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**FEMINIST THEORIES OF AUTONOMY  
AND THEIR  
IMPLICATIONS FOR RAPE LAW REFORM**

By

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Bachelor's Degree, Simpson College, Indianola, IA, 2003

Thesis

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**Feminist Theories of Autonomy and their Implications for Rape Law Reform**

**Chairperson: Dr. Bridget Clarke**

Liberal notions of autonomy have shaped our laws, and perhaps more importantly, the way we think about ourselves. In this paper, I discuss various theories of autonomy, and their problems – specifically their implications for understanding human subjects and their experiences. I am particularly concerned with the role of gender in these theories, and want to know whether women’s autonomy is meaningfully different than men’s autonomy – that is, if gender inequality significantly influences or determines women’s actual choices.

In chapter one, I discuss Joel Feinberg’s liberal theory of autonomy, which describes an unhindered, self-governing agent, free to pursue his or her own goals. In chapter two, I discuss some feminist responses to liberal theories, and lay out Catharine MacKinnon’s theory of dominance feminism. MacKinnon claims women have the capacity for autonomy, but pervasive systems of gender inequality do not allow them to exercise it. In chapter three, I discuss Kathryn Abrams’ theory of agency – a response to MacKinnon’s dominance feminism. Abrams thinks women’s autonomy is better described as partial or constrained as opposed to nonexistent. Abrams offers a rich conception of agency and challenges us to look at what counts as autonomous action in a new way.

In chapter four, I argue that the most comprehensive theory of autonomy will involve both MacKinnon and Abrams. While Abrams’ theory focuses on women’s struggles to exercise agency within systems of oppression, MacKinnon offers an explanation of the patriarchal systems that create and maintain those conditions.

Together, Abrams’ and MacKinnon’s theories can help us better understand situations in which women’s autonomy is called into question. Their analyses are particularly illuminating with regard to rape and other coercive sexual interactions. The law has difficulty determining what counts as rape – or rather, when sex becomes rape. In chapter five, I analyze three cases that do not fit the law’s current definition of rape. Abrams and MacKinnon show us how the law should be expanded to cover some of the more difficult cases.

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## CHAPTER ONE

### *Joel Feinberg and Liberal Theories of Autonomy*

Philosophers disagree about how to conceive of autonomy. In *The Theory and Practice of Autonomy*, Gerald Dworkin examines various theories of autonomy and finds it has been equated with “liberty, self-rule, sovereignty, freedom of the will, dignity, integrity, individuality, independence, responsibility, self-knowledge, self-assertion, critical reflection, freedom from obligation and absence of external causation.”<sup>1</sup>

Notwithstanding the dispute among philosophers, most theories of autonomy can be divided into two major categories: those that focus on the independence in acts and agents, and those that focus on the rationality in acts and agents. Independence-focused theories of autonomy see agents as being independent from something, and this freedom may be “more or less complete.”<sup>2</sup> This type of autonomy is a desirable trait, and agents must work hard to achieve it. On the other hand, rationality-focused theories of autonomy describe it as an inherent characteristic of humans, a trait they either possess or lack. In other words, agents cannot be more or less autonomous. This type of autonomy cannot be developed or achieved, and does not depend on being free from the constraints of external factors. It is not a matter of being independent from something, but being internally rational or coherent.<sup>3</sup> One of the most influential theories of autonomy, that of Immanuel Kant, is particularly focused on rationality. Many modern political theorists, including John Rawls, are Kantians. Like Kant, their analysis of autonomy is closely linked with rights. In order to

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<sup>1</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), 6.

<sup>2</sup> Onora O’Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2002), 29-30.

<sup>3</sup> Ibid.

exercise rights, agents must have autonomy, and rights are important because they “protect autonomous action.”<sup>4</sup>

In *Bounds of Justice*, Kant scholar Onora O’Neill identifies the key problems with both of these theories. Independence focused theories of autonomy imply any independent or unconventional action can be seen as autonomous, even those that might be illegal or dangerous. These theories describe autonomy as a valuable characteristic to possess, but simply acting in a way that is independent from something does not in and of itself make it valuable. As O’Neill notes, “Independence *per se* does not seem to be either necessary or sufficient for an act to be morally valuable or an agent to be excellent.”<sup>5</sup> On the other hand, rationality based theories of autonomy exclude the idea of independence altogether. This causes O’Neill to wonder whether acts of obedience or subordination, which may be entirely rational and coherent, can truly be considered autonomous. For the best account of autonomy, she thinks both types of theories must be combined to include independence, rationality, and coherence.

Theorist Joel Feinberg agrees that autonomy has no single meaning, but attempts to reconcile some of the above ideas. He thinks the most complete account has four aspects: (1) the “capacity” to self-govern, (2) the “actual condition” of self-government, (3) an “ideal” conception of self-government, and (4) the “sovereign authority” to self-govern.<sup>6</sup> Feinberg attempts to describe the way these four meanings of autonomy relate to give a comprehensive picture of what it means to have personal autonomy.<sup>7</sup>

Having the capacity to self-govern is necessary in order to have the right to self-govern, and the capacity involves having the ability to make rational

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<sup>4</sup> Ibid., 32.

<sup>5</sup> Ibid., 31.

<sup>6</sup> Joel Feinberg, “Autonomy,” in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (NY: Oxford University Press, 1989), 28-29.

<sup>7</sup> Ibid.

choices. Those people who have the capacity are considered “competent” to self-govern. People who are not considered competent include infants, the insane, the senile, the severely retarded, and people in comas. There are varying degrees of competency, but all people must meet the minimal requirements in order to be considered competent to govern themselves. Feinberg calls this a “threshold conception of natural competence, ” and it is used to stipulate “necessary and sufficient conditions for the sovereign right of self-government.”<sup>8</sup> Some people may have more intelligence or better judgment, but they are not more qualified to self-govern than those with less intelligence or worse judgment. While these degrees of capacity do not matter for someone to be competent to govern him or herself, they do matter when considering the actual conditions of autonomous agents.

People may have the capacity to self-govern, but if they are not under favorable conditions, they cannot exercise this capacity. Having the capacity does not necessarily mean people actually govern themselves. Feinberg acknowledges that these conditions are often out of people’s control, and this is simply bad luck. For example, people cannot exercise their autonomy if they are enslaved or become ill and lapse into a coma. In other words, “A certain amount of good luck, no less than capability, is a requisite condition of de facto autonomy.”<sup>9</sup> Feinberg thinks opportunities are available to most people under “normal” circumstances, and that it is up to the autonomous agent to pursue them. This is the aspect of autonomy many feminists and critical race theorists take issue with. If “normal” conditions are oppressive, then certain people will be systematically disadvantaged regardless of their capacity to self-govern. This is not simply “bad luck.” I will discuss this critique in greater detail in chapter two.

Feinberg’s third aspect of autonomy describes the ideal virtues that are part of being a self-governing agent. The ideal autonomous agent would have all

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<sup>8</sup> Ibid., 30.

<sup>9</sup> Ibid., 31.

of these traits in the right degree, although in actuality these virtues vary in degree and combine in different ways within particular agents. They include self-possession, distinct self-identity, authenticity, self-creation, self-legislation, moral authenticity, moral independence, integrity, self-control, self-reliance, initiative, and responsibility for self. Feinberg admits that not all of these character traits are equally important in order to be an ideal autonomous agent; some of them might not even be considered virtues when played out in real life. For example, moral authenticity does not necessarily mean the person has good moral principles as opposed to evil ones. In fact, Feinberg recognizes that all of the above “virtues” could be consistent with deep moral flaws. Clearly, these character traits cannot be the whole ideal. Still, “all other things being equal,” Feinberg thinks it is better to be autonomous than not.

People must have the above virtues in the right degree in order to consider them virtues. For example, the trait of self-reliance might involve not binding oneself to others any more than necessary. A self-reliant person does not have indispensable people in his life, nor does he rely too heavily on the commitments of others. Of course, the ability to be self-reliant when necessary could be virtuous, but avoiding commitments to others altogether seems anti-social. Furthermore, being able to work cooperatively with others might be considered a virtue. Feinberg is reminiscent of Aristotle in saying people must have the right kind of virtue in the right degree. In the wrong degree, “Self-control can be totalitarian repression, and self-discipline can become self-tyranny.”<sup>10</sup>

The final facet of Feinberg’s account of autonomy describes it as a right—that is, the way personal autonomy is analogous to a state’s sovereignty. In the case of states, sovereignty is the “ultimate source of authority.” While Scotland and Wales have local autonomy, Great Britain has sovereignty, and can revoke local autonomy if it chooses. Whereas local autonomy is a privilege, sovereignty

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<sup>10</sup> Ibid., 45.



is a “basic and underivative” right. The analogy, then, is between sovereign nations and sovereign persons.<sup>11</sup> Feinberg thinks this right is “natural” for people as well as states. To say someone is a sovereign person is redundant; the type of self-governing autonomy Feinberg describes is already included in the concept of “person.”

Liberal theorists like Feinberg presuppose a particular type of agent who has the capacity for autonomy. This is based on the idea that humans beings are, first and foremost, separate from each other. Being an individual with a distinct separate life is a key part of what it means to be a human being. In a liberal state, people are individuals first; only then do they engage in relationships and connect with others.<sup>12</sup> Robin West calls this conception of the human being “the separation thesis.” This separation from the “other” results in “an existential state of highly desirable and much valued freedom: because the individual is *separate* from the other, he is *free* from the other.”<sup>13</sup> Legal liberalists assume this to be the universal human condition – that is, people are all equally free. And because they are separate and free, they are autonomous, at least in terms of the capacity for autonomy. People have a right to their freedom and the government (as well as other people) must respect this right; our ends are our ends, and our life is our own. The biggest fear of the autonomous person is a restriction of that freedom, or in the worst case scenario, “annihilation by the other.” Because you are not me, and your ends are not my ends, you may try to restrict me from pursuing my goals. While autonomy is the “official value” of liberalism, “annihilation by the other” is its official harm.<sup>14</sup> All human beings desire the same thing (autonomy), and we all fear the same thing (revocation of our freedom).

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<sup>11</sup> Ibid., 46.

<sup>12</sup> Robin West, “Jurisprudence and Gender,” *University of Chicago Law Review* 55 (1988): 2.

<sup>13</sup> Ibid., 5.

<sup>14</sup> Ibid., 7.

Traditional liberal theorists do acknowledge these sorts of influences, and take into account that all people have histories, as well as commitments to others.<sup>15</sup> However, these “entanglements” are not at the heart of what it means to be an autonomous individual. The possibility that a person’s history or relationships may significantly constrain his or her choices is more an exception than the rule. Liberal theorists often assume people can, and do, “successfully extricate themselves from such influences.”<sup>16</sup> The empirical question of whether they do, or have the capacity to do so, is often ignored. Feinberg thinks autonomous individuals maintain “rational self-direction” in the face of all these influences. Feinberg assumes it is possible for individuals to separate themselves from “the claims and incursion of others,” and that autonomous individuals are not “subject to the influence of, or confined within relationships to, others.”<sup>17</sup>

If people cannot separate themselves from these types of influences in the ways Feinberg suggests, more analysis of what it means to be autonomous is needed. In the next chapter, I will discuss Catharine MacKinnon’s theory of dominance feminism, which questions women’s ability to separate themselves from the influence of masculine ideology.

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<sup>15</sup> Kathryn Abrams, “From Autonomy to Agency: Feminist Perspectives on Self Direction,” *William and Mary Law Review* 40 (1998-1999): 807.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 809.

## CHAPTER TWO

*Responses to Liberalism:  
Catharine MacKinnon and Dominance Feminism*

Feminist theorists have criticized Feinberg's version of the completely free and separate self, highlighting the ways the liberal account of autonomy is flawed. Kathryn Abrams argues that "liberal theorists have developed their conceptions of autonomy at some distance from those attributes of human subjects, such as emotional or relational interdependence and strong gender-related socialization that bear heavily on the lives of women."<sup>18</sup> The paradigmatic legal subject is unconstrained by external influences, such as power structures and diverse social circumstances. This is not to say liberalism ignores the ways humans become socialized or have relationships with others, but that these factors are not central to what it means to be an individual.

Some feminist theorists have questioned whether people, especially women, actually can separate themselves from these sorts of influences – whether their motivations and influences are authentically their own. While Feinberg acknowledges factors like gender, race, and class, these factors do not play a central role in the liberal analysis of the autonomous self. Diane Meyers, author of *Personal Autonomy and the Paradox of Feminine Socialization*, takes a different approach. Instead of focusing solely on what autonomy *should* be, she proposes making a stronger connection between the empirical and the conceptual when defining autonomy.<sup>19</sup> Meyers cares about whether autonomy can be achieved and by whom. She is particularly concerned with specific groups, such as women, who may be excluded from traditional definitions of autonomy.

Meyers focuses on what she calls the "traditional woman" to show how the liberal definition of autonomy needs to be altered. The traditional woman is

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<sup>18</sup> Ibid., 818.

<sup>19</sup> Ibid.

“one who is strongly socialized to feminine norms and devotes herself primarily to the care of her family.”<sup>20</sup> Because of her role as a caregiver, she often puts others’ needs before her own and may not be able to pursue her own goals. Meyers also notes how her “choice” to fulfill this role may have been a product of socialization that dictated which roles were appropriate or valuable for women. Her goals and motivations may not be her own, and to that extent, she does not have autonomy. However, Meyers thinks it is better to understand her autonomy as being restricted or qualified, as opposed to nonexistent. While Feinberg thinks of autonomy as a capacity, Meyers understands autonomy as a “competency, or set of ‘introspective, imaginative, reasoning, and volitional skills’ that makes it possible to act in self-aware and self-directed fashion.”<sup>21</sup> In re-characterizing autonomy as a competence, Meyers shows how it is better understood on a continuum, rather than an “on-off switch.”<sup>22</sup>

While this re-conception of autonomy is a valuable contribution, Kathryn Abrams argues that Meyers’ views of women’s socialization are too narrow and fails to “capture the breadth, complexity, or contingency of the process of social construction.”<sup>23</sup> Many women do not fit the role of the “traditional woman,” and their experiences are excluded from Meyers’ account. Furthermore, Meyers does not discuss issues of power or sexualized dominance, nor does she address theories of “ideological determinism.”

Catharine MacKinnon is particularly critical of the ways issues of power and oppression liberalism ignores, as well as the practices of “sexualized dominance” that shape women’s lives in fundamental ways.<sup>24</sup> Catharine

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<sup>20</sup> Ibid., 813.

<sup>21</sup> Ibid., 815.

<sup>22</sup> Ibid., 817.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., 818.

MacKinnon is generally considered the founder of “radical” feminism, and her writing is most often cited in the ongoing discussion.<sup>25</sup>

MacKinnon’s theoretical framework, in which the focus is on women’s victimization, is often referred to as “dominance feminism,” which highlights the “sexual domination of women and the eroticisation of that dominance through pornography and other aspects of popular culture.”<sup>26</sup> She argues that the illumination of masculine power structures has vast implications for women’s autonomy. Dominance feminism shows how sexualized dominance constrains, and often inhibits, women’s autonomous choices. While MacKinnon is particularly concerned with sexual autonomy, her theory also has implications for women’s autonomy per se. Because it is so pervasive, the systematic “sexual domination” MacKinnon describes affects more than just women’s sexual choices. MacKinnon argues that women’s place in society is not only different, but inferior, and that gender differences are social, not natural or individual. Women do not choose their societal role as second class citizens; it is enforced. MacKinnon concludes, “The feminist view of women’s situation comes to this: across time and space, there is too much variance in women’s status, role, and treatment for it to be biological, and too little variance for it to be individual.”<sup>27</sup>

While MacKinnon’s theory calls women’s autonomy into question, the implications of the theory are often misunderstood. MacKinnon is not saying women lack the *capacity* for autonomous choice. Rather, she is critical of the actual *conditions* that inhibit women’s ability to exercise their autonomy. Feinberg also makes the distinction between autonomy as capacity and autonomy as condition, although he thinks normal conditions are such that most people can

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<sup>25</sup> Catharine MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminism Jurisprudence,” *Signs* 8 (1983): 635, 639. MacKinnon claims radical feminism *is* feminism, or as she refers to it in her book, “feminism unmodified.”

<sup>26</sup> Elizabeth M. Schneider, “Feminism and the False Dichotomy of Victimization and Agency,” *New York Law School Review* 38 (1993): 387.

<sup>27</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 25.

exercise their autonomy. For Feinberg, an abnormal condition would be if one person were “an unwilling slave to another.” In this case, a person would “fall short of autonomy in the sense that he does not actually govern himself, whatever his rights and capacities.”<sup>28</sup> Feinberg thinks these types of conditions are merely bad luck, and that opportunities are available for most people to exercise their autonomy. In many ways, MacKinnon thinks women are unwilling slaves to men (whether they realize it or not), and the oppression is systematic as opposed to bad luck. Furthermore, she thinks the opportunities to exercise autonomy are not available to most under current societal conditions, but are rather available to those in power; in this case, men.

Because MacKinnon thinks most women are not aware of the extent to which they are oppressed, her theory is often referred to as a false consciousness theory. This is the idea that women are not aware that their choices are not truly their own, but are rather determined by gender ideology. In other words, the systematic oppression of women does not allow them to truly make their own decisions. If we keep Meyers’ idea of a spectrum of autonomy, false consciousness theories – also called ideological determinism – would be furthest away from the liberal theories discussed in chapter one.

Kathryn Abrams cites three elements of ideological determinism that are similar to Marxist false consciousness arguments.<sup>29</sup> First, it explains how women make decisions that actually contribute to and prolong the cycle of their own oppression. Second, women’s decisions are products of “internalization” – that is, women have internalized the ideology of the dominant group (in this case, men). And third, women are under the impression that their decisions are, in fact, “freely chosen”; they are not consciously aware they have internalized masculine ideologies. For Catharine MacKinnon, heterosexual relationships are

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<sup>28</sup> Feinberg, “Autonomy,” 31.

<sup>29</sup> Kathryn Abrams, “Ideology and Women’s Choices,” *Georgia Law Review* 24 (1989-90): 763.

primarily coercive, and women maintain the cycle of gender inequality by engaging in those relations. MacKinnon thinks women have bought into the cultural myth that heterosexuality is “individual and biological and voluntary,” when their choices aren’t actually voluntary in a meaningful way. Just as all work is exploitative from a Marxist perspective, all sexuality is exploitative for MacKinnon; just because someone enjoys his or her work or a woman enjoys sex does not make women any less exploited. As MacKinnon points out, women enjoying sex wouldn’t be the first time people enjoyed their own subordination. In order to fully understand this phenomenon, however, it is important to explain MacKinnon’s connection to Marxist theory in more detail.

For MacKinnon, “Sexuality is to feminism what work is to Marxism.” Just as the process of work transforms people into social beings, “the molding, direction, and expression of sexuality organize[s] society into two sexes, women and men.”<sup>30</sup> Sexuality, which eroticizes dominance and submission in our culture, creates gender, the social meaning of “man” and “woman.” The division of men and women is akin to the division of classes in Marxism, and desire in feminism corresponds to value in Marxism. For MacKinnon, sexuality is a social process that “creates, organizes, expresses, and directs desire.”<sup>31</sup> While workers’ social interactions create value, sexuality creates desire. Even though desire is traditionally thought of as being natural or biological, MacKinnon claims it is actually created by the hierarchal social relations of men and women. The following chart helps illustrate how the theories parallel:

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<sup>30</sup> MacKinnon, *Feminism Unmodified*, 49.

<sup>31</sup> *Ibid.*

## MARXISM

### Work

(social process that shapes the material and social world; how people become social beings)

### Class

(division of workers)

### Value

(created by interactions between workers)

## FEMINISM

### Sexuality

(social process that creates desire; how society is organized into two sexes, men and women)

### Gender

(division of men and women)

### Desire

(created by relations between men and women)

Both Marxism and feminism are theories of the unequal distribution of power. Power is unequally distributed between men and women under the guise of difference between genders, which MacKinnon claims is actually dominance of one gender over another. In other words, “The *difference* is, men have power and women do not.”<sup>32</sup>

While feminism is analogous to Marxism for MacKinnon, it is not the same as socialist feminism. She claims socialist feminism is simply “Marxism applied to women” just like “liberal feminism has often amounted to liberalism applied to women.”<sup>33</sup> What makes radical feminism radical is its departure from Marxist methodology – that is, it treats women as a “social group” instead of referring to them in “individual, natural, ideal, or moral” terms.<sup>34</sup> In both Marxist and liberalist terms, the genders are understood as being naturally harmonious, with only some minor societal corrections to be made, whereas a post-Marxist methodology sees sexism as fundamental to the relationship between the genders. MacKinnon explains:

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

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<sup>32</sup> Ibid., 51. (emphasis added)

<sup>33</sup> MacKinnon, “Feminism, Marxism, Method, and the State,” 639.

<sup>34</sup> MacKinnon, *Feminism Unmodified*, 60.



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.<sup>35</sup>

In this analysis, inequality is created by those in power, and then understood as “the truth.” Because she thinks “truth” – or what is mistaken to be truth – is created by those with the power to shape reality, it is not surprising MacKinnon also thinks laws are created and enforced with the interest of the male gender in mind. MacKinnon claims the law mirrors the way men structure their experiences. For example, she thinks both the law and men frame sex in terms of possession. If sex is permissible with women who are “yours” or available to be you, then rape is “sex with a woman who is not yours.”<sup>36</sup> If the law understands rape in this way, MacKinnon thinks it is not surprising date or marital rapes are almost never prosecuted; those women are possessed by the men who rape them. In other words, being an acquaintance, girlfriend, or wife entitles the man to sex. In cases in which the rapist does not know the woman, she is clearly not his. MacKinnon thinks men do not understand their own sexual experiences with acquaintances or girlfriends as rape, and the law reinforces their beliefs by calling the sex consensual.

MacKinnon further separates herself from Marxism and other feminist theories in her analysis of the state *as* gender hierarchy. She proposes that the state itself is male, and the law treats women the same way men treat women. Although the state claims to value equality, its structure is hierarchal in nature and controls the social order by “embodying and ensuring male control over women’s sexuality at every level.”<sup>37</sup> So long as “human” refers to “male,” MacKinnon thinks the standards for equality will continue to be in the interest of the male gender.

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<sup>35</sup> MacKinnon, “Feminism, Marxism, Method, and the State,” 640.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 644.

MacKinnon proposes that the gendered division of power is maintained through and by the state. The state both creates and justifies society, remaining legitimate under the guise of being objective while at the same time preserving the state's position as a mirror of society. MacKinnon explains how pseudo-objectivity is valued and becomes the measure of rationality; what counts as reason or rationality is "that which [objectively] corresponds to the way things are." Supposedly, objective epistemology works to maintain the unequal distribution of power, even though it appears fair and impartial.

For proof that men systematically oppress women, MacKinnon looks to the facts about American culture. She describes the paradigmatic situation of women as being beaten, molested, assaulted, raped, and harassed. Eighty-five percent of women have been sexually harassed at work; 43 percent of girls have been sexually abused before they reach the age of eighteen; 44 percent of women have been raped or experienced an attempted rape; between 25 and 30 percent of women are battered by men in their family. It is not women who have been sexually assaulted who are deviant; in fact, according to a study done by Diana Russell, only 7.8 percent of women will experience no assault or harassment in their lifetime.<sup>38</sup> Furthermore, women are not paid for their work inside the home and are paid less than men statistically for their work outside the home. Prostitution is the only job in which women as a group make more money than men; yet, prostitutes may never see their earnings, handing it over to their pimps instead.<sup>39</sup>

Since sexuality is the process that creates gender, MacKinnon needs to be specific about her definition of sexuality. She thinks it is phenomenological, not something that must have a particular content, but "whatever a particular society eroticizes." In our culture, women are objects for men's pleasure; their

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<sup>38</sup> MacKinnon, *Feminism Unmodified*, 23, 52-53. From Diana Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (1986) and *Rape in Marriage* (1982). This study was a random sample of 930 San Francisco households.

<sup>39</sup> *Ibid.*, 51-52.

submission is eroticized. Pornography is a paradigm example of sexuality in America; it is an “institution of gender inequality.” While generally an issue discussed in terms of obscenity and the First Amendment, MacKinnon discusses the politics of pornography in terms of sexual exploitation and oppression. “Obscenity as such probably does little harm; pornography causes attitudes and behaviors of violence and discrimination that define the treatment and status of half of the population.”<sup>40</sup> On this account, pornography is not a moral issue; it is political.

MacKinnon argues that how men treat women is a result of who they see women as being. Pornography, which institutionalizes the eroticisation of dominance, is one medium that shows who women can be. What makes women desirable in pornography is their submission and subjection to whatever the male desires. Men possess, and women are possessed. As Andrea Dworkin articulates, “Pornography is not a distortion, reflection, projection, expression, fantasy, representation, or symbol either. It is sexual reality.” The fact that pornography gives male consumers what they want is evidence that pornography itself is sexual reality. Men are sexually aroused by watching sex objectively, because their “eroticism is, socially, a watched thing.”<sup>41</sup> Pornography is something to be possessed or consumed, and this consumption is male sexuality, while being possessed or consumed is female sexuality.

MacKinnon is often criticized for her focus on women’s victimization. According to critics, if she describes women as victims, this reinforces the stereotype of women as victims and further victimizes them. This critique rests on the idea that people may think themselves out of being victims and become empowered; or, if victims are not described as such, they will no longer be treated as such. However, MacKinnon thinks it is worse to deny women’s experiences of victimization than to acknowledge them. MacKinnon’s account of

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<sup>40</sup> Ibid., 147.

<sup>41</sup> Ibid., 150.

women's victimization is descriptive and explanatory; it is not the cause of women's victimization. As she says, "How can it be good for women to deny what is happening to them? Since when is politics therapy?"<sup>42</sup>

MacKinnon's focus on women's victimization not only asks women to acknowledge their situation, but it also has implications for their autonomy. Whether they are aware of it or not, MacKinnon thinks women are motivated by the types of alien influences Dworkin discusses. According to Dworkin, certain types of influences inhibit people's liberty because they are alien to the individual. Threats, manipulation, or coercion, for example, are not the types of influences people identify as their own. Dworkin thinks these types of influences threaten people's autonomy, and explains, "It is only when a person identifies with the influences that motivate him, assimilates them to himself, views himself as the kind of person who wishes to be moved in particular ways, that these influences are to be identified as 'his.'"<sup>43</sup> Because they are so often motivated by threats, manipulation, or coercion, women's influences are not their own, according to MacKinnon. If we look at MacKinnon's theory from Dworkin's perspective, MacKinnon claims that autonomous individuals who truly identify with the influences that motivate them would not choose to be victims.

Women's awareness of their own victimization is crucial for the feminist methodology of consciousness raising. Women must become conscious of the social reality of being female, and, according to MacKinnon, that men benefit from the same system that deprives women. Women must become aware of their own oppression and "create a new way of seeing."<sup>44</sup> In the 1960s and 70s, consciousness-raising groups allowed women to break the silence and share with one another, to connect with one another without the physical presence of men.

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<sup>42</sup> Ibid., 220.

<sup>43</sup> Gerald Dworkin, "The Concept of Autonomy," in *The Inner Citadel*, ed. John Christman (NY: Oxford University Press, 1989), 60.

<sup>44</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 84.

Within these groups, women were able to “change the validation by creating community through a process that redefines what counts as verification. This process gives both content and form to women’s point of view.”<sup>45</sup> Women could finally talk about their experiences and how they define themselves, what they think it means to “be a woman.”

MacKinnon notes that the process of consciousness raising is difficult to separate from the women who choose to engage in the practice. Women seem to join the groups in response to “an unspecific, often unattached, but just barely submerged discontent that in some inchoate way women relate to being female.”<sup>46</sup> On some level, most women are aware of their status as second-class citizens; the consciousness-raising groups reaffirm this feeling and give words to the experiences.

A key part of MacKinnon’s thesis – that the personal is political – came out of consciousness-raising groups. MacKinnon explains its four parts:<sup>47</sup> First, the social group of men dominates the social group of women. Thus, women are also dominated as individuals. Second, women’s subordination is social, not biological or natural. Third, the division of gender influences and determines women’s feelings in their personal lives and relationships. Fourth, because the subordination is not fundamentally individual, but geared toward the social group of women as a whole, women must address it as a group. Individual action is not enough.

It is interesting that MacKinnon is often seen as disempowering women by focusing on their victimization. In fact, she thinks the process of understanding one’s victimization is empowering. Once women understand their experiences within a system of gender subordination, their feelings of discontent, frustration, or powerlessness seem appropriate. They are responses to

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<sup>45</sup> Ibid., 87.

<sup>46</sup> Ibid., 85.

<sup>47</sup> Ibid., 95.

an unjust situation, not personal character flaws. MacKinnon explains, “It is validating to comprehend oneself as devalidated rather than as invalid.”<sup>48</sup> Consciousness raising allows women to see that their powerlessness is not inevitable; it reaffirms they can act to change their situation. If women criticize the idea that women are men’s negation, “it becomes clear for the first time that women are men’s equals, everywhere in chains. The chains become visible, the civil inferiority – the inequality – the product of subjection and a mode of its enforcement.”<sup>49</sup>

While MacKinnon illuminates the systematic nature of women’s oppression, we are still left with questions regarding their autonomy. Are social conditions really such that women cannot meaningfully exercise their autonomy at all? The next chapter attempts to answer this question with a discussion of Kathryn Abrams’ theory of partial autonomy, or what she calls “agency.”

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<sup>48</sup> Ibid., 100.

<sup>49</sup> Ibid., 104.

## CHAPTER THREE

### *Kathryn Abrams and the False Dichotomy of Victimization and Autonomy*

Ideological determinism arguments have undergone much criticism, and Catharine MacKinnon's views are often described as essentialist or reductionist. Because her theory "attempts to explain a major portion of American social reality – gender – on the basis of a single powerful construct," scholar Frances Olsen calls it a "grand" or totalizing theory. Many feminist thinkers are skeptical of a grand theory that attributes so many of women's decisions to one ideology; women's decisions seem to be more complicated than that and result from a broad range of influences.<sup>50</sup> Furthermore, even if were true that women's decisions are primarily a function of masculine ideologies, it is dangerous to ascribe the view to such a large group of people as *all* women; thus, the criticism that MacKinnon's theory is essentialist. Some feminist scholars have pointed out that there is no such category as "all women," but rather women of different races, classes, and sexual orientations.<sup>51</sup> To say that all women are affected by gender oppression in the same ways is likely false.

Even more concerning is the inability to critique MacKinnon's theory from within the system of oppression. Women's personal experiences of "freedom" or resisting oppression are not counterexamples for MacKinnon's theory. She is often confronted with women who claim the theory does not apply to them, that they consent to and enjoy sex. The false feeling of enjoyment and consent, MacKinnon claims, is part of the system. Choosing and enjoying sex may itself be "shaped by the practice and ideology of male dominance." She remarks:

Many women in this country believe that gender is a crushing reality from which no woman is exempt. They also believe, or rather act out a belief on a daily basis, that they are or can be exempt. If every tacit "present company excluded" exception I

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<sup>50</sup> Abrams, "Ideology and Women's Choices," 768.

<sup>51</sup> Ibid.

encountered on the road were excluded from my analysis, an analysis would remain that everyone accepts as generally true, but that almost no one – meaning nearly everyone – acknowledges applies to them in particular.<sup>52</sup>

If it is true the analysis applies to everyone, MacKinnon's understanding of women's experiences ends up being "categorically preferred" to women's perceptions of their own experiences. And insofar as women can never view the system of gender oppression from an objective perspective (i.e., from outside the system), they are unable to critique the system itself.

While MacKinnon does not claim women lack agency in all aspects of their lives, she does claim that some of their choices are heavily influenced by ideology, and this calls their autonomy into question. Women whose choices are "determined" by ideological influences beyond their awareness or control are clearly not autonomous agents in the liberal sense, because their actual conditions do not allow them to exercise it. This has caused concern among many feminists who might otherwise agree with MacKinnon, because they are reluctant to say women lack autonomy. Some feminists worry that MacKinnon's focus on women's victimization will only exacerbate the oppression of women.

Martha Mahoney portrays the fight against oppression in two stages: first defining the situation, then confronting the situation. She, and other theorists such as Kathryn Abrams and Elizabeth Schneider, think the abuses of women must be "explained without defining the woman herself by the experience of abuse."<sup>53</sup> Whereas MacKinnon describes violence and abuse as being paradigmatic of women's experience, these theorists wish to separate women's experiences of abuse from the definition of "women." Mahoney argues that victimization and agency are not mutually exclusive, and that women's experiences are much more complicated than MacKinnon's depiction. Not only is

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<sup>52</sup> MacKinnon, *Feminism Unmodified*, 218.

<sup>53</sup> Martha Mahoney, "Victimization or Oppression? Women's Lives, Violence, and Agency," in *The Public Nature of Private Violence*, ed. Martha Albertson Fineman and Roxanne Mykitiuk (NY: Routledge, 1994), 1.



victimization versus agency a false dichotomy, but Mahoney and her contemporaries argue that the focus on victimization is a poor choice strategically. For one, it is offensive to women who have successfully resisted societal oppression. Moreover, a focus on women's victimization might further reinforce ideas of women as weak, vulnerable, or lacking the skills necessary to make important decisions. Too much focus on women as victims might be especially alienating to those lacking a feminist perspective. Women are seen as "whining" and exaggerating the extent of their oppression instead of making claims others would be sympathetic to.

Theorists like Mahoney and Abrams are responding to radical feminism within the liberal tradition. In order to reconcile the two, they have attempted to find a middle ground – one that recognizes women's victimization along with their resistance and struggles. While MacKinnon thinks oppressive conditions inhibit women from fully exercising their autonomy, Abrams and Mahoney attempt to define autonomy in a new way. Not only do they think women have the capacity for autonomy, but they think women often exercise it in forms not traditionally recognized as autonomous action. Abrams and Mahoney think women's autonomy is constrained or partial as opposed to non-existent. Even under oppressive situations, they think women can exercise autonomy. If we continue to view autonomy on a continuum, with MacKinnon's dominance feminism at one end and Feinberg's liberalism at the other, Kathryn Abrams' theory of agency lies somewhere in between.

In order to completely separate herself from the baggage of the term "autonomy," Abrams calls her characterization of autonomy "agency." Agency is the autonomy people have within the conceptual framework of socialization, where socialization refers to the process by which people are shaped by "social norms, images, and practices."<sup>54</sup> Abrams thinks the effects of socialization are more pervasive and diverse than Diane Meyers suggests, and thinks the

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<sup>54</sup> Abrams, "From Autonomy to Agency," 823.

influences are “multiple, specific to particular contexts, and capable of shaping and intersecting with each other in innumerable, unpredictable combinations.”<sup>55</sup> Furthermore, Abrams thinks systems of socialization are so complex that it becomes unintelligible to talk about distinguishing internal influences from external influences. Agency is the ability or capacity people have to be autonomous within complex social circumstances. While Abrams focuses specifically on the lives of women, she does not think anyone is excluded from these influences. To discuss autonomy apart from these influences, or assume people can separate themselves from these constraints, is not the right way to talk about autonomy. In other words, socialization cannot simply be transcended; people must operate within this framework, and it makes no sense to talk about agency outside of it.

Abrams distinguishes between two features of agency: self-definition and self-direction.<sup>56</sup> Self-definition deals with the way people understand themselves, particularly their goals and values. This is closely linked with people’s ability to self-reflect and become “aware of the way that one’s self, and one’s self-conception, are socially constituted.”<sup>57</sup> For example, a woman with a poor body image may come to realize her feelings of inadequacy are partially due to a culture obsessed with thinness. Her feelings of self-worth may be closely tied to obtaining a body that is unrealistic and unachievable. Once she realizes how much advertising, for example, affects how she thinks she “should” look, she may be able to better resist or reinterpret those ideas. Of course, understanding the ways we are influenced or constructed does not allow us to completely transcend them, but this awareness is part of what Abrams thinks allows people to self-define.

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid., 824.

<sup>57</sup> Ibid., 825.

Another part of self-definition is becoming aware of the “political dimension” of social norms. Abrams notes:

Social or cultural norms that embody negative judgments about women’s bodies, women’s competence, or women’s power in relation to others are not mere coincidence. They are a product of, and a means by which, women’s oppression is perpetuated in particular settings. . . These norms make it more difficult for women to develop a positive self-conception that permits them to take part in a range of satisfying choices or projects.<sup>58</sup>

Abrams is especially concerned with the “collective aspect” of self-definition. She thinks people need to become aware of the ways social influences affect them. Often, this cannot be done individually, and people need to communicate with others in order to realize how those influences bear on their self-conception. For example, the woman with poor body image may become aware of the political dimension of the thinness norm when she discovers all her friends have the same negative opinions about their bodies. Realizing you are not the only one to feel a certain way can empower groups to change and support one another – something many feminist writers refer to as “consciousness raising.”<sup>59</sup>

The way Abrams understands the “political dimension of social norms” is strikingly similar to MacKinnon’s views. Abrams acknowledges the effects social norms have on particular groups, especially those who are not in power. It is not coincidental that social norms seem to benefit or be in the interest of those in power. However, Abrams also acknowledges the complexity of social norms and their various meanings in particular contexts. MacKinnon’s analysis of women’s social meaning is narrow, focusing primarily on the identity of women as oppressed objects for men. Abrams discusses the other social meanings that play into a woman’s conception of herself, and how women may be empowered by some social meanings and unempowered by others. For example, “black womanhood” can have the empowering social meaning of “strong matriarchal

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<sup>58</sup> Ibid., 826.

<sup>59</sup> Ibid., 827.

head of household,” or the disempowering social meaning of “dependent single parent.”<sup>60</sup> Because these social meanings are varied, and the creation of identity is complex, Abrams thinks it is possible for disempowered groups to develop “a self-conception that is authorizing, and at least partially free of the negative conceptions that are part of the complicated process of group-based subordination.”<sup>61</sup> MacKinnon thinks this is possible as well, although difficult due to the pervasive nature of masculine ideology. Abrams talks about women’s ability to self-define and overcome negative social norms as something they can, and do, achieve everyday.

The second feature of Abrams theory of agency is self-direction, which involves one’s ability to choose one’s own life, to recognize goals and make plans to achieve those goals.<sup>62</sup> Liberal theorists often talk about this same idea, and focus on one’s ability to form his or her own projects and plans and follow through, instead of being influenced by others. Abrams, of course, addresses how difficult it is to determine whether goals are one’s own or influenced by others when social influences are pervasive. In some cases, social norms deter a people from choosing (or having the goal of) something that defies that norm, even though they might choose it under other circumstances. Abrams gives the example of a woman not choosing to do a physically demanding job because of the social norms that discourage women from such work. If the woman becomes aware that her hesitancy to pursue the job is more a result of gender norms than her ability to do the job, she might feel more comfortable pursuing it. Still, she might encounter other obstacles if she goes ahead and pursues the job. For example, the woman might be met with some resentment and possibly sexual harassment from her male co-workers. Even if people become aware of how social norms affect their goals and choices, other barriers might hinder them

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid., 829.

from achieving their goals, some of which might be part of a system of social inequality.<sup>63</sup>

Abrams redefines self-directive actions, explaining how liberal theorists' conception of self-direction is too narrow. Because we cannot think about self-direction outside this framework of social norms and obstacles, we need to think about how people direct their own lives within it. Abrams thinks self-direction within this conceptual framework has two facets: resistant self-direction and transformative self-direction.

When people are faced with challenges, the ways in which they respond often "constitute a form of self-direction."<sup>64</sup> When people respond to these challenges, such as overcoming gender norms, varying goals elicit varying responses. Transformative self-direction has the primary goal of social or political transformation, while resistant self-direction has the goal of resisting a particular situation in order to pursue a plan or choice.<sup>65</sup> While transformative self-direction takes place on a broader scale and involves groups of people, resistant self-direction usually takes place individually.

In the case of resistant self-direction, Abrams describes how certain responses to challenges are often not seen as demonstrations of agency, especially if it deviates from a direct confrontation. Furthermore, women are often the ones who choose alternate ways to respond to situations, resisting rather than confronting. One example of this is the way women often respond to the challenge of an abusive relationship. While leaving the abusive partner would be the most direct way to respond to the situation, many women exercise their autonomy in different ways. The question, "Why didn't she leave?" fails to recognize the complexity and constraints of the situation battered women face. If leaving is viewed as the only appropriate choice for a woman to make, the other

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<sup>63</sup> Ibid., 830-831.

<sup>64</sup> Ibid., 832.

<sup>65</sup> Ibid.

methods she uses to protect her children and herself are often ignored. In her case studies of battered women, Martha Mahoney focused on the ways in which women were active, trying to solve their problems, and reaching for solutions. The stories Mahoney recounts show the women's strength within situations, and their ability to make choices, even if that choice wasn't to leave.<sup>66</sup> They may save money, find support groups, and seek help in a variety of ways. Elizabeth Schneider claims this emphasis on leaving is shaped by "liberal visions of autonomy, individual action, and individual control and mobility."<sup>67</sup> But as Abrams explains, because women do not have complete individual control or mobility does not necessarily mean they lack agency. The ways they exercise their agency just might not be as obvious or conform to the ways people generally think about agency.

Transformative self-direction usually takes place within groups and has the goal of social transformation. Sometimes this involves mobilizing groups of women. Abrams cites efforts to unionize secretarial and clerical workers or erotic dancers in urban areas, the idea being that a unified group can enact social change or even alter social norms.<sup>68</sup> Abrams also mentions the "Take Back the Night" movement, which gathers women together to confront sexualized violence and domination. Women can also choose individual actions that count as transformative; for example, refusing to laugh at a sexist joke or standing up to a rape attempt. Both of these actions, though individual, have the broader goal of challenging social norms.

While MacKinnon and Abrams disagree about what constitutes autonomy, they both have the goal of challenging negative gender stereotypes and changing the way women think about themselves. The next chapter argues

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<sup>66</sup> Martha Mahoney, "Legal Images of Battered Women: Redefining Issues of Separation," *Michigan Law Review* 90 (1991-1992): 25.

<sup>67</sup> Schneider, "Feminism and the False Dichotomy of Victimization and Agency," 387.

<sup>68</sup> Abrams, "From Autonomy to Agency," 837.

that we need insights from both MacKinnon and Abrams in order to have a comprehensive theory of autonomy.

## CHAPTER FOUR

*A Comprehensive Theory of Autonomy:  
Catharine MacKinnon and Kathryn Abrams*

MacKinnon and Abrams both offer important insights into the way we understand autonomy. Abrams' offers a rich conception of agency and challenges us to look at what counts as autonomous action in a new way. As a phenomenological account, it captures women's resistance and struggles within oppressive situations, and reveals the often false dichotomy of victimization and agency. MacKinnon explains how practices of sexualized dominance shape women's lives, as well as pointing out the pervasive, systematic nature of women's oppression. While Abrams' theory explores the particular choices women struggle to make under oppressive conditions, MacKinnon offers an explanation of the patriarchal systems that create and maintain those conditions. Even though Abrams' and MacKinnon's theories seem to conflict, a comprehensive conception of agency will involve both theorists.

Abrams' theory is illuminating in particular, complex situations; however, some larger questions are left unanswered. At what point does constraint result in a lack of agency? In other words, when do situational constraints become so overpowering that women cannot make autonomous choices? Or, the even bigger question: why are women consistently in abusive, coercive, and physically threatening situations to begin with? We need to recognize women's agency in complex situations as Abrams suggests, but there comes a point when conditions do not allow women to exercise it. Clearly defining this point is difficult, but it seems to occur when the abuse or coercion is itself the primary motivator for decisions, or what Gerald Dworkin calls an "alien" motivation.

Although he is also liberal theorist, Gerald Dworkin's conception of autonomy offers insights Feinberg's theory lacks. Dworkin agrees that a person's history and relationships are significant, and that "a viable concept of autonomy



must acknowledge these kinds of influences.”<sup>69</sup> He stipulates that any workable theory must not only be logically consistent, but empirically possible. A theory of autonomy that stipulated people could not be influenced by their parents or peers, for example, would not be a viable theory. He recognizes the powerful effects of socialization, and notes that people learn principles and values before they reach an age where they can be critical of them. Clearly, the “unchosen chooser” or “uninfluenced influencer” is a myth.

For Dworkin, the meaning of the term itself is telling. First used to describe the Greek city state, “autos” means self, and “nomos” means rule or law.<sup>70</sup> If a city made its own laws, it had “autonomia.” It is easy to see this concept extended to individuals. Those who make their own decisions and are not under the control of another have autonomy. Dworkin thinks a person makes autonomous choice when he or she “identifies with the influences that motivate him, assimilates them to himself. . . that these influences are to be identified as ‘his.’”<sup>71</sup> Besides being able to identify with his own motivations, Dworkin thinks an autonomous individual must be connected with his or her own goals – that is, those goals are not “in some way alien to the individual.”<sup>72</sup>

It is easy to see how coercion or fear would be “alien” motivations. If a woman is in an abusive relationship and fears for her or her children’s safety, this fear would have a strong influence on her decisions. Even if she recognizes that fear as an influence, it is unlikely she would assimilate that influence to herself or desire to be the type of person who was motivated by fear or coercion. At this point, she does not identify with this motivation as “hers,” but likely resents this motivation. She might be connected with her true goals – to care for herself and her children and be a good mother – but the alien motivation of fear hinders those goals. Thus, the choices she can make to attain her true goal of

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<sup>69</sup> Gerald Dworkin, “The Concept of Autonomy,” 55.

<sup>70</sup> Ibid., 57.

<sup>71</sup> Ibid., 60.

<sup>72</sup> Ibid.

caring for her children are limited by her fear of abuse. If a woman cannot “choose” to end a battering relationship because she is afraid, is she really “choosing” to stay in it? Where would we place this type of situation on a continuum of autonomy? These are the difficult questions. Abrams can help us see subtle ways the woman might exercise her agency despite fear, and MacKinnon can help us understand why her decisions may not meaningfully be “hers.”

In many ways, rape is the paradigm example of a situation in which women’s agency is called into question. How much her choices are constrained depends on the particular circumstances of the sexual interaction. Whether they are fearful of actual or implicit threats of violence, or coerced into thinking the consequences will be worse if they do not consent, women in rape situations are motivated by a wide range of influences. Some rapes are extremely violent; some of them are primarily coercive; some of them might just be regrettable sex. Sexual interactions, just like autonomy, are best understood on a continuum. MacKinnon’s theory is particularly helpful for violent, “clear-cut” cases of rape that lie at the far end of the spectrum, and Abrams’ analysis can help us understand the more difficult cases in the middle. While MacKinnon tends not to distinguish between coercive sexual relationships and rape, Abrams’ theory can offer a more nuanced analysis of particular sexual interactions.

The next chapter explores women’s ability to exercise agency in situations in which they are being forced or coerced into sex they do not want. By using MacKinnon and Abrams to analyze a few sample cases, we can attempt to distinguish which types of sexual interactions count as rape. How we conceive of rape will have important implications for how rape law can be revised to best protect women’s autonomy. Before considering specific examples, I will offer some context in order to better understand rape in America.

First, it is important to note that most rapes are not reported. According to a study by the National Victim Center, eighty-four percent of rapes go

unreported, making rape one of the most underreported crimes in America.<sup>73</sup> In fact, statistics show that fifty-four percent of American women are raped or have survived an attempted rape at least once in their lives.<sup>74</sup> Of those women, approximately twenty-five percent have been subjected to a completed rape, according to self-reports.<sup>75</sup> Fourteen percent of women report having been raped within their marriages, and many states still have no law prohibiting marital rape.<sup>76</sup> Of the rapes women report to authorities, hardly any are prosecuted, and most prosecuted rapes do not result in a conviction. In fact, only between two and five percent of accused rapists are convicted, and they usually receive short sentences.<sup>77</sup>

Part of the problem may be that many of these rapes do not fit the model of a “real rape.” According to many people, “real” rape is when a stranger comes out of an alley or parking garage, holds a woman down at gun or knife point, threatens to kill her, and proceeds to have sex with her. While in these cases it is clear that a serious crime has been committed, only a small number of rapes actually happen this way. Most rapes deviate from this model. Most women know the men who rape them, and say “no” but don’t fight back; most rapes happen in bedrooms, not dark alleys, and most women do not sustain physical injuries. In fact, seventy percent of rape victims do not receive any physical injuries, and twenty four percent only receive minor physical injuries.<sup>78</sup> When a rape is anything other than a “real” rape, women are much less likely to be believed, and the crime becomes more difficult to prove. They may even question

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<sup>73</sup> Linda J. Lacey, “We Have Nothing to Fear but Gender Stereotypes: of Katie and Amy and ‘Babe Feminism,’” *Cornell Law Review* 80 (1995): 612, \*622.

<sup>74</sup> Mark Becker, Cynthia Grant Bowman, and Morrison Torrey, *Feminist Jurisprudence: Taking Women Seriously* (St. Paul, MN: West Publishing, 1994), 202.

<sup>75</sup> Catharine A. MacKinnon, *Sex Equality: Rape Law* (NY: Foundation Press, 2001), 777.

<sup>76</sup> *Ibid.*, 772.

<sup>77</sup> *Ibid.*

<sup>78</sup> Judith G. Greenberg, Martha L. Minow, and Dorothy E. Roberts, *Mary Joe Frug’s Women and the Law* (NY: Foundation Press, 2004), 789.

themselves, feeling as though what happened to them was their own fault. The idea that they “deserved it” may be lurking in the back of their minds.<sup>79</sup>

Women are traditionally understood to be the gatekeepers of sex; they, not men, are responsible for whether or not sex occurs. Lynne Henderson, author of “Rape and Responsibility,” describes the dominant cultural narrative, which sees women as the controllers of sex, and it is not surprising when men “lose control.” Instead of focusing on the defendant’s behavior, courts often focus on the woman, recognizing her as the “primary causal agent.” Women are often blamed in the courts and among the general public for “provoking” or failing to prevent a rape. As Henderson notes, “In bourgeois culture, in a bizarre distortion of causality, girls are raised to believe their dress, makeup, hairstyle, walk, and talk determine male reactions.”<sup>80</sup> This cultural narrative clearly casts women as autonomous agents, capable of controlling their own (as well as men’s) sexual encounters. At the same time, women are cast into the “more passive role of consenting or not consenting” while men play the role of “actively initiating” sexual encounters. Within the law, consent need not be active; acquiescence or non-resistance often qualifies as consent. In fact, consent rarely has anything to do with whether the woman actually desired to engage in intercourse. A woman’s behavior prior to the sexual encounter is much more important. Behaviors like “drinking, dancing, agreeing to drive home with a man, or even just being sexually experienced, as evidenced by having a live-in boyfriend or taking the Pill.”<sup>81</sup> Jurors must try to understand the encounter and attempt to interpret whether it was “reasonable” for the man to pressure the woman for sex

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<sup>79</sup> I recognize that sexual violence against men and boys occurs, and that not all rapists are men. However, I will be focusing on sexual violence towards women since the majority of victims are women, and the majority of aggressors are men. I am also aware of the distinction between the terms “victim” and “survivor,” but I will be using them interchangeably throughout this paper. I do not mean to imply anything derogatory by the use of the term “victim.”

<sup>80</sup> Lynne Henderson, “Rape and Responsibility,” *Law & Philosophy* 11, no. 127, (1992): 138.

<sup>81</sup> Martha Chamallas, *Introduction to Feminist Legal Theory* (NY: Aspen Publishers, 2003), 230.

considering her behavior. The legal question is never, “Should he have been pressuring her?” but rather, “Did she do enough to resist?”

Part of dispelling the “real” rape myth involves understanding the men who commit rape. Just as most rapes deviate from the “real” rape model, most rapists deviate from the stereotype of a deranged, perverted criminal. In fact, most rapists are indistinguishable from non-rapists. In 1988, a survey of 6100 college-age men showed that forty-three percent had engaged in “coercive sex,” meaning they had used physical force or ignored women’s protests.<sup>82</sup> In another survey of 1846 college-age men, twenty-three percent said they had been in a situation where they were so “sexually aroused” that they couldn’t stop themselves, even though they knew the woman didn’t want to engage in sex.<sup>83</sup> Even more disturbing, thirty-five percent of college-age men in another study said they would commit rape if they were “sure they could get away with it.”<sup>84</sup> No evidence suggests that the class of rapists is psychologically any different than non-rapists. Indeed, psychologists have found that mental illness exists in only two to twenty percent of convicted rapists in prison, which is similar to the incidence of mental illness in criminals who commit other crimes.<sup>85</sup>

The fact that rapists are not psychologically deviant (at least statistically) indicates that rape, may, in fact, be “culturally dictated” given the social norms that encourage male aggressiveness and assertive behavior. In other words, the types of traditionally masculine behavior that accompany rape are considered “normal” in most contexts, including within sexuality. Of course, the idea that rape is “culturally dictated” is a highly controversial claim, but one for which there is much evidence. Understanding gendered differences in sexuality can help us see how rape may not be as deviant from the norm as is commonly thought. This brings us to a critical question: what is “normal” sex? What are the

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<sup>82</sup> Mary Becker and others, *Feminist Jurisprudence: Taking Women Seriously*, 780.

<sup>83</sup> *Ibid.*, 781.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

social norms that accompany men and women's sexuality? And how do these norms bear on the autonomy of sex acts?

According to Andrew Taslitz, author of *Rape and the Culture of the Courtroom*, we live in a "cult of masculinity, a cult of aggression."<sup>86</sup> Taslitz notes that men and women give different meanings to aggression, which plays itself out in the ways men and women behave. While men view aggression as "instrumental, a way of controlling others, attaining social or material benefits, domination, and self-esteem," women understand aggression as being "expressive, a release of frustration or anger, viewed as a loss of self-control and a danger to relationships." Male aggression is a necessary part of being "masculine," a way to bond with other men, and a way to gain power and control others. Male aggression may or may not be associated with anger. Because this type of aggression is seen as "necessary" or even "desirable" behavior, a much greater amount of aggression is tolerated in men than in women. Also, because men tend to use their aggression as a tool to achieve domination or other benefits, much of the way they talk about aggression is centered around winning or losing. Taslitz says, "The great male fear is of losing." Men may assume that women also view life as a game to be won or lost and interpret women's expressions accordingly. Instead of perceiving women's crying as a sincere emotion, a man may view that expression as a strategy within a larger game. Taslitz says this carries over into sexual relationships, "and there combines with notions of masculinity that involve explosive sexuality, sexual success, independence from relationships, physical toughness, and loss of empathy."<sup>87</sup> Men may not perceive their aggressiveness as "force" because they are playing by the rules of "fair gamesmanship." And how do you win a game? By being aggressive! Men assume women understand the game of sex and its

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<sup>86</sup> Andrew Taslitz, *Rape and the Culture of the Courtroom* (NY: New York University Press, 1995), 25.

<sup>87</sup> *Ibid.*, 26.

rules in the same way they do. Therefore, drinking, wearing revealing clothing and acting flirtatiously are part of the broader “game” of sex; women should understand what they are getting involved in. If a woman did not want to have sex, she should not have played the game. These notions are deeply embedded within our culture; hence, many women blame themselves for their rape. They should have known better.

On this model of male masculinity, we’re left with the following picture: A man may not feel as though he is being forceful or coercive, while the woman feels as though her protests (whether verbal or silent) are not being heard. The woman feels as though she is expressing her displeasure, while the man interprets her resistance as “playing hard to get.” Insofar as men and women do not understand force in the same way, it is possible that many rapes (especially acquaintance rapes) might be due to miscommunication rather than vengefulness. However, a study done by Jodee M. McCaw and Charlene Y. Senn shows the opposite may be true. The study, entitled “Perceptual Cues in Dating Situations,” tested the ways in which men and women communicate their desires and recognize desires of the opposite sex. If the miscommunication hypothesis were true, McCaw and Senn assumed there would be distinctive gender differences in the way desires were perceived and communicated. In fact, both men and women found the same behaviors to be coercive. They also found that the men in the study understood the women’s refusal of sex to be a refusal. There was little miscommunication or gendered differences between the way the men and women understood the situations. McCaw and Senn deduced that “men do not inadvertently threaten women into cooperating with sex, but know what they are doing.”<sup>88</sup> According to this study, a man’s claim that he was unaware of women’s resistance or thought she “wanted it” is not an excuse. In fact, men *are* conscious of their coercive (sometimes forceful) behavior, but continue to do it

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<sup>88</sup> MacKinnon, *Sex Equality*, 838.

anyway. Perhaps the truth lies somewhere in between. Some cases may be a matter of miscommunication, while others may be intentional.

It is difficult to analyze whether these types of cases should be considered rape or not. If we consider sexual interactions on a continuum, with violent rape at one end and consensual intercourse at the other, a lot of cases fall in between. In the next chapter, I will consider three cases that would not fit the current law's definition of rape. Using Abrams and MacKinnon, I will attempt to analyze whether these cases should be considered rape, and if so, how the law could be reformed to account for them.



## CHAPTER FIVE

### *Autonomy and the Law: An Analysis of Rape Cases*

Both MacKinnon and Abrams can help us think more clearly about the law, particularly laws that address crimes against women. Because laws were formed and interpreted based on the assumption that people can fully exercise their autonomy, the results are often flawed and harm those who they are intended to protect. In this chapter, I explore the ways in which different theories of autonomy conceive of rape and how that differs from current rape law. After explaining the law's conception of rape, I will use Abrams and MacKinnon to analyze women's agency in difficult cases that fall somewhere between intercourse and rape: (1) a woman who "consents" to sex within a physically abusive relationship, (2) a woman who has forced sex with a man she knows, and (3) a woman who is coerced into sex within a relationship. In order to understand the current law, we need to keep the liberal conception of autonomy in mind.

In a liberal democracy, criminal law has the ultimate aim of protecting people's individual autonomy – that is, the law attempts to protect people's rights to self-determination and their pursuit of their "own conception of the good."<sup>89</sup> Minimally, criminal law aims to protect people from harming others, and thus, interfering with personal autonomy. It is important to note the difference between positive and negative sexual autonomy, since the law's primary purpose is to protect negative sexual autonomy. While positive sexual autonomy includes "the freedom to seek out opportunities, choose partners, engage in sexual activities that are mutually fulfilling," negative sexual autonomy includes being free from nonconsensual touching or sexual activity.<sup>90</sup>

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<sup>89</sup> Joan McGregor, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Burlington, VT: Ashgate Publishing Limited, 2005), 14.

<sup>90</sup> *Ibid.*

While the state does protect positive autonomy insofar as other people's negative autonomy is not violated, the primary purpose of criminal law is to protect negative sexual autonomy – that is, people have a right to be free from sexual assault. Only serious threats to personal autonomy are generally protected under criminal law, because the law itself shouldn't interfere with people's autonomy; if laws are too protective or paternalistic, they may be doing more harm than good.

Most state laws treat women as liberal agents. It is assumed they are free to exercise their autonomy and say “no” or stop an attempted rape. Because the law assumes women would stop the sexual encounter if they wanted to, acquiescence or non-resistance is interpreted as compliance or saying “yes.” This is especially true when the two parties know each other, because the law sees consent as already implicit in the relationship.

While rape laws vary among the states, they all consider the factors of “force” and “consent.” The biggest difference among state laws is “whether the critical element is nonconsent, no matter how much evidence of force and coercion is available.”<sup>91</sup> In Michigan, for example, the code does not even refer to “nonconsent” and instead focuses solely on the defendant's actions and how much force was used. New York State's Code, on the other hand, is similar to the Model Penal Code in its focus on the victim's consent, although neither code refers to the victim's “subjective nonconsent,” but rather the outward actions of resistance that imply nonconsent. Actions such as physical force are much easier to corroborate in a court of law than the woman's subjective nonconsent. To help illuminate the type of language state statutes use, the Montana State Code is as follows:

A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent. The term “without consent” means: the victim is

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<sup>91</sup> Richard A. Posner and Katharine B. Silbaugh, *A Guide to America's Sex Laws* (Chicago: University of Chicago Press, 1996), 6.

compelled to submit by force against the victim or another; or the victim is incapable of consent because the victim is mentally defective or incapacitated; physically helpless; overcome by deception, coercion, or surprise; or less than 16 years old. The term “force” means: the infliction, attempted infliction, threatened infliction or bodily injury or commission or a forcible felony by the offender; or the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.<sup>92</sup>

The concept of “force” is very narrow within the law. Force, as such, is not prohibited in sexual encounters. It is only prohibited when it is used “to overcome female nonconsent.” If a woman does not physically resist in active ways (punching, kicking, screaming, etc.), it is questionable whether she was truly “forced.” The court must determine whether the force was “sufficient to overcome a reasonable woman’s will to resist,” and it is up to the judge and jury to determine what a “reasonable” woman’s response should be.<sup>93</sup> What counts as legal force is generally the use of a weapon, severe beating, or the “explicit threats” of these combined with the victim’s belief the threats could actually be carried out.<sup>94</sup> Holding a woman down or throwing her onto a bed is not by itself considered force in the eyes of the law, especially if the two people know each other.<sup>95</sup> Neither action would necessarily result in “bodily injury,” nor do those actions imply that bodily injury was attempted, threatened, or inflicted. Depending on the context of the situation, the same actions could be interpreted differently. Being thrown onto a bed could be described as a forceful shove or a playful push depending on the woman’s desires; while very different subjective experiences, these actions might look the same from an outsider’s perspective.

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<sup>92</sup> Mont. Code Ann. section 45-5-501, 45-5-503 (2005).

<sup>93</sup> McGregor, *Is it Rape?*, 6.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, 60.

And as the statute demonstrates, the law does not describe what counts as “consent” or “nonconsent,” but only describes what it means to be “incapable of consent.” Whether the woman actually wanted to engage in sex – her subjective consent – is not at issue. What matters is whether the woman was capable of consenting. If a woman does not meet any of the criteria that deem her incapable of consent, the law assumes consent. This is especially true if the two people know each other. In the eyes of the law, whether a rape occurred or not has much to do with the relationship between the two parties. Even if there is some force and the two people know each other, there is usually no rape conviction.<sup>96</sup> In her book, *Is it Rape?*, Joan McGregor describes this difficulty within the law:

Legal practice and social attitudes have trouble recognizing as legally impermissible a wider range of sexual interactions, for example, nonconsensual sex without force (force in criminal law is conceived quite narrowly usually referring only to extreme physical force), which often includes acquaintance ‘rapes’. In these cases, even where there is force, given that the two are acquaintances the law does not recognize them as ‘with force’.<sup>97</sup>

If the two people know each other, consent is presumed, and there often needs to be an even greater amount of physical force to prove nonconsent.<sup>98</sup> The law permits a lot of aggression and coercion in sexual relationships between acquaintances,<sup>99</sup> which implies that women might consent to aggression and coercion in some cases. This could be one of the reasons people hesitate to call acquaintance cases “rape,” and why women do not report them. These sexual interactions do not conform to the legal definition of rape.

The definition of rape that some states use requires force *and* nonconsent, which seems redundant. The Georgia State Code, for example, describes the crime of rape as having “carnal knowledge of a female forcibly and against her

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<sup>96</sup> Ibid., 3.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid., 32-33.

<sup>99</sup> Ibid., 7.

will.”<sup>100</sup> If sex is forced, why does the law also require nonconsent? Or, if the woman didn’t consent, why must she also be forced? MacKinnon thinks this conception of rape assumes a “somasochistic definition of sex” and indicates that forced sex can become consensual.<sup>101</sup> Historically, this definition also points to the distrust of women’s testimony. If no force were present, the woman might claim she didn’t consent in order to cover up a regrettable choice.<sup>102</sup> Theorist Joan McGregor thinks this “unfortunate conjunction” leaves two primary options for rape law reform: (1) rape could become “sexual activity without consent,” which makes consent meaningful and focuses on protecting women’s sexual autonomy, or (2) the definition of rape could focus on the range of behaviors that are “wrongful because they are violent, abusive, or in other ways inappropriate.”<sup>103</sup>

Liberal feminists such as Katie Roiphe, Camille Paglia, and Christine Hoff Sommers think the law’s conception of rape is appropriate, and that expanding rape law would work against women’s attempts to advance equality. Changing the concept of rape within the law to include nonconsensual sex without legal force, or acquaintance “rapes,” is overly paternalistic, they argue, and makes women seem like “incompetent victims.”<sup>104</sup> They think these types of rape reforms imply that women cannot take care of themselves and require the assistance of the state. Paglia argues women should know the risks or dangers of sex as well as the risks behaviors like dressing provocatively or drinking too much. She argues women should take responsibility for their choices and need to cope with the consequences of their own actions rather than deferring to the law.<sup>105</sup>

In her book, *The Morning After*, Katie Roiphe argues that the dangers of date rape (or acquaintance rape) have been drastically blown out of proportion,

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<sup>100</sup> Posner, *A Guide to America’s Sex Laws*, 12.

<sup>101</sup> McGregor, *Is it Rape?*, 47.

<sup>102</sup> *Ibid.*, 48.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, 23.

<sup>105</sup> *Ibid.*, 77.

especially on college campuses. Echoing Paglia, she says, “By viewing rape as encompassing more than the use or threat of physical violence to coerce someone into sex, rape-crisis feminists reinforce traditional views about the fragility of the female body and the will.”<sup>106</sup> Roiphe is especially dismayed at the idea that “verbal coercion” may also constitute a rape. This depicts women as being weak-willed and unable to stand up to “the barest feather of peer pressure.” According to Roiphe, this also implies that men are “not just physically but intellectually and emotionally more powerful than women.” Roiphe thinks the law should continue to assume the same things about women they do about men: “basic competence, free will, and strength of character.” If we do not want women to exhibit traditional female characteristics such as passivity in the long-term, the law should not be expanded to protect these behaviors in the short-term. Perhaps the most effective way of motivating women to give up passive behavior is to “penalize” them “by not protecting them.”<sup>107</sup> If the law treats women as passive victims, the effects may bring about more harm than good.

Although she does not explicitly argue against it, Roiphe clearly rejects the idea that there are gender differences and thinks “the only valid feminist goal is for women to be treated exactly like men.”<sup>108</sup> To change rape law, and acknowledge other sorts of sexual encounters as “real rape,” would be to acknowledge gender differences and thwart the goal of true equality. For Roiphe, true equality or sexual freedom is embodied in the liberal male – that is, “the best sex is autonomous, ‘free,’ unhampered by any sense of connection to one’s partner.”<sup>109</sup> She thinks other feminists’ focus on sexual oppression takes the fun out of sex and is ultimately a throwback to the Victorian ideal of women as chaste virgins. Roiphe thinks changing rape law would not defend sexual

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<sup>106</sup> Katie Roiphe, *The Morning After: Sex, Fear, and Feminism on Campus* (Boston: Little, Brown & Company, 1993), 66.

<sup>107</sup> McGregor, *Is it Rape?*, 85.

<sup>108</sup> Lacey, “We Have Nothing to Fear but Gender Stereotypes,” \*614.

<sup>109</sup> *Ibid.*, \*629.

autonomy, but undermine it by “enfeebling” women. She thinks expanding rape law to include acquaintance rapes is patronizing to women and would ultimately backfire against women’s struggle for equality.<sup>110</sup> If the law protects these “traditionally female” victims from acquaintance rapes now, women will not become more assertive and aggressive in the long run.

Roiphe’s book is clearly a response to dominance feminism, whose obsession with sexual oppression, she thinks, has “gone too far.”<sup>111</sup> According to Roiphe, this type of feminism, and people like Catharine MacKinnon, are responsible for “victim culture,” which poses more of a threat to women than rape or sexual harassment. Roiphe’s analysis of women’s autonomy in sexual relationships is grossly oversimplified and ignores the contributions MacKinnon and Abrams have made to feminist legal theory. She does not offer a rich conception of agency, nor does she consider all the cases that fall somewhere between violent rape and consensual intercourse. By looking at some of the cases that fall in the middle of the spectrum, we can see how Abrams and MacKinnon shed light on complex sexual situations. First, I will look at a case where a woman has sex within a physically abusive relationship:

*Commonwealth v. Richter*, 1998

The pregnant ex-wife of the defendant verbally resisted his sexual advances but did not physically resist because in the past he had been extremely violent toward her and she feared for her own and her fetus’s safety. The court found no rape since there was no force.<sup>112</sup>

This case compels us to ask whether the law should conceive of nonviolent, nonconsensual sex within a relationship as rape. The ex-husband did not use physical force, nor did he harm the woman or her fetus; there was only the implicit threat of violence since he had hurt her in the past. The woman

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<sup>110</sup> McGregor, *Is it Rape?*, 83-84.

<sup>111</sup> Lacey, “We Have Nothing to Fear by Gender Stereotypes,” \*613.

<sup>112</sup> McGregor, *Is it Rape?*, 2.

“chose” to have sex with her ex-husband rather than fight him because she feared for her and her fetus’s life. Does her choice to submit to the sex count as a meaningful act of agency?

Clearly, her choices were constrained by her fear, but Abrams might consider this an example of the false dichotomy of victimization and agency. Abrams would likely describe the above case as rape, but still say the woman exercised her agency. The woman’s goal was to protect herself and her fetus, and she chose what she thought would accomplish this goal. She understood her situation and acted based on the limited options she had. This situation is not much different from wives who consent to sex with their husbands because they fear violence. They may decide to endure unwanted sex, knowing their chances of being beaten are lessened if they do so. Abrams would probably describe the woman in the above case as having a clear sense of self-definition; she understands her own goals and values, and also understands how her abusive relationship influences them. She knows she wants to protect herself and her fetus, and makes the choice that will most likely achieve that goal. She could have fought back, she could have run, or she could have screamed. She didn’t choose direct confrontation as a response, but this does not mean she lacks agency. But is this “choice” to have sex in order to avoid violence a “choice”?

Despite the lack of physical force, MacKinnon would understand this example to be a clear case of rape. MacKinnon thinks rape should be redefined as “sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime.”<sup>113</sup> MacKinnon wants the theory of compulsion to be nuanced, one that “captures more than actual overwhelming force, but which defines the range of power relationships that might compel a person into sex.” Defining what counts as “wrongful compulsion” is extremely difficult, though, because people disagree about which types of threats (explicit or implicit) should count. The question is, which types

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<sup>113</sup> MacKinnon, *Toward a Feminist Theory of the State*, 245.



of constraints on a person's choices are illegitimate? MacKinnon thinks using fear to intimidate or coerce someone into having sex should count as "compulsion." In this case, the threats were not explicit, but only implied because the defendant had been violent before. Should all nonconsensual sex where women are coerced by implicit threats count as rape? What type of implicit threats count? Must there be a history of violence? What if the ex-husband in the above case had never been violent before? Would the woman's fear have been justified? These types of questions often come up in cases where the two parties do not have a relationship history, but know each other nonetheless. Take the following case:

*Commonwealth v. Berkowitz, 1994*

A 19-year-old sophomore at a Pennsylvania college one afternoon went to the room where her boyfriend lived. While waiting for him to return she entered the room of an acquaintance, Robert Berkowitz. She sat on the floor and talked with him for awhile. He sat on the floor next to her and began kissing and fondling her. She protested his advances and said that she had to go. Berkowitz disregarded her protests, got up and locked the door, came back and pushed her on to the bed, lay on top of her, removed her clothes, and penetrated her. Throughout she was saying 'no.' Berkowitz said he took the 'no's to be passionate moaning. He was found not guilty of rape because there was no forcible compulsion.<sup>114</sup>

In this case the woman did not know Berkowitz very well and had no reason to believe he would be violent from past experience. The woman did not physically resist and only verbalized her nonconsent. Berkowitz did not threaten her implicitly or explicitly, nor did he use obvious physical force. Should cases like this be included in our conception of rape?

For MacKinnon, locking the door, lying on top of the woman, and ignoring her protests would likely count as "wrongful compulsion." Although there were no threats or violence per se, it would have been reasonable for the woman to believe Berkowitz might harm her given the circumstances. Pushing

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<sup>114</sup> McGregor, *Is it Rape?*, 2.

someone on to a bed and lying on top of him or her could certainly be understood as “force,” although some laws do not see it that way, because “normal” sex could include the same actions and not be rape. If we redefined what counted as “normal” sex, MacKinnon thinks these types of cases would more clearly be considered rape.

Rape is defined as forced sex without consent, and is supposed to be ontologically distinct from intercourse. The law assumes sex in and of itself is not harmful or bad, but only becomes so when there is force and nonconsent. MacKinnon claims, however, that women’s experiences of sex and rape are not so distinct under “conditions of male dominance.”<sup>115</sup> What counts as “normal” sex is defined from a masculine perspective and is often aggressive and coercive. Furthermore, MacKinnon thinks men are systematically conditioned “not even to notice what women want.”<sup>116</sup> Many men assume that “no” means “yes,” and that women are playing hard to get if they refuse intercourse. Men may then use force, and think the woman “wanted it.” Until the current conception of “normal” sex is seen to violate women, MacKinnon thinks women’s real experiences of rape will never be understood. Still, the question of how much agency the woman had in the above case is difficult to answer.

The woman in the above case clearly had more agency than a woman in an extremely violent rape situation, although her choices were still constrained by fear and shock. It might be reasonable to ask why she did not fight back or try to run away, although her response of just laying there “as if in a dream” is a common reaction to rape. Becoming silent, crying, or “blocking it out” are frequently the ways women respond to rape situations.<sup>117</sup> Of course, we can wonder if she could have avoided the rape by screaming or fighting, but putting a focus on the victim’s responses is exactly what the law should avoid doing. The

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<sup>115</sup> MacKinnon, *Feminism Unmodified*, 81-82.

<sup>116</sup> MacKinnon, *Toward a Feminist Theory of the State*, 181.

<sup>117</sup> McGregor, *Is it Rape?*, 85.

law could account for these more ambiguous cases by dividing rape into two categories: (a) forceful or violent rape, and (b) nonconsensual sex.<sup>118</sup> Having two categories of rape would help account for the complexities of sexual situations that Abrams points out. It would recognize that not all rapes are the same, but still acknowledge nonconsensual sex as a crime.

The first type of rape (forceful or violent rape) is best characterized by MacKinnon's conception of rape as "sex by compulsion." It would focus on the defendant's violent behavior as the crime, and the violence would negate consent. MacKinnon does not think women's consent is meaningful in rape trials. How a woman actually feels about the sexual interaction, or what she says, is irrelevant; what matters is "who she is relative to a man who wants her." MacKinnon thinks there are two paradigm categories of women: young girls or "virginal daughters" who cannot consent and are rapable, and "whorelike wives and prostitutes" who cannot help but consent and are unrapable.<sup>119</sup> Once women reach adulthood and are no longer virginal daughters, consent is inferred if the woman knows the man she has sex with. MacKinnon notes, "If rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception, and it would not be effectively legal to rape a prostitute."<sup>120</sup>

One way to think whether a woman's consent is meaningful is to consider the consequences if she fails to consent. Under coercive conditions, it is unlikely a woman would feel free to refuse without consequences. Catharine MacKinnon argues that because women have unequal social positions, they are at a disadvantage in their relationships with men. Within these relationships that MacKinnon deems "coercive," voluntary consent is unlikely. Ultimately, MacKinnon thinks "the imbalance of power present in many (most?) gender

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<sup>118</sup> Ibid., 61.

<sup>119</sup> Ibid., 175

<sup>120</sup> Ibid.

relationships undermines the legitimacy of consent.”<sup>121</sup> For this reason, she thinks the consideration of the woman’s consent should be removed from rape law completely. It should not be assumed that women can or do consent to coercive, violent behavior.

Not all coercive sexual situations revoke women’s agency, as Abrams’ analysis shows us. In these types of situations, it is important to focus on women’s choices to engage or not engage in sex. The second type of rape (nonconsensual sex) would focus on the absence of consent, and work to make women’s consent more meaningful; thus, protecting their sexual autonomy. If a woman has sexual autonomy, she is in control of her own body and can determine with whom, how, and under what circumstances she wishes to engage in sexual activity; in other words, she controls her own sexual life. Joan McGregor adds to this conception by noting, “Saying that autonomous agents have control means that they will not be penalized for granting or failing to grant consent.”<sup>122</sup> Currently, the law seems to protect men’s positive sexual autonomy more than women’s negative sexual autonomy by putting the burden of proof on the woman to show she was not consenting.<sup>123</sup> In other words, the woman must prove she was not consenting, making the default position that she was consenting. Men can assume women are consenting, unless they physically resist in particular ways. Verbal nonconsent is not even meaningful, because the law recognizes that “no” sometimes means “yes.” If the law’s goal was to protect women’s negative sexual autonomy, it seems the default position would be that the woman was *not* consenting.<sup>124</sup>

In cases where there is no obvious force (in the legal sense), judges and juries need to look at the types of constraints that would undermine a woman’s consent, turning intercourse into rape. Consent should act to protect women’s

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<sup>121</sup> Ibid., 79.

<sup>122</sup> McGregor, *Is it Rape?*, 111.

<sup>123</sup> Ibid., 104.

<sup>124</sup> Ibid., 105.

autonomy and has the moral significance of making the “impermissible, permissible.” Joan McGregor argues that consent is a “mechanism by which we treat each other as equals, by asking for consent before crossing another’s border or taking what is rightfully theirs, whether it is their property or their body.”<sup>125</sup> In order to treat women as equals, men need to respect women’s sexual choices. In the case of Berkowitz, for example, the man acted on his own desires while ignoring the woman’s thoughts and feelings about the situation. Not bothering to find out whether someone consents or disregarding their nonconsent is to treat someone as a means to an end in Kantian terms. If consent is not meaningful, it does not have the power to protect people’s autonomy.

McGregor further argues that consent has the power to transform relationships and turn criminal actions into non-criminal ones. Consent is “morally transformative,” and can turn stealing into borrowing, assault into surgery, or rape into sex. Because it has this power, consent must be “voluntary and deliberate” and the person must understand what they are consenting to.<sup>126</sup> The person must also have the intention of consenting. Descriptively, a woman may consent to sex by saying “yes,” but the consent is not meaningful if, for example, she has a gun pointed at her head. If a woman’s consent is not intended or not “voluntary enough to be a true reflection of [her] autonomy,” judges and juries should recognize those cases as rape.

There are two major theories of consent: the “attitudinal” or mental state view, and the “performative” view. The first view focuses on the subjective state of the person consenting – whether they wanted to consent or not, despite the way they might have acted. In this view, “behavioral or verbal signs are merely *indications* of the person’s mental state; they are not the consent itself.”<sup>127</sup> The consent itself is the mental state of willing a certain state of affairs. The

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<sup>125</sup> McGregor, *Is it Rape?*, 106.

<sup>126</sup> *Ibid.*, 115.

<sup>127</sup> *Ibid.*, 122.

performative account, on the other hand, requires that consent be communicated. If consent has the power to make the impermissible, permissible, it can only do this if others are aware of the consent. In order to protect autonomy, consent must be communicated.<sup>128</sup> In the performative account, consent is more than just a mental state; McGregor explains that the performative action combined with the proper intent counts as consent.

Currently, rape law defines “without consent,” and often presumes that the default position is consent. The sexual interaction is assumed to be consensual unless “without consent” can be proven. This does not give judges or juries a clear picture of what “with consent” looks like. In order to make the rape statute more clear, “with consent” should be defined. Using what McGregor tells us about meaningful consent, the law should define consent in the following way: The woman must have the mental state of consenting, communicate that consent via her words and behavior, and intend for those words and behavior to mean consent. Her actions must also be voluntary and deliberate – that is, she consents to intercourse for reasons of her own as opposed to consenting as a result of fear or coercion.

The law already describes some cases where the victim is “incapable of consent.” If a person is mentally defective or incapacitated, physically helpless, or under 16 years old, the person cannot legally consent. The law also states that a person cannot consent if “overcome by deception, coercion, or surprise.” The law does not specify exactly what would count as coercion or deception, and it is difficult to determine how much coercion undermines consent. MacKinnon, for example, thinks all heterosexual relationships are primarily coercive and that women’s consent is never meaningful under current social conditions.

MacKinnon explains:

Politically, I call it rape whenever a woman has sex and feels violated. You might think that’s too broad. I’m not talking about

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<sup>128</sup> Ibid., 124.

sending all you men to jail for that. I'm talking about attempting to change the nature of the relations between men and women by having women ask ourselves, 'Did I feel violated?' To me, part of the culture of sexual inequality that makes women not report rape is that the definition of rape is not based on our sense of our violation.<sup>129</sup>

This analysis is not particularly helpful for determining the legal definition of rape, however, since not all sexual situations are equally coercive and not all coercion is criminal behavior. For example, a woman might be in a situation where her boyfriend threatens to break up with her if she does not have sex with him. She could have a variety of reasons for not wishing to engage in sex; she might not want to have sex until marriage, she might want to wait until the relationship is more stable, or she might be concerned about sexually transmitted infections. While we might describe this relationship as coercive or "unhealthy," the man's behavior is not criminal and the woman is still able to choose her own course of action. Abrams would see this as the type of situation where the woman can exercise her agency, even if she might be in an undesirable situation. The woman might determine that she cares more about the relationship than her goal of waiting until marriage, or she might decide that her boyfriend is not the type of man she wants to be with since he does not respect her values. Either way, the woman is able to exercise some agency within her relationship and determine the best course of action for her.

In the case described above, it is not unreasonable or illegal for the man to request sex from his partner or to make the relationship contingent on sex. However, what is reasonable or legal to request changes depending on the capacity of the relationship and the nature of the threats. For example, if a male therapist threatened to release a female patient's files if she did not consent to sex, the woman faces different sorts of constraints. The relationship between a therapist and patient cannot legally be contingent on sex, and the woman might fear negative consequences enough to engage in sex. Her "consent" in this case

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<sup>129</sup> Ibid., 82.

would not be intended, deliberate, or voluntary but instead the result of a highly coercive situation. Depending on how much she feared the violation of her privacy and the nature of her relationship with the therapist, the woman might feel as though she has no other choice. Furthermore, it would not be reasonable for the therapist to think the woman was voluntarily consenting to sex with him. Other relationships that cannot legally be contingent on sex would be: a teacher and a student, a tenant and a landlord, a doctor and a patient, or an employer and an employee. Grades, rent, medical treatment, or a salary cannot legally be revoked or negotiated with sexual intercourse. It would not be reasonable for an employer to think a woman was voluntarily consenting to have sex with him if he threatened to fire her, nor would a professor be justified in thinking a student was consenting to sex if he threatened to fail her.

Abrams would likely describe women as having some agency in these cases, much like the woman who is faced with losing a relationship if she does not consent to sex. A woman could decide that her job is not worth having sex with an employer, and suffer the consequences of being fired. She could take other action, such as filing sexual harassment charges, but she might not be in position to do so. She might not be able to afford to lose her job financially, or think the legal process of suing her employer is hopeless. While the women in both types of cases have some agency, there is a primary difference between them. The man in the dating relationship is not making an unreasonable or illegal request, while the teacher/landlord/doctor/employer is. The nature of the latter relationships should not be sexual, and the level of constraint placed on women's autonomy is much higher in these cases. Judges and juries should recognize these types of constraints as "coercion" in rape trials.

Besides better accounting for the way coercive sexual situations violate women's autonomy, broadening the definition of "coercion" should help promote men's responsibility. While women are responsible for communicating their consent (or nonconsent), men are responsible for listening to women and



making sure their partner is consenting. Men often do not think their own actions count as rape because aggressive and coercive behavior is often a part of “normal” sex. MacKinnon argues that rape is not only commonplace, but “indigenous” to women’s experience, not an exception to the rule. The prevalence of rape is a result of two truths: forced sex is “central to sexuality,” and “sexuality is central to women’s condition.”<sup>130</sup> While the law considers rape at the private, individual level (an infraction of one man against one woman), MacKinnon compares rape to lynching – an act of terrorism “within a systemic context of group subjection.” Rape victims are mostly women, rapists are mostly men, and “the rape of women by men is integral to the way inequality between the sexes occurs in life.”<sup>131</sup> For MacKinnon, rape is a sex inequality issue, not just a violent gender-neutral crime.

While liberal feminists like Roiphe think men and women are fundamentally the same and that women should strive to be like men, MacKinnon thinks there are differences, the primary one being that “women get fucked and men fuck.”<sup>132</sup> Definitionally, “women are those from whom sex is taken.” MacKinnon thinks rape law must be reformed to describe rape in terms of the woman’s sense of violation. Currently, the crime of rape revolves a masculine sense of what it means to be sexually violated. Penetration itself is the violation. As MacKinnon notes, women do feel violated by 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.”<sup>133</sup> Often after a rape, women cannot experience sexual feelings or touching again without reliving or thinking about the rape.<sup>134</sup> Rape violates more than just a woman’s body; it violates her ability to enjoy sex. In many ways, this is the more damaging and lasting

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<sup>130</sup> MacKinnon, *Toward a Feminist Theory of the State*, 172.

<sup>131</sup> *Ibid.*, 245.

<sup>132</sup> West, “Jurisprudence and Gender,” 13.

<sup>133</sup> MacKinnon, *Toward a Feminist Theory of the State*, 172.

<sup>134</sup> MacKinnon, *Feminism Unmodified*, 87-88.

violation. What we need to do, MacKinnon thinks, is “change the nature of the relations between men and women.” One of the ways we can do this is to redefine “normal” sexuality. MacKinnon thinks what currently counts as “normal” sex has been created by those in power within oppressive conditions, and the line between intercourse and rape is drawn from a masculine perspective.<sup>135</sup>

Expanding our conception of “coercion” and being clear about what it means to consent would help describe rape in terms of women’s sense of violation. The law struggles to determine the difference between sex and rape, or rather, when sex becomes rape. Because the law is a crude tool that describes criminal behavior in abstract terms, it is difficult to account for all the complex sexual situations that might be rape. Still, the law could account for some of these complexities by dividing rape into the two aforementioned types. Besides protecting women’s sexual autonomy, this type of revision to the law would have the broader goal of challenging social norms and changing the relationships between men and women. If normal sex is no longer the type of sex that makes women feel violated, if force and coercion no longer have a place in the bedroom, if men learn to listen to women and “no” means “no,” if women do not fear repercussions when they say “no,” eventually women’s consent will be meaningful.

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<sup>135</sup> MacKinnon, *Feminism Unmodified*, 86.

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