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# Marx and MacKinnon: The Promise and Perils of Marxism for Feminist Legal Theory

**KATE SUTHERLAND**

*ABSTRACT:* Catherine MacKinnon, perhaps the dominant voice of North American feminist legal theory over the last two decades, developed her feminist theory of law through an extended metaphor with Marxism. Marxist thought thus became thoroughly intertwined with MacKinnon's particular brand of radical feminism in the minds of many feminist legal scholars and activists. As MacKinnon's work has fallen out of favor in recent years, largely as a result of criticisms leveled against it from postmodern and critical race feminist perspectives, so too has the work of Marx. Setting MacKinnon's *Towards a Feminist Theory of the State* side by side with Volume I of *Capital*, and offering a critique of the use she made of Marx's work, reveals the continued relevance of Marxism to feminist legal scholarship and activism.

CATHERINE MACKINNON, ONCE THE DOMINANT VOICE of North American legal feminism, developed her feminist theory of law through an extended metaphor with Marxism. She first laid out her theory in two highly influential articles in 1982 and 1983, and later expanded it in her 1989 book, *Towards a Feminist Theory of the State*. In the wake of these publications, Marxist thought became thoroughly intertwined with MacKinnon's particular brand of radical feminism in the minds of many feminist legal scholars and activists.

As MacKinnon's work has fallen out of favor in recent years, largely as a result of criticism leveled from postmodern and critical race feminist perspectives, so too has that of Marx. By setting

MacKinnon's *Towards a Feminist Theory of the State* side by side with Volume I of *Capital* and critiquing the use she made of Marx's work, I endeavor in this article to disentangle the two. My purpose is to free Marxist theory from this association and thereby reclaim it as a resource for feminists who have rejected MacKinnon's radical feminist legal theory.

MacKinnon builds her theory of women's subordination by pairing key components of Marxist theory with feminist analogues: work–sex; worker–woman; capitalist–man; commodity–sex/woman; value–female sexual desirability; capitalist accumulation–male sexual desire; class–heterosexuality; capital–gender & family; production–reproduction, and so on. In the first half of this article, I interrogate the pairs that play a central role in MacKinnon's theory. In the second, I critique her consequent deployment of Marxist ideas about consent, legitimation, ideology, consciousness, law and the state.

I do not propose to evaluate how accurately MacKinnon uses Marxist concepts. She is critical of Marxism and uses its structure and component parts only insofar as they serve her purposes. Rather, I stand her readings of Marx alongside my own in order to crystallize my critique of her work and, in the process, to make a case for the continued relevance of Marxism to feminist legal scholarship and activism.

My analysis of MacKinnon owes a great deal to her postmodern critics. But I have serious concerns about much postmodern feminist work as well, particularly in relation to theorization of the state and law. When pursuing change through law, both radical feminists and postmodern feminists are highly vulnerable to liberal co-optation, though for very different reasons. A re-engagement with Marxist theory offers alternate possibilities for feminist praxis in the legal arena.

Revisiting MacKinnon's work is of crucial importance at this juncture. For even as MacKinnon's influence has waned among feminists, it has increased among legislators and judges. For example, in recent years she has had an enormous impact on the crafting of U. S. sexual harassment laws and of Canadian obscenity laws. While such legal developments may have produced victories for individual women, they have done little to counter systemic inequality. Indeed, they have often exacerbated systemic inequality, particularly where gender inequality intertwines with discrimination based on class, race, sexual orientation, or disability. For feminists who seek to engage with law

without similarly falling prey to liberal co-optation, a re-evaluation of MacKinnon's work is imperative.

## 1. INTERROGATING THE PARALLELS

### *Work–Sex*

Marx says of labor that it is a condition of human existence in all forms of society at all points in history. Labor is the means by which man mediates between himself and nature. Through work man "develops the potentialities slumbering within nature, and subjects the play of its forces to his own sovereign power" (Marx, 1990, 283). Man acts upon nature and changes it, thereby changing himself; "he realizes his own purpose in these materials" (Marx, 1990, 284).

According to Marx, the labor process comprises three elements: 1) purposeful activity (work itself); 2) the object on which that work is performed; and 3) the instruments of that work (Marx, 1990, 284). In the labor process specific to capitalism, the worker works under the control of the capitalist to whom his labor belongs, and to whom the means of production belong. The product the worker produces also becomes the property of the capitalist.

Work is not inherently negative; indeed, for Marx, the opposite is true. It is the conditions within which work takes place under capitalism that make it negative. Within such conditions,

> the worker does not affirm himself in his work but denies himself. . . . The worker, therefore feels at ease only outside work, and during work he is outside himself. . . . His work, therefore, is not voluntary, but coerced, *forced labor*. It is not the satisfaction of a need but only a *means* to satisfy other needs. . . . it is not his own spontaneous activity. It belongs to another. It is the loss of his own self. (Marx, 1994a, 62.)

Under capitalism, labor alienates man from nature, man from himself and, finally, man from other men (Marx, 1994a, 63). The concern, then, is not with labor in and of itself, but with alienated and exploited labor.

MacKinnon begins her parallel of feminism and Marxism by proclaiming: "Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away." She continues: "As

the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman" (MacKinnon, 1989, 3).

MacKinnon very eloquently describes how sexuality is that which is "most taken away" from women under patriarchy. Under patriarchy, women's sexuality cannot, in fact, be said to be women's at all. Women's sexuality becomes that which arouses desire in men (MacKinnon, 1989, 118). She concludes:

> If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it is its own lack, then there is no such thing as a woman as such; there are only walking embodiments of men's projected needs. (1989, 119.)

If this is so, how can it be said that sexuality is, for women, "that which is most one's own"? Such an assertion seems to require possession by women of a positive life-affirming sexuality which is then wrested away from them and distorted into something which only serves men. This would leave open the possibility of an unalienated sexuality.

Perhaps there is something in Marx's early discussion of free labor that might help to construct an account of a female sexuality which is neither alienated nor exploited. Marx asserts that it is in the labor process that man gets in touch with nature, with himself and with his "species-being" (1994a, 62). In his productive life, that is, in his work, man finds his species-character. In purposeful work, man asserts his will and finds his consciousness. "The object of labor is thus the *objectification of man's species-life*: he produces himself not only intellectually, as in consciousness, but also actively in a real sense and sees himself in a world he made" (Marx, 1994a, 64).

MacKinnon's theory precludes a parallel account of sexuality, at least for women. She takes issue with Marx's depiction of objectification without alienation as the foundation of human freedom. For women, she says, "have not authored objectifications, they have been them" (1989, 124). In this scenario, woman is not the worker, she is "the nature, the matter, the acted upon to be subdued by the acting subject seeking to embody himself in the social world" (MacKinnon, 1989, 124).

Some radical feminists do posit cautious models of an unalienated or non-exploitive sexuality for women. This is a sexuality linked to love, relationships and mutual pleasure, and cleansed of any residue of power and domination, even in fantasy (Barry, 1995). MacKinnon, however, makes no such leap of the imagination. She says: "So long as sexual inequality remains unequal and sexual, attempts to value sexuality as women's, possessive as if women possess it, will remain part of limiting women to it, to what women are now defined as being." She will allow for only "truly rare and contrapuntal glimpses" of an equal sexuality (1989, 153).

Returning, then, to MacKinnon's insistence that sexuality is, for women, that which is most one's own, her claim begins to sound suspiciously like one of the sort of universal, natural female sexual essence that she elsewhere argues so vigorously against. Surely the centrality of sexuality to women is an integral part of the social construction of female identity under patriarchy, not a natural given. It therefore cannot be accepted as the starting point of a theory that challenges male supremacy.

Setting sexuality apart as something natural and integral to the self, and therefore more damaging when alienated than other human activities, is a common thread in radical feminist arguments for the centrality of sexuality generally, and commercial sex in particular, to women's oppression. For example, this is the tack Carole Pateman takes in arguing that prostitution cannot be regarded simply as a form of employment with the same risks of alienation and exploitation as any other (1988, 207).

There is no reason to suppose, however, that sexuality is more natural and less social than other aspects of our being. Indeed, MacKinnon's analysis of sexuality as socially constructed would seem to dictate this conclusion. On this basis Wendy Chapkis argues: "Once sex and emotion have been stripped of their presumed unique relationship to nature and the self, it no longer automatically follows that their alienation or commodification is simply and necessarily destructive" (1997, 76).

Whichever critical path we follow, this analysis challenges central features of MacKinnon's theory. If sexuality is, for women, that which is most one's own, then any challenge to male dominance would seem to require an aggressive effort to reclaim or recreate this

sexuality. If it is not, then MacKinnon's claim for sexuality as "the linchpin of gender inequality" (1989, 113) is cast into doubt.

*Commodity–Sex/Woman*

According to Marx, man initially uses labor to produce a use-value for himself or his community. This may involve the incidental exchange of one use-value for another. At this point, however, we have not yet entered into a commodity economy. Use-values produced do not become commodities until they are produced solely for the purpose of exchange.

Exchange of commodities begins at the edges of communities as communities come into contact with one another and articles thus exchanged tend, in turn, to take on the character of commodities within single communities thereafter. Through repetition, exchange of commodities becomes a normal social process. On the market, a commodity is exchanged for money, and money is in turn exchanged for another commodity. Eventually the circulation of commodities supersedes the mere exchange of products. The circulation of commodities is the starting point of capital. The purpose of exchange becomes the generation of capital, rather than the securing of an equivalent.

In this commodity economy, the phenomenon of the fetishism of commodities arises. With human labor objectified in products, the products appear to exist apart from and independent of the producers. And as the producers do not come into contact with one another until they exchange their products, the relationship between producers takes on the form of a social relation between products. The social relation between producers themselves is thus concealed. It begins to seem as though the products control the producers rather than the reverse, as if decisions about production flow naturally from the value of commodities rather than being made by people: "Those who suffer from commodity fetishism attribute to commodities powers to regulate relations among people that belong only to the people themselves" (Kennedy, 1985, 971).

For MacKinnon, sex and the woman in whom that sex is embodied simultaneously stand in for the commodity in radical feminist theory. She points out: "Women's sexuality is, socially, a thing

to be stolen, sold, bought, bartered, or exchanged by others" (1989, 172).

This articulation of the commodity–sex parallel takes us back to the work–sex parallel. For in Marxist theory, under capitalism labor does not simply produce commodities; labor itself becomes a commodity. But before the worker can offer his labor-power for sale as a commodity on the market, a couple of conditions must be met. The worker must own his own person, and he must never sell it once and for all. He must alienate his labor-power without renouncing his rights of ownership over it. Further, he must offer it for sale as it exists in his own body, not as objectified in commodities he has made.

If we accept woman as the parallel of the worker and sex as the parallel of the commodity, are these conditions met? MacKinnon says no. She states, of women's sexuality: "Women never own it, and men never treat it, in law or in life, with the solicitude with which they treat property" (1989, 172). We must return then to her claim that it is not simply sex as embodied in woman that serves as commodity under patriarchy, it is woman herself.

In exploring the commodity–woman parallel, we must not forget that Marx also considered the possibility of the alienated worker himself becoming a commodity (1994a, 124). MacKinnon, however, makes a deeper claim than this. For the worker, even if commodified himself, still labors to produce other commodities. As noted above, women, according to MacKinnon, "have not authored objectifications, they have been them" (1989, 124).

If women are not simply alienated subjects, but commodified objects, how can they come to know their oppression and endeavor to overcome it? MacKinnon states:

> Having been objectified as sexual beings while stigmatized as ruled by subjective passions, women reject the distinction between knowing subject and known object — the division between subjective and objective postures — as the means to comprehend social life. Disaffected from objectivity, having been its prey, but excluded from its world through relegation to subjective inwardness, women's interest lies in overthrowing *the distinction itself.* (1989, 120–121.)

How are women to accomplish this feat? Can women do so by occupying both positions simultaneously? MacKinnon does not appear

to leave room for even this partial subjectivity. She states that "interpreting female sexuality as an expression of women's agency and autonomy, as if sexism did not exist, is always denigrating and bizarre and reductive" (1989, 153). If women are thus precluded from occupying the role of sexual subject and cannot liberate sex for their own pleasure and strategic use, it is difficult to imagine how the subject/object division can be transcended.

In conflating woman with commodity, MacKinnon seems to deny women even the possibility of agency. She theorizes women as even more inextricably oppressed within patriarchy than are workers within capitalism. Women's status as commodities rather than authors of commodities ultimately forecloses the possibility of consciousness-raising and of praxis.

*Value–Female Sexual Desirability*

According to Marx, objects become commodities by virtue of their dual character as objects of utility and bearers of value. The process by which an object becomes a bearer of value is a social one; the value form "conceals a social relation" (Marx, 1990, 149) in that "the commodity reflects the social characteristics of men's own labor as objective characteristics of the products of labor themselves" (Marx, 1990, 164–165).

MacKinnon states: "As Marxism exposes value as a social creation, feminism exposes desire as socially relational, internally necessary to unequal social orders but historically contingent" (1989, 4). Consequently: "Like the value of a commodity, women's sexual desirability is fetishized: it is made to appear a quality of the object itself, spontaneous and inherent, independent of the social relation that creates it, uncontrolled by the force that requires it" (MacKinnon, 1989, 123).

Value, in Marxist theory, is a totalizing concept and MacKinnon intends for desire to operate similarly in feminist theory. But, as Shannon Bell argues, desire cannot serve this function:

> Value's quantitative aspect makes everything commensurable. But desire cannot be reduced to commensurability. Even heterosexual desire does not always manifest in the prescribed male-dominant form. Many different forms of desire exist within the hegemonic system, both inside heterosexuality and outside of it: there are many heterosexual scripts; there are many desires that

do not conform to the requirements of the masculinist system. By contrast, there can be no value that does not conform to the systemic requirements of capitalism. The concept of desire cannot do the work that value does; that is, it cannot make different forms of desire commensurable. (1994, 84.)

Thus, in drawing a parallel between value and desire, MacKinnon may have subverted her own theory.

*Capitalist Accumulation–Male Sexual Desire*

Marx describes the capitalist as "capital personified and endowed with consciousness and a will" (1990, 254). The aim of the capitalist is never consumption, nor the mere securing of an equivalent, but rather the generation of a surplus. His aim is "the unceasing movement of profit-making" (Marx, 1990, 254).

MacKinnon identifies as a dominant theme of patriarchy "the male pursuit of control of women's sexuality – men not as individuals or as biological beings, but as a gender group characterized by maleness as socially constructed, of which this pursuit is definitive" (1989, 112). Male sexuality is power; women's sexuality, on the other hand, is simply "a construct of male sexuality searching for someplace to happen" (MacKinnon, 1989, 152).

This depiction beautifully echoes Marx's scheme in which the relentless search for profit is definitive of the capitalist under capitalism. A crucial factor for Marx, though, is the way the capitalist experiences the "boundless drive for enrichment, this passionate chase after value" (1990, 254). The capitalist pursues his goal of profit through exploitation of the worker, but the degree of exploitation does not depend on the will, good or bad, of the individual capitalist: "Under free competition, the immanent laws of capitalist production confront the individual capitalist as a coercive force external to him" (Marx, 1990, 381). Thus the capitalist can be said to be as much subject to fetishism as the worker.

MacKinnon's analysis seems to preclude a parallel conclusion with respect to men under patriarchy. She does state that male power is a myth which has made itself true and that male dominance is an unreal thing with real consequences (1989, 104, 125). But she maintains that it is male power that constructs women's sexuality and never considers the construction of male power in any depth. Men, male

sexuality and the power with which it is synonymous, appear to stand outside the system as natural, pre-existing givens and thus are rendered impervious to challenge.

## 2. MARXISM AND FEMINIST LEGAL THEORY

Building her feminist theory of law on the parallels outlined above leads MacKinnon to a very circumscribed deployment of Marxist ideas about, for example, ideology, consciousness, law and the state. She emphasizes some facets of Marxism while erasing or downplaying others. Ultimately, in so doing, MacKinnon overlooks the transformative potential of Marxism for feminist legal theory.

### *Surplus*

One central concept in Marxist theory for which there appears to be no parallel in MacKinnon's theory is the concept of surplus. In Marxism, the rate of surplus value provides "an exact expression for the degree of exploitation of labor-power by capital, or of the worker by the capitalist" (Marx, 1990, 326).

Marx states that it is the form in which surplus labor is extorted from the worker that distinguishes one form of economic organization from another (1990, 325). In the capitalist labor process, the capitalist needs the worker to produce a commodity greater in value than the sum of the commodities used to produce it (means of production plus labor-power). He needs to generate surplus value. The labor process thereby becomes a process of valorization.

Ultimately, it is with the generation of a surplus and the consequent accumulation of capital that "the class struggle develops, and hence the class consciousness of the workers as well" (Marx, 1990, 808).

Clearly, then, the concept of surplus is central on three fronts. It is determinative of the dominant form of economic organization, it is an exact measure of the degree of exploitation under that system of organization (though not necessarily of its magnitude), and it provokes the class struggle and the class consciousness that bear the promise of change.

What in MacKinnon's theory might serve the function of the concept of surplus? If we return to the work–sex parallel, is the way in which sex is appropriated from women by men determinative of

the form of patriarchy under which we live? Can it be said that sex serves as a commodity that generates commodities of greater value than those used to produce it? If reproduction stands in for production, can children be conceptualized as the commodity of greater value generated by sex? What about housework? This is unpaid labor that benefits men, but it seems primarily to benefit capitalist men in that it serves to reproduce the worker. These applications of the idea of surplus to women seem altogether too literal.

We might return instead to the idea of desire. After all, we are concerned in Marxism with surplus *value* and in MacKinnon's typology desire stands in for value. Is this where we find room for the excess of desire to which Bell has referred (1988, 84)? A surplus is, after all, by definition, excess. But an excess of value under capitalism serves capitalists. It is by no means certain that an excess of desire under patriarchy would serve men. Again, this may be where MacKinnon's theory subverts itself. Perhaps an excess of desire could serve one crucial function of surplus, that of provoking the struggle between men and women and awakening the consciousness of women.

### *Consent and Legitimation*

In Marx's depiction of the evolution and operation of capitalism, consent emerges as central. By consent, I mean the worker's voluntary acquiescence in his own subordination. Marx makes clear that it is this voluntariness on the part of the worker, or at least the appearance thereof, that renders capitalism so effective as compared to previous economic systems based on compulsory labor.

The success of capitalism rests on surplus labor; hence it is necessary for the capitalist class to somehow compel the working class to do more work than their own needs dictate. Initially, direct force is required. In the early stages of capitalism, capitalists relied upon state power to absorb a sufficient quantity of surplus labor. By way of example, Marx cites the early Factory Acts of England that forcibly lengthened the working day. Over time, however, "the 'free' worker, owing to the greater development of the capitalist mode of production, makes a voluntary agreement, *i.e.*, is compelled by social conditions to sell the whole of his active life, his very capacity for labor, in return for the price of his customary means of subsistence" (Marx, 1990, 382).

Eventually,

> The advance of capitalist production develops a working class which, by education, tradition and habit, looks upon the requirements of that mode of production as self-evident natural laws. The organization of the capitalist process of production, once it is fully developed, breaks down all resistance. . . . The silent compulsion of economic relations sets the seal on the domination of the capitalist over the worker. Direct extra-economic force is still of course used, but only in exceptional cases. In the ordinary run of things, the worker can be left to "the natural laws of production." (Marx, 1990, 899.)

The worker is forced to sell his labor to live, yet the appearance of independence and freedom is maintained by the fiction of the contract. The consent embodied in the employment contract comes to serve a dual purpose. First, it legitimates capitalism, concealing the force upon which it is based. Second, it makes capitalism more efficient in that the capitalist can rely upon the worker to police himself. Outside force becomes superfluous when the worker believes he has chosen his fate.

MacKinnon, together with other radical feminist theorists, has drawn extensively upon the above insights of Marxism with respect to consent. For her, consent is central to patriarchy in its modern guise. Women are first forced to submit to male domination under patriarchy but, eventually, they come to acquiesce in their own subordination.

Andrea Dworkin, a frequent collaborator of MacKinnon's, asserts that initially women are compelled to perform sex-labor for the benefit of men, for example in marriage. By law, women's bodies belong to their husbands, not to themselves: "The good wife submits; the bad wife can be forced to submit. All women are supposed to submit" (Dworkin, 1983, 79).

Here too the contract fiction comes into play to suggest that women at least enter into marriage voluntarily. But material circumstances belie the notion that women and men negotiate with one another on an equal footing. Further, Dworkin maintains that the submissive ideal is imposed on women from within as well as without:

> Women are brought up to conform: all the rules of femininity — dress, behavior, attitude — essentially break the spirit. Women are trained to need

men, not sexually but metaphysically. Women are brought up to be the void that needs filling, the absence that needs presence. Women are brought up to fear men and to know that they must please men and to understand that they cannot survive without the help of men richer and stronger than they can be themselves, on their own. (1983, 81.)

MacKinnon states that "women have little choice but to become persons who then freely choose women's roles" (1989, 124). Under such circumstances, female sexuality cannot be interpreted as an expression of women's agency (MacKinnon, 1989, 153). Most often it is, rather, an expression of the eroticization of domination. "Love of violation . . . comes to define female sexuality, legitimating this political system by concealing the force on which it is based" (MacKinnon, 1989, 141).

As with capitalism, some direct force is still required "where [society's] edges are exposed: at points of resistance, conflict, and breakdown," but for the most part women internalize the demands of patriarchy and they can be expected to police themselves accordingly (MacKinnon, 1989, 239). Dworkin concludes: "It is the best system of colonization on earth: she takes on the burden, the responsibility, of her own submission, her own objectification" (1987, 142).

### *Ideology and Consciousness*

Marx declares: "It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness" (1994b, 211). This statement is rooted in the distinction Marx draws between the material base and the legal and political superstructure. The superstructure is determined by the base: "The mode of production of material life conditions the general process of social, political and intellectual life" (Marx, 1994b, 211).

Yet Marx also made reference to the "ideological forms in which men become conscious of this conflict and fight it out" (Marx, 1994b, 211). Some Marxist theorists have seized on this idea and brought ideology and consciousness to the forefront of their analyses, often through a complex and nuanced articulation of the function and operation of the superstructure.

Louis Althusser (1971) divides the superstructure according to its politico-legal functions (law and the state) and its ideological functions (religious, political, legal, ethical, and so on). The state apparatus

corresponds to the former, while the ideological state apparatuses correspond to the latter. The state apparatus is comprised of the government, the administration, the army, the police, the courts and the prisons. It is unitary and public. It functions primarily by violence. The ideological state apparatuses include religion, education, the family, political parties, trade unions, media and culture. They are plural and largely private. They function primarily by ideology.

The unity of the ideological state apparatuses lies in their functioning "beneath the ruling ideology" (Althusser, 1971, 146). To hold power over a long period, the dominant class must also exercise hegemony over the ideological state apparatuses.

Althusser notes, though, that while the ideological state apparatuses are certainly stakes in the class struggle, they also serve as sites of class struggle. Indeed, given that "the ideological state apparatuses are multiple, distinct, 'relatively autonomous,' and capable of providing an objective field of contradictions," they are particularly promising sites for resistance by the exploited classes (Althusser, 1971, 147).

While it is material change that is required, Marx himself reminds us that "circumstances are changed by men" and that the "coincidence of the change of circumstances and of human action or self-change can be comprehended and rationally understood only as *revolutionary practice*" (1994c, 99).

What provides the catalyst for such change? Antonio Gramsci (1995, 333) describes the worker as subject to a "contradictory state of consciousness," the consciousness implicit in his practical activity which unites him with his fellow-workers contradicting with the theoretical consciousness of that activity which he has inherited from the past and uncritically absorbed. This contradictory consciousness may be paralyzing; it may "not permit of any action, any decision or any choice, and produces a condition of moral or political passivity." On the other hand, this struggle of political hegemonies may be the means to a critical understanding of self, "the first stage towards a further, progressive self-consciousness in which theory and practice will finally be one."

Thus, Gramsci argues, "the existence of objective conditions, of possibility or of freedom is not yet enough: it is necessary to 'know' them, and to know how to use them and to want to use them" (1995, 360). In this sense, then, "knowledge is power" (Gramsci, 1995, 353). "Structure ceases to be an external force which crushes man, assimi-

lates him to itself and makes him passive; and is transformed into a means of freedom, an instrument to create a new ethico-political form and a source of new initiatives" (Gramsci, 1995, 367).

MacKinnon insists upon the primacy of the material in the exploitation of women by men under patriarchy, but she also assigns consciousness a central role. She distinguishes feminism from Marxism on the question of consciousness as follows:

> Because marxists tend to conceive of powerlessness, first and last, as concrete and externally imposed, they believe it must be concretely and externally undone to be changed. Through consciousness raising taken more broadly, women's powerlessness was found to be both externally imposed and deeply internalized. . . . From this practical analytic, a distinctly feminist concept of consciousness and its place in social order and change has emerged. . . . What marxism conceives as change in consciousness is not, within marxism, a form of social change itself. For feminism it can be, but this is because women's oppression is not just in the head, so feminist consciousness is not just in the head either. (1989, 8.)

Yet in claiming consciousness-raising as feminist method, MacKinnon articulates a notion of praxis reminiscent of that theorized by Gramsci:

> The process is transformative as well as perceptive, since thought and thing are inextricable and reciprocally constitutive of women's oppression, just as the state as coercion and the state as legitimating ideology are indistinguishable, and for the same reasons. The pursuit of consciousness becomes a form of political practice. (MacKinnon, 1989, 84.)

In the course of her discussion, MacKinnon distinguishes two strands of Marxist theory. In the first, sometimes termed the "consciousness critique," being and knowledge are conceptualized as intertwined; social being shapes thought, but thought in turn shapes social being. Consequently, ideology and consciousness are assigned a meaningful role in the overall scheme. In the second, dubbed scientific or deterministic, "being has primacy over knowledge" (MacKinnon, 1989, 108). The material is emphasized to the exclusion of any significant role for ideology and consciousness. In adopting consciousness-raising as the quintessential feminist method, MacKinnon aligns herself with the first strand, calling it "more hospitable to feminism" (1989, 108).

But when it comes to the state and law, MacKinnon sets up a different opposition – one between liberalism and Marxism, defining the latter as exclusively scientific, deterministic Marxism. The consciousness critique is shut out altogether. So while consciousness-raising as political practice initially sounds promising, in the end, MacKinnon does not allow room in her structure for its free play. It is therefore difficult to discern what in her theory might provide a catalyst for the transformative pursuit of consciousness that she advocates.

When MacKinnon concludes that "control over being produces control over consciousness, fusing material conditions with consciousness in a way that is inextricable short of social change" (1989, 238), she becomes mired in an impossible quandary. How can women be extricated from this fusion? Women need to be extricated to provoke social change, yet women cannot be extricated without social change. No one is outside the system, but no one can provoke change from within it.

*State and Law*

MacKinnon states that both in liberalism and in Marxism, law serves as the "mind of society." In the liberal version, law represents "disembodied reason"; in the Marxist version it is a "reflection of material interest" (1989, 159). In the former, the state is a neutral arbiter and law is available to women as a tool. In the latter, the state is instead a vehicle of dominance and oppression and law serves as legitimating ideology. As MacKinnon sees it, liberalism counsels the use of the state and law as a primary tool for advancing women's equality, whereas Marxism counsels the abdication of the state as an arena for change and dismisses the use of law on behalf of women as idealism that is destined to failure.

MacKinnon claims to reject both options but ultimately she embraces an odd amalgam of the two. She unequivocally characterizes the state and law as reflections of male interest: "Over and over again, the state protects male power through embodying and ensuring existing male control over women at every level — cushioning, qualifying or *de jure* appearing to prohibit its excesses when necessary to its normalization" (MacKinnon, 1989, 167). Nevertheless, she concludes that feminists cannot afford to ignore the state and law as

central arenas of political struggle (1989, 161). But how, in this closed system, can law serve as a liberatory tool for women?

Had MacKinnon not limited herself to a stark choice between a liberal view of the state and law and a deterministic Marxist one, a way out of this box might have been possible. She could have returned to the strain of Marxism that she earlier termed "more hospitable to feminism" to construct a theory of the state and law more amenable to transformation through consciousness-raising.

Many who identify with this strain refute a clear-cut base–superstructure dichotomy wherein the state is simply a reflection and instrument of class power (Collins, 1982; Jessop, 1990, Kennedy, 1985; Klare, 1979; Poulantzas, 1980). For example, Karl Klare asserts that we need a different theory to make sense of the "relationship between consciousness and actuality" (1979, 127). In working to formulate such a theory, he brings to the fore Marx's conception of "objectification as social world-creating" (1979, 128).

Klare conceptualizes law-making as a form of objectification: "My argument is that we can conceive law-making as, *in theory*, a form of expressive social practice in which the community participates in shaping the moral, allocative and adjudicatory texture of social life, but that in class society, this process is alienated" (1979, 132). He asserts that, even in its present alienated form, law cannot be dismissed as a mere sham. It reflects not simply dominant interests, but also compromises between dominant classes and dominated classes — "concessions imposed by the struggle of the subordinate classes" (Poulantzas, 1978, 31).

Had MacKinnon adopted this vision of the state and law, there would be room in her theory for consciousness and ideology to play a central role, both in propping up the system and in challenging the system. Law could thereby have been claimed as a potent site of struggle and resistance.

The problem in bringing Klare's insight to bear in MacKinnon's realm is its reliance on objectification as "the ontological foundation of human freedom" (Klare, 1979, 131). In MacKinnon's view, there can be no positive objectification, at least not for women: "For women, there is no distinction between objectification and alienation because women have not authored objectifications, they have been them" (1989, 124). Thus she leaves no opening for women to participate in

sex, in the constitution of sexual relations, or in lawmaking, in a positive or subversive way.

## CONCLUSION

MacKinnon's use of Marxist theory is sometimes brilliant but ultimately deeply flawed. At some points in her analysis, she adheres too strictly to aspects of Marxist theory that are not amenable to her purposes. At other points, she jettisons or overlooks some of the most liberatory aspects of Marxism.

A central problem in MacKinnon's theory relates to questions of subjectivity and the (im)possibility of agency. These are questions that have provoked considerable debate among Marxist theorists as well, of course. But MacKinnon does not simply replicate problems in Marxist theory here; she exacerbates them in theorizing women as even more inextricably oppressed within patriarchy than are workers within capitalism.

A second look at the possibility of female participation in processes of objectification is warranted here. So too is some consideration of what role the concept of surplus might play in relations between women and men, in particular, the question of whether an excess of desire could prove a radicalizing force.

Another key problem in MacKinnon's analysis arises from her theorization of law and the state. As noted above, she limits herself to a polarized choice between a liberal conception of the state as neutral arbiter and an instrumentalist Marxist conception of the state as a reflection of dominant interests. Yet she accords the legal arena a central place in feminist struggles. For radical feminists engaging with law, this has meant the translation of a discourse about power into a discourse of rights (Fudge, 1989). Feminist demands have thereby been recast in terms that run counter to complex and situated conceptualizations of subjectivity, equality, law, and the state. Certainly this form of engagement has produced legal victories, but such victories are dubious in that they most often occur when feminist demands comport with state agendas, for example, remedies for sexual violence are granted when they fall in line with state agendas promoting sexual regulation more broadly (Fudge, 1989; Boyd, 1994).

Many feminist legal theorists have looked to postmodernism to serve as a corrective to the reductionist tendencies of radical feminism. But postmodernism carries with it its own risks of reductionism and co-optation. For example, though postmodern feminists may frame legal claims in a manner that does justice to the complexity and multiplicity of women's voices, only those voices that resonate with the understandings and goals of dominant constituencies are likely to be heard in legal forums. The claims that are most likely to be successful are those that sound most liberal and most in tune with capitalist free market principles.

An alternative strategy for exploring the complex and contradictory operation of the state and law is through the lens of the Marxist concept of ideology (Boyd, 1994; Gavigan, 1992). Susan Boyd argues that this is one means of accounting for the privileged place that the state and law hold, despite the complex nature of power and the simultaneous operation of a multiplicity of discourses: "Dominant ideological frameworks are connected to state dynamics and influence the according of legitimacy by branches of the state such as courts and legislatures to some discourses more than others as well as limiting the vision of both dominant and subordinate social groups" (1994, 25). I am not suggesting that postmodern feminists have it all wrong and we should turn to Marxism instead. Rather, I assert that postmodern feminist work is extremely valuable, but that this work would benefit from the complement of Marxist feminist insights into the "links between micro- and macro-level politics, and structures and discourses" (Boyd, 1994, 55).

Given the vast feminist resources that have been devoted to legal activism, the question of how feminists can engage with law without liberal co-optation is a pressing one. Far from having exhausted the possibilities of Marxism, Catherine MacKinnon understated and overlooked its transformative potential for feminist legal theory. A fresh look at Marx's writings as well as those of Marxist feminists and neo-Marxists offers considerable promise for feminist legal praxis.

*Osgoode Hall Law School*
*4700 Keale Street*
*North York, Ontario M3J 1P3*
*Canada*

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