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A CRITIQUE OF CATHARINE MACKINNON'S SEX-BASED THEORY OF RAPE

by

MEAGAN MALONE

Under the Direction of Christie Hartley, PhD

ABSTRACT

In a critique of sex-based theories of rape, Aletta Brenner suggests that feminists such as Catharine MacKinnon rely on a harmful set of assumptions when theorizing about the law of rape leading to harms to victims and perpetrators. I defend MacKinnon's position in order to demonstrate how MacKinnon's theory does not employ the assumptions Brenner suggests and therefore does not lead harms. However, I highlight one concern of Brenner's that MacKinnon's theory does not adequately address: that MacKinnon insists that all rape is sex based. I posit that in Same Sex Mutual Intimate Partner Violence, rape appears to be sexual-orientation based rather than sex based and suggest that MacKinnon's theory ought to make distinctions that allow the law to be sensitive to those most vulnerable to rape.

INDEX WORDS rape, Catharine MacKinnon, law, harms

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by

MEAGAN MALONE

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2017

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1 INTRODUCTION

For Catharine MacKinnon, rape is always an act of sex subordination. It is not merely an isolated incident of violence in the way that a drive-by shooting might be, for example. Whereas there is no particular feature of one's identity that singles one out for being injured in a drive-by shooting, *gender* is the common, salient feature that determines one's vulnerability for rape¹. On MacKinnon's view, rape is a prime site of subordination in which some people are made into women and some people are made into men or in which men do what men do—dominate—and women are subordinate. As a result of her belief that one's power and status in society is determined by one's gender, it is a fundamental error to stop at the claim that rape occurs when the perpetrator is more powerful than the victim. To do so fails to acknowledge and critique masculine domination as the force that creates the imbalance of power. Instead, MacKinnon asserts that rape happens *because of* gender. Put another way, "if it is sexual, it is gender-based, hence sex-based."²

MacKinnon denies that it is fruitful to consider other factors separate from one's gender that may make one vulnerable to rape or other sexual violence because she does not see that there possibly can be any. If there is sexual abuse, it occurs only because of one's gender. Does a female perpetrator rape a female victim because the victim is female? MacKinnon would say yes, that "given the imbrication of sexuality with sex and gender, and all with social hierarchy, truly sex-neutral and gender-neutral—hence sex-equal—sexual abuse is virtually nonexistent."³

The female perpetrator of rape against a female victim, for example, is part of a large narrative; it

¹ When describing MacKinnon's position, I use the words sex and gender interchangeably as she believes the two share the same social meaning. She does not deny that there are biological differences when she collapses sex and gender into one. Rather, she is interested in the cultural construction of identity categories in society. See: Catharine MacKinnon, "Desire and Power," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Harvard University Press, 1987) 46-62.

² Catharine A. MacKinnon, *Women's Lives Men's Laws* (Cambridge: Belknap Press, 2005), 170.

³ *Ibid.*, 174.

necessarily involves domination and subordination in which the perpetrator rapes the victim because of the victim's gender.⁴ The perpetrator is a man or functions as a man, and the victim is a woman. Instances that do not involve these two factors—gender and membership in dominant or subordinate social group—if there are any, are so very rare as to not warrant attention or inclusion in her theory.

Some critics reject the idea that rape is a sex-based crime, arguing that a feminist sexual-subordination theory of rape like MacKinnon's is not only incorrect but that the position generates harms to victims. Aletta Brenner's "Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape," is one example of a very strong critique of the position.⁵ In it, she posits that feminist theories of rape like MacKinnon's tacitly rely on a set of problematic assumptions which yield an under-inclusive definition of rape which in turn leads to harms to victims and perpetrators. Brenner suggests, among other things, that there are instances of rape that do not appear to be motivated by gender and that, therefore, not all rape can be considered acts of sex inequality. She therefore calls for a theory of rape that "would resist broad generalizations about the nature and root causes of rape as a form of gendered violence" in favor of one that "would treat individual acts of rape as contextual, always recognizing that power can operate in a multiplicity of ways."⁶

I will defend a sexual subordination theory of rape against much of the criticisms that Brenner levies because the theory is an important tool that has powerful explanatory force. Empirical evidence continues to confirm the theory's assertion that predominantly women rather

⁴ Catharine A. MacKinnon, "Rape Redefined," *Harvard Law & Policy Review* 10, no. 2 (2016): 440.

⁵ Aletta Brenner, "Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape," *Harvard Journal of Law and Gender* 36, no.2 (2013): 505.

⁶ *Ibid.*, 557.

than men are subject to rape. Acknowledging this social imbalance between men and women is a vital component of bringing relief to those who suffer from all forms of sexual violence.

However, I suggest that Brenner is correct to conclude that a sexual subordination theory of rape is not the best explanation for all cases of violence involving unwanted sex, and I provide an example of a current phenomenon that MacKinnon's view, representing the sexual subordination theory, is unable to explain in a helpful way. Same-sex mutual intimate partner violence (SSMPV), I posit, may constitute a type of sexual violence in which a person's rape is not best understood in terms of sex subordination. I disagree with Brenner that MacKinnon is unable to recognize rape that occurs in SSMPV as rape; however, I am sympathetic to Brenner's concern that a position like MacKinnon's does not best explain this kind of sexual violence. Specifically, I suggest that MacKinnon's position does not allow for consideration of factors specific to SSMPV that may motivate sexual violence. MacKinnon draws our attention to how one's gender marks one out as particularly vulnerable to rape, yet it is not adequately sensitive to the way in which sexual orientation, regardless of gender, also increases one's vulnerability.

In the first chapter, I present and explain Brenner's critique of the liberal and radical feminist sexual-subordination theory of rape. Here I introduce her claim that when theorizing about rape, these feminists employ a set of harmful assumptions which Brenner calls the victim/perpetrator framework. In the second chapter, I give a summary of Catharine MacKinnon's view, the body of work that greatly informs Brenner's understanding of feminism. I do so to demonstrate that, contra Brenner, the sexual subordination theory of rape need not entail each of the assumptions of the victim/perpetrator model and therefore does not lead to the harms Brenner suggests. Additionally, I point out where Brenner's understanding of the feminist sexual subordination theory simply is not representative of the view. In the third chapter, I flag

one element of the victim/perpetrator framework that does appear to be plausibly linked to the sexual subordination theory of rape: the presumption that rape is always a crime of man against a woman. I posit that sexual-orientation is a characteristic that marks one for rape that, in certain contexts, may be distinct from gender. I conclude that a theory of rape must be able to make this distinction in order to best develop resources to support victims and work towards ending sexual violence.

2 BRENNER'S CRITIQUE

Aletta Brenner claims that liberal and radical feminists employ the victim/perpetrator framework when theorizing about rape.⁷ This framework is not explicitly acknowledged by all liberal and radical feminists; rather, certain assumptions that are definitive of this framework underlie the defining elements of their views for reforming rape law and influence public perspectives on what counts as rape.⁸ Brenner claims that these assumptions can harm both rape victims and perpetrators. To address these harms, she calls for abandoning these feminist theories of rape and developing a different model that does not treat rape as a symptom of sexual inequality arising from patriarchy but rather as isolated “acts of sexual violence” that are “highly contingent.”⁹

She presents a summary of these theories under the name of the liberal/radical feminist position on rape. It is as follows: Rape is fundamentally linked to men's and women's relative positions within the fixed sexual hierarchy of patriarchy. By virtue of their location within the patriarchy, rape perpetrators are assumed to be in a position of relative power, while all rape victims are in a position of relative disempowerment; because patriarchy is normatively bad, all acts stemming from it are understood to constitute a form of female injury.¹⁰

Based on her characterization, it appears that the foundational source that informs her description is best understood as the sexual subordination theory of Catharine MacKinnon. In what follows, I will refer to this general statement of what Brenner calls the liberal and radical feminist viewpoint as the sexual subordination theory of rape. I acknowledge that there is no unified liberal or radical

⁷ Brenner, “Resisting Simple Dichotomies,” 505.

⁸ Ibid.

⁹ Ibid., 560.

¹⁰ Ibid., 516-7.

feminist position on what explains rape and how best to end it nor is there a unified notion of what a feminist is.

Brenner believes that the sexual subordination theory of rape relies silently on the following three assumptions which she calls the victim/perpetrator model:

- 1: The (male) person committing rape acts “freely and deliberately to harm.”
- 2: The (female) victim of rape exercises no agency and “in no way participates” in the sexual encounter.
- 3: Extreme, traumatic harm—to the victim only—results from every rape.¹¹

Brenner suggests that these assumptions work together to create in the public both an under- and over-inclusive idea about what rape is which leads to harms to both victims and perpetrators. In other words, the victim/perpetrator framework does not allow theories to capture some sexual experiences that we believe should count as rape. In this way, it harms victims of rape. Yet the framework also leads to defining some sexual encounters that Brenner claims are not problematic; here, the accused perpetrator is harmed because the label mischaracterizes the perpetrator’s intentions or results in undeserved punishment. While Brenner’s article posits ways in which the feminist theories harm both victims and perpetrators, I focus only on Brenner’s discussion of victim harms.

Brenner posits that is harmful to victims for a theory of rape to be under-inclusive because it makes it difficult for victims and for others in society to recognize that a rape has occurred. By society, I mean citizens and community members, leaders of institutions such as schools and workplaces, as well as judges and juries. It is harmful for one’s fellow citizens to fail to recognize that a rape has occurred because it can result in unwarranted shaming of, disbelieving, or blaming

¹¹ Ibid, 505.

victims. Furthermore, it is harmful for an individual to fail to recognize themselves as having been raped because it their interest to have as many resources as possible at their disposal for making sense of their experience and for recovering from it.¹² When institutional leaders fail to recognize rape, they harm past and future victims by not addressing institutional practices that lead to rape and by not providing resources to help victims.¹³ Lastly, harms arise when judges or juries hold under-inclusive ideas about rape because it prohibits them from reaching just verdicts in rape cases.¹⁴

2.1 Harms of Victim Perpetrator Framework

2.1.1 Harms of Assumption 1

The first assumption, that the male person committing rape acts “freely and deliberately to harm,” is problematic because it leads people to believe that a perpetrator must be, first, a man and, secondly, actively malicious and hateful towards women, consciously seeking to inflict serious harm by forcing unwanted sex onto a victim. This definition, however, is too narrow according to Brenner because, if the perpetrator is a woman or if “accused rapist fails to fit the prescribed role” of hateful misogynist, people are unwilling to believe that a rape has occurred.¹⁵ For example, if the accused perpetrator is the victim’s friend, significant other, or a spouse, or simply does not appear to be particularly malevolent, it is less likely that people will believe that a rape occurred or that authorities will be interested in punishing those perpetrators.

Brenner gives an example of this in her discussion of the responses from administrators and students to a series of rape allegations at Amherst College in 2012. Angie Epifano reported to

¹² Ibid., 552.

¹³ Ibid., 545.

¹⁴ Ibid., 535.

¹⁵ Ibid., 520.

administrators that she had been raped by a fellow student and sought counseling from the school.¹⁶ The institutional leaders discouraged her from bringing a complaint against the perpetrator via the institutional channels, citing lack of evidence to prove her claim and saying that “pressing charges would be useless” as the accused student was “about to graduate.”¹⁷ Brenner believes that this failure on the part of the institution to respond properly to Epifano’s allegations was in part due to the belief that a successful college student who has the respect of his community cannot truly be a rapist, a belief that Brenner believes stems from the sexual subordination theory of rape. She believes that “in a system where the only options are to demonize the perpetrator or to let him off entirely, many people will refuse to recognize the wrongness of the act in order to justify their sympathy for the perpetrator.”¹⁸ Therefore, the sexual subordination theory of rape provides an inadequate, overly narrow picture of who a rapist is that makes it more difficult for people to recognize when rape has occurred.

2.1.2 Harms of Assumption 2

The second assumption is that the female victim of rape exercises no agency and “in no way participates” in the sexual encounter.¹⁹ According to Brenner, this under-inclusive idea of who a victim is results in two main problems: first, non-recognition by the victim or society that rape occurred based on beliefs about the victim’s participation in the sexual encounter; and secondly, non-recognition of rape when the victim is not female or is not heterosexual.

Brenner says that in general these feminists believe victims are completely passive and do not perform any actions that contribute to their rape. If someone holds this belief about what it

¹⁶ Ibid, 546.

¹⁷ Ibid, 547.

¹⁸ Ibid, 550.

¹⁹ Ibid, 505.

means to be a victim of rape, it may prohibit them from classifying rape as such if they perceive that the victim actively participated in at least some events leading up to or surrounding the unwanted sex. To illustrate this, consider the response of rape victims interviewed in 2007 for a study on acquaintance rape on college campuses. In response to the question of why she did not initially believe that she had been raped, one interviewee said “I blamed myself. I went over there. I gave him and his friends an excuse to banter [sic] me. I shouldn’t have been there.”²⁰ In this case, because the woman voluntarily spent time and interacted with the perpetrator, she believed that she was not a victim based on her understanding that a victim is someone entirely passive in relation to the perpetrator. Brenner seems to be saying here that the feminist-position-inspired image of rape victim resembles a damsel-in-distress who is stolen from her castle against her will and subjected to unwanted sex, never making a single autonomous choice in the entire unfortunate encounter. This is too narrow of an image and excludes many victims who believe that by voluntarily engaging in certain ways with the perpetrator, one is complicit in the sexual act.

This assumption is also extremely problematic in that it hides the reality that people of all genders and sexualities can be targets of sexual violence. Brenner says that absent from the victim/perpetrator framework—and therefore the sexual subordination theory of rape—are male victims of rape where the perpetrator is male or female, female victims where the perpetrator is female, as well as queer, transgendered, and intersex victims.²¹ By building gender into their understanding of what rape is, the feminist-position “contributes to the law of rape’s tendency to marginalize” these victims.²²

²⁰ Sarah M. Guerette and Sandra L. Caron, “Assessing the Impact of Acquaintance Rape: Interviews with Women Who are Victims/Survivors of Sexual Assault While in College,” *Journal of College Student Psychotherapy* 22 no. 2 (2007): 43.

²¹ Brenner, “Resisting Simple Dichotomies,” 526.

²² *Ibid.*, 527.

2.1.3 *Harms of Assumption 3*

The third assumption is that extreme, traumatic harm results from every rape. Like the first two assumptions, this is harmful because it generates an under-inclusive understanding of rape thereby preventing some victims and members of society from recognizing when it happens. Brenner notes that unwanted sexual encounters that do not display signs of violence are less likely to be considered rape. For example, “when a victim does not conform to expectations of harm, jurors, police, and even friends might question his or her genuineness.”²³ This makes it “harder for law enforcement, the courts, and everyone else to accept that an act of sexual violence is really rape when the violence is not particularly explicit.”²⁴ For example, the Pennsylvania Supreme Court ruled in *Commonwealth vs. Berkowitz* that what lower courts had classified as rape was in fact not. This ruling was a result, in part, Brenner argues, because “the events in *Berkowitz* appear to lack the explicit violence or sense of domination that the victim/perpetrator framework presents as typical for rape.”²⁵ In other words, while lower courts believed that defendant Robert had forced unwanted sex onto the victim Linda, one reason that the higher court was unwilling to characterize the sexual encounter between the two was that Linda did not have signs of physical abuse, nor did she present to the court any evidence of psychological trauma.²⁶

2.2 **Replacing the Victim Perpetrator Framework**

Because the sexual subordination theory of rape leads to numerous harms to victims, Brenner calls for replacing it with an intersectional model. Such a model would resist generalizing about how one’s gender affects one’s exercise of power in sexual situations. Rather,

²³ Ibid., 530.

²⁴ Ibid., 531.

²⁵ Ibid., 540.

²⁶ Ibid.

it would “treat rape...more as a break in the mutual process of relating to one another as human beings.”²⁷ On this account, acts of rape are individual and localized, not related to overarching power structures or social dynamics.

²⁷ Ibid., 557.

3 A RESPONSE TO BRENNER'S CRITIQUE

In order to draw conclusions about the viability or harmful effects of feminist contributions to theorizing and crafting policy about rape, it is important to acknowledge the distinctions the sexual subordination theory of rape is capable of making rather than relying on the most extreme iterations of the view.²⁸ I suggest that Brenner's characterization of the view most closely resembles MacKinnon's work on rape. While some elements of Brenner's summary align with MacKinnon's position, it is important to clarify MacKinnon's view to determine whether it truly relies on assumptions of the victim/perpetrator framework and whether those assumptions result in harms. In this chapter, I will first summarize MacKinnon's sexual subordination theory of rape. Next, I will use her view to demonstrate how this theory does not lead to each of the harms that Brenner enumerates.

3.1 MacKinnon's View

MacKinnon's sexual subordination theory has two interrelated parts: a theory of inequality and a theory of gender. These work together to describe how women, as a group, are socially subordinated to men through sexuality. Anderson usefully characterizes MacKinnon's view on the subject in a way that is applicable to her position on rape: the "core wrong... consists in a group injury, the subordination of women by men."²⁹ Anderson's summary of MacKinnon's sexual harassment theory can be applied to MacKinnon's theory on rape because, while the content of the two forms of sexual conduct differs, the cause and function of the two are the same; men use both in such a way that subordinates women. Most simply, then, to be a woman is

²⁸ I want to reiterate that I am using the singular "view" when in reality the liberal/radical feminist position that Brenner describes is a summary of several "views."

²⁹ Elizabeth Anderson, "Recent Thinking about Sexual Harassment: A Review Essay," *Philosophy and Public Affairs* 34, no. 3 (2006): 290.

to be part of a group that occupies a subordinate position in society. The force that subordinates is male dominance, and the tool of masculine power is sexuality.

For MacKinnon, equality consists in the absence of social hierarchy. Inequality, on the other hand, is a state of affairs in which one group in society holds more power than those in other groups.³⁰ Our society is an unequal one because men have more power than women; the fact that the material realities of women are demonstrably worse than men's shows women's powerlessness.³¹

What distinguishes MacKinnon's position on equality from the prevailing view in law and society is that, according to her, this social inequality is not a problem of differences between the sexes but one that is actively maintained by masculine dominance. Law and society take the "difference approach" to equality which allows them to justify and naturalize this gap between the sexes rather than seeing it as a problem of inequality.³² There is an assumption that the differences between the sexes naturally produced the structure of society that we see today; any kind of social stratification that falls on gender lines is a result of how women are different from men. On this view, equality means treating women the same as men only when women appear to be the same as men, and it justifies treating women differently when they appear to be different from men. However, MacKinnon says that the differences between the sexes are a result of the structural sexual inequality, not the reverse. The inequality is, first, created and enforced by male dominance. Only then does the inequality lead to the differences between the sexes. Therefore, "sex inequality questions are questions of systematic dominance, of male supremacy," and to end inequality requires taking measures to end this domination.³³

³⁰ Catharine A. MacKinnon, *Feminism Unmodified*, (Cambridge: Harvard University Press, 1987), 40.

³¹ *Ibid.*, 34.

³² *Ibid.*, 32.

³³ *Ibid.*, 42.

The tool of subordination, or the means by which inequality between men and women is perpetuated, is sexuality. Heterosexuality as the prevailing sexual practice in society involves the sexual dominance of one, the man, and submission of the other, the woman. It is this sexual paradigm that gives meaning to gender. For MacKinnon, “the erotic is what defines sex as an inequality;” in other words, the eroticization of the violent and unequal power dynamic of sex roles produces the meaning of gender where being a man means dominating, physically and otherwise, and being a woman means being subordinated.³⁴ Insofar as this is pleasurable for men and taken to be natural in sex, these sexual attributes become social attributes assigned to the different sexes and seen as natural differences. Once these attributes and differences are solidified and inequality is established, the differences and inequalities are maintained by the continued violent sexual exploitation of men by women. This sexual violence:

symbolizes and actualizes women’s subordinate social status to men. It is both an indication and practice of inequality between the sexes, specifically of the low status of women relative to men. Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth. To be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position.³⁵

On MacKinnon’s view, then, gender—a term that, for MacKinnon, is interchangeable with the term “sex”—is not biological but social; one is a man or woman not in virtue of one’s body parts but in virtue of one’s position in society which corresponds with one’s vulnerability

³⁴ Ibid., 50.

³⁵ MacKinnon, *Women’s Lives*, 129.

to sexual violence.³⁶ In society, men are “subjects” whose point of view is taken to be objective and is therefore the dominant point of view. To be male is to be a member of this dominant group who shares this point of view. To be a woman, on the other hand, is to be an “object” whose point of view is often excluded from dominant discourse.³⁷ Along with this exclusion comes sexual objectification. This is what leads MacKinnon to assert that “to be rapable, a position which is social, not biological, defines what a woman *is*.”³⁸ This social gender usually tracks what we know as biological gender, but it does not always. MacKinnon says that biologically male people can be raped, and biologically female people can rape others. When this happens, however, it is because the raped male in this case “is feminized”³⁹ or the female rapist has taken “the male point of view” by making their victim into a sexual object.⁴⁰

This way of understanding gender shows us that crimes of sexual violence are done because of one’s membership in a particular gender group, not simply as an individual expression of a particular power differential. One is targeted for rape and other forms of sexual violence because one is part of the subordinated social group, women. It is not enough to say that one is raped or otherwise sexually violated because one is less powerful; MacKinnon’s insight invites us to go a step further and specify that is it because one is a woman that one is less powerful. She concludes that men sexually violate and harass women “because they get off on it in a way that fuses dominance with sexuality” and because “it expresses male control over sexual access to” women.⁴¹ Defining rape and other instances of sexual assault, control, and coercion as

³⁶ MacKinnon, *Feminism Unmodified*, 54.

³⁷ *Ibid.*, 55.

³⁸ Catharine A. MacKinnon, “Feminism, Marxism, Method, and State: Toward Feminist Jurisprudence,” *Signs* 8, no. 4 (1983), 651.

³⁹ MacKinnon, *Feminism Unmodified*, 56.

⁴⁰ *Ibid.*, 52.

⁴¹ *Ibid.*, 92.

isolated instances of violence or expressions of power fails to critique the way that masculine domination remains the foundation that facilitates these acts in the first place.

3.2 MacKinnon's Response to Brenner

Some of the elements of Brenner's victim/perpetrator framework can be found in a feminist sexual subordination theory of rape such as MacKinnon's; however, Brenner's articulations of the assumptions are in large part mischaracterizations of this kind of theory. I will use MacKinnon's work as an example of feminism that one could interpret as being committed to these assumptions. With MacKinnon's work, I show that assumptions 1 and 2 are not central to a feminist view then demonstrate a more accurate understanding of assumption 3 that is a tenet of feminism but does not lead to harm to rape victims. However, I agree with Brenner that an unhelpful notion of perpetrators as male and victims as female, which Brenner discusses as part of assumptions 1 and 2, is built in to sexual subordination theories of rape. I bracket my response to this part of the first two assumptions for discussion in Chapter 3.

Assumption 1 says that the male perpetrator of rape is "a freely acting predator motivated by misogynist lust/hate."⁴² In other words, to be a perpetrator of rape is to intentionally sexually violate women and to do so as an active and chosen response to one's hatred of women. To believe that rape perpetrators fit this profile, Brenner says, makes it difficult to recognize that rape has occurred when the rapist is not overtly violent or outwardly hateful.

While the sexual subordination theory of rape sees this act as connected to the systematic subordination of women by men, the position need not make claims about the intentions or the especially deviant nature of the perpetrator in order to maintain that "rape perpetrators are

⁴² Brenner, "Resisting Simple Dichotomies," 518.

assumed to be in a position of relative power.”⁴³ This is not to deny that there are individual feminist thinkers who hold these categorical beliefs about male perpetrator intent to harm;⁴⁴ rather, I suggest that a sexual subordination theory of rape can accommodate a view that male perpetrators may not be motivated to rape by hate for women while still believing that when a male rapes a female, they are in a position of power relative to their victim and that the act perpetuates systematic female sexual subordination.

MacKinnon’s work calls for the opposite of what Brenner suggests are the harmful results of the first assumption. She argues that even when a man asks and receives consent from a woman to engage in sex, because of the “invisible background, sometimes foreground, conditions of sex (meaning gender) inequality,” it is not safe to assume that the sexual encounter is not rape.⁴⁵ Everyday sexual encounters, ones that lack the hallmarks of a brutal and violent encounter, are often nevertheless coercive and ought to be classified as rape if they are unwanted by one of the parties. In other words, men need not display extreme violence or behave in what we might consider abnormal ways in order to secure sex or consent for sex because, as a group, they possess more power than women. One result of this, she notes, is that “normal masculinity under conditions of sex inequality is consistent with sexual predation.”⁴⁶ In this way, she shows that a male can behave in society without displaying hallmarks of violent behavior but nevertheless display violence in sexual settings. This shows that her position, if understood, does not contribute to under-inclusive social conceptions of what it means to be a rapist.

⁴³ *Ibid.*, 516.

⁴⁴ Brenner cites Susan Brownmiller’s account of rape as an example of such a position.

⁴⁵ MacKinnon, “Rape Redefined,” 440.

⁴⁶ Catharine A. MacKinnon, “In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education,” *The Yale Law Journal* 125 no. 7 (2016): 2055.

It is clear now that the sexual subordination theory of rape, properly understood, would not lead to rape non-recognition in a case like Angie Epifano's 2012 incident at Amherst College. MacKinnon's view emphasizes the way in which encounters that display signs of "normal" sexuality can nevertheless be coercive and violent. That the perpetrator in this case was considered by his community to be a successful college student is no indication whatsoever of his innocence. A sexual subordination theory of rape leads judges, juries, administrators, and others responding to claims of rape to be sensitive to the possibility of sexual violence in all contexts and perpetrated by any man. Amherst College administrators examining Epifano's case from MacKinnon's position would easily accept Epifano's claims. Their rejection of Epifano's concerns and inaction must stem from other circumstances.

Assumption 2 says that "the rape victim is passive and in no way participates in or contributes to the actions of the perpetrator."⁴⁷ Elsewhere, Brenner suggests that feminists assume that the victim is "purely" passive.⁴⁸ To hold this belief is harmful, Brenner says, because it makes it harder for a victim to recognize their experience as rape if, for example, the victim interacted voluntarily with the perpetrator prior to the sexual encounter. Furthermore, this belief is harmful because it leads to disempowering women, suggesting that they have no means of resistance in a rape situation.

However, the sexual subordination theory of rape only claims that "rape victims are in a position of *relative* disempowerment" in relation to the perpetrator (emphasis mine) which allows for the fact that victims of rape may exhibit a range of resistance in the encounter.⁴⁹ Because victims do not hold the degree of power that their perpetrators do, the sexual

⁴⁷ Brenner, "Resisting Simple Dichotomies," 505.

⁴⁸ *Ibid.*, 531.

⁴⁹ *Ibid.*, 516.

subordination theory of rape notes that, often, the most logical response of a victim, and one that may save her life, is to comply with the unwanted sex. However, it is not the position of all liberal or radical feminists that rape victims are not able to resist their attackers, rather that is, in many cases, simply in the interest of their safety to do so.

MacKinnon's view accommodates both the idea that it is reasonable for victims to comply with unwanted sex—or, in the language of the victim perpetrator framework, to be passive in a rape encounter—and the idea that it can be reasonable for some victims to say no and resist, whether during an encounter or afterwards through reporting incidents to the authorities. She recognizes that victims, as women, are in a double bind when it comes to their response to unwanted sexual advances. Their reality of relative disempowerment means that victims cannot without possible repercussion simply attempt to deny sexual advances from men or physically fight back—and this fighting back sometimes takes the form of reporting rape—because of the threat of more intense violence, yet complying with those advances results in sexual violence nonetheless.⁵⁰ Still, she articulates the possibility of both responses: passivity *and* resistance. In a talk she gave in 1981 at a rally objecting to rape on Stanford University's campus, MacKinnon calls for women, where able, to report their rape and to begin to develop self-defense tactics which could “begin to give...back a sense that we have a self worth defending.”⁵¹ Taking these steps would be in service of “[changing] our lives and [supporting] all sisters who resist.”⁵² This emphasis on the possibility of change and resistance demonstrates that the second assumption of the victim/perpetrator framework is not built in to her view.

⁵⁰ MacKinnon, *Feminism Unmodified*, 90.

⁵¹ *Ibid.*, 84.

⁵² *Ibid.*

Assumption three—that the harm of rape is extremely serious— can be linked to the radical feminist claim that rape functions as a means to perpetuate systematic female subordination; insofar as each rape constitutes an instance of female subordination, each rape is necessarily harmful.⁵³ Brenner says that this assumption leads to rape non-recognition by society and victims themselves when the sexual violation did not display outward signs of extreme violence.

A liberal/radical feminist such as MacKinnon might respond to Brenner that what she calls an assumption about the harm of rape is actually an accepted tenet of the position. However, it does not follow from this tenet, as Brenner suggests, that feminists believe that extreme violence need to be present in order for an unwanted sexual encounter to be classified as a rape. Nor must the victim feel traumatized or helpless in order for rape to have taken place according to feminists. The sexual subordination theory of rape simply says that when nonconsensual sex has taken place, there is a harm done against women, but this fact does not rely on the amount of violence inflicted or the degree of psychological suffering that victim experiences as the assumption suggests.

Because the harm of rape is a corporate as well as individual wrong, it is not helpful to use a victim's response alone as a barometer for determining the harm of rape. MacKinnon emphasizes that the individual harm of rape, while present in any unwanted sexual encounter, differs in degree from experience to experience. Rape certainly negatively affects the individual victim; however, regardless to the extent to which the individual feels harmed, rape functions to perpetuate the lowered status of all women. According to Anderson's assessment of MacKinnon's position, sexual harassment as well as "forms of sexual conduct, including also

⁵³ Brenner, "Resisting Simple Dichotomies," 513.

rape, prostitution, and pornography keep women subordinate, not just sexually, but economically, politically, and socially.”⁵⁴ MacKinnon holds that “feminism claims not that all women are affected the same by male power or are similarly situated under it” but rather that “no woman is unaffected by it.”⁵⁵

To conclude, MacKinnon’s work shows us that assumptions 1 and 2 of Brenner’s victim/perpetrator framework are not definitive of a feminist sexual subordination theory of rape. Assumption 3 is central to the view; however, when properly understood, it does not lead to the under-inclusive social conceptions of rape Brenner posits.

⁵⁴ Anderson, “Recent Thinking,” 290.

⁵⁵ MacKinnon, *Women’s Lives*, 87.

4 A CRITIQUE OF MACKINNON

I have shown that the radical/liberal sexual subordination theory of rape best characterized by Catharine MacKinnon's view does not necessarily rely on each of the assumptions Brenner posits in the victim/perpetrator framework and therefore does not generate the harms that Brenner claims. Nevertheless, I agree that it may not be helpful for sexual subordination theories of rape to assert that all rape is sex/gender-based. What is insightful about Brenner's articulation of the assumptions 1 and 2 is that they draw our attention to how the feminist theories posit that only men are perpetrators and only women are victims of rape. While it may be the case for many instances of rape, this generalization is not helpful for explaining all cases of rape; I will show that this is the case regardless of whether we understand sex/gender as MacKinnon does. Instead of making this assertion, it seems helpful to recognize sexual-orientation as a factor distinct from sex/gender that increases one's likelihood to be raped. Unlike Brenner, however, I believe that the harm of holding such a belief is not that it results in rape non-recognition but that it does not allow for developing resources specific to helping the most vulnerable populations recover from past or prevent future rapes.

To illustrate how MacKinnon's view in particular is not helpful for understanding and eradicating some rape, I will discuss rape as it occurs in same-sex mutual intimate partner violence (SSMPV).⁵⁶ SSMPV may constitute a type of sexual violence in which factors other than MacKinnon's sex/gender may explain why rape happens. In cases of SSMPV, both members of the intimate partnership, Person A and Person B, alternately embody victim and perpetrator roles. Neither is the primary victim nor the primary perpetrator; rather, they both experience sexual violence victimization and administer sexual violence. In order for

⁵⁶ Mutual IPV is also called bidirectional IPV in some of the literature.

MacKinnon's understanding of rape to fit these situations, it would have to be the case, first, that Person A in the relationship is both a man and a woman and is a member of both a dominant gender group and subordinate one, and, second, that Person B is also both a man and woman and member of both a dominant and subordinate social group. This is one explanation, but there may be a simpler account that does not require gender switching within a same-sex couple and that suggests there might be resources specific to the same-sex community required for alleviating this problem. That account hypothesizes that minority stress specifically, perhaps in conjunction with male domination, leads to bidirectional expressions of sexual aggression; this means that sexual orientation may be a factor other than sex/gender that makes one vulnerable to rape. While MacKinnon may have the theoretical resources to explain the phenomenon of SSMPV, her framework overlooks the possibility that minority stress contributes to one's likelihood to experience sexual violence. The alternate explanation, if research continues to support it, could lead to the development of resources specific to the same-sex community to tackle that problem.

This is similar to Elizabeth Anderson's critique of MacKinnon's position on sexual harassment. Anderson concludes that while MacKinnon is "right to see the majority of cases [of sexual harassment] as cases of expressions of male dominance," this explanation does not include all instances of sexual harassment.⁵⁷ She concludes, therefore, that "no single theory of sexual harassment accounts for all the valid moral and legal claims that can be raised in the cases."⁵⁸ I too suggest that most cases of rape most likely involve a man subordinating a woman through sexual domination, but I identify at least one case in which rape may not be best understood as sex-based. In this chapter, I first describe SSMPV. I then demonstrate how MacKinnon's view, while one explanation, may not be the most helpful for understanding

⁵⁷ Anderson, "Recent Thinking," 292.

⁵⁸ *Ibid.*, 291.

SSMPV. Additional theories may be required to explain and provide resources to eliminate rape that happens in SSMPV.

4.1 An Overview of SSMPV

While mutual partner violence (MPV) also occurs in opposite sex relationships, in what follows I will describe the phenomenon as it takes place within same sex relationships for the purposes of highlighting one way in which MacKinnon's view is under-inclusive.⁵⁹ In this section, I first discuss what behaviors constitute intimate partner violence (IPV) according to the literature and explain how MPV differs from IPV. Next, I review evidence from recent studies that suggests MPV constitutes a significant problem for some same-sex partners that warrants further study as well as development of specific resources to bring relief to those experiencing it. I then demonstrate that SSMPV may be more helpfully understood as sexual-orientation-based rather than sex-based. This means that MacKinnon's view of why rape happens may not be appropriately sensitive or responsive to some important features at play in mutual-rape that occurs in same-sex couples.

IPV refers to a group of physical and psychological measures employed by one person over the other within an intimate partnership. Kelly et al. understand IPV in the same-sex community to be "a pattern of violent and coercive behaviors whereby a lesbian or gay man seeks to control the thoughts, beliefs, or conduct of an intimate partner or punish the intimate for resisting the perpetrator's control."⁶⁰ This kind of controlling behavior can be physically, sexually, and/or psychologically violent including such acts as "pushing, punching, grabbing,"

⁵⁹ In this section, some researchers use gender to mean chosen identity and sex to mean biological sex. Others use the words without clarity about whether they mean biological sex or self-chosen identity. Edwards et al. (2015), reviewing the work done on SSMPV, critique the ambiguous use of these terms and call for researcher to make clear distinctions in future work.

⁶⁰ Brian C. Kelly et al., "The Intersection of Mutual Partner Violence and Substance Use Among Urban Gays, Lesbians, and Bisexuals," *Deviant Behavior* 32, no. 5 (2011), 381-2.

“verbal humiliation,” as well as “forced intercourse.”⁶¹ In other words, IPV can, but does not always, include rape.

In most cases of IPV studied to date, one partner plays the role of aggressor while the other is the victim. However, when both partners trade this role within a relationship, the aggressive behaviors are best characterized as MPV. Whereas researchers once believed that victim and perpetrator were fixed roles for individuals, more recent studies, such as one by Stults et al., “suggest that a person can be a victim of IPV in one relationship, a perpetrator in another, or both with the same partner.”⁶² In cases of SSMPV, Badenes-Ribera et al. found that partners characterized the violent behavior “as mutual aggression” rather than “self-defense.”⁶³ A study of MPV among gay men also found that there “is often no clear distinction between the perpetrator and the victim.”⁶⁴ This evidence of mutuality of aggression shows that it may not always be meaningful to use the words victim and perpetrator to categorize the individuals within a same-sex partnership experiencing MPV.

Understanding of SSMPV is limited because there is not yet a breadth of literature on the subject; however, as evidence of it continues to emerge, there is a call to make it a research priority. Authors of the studies I present here express their belief that it is due to the lack of attention paid by researchers to these couples in the past and to underreporting of IPV by couples in this community that these patterns of behavior are only now emerging. Therefore, most authors recognized the need for additional studies to replicate and narrow the focus of their findings.

⁶¹ Ibid.

⁶² Christopher B. Stults et al., “Intimate Partner Violence Perpetration and Victimization Among YSMS: The P18 Cohort Study,” *Psychology of Sexual Orientation and Gender Diversity* 2, no. 2 (2015), 155.

⁶³ Laura Badenes-Ribera et al., “Intimate Partner Violence in Self-Identified Lesbians: A Systematic Review of Its Prevalence and Correlates,” *Trauma, Violence, and Abuse* 17, no. 3 (2016), 293.

⁶⁴ John L. Oliffe et al., “Gay Men and Intimate Partner Violence: a Gender Analysis,” *Sociology of Health and Illness* 36, no. 4 (2014), 576.

Despite the fact that work on SSMPV is in nascent stages, current studies show that MPV may be prevalent in the same sex community for partnerships in which there is IPV. In a 2011 study of gays, lesbians, and bisexuals, Kelly et al. found that almost a quarter of all respondents “reported having experience being both the victim and perpetrator (MPV) during the previous five years.” Of those reporting MPV, 78.4% said that the violence exchanged was both psychological and physical.⁶⁵ Moreover, these researchers found that the gender of the respondent did not affect their likelihood of experiencing physical MPV. They concluded that “those involved in mutually combative relationships may have a high likelihood of physical force, regardless of gender.”⁶⁶

Studies that focused on young gay men found similar rates of MPV as those found by Kelly et al. One report looked at the population of young men who have sex with men (YMSM). Like the 2011 findings by Kelly et al, of those 18 and 19 year-olds who were studied, a quarter of them had experienced MPV⁶⁷. Another sample of YMSM ages 18-25 also found “high rates” of MPV. For example, in the sample, “28% reported being both victim and perpetrator of *insisting on sex without a condom* and 26% reported being both victim and perpetrator of *insisting on anal or oral sex*.”⁶⁸ Furthermore, the respondents reporting victimization and perpetration of this behavior resisted calling it rape but were not certain how to classify it; because it happened with an acquaintance, not a stranger, and because it often involved “inexperience in dating, alcohol, and other illicit substances,” these YMSM did recognize their coercive sexual experiences as rape but still felt uneasy about them.⁶⁹

⁶⁵ Kelly et al., “Intersection of Mutual Partner Violence,” 389.

⁶⁶ Ibid., 398.

⁶⁷ Stults et al., “Intimate Partner Violence Perpetration,” 155.

⁶⁸ Katrina Kubicek et al., “Young Men Who Have Sex With Men’s Experiences With Intimate Partner Violence,” *Journal of Adolescent Research* 31, no. 2 (2016), 161.

⁶⁹ Ibid., 163.

Edwards et al. reviewed 96 studies that investigated IPV in the same sex community in order to draw broader conclusions as well as to make methodological recommendations for future work. They note that “research with student and community samples of [lesbian gay and bisexual] individuals suggests that physical, sexual, and psychological IPV is more often mutual and bidirectional as opposed to unidirectional” but find that in clinical studies that there is less evidence of MPV.⁷⁰ They ultimately suggest that while existing literature has identified potentially important commonalities in IPV within the same sex community—such as the prevalence of MPV—findings must be replicated with additional studies that address some important “measurement and assessment, as well as conceptual, issues.”⁷¹ They specifically highlight the need for samples that are representative of the diversity of the same sex community in terms of age and race/ethnicity. They also emphasize the importance of future studies “assessing the gender identity and biological sex of the” partners in order to best clarify results.⁷²

It is clear that there is a need for further research to more accurately determine the rate of MPV in the same sex community. Nevertheless, in light of high rates of same sex IPV and MPV found in a growing body of studies, many authors tentatively hypothesize that the dynamics of some same-sex partnerships may differ in a significant way from those of opposite-sex partnerships. Many suggest that same-sex partnerships may involve minority-stress, whereas heterosexual partnerships do not, thereby leading individuals in same-sex partnerships to be more vulnerable to violence from a partner than individuals in opposite-sex partnerships.

Badenes-Ribera et al. believe that high rates of IPV same-sex couples suggest that perhaps “there are factors specific to the LG population that stem from the homophobic context in which they

⁷⁰ Katie M. Edwards et al., “Intimate Partner Violence Among Sexual Minority Populations: A Critical Review of the Literature and Agenda for Future Research,” *Psychology of Violence* 5 no. 2, (2015): 115.

⁷¹ Ibid.

⁷² Ibid., 117.

immersed.”⁷³ Some researchers hypothesize that “the homophobic context” leads individuals within a same-sex couple to experience “minority stress” because of their membership in a sexual minority group. Individuals who belong to a sexual minority group face being ostracized, discriminated against, and harmed in a number of ways in society. Such an existence can create stress.⁷⁴ That stress has been found in some studies to be related to the experience and use of violence.⁷⁵ Kelly et al. suggest that “the experience of minority stress alone may heighten the possibility of same-sex partner violence, particularly as the relationship itself is a palpable reminder of a minority status.”⁷⁶ Therefore, in this context, it could be that one’s membership in a sexual-minority group, not one’s membership in a particular gender group, may make one more vulnerable to experiencing violence in an intimate partnership.

4.2 SSMPV as Sexual-Orientation-Based not Sex-Based

The explanation that Kelly et al. put forth for why sexual violence occurs differs from MacKinnon’s. On the one advanced by Kelly et al., both parties are similarly positioned in society rather than belonging to groups with more or less power relative to the other. Furthermore, both parties are treated as available for rape despite the fact that they belong to the same gender group; the victim serves as a symbol of the perpetrator’s subordinated status, triggers feelings of stress in the perpetrator, and leads to sexual violence. MacKinnon’s theory of how and why rape happens may be able to explain SSMPV, but it does not appear to be able to best explain the unique motivations at play in mutual sexual violence in a same-sex partnership. This means that rape may not always be a crime that happens solely in virtue of one’s gender as

⁷³ Badenes-Ribera et al., “Intimate Partner Violence in Self-Identified Lesbians,” 294.

⁷⁴ Kelly et al., “Intersection of Mutual Partner Violence,” 399.

⁷⁵ Kubicek et al., “Young Men Who Have Sex With Men’s Experiences,” 169.

⁷⁶ Kelly et al., “Intersection of Mutual Partner Violence,” 400.

MacKinnon understands it; rather, in some contexts, it may be a crime that happens because of one's sexual-orientation.

MacKinnon would challenge the distinction between sex/gender and sexual orientation by claiming that the norms of sexual orientation are simply expressions of the reigning patriarchy. Minority stress, she might say, provides a psychological account of the violence, but she would say there is no true distinction to be made between the social factors that give rise to the violence in SSMPV and in other instances of sexual violence. The stress, she would say, is brought about not just by the group being a sexual minority in society but being a sexual minority that is condemned because it does not conform to the prevailing gender roles. She would claim that there is nothing left to be explained when it comes to SSMPV. My claim is not that MacKinnon's account fails to provide any part of the explanation but rather that it fails to provide the complete explanation. I maintain that sexual orientation is a missing element in the account of sexual violence—one that may operate independently of MacKinnon's gender norms—that sheds light on why it is that certain communities experience more sexual violence than others.

To demonstrate how MacKinnon's view does not easily fit instances of SSMPV, consider an example. There is an intimate partnership between two lesbians, Person A and Person B. MacKinnon's reading fits if it is the case that Person A is the primary aggressor and Person B is the primary victim. In one encounter, Person A forces Person B to have sex. MacKinnon would say that in this situation, Person A is a man because Person A has adopted "the male point of view" and sees Person B as a feminine object to be dominated.⁷⁷ Person B, under MacKinnon's description of what happens in rape, is a woman, and Person A targets Person B for sexual

⁷⁷ MacKinnon, *Feminism Unmodified*, 52.

violence because Person B is a “member of social groups defined by...sex.”⁷⁸ This seems to be a plausible reading of what is happening between Person A and Person B. Heterosexual norms are simply grafted on to the same sex couple such that Person A is a man relative to the victim despite the presence of female genitalia.

However, MacKinnon’s description is less plausible if this lesbian couple experiences MPV. If this is the case, on certain occasions, Person B forces Person A to have sex. To explain this situation using her theory requires that at any given moment, Person A and B are both more *and* less powerful than the other and that they are both men *and* women; but this does not appear plausible given the way MacKinnon characterizes gender as linked to group membership. According to a MacKinnon reading, Person B, the woman in the previous situation, is now a man and targets Person A, now a woman but previously a man, for rape. In a MacKinnon reading, Person A is vulnerable to rape because of her membership in group defined by her femininity. However, MacKinnon’s theory characterizes rape as taking place “in the context of historically unequal power relations, in which members of one group have more power than members of another.”⁷⁹ I take this to mean that the disparity in power between a particular perpetrator and a particular victim is relatively fixed because the theory claims that the perpetrator always be more powerful than the victim by virtue of that person’s position in the social hierarchy. We established in the previous example that if Person A rapes Person B, it is at least in part because Person B is in a “position of hierarchical vulnerability.”⁸⁰ If we accept this, then how do we explain what allows or motivates Person B, who we have already established is more vulnerable,

⁷⁸ MacKinnon, *Women’s Lives Men’s Laws*, 208.

⁷⁹ MacKinnon, “Rape Redefined,” 442.

⁸⁰ MacKinnon, *Women’s Lives*, 112.

to rape Person A, who we accepted previously was in a powerful position relative to Person B? MacKinnon does not appear to offer an easy solution to this.

This example may show that rape is not always sex-based whereas MacKinnon claims that it always necessarily is. In MacKinnon's terms, to say that rape is not always sex-based means that rape perpetrators do not always target victims for rape *because* the victim is a woman where being a woman means belonging to a less powerful gender group. In the example of the lesbian couple experiencing mutual rape, however, it does not seem helpful to say that a lesbian rapes another lesbian because she is a member of a less powerful gender group. The SSMPV research hypothesizes that perhaps a lesbian rapes another lesbian because she is a lesbian; as a member of the same gender group as the perpetrator, the victim is a reminder to the perpetrator of the perpetrator's own marginalized status. MacKinnon would say that this is still sex-based; being a lesbian means being a woman, and being a woman motivates the rape. However, I demonstrated how the lesbian victim in this example cannot easily be considered a woman on MacKinnon's view because of her alternating role as perpetrator in which she is a man. In this case, the lesbian is not targeted for rape because of being a woman.

Furthermore, in this example, and in others of SSMPV, rape does not appear to “[symbolize] or [actualize] women's subordinate social status to men.”⁸¹ Part of what makes rape and other crimes of sexual assault a sex-based inequality is that it renders one group—women—inferior to men. Rape and sexual assault degrade women, according to MacKinnon.⁸² However, here, it appears to subordinate and degrade not the status of women but the status of non-heterosexual people. When Person C, a gay man, rapes another gay man, Person D, then Person D rapes Person C, it is not clear that women are subordinated as a result, especially when neither

⁸¹ MacKinnon, *Women's Lives, Men's Laws*, 129.

⁸² *Ibid.*

party can easily be considered a woman on MacKinnon's view. It seems more helpful to say that rape, here, degrades the status of non-heterosexual people.

MacKinnon would respond that all of this necessarily fits in to her larger causal narrative of group-based inequality. For MacKinnon, claiming that rape is, in certain situations, a sexual-orientation-based crime, is the same as saying that it is sex-based because the driving force behind inequality is patriarchy, and patriarchy is sex-based; it is founded on masculine norms which are necessarily heterosexual. Deviations from the practice of heterosexuality will result in inequalities because the greatest power lies with heterosexual men. However, while I agree that the inequality arises from patriarchy, I maintain that it is important to recognize distinctions between which aspects of a person's identity results in greater vulnerabilities to violence and other forms of oppression. MacKinnon's work insightfully articulates how one's gender makes one much more vulnerable to rape and other kinds of sexual violence. However, SSMPV data shows that sexual-orientation, regardless of gender, also makes one vulnerable to certain kinds of sexual violence. There does not seem to be room to recognize that distinction in MacKinnon's theory as long as she holds that rape is necessarily and always sex-based.

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