

CRITICAL LEGAL THEORY

Edited by
Costas Douzinas and Colin Perrin

CRITICAL CONCEPTS IN
LAW



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Critical Concepts in Law

*Edited by Costas Douzinas and
Colin Perrin*

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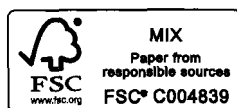
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Part 5

FEMINISM, GENDER, AND SEXUALITY

FEMINISM, MARXISM, METHOD, AND THE STATE

Towards feminist jurisprudence

Catharine A. MacKinnon

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I

Feminism has no theory of the state. It has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctively feminist account of gender inequality.¹ Sexual objectification, the central process within this dynamic, is at once epistemological and political.² The feminist theory of knowledge is inextricable from the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.

The perspective from the male standpoint³ enforces woman's definition, encircles her body, circumlocutes her speech, and describes her life. The male perspective is systemic and hegemonic. The content of the signification "woman" is the content of women's lives. Each sex has its role, but their stakes and power are not equal. If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective. And they are connected. In this context, objectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it. Sexual metaphors for knowing are no coincidence.⁴ The solipsism of this approach does not undercut its sincerity, but it is interest that precedes method.

Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a

dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred. If women had consciousness or world, sex inequality would be harmless, or all women would be feminist. Yet we have something of both, or there would be no such thing as feminism. Why can women know that this—life as we have known it—is not all, not enough, not ours, not just? Now, why don't all women?⁵

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

This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect.⁷ Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy. Feminism claims the voice of women's silence, the sexuality of our eroticized desexualization, the fullness of "lack," the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence. This approach is more complex than transgression, more transformative than transvaluation, deeper than mirror-imaged resistance, more affirmative than the negation of our negativity. It is neither materialist nor idealist; it is feminist. Neither the transcendence of liberalism nor the determination of materialism works for us. Idealism is too unreal; women's inequality is enforced, so it cannot simply be thought out of existence, certainly not by us. Materialism is too real; women's inequality has never not existed, so women's equality never has. That is, the equality of women to men will not be scientifically provable until it is no longer necessary to do so. Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. If feminism is revolutionary, this is why.

Feminism has been widely thought to contain tendencies of liberal feminism, radical feminism, and socialist feminism. But just as socialist feminism has often

amounted to marxism applied to women, liberal feminism has often amounted to liberalism applied to women. Radical feminism is feminism. Radical feminism—after this, feminism unmodified—is methodologically post-marxist.⁸ It moves to resolve the marxist-feminist problematic on the level of method. Because its method emerges from the concrete conditions of all women as a sex, it dissolves the individualist, naturalist, idealist, moralist structure of liberalism, the politics of which science is the epistemology. Where liberal feminism sees sexism primarily as an illusion or myth to be dispelled, an inaccuracy to be corrected, true feminism sees the male point of view as fundamental to the male power to create the world in its own image, the image of its desires, not just as its delusory end product. Feminism distinctively as such comprehends that what counts as truth is produced in the interest of those with power to shape reality, and that this process is as pervasive as it is necessary as it is changeable. Unlike the scientific strain in marxism or the Kantian imperative in liberalism, which in this context share most salient features, feminism neither claims universality nor, failing that, reduces to relativity. It does not seek a generality that subsumes its particulars or an abstract theory or a science of sexism. It rejects the approach of control over nature (including us) analogized to control over society (also including us) which has grounded the “science of society” project as the paradigm for political knowledge since (at least) Descartes. Both liberalism and marxism have been subversive on women’s behalf. Neither is enough. To grasp the inadequacies for women of liberalism on one side and marxism on the other is to begin to comprehend the role of the liberal state and liberal legalism⁹ within a post-marxist feminism of social transformation.

As feminism has a theory of power but lacks a theory of the state, so marxism has a theory of value which (through the organization of work in production) becomes class analysis, but a problematic theory of the state. Marx did not address the state much more explicitly than he did women. Women were substratum, the state epiphenomenon.¹⁰ Engels, who frontally analyzed both, and together, presumed the subordination of women in every attempt to reveal its roots, just as he presupposed something like the state, or state-like social conditions, in every attempt to expose its origins.¹¹ Marx tended to use the term “political” narrowly to refer to the state or its laws, criticizing as exclusively political interpretations of the state’s organization or behavior which took them as *suigeneris*. Accordingly, until recently, most marxism has tended to consider political that which occurs between classes, that is, to interpret as “the political” instances of the marxist concept of inequality. In this broad sense, the marxist theory of social inequality has been its theory of politics. This has not so much collapsed the state into society (although it goes far in that direction) as conceived the state as determined by the totality of social relations of which the state is one determined and determining part—without specifying which, or how much, is which.

In this context, recent marxist work has tried to grasp the specificity of the institutional state: how it wields class power, or transforms class society, or

responds to approach by a left aspiring to rulership or other changes. While liberal theory has seen the state as emanating power, and traditional marxism has seen the state as expressing power constituted elsewhere, recent marxism, much of it structuralist, has tried to analyze state power as specific to the state as a form, yet integral to a determinate social whole understood in class terms. This state is found "relatively autonomous." This means that the state, expressed through its functionaries, has a definite class character, is definitely capitalist or socialist, but also has its own interests which are to some degree independent of those of the ruling class and even of the class structure.¹² The state as such, in this view, has a specific power and interest, termed "the political," such that class power, class interest expressed by and in the state, and state behavior, although inconceivable in isolation from one another, are nevertheless not linearly or causally linked or strictly coextensive. Such work locates "the specificity of the political" in a mediate "region"¹³ between the state as its own ground of power (which alone, as in the liberal conception, would set the state above or apart from class) and the state as possessing no special supremacy or priority in terms of power, as in the more orthodox marxist view.

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

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

gradualist reform, each apparent gain deceptive or cooptive, and each loss inevitable.

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

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

Feminism has descriptions of the state's treatment of the gender difference, but no analysis of the state as gender hierarchy. We need to know. What, in gender terms, are the state's norms of accountability, sources of power, real constituency? Is the state to some degree autonomous of the interests of men or an integral expression of them? Does the state embody and serve male interests in

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

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

Formally, the state is male in that objectivity is its norm. Objectivity is liberal legalism's conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality. If rationality is measured by point-of-viewlessness, what counts as reason will be that which corresponds to the way things are. Practical will mean that which can be done without changing anything. In this framework, the task of legal interpretation becomes "to perfect the state as mirror of the society."¹⁷ Objectivist epistemology is the law of law. It ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own highest ideal of fairness. Like the science it emulates, this epistemological stance can not see the social specificity of reflection as method or its choice to embrace that which it reflects. Such law not only reflects

a society in which men rule women; it rules in a male way: "The phallus means everything that sets itself up as a mirror."¹⁸ The rule form, which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence. A closer look at the substantive law of rape¹⁹ in light of such an argument suggests that the relation between objectification (understood as the primary process of the subordination of women) and the power of the state is the relation between the personal and the political at the level of government. This is not because the state is presumptively the sphere of politics. It is because the state, in part through law, institutionalizes male power. If male power is systemic, it *is* the regime.

II

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

The point of defining rape as "violence not sex" or "violence against women" has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors, with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable.²³ Instead of asking, what is the violation of rape, what if we ask, what is the nonviolation of intercourse? To tell what is wrong with rape, explain what is right about sex. If this, in turn, is difficult, the difficulty is as instructive as the difficulty men have in telling the difference when women see one. Perhaps the wrong of rape has proven so difficult to articulate²⁴ because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance.²⁵

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

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

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