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Book Review

***1146 FEMINIST CONSCIOUSNESS AND THE STATE: A BASIS FOR CAUTIOUS OPTIMISM**

Toward a Feminist Theory of the State. By Catharine A. MacKinnon. Cambridge, Mass.: Harvard University Press, 1989. Pp. xvii, 249. \$25.00.

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In this essay, I will discuss how a feminist can continue to use the tools of law to respond to a male-dominated society, despite the critique of the state found in feminist theory. [\[FN1\]](#) Catharine MacKinnon's latest book, *Toward a Feminist Theory of the State*, will be my jumping off point for this discussion.

As a lawyer who uses legal tools to challenge male dominance in society, I find it necessary to be optimistic about our ability to work within the state to effectuate change in society. Yet it is not easy to have such optimism when feminists cannot count on the courts to strike down the most onerous restrictions on abortion that demonstrate virtually no concern for women's well being. [\[FN2\]](#)

The very structure of legal argumentation, with its adversarial requirements, rarely appears feminist. For example, I recently represented a gay man who was fired from his position as a licensed practical nurse after his roommate died of AIDS. [\[FN3\]](#) Although my co-counsel and I attempted to handle the case ethically and professionally, the defendants accused us of "purposefully distort ing the testimony presented" and "bastardiz ing the cases." [\[FN4\]](#) I therefore wonder whether it is possible to speak in a voice that is remotely feminist when our adversaries want to talk about "bastardizing" cases.

Because of the futility of working with the courts and preparing legal arguments from a feminist perspective, I have sometimes chosen to participate in legislative strategies. Those strategies can be equally frustrating. For example, I campaigned several years ago to elect members *1147 of the New Orleans City Council who would support a gay rights ordinance. Despite the fact that a majority of the individuals who were elected to the city council told me in person (and often on tape) that they would cosponsor and support a gay rights ordinance, the ordinance was soundly defeated. AIDS hysteria, fundamentalist religious arguments and the claim that there was no evidence of discrimination against gay people were used to justify not extending basic civil rights to gay people. The gay community is considering making a third attempt in ten years to enact a gay rights ordinance; it is hard to feel optimistic.

Even when it seems possible to transform the state, it is often difficult to decide what is the "correct" feminist perspective on a particular issue. Does pornography, for example, cause women's subordination? Does our opposition to pornography fuel antisex and homophobic sentiments by the right? Although I do believe that pornography contributes to women's subordination in society, I would not want to introduce antipornography legislation within my home community in New Orleans. At the hearings for the gay rights ordinance, for example, I became acutely aware of the homophobic (and antiwoman) perspective of many individuals within the community who opposed pornography. Similarly, what do we do about women who apparently abuse their bodies during pregnancy, thereby causing health risks to the fetus? I suspect that feminists are correct

when they say that intruding on these women's lives often reflects a lack of respect for them as women and possibly takes us down the slippery slope of intruding substantially on the lives of all women. [\[FN5\]](#) On the other hand, the pain and suffering of children born with fetal alcohol syndrome is real and should be of concern to us as feminists. On both issues, there are competing feminist perspectives that seem to reflect considerations of women's well-being. How do we choose between competing perspectives; how do we attain confidence that we have chosen the correct feminist position?

In the face of these frustrations, defeats, never-ending battles and internal debates, it is easy to give up hope. [\[FN6\]](#) It is easy to conclude that *1148 participating in this legal system only adds legitimacy to its power base and fails to move us forward. It is easy to conclude that feminist consensus is unattainable so that often we cannot know that our efforts are for the benefit of women. Nevertheless, many of us sustain the optimism to continue in our work with other feminists within the existing legal-political system to improve the status of women and others.

One of the individuals who has helped me to sustain optimism in the face of never-ending battles [\[FN7\]](#) has been Catharine MacKinnon. MacKinnon has tirelessly sustained her legal-political work as a feminist in the face of substantial adversity. She wrote a major book on sexual harassment and circulated it widely in draft form while the lower courts were concluding that sexual harassment was not a cause of action under Title VII. [\[FN8\]](#) Influenced by her work, even Justice Rehnquist currently recognizes that sexual harassment is a cause of action under Title VII. [\[FN9\]](#) She and Andrea Dworkin drafted an anti-pornography ordinance that took the radical perspective that pornography violates the civil rights of women. [\[FN10\]](#) Variations of the ordinance have passed in many cities in the United States. Nevertheless, the Supreme Court has summarily affirmed a lower court's conclusion that the statute is unconstitutional under the first amendment. [\[FN11\]](#) MacKinnon continues to speak and write about pornography, waiting for the day when she can convince the courts, legislatures and other feminists of the appropriateness of her approach. [\[FN12\]](#)

*1149 MacKinnon's lifework on behalf of women, in light of her theoretical perspective, raises two questions: (1) how can there be a distinctive feminist perspective under male domination, and (2) how can we use the legal tools of this state to transform society, given the feminist critique of the state and society? These are the questions that I will discuss in this essay.

I was delighted when I learned that MacKinnon had published a new book entitled *Toward a Feminist Theory of the State*. I had hoped that she would share the answers to those fundamental questions. As MacKinnon promises in the Preface, "Hopefully, it exposes the coherence underlying the approach taken in earlier publications" (p. xiv).

The book is divided into three distinct sections. Part I discusses feminism and Marxism, drawing on MacKinnon's second article in the feminist journal, *Signs*. [\[FN13\]](#) Part II discusses feminist method, drawing on MacKinnon's first *Signs* article. [\[FN14\]](#) Part III discusses the State, drawing on MacKinnon's practical work on rape, abortion, pornography and sex equality. The final chapter is entitled *Toward Feminist Jurisprudence*. In this review, I will focus mostly on Parts II and III of the book because they relate to the questions that I have posed. [\[FN15\]](#) Although I find MacKinnon's critique of the state and society extremely powerful and largely correct, I find that her work does not provide satisfactory answers to these basic questions, especially the second question.

I. DEVELOPING A FEMINIST PERSPECTIVE UNDER MALE DOMINATION

MacKinnon recognizes the significance of my first question. She says: "Why some women take the step of identifying their situation with their status as women, transforming their discontents into grievances, is *1150 a crucial unanswered question of feminism (or, for that matter, of marxism)" (p. 86). MacKinnon seems to offer two quite different answers to that question. Her central response is that there is no problem in accounting for feminist consciousness within feminist theory. It only appears problematic or circular from the perspective of male domination. I do not find that response satisfactory because it does

not explain how women can make normative judgments that are inconsistent with male domination. Nevertheless, MacKinnon also seems to provide another way of accounting for feminist consciousness. She suggests [\[FN16\]](#) that women can come to understand their own oppression because male domination is not all-pervasive and all-powerful. Although MacKinnon repeatedly backs off of this statement, I find it a much more satisfactory explanation of the possibility of feminist consciousness.

A. MacKinnon's Central Response: Consciousness Raising

MacKinnon notes that women began the process of consciousness raising without knowing why it would work. They simply had a "prearticulate consensus" that consciousness raising could be successful; they had a working assumption (p. 86). This working assumption, according to MacKinnon, yielded a working discovery. Women who came together and shared consciousness raising discovered that by sharing the particularities of their lives, they came to understand what was common to all of them as women. "The particularities became facets of the collective understanding within which differences constitute rather than undermine collectivity" (p. 86). The existence of consciousness raising poses a difficult methodological question. Instead of responding to why consciousness raising is possible, MacKinnon says that it must have been possible because it worked.

I have previously suggested [\[FN17\]](#) that it is difficult to explain why consciousness raising works because women would have to have access to the truth in order to know that consciousness raising does work. MacKinnon responds to this observation by saying that there is no need to explain further why consciousness raising works within traditional modes of thinking. To ask for more confirmation is to collaborate with male domination. "Feminism only seems to be circular from the point of view of the existing epistemology because that is the relation of a new paradigm to the old one ..." (p. 96). To explain that this circularity only seems apparent to those of us caught in the existing paradigm of knowledge, MacKinnon attempts to provide an explanation from within her own paradigm:

The apparent circularity of this as a theory of knowing about *1151 the world is not a barrier to analysis, but rather the core of the method, the way it breaks the circularity of that which it is attempting to understand in order to change. The seemingly self-enclosed character of feminist consciousness and the community it inhabits by creating it is, in reality, the opposite of solipsism: what it sees is that it is male reality that is self-enclosed. (P. 96.)

MacKinnon seems to be saying that, of course, women can see their own oppression within a world that contains their own oppression because that is exactly what the world does look like, as constructed by men. Women are not seeing from outside of this world, but from within it so we should not be surprised that such insight is possible. There is no circularity because consciousness raising enables women to see the world acutely from within male domination as it does exist.

MacKinnon's explanation is somewhat helpful in that she is reminding us that we do not always need to find logical, rational explanations for human phenomena; we can turn to glimpses from our own life experience to explain something like our theory of knowledge. Nevertheless, MacKinnon's explanation would be more helpful if she drew on more than life experience because her explanation cannot explain the normative judgments that emerge from consciousness raising. Consciousness raising involves women not only describing the world, but also putting normative judgments on that world. These normative judgments, to the extent that they are inconsistent with male domination, should be unattainable under male domination. One important aspect of male domination is women's participation in its perpetuation-women's "collaboration" as MacKinnon has aptly noted elsewhere. [\[FN18\]](#) Male domination must necessarily construct the world so that women do not and cannot understand that they are oppressed; otherwise, male domination would lose its collaborators. Thus, if women describe their world from within its self-enclosed vantage point, they would have to reach the conclusions of Phyllis Schlafly-that men and women are different but the difference benefits women as well as men. [\[FN19\]](#)

Stating my observation somewhat differently, it is not surprising that feminists can identify sex-roles in society within or outside consciousness raising. Most women, especially antifeminist women, can identify sex-roles. [\[FN20\]](#) We can see sex-roles from within the self-enclosed space of male domination. What is difficult to see under male domination is that some aspects of these sex-roles are wrong, are bad for women. It takes norms outside male domination to provide that meaning. *1152 An experiential justification cannot provide us with an explanation of the source of that evaluative judgment.

MacKinnon does recognize that it is more difficult to identify sex-roles as wrong than to see them. Thus, she asks: "What is the feminist account of how women can come to reject the learning portrayed as so encompassing?" (p. 103). She acknowledges: "A theory that explains how some women come to be critical does not explain why others, who are for all purposes of the analysis identical, are not critical" (p. 103). These comments follow a lengthy discussion of how consciousness raising works as feminist method. Thus, MacKinnon herself seems to recognize that her previous discussion did not satisfactorily explain how some women can develop a critical perspective on male domination.

MacKinnon next devotes a few paragraphs to answering this question. She quotes Marx's views on the possibilities of the proletariat seeing the subjectivity of science and using that doctrine for its revolutionary potential (p. 104). By analogy, she then argues that consciousness raising makes the chains visible for women and thereby provides the basis for confronting male power. The reader may find these various assertions, filled with quotations from others, convincing. I, however, am left not understanding how any woman can come to criticize sex inequality as well as see it under this view, which sees sex inequality as "pervasive" and "universal" (p. 105). Why is consciousness raising itself not infested with male-dominated values? Perhaps the insights that women gain from consciousness raising, for example, the brutality of men's sexual relations with women, are convenient to a male-dominated order that wants to make it more possible for men to divorce women without feeling guilty about leaving them impoverished by divorce. More generally, as MacKinnon has observed, what are often perceived as gains for women, for example, the right to choose an abortion, may benefit men by leaving them unaccountable for their coercive sexual behavior and by giving women one less excuse to avoid sexual interactions with men (p. 190).

MacKinnon's arguments about the pervasiveness and universality of sex inequality are also problematic when we consider how it is that some men come to identify with feminist theory. [\[FN21\]](#) If male domination is pervasive and is for the benefit of men, why would some men come to identify with feminist theory? Accounting for the possibility of men identifying with feminist theory is important if we are to use the tools of the state to change society. For example, if a predominantly male judiciary cannot possibly understand women's arguments about, inter alia, abortion, rape, sexual harassment or pornography, there is little or no point in making legal arguments at this time in our history.

*1153 I would suggest that feminists can only accept the possibility of consciousness raising working and the possibility of men identifying with feminist theory if they describe male domination as not being all-pervasive and all-powerful. There must be values present in society that are inconsistent with male domination and can be the basis of feminist consciousness for both women and men. MacKinnon's theory does provide glimpses of that possibility.

B. MacKinnon's Alternative Response: The Incompleteness of Male Domination

MacKinnon observes that consciousness raising takes place in women-only space. In that space, women appear to create their own community in which they can redefine what counts as verification (p. 87). This observation suggests that, despite the male-dominated character of society, women have a self that is relatively free from male domination. Despite society's best efforts, it is not successful in creating women entirely to suit its needs. Male-dominated society also creates women to value and understand their own well-being so that, when somewhat left alone from male domination, women can reinforce that

point of view. [\[FN22\]](#)

If we view male-dominated society as only partially successful in creating women's selves, then we have insight into how women can come not only to understand their position in society but also to act upon it. MacKinnon suggests that feminism is possible because male domination has not been entirely successful. "When one gets to know women close up and without men present, it is remarkable the extent to which their so-called biology, not to mention their socialization, has failed" (p. 91). This observation-that male domination has failed so that openings exist through which women can assess their lives and well-being-is remarkable within MacKinnon's absolute-sounding theory. For example, MacKinnon says, "This understanding of power is one of the key comprehensions of feminism. The reality it points to, because it is everywhere and relatively invariant appears to be nowhere separable from the whole" (p. 94) (emphasis added). Apparently, MacKinnon did not mean to say "everywhere" and "invariant"; she meant to leave open the possibility that male domination may not be everywhere, thereby permitting women to have openings to assess their condition in society. [\[FN23\]](#)

***1154** Nevertheless, MacKinnon does not seem to want to acknowledge fully that women have the capacity to limit the influence of male domination. By reiterating that women cannot stand outside society, she seems to suggest that they also cannot stand outside male domination (p. 98). I would agree with MacKinnon that we cannot stand outside of society since we are socially constructed in our values and beliefs. However, the observation that we cannot stand outside society does not also mean that we cannot stand outside male domination. Society is more than male domination, although male domination certainly is a distinct and important aspect of society. [\[FN24\]](#) There are values present in society that are inconsistent with and in opposition to male domination.

On a formal level, it may be true that women cannot stand outside male domination, because male domination permeates, at least in a modest way, all institutions in society. However, I would argue that in a real, lived sense women can step outside the control of male domination. For example, feminists who engage in consciousness raising have used their power to create women-only space where the focus of the discussion is women's well-being and the tone is one of respect. Consciousness raising is possible in that setting because women have the power to acknowledge and control the influence of male domination on their lives. If women did not have that power, then consciousness raising would not be possible. When women exercise that power, they have stepped outside of the control of male domination because male domination is no longer controlling or defining their lives. They may be reacting to male domination, but they are not being controlled by it.

***1155 C. Universality: A Reevaluation**

By recognizing that women can stand outside the control of male domination, we not only provide an account of women developing feminist consciousness, but we provide an account of men developing feminist consciousness. MacKinnon's theory, by contrast, does not seem to provide an explanation for how it is that some men are committed to feminist issues.

For example, MacKinnon's full statement about the universality of male domination is that:

[T]he major advantage men derive, dubious though it may seem to some, is the process, the value, the mechanism by which their interest itself is enforced and perpetuated and sustained: power. Power in its socially male form. It is not only that men treat women badly, although often they do, but that it is their choice whether or not to do so. This understanding of power is one of the key comprehensions of feminism. The reality it points to, because it is everywhere and relatively invariant, appears to be nowhere separable from the whole, from the totality it defines. (p. 94.)

If male power benefits all men, why would any man reject male domination and become a feminist? I would suggest that men identify with feminism for many of the same reasons that women do. They see glimpses of a better society outside the vantage point of male domination and act on those glimpses to make those values more pervasive in society: to benefit men as

well as women.

MacKinnon's statement, as quoted above, has numerous other difficulties. First, her absolutist-sounding statement about men fails to recognize that not all men exercise power over women. Male power, despite MacKinnon's claim, is not "relatively invariant" when we consider, for example, the relative powerlessness of Afro-American men to live as long as Caucasian men, [\[FN25\]](#) let alone exercise power over any one in their lives; or the powerlessness of men dying of AIDS to acquire the protection from the state to die with respect. [\[FN26\]](#) To say that male power *1156 is relatively invariant is to impose upon men the sameness that MacKinnon criticizes male society for imposing upon women.

Second, her statement about "reality" appears to be inconsistent with her broad claim that all reality is culturally contingent. She seems to be assuming that there is such a thing called "reality" that we can uncover. For example, she says, in discussing consciousness raising: "Realities hidden under layers of valued myth were unmasked simply by talking about what happens every day, such as the hard physical labor performed by the average wife and mother, the few women who feel strictly vaginal orgasms and the many who pretend they do" (p. 89).

But if reality is just a question of subjectivity and social construction, as MacKinnon suggests, then men's perspective is no more unreal than women's perspective. All perspective would be culturally contingent. MacKinnon talks as if what consciousness raising uncovers is truly "reality"-as if the unmasking of men's perspective leaves an objective perspective. [\[FN27\]](#)

By arguing that women's perspective should be embodied in the law, MacKinnon is making women's perspective the dominant, and eventually the universal, perspective of society. For example, MacKinnon says: "When the reality is split, is the woman raped but not by a rapist? Under these conditions, the law is designed to conclude that a rape did not occur" (p. 183). If the law were changed so that the man was considered to be a rapist when the woman felt raped, then the woman's perspective would become the dominant perspective of the law, the perspective by which society expected all people to abide. At present, MacKinnon claims that law embodies the perspective of men so that, as stated above, the law concludes that a rape did not occur when the man does not consider himself to be a rapist. In addition, MacKinnon acknowledges that the male perspective often becomes the female perspective, as women are taught to identify with and collaborate with their oppressor. Although MacKinnon would call the existing perspective of law a subjective perspective, because it protects men's *1157 well-being rather than women's well-being, it is really a universal perspective under MacKinnon's theory because it is held by men as well as women. It may be partial in its protection, but it is universal in its acceptance.

Accepting MacKinnon's theoretical framework, I would then argue that law's embodiment of a feminist perspective, for example, by changing the rape laws to protect women's well-being, would affect what is the dominant and universal perspective of society. A man in a state with MacKinnon's suggested rape law would inquire into a woman's desires before engaging in sexual behavior because his failure to do so could result in a substantial criminal penalty. By requiring him to inquire into her needs and desires, we are making the woman's perspective into the dominant, universal perspective. [\[FN28\]](#)

Under MacKinnon's theoretical framework, feminism inevitably results in a power struggle between two competing subjective perspectives-men's and women's. If the feminist revolution is successful, men would face the imposition of women's perspective on their lives. I am suggesting, by contrast, that feminism must offer more than a claim to subjectivity. It must hold out the hope that what is now seen as women's perspective can become the perspective of both men and women in a society that values women's well-being. If that step is successful, then feminism will have a lasting effect on society rather than representing a temporary victory for women's perspective.

Returning to the example of rape law, MacKinnon's theory provides no explanation as to why law should throw away its

male-dominated perspective and accept a feminist perspective because all she can offer is two subjective analyses, neither of which is inherently preferable. I would argue that the law should move to the feminist perspective because it would be better for both women and men to live in a society with more mutual sexual relations. In general, the self is a relational self. We are never wholly autonomous actors in this society. In the context of sexual relations, it is quite apparent that the self is a relational self. Thus, when we change the meaning of sexual relations in women's lives, we also change it in the context of men's lives. As women *1158 come to enjoy more fully sexual relationships with men, men will come to enjoy more fully sexual relationships with women. Although feminist theory starts from the vantage point of understanding and appreciating women's well-being, which has been largely ignored by the rest of society, it ends with the vantage point of all people-women, children and men-because of its central aspiration to improve society. Thus, MacKinnon is right to suggest that it is not simply a power struggle. Feminists do not want to gain power simply to dominate men. Feminists want power to make this a better society for women and men.

A frequent misunderstanding that occurs when I speak or write about universality is that people assume that a universal perspective is a presocial, static perspective. But that is not necessarily true. We can control the perspectives that exist in our society through the universal norms that we impose on society through law. It only makes sense to translate norms into law if we think that society would benefit universally from those norms. By suggesting that MacKinnon's framework assumes the appropriateness of women's perspective becoming the dominant perspective in society, however, I am in no way making an "essentialist" argument about presocial, static values. By contrast, I am recognizing that norms are constructed and that we should exercise power over that construction through law.

One might wonder why it really matters whether feminist theory offers a new subjectivity or a new universality. In either case, it offers a perspective that has not previously been accepted widely. There is one reason that I think it matters: for feminist theory to be successful, men, too, must accept its premises. After all, as MacKinnon argues, men have the choice of whether to oppress women. But if feminist theory is simply another kind of subjectivity-a subjectivity that benefits women-why would men endorse it? Yet, we know that some men do embrace feminist theory. Feminist theory can be successful because it argues for the acceptance of values that are present in our society-but are outside the control of male domination-and which would, if adopted, benefit all of society. An end to dominance, for example, would solve the problem of war as well as the problem of women's subordination in society. It would also lead us to treat the Earth with more respect, leading to an environmentally safe society. Thus, it is not surprising that women, as feminists, have been centrally involved in efforts to create world peace and a safe environment. Women are discovering universal values through consciousness raising that they can use as a basis for political action, not just a new subjectivity. [\[FN29\]](#)

In sum, feminist theory would be more coherent if it adopted two premises: (1) that women can step outside the control of male domination, *1159 yet reside within society, and (2) that universally-held values do exist outside the controlling force of male domination that could be the basis for feminism being accepted throughout society. Taken together, these premises make it possible for me to understand the possible effectiveness of feminist political work.

II. WORKING WITHIN THIS STATE, NOTWITHSTANDING THE FEMINIST CRITIQUE OF THE STATE

Within jurisprudence, there is an active debate among critical legal scholars about the usefulness of litigation. Critical theorists, such as Alan Hutchinson [\[FN30\]](#) and Judge Fudge, [\[FN31\]](#) who may be characterized as "nihilists," [\[FN32\]](#) minimize the positive potential of rights-based litigation. Other critical legal studies scholars, such as Mari Matsuda [\[FN33\]](#) and Elizabeth Schneider [\[FN34\]](#) argue that feminists and people of color must use the rights talk of litigation to protect their liberty. MacKinnon's legal-political work demonstrates that she is not in the nihilist camp- that she clearly believes that some of our energies should be devoted to using the law and politics constructively.

A. MacKinnon's Approach: Openings for Change Within the Male State

For the first time (of which I am aware), MacKinnon explains where her perspective fits into this rights/critical debate. In the Preface, MacKinnon summarizes her perspective:

This book is not an idealist argument that law can solve the problems of the world or that if legal arguments are better made, courts will see the error of their ways. It recognizes the power of the state and the consciousness- and legitimacy-conferring power of law as political realities that women ignore at their peril. It recognizes the legal forum as a particularly but not singularly powerful one. It does not advance a critique of "rights" per se but of their form and content as male, hence exclusionary and limited and limiting. It is one thing for upper-class white men to repudiate rights as intrinsically liberal and individualistic and useless and alienating; they have them in fact even as they purport to relinquish them in theory. It is another to reformulate the relation between life and law on the basis of the experience of the subordinated, the disadvantaged, the dispossessed, the silenced-in other words, to create *1160 a jurisprudence of change. In this as in all other respects, the title term toward is a considered one. (Pp. xiii-xiv.)

The effectiveness of the male state, MacKinnon argues, is guaranteed through a liberal legal system that makes male dominance "both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society" (p. 237).

Several important concepts emerge from MacKinnon's general statement of her perspective: (1) she apparently believes that we can engage in the "rights" talk of the legal system without necessarily collaborating with our own oppression, (2) that we can develop the consciousness to speak in the voice of the disadvantaged, the dispossessed and the silent, and (3) that through both of these efforts, we can achieve progressive change; that the courts can, on occasion, hear such a voice.

So how can male dominance's hold on the world be broken? MacKinnon argues that feminist theory offers the possibility of breaking the grip of male dominance by providing "points of confrontation, perhaps even openings for change" (p. 239). The challenge for feminist theory is to expose the male point of view as particular, rather than universal. "The point of view of a total system emerges as particular only when confronted, in a way it cannot ignore, by a demand from another point of view" (p. 239). If it is true that the male, liberal state becomes disempowered when its perspective is made to look partial, the question, as MacKinnon aptly notes, is "what can extend this method to the level of the state for women?" (p. 240).

MacKinnon provides the same answer here as she did to the earlier question of how women can come to know the conditions of their subordination. Again, the answer is consciousness raising:

What point of view can question the code of civil society? The answer is simple, concrete, specific, and real: women's social inequality with men on the basis of sex, hence the point of view of women's subordination to men [Women] know inequality because they have lived it, so they know what removing barriers to equality would be. (P. 241.)

This answer, although simple, does not answer the question of how women's articulation of their point of view (assuming that they can accurately discern it through consciousness raising) causes the basic value structure and point of view of society to change. One answer might be that women can come to use power to dominate society so that their point of view becomes pervasive. But MacKinnon rejects that answer. She says that feminism "aspires to better" (p. 241) than winning a power struggle through dominance. How does feminist theory aspire to do better?

MacKinnon says that "legal guarantees of equality in liberal regimes provide an opening" (p. 242). Sex inequality, she asserts, in words anyway, is "illegal sometimes" (p. 242). Later, she says: "The law of equality, statutory and constitutional, therefore provides a peculiar *1161 jurisprudential opportunity, a crack in the wall between law and society" (p. 244).

How can women take advantage of this "crack in the wall?" MacKinnon outlines the following steps: (1) women should claim their concrete reality of abuse, and (2) women should argue that this reality is illegal or unconstitutional by using group-based equality doctrine rather than individual-rights doctrines such as privacy. Under this new legal regime, the question would be: "[D]oes a practice participate in the subordination of women to men, or is it no part of it?" (p. 248).

The question that MacKinnon does not adequately answer is how there can be "cracks" in the walls of male dominance so that the feminist perspective can be heard and why those cracks would deepen when feminists are heard. [\[FN35\]](#) The answer would seem to depend, in part, on the message that women are trying to convey. For MacKinnon, that message should be that there is a systematic inequality between women and men through the social practice of sexual violence, which defines women's status (p. 245).

Is that a claim that we can realistically expect a male judiciary to hear through the cracks in its walls? Moreover, could feminist theory make that claim heard without itself becoming a dominating perspective in society, thereby defeating, within MacKinnon's perspective, its very goal?

B. An Alternative Approach: Focusing on Women's Well-Being Rather Than Women's Subordination

I agree with MacKinnon that it is important for women to claim their reality and for women to consider how to make those claims to a legal system in group-based equality terms. However, I believe that MacKinnon is wrong to suggest that her anti-subordination question is the right question with which we should confront the legal system. [\[FN36\]](#)

I would suggest, by contrast, that the appropriate question with which women should confront the legal system is: Would a legislature or institution have been willing to impose the policy at issue if it respected women's well-being, as seen from women's perspective? This approach has many of the advantages of MacKinnon's perspective *1162 in that it requires men to try to understand women's perspective in society, to inquire about the reality of women's life conditions.

In addition, this approach is gentler and more optimistic about men's character. It does not assume that men hate women, want to subordinate them, or even treat them badly. Moreover, it insists that men are capable of empathizing with women's situation in society if they are informed concretely about the conditions of women's lives. Finally, I think this approach is more compatible with contemporary legal doctrine than MacKinnon's.

The advantage to my approach becomes more clear if we consider contemporary constitutional legal doctrine. A major stumbling block for sex discrimination doctrine was *Geduldig v. Aiello*, [\[FN37\]](#) in which the Supreme Court concluded that pregnancy-based discrimination is not sex-based discrimination under the equal protection clause. In other words, the Court considered pregnancy-based discrimination to be a second-order legal problem rather than a first-order problem worthy of the Court's highest level of scrutiny. In a case of pregnancy-based discrimination, the Court required a plaintiff to prove intent; such a requirement would not have been imposed if pregnancy-based distinctions were considered first-order problems of sex discrimination. [\[FN38\]](#) The final blow in this area of the law came when the Court clarified what it meant by "intent." In *Personnel Administrator v. Feeney*, [\[FN39\]](#) the Supreme Court ruled that a plaintiff would have to show that a legislature created a policy that had a disproportionate impact on women "because of" rather than "in spite of" its impact on women. This requirement has been virtually a roadblock for pregnancy-based discrimination doctrine since the "because of" test can almost never be met.

Under MacKinnon's perspective, we would have to acknowledge that men do create policies because they want to harm women, to subordinate women. As her colleague Andrea Dworkin has often written, we can think of women's inequality in society as part of a pattern of "woman-hating" by men. [\[FN40\]](#) If the world, from the perspective of women, looks like men hate

women, then it is hard for feminists to complain that it is inappropriate for the court to require that women prove that fact.

MacKinnon never says that the law is correct in requiring female plaintiffs in sex discrimination, equal protection cases to prove intent. She says that the important fact is women's injury, not men's intent (pp. 180-81). Whether a man touched a woman intimately because he loved her or hated her is irrelevant to MacKinnon so long as the woman felt injury. While I acknowledge that this is MacKinnon's perspective, I am *1163 also pointing out that MacKinnon does not disagree with the assertion in contemporary legal doctrine that says that men act the way they do because they do truly hate women. I am suggesting, by contrast, that feminists need to disagree with the account of sex inequality that assumes that sex inequality exists because men hate women. It makes no sense for legal doctrine to be created around that assumption because that is not the way sex inequality works. Since MacKinnon does not challenge that assumption, it seems to me that she does not have the most powerful possible response as to why law should not require women to prove that men hate women (or intended to harm them).

Returning to the examples of Geduldig and Feeney, the problem in both of those cases was that male legislatures did not treat women's life conditions with respect. In Geduldig, the reason that the state's disability insurance system did not cover women's pregnancy-related disabilities resulting from a normal pregnancy [FN41] was to keep the employee's contribution level at the one-percent level and to keep the program self-funded at that level. [FN42] The state felt comfortable in perpetuating a system of social inequality in which women face the primary responsibilities of child birth and child care. It was unacceptable to the state to spread those costs throughout society by increasing the level of employee contribution or to have the state subsidize the program through general revenues. [FN43] I think that if we explain those social conditions to men and ask them if they would be willing to impose those social burdens on themselves, they might see how inappropriate those burdens are. Under such an approach, we are not asking men to conclude that they have contributed to women's subordination; we are asking men to consider whether a society that respects women's well-being would allocate burdens and responsibilities in this particular way. The California legislature balanced the state's budget with respect to the disability insurance scheme by collecting revenues from working women, yet did not pay disability benefits to these women when they experienced one of the most common disabilities that a woman is likely to experience- pregnancy. If asked, women might say that coverage for pregnancy disability, which they can readily foresee, is more important to them than coverage for disability from the occasional accident, which they cannot readily foresee. The male legislature, however, probably did not even think through the issue in those terms. Since it was accustomed to passing pregnancy costs along to women, it probably acted in conformity *1164 with that assumption in our society. The fact that the legislature never fully considered the fairness of their legislation, however, does not mean that it would be hostile when confronted with a sensitive description of the issue.

In fact, when subsequently confronted with arguments about women's well-being, the California legislature adopted a comprehensive scheme to assist pregnant workers. The California Unemployment Insurance Code was amended, after Geduldig was decided, to provide the following definition of disability: "illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical conditions." [FN44] In addition, as we know from California Federal Savings & Loan Association v. Guerra, [FN45] California also provides pregnant workers up to four months unpaid pregnancy disability leave with the right to return to the same or a similar job. [FN46] Ironically, Professor Wendy Williams, who argued the Geduldig case in the Supreme Court, opposed the pregnancy leave statute that was eventually passed by the state of California. In fact, she was one of the authors of an amicus brief in the Supreme Court that asked the Court to find that the California leave statute was unlawful and unconstitutional because it represented a paternalistic view of women's position in society. [FN47] These political developments demonstrate how difficult a task it is for legislatures to listen to arguments about women's well-being; we cannot expect women, or even feminists, to speak in a monolithic voice. I am simply suggesting that legislatures can listen to such arguments and that, constitutionally, they should be required to listen. The statute at issue in Geduldig should have been found unconstitutional because it did not reflect considera-

tion of women's well-being. [\[FN48\]](#)

Similarly, in Feeney, under my proposed framework, a court would ask whether a state legislature that respected women's well-being in society could impose a life-time preference for hiring veterans, when the *1165 legislature knew that this preference would exclude the overwhelming majority of women from procuring decent civil service jobs. In Feeney, I think it is clear that the legislature had no particular intent with regard to women at the time that it passed its veterans preference legislation since at that time women were already excluded from most of those jobs through the operation of single-sex job certifications. [\[FN49\]](#)

Because the original veterans preference statute contained a provision stating that "nothing herein contained shall be construed to prevent the certification and employment of women," [\[FN50\]](#) the Court concluded that the veterans preference statute "may have operated to encourage the employment of women in positions from which they previously had been excluded." [\[FN51\]](#) In other words, veterans preference only operates adversely against women in a system in which women and men compete against each other for the same jobs. In the late 1880s when veterans preference was first introduced in Massachusetts, the legislature's probable expectation was that men and women rarely compete for the same jobs. An inquiry that looks for a deliberate intent to subordinate women would therefore come up dry, especially because the veterans preference statute may have benefitted women by opening up some male-only jobs to both men and women. Nevertheless, the continuation of the preference after the sex-specific certifications were discontinued in the twentieth century reflects disregard for women's well-being. That disregard should be unacceptable irrespective of whether the legislative destruction was initially enacted "because of" an insidious intent to cause harm.

One more example may make my perspective more clear. Guam has passed broad criminal sanctions against abortion; [\[FN52\]](#) such laws are often considered in Louisiana. [\[FN53\]](#) When I speak in opposition to the enactment of such a statute in Louisiana, often to people who have a pro-life perspective, I discuss the social conditions under which women find themselves pregnant. I point out that the root of the problem begins with inadequate birth control and coercive sexual relations. I add that women do not engage in sexual activity in order to have an abortion. I then observe the tremendous burdens that society places upon women who are pregnant—we provide no prenatal care, no postnatal care, no child care, no paid pregnancy leave. Given the conditions under which women become pregnant, I ask whether a society that respects women's well-being could respond to this problem by criminalizing abortion with virtually no exceptions. I have found that many people who are sincerely pro-life, but care about women's well-being, find that they can no longer justify a criminal abortion statute once I *1166 have posed the question in that way. Supporters of such a statute, especially the women, sincerely believed that they were taking an appropriate perspective in supporting antiabortion legislation. But they had never really thought about that legislation from the perspective of women's well-being. I find that I can speak to them through the "crack" that makes them care about women's well-being, but not if I speak in a voice that accuses them of hating women and deliberately perpetuating male dominance.

Discussing the abortion issues properly, however, involves more than seeing the issue as one that involves women's well-being. Prochoice feminists have to be willing to talk about how their pro-choice perspective reflects respect for life in all of its various forms in order to be persuasive in accordance with values already present in society. MacKinnon takes a good step in that direction, although I do not believe she goes far enough. When MacKinnon discusses abortion, she first places it in the context of women's well-being by pointing out that the need for an abortion is a "consequence of intercourse under conditions of gender inequality" (pp. 185-86). She then confronts the issue of fetal life:

The abortion choice should be available and must be women's, but not because the fetus is not a form of life. Why should women not make life-or-death decisions? The problem has been that if the fetus has any standing in the debate, it has more weight than women do. (P. 186.)

Although I believe that MacKinnon takes us a positive step forward by discussing abortion in sex-equality terms and by being willing to assume that a fetus is a "life" when she makes her pro-choice argument, I do not find her argument persuasive. The best feminist pro-choice argument, I believe, must center on the sexual, reproductive and childcare burdens on women in our society. It is not that women are morally superior beings who would always make morally justifiable abortion decisions about someone else's pregnancy, but rather that a society that imposes such substantial burdens of coercive sexual behavior, lack of medical care during pregnancy, and no childcare or medical care after the birth of a child on women cannot, in the name of life, force women to make a particular decision about their own pregnancy. We do not have to romanticize women's moral decision-making power, as MacKinnon seems to, to justify the pro-choice position. We have to talk about how the burden of protecting life is thrust on women in a pervasive way that shows no respect for women's well-being.

Feminists will never be persuasive on the topic of abortion until they demonstrate that a pro-choice position is genuinely also pro-life- that feminists do value fetal life but that their respect for the lives of women makes them reluctantly support the availability of abortion. MacKinnon's somewhat glib consideration of the importance of valuing fetal life is not, in my view, persuasive. To make my point more concrete, *1167 I would like to describe a pro-choice position that I believe would also be respectful of the pro-life position. I would also like to share with the reader how I come to my position.

More than six million American women become pregnant each year-eleven percent of all women of reproductive age-and more than half of those pregnancies are unintended. Two-thirds of women have at least one unintended pregnancy by the time they reach menopause. Forty-three percent of the women who face unintended pregnancies were engaging in sexual activity protected by contraceptives. Of the 3.4 million women who become pregnant unintentionally each year, 1.6 million of them terminate their pregnancy through abortion. Twenty-four percent of the women who terminate their pregnancies through abortion are teenagers. Thirty-three percent of them have a family income under \$11,000. [FN54] Ninety-one percent of abortions occur in the first twelve weeks of pregnancy and another eight percent occur up to the twentieth week. [FN55] Of the abortions that occur during the second trimester, a disproportionate percentage of those abortions are by poor, teenage and often Afro-American women who delayed their abortion in order to have time to obtain the necessary funds or to acquire the information necessary about how to obtain an abortion. [FN56] The availability of abortion is often considered to be of crucial importance to helping poor, young females break out of the cycle of poverty. As one author has said:

There is a voluminous literature on the social and economic consequences of adolescent childbearing. As the most recent and comprehensive review makes clear, adolescents who become parents will complete less schooling, have lower wages, experience greater marital instability, and be more dependent on welfare programs than their adolescent peers who delay childbearing. Moreover, the children of teenage mothers will experience greater health, cognitive, and socioemotional difficulties. [FN57]

*1168 Thus, from the perspective of the well-being of poor, young females, many of whom are Afro-American, it is dramatic to realize that the legalization of abortion in New York City is given credit for dropping the level of births to Afro-American adolescents living in New York City by 18.7%. [FN58] That drop in the birth rate materially improved the lives of those Afro-American women as well as the lives of the children they eventually had. Based on such figures, I oppose the regulation of abortion before the twentieth week of pregnancy because those regulations are most likely to raise the cost of abortion and thereby preclude poor women from being able to acquire a legal abortion.

Nevertheless, those figures do not lead me to take any particular position on post-twenty week abortions, when one percent of abortions take place. Unfortunately, I have not been able to find demographic information about the women who have post-twenty week abortions. Nevertheless, I believe that some reasonable speculations about those women are appropriate. First, although it is fair to say that women who have first trimester abortions have often not, in any way, chosen or intended to be pregnant, it is hard to make that statement about a woman who has been pregnant for twenty weeks. Irrespective of whether

she initially intended to become pregnant, it is fair to say that her pregnancy has become wanted by the twentieth week of her pregnancy, assuming that an abortion was a legal and available option. Second, it is fair to say that most people, usually including the pregnant woman, value the life of the fetus more as it progresses during her pregnancy. Third, it is probably true that most of those women who choose an abortion after the twentieth week of pregnancy do so because they learned that the fetus will be severely handicapped or that their own life or health would be endangered by continuation of the pregnancy. Because expensive testing is required to determine that the fetus is handicapped, it is unlikely that these women are disproportionately poor.

These speculations suggest that feminists should show an openness to the possibility that women who face post-twenty-week abortions must meet a "good cause" standard that would be assessed by the person performing the abortion. Good cause would be defined as including abortions to protect a woman's health or life or to abort a severely handicapped fetus; [\[FN59\]](#) it would also be defined not to include abortions *1169 for the purpose of sex selection. Frances Kissling offers an excellent justification for this proposal:

[T]he notion that women would seek abortions in the mid to late second trimester because the nursery is painted blue or hubby's family has had firstborn boys for generations is ludicrous. It really deserves no response. It also deserves no defense. I would seek no laws to prevent that which does not happen, but I would not oppose such laws

In a similar vein, I think the question of postviability abortions is of little practical significance and of enormous symbolic importance. In practice, it is extremely difficult to find a physician who will perform such abortions unless there is a serious, physical, life-threatening condition for the woman or the fetus is diagnosed with profound abnormalities. [\[FN60\]](#)

As noted by Kissling, women and their physicians are already imposing such a "good cause" standard on themselves, because of their valuation of life. Feminists could obtain public recognition of their valuation of life, as well as choice, by endorsing such a standard.

The discussion of abortion that I have presented is only preliminary and has possible problems. [\[FN61\]](#) But I do think it is a good beginning in suggesting that feminists must learn to speak in a voice that is respectful of the multitude of values that are present in our society. We are not likely to earn the respect of others when we have not demonstrated respect toward them.

I have learned over the years as I have attempted to practice my feminist politics that I can only be heard as a feminist when I treat my audience with the respect with which I want it to treat me. MacKinnon says, rightly I believe, that we do not want to prevail in a game of dominance. Nevertheless, her writing often has the tone of such a game. In contrast, feminists need to learn how to speak to men in the respectful, empathetic tone in which we want them to speak to us. Then, I believe, we will be heard outside the walls of dominance-submission.

I, too, have learned some of these lessons from consciousness raising. Consciousness raising taught me that the style of speaking that is filled with compassion and respect is the style of speaking that is most *1170 effective in helping women talk to each other. I believe that same tone of voice would be helpful in helping women talk to men.

If men truly subordinate women in the hateful way that MacKinnon says that they do, then there would be no cracks in the wall. There are those cracks because the liberal social-legal system teaches men that they should respect women. We need to talk in a voice that assumes such respect exists and try to extend that respect further. I would therefore suggest that there is a base of respect in existing society, not just a crack that might rupture.

III. CONCLUSION

Catharine MacKinnon is a role model to all of us who try to combine theory and politics. She has a strong theoretical perspective, which has now been more fully explained in her most recent book. And she has a history of political action that is

consistent with that theoretical framework.

MacKinnon's approach, however, has its flaws. By insisting that male domination is all-encompassing and that we need to explain women's inequality in society through a framework that insists that men overtly subordinate women, MacKinnon does not provide a basis for change in society. I suggest that a framework that describes male domination as powerful, but not all-encompassing, and that describes men as often being ignorant of women's well-being, but sharing respect and concern for women's position in society, can make more sense of both our theory and our politics.

[FN*] C.J. Morrow Professor of Law, Tulane University; Visiting Professor of Law, University of Toronto Law School (Spring 1990). I would like to thank John Stick for his helpful, constructive comments on an earlier draft of this essay.

[FN1]. In this essay, I will use the terms "society," "state" and "male domination." They are not interchangeable. "Society" describes the entire context of our lives; the "state" describes only the public, institutional mechanisms; and "male domination" refers to the patriarchal aspects of both society and the state. The term "state" includes the legal mechanisms created by society.

[FN2]. See, e.g., Guam's recently enacted criminal sanctions against abortion. [9 Guam Code Ann. §31.20-23](#) (1990).

[FN3]. [Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377 \(E.D. La. 1989\)](#), appeal docketed, No. 89-3256 (5th Cir. July 13, 1989).

[FN4]. See Brief for Defendants-Appellees at 18, 21, [Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1](#), appeal docketed, No. 89-3256 (5th Cir. July 13, 1989).

[FN5]. For further discussion of this problem, see Field, Controlling the Woman to Protect the Fetus, 17 Law, Med. & Health Care 114 (1989). In addition, it seems fair to suggest that this problem is a symptom of society's failure to place sufficient resources in drug treatment programs, especially programs for pregnant women. Threatening legal action against pregnant women with alcohol-abuse problems probably discourages these women from seeking treatment in the existing programs that do accept pregnant women as patients.

[FN6]. I do not mean to discount or ignore the victories that have also occurred. For example, my client who faced AIDS-related discrimination lost before the federal district court, [714 F. Supp. 1377 \(E.D. La. 1989\)](#), but won in a separate action filed before the administrative agency, after a three-year delay while the case sat in the Washington, D.C. office. See Correspondence from Davis A. Sanders, Regional Manager, U.S. Dep't of Health and Human Servs., to R. James Kellogg, Attorney (Dec. 13, 1989) (responding favorably to complaint filed in October 1986). Winning before the administrative agency, after a three-year delay in rendering a decision, and losing in the federal courts, is the opposite of the result we would have expected. Cf. [Colker, Administrative Prosecutorial Indiscretion, 63 Tul. L. Rev. 877 \(1988\)](#) (commenting on the difficulties of a complainant winning administrative cases in the civil rights area under the Reagan administration). In addition, one of my sexual harassment cases and another of my AIDS cases were settled quite favorably, and I was able to help convince my university to adopt a sexual orientation nondiscrimination policy. However, when the losses appear devastating, it is easy to wonder whether the seeming successes do not simply keep us invested in working within a society that ultimately preserves our oppression-to wonder whether we legitimize the institutions that oppress us by claiming minor victories from time to time. For further discussion, see Fudge, The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles, 25 Osgoode Hall L.J. 485 (1987). I do not take Fudge's point of view, although I recognize that some people might discount entirely the significance of what I call victories, labelling them "cosmetic."

[FN7]. I am reluctant to use the warlike imagery of "battles"; however, I also recognize that these struggles are often battles because they occur within the male structure of war.

[FN8]. C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979). Title VII is codified at [42 U.S.C. §2000e-2000e-17 \(1989\)](#).

[FN9]. [Meritor Sav. Bank v. Vinson, 477 U.S. 57 \(1986\)](#).

[FN10]. The Indianapolis version of the statute is reprinted in [American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324-26 \(7th Cir. 1985\)](#).

[FN11]. [Hudnut v. American Booksellers Ass'n, 475 U.S. 1001 \(1986\)](#) (summary affirmance).

[FN12]. This is MacKinnon's assessment of the current legal status of her ordinance:

A summary affirmance resolves a case without briefs or arguments by letting stand a result reached in a court of appeals. Lower courts reviewing the identical issues are bound by the results but not by the reasoning of the decision that is affirmed. Where the issues are not identical, or where the decision departs from established precedent, or where intervening legal developments suggest that the Court would reach a different result, lower courts may not be bound by the result. The Supreme Court may grant full review to the issues without being bound by the previous summary affirmance. [Mandel v. Bradley, 432 U.S. 173 \(1977\)](#); [Hicks v. Miranda, 422 U.S. 332 \(1975\)](#). So while this result is a significant state behavior, it need not be the last word on the subject. (p. 314, n.67.)

[FN13]. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs: A Journal of Women in Culture and Society* 635 (1983).

[FN14]. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *Signs: A Journal of Women in Culture and Society* 515 (1982), reprinted in *Feminist Theory: A Critique of Ideology 1* (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982).

[FN15]. I am not going to discuss MacKinnon's critique of Marxism. It is apparent that MacKinnon's discussion of Marxism-feminism in the first several chapters is out-of-date because it fails to discuss any authorities published after the mid-1970s. The out-of-datedness of those chapters detracts from the currency and sophistication of the book.

[FN16]. I say "suggests" rather than argues because this is not MacKinnon's dominant perspective. The first argument is her dominant argument.

[FN17]. See [Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity* \(Book Review\), 68 B.U.L. Rev. 217 \(1988\)](#).

[FN18]. C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 7 (1987).

[FN19]. *Id.* at 21-31.

[FN20]. Although feminists generally criticize sex-roles, meaning the functions that women are allowed to perform in society, not all feminists criticize all of women's gender traits. See, e.g., C. Gilligan, *In a Different Voice* (1982) (suggesting that women's moral reasoning is often superior to men's moral reasoning).

[FN21]. MacKinnon certainly recognizes this phenomenon. For example, she dedicates *Toward a Feminist Theory of the State* to her friend, Kent Harvey, who has worked with her on feminist issues for decades. (MacKinnon also dedicated her second *Signs* article to Kent Harvey, as well as Andrea Dworkin. See MacKinnon, *supra* note 13.)

[FN22]. I do not mean to suggest that women are ever truly left alone from male domination. The effectiveness of socialization results in women internalizing male values which are destructive to their well-being. However, I do believe it is plausible that women are relatively more free from male domination in women-only space than in space where men are present.

[FN23]. In general, I believe that MacKinnon goes back and forth between unqualified statements, referring to the "totality of social relations" (p. 3) and qualified statements, which recognize that male domination has, in part, failed (p. 91). When MacKinnon gives oral presentations, I have often noticed that her written text is unqualified, yet her responses to questions are qualified. I therefore tend to see her use of unqualified statements as a rhetorical device. My experience in teaching her work is that some students do find her unqualified statements to be persuasive because they inspire them to look at the world through a keener lens. Other students, however, are "turned off" by what they perceive to be inaccurate rhetoric. By going back and forth between two kinds of styles, MacKinnon might therefore be reaching more readers. Her work, however, is predominantly filled with unqualified statements that, in my experience with students, are generally less convincing than her qualified statements.

[FN24]. See *supra* note 1. This recognition does not undermine the power of male domination. As Mari Matsuda observed in her presentation at Tulane Law School on November 6, 1989, male domination preserves its power by terrorizing women through random but systematic violence. Although I was certainly safe from the man, Marc Lepine, who killed fourteen female university students in Montreal in December 1989, his actions served to remind me and other women that we live in a world of random violence against women. For further discussion of the connection between Marc Lepine's killing of fourteen female university students and violence against women, see Bergman, *Sisterhood of Fear and Fury*, *MacLeans*, Dec. 18, 1989, at 18-19. It is also interesting to note, through public opinion polls conducted in Canada in December 1989, that women see the relationship between Lepine's actions and violence against women whereas men deny that relationship. Conversations with Professor Rosemary Gartner, University of Toronto, an expert in the relationship between the rise of feminism and increased violence against women (Spring 1990, Toronto); see *Most See Campus Massacre as Random Act-Poll*, *The Gazette*, [Montreal], Dec. 29, 1989, at A-2.

[FN25]. An Afro-American child can expect to live 69.4 years whereas a Caucasian child can expect to live 75.6 years. *Chicago Tribune*, Oct. 10, 1989, at 6. Per 100,000 population, 2.1 Afro-American males die for every Caucasian male; in the 15-44 age group, 4.25 per 1000 Afro-American men died in 1986. *Boston Globe*, July 16, 1989, at 2.

[FN26]. In discussing gay men, MacKinnon occasionally recognizes that they do not always have access to the power of men. Theoretically, she says that they have been treated as if they are women; thus, we can consider them, in a sense, to be female men who do not have access to male power that is reserved to male men. See C. MacKinnon, *supra* note 18, at 178-79 (discussing antipornography ordinance's application to men). This statement has two problems. First, it raises the question of why feminists refer to men and women if they mean maleness and femaleness. But even as to the categories of maleness and femaleness, it raises the question of whether feminists help perpetuate sex-role stereotypes by labeling characteristics male and female that relate to either sex. Second, and perhaps more important, such statements are disrespectful to the unique and substantial discrimination faced by gay men in our society. MacKinnon has offered the insightful observation that the discrimination faced by black women is not simply a sum of the discrimination faced by blacks and the discrimination faced by women; it is distinct unto itself. Similarly, the discrimination experienced by gay men is not simply a mirror of the discrimination faced by women; it is distinct and must be acknowledged. Although MacKinnon recognizes that some men lack power

(p. 160), she never provides an adequate explanation of how that phenomenon can be true under the monolithic force of male domination that she describes.

[FN27]. I am confident that MacKinnon would resist characterizing women's description of reality as "objective," since she strongly criticizes the concept of objectivity. However, MacKinnon's theoretical perspective does represent an attempt to make women's perspective the universal or objective perspective in society. For example, MacKinnon argues that women are injured during the act of rape, irrespective of whether penetration ever occurs. Thus, MacKinnon argues that the law should define the crime of rape from the perspective of women's injury rather than men's desires (pp. 180-82).

[FN28]. The word "perspective" is actually a little confusing as used by MacKinnon and other feminists. When MacKinnon talks about women's perspective, she is not really talking about how women see the world because, as MacKinnon argues, many if not most women see the world from the same perspective as men (and thereby collaborate with their own oppression). I think it would be more fair to say that a woman's perspective, as the phrase is used by MacKinnon, is a description of a perspective that primarily tries to protect women's well-being. It is therefore a perspective with a normative judgment that protecting women's well-being is important. Thus, I would argue that a woman's perspective is equally available to men and women in society. Women and men, however, have been socialized not to place primary value on protecting (or even considering) women's well-being (aside from a patronizing perspective). In my own writing, I therefore try to talk about protecting women's well-being rather than seeing the world from women's perspective.

[FN29]. I discuss the universal values of love, compassion and wisdom in another work. See [Colker, *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, 77 Calif. L. Rev. 1011 \(1989\)](#).

[FN30]. Hutchinson, [Alien Thoughts: A Comment on Constitutional Scholarship](#), 58 S. Cal. L. Rev. 701 (1985).

[FN31]. Fudge, *supra* note 6.

[FN32]. Stick, [Can Nihilism be Pragmatic?](#), 100 Harv. L. Rev. 332 (1986).

[FN33]. Matsuda, [Looking to the Bottom: Critical Legal Studies and Reparations](#), 22 Harv. C.R.-C.L. L. Rev. 323 (1987).

[FN34]. Schneider, The [Dialectic of Rights and Politics: Perspectives from the Women's Movement](#), 61 N.Y.U. L. Rev. 589, 648-52 (1986).

[FN35]. Also, what is on the other side of the wall? Is it still society?

[FN36]. Some readers may find this a surprising statement for me to make given my article, Colker, [Anti-Subordination Above All: Sex, Race, and Equal Protection](#), 61 N.Y.U. L. Rev. 1003 (1986). At the time that I wrote that article, I thought we had two choices-making liberal antidifferentiation arguments and making group-based antisubordination arguments. I still believe that we should make group-based arguments; however, I no longer believe that those arguments need to be framed in exclusively antisubordination terminology. As I discuss in the text, I now prefer an "equality as compassion" or "equality as respect" perspective. For further discussion of this perspective, see Colker, *supra* note 29.

[FN37]. 417 U.S. 484 (1974).

[FN38]. *Id.* at 496 n.20.

[FN39]. 442 U.S. 256, 279 (1979).

[FN40]. A. Dworkin, *Woman Hating* (1974).

[FN41]. The payment of hospitalization and disability benefits for normal delivery and recuperation were excluded. Disabilities that resulted from medical complications, such as an ectopic pregnancy, that arose during pregnancy were covered. [417 U.S. at 490-91 & n.15.](#)

[FN42]. [Id. at 492-93.](#)

[FN43]. Everyone agreed that extra revenue would be needed to fund the program if pregnancy was covered. The estimate of these increased costs ranged from a twelve percent to a thirty-six percent increase. [Id. at 494 n.18.](#)

[FN44]. [Cal. Unemp. Ins. Code §2626\(a\)](#) (West 1986).

[FN45]. [479 U.S. 272 \(1987\).](#)

[FN46]. [Cal. Gov't Code §12945\(b\)\(2\)](#) (West 1986).

[FN47]. Brief Amici Curiae of the National Organization for Women, [California Fed. Sav. & Loan Ass'n v. Guerra](#), [479 U.S. 272 \(1987\)](#) (No. 85- 494).

[FN48]. When I presented this argument at a workshop at George Washington University Law School in October 1989, it was suggested that I am making an administrative law-like process argument. Although there are similarities between my argument and an administrative law argument, I do not think that that is what I am doing because I am not afraid to say that courts must make substantive judgments. A legislature, for example, that says that it held hearings and heard arguments about women's well-being, but decided nonetheless to exclude pregnancy from insurance disability coverage, would still, in my view, be acting unconstitutionally. Why? Because I would make the substantive argument that a legislature that respected women's well-being (and did not just hear arguments about it) could not respond in that way. Admittedly, that is a harder argument to make than the pure process argument that is available on the facts of *Geduldig*. But if hearings were held and the pregnancy exclusion were still enacted, I would want to make that substantive argument.

[FN49]. [442 U.S. at 270-71 n.22.](#)

[FN50]. [Id. at 266 n.13.](#)

[FN51]. [Id. at 271 n.22.](#)

[FN52]. See *supra* note 2.

[FN53]. See [Margaret S. v. Edwards](#), [794 F.2d 994, 996-97 \(5th Cir. 1986\).](#)

[FN54]. R. Gold, *Abortion and Women's Health: A Turning Point for America?* 11-14 (Alan Guttmacher Inst. 1990).

[FN55].

Weeks of Gestation	No.	%
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8 or below	810,300	51.4
9-10	423,910	26.9
11-12	203,970	12.9
13-15	75,770	4.8
16-20	49,600	3.1
21 +	13,790	0.9

C. Francome, *Abortion Practice in Britain and the United States* 104 (1986) (citing Henshaw, Binkin, Blaine & Smith, *A Portrait of American Women Who Obtain Abortions*, 17 *Fam. Planning Persp.* 90-96 (1985)).

[FN56]. *Id.*

[FN57]. Joyce & Mocan, *The Impact of Legalized Abortion on Adolescent Childbearing in New York City*, 80 *Am. J. Pub. Health* 273, 278 (1990).

[FN58]. *Id.* at 277.

[FN59]. I realize that many antiabortion advocates would not be satisfied with this proposal, especially because it permits the abortion of a handicapped fetus. I, too, am troubled by this fact because I am concerned about the image that it sends to society about how much we value the lives of handicapped people. However, so long as society imposes virtually all of the child-care burdens on women and adoption is not an available option for handicapped children, it is not fair to impose coercively upon women the entire burden of raising handicapped children in our society. In addition, the good cause requirement will force women to articulate their inability to meet those burdens. I realize that verbal assurances that the abortion decision was difficult for a woman when the fetus was handicapped will not satisfy many antiabortion, pro-life advocates. It might, however, in a small way, show to society at large that women who have post-twenty week abortions do not have a callous view about the value of life.

[FN60]. Kissling, *Ending the Abortion War: A Modest Proposal*, *The Christian Century*, Feb. 21, 1990, at 180, 183.

[FN61]. Before I could fully endorse such an approach, I would have to know more about its impact on poor, minority, young women. Apparently, such women often delay abortions because they do not have sufficient funds to purchase an abortion earlier. For further discussion of this problem, see Colker, *Feminist Litigation: An Oxymoron?*, 13 *Harv. Women's L.J.* 1037 (1990). That delay often causes their abortions to be performed in the second trimester rather than the first trimester. I have not seen evidence that shows whether that delay also causes them to disproportionately have third-trimester abortions.

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