions on pornography.³⁹ On the other hand, Thomas Nagel's understanding of an "offense" and his argument for reasonableness within the context of a much more traditional legal argument about "free" speech makes us question whether some restrictions on pornography could be justified.

But let me first give an account of the relationship between the feminine and sexual shame, which I develop later,⁴⁰ which ultimately helps us to understand pornography as an "offense," broadly conceived, against women. Pornography is an offense to women because it is inescapable and it is in public. Do I have the choice to make pornography none of my business? Not if I choose to go out of my apartment in New York City. I cannot escape the image of the devalorization of my "sex," which appears everywhere, including the supermarket where I shop, the public transportation I ride, and wherever I might choose to buy my Coca-Cola. I also understand the serious nature of censorship, particularly as it is now being used to shut down artistic ventures that themselves challenge, on the stage or in other forms of performance art, the very sexual violence that MacKinnon wants to expose.

Nagel's concept of reasonableness is helpful in examining the legitimacy of some time and place restrictions on pornography. His theory is important because we need a concept of legal legitimacy. Without such a concept, we are left with random balancing devoid of standards. It is essential to explain why and how we recognize not only the way pornography harms women, but also why that harm can justify time and place restrictions on pornography. This "weighing" process demands a guiding principle as to how to proceed in the social field of profound neglect. Nagel's reasonableness gives us such direction; he gives us standards by which judges can assess "competing" harms and viewpoints under which harm is defined.

Under Nagel's theory, we weigh the extent of the *wrong* and the degree of the *suffering* of competing parties having different moral positions against one another. For example, who is wronged more profoundly and suffers more intensely—the homosexual who is repressed or the puritan who believes that homosexuality is an evil that contaminates the puritan's social reality, his children's well-being, etc?⁴¹ This conception of reasonableness allows the law

39. Langton, *Whose Right? Ronald Dworkin, Women, and Pornographers*, 19 PHIL. & PUB. AFF. 311 (1990).

40. See *infra* notes 75-79 and accompanying text.

41. Nagel argues that:

[T]he argument for a liberal solution, which gives the second answer, has to depend on the judgment that it is terrible to have one's desired form of sexual expression restricted by others who find it repellent, as part of their own strong sexual feelings. The suppression of homosexuality is so much worse for the homosexual than is the relaxation of ambient taboos and restrictions for the sexual puritan, that even the puritan should decide in favor of freedom unless he is prepared to claim that no legitimate state need consider the potential objections of homosexuals because homosexuality is wicked and worthy of suppression for its own sake. This, however, is not a position that no one could reasonably reject, and the puritan is simply mistaken if he thinks it is.

T. NAGEL, *THE VIEW FROM NOWHERE* 200 (1986).

and the state to make the difficult decisions between competing moral and ethical positions when there is not only no moral consensus, but a "war" between different moral visions and different perspectives on life in which these visions are embedded. I am arguing here that the feminist position, particularly on the issue of pornography, deserves more of a hearing than Nagel himself has given it.⁴² I also want to call attention to how Thomas Nagel's own "view from nowhere,"⁴³ in which he urges us to overcome our perspective on the world in the name of the "uncontaminated" nowhere, leads us to what I would call "compassion." It is interesting to note that Nagel fails to show the same compassion for the feminist argument against pornography as he does for the homosexual's argument for freedom of sexual expression. I would argue that his reason for this "blindness" is Nagel's inability to see the harm to women, precisely because he does not integrate a psychoanalytic theory of the construction of feminine sexual difference into his analysis of pornography.

By pornography, and I am adopting Cass Sunstein's definition here,⁴⁴ I mean the explicit connection of sex with violence that in no way denies that pornography is sexual and not just violence. Why am I adopting Cass Sunstein's definition? Sunstein's definition allows us to distinguish between erotica and pornography. We have to think about which definition we adopt within the context of our political times. The National Endowment of the Arts' campaign to repress certain forms of erotic expression has now become only too well-known. Ironically, this censorship has been directed against feminist artistic attempts to expose and then to critique the reduction of women to sexual objects as masculine desire. Thus, I adopt Sunstein's definition because it allows us to distinguish between erotica and pornography, and because it protects feminist artists who may choose to graphically depict women's sexual objectification in such a way as to themselves fall victim to censorship. But even if one adopts Sunstein's definition, his own argument for certain time and place restrictions on pornography lacks a crucial philosophical dimension.

Sunstein's argument is strengthened in defense of the possible legitimation of time and place restrictions, if he works within Nagel's concept of reasonableness. Indeed, the weakness of Sunstein's own argument is that he does not have a concept of legal legitimacy. Nagel's reasonableness can provide him with such a concept. Sunstein argues that the periphery of pornography within the traditional context of First Amendment arguments, combined with evidence that pornography promotes violence in men, might lead us to accept legal restric-

42. In the case of the homosexual, Nagel argues that "[t]he freedom to act on these desires is therefore a leading candidate for protection as a right." *Id.* at 200-01. On the other hand, in the case of pornography, he states, "[t]his does not exclude prohibitions against acute and direct offense to the equally deep sensibilities of others; but it does mean that personal and private activities (including the consumption of pornography) should be protected from political control." *Id.* at 201.

43. *Id.*

44. C. Sunstein, *Neutrality and Constitutionality with Special Reference to Pornography, Abortion, and Surrogacy* (1991) (unpublished manuscript on file with author).

tions, notwithstanding the concern with censorship and the constraints such restrictions must place on men in their access to pornography. Sunstein explains:

[T]here is a quite straightforward argument for regulating at least some pornographic materials. The first point is that much pornographic material lies far from the center of the first amendment concern. If the first amendment is, broadly speaking, a safeguard against governmental suppression of points of view with respect to public affairs, at least some forms of pornography are far from the core of constitutional concern. Under current doctrine, and under any sensible system of free expression, speech that lies at the periphery of constitutional concern may be regulated on the basis of a lesser showing of government interest than speech that lies at the core.

To say this is hardly to say that the definition of the core and the periphery will be simple. Under nearly any standard, however, at least some pornographic materials will be easily classified as belonging in the periphery.⁴⁵

If, under traditional doctrinal analysis, pornography is at the periphery of free speech and there is evidence that it perpetuates the legitimization of violence against women, while “suffering” to the pornography reader is limited, particularly if access is restricted and not banned, then “reasonableness” may demand time and place restrictions even before we have an adequate account of the relationship between gender hierarchy and the devalorization of the feminine “sex.” This account is ultimately necessary if we are to justify the tip in the balance toward such restrictions.

VI. MACKINNON’S CRITIQUE OF MARXISM IN THE CONTEXT OF GENDER

I have critiqued MacKinnon for her identification of liberalism with principles of neutrality and for her failure to see that there are liberal arguments for some of the legal reforms she seeks to make. In this difficult period, we need to choose our allies carefully. But there is, perhaps, a more important critique to be made of her own transposition of Marxism into the context of gender. I agree with her that the Marxist tradition has tended to reduce gender and sex to a secondary question. And I agree with MacKinnon, as so many others have,

45. *Id.* at 22-23 (footnotes omitted).

that this reduction is a disservice to women.⁴⁶ Yet I still believe MacKinnon's own use of Marxism can be critiqued on three separate grounds.

The first is related to the "pragmatic"⁴⁷ and "postmodern"⁴⁸ critique of any attempt to develop an empiricist, positivist, or materialist account of women's situation that could claim, in any strong sense, to be scientific, if by scientific we mean "free" of the mediation of narration.⁴⁹ MacKinnon does not recognize the status of her own analysis as a story, but rather as a materialist conceptualization of gender inequality. Such accounts are never just descriptions, but are always narrations that give meaning to reality. They can never be free of an evaluation of that reality, which is what gives the story its meaning and, in the case of law, its legal meaning. A classic example is "date rape." In order to define a certain kind of sexual abuse to women as date rape, we have to rely on a seeming oxymoron: putting the idea of date—with its implied concept of consent—together with rape. The behavior may have always been there, but it took a different story, with a different evaluation of those acts—such as locking a woman into a dorm room until she agreed to have sex—to define this behavior as rape.

To say that the philosophical status of MacKinnon's account is a narration in no way takes away from its "truth," if one means by truth an illumination of an existing "reality" that previously was invisible, because it had not been told or evaluated in a way that made that particular behavior "appear" as a wrong or harm to women within our legal system.⁵⁰ MacKinnon's story helps us to see that what was once thought of as normal was and remains the systematic sexual abuse of women. I do not disagree with that part of the story which emphasizes the "normalcy" of sexual violence to women as a physical reality. The story tells us why it is abuse, and not just "boys being boys."⁵¹ As one of the many reflected in the unfortunate statistic that at least one-half of all women will undergo a sexual assault,⁵² I cannot deny this story myself. Having survived an attempted rape, I know only too well the "truth" of MacKinnon's chapter on rape where she discusses the long-term trauma that

46. As Luce Irigaray puts it:

How can the double demand—for both equality and difference—be articulated? Certainly not by acceptance of a choice between "class struggle" and "sexual warfare," an alternative that aims once again to minimize the question of the exploitation of women through a definition of power of the masculine type. More precisely, it implies putting off to an indefinite later date a women's "politics," a politics that would be modeled rather too simplistically on men's struggles.

L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* 81-82 (C. Porter trans. 1985).

47. See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 357-94 (1979).

48. J. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

49. This basic Hegelian insight has been the basis of what are now called either pragmatic or postmodern critiques of scientism. See G. HEGEL, *PHENOMENOLOGY OF MIND* 147-213 (J. Baillie trans. 1967).

50. See, e.g., J. LYOTARD, *THE DIFFERENT: PHRASES IN DISPUTE* (G. Van Abbeele trans. 1988).

51. See, e.g., Barrett, *Date Rape—A Campus Epidemic?*, *MS.*, Sept. 1982, at 48, 50.

52. MacKinnon explains that "[a]lmost half of all women . . . are raped or victims of attempted rape at least once in their lives. Almost 40 percent are victims of sexual abuse in childhood." P. 176.

such attacks leave in their wake. But her story is limited precisely because she figures women only as victims and feminine sexual difference as *only* “the velvet glove on the iron fist of domination.”⁵³

The figure of Woman as victim is an important one, but it is not the *only* figure of the feminine. MacKinnon tells us a story, a profound story, and it is true, but only partially so. This is the second criticism of MacKinnon’s Marxist transposition which can only understand women’s “material” oppression through the reduction of feminine sexual difference to Woman as the fuckee.

As we have seen, for MacKinnon, having a “sex,” particularly a feminine identity, cannot be separated from “having sex,” and “having sex” cannot be separated from domination and sadomasochism.

Feminism has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctly feminist account of gender inequality. Sexual objectification, the central process within this dynamic, is at once epistemological and political.⁵⁴

The third criticism, which is primarily political, is that despite the limits of Marxism as a “science,” its emphasis on class, race, and national difference remains extremely important to a feminism that is *always modified* through its respect for difference and which continually allows new narrations of the feminine and how it is lived, experienced, and told. As Audre Lorde has succinctly argued:

By and large within the women’s movement today, white women focus upon their oppression as women and ignore differences of race, sexual preference, class, and age. There is a pretense to homogeneity of experience covered by the word *sisterhood* that does not in fact exist.⁵⁵

In other words, femininity, if it is not to fall into the erasure of race and class difference, must always be modified. Indeed, put even more strongly, the openness to modification through—or openness to modification by—the “other woman” is what provides the very basis of feminism as an aspiration to an ethical relationship irreducible to a set of established rules or any currently accepted political slogan.

53. P. 219.

54. Pp. 113-14 (footnote omitted).

55. A. LORDE, *SISTER OUTSIDER* 116 (1984) (emphasis in original).

VII. THE AFFIRMATION OF FEMININE SEXUAL DIFFERENCE

A. *Overcoming the Repudiation of the Feminine*

Politically, I can summarize my disagreement with MacKinnon as follows: for MacKinnon, feminism must involve the repudiation of the feminine; for me, feminism *demand*s the affirmation of feminine sexual difference and the challenge to women's *dereliction* which flows inevitably from the repudiation of the feminine. Without this challenge, we are left with the politics of revenge and lives of desolation, which make a mockery of the very concept of freedom. But to understand how we can make this challenge without simply replicating the pattern of gender hierarchy, we must first give a different account of why a gender hierarchy cannot completely capture feminine sexual difference.

MacKinnon's own analysis of femininity does not turn on a naturalist account of anatomy as destiny or on appeal to pre-given natural libidinal drives as the basis of male desire and domination. She moves within accepted post-modern insight by recognizing that femininity as imposed sexuality is a social construction. But, social construction or not, the constitution of the world through the male gaze as reinforced by male power totalizes itself as our social reality. Thus, if MacKinnon clearly rejects naturalism, she nevertheless remains a specific kind of essentialist. Under this patriarchal social reality, women's imposed "sex" is women's "essence," her only "being."

B. *The Lesson of Deconstruction*

I have argued at length elsewhere that MacKinnon fails to understand the critical lesson of deconstruction.⁵⁶ The lesson is that no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meaning can never be fully protected from slippage and reinterpretation.⁵⁷ MacKinnon believes that a feminist theory of sexuality

must be studied in its experienced empirical existence, not just in the texts of history (as Foucault does), in the social psyche (as Lacan does), or in language (as Derrida does). Sexual meaning is not made only, or

56. D. CORNELL, *The Feminist Alliance with Deconstruction*, in D. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 8; Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 685-89 (1990).

57. Jacques Derrida has demonstrated that, as the repressed Other, the feminine is irreducible to that which it supposedly is designated to be, the lack that signifies woman within the Symbolic. This irreducibility of the feminine also results from what Derrida calls "logic of parergonality," by which he argues that the very frame that designates social reality always implies "more" because our reality is necessarily enframed. See J. DERRIDA, *THE TRUTH IN PAINTING* (G. Bennington & I. McLeod trans. 1987).

even primarily, by words and in texts. It is made in social relations of power in the world, through which process gender is also produced.⁵⁸

Jacques Derrida does not argue that sexual meaning is made in and through words and texts in the limited way MacKinnon defines them. Derrida shows us that social reality (including the very definition of power) and "empirical" experience cannot be separated from the meanings they are given, while simultaneously exposing the inevitability of the limit on those meanings that have dominated our social life. The relevance of the limit to institutionalized meaning in this context is that it allows for the affirmation of feminine sexual difference as other than its stabilized definitions within gender hierarchy. This, in turn, is precisely what allows us to develop a feminist celebration of women's "sex," rather than its repudiation, as well as a feminist "perspective" which, even under MacKinnon's own program, must be the very basis of a feminist theory of the state.

More specifically, I argue that "seeing" and "being" can never be separated.⁵⁹ This argument would, at first glance, seem to bolster MacKinnon's argument: So we are seen, so we are. But, as Paul Ricoeur has convincingly argued, we do not "see" reality directly. Instead, we "see" through language and, more specifically, through the metaphors in which "being" is given to us.⁶⁰ "Being" for Ricoeur is itself a metaphor. This means that the "being" of femininity can never just be described as "there."

As a result, the rule of metaphor has specific implications within the context of feminism.⁶¹ I have argued that "feminine being" cannot be separated from the metaphors in and through which it is figured. Metaphor as transference and analogy always implies both the like and the not like. The definition of the feminine, including MacKinnon's definition, *is* only as metaphor. Metaphor, in turn, allows both for expansion of meaning and for reinterpretation. The characterization can then be cemented in stone, precisely because it is designated only as metaphor. Therefore, the realization of "feminine being" as metaphor is what allows us to reinterpret and, more importantly, to affirm the feminine as other, and irreducibly other, to any of the definitions imposed by patriarchy. Thus we can challenge MacKinnon's position on feminine sexuality.

For MacKinnon, as we have "seen," a feminist perspective is impossible as anything other than the recognition of the totalization of the masculine viewpoint. Therefore, the most we can do is to simply reverse the meaning of

58. P. 129.

59. See D. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 8.

60. Ricoeur argues that we must treat the verb "to be" as a metaphor itself and recognize in "being as" the correlate of "seeing as." 3 P. RICOEUR, *TIME AND NARRATIVE* 155 (1984).

61. Derrida suspects that through Woman's re-metaphorization we will once again capture women in a new concept, one in which the very process of metaphorization will itself be erased. See generally J. DERRIDA, *THE EAR OF THE OTHER: OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION* (C. McDonald ed., P. Kamuf trans. 1985).

the totality, rather than challenge it in the name of the feminine. In MacKinnon's reality, what men see as sex, women see as rape. The problem with this solution, as Luce Irigaray has explained, is that

if [women's] aim were simply to reverse the order of things, even supposing this to be possible, history would repeat itself in the long run, would revert to sameness: to phallocratism. It would leave room neither for women's sexuality, nor for women's imagination, nor for women's language to take (their) place.⁶²

The possibility of feminine desire—and let me use the beautiful French word *jouissance*⁶³—that is irreducible to being fucked by men and liking it is foreclosed by MacKinnon's analysis.

I will return to lesbianism and love between women as an alternative shortly. For now I am operating within MacKinnon's own heterosexual framework, because given MacKinnon's analysis, that is the framework that defines social reality. I want to emphasize that given MacKinnon's repudiation of the feminine, there can only be the inescapable totality of male violence, the world of the "fuckees" and the "fuckors."⁶⁴ "True love" between women is always blocked by the totality of an imposed pornographic heterosexual reality. As a result, the utopian vision of lesbianism developed by innumerable writers such as Cixous, Irigaray, and Wittig, is foreclosed.⁶⁵ We are left instead with a disjuncture between sex and freedom. To quote MacKinnon:

So long as sexual inequality remains unequal and sexual, attempts to value sexuality as women's, possessive as if women possess it, will remain part of limiting women to it, to what women are now defined as being. Outside of truly rare and contrapuntal glimpses (which most people think they live almost their entire sex life within), to seek an equal sexuality without political transformation is to seek equality under conditions of inequality. Rejecting this, and rejecting the glorification of settling for the best that inequality has to offer or has stimulated the resourceful to invent, are what Ti-Grace Atkinson meant to reject when she said: "I do not know any feminist worthy of the name who, if forced to choose between freedom and sex, would choose sex. She'd choose freedom every time."⁶⁶

62. L. IRIGARAY, *supra* note 46, at 33.

63. *Jouissance* is a term which, as used by Lacan, lacks direct translation. In contemporary philosophical and psychoanalytic discourse, it is often taken to refer to women's specifically feminine, total sexual pleasure. For a more detailed and nuanced explication of this aspect, see H. CIXOUS & C. CLÉMENT, *THE NEWLY BORN WOMAN* 88-89 (1986).

64. See C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 6, at 60-61.

65. In *The "Herethics" of Carnality*, in D. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 8, I present a comprehensive treatment of these authors and their efforts to write of feminine desire and pleasure differently, in a way that refuses to repudiate the feminine while it insists on believing in the woman writer and, thus, in woman's new beginning.

66. Pp. 153-54 (quoting Atkinson, *Why I'm against SIM Liberation*, in *AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS* 91 (E. Linden, D. Pagano, D. Russel & S. Star eds. 1982)).

Maybe. But what is the content of this freedom? More specifically, what kind of conception of the person would we need to think that the disjuncture between sex and freedom could lead to freedom? In fact, one central theme of feminist philosophy has been to challenge conceptions of freedom that pit freedom against the reality that we are beings of the flesh, and necessarily sexual. The argument, simply put, has been that we cannot rise above our empirical selves of the flesh in order to be *free*. Such a conception has been critiqued as repression, not freedom, and has been connected to the devaluation of women—just as women have come, in Western philosophy, to be associated with the flesh.⁶⁷ If this is women's "choice"—and choice would hardly seem to be the right word since, under MacKinnon's analysis, it is forced upon women—it would seem rather to be a "choice" between desolation⁶⁸ or sacrifice and sex, not between "freedom" and sex. The celebration of the feminine "sex" and women's sexuality, on the other hand, suggests that our sexuality is not represented by any of the current male fantasies of woman and sex within patriarchy. By "having sex," then, I do not mean "getting fucked" in MacKinnon's sense. Such a reduction obviously envisions an act perpetuated by men upon women: the man fucks, the woman "gets fucked"—with all the negative connotations "getting fucked" takes on within our culture of so-called heterosexuality. Instead, by "sex" I mean the physical intimacy necessary for creatures of the flesh. Sex is the caressing, the kissing,⁶⁹ the embracing that can bring comfort and connection to two mortal, sexual creatures clinging to one another against the darkness and finding in one another a moment of protection and safety. Irigaray beautifully imagines two women making love as an alternative to MacKinnon's vision of "getting fucked." As Irigaray writes,

No surface holds. No figure, line, or point remains. No ground subsists. But no abyss, either. Depth, for us, is not a chasm. Without a solid crust, there is no precipice. Our depth is the thickness of our body, our all touching itself. Where top and bottom, inside and outside, in front and behind, above and below are not separated, remote, out of touch. Our all intermingled. Without breaks or gaps.⁷⁰

67. See generally R. SCHOTT, *COGNITION AND EROS: A CRITIQUE OF THE KANTIAN PARADIGM* (1988).

68. I am indebted to A. Collin Biddle for suggesting the word "desolation" which, to my mind, so effectively describes women's experience of having to make this kind of "choice" about their "sex" and sexuality.

69. Luce Irigaray offers us a beautiful and poetic description of this kissing:

Kiss me. Two lips kissing two lips: openness is ours again. Our "world." And the passage from the inside out, from the outside in, the passage between us, is limitless. Without end. No knot or loop, no mouth ever stops our exchanges. Between us the house has no wall, the clearing no enclosure, language no circularity. When you kiss me, the world grows so large that the horizon itself disappears. Are we unsatisfied? Yes, if that means we are never finished. If our pleasure consists in moving, being moved, endlessly. Always in motion: openness is never spent nor sated.

L. IRIGARAY, *supra* note 46, at 210.

70. *Id.* at 213.

I am not arguing that lesbianism can simply take us away from male domination. Yet even so, as Wittig has brilliantly argued, lesbianism *can* provide us with a politically significant vision of a different engagement with a woman's own body and with her lover in which a woman's "sex" is not repudiated.⁷¹ Indeed, for Wittig, the lesbian is not a woman, precisely because a woman traditionally defined cannot be separated from her role within heterosexuality. Simply put, the lesbian need not engage with her "sex" from within the psychosexual dynamic MacKinnon describes to live her life or explore her love. Ironically, given MacKinnon's move to totalize her own description of heterosexuality, she excludes Wittig's promise of lesbianism as a different practice of sexuality other than to the truth of sadomasochism which MacKinnon defines as heterosexuality.

Nor am I arguing that the practice of heterosexuality is reducible to MacKinnon's and Dworkin's view of "sex" as "intercourse" or of "intercourse" as "getting fucked."⁷² Here again, we are returned to the possibilities of reinterpretation, even if we simultaneously recognize the institutionalization of certain sexual practices, particularly within heterosexuality, as "normal" when they may have nothing at all to do with women's desire. But I insist on the need to affirm the feminine and feminine sexuality, because it is necessary to challenge the conception of a free person as one who has been cut off from her own sexuality. Such an affirmation allows us to avoid the tragedy into which MacKinnon's analysis inevitably leads us.

But does this mean that she is not right to remind us at every step that, under gender hierarchy, to use Lacan's famous phrase, "fucking [is] not working?"⁷³ The answer is no. I too want to emphasize the suffering women must endure and, more specifically, expose the relationship in our society between sexual shame and women's lives. However, the story I relate may be a narration very different from the one MacKinnon tells.

I turn now to Lacan because his story lies at the base of how gender hierarchy is constructed and goes beyond MacKinnon's limited vision of gender hierarchy as only a matter of social psyche.⁷⁴ My focus will be to show how Lacan helps us to understand the devalorization of the feminine sex as the foundation of gender inequality.

71. M. WITTIG, *THE LESBIAN BODY* (1975).

72. See generally A. DWORKIN, *INTERCOURSE* (1987).

73. L. IRIGARAY, *supra* note 46, at 88 (quoting J. LACAN, *ENCORE, LE SÉMINAIRE XX* (1975)).

74. For insight into Lacan's basic theories of feminine sexuality, see generally, J. LACAN, *FEMININE SEXUALITY: JACQUES LACAN AND THE ÉCOLE FREUDIENNE* (J. Mitchell & J. Rose eds., J. Rose trans. 1982) (questioning any certainty or authority in conceptions of psychic and sexual life). For a detailed explanation of the Lacanian framework, see Cornell & Thurschwell, *supra* note 8, at 145-46. For Derrida's intervention into Lacan's psychoanalytic theories, see generally J. DERRIDA, *supra* note 57.

C. *The Lacanian Account*

According to Lacan, the genesis of linguistic consciousness occurs when the infant recognizes itself as having an identity separate from the mother, because the mother is Other to herself or himself. The primordial moment of separation is experienced by the infant both as a loss of unity and the gaining of an identity. The pain of this loss results in a primary repression that simultaneously buries the relationship to the mother in the unconscious and catapults the infant into the Symbolic realm to fulfill its desire for the Other. Once projected into language, this primary identification with the mother is experienced only through the disruptive force of the unconscious. The unrepresentable desire for the Phallic Mother is only remembered in the fantasy projection that compensates for Her absence. So far on this account, it would seem that both sexes suffer a primordial separation from the mother and would be marked by this separation in the same way.

Although Lacanians maintain the difference between the penis and the phallus (the phallus represents the lack that triggers desire in both sexes), it remains the case in Lacan's analysis that because the penis can visibly represent the lack, the penis can appear to stand in for the would-be neutral phallus. This establishes the basis of the illusion that having the penis is having the phallus, with all its attendant symbolic power. In this culture of gender hierarchy, the male child "sees" his mother's lack, which gains significance as her castration. Sexual difference and gender identity are based on the cultural significance attributed to this experience of "sighting." The penis is identified with potency, able to satisfy the mother's desire. Woman, on the other hand, is identified as the castrated Other. If the penis, at least on the level of fantasy, is identified with the phallus, then Woman, who lacks the penis, is also seen as lacking the affirmative qualities associated with the phallus.

Lacan's speculative insight has been reinforced by such empirical research as the work of Eleanor Galenson.⁷⁵ Galenson's nurseries provided the arena for observing the actual behavior of little girls. Her studies argue that sexual shame in girls is associated with the recognition of themselves as the castrated Other. Galenson's work further tries to draw the connection between this early experience of sexual shame as inherent in feminine identity and some of the symptoms and behavioral patterns in mature women including depression, profound feelings of inadequacy, feeling like a "fake," or fear of being "found out" despite a record of accomplishment. One of the most significant expressions of sexual shame is the denial of the value of femininity and of the value of feminine sexual difference which is irreducible to the current cultural trappings of femininity.

75. See, e.g., Galenson & Roiphe, *supra* note 9.

It also is important to note that Lacan understands male superiority as a “sham,” meaning that it is not mandated by a person’s “sex” but instead rests on the fantasy identification that having the penis is having the phallus. This illusion also means that the symbolic “Daddy” can always take the phallus away and, with the phallus, the affirmative qualities associated with potency. This fear is the basis of the designation of the male as the “wimp,” beautifully allegorized in Samuel Beckett’s “Happy Days.” The man crawls around on all fours unable to face the woman:

Winnie: “What is a hog exactly? What exactly is a hog, Willie, do you know, I can’t remember. What is a hog, Willie, please!”
Willie: “Castrated male swine. Reared for slaughter.”⁷⁶

The analysis of the fear of the “wimp” in no way takes away from the cruelty and the violence of the “male swine.” But it does explain this violence and cruelty as rooted in fear and not in power, especially if one defines the empowerment of personality as innovative capability rather than beating up the other.⁷⁷ It would be accurate under this analysis to say that pornography is what wimps need, not what men want. Thus, I disagree with MacKinnon when she argues that “[p]ornography permits men to have whatever they want sexually. It is their ‘truth about sex.’”⁷⁸ Nonetheless, for me, pornography is clearly an “offense.”

How can we more profoundly understand pornography as an offense to women under the story of gender hierarchy I have just developed? Pornography reinforces the very sexual shame that, as Galenson and others have shown, makes it difficult for women truly to find equality of capability and well-being. We can only truly understand pornography as an offense within a context that explains gender hierarchy as the basis of sexual shame. Pornography, in this most basic sense, is an offense because it reflects the devalorization of women’s “sex.” Pornography prevents women from feeling like equal members of the community because it reflects their “sex” in a way that no woman can affirm. Thus, the harm to women is understood to outweigh the claim of the man who desires that pornography be available to him free of any restrictions, particularly once we understand the idea that pornography is not only an offense to women, but also an insult to men.

The insult to men is that it depicts them as having to violate women in order to imagine having sex with them. It gives us a vision and reinforces a view of the man as the “wimp,” afraid of women and, therefore, needing to have them in chains. Hardly a flattering picture. I distinguish insult from

76. S. BECKETT, *HAPPY DAYS* 60 (J. Knowlson ed. 1978) (emphasis in original) (stage directions omitted).

77. For a more thorough examination of the concept of innovative capability, see Cornell, *supra* note 11.

78. P. 138 (footnote omitted).

offense because I in no way want to pretend that the insult to men imposes the same kind of suffering as the offense to women. Nevertheless, it should be noted. Finally, it is important to recognize that the fear of the “wimp,” the fear of losing the supposed all-powerful phallus, is so overwhelming because in the context of gender hierarchy the worst thing that can happen to a person is to become a “girl,” or rather a “cunt.”

The identification of Woman as the castrated Other explains the fear in the “wimp” as well as the devalorization of Woman. The assumption of masculine gender identity thus depends upon the devalorization of Woman which, in turn, explains the repudiation of the feminine as the basis for patriarchal culture. The result for women is that we are left in a state of *dereliction*, which means that the little girl cannot positively understand her relationship to her mother and, therefore, to her own “sex.” Thus, Lacan’s account of gender differentiation into two sexes explains why the gender divide becomes a hierarchy in which the feminine is repudiated and despised, by women as well as men. Lacan leaves us with a world of “wimps” (men) and ghosts (women) unable to meet, speak, touch, ally. Beckett’s depiction of the male crawling on all fours and the woman slowly sinking into the “same old shit” in *Happy Days* allegorizes the Lacanian understanding of the reality of gender hierarchy. “Fucking,” for both Lacan and MacKinnon, cannot succeed because of the subjection of women. But, if Lacan recognizes the subjection of women, he also believes that the problem is insoluble. In response, I return to Derrida’s intervention into Lacan because he shows why the affirmation of feminine sexual difference cannot be foreclosed by the institutionalized meanings of patriarchy.

Derrida teaches us that Lacan’s own understanding of gender identity constituted in and through the linguistic structures of the Symbolic realm—the conventional meanings given to gender in patriarchy—can be turned against Lacan’s own political conclusions. Derrida illustrates that shifts in language, including a shift in the definition of gender identity and the designation of the feminine as the lack of the phallus, demonstrate that this same language cannot be definitively stabilized. In French feminist writing and in my own recent work, another step has been taken beyond deconstruction, to advocate the need not only to open the space for the reevaluation of the feminine, but also to write its celebration through re-figuration and re-metaphorization of feminine figures.⁷⁹

79. For examples of the re-figuration and re-metaphorization of feminine figures, see generally H. CIXOUS & C. CLEMENT, *supra* note 63; L. IRIGARAY, *supra* note 46 (developing concept of “writing” the feminine body); J. KRISTEVA, *THE KRISTEVA READER* (T. Moi ed. 1986). For my analysis, see D. CORNELL, *Feminine Writing, Metaphor and Myth*, in D. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 8.

VIII. EQUIVALENT RIGHTS: A NEW CONTEXT FOR SEX, SEXUALITY, AND GENDER IDENTITY

A. *Challenging the "Sameness" Ideology*

I now want to turn to my own program of equivalent rights to develop a different theory of equality, which I believe can overcome the deficiency in MacKinnon's analysis. We need a theory of equality which does not end by reinforcing the privileging of the masculine as the norm and insisting that the gender hierarchy must be challenged. MacKinnon has correctly and profoundly challenged the "sameness" ideology that informs so much of the law of sex discrimination.⁸⁰ She explains that if we can show that women are like men, then we can show that we have been discriminated against if and when we *are* in fact like them, but are treated differently. Women continually have to analogize their experience to men's if we want it legally recognized as unequal treatment. For MacKinnon, "sameness" and "likeness" analysis is itself a reflection of discrimination because it demands that women meet the male norm without questioning why the masculine was identified as the norm in the first place. My argument insists further that unless we recognize the value of feminine sexual difference we cannot adequately challenge the acceptance of the male as the human and, therefore, we cannot ultimately challenge gender hierarchy. In other words, we need the affirmation of feminine sexual difference if we are doctrinally to challenge the likeness analysis without reducing our insistence on women's rights in an appeal for special privilege.

A program of equivalent rights is the legal expression of the affirmation and valuation of sexual difference. "Equivalence" is defined in the *Standard Oxford Dictionary* as "of equal value," but not of equal value *because of likeness*. Equivalence does not demand that the basis of equality be likeness to men. Such a view would once again deny that we are indeed sexuate beings of two genres and not one species without differentiation. Equivalent rights can then be distinguished from the dominant analysis of sex discrimination that has been reflected in current opinions in the federal courts and in the United States Supreme Court. Moreover, equivalent rights recognize the irreducibility of the two genres, male and female, to one another. As Luce Irigaray has explained:

I know that some men imagine that the great day of the good-for-everyone universal has dawned. But what universal? What new imperialism is hiding behind this? And who pays the price for it? There is no universal valid for all women and all men outside the natural economy. Any other universal is a partial construct and, therefore, authoritarian and unjust. The first universal to be established would be that of a legislation valid for both sexes as a basic element in human culture.

80. Pp. 215-34.

That does not mean forced sexual choices. But we are living beings, which means sexuate beings, and our identity cannot be constructed without a vertical and horizontal horizon that respects difference.⁸¹

The “legislation valid for both sexes as a basic element in human culture” to which Irigaray refers, must include equivalent rights as rights, not just as privileges needed to correct the imposed inequality of women. Equivalent rights are not merely a means to help women become more like men in the name of promoting one species undivided by sexual difference. Equivalent rights do not have as their sole or even their main goal the creation of a space for women in a male world from which we have previously been shut out. Rather, they are designed to enable women to value the choices we make about our life and work without shame of our “sex.” MacKinnon has criticized the patriarchal culture which imposes “forced sexual choices.” Yet she fails to see that one of these forced sexual choices is the very repudiation of the feminine. I can suggest here how the program of equivalent rights, once it is put into the context of sex, sexuality, and gender identity, can help further the analysis of specific issues of doctrinal concern.

B. *Equivalent Rights and Pornography*

I have argued through my reading of Lacan⁸² and the reinforcement of his theory in the empirical research of Eleanor Galenson that the repudiation of the feminine and, more specifically, the reinforcement of sexual shame as the basis of identity harms women in a very specific sense and that this harm is reinforced by pornography. Moreover, pornography is not the projection of all-powerful men but, as Lacan would tell us, of the “wimps” who are afraid of women. Ultimately, pornography amounts only to a compensatory fantasy to make up for fear of women, the “dark continent.” I in no way want to deny that fear too often leads to cruelty. We see this in race relations as well as in relations between the sexes. But, when MacKinnon speaks of the all-powerful man—and of pornography as his vision and his desire—she accepts the psychological fantasy of macho compensation as truth. Who but a “wimp” would fantasize about sex with a woman in chains, tied, bound and gagged, so he would, in the most profound sense, not have to face her, let alone hear her?

C. *Equivalent Rights and Abortion*

I want to turn now to the issue of abortion. The right of abortion is a classic example of equivalent rights for women and should be included in what

81. L. Irigaray, *How to Define Sexuate Rights?* (date unknown) (unpublished manuscript on file with author).

82. See *supra* notes 72-74 and accompanying text.

Irigaray has called the right to “motherhood” (as should such rights as maternity leave and prenatal care). Without such a right women cannot aspire to achieve the most basic sense of well-being because we are denied both control over our reproductive capacity and the power to live pregnancy and motherhood with joy and without sacrifice of other aspects of our lives. Men clearly do not need the right of abortion. But that does not mean that women should not have such a right guaranteed if we are to have equality of capability and well-being. To understand why the right of abortion is crucial as an equivalent right, we must understand ourselves as sexual beings whose freedom can never be separated from an affirmative relationship to our “flesh.” Such an affirmative relationship is impossible without a right of bodily integrity. Justice Blackmun, in his dissent in *Webster v. Reproductive Health Services*,⁸³ voiced his fear of the loss of freedom to women if we were to lose this right of abortion, which I would include under the right to bodily integrity.⁸⁴ I want to stress here the suffering imposed on women as creatures of the flesh if we lose that right and yet find ourselves in circumstances in which we are unable to raise and mother a baby and, therefore, must impose upon ourselves a self-inflicted abortion. The abortion movement of the early 1970’s documented just how many women were forced to rely on such an option when abortion was illegal. In her horrifying novel—horrifying because it depicts so brilliantly the toll of the sexual shame of women as the basis of their identity—Torborg Nedreaas describes the anguish, the physical anguish of a self-inflicted abortion:

Then I set to. Drops of sweat ran down the bridge of my nose, and I noticed that I was sitting there with my tongue hanging out of my mouth. Because something burst. I could hear it inside my head from the soft crunch of tissues that burst. The pain ran along my spine and radiated across my loins and stomach. I screamed. I thought I screamed, but there wasn’t a sound. More, more, push more, find another place. It had to be wrong. And I held the very tip of the weapon between my thumb and forefinger to find the opening to my uterus once more. It was difficult but I thought I’d succeeded. The steel needle slid a little heavily against something. It went far up. Then a piercing lightning of pain through my stomach, back and brain told me it had hit something. More, more, don’t give up. Tissues burst. The sweat blinded my eyes. I heard a long rattling groan come out of me while my hand let the weapon do its work with deranged courage.⁸⁵

83. 109 S. Ct. 3040 (1989).

84. Blackmun stated: “I fear for the future. I fear for the liberty and equality of millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court. I dissent.” *Id.* at 3067 (Blackmun, J., dissenting); see also *Cruzan v. Director, Mo. Dep’t of Health*, 110 S. Ct. 2841, 2851 (1990) (affirming constitutionally protected liberty interest in refusing unwanted medical treatment).

85. T. NEDREAAS, *NOTHING GROWS BY MOONLIGHT* 189-90 (B. Lee trans. 1987).

Feminine flesh is not the same as masculine flesh. The right to bodily integrity is a right necessary for both sexes under the vision of equality of capability and well-being. But given the difference of our "sexual being," the right to bodily integrity does not mean the same rights, but rather the guarantee of its equivalent scope for both sexes. The right of abortion is most definitely necessary to guarantee bodily integrity for women. Rights should not be based on what men need for their well-being as sexual beings of the flesh, as if there were only one genre of the human species.

IX. CONCLUSION

If MacKinnon ultimately repudiates the feminine, she perpetuates rather than challenges the gender hierarchy which lies at the base of women's inequality. If the feminist point of view is to be incorporated into the state, we must have an account of its possibility. I have argued that such an account is possible once we correctly understand the role of deconstruction and, beyond this, the place of re-metaphorization and re-figuration of the feminine in reinventing and thus affirming, sexual difference. This affirmation allows us to identify the wrongs to women within a context of sexual shame imposed upon women by gender hierarchy. It also allows us to challenge the idea that the human species is only one genre and therefore that the "rights of man" give us a full conception of rights. To argue for equivalence is not to advocate special privilege once we value sexual difference as necessary for women's equality of capability and well-being, and recognize sexuality itself as necessary for a creature of the flesh to enjoy a full life.

