

# Tulsa Law Review

---

Volume 46  
Number 1 *Symposium: Catharine MacKinnon*

---

Fall 2010

## Three Snapshots of Scholarly Engagement: Catharine MacKinnon's Ethical Entrenchment, Transformative Politics, and Personal Commitment

Adrienne D. Davis

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Adrienne D. Davis, *Three Snapshots of Scholarly Engagement: Catharine MacKinnon's Ethical Entrenchment, Transformative Politics, and Personal Commitment*, 46 *Tulsa L. Rev.* 15 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol46/iss1/5>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# THREE SNAPSHOTS OF SCHOLARLY ENGAGEMENT: CATHARINE MACKINNON'S ETHICAL ENTRENCHMENT, TRANSFORMATIVE POLITICS, AND PERSONAL COMMITMENT

Adrienne D. Davis\*

Those who know me know that very little awes me. Those who know me very well know that one thing that does awe me is Catharine MacKinnon and her work. As I always tell my own students for props, I was a student in Professor MacKinnon's class during her year-long challenge to the Yale Law School curriculum and hiring process for faculty. In fact, I have three sets of photographs in my office: several of my family, one of Billie Holiday, and one snapped at the *Yale Law Journal* Centennial Banquet in 1991 that shows Professors MacKinnon and Derrick Bell, another senior intellectual icon in legal academia who transformed how we think about law and justice and who, not uncoincidentally, was on strike from Harvard Law School while Professor MacKinnon was visiting at Yale.<sup>1</sup> When visitors to my office ask about that photo, I tell them that these two scholars are my intellectual forebears, academic and activist heroes who have inspired my scholarship and career. Like Derrick Bell — as a teacher, as a writer, as an activist, and a lawyer — Professor MacKinnon has embodied the subject of this essay: the engaged scholar.

One of Professor MacKinnon's germinal works calls attention to the political effects of modifiers.<sup>2</sup> So, I was intrigued by the modifier of the conference panel that sparked this essay, the "engaged" scholar. I was struck by the quite distinct connotations invoked by this modifier. Of course there is the use I believe was envisioned by the plenary organizers as characterizing Professor MacKinnon's stunning body of legal work: engaged as in connected to something, seriously paying attention to consequences, rigorous and sustained involvement with a subject. Yet there are other connotations of engaged that I think are also helpful in understanding the scholar modified, and, hence,

---

\* Vice Provost and William M. Van Cleve Professor of Law, Washington University. This essay was sparked by a plenary session on Catharine MacKinnon's work, "Feminism and Law: Women's Lives and the Law" at the 2005 Annual Meeting of the AALS, published in Catharine A. MacKinnon, *Engaged Scholarship as Method and Vocation*, 22 *YALE J.L. & FEMINISM* 193 (2010). I would like to thank Gerald Torres for organizing the plenary and inviting me to participate. I also thank Jessica Hille, who is a wonderful research assistant and also interlocutor. Finally, I thank Professor MacKinnon herself for her inspiration — intellectual, political, and personal. She changed the perspective from which someone like me could view the landscape of law and possibilities for justice.

1. See, e.g., Fox Butterfield, *Professor Steps Up Fight with Harvard*, *NY TIMES*, Feb. 28, 1992, at A12.

2. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *FEMINISM UNMODIFIED*].

the import of Professor MacKinnon's work for sex equality and jurisprudence more generally. There is also engaged, as in to have ceased negotiations and begun actual fighting, to have stopped hand-wringing and undertaken serious offensive or defensive measures. Finally, there is the meaning least invoked among legal scholars, yet the most commonly associated with the modifier: engaged, as the liminal status between being single and married. That is, a public proclamation of connection and intention sustained not by institutionally imposed obligation but by personal commitment. In this sense, it is a connection characterized typically by confidence in past efforts and faith in the future.

This short essay offers three snapshots of Catharine MacKinnon's work, exemplifying each of these common connotations of engagement — or the scholar modified.

The first snapshot comes from several pieces that proved germinal for legal theory, feminist and not. *Feminism, Marxism, Method and the State: An Agenda for Theory* and *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, both published in the influential feminist journal *Signs*, and MacKinnon's essays on difference and dominance published in her second book, *Feminism Unmodified*, each portray that first, probably most anticipated connotation of engagement.<sup>3</sup> Again, that is to take something seriously; to treat it rigorously rigorously and with sustained reflection; involvement; connection; paying attention to what is going on.

In her two *Signs* articles, MacKinnon sets out structuralist accounts of gender as an operative system. She compares sexuality with labor as the fulcrum of gender oppression, demonstrating how, like Marxism, feminism should be a theory of power: its derivation and its maldistribution. (In fact, MacKinnon's work anticipates the most recent turn to distributive justice accounts of legal rules.<sup>4</sup>) If Marxism exposes value as social creation, MacKinnon's feminism exposes desire as socially relational and historically contingent.<sup>5</sup> Then, in an anthology of essays published in *Feminism*

3. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1983) [hereinafter *An Agenda for Theory*]; Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635 (1983); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED, *supra* note 2, at 32, 32 (1984) [hereinafter *Difference and Dominance*].

4. See, e.g., Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 742 (1999) (proposing that "distributive criteria should guide the distribution of the burden of the public project, activity, or regulation" in takings jurisprudence); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235 (using game theory to identify criteria for altering welfare policy).

5.

As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. 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 benefit of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue. Marxism and feminism are theories of power and its distribution: inequality. They provide accounts of how social arrangements of patterned disparity can be internally rational yet unjust. But their specificity is not incidental. In marxism to be deprived of one's work, in feminism of one's sexuality, defines each one's conception of lack of power per se.

*An Agenda for Theory*, *supra* note 3, at 516 (footnotes omitted). See also CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 3 (1991) [hereinafter TOWARD A FEMINIST THEORY OF THE STATE] ("Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away.").

*Unmodified*, she distinguished her own account of gender from those generated in litigation and law reviews through the 1970s. Formal equality sought to treat women like men, that is, to eliminate gender specific regulation of women. What MacKinnon termed difference feminism urged that equality could not be achieved without taking account of women's differences from men and giving women resources to account for those differences.<sup>6</sup> This had resulted in an apparent contradiction between sameness and difference visions of sex equality. Professor MacKinnon resisted this state of theoretical affairs, rejecting both the contradiction and the theories that seemed to spawn it. She argued that each of these apparently dichotomous accounts of gender kept and reinforced men as its measuring point: the extent to which women were the same as or different from men.<sup>7</sup>

In contrast, her account of gender as dominance argued that gender is not about how men and women are the same or different. Rather, gender is about the power assigned to those differences: "Gender is a . . . question of power, specifically of male supremacy and female subordination . . . The dominance approach centers on the most sex-differential abuses of women as a gender, abuses that sex equality law in its difference garb could not confront."<sup>8</sup>

The chief architect of what I have elsewhere labeled the sex/violence axis of sex equality,<sup>9</sup> Professor MacKinnon linked together the Marxism and method pieces with her account of gender inequality as dominance to demonstrate how apparently unrelated

6.

Upon further scrutiny, two alternate paths to equality for women emerge . . . The leading one is: be the same as men. This path is termed gender neutrality doctrinally and the single standard philosophically . . . To women who want equality yet find that you are different, the doctrine provides an alternate route: be different from men. This equal recognition of difference is termed the special benefit rule or special protection rule legally, the double standard philosophically. It is in a rather bad odor . . . The philosophy underlying the difference approach is that sex *is* a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine is to make normative rules conform to this empirical reality by granting women access to what men have access to: to the extent that women are no different from men, we deserve what they have. The difference branch, which is generally seen as patronizing but necessary to avoid absurdity, exists to value or compensate women for what we are or have become distinctively as women (by which is meant, unlike men) under existing conditions.

*Difference and Dominance*, *supra* note 3, at 33. See also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 (1991) [hereinafter *Reflections on Sex Equality*] ("The first step in these legal attempts to advance women was to demand women's inclusion on the same terms as men. Laws that had provided "special protections" for women were to be avoided. The point was to apply existing law to women as if women were citizens – as if the doctrine was not gendered to women's disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies.") (citations omitted).

7.

Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.

*Difference and Dominance*, *supra* note 3, at 34.

8. *Id.* at 40.

9. Adrienne D. Davis & Joan C. Williams, *Symposium: Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture Foreword*, 8 AM. U.J. GENDER SOC. POL'Y & L. 1 (2000); Adrienne D. Davis, *Foreword, Straightening It Out: Joan Williams on Unbending Gender, Symposium Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U.L. REV. 823 (2000).

forms of sexual subordination were interconnected as manifestations of sexual violence.<sup>10</sup> Again insisting on the power rubric, she rejected efforts to brand these acts as morally and legally deviant, and hence exceptional, but rather, as intrinsically normalized manifestations of gender dominance.<sup>11</sup> She set out the contours of dominance feminism in these different doctrinal regimes to demonstrate its impact on how sex equality is practiced, or rejected; on how feminism is conceived within the academy; and finally, on liberal jurisprudence more generally. She took on every sacred cow of legal liberal theory — consent, agency, choice, the first amendment *uber alis*, privacy, liberty — showing how each interferes with a feminist project committed first and foremost to sex equality. It was no longer theoretically possible to claim, dismiss, or accuse feminist jurisprudence as a mere subset of liberal theory.

The mark of the scholar modified, the scholar engaged as serious and rigorous and paying attention, is not, I think, generating consensus or agreement. Because certainly we do not have that in Professor MacKinnon's case. But what we do have is an account of power and of feminist theory distinct from extant jurisprudential structures that set the terms for feminist debates generations to come. Her structural account — compelling in its explanatory power, its complete interface with the real world, its call for distinct epistemological standards, its normative bent — demanded engagement from all of us who called ourselves feminist. For some of us it provided the conceptual underpinning for our own scholarship. For others, challenging its assumptions and proffering alternative ones became a life's work. In either event, her insistence on method and epistemology connected to ontology helped to consolidate feminist legal theory as a distinct jurisprudence.

The second model of the scholar modified is the scholar engaged, as in to move beyond strategizing, negotiating, and hoping as one's only mode of interaction and to actually fight, change, and transform. Relatedly, to initiate or respond to attacks by one's enemies. At the same time that I was delivering these remarks at a conference, at a contemporaneous session on gay rights and democracy Chai Feldblum invoked the *Star*

---

10.

Looking at the facts of the abuses of women all at once, you see that a woman is socially defined as a person who, whether or not she is or has been, can be treated in these ways [abused] by men at any time, and little, if anything, will be done about it. This is what it means when feminists say that maleness is a form of power and femaleness is a form of powerlessness ... In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children ... Gender has no basis in anything other than the social reality its hegemony constructs. Gender is what gender means.

CATHARINE MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED, *supra* note 2, at 171,173 (emphasis in the original) [hereinafter *Francis Biddle's Sister*]. See also *Reflections on Sex Equality*, *supra* note 6, at 1298 ("The inequality of women to men deserves a theory of its own. The status of women resembles other bases for inequality, but, like every inequality, is also particular and unique. Women's situation combines unequal pay with allocation to disrespected work; sexual targeting for rape, domestic battering, sexual abuse as children, and systematic sexual harassment; depersonalization, demeaned physical characteristics, and use in denigrating entertainment; deprivation of reproductive control and forced prostitution.") (citations omitted).

11. "If one believes women's accounts of sexual use and abuse by men; if the pervasiveness of male sexual violence against women substantiated in these studies is not denied, minimized, or excepted as deviant or episodic ... if violation of women is understood as sexualized on some level — then sexuality itself can longer be regarded as unimplicated." TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 5, at 127.

*Trek* franchise, describing that point in all of the shows when the various captains stopped trying to establish radio contact with the enemy alien species that was bombarding the ship and began to fire back.<sup>12</sup> And let me be clear, the enemy alien species here is not characterized by its biology, that is, it is not men, but rather, as MacKinnon has pointed out repeatedly, by its ideas and its political commitments.<sup>13</sup>

Here I would say Professor MacKinnon embodies one of the best and most distinctive features of the feminist legal project: its efforts to implement its theoretical and doctrinal critiques in the world. Many who identify with feminist scholarship obviously do this as well. They try to change the lives of real people, to solve their problems. And, critically, to take the experiences of real people, mainly non-lawyers, and use those experiences to craft our jurisprudential agenda and critique. Another one of MacKinnon's germinal articles, one my students love, is her essay on consciousness-raising as feminist method, which borrows from the feminist movement on the ground to argue the need for women to talk and listen to each other, to move the reference point for truth and what counts as verification and thereby the definition of reality.<sup>14</sup>

Her efforts to use the dominance analytic to achieve sex equality are legion: the anti-pornography ordinances she co-drafted with Andrea Dworkin that were subsequently adopted in Indianapolis and Minneapolis; her work against prostitution, kidnapping, and pimping. Subsequently, she was one of several feminist and human rights architects who worked to have rape in military campaigns labeled as not just soldiers run amuck or consensual sexual play, but as a human rights violation and international war crime.<sup>15</sup> In describing slaveholders' use of rape against the enslaved

12. Chai Feldblum, Professor, Georgetown University, Remarks at Gay Rights and Democracy Workshop at AALS Annual Meeting 2005 (Jan. 6, 2005).

13. She explains, "Gender is a social system that divides power. It is therefore a political system." TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 5, at 160. Elsewhere, she elaborates, "Men are damaged by sexism. (By men I mean the status of masculinity that is accorded to males on the basis of their biology but is not itself biological.) But whatever the damage of sexism to men, the condition of being a man is not defined as subordinate to women by force." *Francis Biddle's Sister*, *supra* note 10, at 170 (emphasis in the original).

14.

Consciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement. In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women's experience, from the perspective of that experience. Because marxists tend to conceive of powerlessness, first and last, as concrete and externally imposed, they believe that it must be concretely and externally undone to be changed. Women's powerlessness has been found through consciousness raising to be both internalized and externally imposed, so that, for example, femininity is identity to women as well as desirability to men. The feminist concept of consciousness and its place in social order and change emerge from this practical analytic. What marxism conceives as change in consciousness is not a form of social change in itself. For feminism, it can be, but because women's oppression is not just in the head, feminist *consciousness* is not just in the head either. But the pain, isolation, and thingification of women who have been pampered and pacified into nonpersonhood — women "grown ugly and dangerous from being no-body for so long" — is difficult for the materially deprived to see as a form of oppression, particularly for women whom no man has ever put on a pedestal.

*An Agenda for Theory*, *supra* note 3, at 519-20 (footnotes omitted). See also TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 5, at 104 ("In consciousness raising, women learn that they have learned that men are everything, women their negation, but the sexes are equal ... If 'Men are all, women their negation' is taken as social criticism rather than as simple description, it becomes clear for the first time that women are men's equals, everywhere in chains.")

15.

As to men's so-called private acts against women, wartime is something of a legal exception . . .

black community Angela Yvonne Davis showed how men wield sexual abuse against enemy women not only as individuals, but as a weapon of political terror.<sup>16</sup> Shifted forward 150 years, rape remains not just a “private” matter, or an issue of failed military discipline, but, as Davis put it, a mechanism of sexual terrorism.<sup>17</sup>

Let me say a little bit more about one of Professor MacKinnon’s particularly successful and revolutionary engagements with inequality: her work transforming sexual harassment. In MacKinnon’s mapping of why sexual harassment constitutes sex discrimination, one sees both the analytic power and complexity of her model. Her classic articulation of sexual harassment rejected the common understanding in which “[p]hysical closeness and daily contact seem to lend the appearance of individuation to relationships . . .”<sup>18</sup> Instead, she grounded sexual harassment in women’s material and economic needs, in other words, not in male fantasies but in women’s real lives as workers:

Work is critical to women’s survival and independence. Sexual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women . . . [S]exual harassment at work undercuts woman’s potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically.<sup>19</sup>

Sex was what employers and colleagues expected from the women who worked with them. (Much contemporary television reinforces this — introducing women as workforce peers has also rendered sex as an expected outcome of any co-ed workforce. It

Atrocities by soldiers against civilians, so long as they are in the scope of armed conflict, are always seen as essentially state acts. But men do in war what they do in peace. When it comes to women as civilian casualties, the complacency that surrounds peacetime extends to war, however the laws read . . . The more a conflict can be framed as within a state, as a civil war, as social, as domestic, the less human rights are recognized to be violated. The closer the fight comes to home, the more feminized the rights and the victims (no matter their sex) become, and the less likely international human rights will be found to be violated, no matter what was done.

CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 39-40 (2007). See also Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5 (1993); Catharine A. MacKinnon, *Women’s September 11<sup>th</sup>: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1 (2006) (contending new international legal architecture for combating violence by non-state actors can and should be utilized to combat violence against women).

16. ANGELA Y. DAVIS, *Reflections on the Black Woman’s Role in the Community of Slaves*, in THE ANGELA Y. DAVIS READER 111, 122-24 (Joy James ed., 1998) (originally published in 32-34 THE BLACK SCHOLAR 3, 13 (Dec. 1971).

17.

In confronting the black woman as adversary in a sexual contest, the master would be subjecting her to the most elemental form of terrorism distinctively suited for the female: rape. Given the already terroristic texture of plantation life, it would be as potential victim of rape that the slave woman would be most unguarded. Further, she might be most conveniently manipulable if the master contrived a ransom system of sorts, forcing her to pay with her body for food, diminished severity in treatment, the safety of her children, etc.

*Id.* at 123.

18. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 7 (1979) [hereinafter *SEXUAL HARASSMENT OF WORKING WOMEN*].

19. *Id.*

makes one wonder how earlier, single-sex shows about the work place ever worked.) This also drafted the workplace as a primary site to produce and reinforce gendered norms.

Feminists may disagree about what behavior comprises sexual harassment, but I do not know any feminist who believes that sexual harassment of workers should be permitted under Title VII.<sup>20</sup> Even more importantly, I do not know any working woman who wishes things were back the way they were “before,” when they could be fired at will for refusing to have sex or could be subjected to unwanted sexual advances ranging from the crude and annoying, to the threatening and hostile, to the deeply ugly and violent.

There is another aspect to MacKinnon’s work on sexual harassment that I think exemplifies her as a scholar modified: that is the very real presence of non-white women in her theory and activism. In her maps of sexual harassment, MacKinnon reminds us of points made by recently deceased co-founder of NOW and the National Women’s Caucus, Shirley Chisholm; architects of black feminist theory in the early 1970s, Michele Wallace, Toni Cade Bambara, and Angela Yvonne Davis; and NOW co-founder and ERA advocate, Pauli Murray: that is the leadership of non-white women in the feminist movement.<sup>21</sup>

While many anti-feminists continue to caricature feminism and its sexual equality project as the provenance of white women, black women workers were among the first to bring sexual harassment claims, and, in a non-discriminatory fashion, they brought them against both white and black men. When one reads MacKinnon’s *Sexual Harassment of Working Women*, which helped articulate the doctrinal framework, one meets Margaret Miller, Paulette Barnes, Diane Williams, and Maxine Munford.<sup>22</sup> A black woman was the plaintiff in the Supreme Court case that established sexual harassment as sex discrimination in violation of Title VII. And, of course, Anita Hill became the public face of sexual harassment when she named now-Justice Clarence Thomas as an illegal harasser during his confirmation hearings in 1991.<sup>23</sup> The presence and passion of these

20. For instance, some argue for different applications, emphases, or conceptual underpinnings for sexual harassment doctrine. See, e.g., Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (contending the discriminatory wrong of sexual harassment is not sex per se but reinforcement of gender norms and stereotypes); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (criticizing sexual harassment doctrine for focusing on sexual behavior to exclusion of non-sexual but hostile behavior that reinforces gender hierarchies in workplaces).

21. See, e.g., ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (1981) (critical review of the women’s movement through the lens of class and racial struggles); DARLENE CLARK HINE & KATHLEEN THOMPSON, *A SHINING THREAD OF HOPE* 299, 300 (1998) (describing Chisholm’s 1972 bid for the presidency as early, and largely ignored, example of feminist activism); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011) (describing how Murray pioneered the analogies between race and sex discrimination that became a key strategy of the struggle for women’s legal rights and sex equality); *SAVORING THE SALT: THE LEGACY OF TONI CADE BAMBARA* (Linda Janet Holmes & Cheryl A. Wall eds., 2007) (interdisciplinary essays exploring Bambara’s influence on feminist, anti-racist, and cultural thought); *THE BLACK WOMAN: AN ANTHOLOGY* (Toni Cade ed., 1970) (germinal collection of essays in black feminist thought); MICHELE WALLACE, *BLACK MACHO AND THE MYTH OF THE SUPERWOMAN* (1979);

22. MacKinnon describes the early cases these women litigate in detail. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 18, at 59-74; see also Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 LAW & SOCIAL INQUIRY 761, 775-782 (1998).

23. See, e.g., *RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE SOCIAL CONSTRUCTION OF REALITY* (Toni Morrison ed., 1992) (collection of interdisciplinary essays on the Hill/Thomas conflict and its broader social and political implications); Symposium, *Gender, Race and*

women did not escape MacKinnon's notice. She mused: "Black women's least advantaged position in the economy is consistent with their advanced position on the point of resistance. Of all women, they are most vulnerable to sexual harassment, both because of the image of black women as the most sexually accessible and because they are the most economically at risk. These conditions promote black women's resistance to sexual harassment and their identification of it for what it is."<sup>24</sup> In short, "[S]exual harassment can be both a sexist way to express racism and a racist way to express sexism."<sup>25</sup> Architect of intersectionality Kimberle Crenshaw concurs: "Racism may well provide the clarity to see that sexual harassment is neither a flattering gesture nor a misguided social overture but an act of intentional discrimination that is insulting, threatening, and debilitating."<sup>26</sup> And, as I have argued elsewhere in an essay on sexual harassment, since slavery, sexual subordination in the workplace has comprised a central tool of labor, sexual, and racial control. I noted that "[o]ne quite effective strategy among anti-feminists is to whitewash feminism, erasing the presence of women of color in feminism's ranks and leadership."<sup>27</sup> But when scholars fight real battles, they see that many of the bodies on the front lines of gender equality are non-white: they are incarcerated women, undocumented women, women trapped economically or by barbed wire or even guns in sweatshops.

Through her work in sexual harassment and in other equality regimes, MacKinnon embodies the scholar modified. This is not to say everyone agrees with her. I have met activists who adore Professor MacKinnon; I know activists who do not adore her so very much. The point is I know activists who know Professor MacKinnon, who know that she is as committed to the material world of real sex and gender as she is to law reviews and ideas. As we all know, visions of equality are always deeply contested. But the point here is that we cannot be crippled by uncertainty: we have to engage the world.

Finally, there is the scholar modified least associated with law or with the feminist juridical project: engagement as the liminal state before marriage, as in affianced. But, counter to our intuition that law is antithetical to romance, certainly a sentiment advanced by my students and one ascribed to feminist theory in particular, I would like to make the case that Professor MacKinnon's work exemplifies the best aspects of this sense of engagement. Here I mean to capture engagement as obligation, as public proclamation of commitment and connection not induced by legal or institutional sanction. In other words, you can leave if you want when you want. Illustrating my point, in a recent conversation with a male friend of mine I asked him if he and his fiancée had set a date for the wedding. He looked rather sheepish and replied, "How do you know when you're unengaged?" In contrast, no one ever says they are unsure whether they are divorced or still married. The point here is that MacKinnon as a scholar modified

---

*the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992) (symposium exploring various legal and social dimensions of Hill/Thomas hearings).

24. SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 18, at 53.

25. *Id.* at 30.

26. Kimberle Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill, in Race-ing Justice, En-gendering Power*, *supra* note 23, at 412.

27. Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine MacKinnon & Reva B. Siegel eds., 2004).

captures much about engagement that encourages us to recognize it as a distinct subjective state, because her own relationship to sex equality was not inspired or supported by institutional commandment or the promise of professional or career benefit.

I think my students today look at me and many of my colleagues and say, “Wow, being a legal feminist is pretty cool.” I am both grateful and relieved that they view feminism as a career, to not be thoroughly abjecting and utterly marginalizing. But, I was in law school when Catharine MacKinnon did not have a tenure track job in the United States. As I said earlier, not un-coincidentally, during these precise same years Derrick Bell was giving up his salary and health benefits to be on strike from Harvard Law School, and other first and second generation critical race scholars could not find academic jobs because of their politics, their methodology, and their commitment to engaging the real world, including law schools as part of that real world, by the way. Professor MacKinnon’s commitment to her field, to her students, to her scholarship, to her activism, was not inspired by the prospect of a permanent slot on the appointments committee, or better yet, veto power without the work, or by being on the front page of the glossy law school brochure, or even a spot on the NOW board. Quite the opposite in fact. It was inspired by her complete commitment to the feminist jurisprudential project, her pledge to re-gender the lives of real women and real men, to help alienated and marginalized students transform into feminist theorists, to help the disfranchised and frustrated metamorphose into litigants, and to putting the language of sex equality into the mouths of legislators and judges.

By 1991, when I started teaching, sex equality and feminist jurisprudence were marginally acceptable courses to teach. And regardless of what we do with those courses, whether we theorize dominance or Ginsburgian equality or Robin West’s relationality, Crenshaw’s intersectionality or Foucauldian sexuality, or do our own thing, those courses secure for us and our students intellectually and academically legitimate spaces to do our work. As my friend and mentor Stephanie Wildman reminded me, when she started teaching thirty-five years ago there was one feminist theory casebook, Ruth Bader Ginsburg and Herma Hill Kay’s legendary *Cases and Materials on Sex-Based Discrimination*.<sup>28</sup> Now there are at least eight, not including growing numbers on sexuality as a distinct field.

Another connotation of this form of engagement is its hope, its commitment to negotiation, its rejection of cynicism as a safe refuge, its faith in a different, better future. This is something extremely characteristic of the feminist juridical project — its ongoing optimism in the face of utterly depressing odds. Because, of course, much of the biggest opposition to feminist theory comes from women. When I teach Sex Equality and Feminist Legal Theory, my students and I spend a lot of time theorizing how feminism is different from various other justice projects, especially racial ones. While non-whites obviously disagree about the form equality should take and the best paths to reach it, there is overwhelming consensus in communities of color that equality should be a norm, that we want to be free, whatever that looks like, that we want rights, that we

---

28. *CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* (Kenneth M. Davidson et al eds., 1974). The casebook is now in its sixth edition. *CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* (Herma Hill Kay & Martha S. West, eds., 6<sup>th</sup> ed., 2006).

want to be treated with respect and dignity. Yet, part of what is so daunting about feminist work is that women routinely insist that we want no truck with that equality stuff. When it comes to freedom for women, we do not squabble about what it will look like, how it might feel; instead, we say, well, wait, does that mean I'll have to open the door for myself? Because, as many feminists, including MacKinnon, have pointed out, part of what makes gender so damned slippery is its simultaneous manifestation as subordination and privilege, forcing many women into unconscious, or conscious, cost/benefit calculations. It also is the case that while most non-whites learn some version of radical DuBoisian double consciousness at home, i.e., you are as good as anyone else and don't let anyone tell you different, in other words, a sense of racial pride, most little girls are not taught a similar lesson in unequivocal gender pride at our parents' knees. The point is that it requires a serious commitment, a deep-seated faith, to continue to theorize and call for sex equality against the insistence and condemnations of those we seek to liberate along with ourselves.

The immediate future of gender seems rather clear to me at the moment. Despite significant challenges already posed by queer communities and the \$60,000 question posed by gay marriage: will it or won't it challenge gender norms, as those of us doing feminist theory in the deep red states know, conventional gender seems relatively safe in the U.S. for the moment. Yet, the future of gender theory, particularly in the legal academy is far less clear. Feminists appear more divided than ever over the liberatory possibilities of sex and dominance as well as over appropriate alliances and coalitions: men? employers? the state? sexual minorities? As part of this flood of new work, at least some are rejecting the convenient caricatures; Catharine MacKinnon's work is being reread, more closely and thoughtfully I think than it has been in decades. As the trajectory of her arc across the legal world becomes more clear, certain aspects of her legacy are coming into view: the need to engage, the need to test theories and doctrinal interventions against real litigants, real people, real lives, real laws. The test is not how fancy the theory nor where the author teaches: it is what kind of equality would it produce. This, then, is feminist scholar modified.