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Graduation Address: Yale Law School, June 1989

Catharine A. MacKinnon†

Catharine A. MacKinnon was one of two speakers elected by the graduating class to speak at the law school's commencement ceremony, June 1989. Although her speech was addressed to the commencement audience, her message speaks to all those whose lives are affected by the law. [eds.]

Dean Calabresi, members of the faculty, distinguished guests, our wonderful graduates, and all of your friends: I must say, this is not something I ever imagined doing. I may share with some of the graduates here the sense of incredulity expressed by Cher when she won the Academy Award: "If I can get this, anyone can do anything."

I want to talk with you about the nature of law in terms of some of the qualities shared by law in the academy and law in the world, and about what it means to hold the power of law in your hands. Law is written by the powerful. You know that. But there is more. Law *is* words in power; it is written by power. Its power is not unlimited but it is real. This tends to mean that experiences which take place outside the routes in which power is socially negotiated do not make law because they do not count to power. Problems posed outside of power are outside the scope of legitimacy. They leave no trace. Law resists them because it does not know how to solve them or because it does not want them solved. When I say law is power, you are thinking "them." Of course, it's also us. And for you, the graduates, now, or soon, it's you. I want to work this through with one example. I could have chosen the example of all people of color; I could have chosen the example of all working people; I choose the example of all women. Women, compared with men, have been historically deprived of the franchise, and still are deprived of income and adequate means of material survival and are systematically allocated to disrespected

† Catharine A. MacKinnon is a lawyer, teacher, writer, and activist who visited as Professor of Law at Yale Law School in Spring 1989 and 1990. She pioneered the legal claim for sexual harassment as a form of sex discrimination and, with feminist writer Andrea Dworkin, co-authored ordinances recognizing pornography as a violation of civil rights. Her most recent book is *TOWARD A FEMINIST THEORY OF THE STATE* (Harvard, 1989).

work. Women are deprived of physical security through targeting for sexual assault in settings that range from the intimate to the anonymous. Women are used in denigrating entertainment, bought and sold on street corners for sexual use and abuse, and deprived of reproductive control. Women's authentic voice has been silenced, our culture taken away, our contributions often stolen when they have been recognized at all, and when not recognized, erased. Women of color are intensively subjected to these denigrations, abuses, and humiliations that afflict all women.

This is what it means to say that power takes a male form, and that powerlessness takes a female form. This system has been supported by the notion that it is inevitable and somehow natural and fulfilling to women. It is also believed that the existence of this system of disadvantage is consistent with equality of the sexes.

This is not a problem law has solved; nor has law ever really apparently heard about it. Law in the academy and in the world actively collaborate in this situation through excluding women's point of view from the public realm and by denying women equal access to justice under law: for example, by excluding harms that happen particularly to women from the legal definition of harm at all. Law collaborates by depriving women of credibility through the institutionalized belief that we are likely to lie about sexual assault, and by legally defining sexual assault from the point of view of the perpetrator. Law collaborates through the active protection of some forms of abuse of women, such as pornography, through affirmative guarantees to men of individual rights called, in this case, speech. Law collaborates through the elimination of the right to abortion for women who are least able to get access to it by depriving them of government funding: and, of course, the law is working on eliminating that right for women who can pay for it as well. Law also actively collaborates in women's status by defining sex inequality under law so that one virtually already has to have sex equality before the law supports your right to demand it.

Power's latest myth in this area is that the problem of inequality between women and men has been solved. Because now a few women can become lawyers, we all have sex equality. Yet, 44 percent of women are still victims of rape and attempted rape, at least once in our lives; 85 percent of us are sexually harassed on the job; 38 percent of us are sexually abused as children; a quarter to a third of us are battered in our homes. Women who are lawyers are exceptions to none of these. Women still make around half the average male wage. Thousands and thousands of women are still being bought and sold on street corners as and for sex. Pornographers still traffick us and our children, making ten billion dollars

a year. We are told that sex inequality is over, when some proud mothers must, statistically, sit here at graduation next to their batterers; when some excited graduates must sit a row or two away from their rapists, relieved to be leaving their sexual harassers, trying not to think about those who molested them as children, who may also be celebrating this moment with them. Women especially must live with a division between what we know and what can be publicly acknowledged, between what we know and what the law will tell us back is true.

I want to talk about some of the professional pressures that help account for how those who have law's power in their hands have not changed this, and have not yet made it unnecessary to speak about such atrocities on joyful occasions like this one. I have identified three strategies for comfort, three deep mechanisms of power that, both with law in school and law in the world, conspire to keep situations like women's in place. They are the avoidance of accountability, the aspiration to risklessness, and the assumption of immortality. I want to challenge you, the graduates, to resist these pressures.

By avoidance of accountability I mean: you may have noticed in the legal academy a tendency to treat ideas as if they are just ideas, as if one can choose among them without consequence, as if they have no part in shaping or sharing power. You may also have noticed the use of neutrality as a norm and the way it hides its standards, obscures its reference point, and does not produce fairness, but rather derails accountability for the point of view being taken by presenting itself as no point of view at all. You may have observed, and learned to engage in, devil's advocacy: "Nobody really thinks this, certainly not me, but let me ram this particular point down your throat." You may have noticed hypothetical reasoning, the "as if" form, when law is not practiced nor is life lived in the hypothetical. There are also ethical norms in law that purport to protect the client from the lawyer, but as often protect the lawyer from accountability to the client. As to the practice of law, you may have heard that everyone has a right to counsel. The less-asked question is whether everyone has a right to counsel by *you*. I urge you to see through these devices and hold yourself accountable, including for the uses to which you are put.

There is a form of accountability that *is* encouraged in law school, one I know you are aware of having. When you came here you were chosen, not only for your academic achievements, for your demonstrated brilliance, but for your community ties, your commitment, and your diversity. These are not only qualifications but devices for accountability. At law school, you may have felt challenged, stimulated, expanded, elevated, rewarded, and prepared. If, however, you raised problems from your communities

and from your experience that are not real to power, you may also at times have felt brutalized, humiliated, limited: as if you had wandered into some intellectual equivalent of boot camp. This was not because anyone on the faculty intended to do this, but because when you get an education in law, you get an education in power. Legal education works to attempt to make you accountable to power and not, for instance, to women. I urge you to keep your commitments, your communities, your accountability to who you are.

By aspiration to risklessness, I mean primarily a definition of effectiveness that ends contingency, makes everything certain. This comes out in all the energy lawyers put into figuring out ways to avoid telling the truth to power because they think power does not want to hear it. Typically, it is called litigation strategy. It would appear that some people believe that the Supreme Court is not old enough to hear the truth about women. There are so many ways to lie with law: not telling the whole truth, techniques of selection and obfuscation that make those who lie with statistics look like amateurs, making everything into a matter of interpretation so that in your hands A becomes not-A.

The voice of women in particular has been excluded or twisted by this process. One has to take risks to get it back in. Women's screams in pornography have, in law, become the pornographer's speech. Few in power have heard them as anything else. Few will take the risk of siding with them. I am told that people can take only so much truth. I also think that people can take only so many lies. You will hear people's voices scratched from screaming as well as slippery with innuendo and luxury. I urge you to be selective and take risks in how you magnify them. You can affect how they are heard.

By the assumption of immortality, I mean living as if you have all the time in the world, as if you are awash in time, as if you will live forever. It's not true. This strategy for comfort is not, of course, peculiar to law, but it has consequences that are specific to it. The legal biography and legal norms seem designed to encourage putting off the real thing: the big issue, the major change. We get told change is gradual, small, slow. But many women's problems can be solved only by big changes. And even if you will live forever, other people won't. So do it now. Do it big. *Start* big. There are very few jobs in law where the norms include growth—the federal bench is one of them—and a great many jobs in law that make you smaller and smaller and smaller as your salary gets bigger and bigger and bigger. Speak and write as if it is the last thing you will ever say, the last chance you will ever have, as if it is the last thing that your audience is ever going to hear.

Now, or soon, you have this law in your hands, with all its pressures, undertow, and cross-currents. The women among you have more power than any group of women have ever had in the history of the world. Remember that what all of you do with law takes a position: it either makes power more powerful or it redistributes and transforms it. I urge you to define principle in opposition to the pressures of power. A lot of people are waiting for your help.

If you take up this challenge, I am confident that the tradition of excellence, creativity, and originality that is encouraged at Yale Law School, the social and political engagement that is valued here, and the activism and even the militancy that is permitted, will assist you in these tasks.

You may even find the law unexpectedly receptive. For law itself is ultimately about accountability. It responds to risks and risk-takers; it can alter and reduce the social risks people have to face. And while law is, thankfully, not exactly immortal, in the shape we give it, it will outlast us all.

