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Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence

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## VIEWPOINT

# Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence

Catharine A. MacKinnon

### I

Feminism has no theory of the state. It 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 distinctively feminist account of gender inequality.<sup>1</sup> Sexual objectification, the central process within this

For A. D. and D. K. H. In addition to all those whose help is acknowledged in the first part of this article, "Feminism, Marxism, Method, and the State: An Agenda for Theory," *Signs: Journal of Women in Culture and Society* 7, no. 3 (Spring 1982): 515–44 (hereafter cited as part 1), my students and colleagues at Yale, Harvard, and Stanford contributed profoundly to the larger project of which both articles are parts. Among them, Sonia E. Alvarez, Jeanne M. Barkey, Paul Brest, Ruth Colker, Karen E. Davis, Sharon Dyer, Tom Emerson, Daniel Gunther, Patricia Kliendienst Joplin, Mark Kelman, Duncan Kennedy, John Kaplan, Lyn Lemaire, Mira Marshall, Rebecca Mark, Martha Minow, Helen M. A. Neally, Lisa Rofel, Sharon Silverstein, Dean Spencer, Laurence Tribe, and Mary Whisner stand out vividly in retrospect. None of it would have happened without Lu Ann Carter and David Rayson. And thank you, Meg Baldwin, Annie McCombs, and Janet Spector.

Marxism appears in lower case, Black in upper case, for reasons explained in part I.

1. Much has been made of the distinction between sex and gender. Sex is thought the more biological, gender the more social. The relation of each to sexuality varies. Since I believe sexuality is fundamental to gender and fundamentally social, and that biology is its social meaning in the system of sex inequality, which is a social and political system that does not rest independently on biological differences in any respect, the sex/gender distinction looks like a nature/culture distinction. I use sex and gender relatively interchangeably.

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dynamic, is at once epistemological and political.<sup>2</sup> The feminist theory of knowledge is inextricable from the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.

The perspective from the male standpoint<sup>3</sup> enforces woman's definition, encircles her body, circumlocutes her speech, and describes her life. The male perspective is systemic and hegemonic. The content of the signification "woman" is the content of women's lives. Each sex has its role, but their stakes and power are not equal. If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective. And they are connected. In this context, objectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it. Sexual metaphors for knowing are no coincidence.<sup>4</sup> The solipsism of this ap-

2. This analysis is developed in part 1. I assume here your acquaintance with the arguments there.

3. Male is a social and political concept, not a biological attribute. As I use it, it has *nothing whatever* to do with inherency, preexistence, nature, inevitability, or body as such. It is more epistemological than ontological, undercutting the distinction itself, given male power to conform being with perspective. (See part 1, pp. 538–39, n. 56.) The perspective from the male standpoint is not always each man's opinion, although most men adhere to it, nonconsciously and without considering it a point of view, as much because it makes sense of their experience (the male experience) as because it is in their interest. It is rational for them. A few men reject it; they pay. Because it is the dominant point of view and defines rationality, women are pushed to see reality in its terms, although this denies their vantage point as women in that it contradicts (at least some of) their lived experience. Women who adopt the male standpoint are passing, epistemologically speaking. This is not uncommon and is rewarded. The intractability of maleness as a form of dominance suggests that social constructs, although they flow from human agency, can be less plastic than nature has proven to be. If experience trying to do so is any guide, it may be easier to change biology than society.

4. In the Bible, to know a woman is to have sex with her. You acquire carnal knowledge. Many scholarly metaphors elaborate the theme of violating boundaries to appropriate from inside to carry off in usable form: "a penetrating observation," "an incisive analysis," "piercing the veil." Mary Ellman writes, "The male mind . . . is assumed to function primarily like a penis. Its fundamental character is seen to be aggression, and this quality is held essential to the highest or best working of the intellect" (*Thinking about Women* [New York: Harcourt, Brace, Jovanovich, 1968], p. 23). Feminists are beginning to understand that to know has meant to fuck. See Evelyn Fox Keller, "Gender and Science," *Psychoanalysis and Contemporary Thought* 1, no. 3 (1978): 409–33, esp. 413; and Helen Roberts, ed., *Doing Feminist Research* (London: Routledge & Kegan Paul, 1981). The term "to fuck" uniquely captures my meaning because it refers to sexual activity without distinguishing rape from intercourse. At least since Plato's cave, visual metaphors for knowing have been central to Western theories of knowledge, the visual sense prioritized as a mode of verification. The relationship between visual appropriation and objectification is now only begin-

proach does not undercut its sincerity, but it is interest that precedes method.

Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view 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. If women had consciousness or world, sex inequality would be harmless, or all women would be feminist. Yet we have something of both, or there would be no such thing as feminism. Why can women know that this—life as we have known it—is not all, not enough, not ours, not just? Now, why don't all women?<sup>5</sup>

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ning to be explored. "The knowledge gained through still photographs will always be . . . a semblance of knowledge, a semblance of wisdom, as the act of taking pictures is a semblance of wisdom, a semblance of rape. The very muteness of what is, hypothetically, comprehensible in photographs is what constitutes their attraction and provocativeness" (Susan Sontag, *On Photography* [New York: Farrar, Straus & Giroux, 1980], p. 24). See part 1, pp. 539–40, n. 59.

5. Feminism aspires to represent the experience of all women as women see it, yet criticizes antifeminism and misogyny, including when it appears in female form. This tension is compressed in the epistemic term of art "the standpoint of all women." We are barely beginning to unpack it. Not all women agree with the feminist account of women's situation, nor do all feminists agree with any single rendition of feminism. Authority of interpretation—the claim to speak as a woman—thus becomes methodologically complex and politically crucial for the same reasons. Consider the accounts of their own experience given by right-wing women and lesbian sadomasochists. How can patriarchy be diminishing to women when women embrace and defend their place in it? How can dominance and submission be violating to women when women eroticize it? Now what is the point of view of the experience of all women? Most responses in the name of feminism, stated in terms of method, either (1) simply regard some women's views as "false consciousness," or (2) embrace any version of women's experience that a biological female claims as her own. The first approach treats some women's views as unconscious conditioned reflections of their oppression, complicitous in it. Just as science devalues experience in the process of uncovering its roots, this approach criticizes the substance of a view because it can be accounted for by its determinants. But if both feminism and antifeminism are responses to the condition of women, how is feminism exempt from devaluation by the same account? That feminism is critical, and antifeminism is not, is not enough, because the question is the basis on which we know something is one or the other when women, all of whom share the condition of women, disagree. The false consciousness approach begs this question by taking women's self-reflections as evidence of their stake in their own oppression, when the women whose self-reflections are at issue question whether their condition is oppressed at all. The second response proceeds as if women are free. Or, at least, as if we have considerable latitude to make, or to choose, the meanings if not the determinants of our situation. Or, that the least feminism can do, since it claims to see the world through women's eyes, is to validate the interpretations women choose. Both responses arise because of the unwillingness, central to feminism, to dismiss some women as simply deluded while granting other women the ability to see the truth. These two resolutions echo the object/subject split:

The practice of a politics of all women in the face of its theoretical impossibility is creating a new process of theorizing and a new form of theory. Although feminism emerges from women's particular experience, it is not subjective or partial, for no interior ground and few if any aspects of life are free of male power. Nor is feminism objective, abstract, or universal.<sup>6</sup> It claims no external ground or unsexed sphere of generalization or abstraction beyond male power, nor transcendence of the specificity of each of its manifestations. How is it possible to have an engaged truth that does not simply reiterate its determinations? *Dis-engaged* truth only reiterates *its* determinations. Choice of method is choice of determinants—a choice which, for women as such, has been unavailable because of the subordination of women. Feminism does not begin with the premise that it is unpremiered. It does not aspire to persuade an unpremiered audience because there is no such audience. Its project is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience.

This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect.<sup>7</sup> Its point of view is the standard for

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objectivity (my consciousness is true, yours false, never mind why) or subjectivity (I know I am right because it feels right to me, never mind why). Thus is determinism answered with transcendence, traditional marxism with traditional liberalism, dogmatism with tolerance. The first approach claims authority on the basis of its lack of involvement, asserting its view independent of whether the described concurs—sometimes because it does not. It also has no account, other than its alleged lack of involvement, of its own ability to provide such an account. How can some women see the truth and other women not? The second approach claims authority on the basis of its involvement. It has no account for different interpretations of the same experience or any way of choosing among conflicting ones, including those between women and men. It tends to assume that women, as we are, have power and are free in exactly the ways feminism, substantively, has found we are not. Thus, the first approach is one-sidedly outside when there is no outside, the second one-sidedly inside when someone (probably a woman) is inside everything, including every facet of sexism, racism, and so on. So our problem is this: the false consciousness approach cannot explain experience as it is experienced by those who experience it. The alternative can only reiterate the terms of that experience. This is only one way in which the object/subject split is fatal to the feminist enterprise.

6. To stress: the feminist criticism is not that the objective stance fails to be truly objective because it has social content, all the better to exorcise that content in the pursuit of the more truly point-of-viewless viewpoint. The criticism is that objectivity is largely accurate to its/the/a world, which world is criticized; and that it becomes more accurate as the power it represents and extends becomes more total. Analogous criticisms have arisen in the natural sciences, without being seen as threatening to the "science of society" project, or calling into question that project's tacit equation between natural and social objects of knowledge. What if we extend Heisenberg's uncertainty principle to social theory? (Werner Heisenberg, *The Physical Principles of the Quantum Theory* [Chicago: University of Chicago Press, 1930], pp. 4, 20, 62–65). What of the axiomatic method after Gödel's proof? (See Ernest Nagel and James R. Newman, *Gödel's Proof* [New York: New York University Press, 1958].)

7. Andrea Dworkin helped me express this.

point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy. Feminism claims the voice of women's silence, the sexuality of our eroticized desexualization, the fullness of "lack," the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence. This approach is more complex than transgression, more transformative than transvaluation, deeper than mirror-imaged resistance, more affirmative than the negation of our negativity. It is neither materialist nor idealist; it is feminist. Neither the transcendence of liberalism nor the determination of materialism works for us. Idealism is too unreal; women's inequality is enforced, so it cannot simply be thought out of existence, certainly not by us. Materialism is too real; women's inequality has never not existed, so women's equality never has. That is, the equality of women to men will not be scientifically provable until it is no longer necessary to do so. Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. If feminism is revolutionary, this is why.

Feminism has been widely thought to contain tendencies of liberal feminism, radical feminism, and socialist feminism. But just as socialist feminism has often amounted to marxism applied to women, liberal feminism has often amounted to liberalism applied to women. Radical feminism is feminism. Radical feminism—after this, feminism unmodified—is methodologically post-marxist.<sup>8</sup> It moves to resolve the

8. I mean to imply that contemporary feminism that is not methodologically post-marxist is not radical, hence not feminist on this level. For example, to the extent Mary Daly's *Gyn/Ecology: The Metaethics of Radical Feminism* (Boston: Beacon Press, 1978) is idealist in method—meaning that the subordination of women is an idea such that to think it differently is to change it—it is formally liberal no matter how extreme or insightful. To the extent Shulamith Firestone's analysis (*The Dialectic of Sex: The Case for Feminist Revolution* [New York: William Morrow & Co., 1972]) rests on a naturalist definition of gender, holding that women are oppressed by our bodies rather than their social meaning, her radicalism, hence her feminism, is qualified. Susan Griffin's *Pornography and Silence: Culture's Revolt against Nature* (San Francisco: Harper & Row Publishers, 1982) is classically liberal in all formal respects including, for instance, the treatment of pornography and eros as a distinction that is fundamentally psychological rather than interested, more deeply a matter of good and bad (morality) than of power and powerlessness (politics). Andrea Dworkin's work, esp. *Pornography: Men Possessing Women* (New York: Perigee Books, 1981), and Adrienne Rich's poetry and essays, exemplify feminism as a methodological departure. This feminism seeks to define and pursue women's interest as the fate of all women bound together. It seeks to extract the truth of women's commonalities out of the lie that all women are the same. If whatever a given society defines as sexual defines gender, and if gender means the subordination of women to men, "woman" means—is not qualified or undercut by—the uniqueness of each woman and the specificity of race, class, time, and place. In this sense, lesbian feminism, the feminism of women of color, and socialist feminism are converging in a feminist politics of sexuality, race, and class, with a left to right spectrum of its own. This politics is struggling for a practice of unity that does

marxist-feminist problematic on the level of method. Because its method emerges from the concrete conditions of all women as a sex, it dissolves the individualist, naturalist, idealist, moralist structure of liberalism, the politics of which science is the epistemology. Where liberal feminism sees sexism primarily as an illusion or myth to be dispelled, an inaccuracy to be corrected, true feminism sees the male point of view as fundamental to the male power to create the world in its own image, the image of its desires, not just as its delusory end product. Feminism distinctively as such comprehends that what counts as truth is produced in the interest of those with power to shape reality, and that this process is as pervasive as it is necessary as it is changeable. Unlike the scientific strain in marxism or the Kantian imperative in liberalism, which in this context share most salient features, feminism neither claims universality nor, failing that, reduces to relativity. It does not seek a generality that subsumes its particulars or an abstract theory or a science of sexism. It rejects the approach of control over nature (including us) analogized to control over society (also including us) which has grounded the "science of society" project as the paradigm for political knowledge since (at least) Descartes. Both liberalism and marxism have been subversive on women's behalf. Neither is enough. To grasp the inadequacies for women of liberalism on one side and marxism on the other is to begin to comprehend the role of the liberal state and liberal legalism<sup>9</sup> within a post-marxist feminism of social transformation.

As feminism has a theory of power but lacks a theory of the state, so marxism has a theory of value which (through the organization of work in production) becomes class analysis, but a problematic theory of the state. Marx did not address the state much more explicitly than he did women. Women were substratum, the state epiphenomenon.<sup>10</sup> Engels,

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not depend upon sameness without dissolving into empty tolerance, including tolerance of all it exists to change whenever that appears embodied in one of us. A new community begins here. As critique, women's communality describes a fact of male supremacy, of sex "in itself": no woman escapes the meaning of being a woman within a gendered social system, and sex inequality is not only pervasive but may be universal (in the sense of never having not been in some form) although "intelligible only in . . . locally specific forms" (M. Z. Rosaldo, "The Use and Abuse of Anthropology: Reflections on Feminism and Cross-cultural Understanding," *Signs: Journal of Women in Culture and Society* 5, no. 3 [Spring 1980]: 389–417, 417). For women to become a sex "for ourselves" moves community to the level of vision.

9. See Karl Klare, "Law-Making as Praxis," *Telos* 12, no. 2 (Summer 1979): 123–35; Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964). To examine law as state is not to decide that all relevant state behavior occurs in legal texts. I do think that legal decisions expose power on the level of legitimizing rationale, and that law, as words in power, is central in the social erection of the liberal state.

10. Karl Marx, *Capital, Selected Works*, 3 vols. (Moscow: Progress Publishers, 1969), 2:120, 139–40; *The German Ideology* (New York: International Publishers, 1972), pp. 48–52; *Introduction to Critique of Hegel's Philosophy of Right*, ed. Joseph O'Malley, trans. Annette Jolin (Cambridge: Cambridge University Press, 1970), p. 139; Marx to P. V. Annenkov, 1846, in *The Poverty of Philosophy* (New York: International Publishers, 1963), pp. 179–93, 181.

who frontally analyzed both, and together, presumed the subordination of women in every attempt to reveal its roots, just as he presupposed something like the state, or state-like social conditions, in every attempt to expose its origins.<sup>11</sup> Marx tended to use the term “political” narrowly to refer to the state or its laws, criticizing as exclusively political interpretations of the state’s organization or behavior which took them as *sui generis*. Accordingly, until recently, most marxism has tended to consider political that which occurs between classes, that is, to interpret as “the political” instances of the marxist concept of inequality. In this broad sense, the marxist theory of social inequality has been its theory of politics. This has not so much collapsed the state into society (although it goes far in that direction) as conceived the state as determined by the totality of social relations of which the state is one determined and determining part—without specifying which, or how much, is which.

In this context, recent marxist work has tried to grasp the specificity of the institutional state: how it wields class power, or transforms class society, or responds to approach by a left aspiring to rulership or other changes. While liberal theory has seen the state as emanating power, and traditional marxism has seen the state as expressing power constituted elsewhere, recent marxism, much of it structuralist, has tried to analyze state power as specific to the state as a form, yet integral to a determinate social whole understood in class terms. This state is found “relatively autonomous.” This means that the state, expressed through its functionaries, has a definite class character, is definitely capitalist or socialist, but also has its own interests which are to some degree independent of those of the ruling class and even of the class structure.<sup>12</sup> The state as such, in this view, has a specific power and interest, termed “the political,” such that class power, class interest expressed by and in the state, and state behavior, although inconceivable in isolation from one another, are nevertheless not linearly or causally linked or strictly coextensive. Such work locates “the specificity of the political” in a

11. I am criticizing Engels’s assumptions about sexuality and women’s place, and his empiricist method, and suggesting that the two are linked. Friedrich Engels, *Origin of the Family, Private Property and the State* (New York: International Publishers, 1942).

12. Representative works include Fred Block, “The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State,” *Socialist Revolution* 33 (May–June 1977): 6–28; Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969); Nicos Poulantzas, *Classes in Contemporary Capitalism* (London: New Left Books, 1975), and *Political Power and Social Classes* (London: New Left Books, 1975); Goran Therborn, *What Does the Ruling Class Do When It Rules?* (London: New Left Books, 1978); Norberto Bobbio, “Is There a Marxist Theory of the State?” *Telos* 35 (Spring 1978): 5–16. Theda Skocpol, *States and Social Revolution: A Comparative Analysis of France, Russia and China* (Cambridge: Cambridge University Press, 1979), pp. 24–33, ably reviews much of this literature. Applications to law include Isaac Balbus, “Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law,” *Law and Society Review* 11, no. 3 (Winter 1977): 571–88; Mark Tushnet, “A Marxist Analysis of American Law,” *Marxist Perspectives* 1, no. 1 (Spring 1978): 96–116; and Klare (n. 9 above).

mediate “region”<sup>13</sup> between the state as its own ground of power (which alone, as in the liberal conception, would set the state above or apart from class) and the state as possessing no special supremacy or priority in terms of power, as in the more orthodox marxist view.

The idea that the state is relatively autonomous, a kind of first among equals of social institutions, has the genius of appearing to take a stand on the issue of reciprocal constitution of state and society while straddling it. Is the state essentially autonomous of class but partly determined by it, or is it essentially determined by class but not exclusively so? Is it relatively constrained within a context of freedom or relatively free within a context of constraint?<sup>14</sup> As to who or what fundamentally moves and shapes the realities and instrumentalities of domination, and where to go to do something about it, what qualifies what is as ambiguous as it is crucial. Whatever it has not accomplished, however, this literature has at least relieved the compulsion to find all law—directly or convolutedly, nakedly or clothed in unconscious or devious rationalia—to be simply bourgeois, without undercutting the notion that it is determinately driven by interest.

A methodologically post-marxist feminism must confront, on our own terms, the issue of the relation between the state and society, within a theory of social determination adequate to the specificity of sex. Lacking even a tacit theory of the state of its own, feminist practice has instead oscillated between a liberal theory of the state on the one hand and a left theory of the state on the other. Both treat law as the mind of society: disembodied reason in liberal theory, reflection of material interest in left theory. In liberal moments the state is accepted on its own terms as a neutral arbiter among conflicting interests. The law is actually or potentially principled, meaning predisposed to no substantive outcome, thus available as a tool that is not fatally twisted. Women implicitly become an interest group within pluralism, with specific problems of mobilization and representation, exit and voice, sustaining incremental gains and losses. In left moments, the state becomes a tool of dominance and repression, the law legitimizing ideology, use of the legal system a form of utopian idealism or gradualist reform, each apparent gain deceptive or coercive, and each loss inevitable.

Applied to women, liberalism has supported state intervention on behalf of women as abstract persons with abstract rights, without scrutinizing the content of these notions in gendered terms. Marxism

13. Poulantzas's formulation follows Althusser. Louis Althusser and Etienne Balibar, *Reading Capital*, trans. Ben Brewster (London: New Left Books, 1968). For Poulantzas, the “specific autonomy which is characteristic of the function of the state . . . is the basis of the specificity of the political” (*Political Power and Social Classes* [n. 12 above], pp. 14, 46). Whatever that means. On structural causality between class and state, see p. 14.

14. See Ernesto Laclau's similar criticism of Miliband in *Politics and Ideology in Marxist Theory* (London: New Left Books, 1977), p. 65.

applied to women is always on the edge of counseling abdication of the state as an arena altogether—and with it those women whom the state does not ignore or who are, as yet, in no position to ignore it. Feminism has so far accepted these constraints upon its alternatives: either the state, as primary tool of women's betterment and status transformation, without analysis (hence strategy) for it as male; or civil society, which for women has more closely resembled a state of nature. The state, with it the law, has been either omnipotent or impotent: everything or nothing.

The feminist posture toward the state has therefore been schizoid on issues central to women's survival: rape, battery, pornography, prostitution, sexual harassment, sex discrimination, abortion, the Equal Rights Amendment, to name a few. Attempts to reform and enforce rape laws, for example, have tended to build on the model of the deviant perpetrator and the violent act, as if the fact that rape is a crime means that the society is against it, so law enforcement would reduce or delegitimize it. Initiatives are accordingly directed toward making the police more sensitive, prosecutors more responsive, judges more receptive, and the law, in words, less sexist. This may be progressive in the liberal or the left senses, but how is it empowering in the feminist sense? Even if it were effective in jailing men who do little different from what nondeviant men do regularly, how would such an approach alter women's rapability? Unconfronted are *why* women are raped and the role of the state in that. Similarly, applying laws against battery to husbands, although it can mean life itself, has largely failed to address, as part of the strategy for state intervention, the conditions that produce men who systematically express themselves violently toward women, women whose resistance is disabled, and the role of the state in this dynamic. Criminal enforcement in these areas, while suggesting that rape and battery are deviant, punishes men for expressing the images of masculinity that mean their identity, for which they are otherwise trained, elevated, venerated, and paid. These men must be stopped. But how does that change them or reduce the chances that there will be more like them? Liberal strategies entrust women to the state. Left theory abandons us to the rapists and batterers. The question for feminism is not only whether there is a meaningful difference between the two, but whether either is adequate to the feminist critique of rape and battery as systemic and to the role of the state and the law within that system.

Feminism has descriptions of the state's treatment of the gender difference, but no analysis of the state as gender hierarchy. We need to know. What, in gender terms, are the state's norms of accountability, sources of power, real constituency? Is the state to some degree autonomous of the interests of men or an integral expression of them? Does the state embody and serve male interests in its form, dynamics, relation to society, and specific policies? Is the state constructed upon the subordination of women? If so, how does male power become state power?

Can such a state be made to serve the interests of those upon whose powerlessness its power is erected? Would a different relation between state and society, such as may pertain under socialism, make a difference? If not, is masculinity inherent in the state form as such, or is some other form of state, or some other way of governing, distinguishable or imaginable? In the absence of answers to such questions, feminism has been caught between giving more power to the state in each attempt to claim it for women and leaving unchecked power in the society to men. Undisturbed, meanwhile, like the assumption that women generally consent to sex, is the assumption that we consent to this government. The question for feminism, for the first time on its own terms, is: what is this state, from women's point of view?

As a beginning, I propose that the state is male in the feminist sense.<sup>15</sup> 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 legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying, or de jure prohibiting its excesses when necessary to its normalization. Substantively, the way the male point of view frames an experience is the way it is framed by state policy. To the extent possession is the point of sex, rape is sex with a woman who is not yours, unless the act is so as to make her yours. If part of the kick of pornography involves eroticizing the putatively prohibited, obscenity law will putatively prohibit pornography enough to maintain its desirability without ever making it unavailable or truly illegitimate. The same with prostitution. As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law. To the extent that the point of abortion is to control the reproductive sequelae of intercourse, so as to facilitate male sexual access to women, access to abortion will be controlled by "a man or The Man."<sup>16</sup> Gender, elaborated and sustained by behavioral patterns of application and administration, is maintained as a division of power.

Formally, the state is male in that objectivity is its norm. Objectivity is liberal legalism's conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it,

15. See Susan Rae Peterson, "Coercion and Rape: The State as a Male Protection Racket," in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, N.J.: Littlefield, Adams & Co., 1977), pp. 360-71; Janet Rifkin, "Toward a Theory of Law Patriarchy," *Harvard Women's Law Journal* 3 (Spring 1980): 83-92.

16. Johnnie Tillmon, "Welfare Is a Women's Issue," *Liberation News Service* (February 26, 1972), in *America's Working Women: A Documentary History, 1600 to the Present*, ed. Rosalyn Baxandall, Linda Gordon, and Susan Reverby (New York: Vintage Books, 1976), pp. 357-58.

and calling that view, and that relation, practical rationality. If rationality is measured by point-of-viewlessness, what counts as reason will be that which corresponds to the way things are. Practical will mean that which can be done without changing anything. In this framework, the task of legal interpretation becomes "to perfect the state as mirror of the society."<sup>17</sup> Objectivist epistemology is the law of law. It ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own highest ideal of fairness. Like the science it emulates, this epistemological stance can not see the social specificity of reflection as method or its choice to embrace that which it reflects. Such law not only reflects a society in which men rule women; it rules in a male way: "The phallus means everything that sets itself up as a mirror."<sup>18</sup> The rule form, which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence. A closer look at the substantive law of rape<sup>19</sup> in light of such an argument suggests that the relation between objectification (understood as the primary process of the subordination of women) and the power of the state is the relation between the personal and the political at the level of government. This is not because the state is presumptively the sphere of politics. It is because the state, in part through law, institutionalizes male power. If male power is systemic, it *is* the regime.

17. Laurence Tribe, "Constitution as Point of View" (Harvard Law School, Cambridge, Mass., 1982, mimeographed), p. 13.

18. Madeleine Gagnon, "Body I," in *New French Feminisms*, ed. Elaine Marks and Isabelle de Courtivron (Amherst, Mass.: University of Massachusetts Press, 1980), p. 180. Turns on the mirroring trope, which I see as metaphoric analyses of the epistemological/political dimension of objectification, are ubiquitous in feminist writing: "Into the room of the dressing where the walls are covered with mirrors. Where mirrors are like eyes of men, and the women reflect the judgments of mirrors" (Susan Griffin, *Woman and Nature: The Roaring Inside Her* [New York: Harper & Row Publishers, 1979], p. 155). See also Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1975), pp. 195, 197; Sheila Rowbotham, *Women's Consciousness, Man's World* (Harmondsworth: Pelican Books, 1973), pp. 26–29. "She did suffer, the witch/ trying to peer round the looking/ glass, she forgot/ someone was in the way" (Micheline, "Reflexion," quoted in Rowbotham, p. 2). Virginia Woolf wrote the figure around ("So I reflected . . ."), noticing "the necessity that women so often are to men" of serving as a looking glass in which a man can "see himself at breakfast and at dinner at least twice the size he really is." Notice the doubled sexual/gender meaning: "Whatever may be their use in civilized societies, mirrors are essential to all violent and heroic action. That is why Napoleon and Mussolini both insist so emphatically upon the inferiority of women, for if they were not inferior, they would cease to enlarge" (*A Room of One's Own* [New York: Harcourt, Brace & World, 1969], p. 36).

19. Space limitations made it necessary to eliminate sections on pornography, sex discrimination, and abortion. For the same reason, most supporting references, including those to case law, have been cut. The final section accordingly states the systemic implications of the analysis more tentatively than I think them, but as strongly as I felt I could, on the basis of the single substantive examination that appears here.

## II

Feminists have reconceived rape as central to women's condition in two ways. Some see rape as an act of violence, not sexuality, the threat of which intimidates all women.<sup>20</sup> Others see rape, including its violence, as an expression of male sexuality, the social imperatives of which define all women.<sup>21</sup> The first, formally in the liberal tradition, comprehends rape as a displacement of power based on physical force onto sexuality, a pre-existing natural sphere to which domination is alien. Thus, Susan Brownmiller examines rape in riots, wars, pogroms, and revolutions; rape by police, parents, prison guards; and rape motivated by racism—seldom rape in normal circumstances, in everyday life, in ordinary relationships, by men as men.<sup>22</sup> Women are raped by guns, age, white supremacy, the state—only derivatively by the penis. The more feminist view to me, one which derives from victims' experiences, sees sexuality as a social sphere of male power of which forced sex is paradigmatic. Rape is not less sexual for being violent; to the extent that coercion has become integral to male sexuality, rape may be sexual to the degree that, and because, it is violent.

The point of defining rape as “violence not sex” or “violence against women” has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors, with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable.<sup>23</sup> Instead of

20. Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1976), p. 15.

21. Diana E. H. Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein & Day, 1977); Andrea Medea and Kathleen Thompson, *Against Rape* (New York: Farrar, Straus & Giroux, 1974); Lorene M. G. Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977); Susan Griffin, “Rape: The All-American Crime,” *Ramparts* (September 1971), pp. 26–35; Ti-Grace Atkinson connects rape with “the institution of sexual intercourse” (*Amazon Odyssey: The First Collection of Writings by the Political Pioneer of the Women's Movement* [New York: Links Books, 1974], pp. 13–23). Kalamu ya Salaam, “Rape: A Radical Analysis from the African-American Perspective,” in *Our Women Keep Our Skies from Falling* (New Orleans: Nkombo, 1980), pp. 25–40.

22. Racism, clearly, is everyday life. Racism in the United States, by singling out Black men for allegations of rape of white women, has helped obscure the fact that it is men who rape women, disproportionately women of color.

23. “Like other victims, I had problems with sex, after the rape. There was no way that Arthur could touch me that it didn't remind me of having been raped by this guy I never saw” (Carolyn Craven, “No More Victims: Carolyn Craven Talks about Rape, and about What Women and Men Can Do to Stop It,” ed. Alison Wells [Berkeley, Calif., 1978, mimeographed]), p. 2.

asking, what is the violation of rape, what if we ask, what is the nonviolation of intercourse? To tell what is wrong with rape, explain what is right about sex. If this, in turn, is difficult, the difficulty is as instructive as the difficulty men have in telling the difference when women see one. Perhaps the wrong of rape has proven so difficult to articulate<sup>24</sup> because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance.<sup>25</sup>

Like heterosexuality, the crime of rape centers on penetration.<sup>26</sup> The law to protect women's sexuality from forcible violation/expropriation defines the protected in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss, not coincidentally also upon the way men define loss of exclusive access. In this light, rape, as legally defined, appears more a crime against female monogamy than against female sexuality. Property concepts fail fully to comprehend this,<sup>27</sup> however, not because women's sexuality is not, finally, a thing, but because it is never ours. The moment we "have" it—"have sex" in the dual sexuality/gender sense—it is lost as ours. This may explain the male incomprehension that, once a woman has had sex, she loses anything when raped. To them we *have nothing* to lose. Dignitary harms, because nonmaterial, are remote to the legal mind. But women's loss through rape is not only less tangible, it is less

24. Pamela Foa, "What's Wrong with Rape?" in Vetterling-Braggin, Elliston, and English, eds. (n. 15 above), pp. 347-59; Michael Davis, "What's So Bad about Rape?" (paper presented at Annual Meeting of the Academy of Criminal Justice Sciences, Louisville, Ky., March 1982).

25. "Since we would not want to say that there is anything morally wrong with sexual intercourse per se, we conclude that the wrongness of rape rests with the matter of the woman's consent" (Carolyn M. Shafer and Marilyn Frye, "Rape and Respect," in Vetterling-Braggin, Elliston, and English, eds. [n. 15 above], p. 334). "Sexual contact is not inherently harmful, insulting or provoking. Indeed, ordinarily it is something of which we are quite fond. The difference between ordinary sexual intercourse and rape is that ordinary sexual intercourse is more or less consented to while rape is not" (Davis [n. 24 above], p. 12).

26. Sec. 213.0 of the *Model Penal Code* (Official Draft and Revised Comments 1980), like most states, defines rape as sexual intercourse with a female who is not the wife of the perpetrator "with some penetration however slight." Impotency is sometimes a defense. Michigan's gender-neutral sexual assault statute includes penetration by objects (sec. 520a[h]; 520[b]). See *Model Penal Code*, annotation to sec. 213.1(d) (Official Draft and Revised Comments 1980).

27. Although it is true that men possess women and that women's bodies are, socially, men's things, I have not analyzed rape as men treating women like property. In the manner of many socialist-feminist adaptations of marxian categories to women's situation, that analysis short-circuits analysis of rape as male sexuality and presumes rather than develops links between sex and class. We need to rethink sexual dimensions of property as well as property dimensions of sexuality.

existent. It is difficult to avoid the conclusion that penetration itself is known to be a violation and that women's sexuality, our gender definition, is itself stigmatic. If this is so, the pressing question for explanation is not why some of us accept rape but why any of us resent it.

The law of rape divides the world of women into spheres of consent according to how much say we are legally presumed to have over sexual access to us by various categories of men. Little girls may not consent; wives must. If rape laws existed to enforce women's control over our own sexuality, as the consent defense implies, marital rape would not be a widespread exception,<sup>28</sup> nor would statutory rape proscribe all sexual intercourse with underage girls regardless of their wishes. The rest of us fall into parallel provinces: good girls, like children, are unconsenting, virginal, rapable; bad girls, like wives, are consenting, whores, unrapable. The age line under which girls are presumed disabled from withholding consent to sex rationalizes a condition of sexual coercion women never outgrow. As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone. Risking loss of even so little cannot be afforded. Yet the protection is denigrating and limiting (girls may not choose to be sexual) as well as perverse (girls are eroticized as untouchable; now reconsider the data on incest).

If the accused knows us, consent is inferred. The exemption for rape in marriage is consistent with the assumption underlying most adjudications of forcible rape: to the extent the parties relate, it was not really rape, it was personal.<sup>29</sup> As the marital exemptions erode, preclusions for cohabitants and voluntary social companions may expand. In this light, the partial erosion of the marital rape exemption looks less like a change in the equation between women's experience of sexual violation and men's experience of intimacy, and more like a legal adjustment to the social fact that acceptable heterosexual sex is increasingly not limited to the legal family. So although the rape law may not now always assume that the woman consented simply because the parties are legally one, indices of closeness, of relationship ranging from nodding acquaintance to living together, still contraindicate rape. Perhaps this reflects men's experience that women they know meaningfully consent to sex with them. That cannot be rape; rape must be by someone else,

28. For an excellent summary of the current state of the marital exemption, see Joanne Schulman, "State-by-State Information on Marital Rape Exemption Laws," in *Rape in Marriage*, Diana E. H. Russell (New York: Macmillan Publishing Co., 1982), pp. 375-81.

29. On "social interaction as an element of consent," in a voluntary social companion context, see *Model Penal Code*, sec. 213.1. "The prior *social* interaction is an indicator of consent in addition to actor's and victim's *behavioral* interaction during the commission of the offense" (Wallace Loh, "Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling," *Journal of Social Issues* 37, no. 4 [1981]: 28-52, 47). Perhaps consent should be an affirmative defense, pleaded and proven by the defendant.

someone unknown. But *women* experience rape most often by men we know.<sup>30</sup> Men believe that it is less awful to be raped by someone one is close to: "The emotional trauma suffered by a person victimized by an individual with whom sexual intimacy is shared as a normal part of an ongoing marital relationship is not nearly as severe as that suffered by a person who is victimized by one with whom that intimacy is not shared."<sup>31</sup> But women feel as much, if not more, traumatized by being raped by someone we have known or trusted, someone we have shared at least an illusion of mutuality with, than by some stranger. In whose interest is it to believe that it is not so bad to be raped by someone who has fucked you before as by someone who has not? Disallowing charges of rape in marriage may also "remove a substantial obstacle to the resumption of normal marital relations."<sup>32</sup> Depending upon your view of normal. Note that the obstacle to normalcy here is not the rape but the law against it. Apparently someone besides feminists finds sexual victimization and sexual intimacy not all that contradictory. Sometimes I think women and men live in different cultures.

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation. Rape cases finding insufficient force reveal that acceptable sex, in the legal perspective, can entail a lot of force. This is not only because of the way specific facts are perceived and interpreted, but because of the way the injury itself is defined as illegal. Rape is a sex crime that is not a crime when it looks like sex. To seek to define rape as violent, not sexual, is understandable in this context, and often seems strategic. But assault that is consented to is still assault; rape consented to is intercourse. The substantive reference point implicit in existing legal standards is the sexually normative level of force. Until this norm is confronted as such, no distinction between violence and sexuality will prohibit more in-

30. Pauline Bart found that women were more likely to be raped—that is, less able to stop a rape in progress—when they knew their assailant, particularly when they had a prior or current sexual relationship ("A Study of Women Who Both Were Raped and Avoided Rape," *Journal of Social Issues* 37, no. 4 [1981]: 123–37, 132). See also Linda Belden, "Why Women Do Not Report Sexual Assault" (City of Portland Public Service Employment Program, Portland Women's Crisis Line, Portland, Ore., March 1979, mimeographed); Diana E. H. Russell and Nancy Howell, "The Prevalence of Rape in the United States Revisited," in this issue; and Menachem Amir, *Patterns in Forcible Rape* (Chicago: University of Chicago Press, 1971), pp. 229–52.

31. Answer Brief for Plaintiff-Appellee at 10, *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

32. *Brown*, 632 P.2d at 1027 (citing Comment, "Rape and Battery between Husband and Wife," *Stanford Law Review* 6 [1954]: 719–28, 719, 725).

stances of women's experienced violation than does the existing definition. The question is what is *seen as* force, hence as violence, in the sexual arena. Most rapes, as women live them, will not be seen to violate women until sex and violence are confronted as mutually definitive. It is not only men convicted of rape who believe that the only thing they did different from what men do all the time is get caught.

The line between rape and intercourse commonly centers on some measure of the woman's "will." But from what should the law know woman's will? Like much existing law, Brownmiller tends to treat will as a question of consent and consent as a factual issue of the presence of force.<sup>33</sup> Proof problems aside, force and desire are not mutually exclusive. So long as dominance is eroticized, they never will be. Women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive. Some eroticize dominance and submission; it beats feeling forced. Sexual intercourse may be deeply unwanted—the woman would never have initiated it—yet no force may be present. Too, force may be used, yet the woman may want the sex—to avoid more force or because she, too, eroticizes dominance. Women and men know this. Calling rape violence, not sex, thus evades, at the moment it most seems to confront, the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it. When sex is violent, women may have lost control over what is done to us, but absence of force does not ensure the presence of that control. Nor, under conditions of male dominance, does the presence of force make an interaction nonsexual. If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept.<sup>34</sup>

To explain women's gender status as a function of rape, Brownmiller argues that the threat of rape benefits all men.<sup>35</sup> She does not specify in what way. Perhaps it benefits them sexually, hence as a gender: male initiatives toward women carry the fear of rape as support for persuading compliance, the resulting appearance of which has been called consent. Here the victims' perspective grasps what liberalism applied to women denies: that forced sex as sexuality is not exceptional in relations between the sexes but constitutes the social meaning of gender: "Rape is a man's act, whether it is male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively

33. Brownmiller (n. 20 above), pp. 8, 196, 400–407, 427–36.

34. See Carol Pateman, "Women and Consent," *Political Theory* 8, no. 2 (May 1980): 149–68.

35. Brownmiller (n. 20 above), p. 5.

temporarily.”<sup>36</sup> To be rapable, a position which is social, not biological, defines what a woman is.

Most women get the message that the law against rape is virtually unenforceable as applied to them. Our own experience is more often delegitimized by this than the law is. Women radically distinguish between rape and experiences of sexual violation, concluding that we have not “really” been raped if we have ever seen or dated or slept with or been married to the man, if we were fashionably dressed or are not provably virgin, if we are prostitutes, if we put up with it or tried to get it over with, if we were force-fucked over a period of years. If we probably couldn’t prove it in court, it wasn’t rape. The distance between most sexual violations of women and the legally perfect rape measures the imposition of someone else’s definition upon women’s experiences. Rape, from women’s point of view, is not prohibited; it is regulated. Even women who know we have been raped do not believe that the legal system will see it the way we do. We are often not wrong. Rather than deterring or avenging rape, the state, in many victims’ experiences, perpetuates it. Women who charge rape say they were raped twice, the second time in court. If the state is male, this is more than a figure of speech.

The law distinguishes rape from intercourse by the woman’s lack of consent coupled with a man’s (usually) knowing disregard of it. A feminist distinction between rape and intercourse, to hazard a beginning

36. Shafer and Frye (n. 25 above), p. 334. Battery of wives has been legally separated from marital rape not because assault by a man’s fist is so different from assault by a penis. Both seem clearly violent. I am suggesting that both are also sexual. Assaults are often precipitated by women’s noncompliance with gender requirements. See R. Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (New York: Free Press, 1979), pp. 14–20. Nearly all incidents occur in the home, most in the kitchen or bedroom. Most murdered women are killed by their husbands, most in the bedroom. The battery cycle accords with the rhythm of heterosexual sex (see Leonore Walker, *The Battered Woman* [New York: Harper & Row Publishers, 1979], pp. 19–20). The rhythm of lesbian S/M appears similar (Samois, eds., *Coming to Power* [Palo Alto, Calif.: Up Press, 1981]). Perhaps most interchange between genders, but especially violent ones, make sense in sexual terms. However, the larger issue for the relation between sexuality and gender, hence sexuality and violence generally, including both war and violence against women, is: What is heterosexuality? If it is the erotization of dominance and submission, altering the participants’ gender is comparatively incidental. If it is males over females, gender matters independently. Since I see heterosexuality as the fusion of the two, but with gender a social outcome (such that the acted upon is feminized, is the “girl” regardless of sex, the actor correspondingly masculinized), battery appears sexual on a deeper level. In baldest terms, sexuality is violent, so violence is sexual, violence against women doubly so. If this is so, wives are beaten, as well as raped, *as women*—as the acted upon, as gender, meaning sexual, objects. It further follows that all acts *by anyone* which treat a woman according to her object label “woman” are *sexual* acts. The extent to which sexual acts are acts of objectification remains a question of our account of our freedom to make our own meanings. It is clear, at least, that it is centering sexuality upon genitivity that distinguishes battery from rape at exactly the juncture that both the law, and seeing rape as violence not sex, does.

approach, lies instead in the *meaning* of the act from women's point of view. What is wrong with rape is that it is an act of the subordination of women to men. Seen this way, the issue is not so much what rape "is" as the way its social conception is shaped to interpret particular encounters. Under conditions of sex inequality, with perspective bound up with situation, whether a contested interaction is rape comes down to whose meaning wins. If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality. It transpires somewhere between what the woman actually wanted and what the man comprehended she wanted. Instead of capturing this dynamic, the law gives us linear statics face to face. Nonconsent in law becomes a question of the man's force or the woman's resistance or both.<sup>37</sup> Rape, like many crimes and torts, requires that the accused possess a criminal mind (*mens rea*) for his acts to be criminal. The man's mental state refers to what he actually understood at the time or to what a reasonable man should have understood under the circumstances. The problem is this: the injury of rape lies in the meaning of the act to its victims, but the standard for its criminality lies in the meaning of the same act to the assailants. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.

Thus is the crime of rape defined and adjudicated from the male standpoint, that is, presuming that (what feminists see as) forced sex is sex. Under male supremacy, of course, it is. What this means doctrinally is that the man's perceptions of the woman's desires often determine whether she is deemed violated. This might be like other crimes of subjective intent if rape were like other crimes. But with rape, because sexuality defines gender, the only difference between assault and (what is socially considered) noninjury is the meaning of the encounter to the woman. Interpreted this way, the legal problem has been to determine whose view of that meaning constitutes what really happened, as if what happened objectively exists to be objectively determined, thus as if this task of determination is separable from the gender of the participants and the gendered nature of their exchange. Thus, even though the rape law oscillates between subjective tests and more objective standards invoking social reasonableness, it uniformly presumes a single underlying reality, not a reality split by divergent meanings, such as those inequality produces. Many women are raped by men who know the meaning of their acts to women and proceed anyway.<sup>38</sup> But women are also violated

37. Even when nonconsent is not a legal element of the offense (as in Michigan), juries tend to infer rape from evidence of force or resistance.

38. This is apparently true of undetected as well as convicted rapists. Samuel David Smithyman's sample, composed largely of the former, contained self-selected respondents to his ad, which read: "Are you a rapist? Researchers Interviewing Anonymously by Phone to Protect Your Identity. Call. . . ." Presumably those who chose to call defined their acts as rapes, at least at the time of responding ("The Undetected Rapist" [Ph.D. diss., Claremont Graduate School, 1978], pp. 54-60, 63-76, 80-90, 97-107).

every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law, it is sex. That is the single reality of what happened. When a rape prosecution is lost on a consent defense, the woman has not only failed to prove lack of consent, she is not considered to have been injured at all. Hermeneutically unpacked, read: because he did not perceive she did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women consent to sex every day. Sex makes a woman a woman. Sex is what women are *for*.

To a feminist analysis, men set sexual mores ideologically and behaviorally, define rape as they imagine the sexual violation of women through distinguishing it from their image of what they normally do, and sit in judgment in most accusations of sex crimes. So rape comes to mean a strange (read Black) man knowing a woman does not want sex and going ahead anyway. But men are systematically conditioned not even to notice what women want. They may have not a glimmer of women's indifference or revulsion. Rapists typically believe the woman loved it.<sup>39</sup> Women, as a survival strategy, must ignore or devalue or mute our desires (particularly lack of them) to convey the impression that the man will get what he wants regardless of what we want. In this context, consider measuring the genuineness of consent from the individual assailant's (or even the socially reasonable, i.e., objective, man's) point of view.

Men's pervasive belief that women fabricate rape charges after consenting to sex makes sense in this light. To them, the accusations *are* false because, to them, the facts describe sex. To interpret such events as rapes distorts their experience. Since they seldom consider that their experience of the real is anything other than reality, they can only explain the woman's version as maliciously invented. Similarly, the male anxiety that rape is easy to charge and difficult to disprove (also widely believed in the face of overwhelming evidence to the contrary) arises because rape accusations express one thing men cannot seem to control: the meaning to women of sexual encounters.

Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology. For example, when an accused wrongly but sincerely believes that a woman he sexually forced consented, he may have a defense of mistaken belief or fail to satisfy the mental requirement of knowingly proceeding against her will.<sup>40</sup> One commentator notes, discussing the conceptually similar issue of revocation of prior consent (i.e., on the issue of the conditions under which women are

39. "Probably the single most used cry of rapist to victim is 'You bitch . . . slut . . . you know you want it. You *all* want it' and afterward, 'there now, you really enjoyed it, didn't you?'" (Nancy Gager and Cathleen Schurr, *Sexual Assault: Confronting Rape in America* [New York: Grosset & Dunlap, 1976], p. 244).

40. See Director of Public Prosecutions v. Morgan, 2411 E.R.H.L. 347 (1975); Pappajohn v. The Queen, 11 D.L.R. 3d 1 (1980); People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337 (1975).

allowed to control access to their sexuality from one time to the next): "Even where a woman revokes prior consent, such is the male ego that, seized of an exaggerated assessment of his sexual prowess, a man might genuinely believe her still to be consenting; resistance may be misinterpreted as enthusiastic cooperation; protestations of pain or disinclination, a spur to more sophisticated or more ardent love-making; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance."<sup>41</sup> This equally vividly captures common male readings of women's indications of disinclination under all kinds of circumstances.<sup>42</sup> Now reconsider to what extent the man's perceptions should determine whether a rape occurred. From whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's experienced violation? This aspect of the rape law reflects the sex inequality of the society not only in conceiving a cognizable injury from the viewpoint of the reasonable rapist, but in affirmatively rewarding men with acquittals for not comprehending women's point of view on sexual encounters.

Whether the law calls this coerced consent or mistake of fact, the more the sexual violation of women is routine, the more beliefs equating sexuality with violation become reasonable, and the more honestly women can be defined in terms of our fuckability. It would be comparatively simple if the legal problem were limited to avoiding retroactive falsification of the accused's state of mind. Surely there are incentives to lie. But the deeper problem is the rape law's assumption that a single, objective state of affairs existed, one which merely needs to be determined by evidence, when many (maybe even most) rapes involve honest men and violated women. When the reality is split—a woman is raped but not by a rapist?—the law tends to conclude that a rape *did not happen*. To attempt to solve this by adopting the standard of reasonable belief without asking, on a substantive social basis, to whom the belief is reasonable and why—meaning, what conditions make it reasonable—is one-sided: male-sided. What is it reasonable for a man to believe concerning a woman's desire for sex when heterosexuality is compulsory? Whose subjectivity becomes the objectivity of "what happened" is a matter of social meaning, that is, it has been a matter of sexual politics. One-sidedly erasing women's violation or dissolving the presumptions into the subjectivity of either side are alternatives dictated by the terms

41. Richard H. S. Tur, "Rape: Reasonableness and Time," *Oxford Journal of Legal Studies* 3 (Winter 1981): 432–41, 441. Tur, in the context of the Morgan and Pappajohn cases, says the "law ought not to be astute to equate wickedness and wishful, albeit mistaken, thinking" (p. 437). In feminist analysis, a rape is not an isolated or individual or moral transgression but a terrorist act within a systematic context of group subjection, like lynching.

42. See Silke Vogelmann-Sine et al., "Sex Differences in Feelings Attributed to a Woman in Situations Involving Coercion and Sexual Advances," *Journal of Personality* 47, no. 3 (September 1979): 420–31, esp. 429–30.

of the object/subject split, respectively. These are alternatives that will only retrace that split until its terms are confronted as gendered to the ground.

Desirability to men is commonly supposed to be a woman's form of power. This echoes the view that consent is women's form of control over intercourse, different but equal to the custom of male initiative. Look at it: man initiates, woman chooses. Even the ideal is not mutual. Apart from the disparate consequences of refusal, or openness of original options, this model does not envision a situation the woman controls being placed in, or choices she frames, yet the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction. Ambiguous cases of consent are often archetypically referred to as "half won arguments in parked cars."<sup>43</sup> Why not half lost? Why isn't half enough? Why is it an argument? Why do men still want "it," feel entitled to "it," when women don't want them? That sexual expression is even framed as a matter of woman's consent, without exposing these presuppositions, is integral to gender inequality. Woman's so-called power presupposes her more fundamental powerlessness.<sup>44</sup>

### III

The state's formal norms recapitulate the male point of view on the level of design. 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 men limits partiality with written constraints and tempers force with reasonable rule following. This law aspires to science: to the immanent generalization subsuming the emergent particularity, to prediction and control of social regularities and regulations, preferably codified. The formulaic "tests" of "doctrine" aspire to mechanism, classification to taxonomy. Courts intervene only in properly "factualized" disputes,<sup>45</sup> cognizing social conflicts as if collecting empirical data. But the de-

43. Note, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," *Yale Law Journal* 62 (1952): 55-56.

44. A similar analysis of sexual harassment suggests that women have such "power" only so long as we behave according to male definitions of female desirability, that is, only so long as we accede the definition of our sexuality (hence, ourselves, as gender female) to male terms. We have this power only so long as we remain powerless.

45. Peter Gabel, "Reification in Legal Reasoning" (New College Law School, San Francisco, 1980, mimeographed), p. 3.

marcations between morals and politics, the personality of the judge and the judicial role, bare coercion and the rule of law,<sup>46</sup> tend to merge in women's experience. Relatively seamlessly they promote the dominance of men as a social group through privileging the form of power—the perspective on social life—feminist consciousness reveals as socially male. The separation of form from substance, process from policy, role from theory and practice, echoes and reechoes at each level of the regime its basic norm: objectivity.

Consider a central example. The separation of public from private is as crucial to the liberal state's claim to objectivity as its inseparability is to women's claim to subordination. Legally, it has both formal and substantive dimensions. The state considers formal, not substantive, the allocation of public matters to itself to be treated objectively, of private matters to civil society to be treated subjectively. Substantively, the private is defined as a right to "an inviolable personality,"<sup>47</sup> which is guaranteed by ensuring "autonomy or control over the intimacies of personal identity."<sup>48</sup> It is hermetic. It means that which is inaccessible to, unaccountable to, and unconstructed by anything beyond itself. Intimacy occurs in private; this is supposed to guarantee original symmetry of power. Injuries arise in violating the private sphere, not within and by and because of it. Private means consent can be presumed unless disproven. To contain a systematic inequality contradicts the notion itself. But feminist consciousness has exploded the private. For women, the measure of the intimacy has been the measure of the oppression. To see the personal as political means to see the private as public. On this level, women have no privacy to lose or to guarantee. We are not inviolable. Our sexuality, meaning gender identity, is not only violable, it *is* (hence we are) our violation. Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with and defined in terms of *men's* ability to

46. Rawls's "original position," for instance, is a version of my objective standpoint (John Rawls, *A Theory of Justice* [Cambridge, Mass.: Harvard University Press, 1971]). Not only apologists for the liberal state, but also some of its most trenchant critics, see a real distinction between the rule of law and absolute arbitrary force. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), pp. 258–69. Douglas Hay argues that making and enforcing certain acts as illegal reinforces a structure of subordination ("Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, D. Hay et al., eds. [New York: Pantheon Books, 1975], pp. 17–31). Michael D. A. Freeman ("Violence against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?" [Madison, Wis., 1980, mimeographed], p. 12, n. 161) applies this argument to domestic battery of women. Here I extend it to women's situation as a whole, without suggesting that the analysis can *end* there.

47. S. D. Warren and L. D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–205.

48. Tom Gerety, "Redefining Privacy," *Harvard Civil Right–Civil Liberties Law Review* 12, no. 2 (Spring 1977): 236.

have. To confront the fact that we have no privacy is to confront our private degradation as the public order. To fail to recognize this place of the private in women's subordination by seeking protection behind a right to that privacy is thus to be cut off from collective verification and state support in the same act.<sup>49</sup> The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism finds central to women's subjection form the core of privacy doctrine. But when women are segregated in private, one at a time, a law of privacy will tend to protect the right of men "to be let alone,"<sup>50</sup> to oppress us one at a time. A law of the private, in a state that mirrors such a society, will translate the traditional values of the private sphere into individual women's right to privacy, subordinating women's collective needs to the imperatives of male supremacy.<sup>51</sup> It will keep some men out of the bedrooms of other men.

Liberalism converges with the left at this edge of the feminist critique of male power. Herbert Marcuse speaks of "philosophies which are 'political' in the widest sense—affecting society as a whole, demonstrably transcending the sphere of privacy."<sup>52</sup> This does and does not describe the feminist political: "Women both have and have not had a common world."<sup>53</sup> Isolation in the home and intimate degradation, women share. The private sphere, which confines and separates us, is therefore a political sphere, a common ground of our inequality. In feminist translation, the private is a sphere of battery, marital rape, and women's exploited labor; of the central social institutions whereby women are deprived of (as men are granted) identity, autonomy, control, and self-determination; and of the primary activity through which male supremacy is expressed and enforced. Rather than transcending the private as a predicate to politics, feminism politicizes it. For women, the private necessarily transcends the private. If the most private also most "affects society as a whole," the separation between public and private collapses as anything other than potent ideology. The failure of marxism adequately to address intimacy on the one hand, government on the

49. *Harris v. McRae*, 448 U.S. 287 (1980), which holds that withholding public funds for abortions does not violate the federal constitutional right to privacy, illustrates. See Zillah Eisenstein, *The Radical Future of Liberal Feminism* (New York: Longman, Inc., 1981), p. 240.

50. *Robeson v. Rochester Folding Box Co.*, 171 NY 538 (1902); Cooley, *Torts*, sec. 135, 4th ed. (Chicago: Callaghan & Co., 1932).

51. This argument learned a lot from Tom Grey's article, "Eros, Civilization and the Burger Court," *Law and Contemporary Problems* 43, no. 3 (Summer 1980): 83–99.

52. Herbert Marcuse, "Repressive Tolerance," in *A Critique of Pure Tolerance*, ed. Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon Press, 1965), pp. 81–117, esp. p. 91.

53. Adrienne Rich, "Conditions for Work: The Common World of Women," in *Working It Out: Twenty-three Women Writers, Artists, Scientists, and Scholars Talk about Their Lives and Work*, ed. Sara Ruddick and Pamela Daniels (New York: Pantheon Books, 1977), pp. xiv–xxiv, esp. p. xiv.

other, is the same failure as the indistinguishability between marxism and liberalism on questions of sexual politics.

Interpreting further areas of law, a feminist theory of the state will reveal that the idealism of liberalism and the materialism of the left have come to much the same for women. Liberal jurisprudence that the law should reflect society and left jurisprudence that all law does or can do is reflect existing social relations will emerge as two guises of objectivist epistemology. If objectivity is the epistemological stance of which women's sexual objectification is the social process, its imposition the paradigm of power in the male form, then the state will appear most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied. When it most closely conforms to precedent, to "facts," to legislative intent, it will most closely enforce socially male norms and most thoroughly preclude questioning their content as having a point of view at all. Abstract rights will authorize the male experience of the world. The liberal view that law is society's text, its rational mind, expresses this in a normative mode; the traditional left view that the state, and with it the law, is superstructural or epiphenomenal expresses it in an empirical mode. Both rationalize male power by presuming that it does not exist, that equality between the sexes (room for marginal corrections conceded) is society's basic norm and fundamental description. Only feminism grasps the extent to which the opposite is true: that anti-feminism is as normative as it is empirical. Once masculinity appears as a specific position, not just as the way things are, its judgments will be revealed in process and procedure, as well as adjudication and legislation. Perhaps the objectivity of the liberal state has made it appear "autonomous of class." Including, but beyond, the bourgeois in liberal legalism, lies what is male about it. However autonomous of class the liberal state may appear, it is not autonomous of sex. Justice will require change, not reflection—a new jurisprudence, a new relation between life and law.

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