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ESSAY

MACKINNON AND EQUALITY: IS DOMINANCE REALLY DIFFERENT?

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I. INTRODUCTION

Catharine MacKinnon has made impassioned and influential arguments about equality and feminist theory. Her arguments demand further analysis and critique if feminists are to develop an effective approach to attacking gender oppression and improving the status of women through the law.

MacKinnon's argument, articulated in a 1984 essay entitled *Difference and Dominance: On Sex Discrimination*,[1] falters on at least two major points. First, she fails to adequately distinguish between conflicts in feminist theories of gender difference, on the one hand, and court decisions resting on the acceptance or rejection of gender classifications, on the other. This analytical blending, combined with an overly narrow interpretation of the Aristotelian model for equality leads MacKinnon to dismiss, too readily, equality arguments based on the Aristotelian model.

Second, although MacKinnon's dominance theory may resolve the methodological problems of the different approaches that she criticizes, her new approach is fraught with its own inconsistencies of method. First, her notions of dominance and submission are too monolithic to serve as a realistic description of the world. Second, she ignores important intragender differences that make institutions of dominance harder than MacKinnon believes to identify and to remedy in the name of "all

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1. *See* CATHERINE A. MACKINNON, DIFFERENCE AND DOMINANCE: ON SEX DISCRIMINATION, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

women." Finally, while she relies on the purportedly feminist method of consciousness-raising to identify gendered abuses, MacKinnon provides no account of how to choose among conflicting consciousnesses. On issues that are hotly debated within feminist communities, such as pornography, the consciousness that MacKinnon selects and attributes to all women, is ultimately her own.

II. WHAT'S WRONG WITH ARISTOTLE?

A significant problem with MacKinnon's analysis is its dismissal of feminist arguments based on the Aristotelian model of equality.[2] According to the Aristotelian model, equality is achieved when alikes are treated alike and unalikes are treated unalike in proportion to their unalikeness.[3] This analysis has been incorporated into Fourteenth Amendment doctrine as the rational basis test for most legislative classifications,[4] with an intermediate scrutiny standard applied to gender[5] and strict scrutiny applied to classifications of race, religion or national origin.[6] What MacKinnon terms the "gender neutral" approach and the "special benefit rule" (which she wrongly interprets as being fundamentally opposed to one another) are alternate sides of Aristotle's model of equality.

MacKinnon argues that feminists have used two (diametrically opposed) strategies in litigating sex discrimination cases. The first, which she calls the "gender neutrality"[7] approach, argues that men and women are essentially the same and are therefore entitled to similar treatment in all respects. She offers the case of *Reed v. Reed*,[8] holding unconstitutional a state statute giving men priority over women as estate administrators, as an example of the Court's adaptation of the feminist gender neutral approach. This approach, for MacKinnon, is the legal arm of liberal feminism, dedicated to creating formal equality. MacKinnon writes, "The leading [path to equality for women] is: be the same as men. This path is termed gender neutrality doctrinally

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2. For an interesting general discussion of Aristotle and feminism, see Linda R. Hirsham, Essay, *The Book of "A"*, 70 TEX. L. REV. 971 (1992), with responses by Richard A. Posner and Martha C. Nussbaum.

3. Aristotle, *Ethica Nichomachea* III, 1131a, 1131b (W. Ross trans., 1925).

4. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 (1938).

5. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

6. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

7. MACKINNON, *supra* note 1, at 33.

8. 404 U.S. 71 (1971).

and the single standard philosophically. It is testimony to how substance gets itself up as form in law that this rule is considered formal equality."[9]

MacKinnon describes an opposing approach, advocated by cultural feminists, as the "special benefit rule."[10] Under this approach, gender classifications are acceptable to the extent that women and men are different. Judicial outcomes using special benefits reasoning may entitle women to different treatment, special privileges, or special protection not afforded to men. I will refer to this approach as the "different treatment" approach because, as MacKinnon points out, the term "special benefit rule" has a "rather bad odor"[11] and because the courts have been inconsistent at best in using this approach to provide women with actual benefits.

MacKinnon's rejection of the Aristotelian model of equality is based on the false notion that the "gender neutral" approach and the "different treatment" approach are opposed to one another rather than aligned. When MacKinnon discovers that neither approach can handle all equality issues on its own, she despairs of both; MacKinnon does not address the fact that the two halves are intended to act in conjunction, rather than in isolation.

MacKinnon critiques the gender neutral argument on the ground that it cannot handle real, observable differences such as pregnancy. It suffers "paradigm trauma,"[12] she says when confronted with gendered circumstances of existence. This is an unfair criticism of a doctrine that is designed to come into play only when parties are similarly situated. Surely, men and women are differently situated with respect to pregnancy, and therefore legal issues of child-bearing are best left to the different treatment approach. The project for feminists then is to develop principles of proportionality and citizenship capable of determining the extent to which and the contexts in which a legal regime may be required to or prohibited from differentiating between women and men.

MacKinnon is also highly critical of the different treatment approach, arguing that it is doomed to failure because it is built on affirmations of qualities (such as ability to nurture), typically thought of as feminine, that have their origin in male domination and female

9. MACKINNON, *supra* note 1, at 33.
10. MACKINNON, *supra* note 1, at 33.
11. MACKINNON, *supra* note 1, at 33.
12. MACKINNON, *supra* note 1, at 36.

subordination. She writes, "[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."[13] MacKinnon does not distinguish between social and biological differences. She believes that any legal rule centered on perceived differences between the sexes will inevitably result in a reinscription of male domination.

MacKinnon's critiques (that the gender neutral approach cannot handle real differences and the different treatment approach reaffirms values of female powerlessness) can best be understood as reactions to different theoretical positions within feminism. For Aristotle, the normative goal of equality is based on an objective description of groups or people that are alike or unalike. For feminists, describing gender similarities and differences involves normative arguments about whether political action to promote gender equality should attempt to create formal equality (the liberal feminist position) or to elevate traditionally feminine devalued traits to a higher level of cultural value and respect (the argument of the cultural feminists). The Aristotelian model of equality suggests that the answer is neither one nor the other, but both, depending on the context. The conflict, then between the gender neutral and the different treatment approaches is not a function of the Aristotelian model itself, but is rather a result of the felt need of feminists to embrace one school of thought or the other.

Not only does MacKinnon create a false dichotomy between the gender neutral and the different treatment approaches, but she fails to distinguish between feminist arguments for different treatment and court decisions that uphold gender classifications. She uses the term "special benefit" approach to refer to both, the somewhat bizarre inferences being that "cultural feminists" always support the Court's decision to uphold gender classifications and that the Court is motivated in upholding gender classifications by a desire to enhance cultural appreciation of so-called feminine characteristics. MacKinnon critiques gender classifications embedded in the law saying, the "double standard of these rules doesn't give women the dignity of the single standard."[14] As examples of the "special benefits" holdings, she cites cases such as *Kahn v. Shevin*,[15] upholding a statute permitting a partial inheritance tax deduction for widows but not widowers; *Schlesinger v. Ballard*,[16]

13. MACKINNON, *supra* note 1, at 39.
14. MACKINNON, *supra* note 1, at 38.
15. 416 U.S. 351 (1974).
16. 419 U.S. 498 (1975).

upholding a regulation allowing women three years more than men to advance within the military before being discharged; *Dothard v. Rawlinson*,[17] upholding a rule prohibiting women from holding jobs requiring direct contact with male prisoners; *Michael M. v. Sonoma County Superior Court*,[18] upholding California's statutory rape law that criminalized only male sexual behavior; and *Doerr v. B.F. Goodrich*,[19] permitting an employment practice of excluding female workers from jobs that might cause birth defects in a fetus.[20]

It is not clear why MacKinnon refers to this group of results as part of a "special benefit rule" when the outcomes are, at best, inconsistent with regard to benefitting women. The first two, *Kahn v. Shevin* and *Schlesinger v. Ballard*, do seem like special benefits from the point of view of the women whose lives are directly affected by these regulations. In both cases, the regulations are designed to compensate for women's subordinate economic or social status. The statute in *Kahn v. Shevin* compensates (albeit minimally) for broad economic inequality between the genders. Similarly, the regulation in *Schlesinger* gives military women more time than men in which to be promoted in order to compensate them for rules denying women combat positions. It is more difficult to see the other three paternalistic results as special benefits for the women affected. *Dothard* and *Doerr*, for example, clearly inhibit women's economic autonomy without providing compensation. While it is possible to argue that the result in *Michael M.* provides a special benefit to women in that they are free from prosecution, regardless of their sexual activity,[21] the result in this case implicitly affirms the incapacity of young women meaningfully to consent to or participate in heterosexual activity. MacKinnon has collapsed the difference between feminist approaches to equality and federal court opinions that either uphold gender classifications or reject them. Because the courts have been inconsistent in protecting women's interest and eroding male dom-

17. 433 U.S. 321 (1977).

18. 450 U.S. 464 (1981).

19. 484 F. Supp. 320 (N.D. Ohio 1979).

20. MacKinnon's article was published before the Supreme Court found that a similar employment scheme violated Title 7 of the Civil Rights Act of 1964 in UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

21. Interestingly, none of the justices writing opinions in *Michael M.* seemed to notice that the statute permits sexual activity between women or girls of any age. It is hard to know what the outcome would be if a case arose concerning sexual activities between two underage men. To the extent that the Court relies on a statutory purpose of preventing teenage pregnancy in maintaining that the parties are differently situated, gay male activity between minors would also be permissible although it seems highly unlikely that the California legislature intended this result.

ination, the feminist analyses must be flawed, so the theory goes.

Just as it is unclear why MacKinnon calls court decisions upholding gender classifications "special benefit rules," it is unclear why she refers to the cumulative impact of these cases as a "doctrinal embarrassment."[22] Perhaps she means that the gender classifications themselves are embarrassing because they rest on perceived feminine flaws, or perhaps she means that the courts have behaved in an embarrassing manner because they have been inconsistent in their interpretations of how gender differences may be evaluated and used to disadvantage women. If the latter is the case, then the problem may not be in the differences approach itself, but rather in the courts' unwillingness to weigh the value of equality as a compelling government interest and in the lack of guidance courts have in determining whether gender classifications (or facially neutral classifications that have a disparate gendered impact) promote or impede full citizenship for both genders.

MacKinnon is correct that under current equality doctrine, the courts have no way of differentiating between statutes that exclude because of gender and those that use gender as a classification in order to promote full citizenship. There is no Wechslerian "neutral principle"[23] equipped to this task. However, MacKinnon's method of identifying practices of true, male domination is not necessarily a more reliable guide than the current approach of trying to define real differences.

III. The Problem of Dominance

MacKinnon distinguishes her "dominance approach" to sex discrimination from traditional doctrine that focuses on gender differences rather than gender domination. MacKinnon's approach "centers on the most sex-differential abuses of women as a gender," including both conditions of "material desperation" and "violence against women," a category in which she includes rape and domestic violence, and (more problematically) pornography and prostitution.[24] Rather than focusing on whether classifications are reasonable or unreasonable, MacKinnon's approach to equality doctrine starts by identifying (through the experiential method of consciousness-raising) what she believes to be gendered abuses. After identifying abuses, the only equality question

22. *See* MacKinnon, *supra* note 1, at 33.

23. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

24. *See* MacKinnon, *supra* note 1, at 40-41.

becomes determining an appropriate remedy for manifest inequalities. "Once no amount of difference justifies treating women as subhuman, eliminating that is what equality law is for."[25] In other essays, MacKinnon elaborates on how her equality theory could be used to challenge state actions that promote or perpetuate conditions of women's subordination.[26]

MacKinnon rejects the differences approach to equality, at least in part, because of the methodological problems involved in reaching descriptive and normative judgements about what gender differences exist now and ought to exist in the future. MacKinnon's own approach, however, does not resolve the methodological problem of determining what social institutions require remedial action in order to improve the status of women. Nor does her approach reveal the kinds of remedies that are appropriate.

The domination theory is totalizing and excessive. It posits a world in which men have absolute control and women are utterly lacking in agency and subjectivity.[27] Not only is any gender neutral standard intrinsically male (and therefore bad by definition), but any difference between men and women (MacKinnon does not differentiate between biological difference and social difference) is simply a power discrepancy in need of redistribution. Her implication is that women who achieve career success in historically male professions are gender traitors in that they are upholding a male standard, whereas women who gain pleasure by fulfilling traditional roles of wife and mother are suffering from false consciousness. MacKinnon fails to distinguish adequately between different groups of women, preferring to speak of "all women." In so doing, she underestimates the difficulty of determining what is an institution of gender domination and what should be done about it.[28]

The issue of pornography, for example, illustrates how her theory

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25. MACKINNON, *supra* note 1, at 43.

26. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991). *See also* Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

27. *See* Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's* TOWARD A FEMINIST THEORY OF THE STATE, 100 YALE L.J. 2247 (1991) (book review) (critiquing MacKinnon for failing to describe feminine sexuality as anything other than victimization).

28. *See* KENT GREENAWALT, LAW AND OBJECTIVITY, 136-39 (1992) (arguing that although a law may disadvantage a certain group, such as women, it may still be preferable to many alternatives).

of dominance fails to take into account differences among women. While she claims to speak for a jurisprudence of "all women," the remedies that follow inevitably from her theory are incapable of benefiting the entire class she seeks to represent. By including pornography in the category of violence against women, MacKinnon implicitly accepts as natural and immutable that all women are victims of this institution. Her practical solution has been to press for the elimination of pornography.[29] MacKinnon's theory, asserting that pornography harms women, ignores the questions of which women may be injured by it, whether any women benefit, and how this should affect the analysis. It requires a strong dose of paternalism to argue that women who gain erotic pleasure from pornography are actually injured by it and simply suffering from false consciousness.[30] A paternalistic attitude is also at the root of any all-encompassing statement asserting that all those who act in pornographic movies or pose for pornographic photographs are necessarily injured by the activity. To the extent that women or men willingly consent to or participate in creating sexually explicit representations, why should MacKinnon's preferences substitute for theirs? MacKinnon is highly critical of the Court's paternalism in *Dothard* and *Doerr*, but she doesn't adequately distinguish her own efforts to prevent women from making "bad choices" from those of the legislature and the Court.

For many, receiving relatively substantial monetary rewards for posing naked may be preferable to working in a low-paying, low-status profession outside the sex industry. Can it be said from the point of view of an outsider that the humiliation of one is worse than that of the other? MacKinnon would certainly agree that women are frequently sexually denigrated without their consent and without remuneration. Is it absurd to imagine that those who willingly make themselves subjects of pornography for financial gain may actually attain a position of rela-

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29. MacKinnon's efforts have included proposing legislation in Minneapolis and Indianapolis that would "prevent and prohibit" the institution of pornography by designating various sexual depictions of women as civil rights violations, and providing for civil damages and equitable relief. For the relevant sections of the defeated Minneapolis statute, see David Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENTARY 147, 181 (1985).

30. I use the term "pornography" to refer to sexually explicit images, written or visual, whose primary purpose is to cause sexual arousal in a reader or viewer. However, even if one accepts MacKinnon's definition of pornography as the "sexually explicit subordination of women" the analysis does not change. Women who have engaged in the enterprise of consciousness raising may still gain erotic pleasure through pornography under either definition. See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) for a discussion of feminine erotic pleasure and The Story of O.

tively greater power?[31] Furthermore, because women's sexuality has historically been thought of as either nonexistent or deviant, explicit depictions of sexuality may provide important avenues for feminist resistance to male domination.

If it can be said that pornography hurts women, that statement must be limited by the stipulation that the term women refers only to certain subclasses of women. The first subclass consists of actors in the sex industry who are harmed through their participation. The second subclass consists of those nonparticipant women who are victims of abuse that may, in part, be related to the prevalence of sexual depictions of women. (Include within this category are those women who may be harmed by conscious and unconscious male responses to pornography.) The final subclass consists of those who simply dislike pornographic images (In which case they are free to register their disapproval in the market by not buying materials they find offensive or by producing alternative erotic visions. These are the classic economic responses of exit and competition).

Any solution that might benefit one class of these injured parties might cause further damage to another group of women. For example, if traffic in pornography were criminalized or were subject to massive civil liability that might lead to a quantitative reduction in the availability of sexually explicit materials. Gendered injuries caused by male consumption of pornography may decrease. The industry itself, however, would probably become more of an underground business than it currently is, thereby leading to a decline in economic opportunities for women within the sex industry, which in all probability would not be compensated for by expansion in non-sexual employment opportunities, and greater incidents of physical injury to sex workers.

What is the point of stuffing all these women into these neat, tidy, analytical boxes in which I'm sure they must be suffocating? Are the women in my boxes worse off than those drowning in MacKinnon's undifferentiated sea of all women? The point here is not to propose a solution to the feminist pornography debate. Rather, this discussion of pornography leads to the conclusion that the process of locating institutions of male domination is not as simple as MacKinnon implies. Even if one were to accept her view that pornography is currently an instru-

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31. See SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (Frederique Delacoste & Pricilla Alexander eds., 1987) for personal accounts tending to answer this question in the negative.

ment of male domination, the remedy is far from intuitively obvious given that many women have a substantial stake in the industry.

Finally, while MacKinnon is at best skeptical about the role the state currently plays as a perpetuating agent in male domination, her own theory has no internal limit on the power the state may use to remedy male domination.

IV. Conclusion

MacKinnon has addressed herself to uncovering areas of the law that promote or protect male domination. She would use equal protection arguments to challenge these government actions. While her theory is compelling, it paints the two paths of the differences approach as oppositional rather than aligned, thereby leading MacKinnon to underestimate the potential value of the Aristotelian model of equality for combatting sex discrimination. Further, her essentialist view of gender, which fails to take account of intragender difference, and her monolithic view of male domination seem to push toward a new kind of female powerlessness, but with a feminist, maternalist twist. Feminist legal advocates should not abandon the ground of difference in favor of MacKinnon's version of equality.