

# Law's Nobility

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In the epigram to her most important book, Catharine MacKinnon sought to “invent a new plot” with respect to the ways men and women negotiate (or not) the terms of their planetary cohabitation.<sup>1</sup> Through historically momentous scholarship<sup>2</sup> and national and international legal advocacy<sup>3</sup> spanning a thirty-

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1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, title and epigram page (1989) [hereinafter FEMINIST THEORY OF STATE] (quoting VIRGINIA WOOLF, BETWEEN THE ACTS: “Surely it was time someone invented a new plot.”).

2. In addition to the works cited elsewhere in the Article, see CATHARINE A. MACKINNON, ONLY WORDS (1993) [hereinafter ONLY WORDS]; CATHARINE A. MACKINNON, WOMEN’S LIVES; MEN’S LAWS (2005) [hereinafter WOMEN’S LIVES; MEN’S LAWS]; Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B. U. L. REV. 793 (1991); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.–C.L. L. REV. 1 (1985).

3. For a discussion of her efforts in Bosnia-Herzegovina around rape and human rights, see Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights and Turning Rape into Pornography: Postmodern Genocide*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmeier ed., 1994). See also Tamar Lewin, *The Balkans Rapes: A Legal Test for the Outraged*, N.Y. TIMES, Jan. 15, 1993, at B16; Linda Watson-Brown, *Rape of a Nation*, THE SCOTSMAN, Feb. 27, 2001, at 2; Elizabeth Neuffer, *Bosnia Rapes Go Unpunished*, BOSTON GLOBE, Jan. 4, 1998, at A1; Burt Herman, *Tribunal Cracking Down on War Rapes; 3 Face Trial at the Hague in Landmark Case Involving Crimes in Bosnia*, CHI. TRIB., Mar. 20, 2000, at N6.

Domestically, MacKinnon has been principally involved in the litigation (including the Supreme Court arguments) for most of the major sexual harassment cases of the last twenty years. See, e.g., Brief for Law Professors as Amici Curiae in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); Brief for Amici Curiae in Support of Petitioners, *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) [hereinafter *Oncale Amici Brief*], reprinted in 8 U.C.L.A. WOMEN’S L.J. 9 (1997); Brief for Amici Curiae in Support of Petitioner, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1992) (No. 92-1168); Brief for Respondent, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

MacKinnon also helped draft and defend notable anti-pornography ordinances, none of which remains good law. See *The Ordinances*, in IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS

year career in public life, she has largely succeeded in doing so. Most visibly, from within law's perspective, MacKinnon invented a "new plot" by fundamentally restructuring our civil rights law, and she did so by re-conceiving the ideal of equality that is at that law's heart.<sup>4</sup> As is now well recognized, she did so in a two step argument: She first exposed the relative emptiness of a "formal" understanding of the ideal of equality that seeks solely to rationalize the treatment of men and "similarly situated" women—an approach which, virtually by definition, does little but provide a modest boost for women who are already relatively well-off.<sup>5</sup> She then provided an alternative, "substantive" or "anti-subordinationist" account that sought to strengthen the power of the most disadvantaged women—and to whom, for that very reason, no formal male equivalent can be found.<sup>6</sup> The critique and reconstruction of our shared ideal of equality has proven sound not only for women, but also for other groups on a similar legal quest. More concretely, MacKinnon's critique sustained the development of a cause of action sounding in equality law for what had previously been regarded as, at most, tortious private wrongs, i.e., work-based sexually harassing behavior.<sup>7</sup>

As dramatically, outside law, MacKinnon upended our collective understandings of human sexuality—a *coup de culture*, so to speak. She had the audacity to suggest, and then the courage to stick to it when the suggestion proved to be flammable, that human sexuality is not mutually shared, discovered, and enjoyed, and more concretely that women's sexuality is not

HEARINGS 426 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM'S WAY] (reprinting the various ordinances); Am. Booksellers Assoc. v. Hudnut, 475 U.S. 1001 (1986) (holding the Indianapolis ordinance unconstitutional); *Minneapolis Council Fails to Override Veto*, N.Y. TIMES, July 28, 1984, at A6 (discussing the Minneapolis ordinance). The anti-pornography movement has had greater success in Canada, where it has not encountered the same degree of constitutionally-inspired resistance. MacKinnon has been integral in those campaigns as well. See generally R. v. Butler, [1992] 1 S.C.R. 452; Factum of the Intervener Women's Legal Education and Action Fund in R. v. Butler, [1992] 1 S.C.R. 452 (No. 22191); BRENDA COSSMAN ET AL., BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION (1997); Jonathan Herland, *Sounding the Death Knell for Butler?*, 43 MCGILL L.J. 955 (1998) (reviewing COSSMAN ET AL., *supra*); Catharine A. MacKinnon & Andrea Dworkin, *Press Release*, available at <http://www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html> (response by MacKinnon and Dworkin to Canada decision).

4. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) [hereinafter *Reflections on Sex Equality*].

5. *Id.*; Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in WOMEN, LAW, AND SOCIAL CHANGE: CORE READINGS AND CURRENT ISSUES 243 (T. Brett Dawson ed., 1990).

6. *Id.* At the time MacKinnon began her critique and reconstruction of equality law, the closest critique of equality law came from the critical legal studies movement and was directed at race law. See, e.g., Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96 (David Kairys ed., 1982). Freeman argued that the focus in race law on the intent of particular discriminators was an obstacle rather than a vehicle for addressing racism. Another closely related (and earlier) argument was put forward by Owen Fiss, who argued that the focus of equality law on particular acts of discrimination by individuals was a hindrance to efforts to upend larger and more systemic patterns of subordination of groups. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

7. CATHARINE A. MACKINNON, SEX EQUALITY (2001) [hereinafter SEX EQUALITY]; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

normally freely "given" by women to men for the mutual betterment of both. Rather, women's sexuality, MacKinnon argued, is that which is consistently and injuriously taken from women, by men, for men's interest, control and enjoyment.<sup>8</sup> In our history and in our current lived reality, she argued, human sexuality is best understood as a site of exploitation and alienation, rather than a site of mature adult affection, transitory pleasure, biologic reproduction, or liberatory transgression.

Both of these contributions (the reconstruction—in law—of our aspirational ideal of legal equality, and the suggestions—in culture—that "women," as presently seen and lived, are rapable sub-humans and that sex, like the personal, is political and not natural) have indeed "changed the plot" of women and men's planetary cohabitation, and the impact has been felt globally.<sup>9</sup> In law, MacKinnon changed the way lawyers and judges think and talk about equality—and accordingly made the world a little more equal. In culture and larger society, she changed the way that lawyers and non-lawyers think, talk, see, and worry over—if not enjoy—sex. By so doing, she has made the world somewhat more attuned than it would have otherwise been to both violent eroticism and eroticized violence. Quite possibly, we live in a less violent world because of it.

Less visibly, and, I think, less successfully, within legal academia, MacKinnon has also tried to invent a new plot—or perhaps a new trajectory—in our shared intellectual history. In her theoretical and scholarly writing, again spanning three decades, MacKinnon has set out an entirely original, and still not well understood, argument regarding the ethical and political foundations and aspirations of modern feminism.<sup>10</sup> The result is an act of discovery and creation that I propose to call, with just a touch of irony and a great deal of appreciation for the magnitude and profundity of the effort, Feminism, Modified. Feminism, Modified, I want to suggest, is both more complex than is widely appreciated and far more original. It incorporates, but by no means rests solely on, her signature, highly skeptical ethical stance toward human sexuality and on her now widely embraced reconstruction of legal equality. It is set out, but only very tentatively and never explicitly, in her early book, *Toward a Feminist Theory of the State*.<sup>11</sup> Its structure, its potential, its power, and its accomplishments are implicitly and with considerable understatement tallied in

8. FEMINIST THEORY OF STATE, *supra* note 1.

9. See sources on the Balkans and Canada, *supra* note 3.

10. FEMINIST THEORY OF STATE, *supra* note 1, at chs. 1, 2, 12, 13; CATHARINE A. MACKINNON, FROM PRACTICE TO THEORY, OR WHAT IS A WHITE WOMAN ANYWAY? (1997); Catharine A. MacKinnon, *Keeping It Real: On Anti-"Essentialism"*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71 (Francisco Valdes et al. eds., 2002); Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002) [hereinafter *Logic of Experience*]; Catharine A. MacKinnon, *Points Against Postmodernism* 75 CHI.-KENT L. REV. 687 (2000) [hereinafter *Points Against Postmodernism*].

11. FEMINIST THEORY OF STATE, *supra* note 1.

her recent casebook, *Sex Equality*.<sup>12</sup> Nowhere, however, has Catharine MacKinnon set out a sustained description or argument for the Feminism, Modified that she has imported into legal academia and, to a lesser extent, into our larger culture. This essay's first ambition is to state as explicitly as possible that theoretical argument and, moreover, to do so in a way that accounts for its incredible power.

My larger goal, however, is unabashedly to strengthen it. Toward that end, what I hope to ultimately do in this article is to present not the only possible but, in my view, the strongest possible interpretation of the new plot Catharine MacKinnon invented. My interpretation will include some departures—a re-modification, in effect, of Feminism, Modified. Feminism, Modified, I will argue, as it is currently understood and as MacKinnon first crafted it, seemingly rests on what might best be called, by shorthand, a “critique of desire”: a claim that women's subordination and the politics of patriarchy have so thoroughly permeated women's subjectivity that our desires, and particularly our sexual desires, are not a reliable guide to our self interest, our true pleasures, or our inherent worth. In short we come to sexually desire our own subordination, and as a result, our own sexual desires should be neither trusted nor desired.

In my view, this critique of desire is deeply mistaken. Women's desires, I want to suggest, are not so polluted. We should at least be neutral—neither critical nor confident—regarding the degree to which our desires, if fulfilled, will give pleasure, and whether their satiation will serve our interests. What we *should* doubt, I will argue, are not women's sexual *desires* but rather women's sexual *choices*, and particularly women's choices to engage in sex—of any description—that is *not* desired. In other words, it is the *undesired* sex in which we engage, and not either the sex we desire, or the desires themselves, of any description at all, that should be the target of our critique. Likewise, it should be women's consensual choices to engage in all of that unwanted, unwelcome, and undesired sex that should be the target of our skepticism. We can leave our unfathomable, and I believe politically inconsequential, sexual desires out of this project altogether, and I will argue that we would be well advised to do so. I will argue, however, that the critique of desire, as it is presently understood and as MacKinnon herself first constructed it, is not essential to the larger picture, either jurisprudential or political, that is Feminism, Modified; nor is it central to that view's genuine radicalism. Both MacKinnon and her critics are wrong to believe to the contrary. An embrace of, or neutrality toward, the content of women's sexual desire, I will urge, does not necessarily reduce to an undue liberal celebration of the sexual status quo. Rather, it holds open the possibility of a redirection of our skeptical gaze.

Our critical tools and acumen should be directed toward the undesired sex in which we participate, both consensually and not—and not toward the sex we

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12. SEX EQUALITY, *supra* note 7.

desire. This modification, I believe, is fully consistent with the core radical message of Feminism, Modified. The strength, as well as the radicalism, of Catharine MacKinnon's theory and advocacy both have always lain in the power of her account as to why some of the choices women "freely" make—and particularly, the choices women make to engage in undesired sex—are so ubiquitous, so harmful, so politically disempowering, so consequential, and so invisible. The "critique of desire" is not necessary to this project (as it is not necessary to Feminism, Modified's greatest doctrinal contribution: sexual harassment law) and indeed, it undercuts it. Toward the end of this paper, I will spell out this argument in some detail. Again, my hope is that my proposed re-modification of Feminism, Modified will be heard as a friendly amendment. I want to retain what I regard as the extraordinary core of Feminism, Modified but also to amend where need be.

Thus, in my view, the radical, life-enhancing, and truly liberatory potential of Feminism, Modified has indeed been hampered by its association with an undue, unnecessary, and—in a word—*overwrought* critique of the content of women's sexual desires, as well as of the sex that women actually enjoy. Both MacKinnon herself and the growing number of her critics who find fault with the critique of desire, however, are wrong to think that *any* aspect of Feminism, Modified—including its Marxist and feminist core—requires any such broad-ranging skepticism regarding either the content of women's sexual desires or the form of the sex women welcome. Rather, what Feminism, Modified rightly counsels us to skeptically regard, as I interpret it, is not women's felt sexual desires, and neither is it the desired sex in which women engage, no matter what its form. Rather, it is the vast array of sexual practices, legal prohibitions, and religious mandates that appropriate *undesired*, *unwanted*, and *unwelcome* sex from women. Feminism, Modified rightly counsels us that unwelcome and undesired sex in which we engage should inspire skepticism regarding our sexual lives—including our consent to that sex. We need to keep our eye on the prize, and the prize, here, is to rid the world not of *welcome* sex of any description but, rather, of the unwelcome sex and of the subtly or not-so-subtly coercive institutions that have so thoroughly normalized this sex that we have a very hard time even seeing (much less resisting) it for what it is: subjectively painful, objectively harmful, and profoundly injurious to women's interests and to women's equality both.

The first Part of this four-part Article attempts a restatement of Feminism, Modified, as I understand it. I will argue that Feminism, Modified, as put forward in MacKinnon's early and most powerful theoretical writing,<sup>13</sup> fused elements from at least *four* usually conflicting classical political traditions:

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13. Primarily, the collection of essays in CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *FEMINISM UNMODIFIED*] and the sustained arguments in the first three chapters of *FEMINIST THEORY OF STATE*, *supra* note 1.

First, a theory of power and subordination drawn from classical Marxism; second, a theory of the state that draws heavily from classical, Hobbesian liberalism; third, an ethical imperative to tend directly to the suffering of women and to do something about it—to keep one's eye on the prize—taken from what might best be called classical feminism; and lastly—and almost never remarked upon, at least within legal scholarship—a utopian imagining of adjudicative law and justice. MacKinnon's faith in what I call "law's nobility" is derived from what the legal academy sometimes calls "legalism," itself an under-theorized and under-appreciated political philosophy. The result of this extraordinary, alchemical fusion—of Marxism, Hobbesian liberalism, classical feminism, and legalism—is a strikingly novel understanding of women's subordination and of the outsized role of law in ending it. There is nothing even approaching its high seriousness, political ambition, or theoretical depth anywhere, either within academic feminism or within critical jurisprudence more broadly. Of all of Catharine MacKinnon's contributions to law and life, her intellectual and imaginative contribution to the history of political thought may be what ultimately proves most enduring. It is certainly what is most uniquely her own.

In Part II of this Article, I take up some current criticism of MacKinnon's theoretical invention. I will not aim to examine the full range of even the most contemporary of the critical feminist commentary on MacKinnon's work—that would be well beyond the range of this or perhaps any article-length treatment of MacKinnon's place in our contemporary world.<sup>14</sup> Rather, I will look in some

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14. Much of that criticism, as MacKinnon herself has noted, is wildly illogical and even hysterical. See, e.g., Carlin Romano, *Between the Motion and the Act*, THE NATION, Nov. 15, 1993, at 563 (reviewing ONLY WORDS, *supra* note 2). Much of it, as she has also noted, is misdirected, badly misconceiving the target of critique. See, e.g., Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996). For MacKinnon's response to Gey, see *Points Against Postmodernism*, *supra* note 10. And most of the critique, I believe, fails to come to grips with the full theoretical picture she has presented the world on her quite large claim—relying, again, on insights drawn from Marxism, liberalism, feminism and legalism to explain the political origin of and the legal cure for women's subordination. For a recent example, see Jennifer Michael Hecht, *Down by Law*, N.Y. TIMES, May 22, 2005, at 17 (reviewing WOMEN'S LIVES, MEN'S LAWS, *supra* note 2). The limitations of much of this decades-long critical reception are unfortunate, and part of the impetus for this Article is my attempt simply to broaden the ambitions of MacKinnon's critics.

The strongest and deepest critiques of Feminism, Modified, until the queer theoretic strand discussed in the text, came from liberal feminists responding to and rejecting MacKinnon and Andrea Dworkin's attempts to regulate the pornography industry. I do not discuss pornography or the critical literature it spawned in this article, beyond my attempt to distinguish much of the liberal feminist response from the more contemporary queer theoretic one. For some of the more influential liberal feminist critiques of MacKinnon's work, and of the anti-pornography movement in particular, see Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., in Am. Booksellers Ass'n v. Hudnut, *supra* note 3 [hereinafter F.A.C.T. Brief], reprinted in Nan D. Hunter & Sylvia A. Law, 21 U. MICH J. L. REFORM 69 (1988); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995); Lisa Duggan, Nan D. Hunter, & Carole S. Vance, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993), originally printed in WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988); Nadine Strossen, *A*

detail at one influential, and penetrating, family of criticism now being voiced by a growing chorus of postmodern, sex-affirmative, and queer-theoretic critics.<sup>15</sup> Feminism, Modified, according to its postmodern critics, is wrong on any number of scores, but, mostly, it is wrong to urge that we take quite so seriously, as classical feminism asks us to do, the complaints of women victimized by various forms of sexual assault and sexual violence—including, importantly, women complaining of sexual harassment in the workplace. In point of fact, according to the postmodern critics, these complaints of sexual violation often reflect nothing more than a panicked reaction to sexual explicitness and sexual play—and particularly to same-sex advances, play, or explicitness—rather than genuinely grievous injury, both in the workplace and elsewhere. I want to take up this thread of these postmodern, queer-theoretic and sex-affirmative critiques because it may well have the potential to derail Feminism, Modified as well as the body of sexual harassment law that has been

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*Feminist Critique of "The" Feminist Critique of Pornography*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 131 (D. Kelly Weisberg ed., 1996). I have written extensively on the differences and conflicts between liberal and radical feminism elsewhere, as well as on the liberal feminist (and pro-sex feminist) anti-anti-pornography movement. See, on the former, Robin L. West, *Fifteenth Anniversary Celebration: The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000) [hereinafter West, *Fifteenth Anniversary Celebration*], and on the latter, see Robin L. West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681 (1987) [hereinafter West, *Feminist-Conservative Alliance*].

Neither do I, in this Article, take up the influential and important critique of Feminism, Modified that has come from critical race feminists and others concerning its alleged essentialism, its consequent undue focus on the dilemmas of middle-class white women, and its inattentiveness to the quite different problems facing African-American women and other racial, ethnic, and religious minorities. See, e.g., Kimberle Crenshaw, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (urging a feminist method that would centralize rather than marginalize the experiences and objective circumstances of persons "at the intersection" of various axes of subordination); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing both MacKinnon's work and my own as essentialist and inattentive to the distinctive problems of non-white women). For MacKinnon's response, see Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991). I have written on this and related objections in ROBIN WEST, *CARING FOR JUSTICE* (1997).

15. See, e.g., Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (Catharine A. MacKinnon and Reva B. Siegel eds., 2003) [hereinafter DIRECTIONS]; Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003). There are a number of other important contributions to the postmodern critique, some of the threads of which were apparent early on. In the legal literature, perhaps the most noteworthy have been Kathryn Abrams, Anne Coughlin, and Katherine Franke. See, e.g., Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998); Anne M. Coughlin, *Sex and Self-Governance*, 29 MCGEORGE L. REV. 17 (1997); Anne M. Coughlin, *Regulating the Self: Autobiographical Performance in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001). I deal exclusively with the Halley and Schultz pieces in this Article simply because, in my view, they articulate what is distinctive about the postmodern critique most forcefully, thereby making clear where and how it differs from the more long-standing liberal critique of the pornography movement.

responsive to it—which, in my view, would be a tragedy. I will argue, in a nutshell, that the queer-theoretic argument against at least sexual harassment law is seriously misguided. Sexual harassment law as presently constituted simply does not target the sex that queer theorists are most passionately committed to defending: hierarchic, edgy, sometimes sadomasochistic, but fully welcome and desired sex, at work or elsewhere.

However, and as its architects make clear, the postmodern, “sex-affirmative” critique of Feminism, Modified goes significantly beyond the contours of harassment law. There is a quite real and quite palpable—not only “apparent” and by no means only “theoretical”—conflict between the conceptions of sexuality and power put forward in Feminism, Modified as Catharine MacKinnon has developed it, on the one hand, and the conceptions put forward in various queer theories, on the other. While MacKinnon urges a deep skepticism toward women’s sexual choices and women’s desires, queer theorists distinctively urge both an embrace of sexual pleasure and desire, and a skepticism regarding women’s claims of sexual violation. In Part III of this piece, I attempt to respond to that deeper conflict. I do so ultimately by proposing the amendment to Feminism, Modified suggested above: Feminism, Modified both could and should drop the critique of desire. I also urge, however, that queer theorists drop the critique of women’s claims of violation or, as it might be put, the critique of women’s “lack of desire.”<sup>16</sup> We can simultaneously remain agnostic toward women’s desires (I believe we should), skeptical regarding women’s choice to engage in unwanted sex, and respectful of women’s claims of sexual violation.

My goal in the final Part and in the conclusion will be to acknowledge the force of those aspects of the postmodern and queer-theoretic critique that I find compelling, but to do so without compromising the classically feminist conviction at the heart of Feminism, Modified that the critics themselves target. We should seriously attend to women’s claims of sexual violence and violation and keep a critical and skeptical focus on the conditions within which women forge their sexual choices.

## I. FEMINISM, MODIFIED

Let me begin with a summary statement and interpretation of MacKinnon’s articulation of theoretical feminism. Again, my claim is that Feminism, Modified incorporates insights from at least four distinctive political traditions.

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16. I thank Gowri Ramachandran for her helpful formulation of this position: that radical feminism could and should drop the critique of desire, while queer theory could and should drop the critique of the *lack of desire*.



*Marxism*

First, although MacKinnon's initial *Signs* articles famously juxtaposed and contrasted feminism with Marxism,<sup>17</sup> the basic logic of MacKinnon's challenge to heterosexuality and its dominion was nevertheless posed analogically and in completely familiar Marxist terms. "Sexuality is to feminism," MacKinnon wrote, in what might be the most important single utterance of twentieth-century radical political thought, "what work is to Marxism: that which is most one's own and yet most taken away."<sup>18</sup> In fact, the notion of sex as that which is appropriated and alienated—the definitional linchpin of women's subordination to men—was so novel to so many readers at the time it was first proposed that, without the use of Marx's parallel formulation regarding labor, it would have struck many as unintelligible. It was, in other words, only by virtue of the closeness of MacKinnon's insight regarding women's sex to Marx's insight regarding workers' labor that the idea was at all communicable.

The borrowing was much more than just analogical and rhetorical. Sex is that which is taken from women, just as labor is that which is taken from workers, and in both cases—labor and workers for Marx, sex and women, for MacKinnon—the alienation defines not only that which is taken, but also what it is to be in the subordinated class.<sup>19</sup> So, women *are* those from whom sex is taken. If sex is taken from you, you're a woman; sex is what is taken from you, if you're a woman. Not *logically*, or *definitionally*, or heaven forbid, *essentially*—for either MacKinnon or Marx.<sup>20</sup> Neither sex nor work serves these functions by virtue of laws of deduction. But nevertheless, contingently and universally, throughout the domains of patriarchy and capitalism respectively, the relation holds. The substantive premise of this claim—that sex is taken from women—is entirely MacKinnon's. The theoretical claim, however, regarding the definitional relation between that which is taken and what the taking does to those from whom it is taken—the definition, in other words, of subordination—is Marx's,<sup>21</sup> and this claim largely dictates this feminist view of the nature of the subordinated individual and hence, for MacKinnon, the nature of the subordinated woman. In other words, the understanding of subordination at the heart of Feminism, Modified is fundamentally and importantly Marxian.

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17. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635 (1983). See also Catharine A. MacKinnon, *Feminism, Method and the State: An Agenda for Theory*, 7 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 515 (1983).

18. FEMINIST THEORY OF STATE, *supra* note 1, at 3.

19. *Id.* at 3-4.

20. See FEMINIST THEORY OF STATE, *supra* note 1, *passim*; *Points Against Postmodernism*, *supra* note 10, at 697-98.

21. See, e.g., FEMINIST THEORY OF STATE, *supra* note 1, at 54 (citing KARL MARX, THE POVERTY OF PHILOSOPHY 121 (International Publishers 1963) (1847)). See also *id.* at 3.

In particular, two aspects of women's status as depicted by Feminism, Modified echo this Marxist account of subordination. First, the specific harm of patriarchy done to women by men, according to MacKinnon<sup>22</sup> and now truly innumerable others,<sup>23</sup> is the harm of *subordination* rather than the harm of *discrimination*<sup>24</sup>—just as, perhaps more clearly, the harm done to workers by capitalists of capitalism, is—*of course*—the harm of economic subordination, not the harm of “discrimination” against members of the working class who by some unappreciated stroke of luck are *really* “most like” capitalists. This contrast dominated the first wave of responses to MacKinnon's reformulation of legal feminism.<sup>25</sup> The act of discrimination was already for the most part illegal and well-theorized within legalism and liberalism both.<sup>26</sup> Particular women are indeed hurt by being treated differently by the state when they are in fact similarly situated or similarly qualified—when they are denied, for example, the right to serve on juries, to run for office, to work in the professions or trade crafts, or to vote. According to MacKinnon's reformulation, however, that harm, although symptomatic, is simply not the heart of the injury done to women, by men, within patriarchy. Rather, the heart of the injury sustained by women is the alienation or expropriation of their sexuality and the subordination of their interests that is necessary to facilitate that expropriation. If the legal and constitutional claim of equality is to be broadened so as to protect women, then it must target subordination (and particularly so-called “private” subordination) as that which causes inequality. MacKinnon's distinctive theory of equality, including its social, legal, and constitutional dimensions, follows directly from this Marxist understanding of the subordination that holds equality at bay.

Second, and far more controversially within feminism, MacKinnon's understanding of women's subjectivity owes more to this Marxist understanding of the individual than to any other political or intellectual

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22. FEMINISM UNMODIFIED, *supra* note 13, at 22, 40, 51, 118; FEMINIST THEORY OF STATE *supra* note 1, at 216-34; *Reflections on Sex Equality*, *supra* note 4, at 1286-89, 1298-99.

23. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Fiss, *supra* note 6, at 147-77. For critical discussions, see Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1987); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987).

24. See chapter 12 of FEMINIST THEORY OF STATE, *supra* note 1.

25. Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, *The James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law - A Conversation*, 34 BUFFALO L. REV. 11 (1985); Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988); Barbara Flagg, *Women's Narratives, Women's Story: Toward a Feminist Theory of the State*, 59 U. CIN. L. REV. 147 (1990); Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147 (1989) (reviewing FEMINISM UNMODIFIED, *supra* note 13); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Cass Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

26. Mary E. Becker, *Care and Feminism*, 17 WIS. WOMEN'S L.J. 57 (2002).

influence.<sup>27</sup> Not only is a woman's objective being determined by the fact of

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27. The influence here is pervasive, but is perhaps most clearly articulated in MacKinnon's chapter titled, "A Marxist Critique of Feminism," in which she distinguishes radical feminism from liberal feminism on the grounds that liberals centralize the free, autonomous individual, while radical feminists, inspired by Marx, do not:

Liberal feminism takes the individual as the proper unit of analysis and measure of the destructiveness of sexism. For radical feminism, although the person is kept in view, the touchstone for analysis and outrage is the collective group called women. The difference is one of emphasis, but an emphasis that is all. . . . Liberal feminism aggregates all women out of each woman. Radical feminism sees all women in each one. In liberalism, women are an aggregate, a plural noun. In radicalism, women is a collective whole. . . . The fact that an individual might be socially constructed is an outrage and an injury in liberalism; liberal feminism applies this critique to women. In radical theory, the fact of social construction of the individual is accepted and even embraced. . . . The relationship between the individual and the social delineates a split between liberal and radical feminism in their view of the personal. In liberal feminism, the personal is distinguished from the collective; in radical feminism, it comprises it. . . .

From Mill to contemporary forms, liberal theory exhibits five interrelated dimensions that contrast with radical feminist theory, clarifying both. These are: individualism, naturalism, voluntarism, idealism and moralism. Individualism involves one of liberalism's deepest yet also superficially most apparent notions: what it is to be a person is to be a unique individual, which defines itself against, as distinct from, as not reducible to, any group. The person in radical feminist thought is necessarily socially constituted, affirmatively so through an active yet critical embrace of womanhood as identity. . . .

The voluntarism of liberalism consists in its notion that social life is comprised of autonomous, intentional, and self-willed actions, with exceptional constraints or qualifications by society or the state. This aggregation of freely-acting persons as the descriptive and prescriptive model of social action is replaced, in radical feminism, with a complex political determinism. Women and women's actions are complex responses to conditions they did not make or control; they are contextualized and situated. Yet their responses contextualize and situate the actions of others. As an individual self, one has little power; but as an other in a social milieu, one ultimately has more. Women struggle to transform conditions, but conditions are not resisted without means given or seized, nor simply because they are determining, nor because women are really free beneath their victimization. With forms of power forged from powerlessness, conditions are resisted, in the radical feminist view, because women somehow resent being violated and used, and because existing conditions deny women a whole life, visions of which are meager and partial but accessible within women's present lives and recaptured past. Women also have access to a clear sense that their lives would be better if they were denigrated less and paid more.

FEMINIST THEORY OF STATE, *supra* note 1, at 40, 45-47.

Later in the chapter, MacKinnon explicitly embraces a Marxist perspective, criticizing liberal feminism for its idealism and its individualism. Thus:

[I]f one accepts sex as a material social category at all and uses Marx's analysis of class to scrutinize feminist analyses of sex, a substantial body of feminist work can be criticized for the very tendencies Marx criticized in bourgeois theory. Marxists have charged feminism with liberalism of two kinds: idealism, or belief in the power of ideas alone to cause social change; and individualism, or reliance on the individual to effect social change. . . . As an example of the feminism to which such a criticism of idealism would apply, Mary Daly . . . speaks less of the creation of women's consciousness by the realities of male power, therefore of the depth of women's damage, and more of its lies and distortions, positing mind change as social change. For instance, in the investigation of suttee, a practice in which Indian widows are supposed to throw themselves upon their dead husband's funeral pyres in grief, . . . Daly focuses upon demystifying its allegedly voluntary aspects. Women are revealed as drugged, pushed, browbeaten, or otherwise coerced. Comparatively neglected—both as to the women involved and as to the implications for the diagnosis of sexism as illusion—are perhaps suttee's deepest victims: women who want to die when their husband dies, who volunteer for self-immolation because they believe their life is over when his is, women whose consciousness conforms to the materially dismal and frightening prospect of widowhood in Indian society. To the extent the analysis turns on whether the women jump or are pushed, it gives ideas both too much and too little power. . . . In the case of female powerlessness, too little, in neglecting the consciousness of the most totally victimized in favor of a critique of the victimization of those whose consciousness, at least, has escaped. . . .

*Id.* at 50-51 (footnotes omitted).

subordination, but further, because this subordination is accomplished through the alienation of sex, women's consciousness of our own interests and injuries, by the force of Marxist logic, is clouded by the dominant pan-sexualist ideology that denies the violative nature of sexual alienation, denies the resulting injury it inflicts, and denies the importance of those injuries, when admitted.<sup>28</sup> What follows, in MacKinnon's view, is a broad-based skepticism toward the genuineness of women's desires, women's sexual preferences, and women's sexual choices, as well as toward the authenticity of the freedom within which those interests are perceived and those choices forged. What follows from that skepticism, in turn, is a deeply il- or non- or anti-liberal understanding of the individual, of individual autonomy, and of the moral significance of free choice. In short, what follows is a broad denial of the aspirational and descriptive "liberal self" as an adequate accounting of selfhood enjoyed by or experienced by women.

Because this part of MacKinnon's appropriation of Marxism is central to my own proposed modification of MacKinnon's Feminism, Modified, which I lay out below, let me elaborate on it just a bit using my own metaphors to capture the individualist aspiration of liberalism and the nature of MacKinnon's quasi-Marxist challenge to it.<sup>29</sup> What I sometimes call the "liberal self"—the

28. See FEMINISM UNMODIFIED, *supra* note 13, at 54; FEMINIST THEORY OF STATE, *supra* note 1, at 148-49.

29. Marx's pithiest denunciation of liberal individualism, as applied to wage labor, appears in chapter six of *Capital*:

[I]n order that our owner of money may be able to find labour power offered for sale as a commodity, [the possessor of labour power] . . . the individual whose labour power it is, offers it for sale, or sells it, as a commodity. In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity for labour, i.e., of his person. He and the owner of money meet in the market and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law. . . . [This] demands that the owner of the labour power should sell it only for a definite period, for if he were to sell it rump and stump, once for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity. He must constantly look upon his labour power as his own property. . . .

The second essential condition to the owner of money finding labour power in the market as a commodity is this—that the labourer, instead of being in the position to sell commodities in which his labour is incorporated, must be obliged to offer for sale as a commodity that very labour power, which exists only in his living self. . . .

For the conversion of his money into capital, therefore, the owner of money must meet in the market with the free labourer, free in the double sense; that as a free man he can dispose of his labour power as his own commodity, and that, on the other hand, he has no other commodity for sale, is short of everything necessary for the realization of his labour power.

The question why this free labourer confronts him in the market has no interest for the owner of money, who regards the labour market as a branch of the general market for commodities. . . . One thing, however, is clear—nature does not produce on the one side owners of money or commodities, and on the other men possessing nothing but their own labour power. This relation has no natural basis. . . . It is clearly the result of a past historical development. . . .

Karl Marx, *Capital* (Samuel Moore & Edward Aveling, trans.), in 50 GREAT BOOKS OF THE WESTERN WORLD 79-80 (Robert Maynard Hutchins ed., 1952).

After discussing how labour is converted into surplus value and then into profit of the capitalist, Marx goes on to discuss the liberal theory that legitimates it:

This sphere that we are deserting, within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule freedom,

self assumed by political and theoretical liberalism—has this central, defining characteristic: the liberal self makes choices—meaning, decisions among proffered alternatives, often, but not only, in open markets—which, when acted upon, become the source of value.<sup>30</sup> Value, for liberals, is a function of the acted-upon choices of free individuals. This sounds simple, but for it to even be minimally coherent, much less plausible, the liberal self must have a particular psychological make-up. First, the liberal self must hold “preferences” between possible potential choices. Because choices generate value, preferences between potential choices are accorded great deference: there’s just no “value-based” reason to interfere with them (how could there be?) and every reason not to.<sup>31</sup> In turn, those preferences, still according to the liberal conception of the self, are forged from the individual’s own privileged awareness of her desires: she knows what she wants, and she prefers that which will satisfy those wants.<sup>32</sup> Our desires, looking at the causal chain the other way around, generate

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equality, property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. The only force that brings them together and puts them in relation with each other is the selfishness, the gain and the private interests of each. Each looks to himself only . . . and just because they do so, do they all, in accordance with the pre-established harmony of things, or under the auspices of an all-wise providence, work together to their mutual advantage, for the common weal, and in the interest of all.

On leaving this sphere . . . which furnishes the “Free-trader *Vulgaris*” with his views and ideas, and with the standard by which he judges a society based on capital and wages, we think we can perceive a change in the physiognomy of our *dramatis personae*. He, who before was the money owner, now strides in front as capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business; the other, timid, and holding back, like one who is bringing his own hide to market and has nothing to expect but—a hiding.

*Id.* at 83-84.

30. Posner states this most clearly in his classic piece on the ethical foundation of wealth maximization. RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 60-61 (1981). Classically liberal versions of the idea that individual choice is the wellspring of social value can be found in JOHN STUART MILL, *ON LIBERTY* 84-87 (1859), and JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1-4 (Gaunt 2001) (1879). Modern statements to similar effect recur in BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 374-78 (1980), and in Ronald Dworkin’s definition of liberalism, according to which liberalism cannot possibly rest on any theory of the social good that relies on anything other than individual choice. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1978). It is this claim that aligns liberalism with antipaternalism and that, in extreme, generates a libertarian political outlook.

There are versions of liberalism which either deny or soften this definitional equivalence of value and satiated choice. I have argued elsewhere that the “liberalism” and “individualism” defended by John Dewey was not committed to this definitional equivalence, but instead rested on a robust account of the good that was independent of individual choice. See Robin L. West, *Pragmatism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

31. There is a vast literature on the role of preferences and preference formation in liberal theory and on liberal arguments against paternalistic intervention based on its understanding of the moral value of “preferences.” For a partial and skeptical taste see, e.g., Daniel Kahneman, *New Challenges to the Rationality Assumption*, 3 *LEGAL THEORY* 105 (1997); Robin West, *Rationality, Hedonism, and the Case for Paternalistic Intervention*, 3 *LEGAL THEORY* 125 (1997).

32. See *infra* notes 33, 66-67 and accompanying text.

our preferences. Finally, our desires, at least ideally, are a guide, at least in a healthy adult, to both individual pleasure and individual interest.<sup>33</sup>

Putting this all together yields a powerful case for radical individualism: our choices produce value, we make those choices based on what we prefer, our preferences are a product of our desires, and our desires for the most part track what is in our overall best interest. Or, putting it slightly differently: Based on his preferences the "liberal self" makes choices that, in turn, reflect his desires, which, if fulfilled, will lead to an increase in both his subjective pleasure and his objective well-being. That increase in an individual's subjective pleasure and objective well-being is of intrinsic value—and that's pretty much *all* that is of intrinsic value.<sup>34</sup> Each part of this quite complex set of correlations is independently important, but the sum of the parts even more so. Taken holistically, the liberal self, with only a few constraints, makes choices that, if fulfilled, will satiate desire and produce value, and she holds preferences that, when satisfied, generate choice.

Whatever one might think philosophically of this highly individualistic liberal understanding of value, the Marxist critique of it that has taken hold in contemporary critical thought is not so much aspirational, or even philosophical, as it is *descriptive*: none of liberal theory's quasi-empirical premises hold true for the *subordinated* self.<sup>35</sup> In particular, the subordinated self's "preferences" are not self-directed—the subordinated self does not "prefer" that which will further her own pleasure or self interest or which will

33. The best defense of this position, I believe, is still Jeremy Bentham's short discussion of the idiosyncrasy of pleasure and the difficulty of judging for another the better of "Push Pin" (think video games) and Poetry. Or consider his anecdote concerning the oculist:

On occasions like this the legislator should never lose sight of the well-known story of the oculist and the sot. A countryman who had hurt his eyes by drinking, went to a celebrated oculist for advice. He found him at table [sic], with a glass of wine before him. "You must leave off drinking," said the oculist. "How so?" says the countryman. "You don't, and yet methinks your own eyes are none of the best."—"That's very true, friend," replied the oculist; "But you are to know, I love my bottle better than my eyes."

BENTHAM, *supra* note 30, at 319 n.2.

The best critique of anti-paternalism still comes from John Stuart Mill, who somewhat notoriously held both positions during the course of his complex ideological odyssey. See chapter two of JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM AND ON LIBERTY* 181, 185-202 (Mary Warnack ed., Blackwell Publishing 2003) (1861). For a full discussion of both men's views, and their relation to other forms of liberalism and utilitarianism, see Robin West, *The Other Utilitarians*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 197 (Brian Bix ed., 1998).

34. In the law and economics literature, this is often held to be true simply as a matter of definition, thus masking the empirical nature of every claim required to support the conclusion. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (1977) ("'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction *as measured by aggregate consumer willingness to pay for goods and services*—is maximized.") (emphasis in original); POSNER, *supra* note 30, at 49.

35. Perhaps the clearest exposition of the role of this critique of the individual self, in the context of critical legal thought, is Robert W. Gordon's classic, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 198-215 (1987). For further examples of critical essays assailing various parts of the liberal depiction of the individual self, see Mark Kelman, *Choice and Utility*, 1979 WIS. LAW REV. 769 (1979); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

satiate her own desires. Rather, the “preferences” of the subordinated self will often, if not always, further the pleasures and well-being of whomever is dominating her rather than further her self-interest, and will satiate his desires rather than her own. Suffering false consciousness is just part of what it means to be politically dominated; for one’s own survival, one learns to prefer not what satisfies oneself, but what serves the interest of the dominator. Consequently, if a woman suffers subordination at the hands of a man (either because all women are subordinated by all men or because she is by him), then, even when her choices are “voluntary” or “consensual,” these choices will reflect his desires—not hers. Given all of this, the wonder, as MacKinnon says in many different ways, is not that so many women have such profoundly illiberal understandings of their own preferences, interests, choices, pleasure, and desires—that our consciousness and self-consciousness are false.<sup>36</sup> The wonder is the exception: the woman who on occasion glimpses her own self as of consequence for herself, who has choices, preferences, desires, and pleasures that reflect that self-assessment, and who then acts on them.<sup>37</sup>

To clarify: MacKinnon’s appropriation of Marxist logic to better articulate the condition of subordinated women entailed *not* an embrace of Marx’s views regarding labor but, rather, an embrace of Marx’s view of the incompatibility of social, private-sphere subordination with the theory of value propounded by liberal individualism. That entailed, in turn, a firm rejection of the liberal (and libertarian) claim that the maximization of individual choices is the way to maximize well-being and, hence, value, so long as subordination on the ground, so to speak, is an adequate description of social reality. The creation of an individual as a source of sex implies as well the creation of an individual whose preferences will interfere only occasionally, not fundamentally, with such a role. Preference and choice are constructed hand-in-hand with the individual: what the individual is—she, from whom sex is taken—will dictate what the individual prefers—she prefers to give her sex, largely so as to avoid the threat to life entailed by its forceful, coerced expropriation.

As I will argue in more detail below, MacKinnon argues that the structures of domination that so misdirect the subordinated individual’s felt preferences and manifest choices *also* have the effect of polluting—or rendering suspect—the content of her desire. Thus, for MacKinnon, the domination that wrongly turns a woman’s preferences and choices away from her own fulfillment likewise affect and even can come to constitute the content of her desires: it is not only that she will prefer his pleasure to her own and will choose accordingly, but also that she actually comes to desire her own subordination, debasement, and submission. The content of her desire is as much a function of

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36. FEMINISM UNMODIFIED, *supra* note 13, at 54; FEMINIST THEORY OF STATE, *supra* note 1, at 115-16.

37. FEMINIST THEORY OF STATE, *supra* note 1, at 173.

her objective subordination as is the content of her choice. It is not so clear that Marx believed that the corollary was true with respect to laborers; while Marx surely believed that the domination of the laborer led him to choices that were not at all in his interest, it is not clear that Marx believed that the laborer actually came to *desire* his own domination. MacKinnon, however, clearly believes that women do so, and I will argue below that this is both an unfortunate inference and an unnecessary one.

Here, though, I want to emphasize what she and Marx so profitably share, and that is an account of the objective conditions of persons in liberal societies such that at least one aspect of the liberal description of selfhood is simply false. Given the structures of domination as both Marx and MacKinnon describe them, it is just untrue that the satisfaction of individual choice will inevitably—virtually by definition—maximize individual and therefore social well-being, and thereby definitionally create value. Both Marx and MacKinnon have provided descriptive and ethical accounts of large swaths of human behavior heretofore simply not seen, for a simple, definitional reason: the descriptive accounts of labor and sex provided by liberalism preclude it. From a liberal perspective, if work is consensually exchanged, it is freely chosen, and if so, it produces value, ethically as well as economically. If it is coerced, it is slavery. There is no room in this accounting for an understanding or critique of labor that is both consensually exchanged (and therefore not slavery) but nevertheless alienated by the force of necessity, objectively harmful to the worker from whom it is taken, and, accordingly, ethically unjust. Likewise, from a liberal perspective, if sex is consensually exchanged, it is freely chosen, and, if so, it produces value—ethically as well as economically. If it is coerced, it is rape. There is no room in this accounting for an understanding or critique of that sex that is consensually exchanged and freely chosen—and therefore not rape—but nevertheless alienated, unwanted, objectively harmful to the woman from whom it is taken, and, accordingly, ethically unjust.

### *Liberalism*

MacKinnon's relation to liberal individualism and particularly to the theory of value at its core is one of thoroughgoing opposition. But it is a mistake to equate liberalism with liberal individualism, and, likewise, it is a mistake to conclude that MacKinnon's feminism stands in unambiguous opposition to liberalism. In fact, MacKinnon's relation to the liberal tradition more broadly understood—in *toto*—is much more nuanced. Specifically, her understanding of the nature and the purpose of the *state*, put forward in both her books and her advocacy, owes far more to classical liberal theory—and particularly to its father, Thomas Hobbes—than to either feminism or Marxism.



Clearly, MacKinnon does not think or hope that the state will wither away. Just as clearly, she does not view the state as invariably hostile to women's interests or, for that matter, to the interests of subordinated peoples generally.<sup>38</sup> Rather, and this time in step with at least one of liberalism's founders, Thomas Hobbes, MacKinnon sees the state as, potentially, the *solution* to the problem of private subordination, rather than the cause of it.<sup>39</sup> As such, the politically sovereign state—the entity with a legitimate (because delegated) claim to a monopoly on the use of force—is a solution to private misery that very much ought to stay put.<sup>40</sup> Put in classically Hobbesian terms, MacKinnon, like Hobbes, sees a violent, fearful, and short life in the state of nature—a violence perpetrated by private individuals on private individuals—and consequently, a need, given the human propensity to violence, for the creation of a state.<sup>41</sup> She then, implicitly and ideally, defines the heart of the state's role by reference to that need: the state (whatever else it does or should do) must police against that private violence.<sup>42</sup> In this, she is in good company, of an emphatically liberal pedigree.

MacKinnon's otherwise thoroughly Hobbesian theory of the state and of the natural society it regulates fundamentally diverges from Hobbes's in two

38. She stated repeatedly, early on, that the state is "male" by virtue of its claim to objectivity. She never held it to be invariably so, and I believe, in retrospect, it's clear that she meant by this that it is male by virtue of a false claim to objectivity, not by virtue of the aspiration itself. One would not so aggressively seek to use the state to counter patriarchy if one believed otherwise. Halley suggests this same migration of MacKinnon's view of the state, albeit much more harshly, in Halley, *supra* note 15, at 187-89.

39. THOMAS HOBBS, *LEVIATHAN* 90, 121 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). I discuss the relation of Hobbes, Hobbesian liberalism, radical feminism, and radical movements more generally, in Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 141-47 (2003).

40. Compare HOBBS, *supra* note 39, at 90, 121 with FEMINISM UNMODIFIED, *supra* note 13, at 40.

41. MacKinnon makes this clear in her typically blunt recitation of the social contract:

Here, on the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who. Comparatively speaking, man has been resting ever since.

FEMINISM UNMODIFIED, *supra* note 13, at 40. Compare this with Hobbes's classic description of life without the protection of a sovereign against the consuming threat of private violence:

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

HOBBS, *supra* note 39, at 89.

42. SEX EQUALITY, *supra* note 7, at, e.g., 715-800, 856-908, 1512-1562; *Logic of Experience*, *supra* note 10, at 825-26, 833; and Catharine A. MacKinnon, *Reflections on Law in the Everyday Life of Women*, in *LAW IN EVERYDAY LIFE* 109 (A. Sarat and T. Kearns eds., 1993) [hereinafter *Reflections on Law*] all express this demand and, implicitly, the hope that it will be met. See also *infra* notes 43-55 and accompanying text.

regards—one stemming from her Marxist understanding of subordination and the second from her feminism. Both push the state's *raison d'être* in directions Hobbes would have found foreign (to put it mildly). First, her Marxist insistence that the problem of private power extends to subordination, and not only to conventionally understood violence, extends the role of the state beyond policing against violence, to policing against the subordination that is violence's product and handmaiden. Second, of course, her feminist insistence that the private violence policed against must include sexual violence puts the leviathan and its justification metaphorically where Hobbes had not envisioned it: in patriarchal space. Both differences are important, but they ought not to overshadow the commonality. The members of the leviathan, for both Hobbes and MacKinnon, must be protected against the violence of others by the state's monopoly on violence, and individuals accordingly have a right to that protection. For MacKinnon, distinctively, the beneficiaries of this pact must include women, and the private power that individuals must give up, when signing onto the project of the leviathan, must include patriarchal power.

This is a powerful synthesis of ideas. In essence, MacKinnon has basically harnessed the power of Hobbes's fundamental liberal insight regarding the nature of states to her feminism, in a way that strikingly parallels the manner in which she harnessed Marx's fundamental insight regarding the nature of subordination. The force, and I think the staying power, of MacKinnon's Feminism, Modified is clearly in this fusion—the fusion of a radical feminist claim regarding the dangerous and violative nature of heterosexuality, with a deeply familiar liberal commitment to countering private violence with state power, no less than with a deeply Marxist understanding of the impact of subordination on the objective nature and subjective life of the subordinated class. This fusion yields a novel claim. The elements fused, however, are not only familiar; they are classics—the proverbial pillars of western enlightenment thought. How we got from the deeply familiar to the thoroughly novel, though, is not at all obvious and, as far as I know, in the scholarship on MacKinnon's Feminism, Modified has never been fully elaborated, much less critiqued.

If we bracket for a moment the feminist (and unfamiliar) component of this synthesis, the contours of the basic theoretical position might be clearer. The combination of Hobbesian liberalism with a Marxist account of the nature of subordination brought on by unjust mal-distributions of private power is not unprecedented in American political theory. A hundred years ago, some of the more left-leaning legal realists, notably Robert Hale, urged a strong state response to the subordination effected by the use of private power in labor markets.<sup>43</sup> It is, however, *unusual* in our political history. At this point in our current conservative and libertarian climate, even just the bare Hobbesian

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43. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); see also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

dimension of Feminism, Modified is not widely embraced. The seemingly uncontroversial Hobbesian pillar of modern liberalism—that the state *must* respond to and protect citizens against private violence (leave aside “subordination”)—is nevertheless seemingly a minority view in this country, both in law<sup>44</sup> and even more so in culture,<sup>45</sup> as evidenced by our uneven history of state protection against violence. Witness the states’ dismal failure in the post-bellum era to respond to the wave of lynchings that persisted well into the twentieth century,<sup>46</sup> or the refusal of states even to criminalize, much less to police against, domestic violence in the nineteenth and much of the twentieth century,<sup>47</sup> all under the protective and legitimating guise of coverture or, more recently, of privacy<sup>48</sup>; or the late twentieth and early twenty-first century movement—gathering, not losing steam—to make private gun ownership not only acceptable but constitutionally protected.<sup>49</sup> Famously—or infamously—the constitutional corollary of the Hobbesian mandate—that either the due process clause or the equal protection clause might be plausibly read to require such a response—has been explicitly rejected by the Supreme Court, albeit in dicta: the individual, the Court opined in *DeShaney v. Winnebago County Department of Social Services*, has no constitutional right to the protection of the state’s police power against private violence.<sup>50</sup> That decision both constitutes and reflects American resistance to the core Hobbesian claim that the state’s *raison d’être* is just that protection. Likewise, the current trend in state law, toward allowing individuals to “carry” lethal weapons in plain view, constitutes as visible a counterweight as one might imagine to the Hobbesian understanding of the leviathan’s reason for being.

Nevertheless, at least within theory, the basic Hobbesian claim comes with the imprimatur of academic, official, liberal acceptance: from Hobbes, to Locke, to Rawls, and to Nozick, liberal theorists of the state explicitly approve

44. The Court has never held that individuals have a right to the state’s protection against private violence; indeed it has stated, albeit in dicta, that there is no such right, or correlative state duty. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197, 201 (1989).

45. The glorification of violent criminality and the denigration of law and legalism is a constant of popular culture, although it ebbs and flows. For a good discussion of this theme in both film and television, see Naomi Mezey & Mark C. Niles, *Screening the Law: Law & Ideology in American Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

46. See generally Emma Coleman Jordan, *Crossing the River of Blood between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545 (2003).

47. ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 14-20 (2000).

48. See Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2151-52 (1996).

49. *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 3 (2000); *Second Amendment Symposium*, 1998 BYU L. REV. 35 (1998); *Symposium: The Second Amendment*, 10 SETON HALL CONST. L.J. 839 (2000); *Symposium: Gun Control and the Second Amendment*, 15 U. DAYTON L. REV. 1 (1989); *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443 (1995); *Symposium: Gun Control*, 49 LAW & CONTEMP. PROBS. 1 (1986).

50. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

it.<sup>51</sup> Rawls, for example, refers to the maxim that the state must deter against private individual, which he terms “Hobbes’s thesis,” as one of the pillars of the “Rule of Law.”<sup>52</sup> He then states unequivocally that Hobbes’s thesis is a necessary condition of contemporary political liberalism.<sup>53</sup> If, though, we *couple*, as MacKinnon wants to do, the Hobbesian mandate with the Marxist insight, then what follows is a markedly expansive mandate for state action and, if constitutionalized, for a wide array of constitutionally required affirmative duties. Put differently, if it is not only private violence to which the state must respond but also other forms and consequences of egregious private subordination, then the states’ obligations to act are extensive, not only in the sexual realm but also in the economic realm and wherever else one finds subordination and its harms. This larger understanding of equality, of subordination, and of the state’s constitutional obligation to meet it is precisely what is implied by MacKinnon’s simultaneous embrace of both a Hobbesian account of the state’s role in social life and a Marxist understanding of the nature and ill consequences of private-sphere subordination. And, as such, it is an *unusual* (again, not unprecedented) political stance: Hobbesian liberalism typically envisions a minimalist rather than maximalist state,<sup>54</sup> and Marxist accounts of subordination, particularly in spheres other than the economic, more often place confidence in other levers of social change than in states and state actors.<sup>55</sup>

It is not, however, unique, and it is not unique, more specifically, in that peculiar anomaly of American politics which might best be described as “*legal radicalism*”—a defining insistence that the state not only should but morally and constitutionally *must* respond to private-sphere subordination. In fact, although usually unarticulated, this Hobbesian-Marxist synthesis might be viewed as the core, shared commitment of non-anarchist, non-violent, and non-revolutionary radical legal movements in America from the Civil War to the present. The legal realist advocates of New Deal radicalism, for example, argued in a parallel fashion that the state must respond to the violence of

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51. HOBBS, *supra* note 39, at 86-90; ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26-28 (1974); JOHN RAWLS, A THEORY OF JUSTICE 206-13 (rev. ed. 1999); John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government* 123, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 267, 357 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

52. RAWLS, *supra* note 51, at 211.

53. *Id.*

54. This understanding of Hobbes seems to be shared by both his celebrants and his critics. Compare Richard Epstein’s treatment, in TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7 (1985) (“Hobbes gives us the account of human nature on which a system of limited government rests.”) with Tushnet’s similar understanding, in MARK TUSHNET, RED WHITE AND BLUE 8-10 (1988).

55. See, for example, Laurie Shrage’s socialist-feminist account of prostitution in *Should Feminists Oppose Prostitution?*, in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 435, 447 (Alan Soble ed., 2002), in which she advocates political organizing and education rather than law to combat prostitution.

economic exploitation with appropriate legislation—the leviathan, in effect, must disempower private economic actors.<sup>56</sup> Post-civil-rights-era critical scholars argue likewise for a more expansive, not less expansive, state to police against private-sphere racial subordination.<sup>57</sup>

Only MacKinnon, however, in the history of American radicalism, at least to my knowledge, has appropriated and then synthesized the Hobbesian-Marxist insistence on a strong and active state moved to address subordination with a feminist claim that sexuality is a site of such subordination. It is noteworthy, although again rarely noted, that the consequence of this double-coupling is both a *limitation* on the reach of the radical Hobbesian-Marxist state and a dramatic reorientation. MacKinnon does not argue anywhere that the state is constitutionally obligated (by the equality guarantee in the fourteenth amendment) or even morally obliged to address *all* consequences of *all* private-sphere subordination.<sup>58</sup> Why not? Why not a *general* egalitarianism, and not just an egalitarian feminism, to inform constitutional and political interpretation? Perhaps it is because our legal history just stubbornly refuses to yield such an interpretation. It hardly needs pointing out, I suppose, that that understanding—whether or not it would over-oblige the state—would run dramatically counter to the point and history of the Constitution.<sup>59</sup> It is, for example, clearly not the understanding of equality that moved the drafters of the Fourteenth Amendment.

Nevertheless, that MacKinnon does not so argue, I believe, is not a function of some sort of Dworkinian reading of our constitutional history and

56. See Cohen, *supra* note 43, at 24-30; see also Hale, *supra* note 43, at 492-94.

57. My colleague Professor Emma Jordan has displayed in her office an interview from twenty years ago in which she plaintively states, as a young civil rights lawyer, "I have always thought it was the state's obligation to protect people." For discussions in the critical race literature of the importance of state intervention to end subordination (rather than to simply correct for irrational private discrimination), see Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (on affirmative action); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1987) (on hate speech); and Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990).

58. She comes closest in *Reflections on Sex Equality*, *supra* note 4.

59. As generation after generation of advocates of constitutionalized "welfare rights" seemingly must forever re-learn, to our ever-growing frustration. See Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also the articles collected in the *Fordham Law Review Symposium, The Constitution and the Good Society*, 69 FORDHAM LAW REVIEW 1569 (2001), particularly those by William Forbath, Robin West, and Frank Michelman. Similarly, see the Georgetown Law Journal's symposium on Charles Black, the Constitution, and welfare rights. *Symposium: Charles L. Black*, 92 GEO. L.J. 773 (2004).

Charles Black, the most eloquent defender of the proposition that the Constitution can be read so as to mandate welfare rights, was careful to couch his argument as relevant only to the constitutionalism of some quite distant (and more enlightened) future. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP* (1969). Charles Beard, an historian, took the opposite tack, and viewed the Constitution, at least as of early twentieth century, as unmovably hostile to the needs and interests of poor people. CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1960).

its limits.<sup>60</sup> Rather, I believe, it is simply a logical implication of her relative neutrality toward Marxism's core claim regarding labor—that labor is that which is most the worker's own, and most taken away. Thus, it is not, in MacKinnon's writing, *all* subordination, and it is certainly not all economic subordination, that is targeted by her expansive understanding of equality. It is, rather, *sexual* subordination. That limits, dramatically, the scope of the anti-subordination principle. And, it is by virtue of that limitation—only by virtue of that limitation—that MacKinnon's anti-subordination principle with respect to sexual equality has even minimal plausibility as a constitutional principle. Clearly, no matter how desirable a general anti-subordination understanding of the equal protection clause might be—if applied to poor people, working class people, or homeless people—it would be so dramatically counter to the core property-protective role of the United States Constitution (to say nothing of our entrepreneurial and capitalist history) that it is virtually unfathomable that even legislators, much less courts, would ever pursue it, either as a serious mandate of constitutionalized legislation or as a meaningful constraint upon it.

By contrast, it is not so unthinkable that courts and/or legislators would seriously regard a principle of equality informed by the target of sexual subordination, for two reasons. First, sexual subordination *is* often, if not always, effectuated by “garden-variety” violence that, although virtually ignored for two thousand years, is nevertheless easily assimilated to a Hobbesian model—think of the violence in the unregulated patriarchal domestic home,<sup>61</sup> the violence that accompanies rape,<sup>62</sup> and the violence that is necessary to the sex trade and trafficking in women. Economic subordination, although it may rest on threats of material deprivation that are potentially lethal, is not of this nature: the violence wielded by threats of material deprivation is indirect, subtle, and largely not visible. The contrast is important. It is certainly not unthinkable, *DeShaney* notwithstanding, that the state has some sort of positive, affirmative obligation—moral at least, but plausibly constitutional as well—to do something proactive or reactive about private violence, including the private violence that so directly entails sexual subordination. It is not so clear that economic subordination carries this sort of plausibility as a target of constitutional critique. The two claims are also

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60. Dworkin famously demanded that any fair reading of our current constitutional “law” must be both reasonably just, or moral, and reasonably true to the facts of our legal history. See DWORKIN, *supra* note 30; see also RONALD DWORKIN, *LAW'S EMPIRE* (1986).

61. There have not, however, been a significant number of successful § 1983 cases brought over the failure of police to respond to domestic violence calls, largely because of the impact of *DeShaney's* dicta. See generally SCHNEIDER, *supra* note 47, at 44; *id.* at 92-93 (explaining why *DeShaney* has made it difficult if not impossible for these claims to succeed).

62. Apparently the possible unconstitutionality of the state's failure to fully criminalize and prosecute domestic violence and rape cases was a part of what moved Congress to pass the Violence Against Women Act of 1994, Pub.L. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C.). See Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

entirely severable: sexual subordination could be addressed—is “addressable”—while leaving economic subordination intact. That limit, in fact, is both its strength, as a guiding norm of a constitutionally feasible understanding of equality and, of course, its weakness.

The consequence I draw from all of this is simply that MacKinnon's appropriation of a Marxist understanding of subordination toward feminist ends does not take the state as far from basic, Hobbesian functions as does the Marxist-Hobbesian argument for state intervention to disrupt and reverse patterns of economic subordination. Affirmatively, a simple, genuine commitment to deter male-on-female sexual violence would go a long way toward ending the sexual subordination at the heart of patriarchy, as understood by Feminism, Modified. That could be accomplished while leaving our class structure fully intact. The equality entailed by MacKinnon's Feminism, Modified has a core liberalism—the state must monopolize violence—that makes it minimally plausible as a body of constitutional doctrine; traditional Marxism, by contrast, does not.

### *Feminism*

The third component of Feminism, Modified, is political feminism, or classical feminism, *per se*. The relation, however, is complicated, and certainly much more complicated than the conceit of MacKinnon's third book title—*Feminism Unmodified*—claimed. MacKinnon fused her Hobbesian-Marxist account of the state's *raison d'être* with strands of political feminism, but certainly not with feminism *in toto*. Feminism *in toto* is just not that simple. Rather, MacKinnon appropriated, magnified, and held fast to one methodological strand of what (now) might be called the classical feminism of the 1960s and 70s: to wit, that we should listen to, and credit, women's narrative accounts of their sexual injuries and violations.<sup>63</sup> In what might best be described as an affirmative-action-like moment of compensatory justice, MacKinnon urged that all of us—and not just the victims and their support groups—do so and that we do so in part to help counter the centuries-long social, cultural, legal, and religious practice of silencing, disbelieving, or trivializing those stories.<sup>64</sup> In this she reversed a dominant trend not only in history, but in contemporary culture and law as well: the consistent, even

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63. The opening pages of chapter seven, “Sexuality,” of *Toward a Feminist Theory of the State* make this clear—MacKinnon describes the range of movements within feminism that she identifies as feminist and makes clear her indebtedness to them. *FEMINIST THEORY OF STATE*, *supra* note 1, at 127-28. Even further, though, she makes clear that she views her own project as an attempt to synthesize and articulate the theoretical structure of those movements—which until then, had not been subjected to analysis or theoretical synthesis. All of those movements were in some way concerned with the sexual use and exploitation of women and girls.

64. *FEMINISM UNMODIFIED*, *supra* note 13, at 51-52; *FEMINIST THEORY OF STATE*, *supra* note 1, at 38-39, 151-52.

compulsive inclination to flat-out not believe any woman who claimed sexual victimization, coupled with a near-total faith in claims of women's agency and authenticity, particularly where those claims directly or indirectly further the interests of sexually dominant actors.

Because this is the part of Feminism, Modified that has come under sustained challenge in the last half decade, this time by queer-theoretic, postmodern, "pro-sex," or "sex-neutral" discourse, let me expand on it just slightly. In culture as in law, at the time MacKinnon began to write and still today, all women's, as well as any particular woman's, various "decisions" and "choices" and "preferences" to engage in virtually all sexual practices that promote men's or a man's sexual interests—the decision to engage in prostitution, to participate in the pornography industry, to enter into surrogacy contracts, to marry, to marry young, to marry a man with multiple wives, to have sex with one's husband, to go out on a date, to sign a prenuptial agreement without benefit of counsel, to have or not to have an abortion, to have a child, to have a fifth child, or to have a tenth child, to have the sexual intercourse that produces those pregnancies, to put up with violence, abuse, and harassment from an abusive domestic partner, to go to work in high paying and high risk jobs, or to not go to work in such jobs—all of these choices are assumed within liberal discourse, and to a lesser extent within contemporary conservatism as well, as expressing an authentic and free and liberal self—a self, that is, whose desires produce preferences that in turn generate choices that, when fulfilled, increase pleasure, well-being, and, ultimately, value. Liberalism, liberal individualism, and a liberal theory of value provide the justification, when any is felt needed, for these practices in which women engage, and which seemingly work against their interest.<sup>65</sup>

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65. For a sampling: On prostitution, see Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 95 (1992); Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L. REP. 99 (1989); Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth,"* 4 COLUM. J. GENDER & L. 26, 37-38 (1994); Veronica Monet, *Sedition*, in WHORES AND OTHER FEMINISTS 217 (Jill Nagle ed., 1997). On pornography, see the F.A.C.T. brief, *supra* note 14. On surrogacy, see Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995). On consent and privacy in justifications of violence within marriage, see Siegel, *supra* note 48. On rape within marriage and the history of various defenses of marital rape statutes as violative of women's choice to enter a marriage, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000). On date rape, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995). On abortion, see EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996) (discussing how the rhetoric of choice has skewed reproductive rights issues); see also Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117 (1999) (reviewing McDonagh); Robin West, *Robin West (concurring in the judgment)*, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 121 (Jack M. Balkin ed., 2004). For a discussion of the use of the "lack-of-interest defense" in equal employment cases involving women's exclusion from high-paying, high-risk jobs, see Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). On consent to harassment, see Jeannie Sclafani Rhee, *Redressing for Success: The*



It wasn't always thus. In fact, for most of our history, women's participation in these institutions, these practices, these labor markets, these religious regimes, particularly when misery-inducing, was justified (again, when the need was felt to do so, which wasn't often) *not* by reference to women's choice or agency—since they were not presumed to have any—but by reference to women's *nature* or, even more directly, simply by reference to the greater imperative of men's need.<sup>66</sup> In the old days, women entered marriage or had children, for example, because women's nature dictates they do so, and if women seemed to get the short end of the stick, well, sacrifice was just a big part of that nature. Now our justificatory rhetoric is different. For at least the last half century, women's choice, agency, freedom, and contractual capacity, rather than women's nature or appeals to "tradition," have been invoked to legitimate women's participation in practices and institutions that seemingly benefit men's interests and not women's. Often times, this shift—from women's nature to women's choice—puts a palpable strain on the coherence of those liberal bulwarks. Authenticity, freedom, choice, and agency, after all, are pretty heroic assumptions, when they lead to conditions or terms that in other contexts—contexts not involving women, and not involving sex—might well lead even the most libertarian observer to question the voluntariness of the choices facilitating those conditions.

For example, look at the still-explicit terms in traditional marriage vows, at least in fundamentalist and some mainline protestant wedding ceremonies, which require a wife's life-long obedience to her husband's commands.<sup>67</sup> Wouldn't even a hard-boiled libertarian, in other contexts, be skeptical of the freedom or agency of a purported "choice," where the content of the contract "chosen" so drastically constrains autonomy in such a large swath of one's adult life? Aren't we skeptical of contracts that dramatically limit future options in virtually all other spheres? Another example, still within marriage: Look at the unstated but quite standard *legal* terms in marriage contracts as defined by the secular state—not religious tradition—regarding the husband's sexual rights within marriage. Marital rape is still under-criminalized in most states, both on the books and more so in practice.<sup>68</sup> Do young brides *know* that they are relinquishing control over access to their physical bodies when they agree to a marriage proposal? Do they know that they are in effect ending, with respect to this man, their right to say no to sexual penetration? Shouldn't all of us—especially libertarians—be skeptical of the free agency involved in a

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*Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163 (1997).

66. For good historical accounts of the effect of this view of women's nature on law, see Siegel, *supra* note 48, at 2145-47; Hasday, *supra* note 65.

67. Women promise to "love, honor, and obey;" men promise to "love and honor."

68. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 46 (1990); Hasday, *supra* note 65, at 1375, 1484-85.

decision to enter a marriage where this particular term regarding the state's unwillingness to protect her against sexual violence is neither known nor its significance appreciated? Is there any other context where the state permits one adult citizen access to another adult citizen's physical body against the latter's wishes and without the latter's contemporaneous consent? (No, there's not.) To take a third example—this time outside of marriage, do prostitutes, when they decide (often as young teenagers) to enter this career, know of the relative lack of police protection against the violence that comes with the territory?<sup>69</sup> If they know and enter the industry anyway, shouldn't that give us reason to suspect that the choice was coerced? Do participants in pornography understand that unlike most other entertainment-related industries their "chosen" career lacks the state regulation of their work conditions that might protect their physical health and safety?<sup>70</sup> Do women signing prenuptial agreements without legal advice appreciate the vastly superior bargaining power of those who have such advice?<sup>71</sup>

The general point here is simply that, in spite of counter-indicators that in other contexts often prove dispositive,<sup>72</sup> women's and girls' consent to enter into these various domestic and sexual institutions, arrangements, contracts, and industries is for the most part presumed, within liberalism, to be fully voluntary. Once entered, of course, the coerciveness of these institutions, such as marriage—constituted in part, perhaps in large part, by the traditional duty to obey and the traditional legal right of husbands to force sexual intercourse on

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69. The literature on this is vast. For an introduction, see Dorchon Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 138 (1993); Vednita Carter and Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 52-55 (1999).

70. See David Pritchard, *Beyond the Meese Commission Report: Understanding the Variable Nature of Pornography Regulation*, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 163 (Susan Gubar & Joan Hoff eds., 1989).

71. For a full discussion, see Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1460-61 (1992).

72. The sexual abuse, child abuse, and violence that often drive teenagers and young women into prostitution as a profession, and into particular acts of prostitution, would be more than enough to vitiate a traditional contract on grounds of "duress." The lack of knowledge of material terms, such as the duty to obey and the terms of the marital rape exemption, would likely be sufficient to void a contract on the grounds of lack of mutual assent. Contracts to sell oneself into slavery are quintessential examples, at least in first-year law school contracts courses, of unenforceable contracts; yet, a marriage contract that contains as a term that a woman has no power or right to refuse sex during the duration of the marriage has never been held to be such a contract. The radically changed circumstances that follow the birth of a child, as well as the severity of the breach-of-contract remedy, might well provide the grounds to modify or altogether void most contractual obligations, but they are only occasionally held sufficient to void contracts for surrogacy births on behalf of birth mothers. In all of these cases, the degree of voluntariness, freedom, and choice required for a finding of "mutual assent" to enter a contract is greater than that routinely exhibited by girls and women entering these "contractual" types of arrangements, but their contractual elements are not challenged on these grounds. See *id.*; Hasday, *supra* note 65; West, *supra* note 68; authorities cited, *supra* note 69 (on prostitution). But see Epstein, *supra* note 65, at 2307-308 (arguing that surrogacy contracts meet traditional criteria for contractual enforcement); Marjorie M. Schultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79 (1992) (arguing that contract, rather than status or family law, offers a better set of legal principles on which to ground relations among family members).

wives—is then fully masked from scrutiny and protected against outside regulation by the initial act of consent.<sup>73</sup> The future coercion was earlier agreed to, thus making the “coercion” freely chosen—and hence not coercive after all. Within such presumed consensuality to participation in coercive institutions, claims of injury are quite naturally going to be made invisible (because they are incoherent); or, if somehow visible, they are disbelieved; or, if believed, they are trivialized. Simply: it couldn't have happened; if it did, she asked for it; and, if she didn't ask for it, it's just not a big deal anyway.

The strand of classical feminism MacKinnon incorporated into Feminism, Modified, and the “consciousness-raising” set of methodological practices she relied upon, effectively reversed these libertarian presumptions. Simply put: it *did* happen, she *didn't* ask for it, and it *is* a big deal. Rather than putting full faith and credit in the agency of the woman and the autonomy of her choice, when she entered a coercive regime, and then turning a deaf ear to the claims of injury once there, MacKinnon insisted upon casting a skeptical eye on a woman's “consent” to enter the transaction, and attending carefully to the injuries sustained within them.<sup>74</sup> *Believe her*, MacKinnon insists, when she complains that her husband beat her, or that she was assaulted by a pimp or a john, or that she suffered undue pressure when she promised away her child or signed a prenuptial agreement, or that she was raped by her date or by an acquaintance or by a customer or by her boss in a hotel room, or that she was sexually abused by her stepfather, or her husband, or that the state's attorney general upon meeting her ordered her to suck his cock, or that she was forced to get an abortion, or that she was forced to go through with an unwanted pregnancy. *Believe her*, when she says that she was forced to go along and that she did not want it; *believe her* when she says that it hurt, that it injured her, that she was traumatized, that she has trouble reclaiming herself, that she feels dead inside, and that she feels belittled, humiliated, betrayed.

By doing just this one, simple, communicative thing—believing her, and *not* assuming or asserting her complicity, and *not* trivializing what she is saying—according to the logic of feminist consciousness-raising, in its political and pre-legal mode, we bolster a woman's or a girl's awareness of herself as

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73. Thus, the general rejoinder to the movement to abolish the marital rape exemption was that wives agree to sex with their husbands at the time of the marriage contract, and that rape during marriage is therefore a legal impossibility. See Hasday, *supra* note 65; West, *supra* note 68. The classic authority for the proposition that a man cannot be accused of raping his wife because of her consent at the time of marriage is Sir Matthew Hale, 1 THE HISTORY OF THE PLEAS OF THE CROWN 629 (1778) (“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”), quoted in Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941, 947 n. 24 (1996); see also Lalenya Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 353 n.10 (1995).

74. I believe this is an accurate summary of the distinctive political method of knowing MacKinnon describes in her chapter “Consciousness Raising,” in FEMINIST THEORY OF STATE, *supra* note 1, at 83-105.

injured, victimized, and deserving of compensation.<sup>75</sup> We bolster her sense of herself as a victim of injustice, rather than her sense of herself as unimportant and of her injuries and pain as trivial, incoherent, or inevitable. By so doing, in turn, we might instill in her a sense of entitlement and of right—of oneself as a subject deserving of respect, rather than as someone deserving only subjugation to male authority.<sup>76</sup> This was the real, political content and, often, the consequence of the “consciousness-raising” referenced in MacKinnon’s early and most cleanly philosophical essays on the theoretical relations of Marxism and feminism.<sup>77</sup> It was *this* feminist practice and the (until MacKinnon’s writing) largely unarticulated theory behind it that MacKinnon highlighted, identified with feminism, and to which her own modification remains entirely and deeply true.

### *Legalism*

Lastly, and least appreciated and least understood, MacKinnon’s feminism reaffirmed the values and ideals, always, of legalism itself. Although she never has explicitly stated as much, her steadfast reliance on courts,<sup>78</sup> and her repeated invocation of classically formalist modes of argument,<sup>79</sup> suggest an orientation toward law, adjudication, and courts—as distinct from politics, legislation, and legislators—that might best be put, I think, syllogistically: The point of law, so goes the first premise, is justice. Justice, in turn, demands substantive equality. Substantive equality is precisely what women distinctively lack, and they lack it, in turn, because they lack full possession of their “own” sexuality. Hence, *law*—and not just politics—must, and should, address inequality, and through methods that at least for a couple of centuries, and maybe longer, have been at law’s disposal: trials, the articulation of injury followed by the testimony of witnesses, jury arguments, jury deliberations, appellate arguments, and the reasoned elaboration of the law by appellate judges. Must, in turn, implies can: law *can* do this work, however far it has

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75. FEMINIST THEORY OF STATE, *supra* note 1, at 84-95.

76. *Id.*

77. MacKinnon references “consciousness raising” throughout those essays as the central method of feminist inquiry. See FEMINIST THEORY OF STATE, *supra* note 1, at 7-8, 83-105, 240-242.

78. MacKinnon has written about her attraction to adjudication as a vehicle for social change, but rarely with any degree of critical reflection. See *Logic of Experience*, *supra* note 10; *Reflections on Law*, *supra* note 42.

79. This can, of course, be accounted for as simply reflecting her desire to win these cases. Nevertheless, it is noteworthy that MacKinnon’s briefs in the major cases in which she has been involved—unlike the briefs filed by other amici advocacy groups—have used entirely traditional modes of argument. See *Oncale Amici Brief*, *supra* note 3. Compare the so-called “Voices Brief” filed by NARAL in a number of abortions rights cases, from *Webster v. Reproductive Health Services* to the present. Brief of Amici Curiae National Abortion Rights Action League et al., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), *reprinted in* 9 WOMEN’S RTS. L. REP. 3 (1986).

strayed from its defining purpose. Through such legalist means, law can, should, and must deliver its promise of equality.

Although it has escaped the notice or interest of her most vocal critics (sex really is monumentally distracting), MacKinnon's near-absolute faith in the capacity of adjudicative law to serve as the midwife of women's substantive equality may be the most remarkable feature of her jurisprudence. It is that amazing faith in law—what I think of as MacKinnon's faith in “law's nobility”—and not her steadfast skepticism of eroticism that is most evidenced by what may be her least reviewed piece of scholarship to date: her recent casebook, *Sex Equality*.<sup>80</sup> *Sex Equality*, as casebooks go, is disturbing and disarming, but it is also both monumental and deeply conventional. It is disturbing because of the skepticism regarding the ethical and political value of human sexuality that so clearly underlies it. The book is both conventional and monumental, however, and, ultimately, as important as it is because of the legalist faith in law's nobility that it expresses and that clearly motivated it. I want briefly to examine, as the book does not, the basis of the faith that underlies it. What are the assumptions of a legal casebook that is, in turn, grounded in the aspirations and histories embedded in Feminism, Modified? Where does *law* fit into the picture?

Let me spell it out jurisprudentially. Look first at the scope of what is being asked by Feminism, Modified of courts, beginning with doctrine. Clearly the theory of equality upon which Feminism, Modified rests and which it asks courts to adopt is foreign to the courts' received equality doctrine, both constitutionally and statutorily. With the exception of only occasional and ambiguous judicial utterances (such as in *Griggs v. Duke Power Company*<sup>81</sup>), there has never been a major judicial pronouncement putting forward a view of inequality as an unacceptable social status quo fostered by systemic private practice, rather than by occasional acts stemming from the discriminatory animus of badly motivated state actors.<sup>82</sup> And, there is certainly nothing in the doctrine even remotely suggesting that the systemic practice of sexual appropriation is or should be at the heart of—or anywhere near—the Court's equality project. Rather, the taking of women's sexuality by men is traditionally deemed as properly a subject only of criminal law, not equality law,<sup>83</sup> and, hence, by definition a wrong against the state, not a wrong against

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80. SEX EQUALITY, *supra* note 7.

81. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

82. And of course, there is much law to the contrary, particularly in the Court's affirmative action jurisprudence. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

83. Thus, rape is understood as a crime, not as a part of the social fabric of women's inequality to men. MacKinnon discusses this throughout *Toward a Feminist Theory of the State*, but most pointedly in the chapter on “Rape.” FEMINIST THEORY OF THE STATE, *supra* note 1, at 172-83. For an illuminating discussion of the strategic decisions of Second Wave Feminists to disentangle discussion of rape law and rape law reform, from equality concerns, and specifically from the Equal Rights Amendment, during the 1970s, see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. (forthcoming October 2006).

women; and, also by definition, the taking of sex is only an occasional and aberrational act—not something so ubiquitous as to be a critical component of our most intimate self-conceptions. To re-envision the taking of sex as being at the heart of inequality rather than at most an occasional and violent crime is itself as clear an example of a genuine paradigm shift as one would hope to find within the history of jurisprudence. But one thing is for sure: courts—relatively conservative, even when moved by progressive arguments or passions—are not generally inclined to embrace paradigmatically novel conceptions of their own binding precedent. Why expect them to embrace this one?

Now look beyond doctrine. The sad fact is that the re-conception of the idea of equality—first from formal to substantive, and then from asexual to sexual—is utterly foreign not only to earlier judicial understandings of that virtue, but also to conceptions of equality that have figured prominently in the western legal and political tradition broadly defined, from Aristotle<sup>84</sup> through Locke, Marx, and John Rawls. It begins, after all, with an insight regarding the cause of inequality of half the world's population—that sex is that which is taken from women—*never before uttered*, not just in equality jurisprudence, but also in the political theory that has informed the equality law of *any* of the western traditions. The courts are being asked to change doctrine in a very fundamental way, on the basis of an insight, a diagnosis, and a utopian vision with virtually no support—textual or otherwise—in the larger canonical culture from which courts, in a time of doctrinal crisis, might be inclined to draw. It is hard to see, on first blush, how this particular hermeneutic project could conceivably get off the ground.

Lastly, this invitation to courts is not only foreign to doctrine and to the western philosophical tradition on which doctrine can sometimes draw, but it is also foreign to the Court's, and courts', *jurisprudential* self understanding.<sup>85</sup> In the jurisprudence assumed, imagined, or argued for in Feminism, Modified, the courts are being asked to imagine an equal future and to strive for it, rather than being asked to do what they are accustomed to do—that is, to discern the traditions of the past and preserve them in a way that accommodates moderate change in the present. In other words, what is being asked is that the courts decide cases not on the basis of doctrine, tradition, *nor* neutral principle, but by reference to a frankly utopian view of equality, and a subtle, nuanced view of the inequality that should be the target of judicial action. The Court is being

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For a discussion of the decision of nineteenth century feminists to advocate for property rights and suffrage, rather than women's full control over and possession of their bodies during marriage, see Hasday, *supra* note 65, at 1382-85, 1417-33.

84. To drive the point home, MacKinnon devotes a chapter to Aristotelian, formalist notions of equality in *Sex Equality*, echoing her very early critical essays on the limits of those Aristotelian doctrines. *SEX EQUALITY*, *supra* note 7, at 2-50 (2001).

85. I have elaborated on this argument in Robin West, *Groups, Equal Protection and Law*, in *ISSUES IN LEGAL SCHOLARSHIP* (2002), <http://www.bepress.com/ils/iss2/art8> (essay discussing Owen Fiss's article of the same name).

asked to reinvent *itself*, as it reinvents our ideals of law, the workplace, home life, and, eventually, our sexual practices and self-understandings.

The change sought by Feminism, Modified in our understanding of equality and what it requires, and in our understanding of courts and what they can do, is revolutionary and perhaps evolutionary—not piece-meal, not gradual, and not interstitial. It is just not clear how a court or even an entire generation of courts could conceivably embrace it, at least assuming their continuing use of those methods—interstitial, partial, case-by-case, inductive—so widely viewed as distinctly juridical. My aim here is not to highlight the novelty of this politics. Rather, what I believe is so methodologically extraordinary about Feminism, Modified is that, with full awareness of the sheer oddity of the proposal, it nevertheless argues that it is mostly interpreted, adjudicative *law*—not religion, not culture, not politics, and not education, but rather, *law*—authored by judges and argued by lawyers (with only a little help from state legislatures, city councils or—God help us—Congress), with its defining reliance on reason, its distinctive rational method of analogizing likes to likes, its constitutive respect for the past, its attention to individual narrative detail, and its mandate to do justice rather than seek the good: *law* is to be the means by which sexual inequality will be best challenged, articulated, and ultimately uprooted. The question I want to ask is this: what must one believe—what could one possibly believe—about law, courts, judges, and adjudication for this to seem like a plausible request?

Maybe there are other legal romantics, and maybe they have their own idiosyncratic answer to that question. But in Catharine MacKinnon's case, *Sex Equality* provides an answer more cleanly than do any of her essays or earlier publications. The first thing revealed by even a casual perusal of the book is what she does not believe: She does not believe or hold out hope that the courts, or law, or judges will simply turn on a dime, suddenly adopting a substantive rather than formal account of equality, or recognizing a hidden sexually oppressive sphere, or employing equality law so as to secure a better tomorrow. If she did believe that, the book would be a good deal shorter. Rather, what MacKinnon attempts to prove in *Sex Equality*, through the logical presentation of almost two-thousand pages of legal materials, is basically that the seeds of this revolution are already planted—but that one must dig very, very deep in our history and in our collective conscience to find them.<sup>86</sup> Once found, those seeds need tending. If tended they will sprout, and eventually

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86. The introductory materials on meanings of equality in the western tradition, see *SEX EQUALITY*, *supra* note 7, at 3-43, are followed by the history of equality law in the United States and elsewhere, see *id.* at 57-564, and then a series of "Applications," *id.* at 565-1651. Each chapter in the applications portion of the book begins with a rich description of an aspect of women's lives and then recounts a series of cases, some empowering and some distinctly disempowering. Taken collectively, however, the book cannot be described as ambivalent; it holds out the clear promise that law, legal tools of analysis, and the concept of equality itself are all central to women's quest for substantive equality.

those sprouts—equality, justice, and the law itself—will grow straight, rather than along the deformed path they've taken to date in the shadow of women's dehumanization. The seeds are there. Their discovery—and only their discovery—is what brings the political goal of Feminism, Modified—sex equality—within the perimeters of a barely conceivable jurisprudence. Their discovery, in other words, is what makes Feminism, Modified a legal, rather than a political or revolutionary, project.

This is, to quote the junior Senator from Illinois, an “audacious hope”<sup>87</sup>: that justice, law, and even existing equality doctrine have been and can be understood in an entirely different, utterly forgotten, but nevertheless, once unearthed, a familiar way. I'd like to briefly elaborate the premises of that hope, which might best be characterized as a set of radical reformulations of very basic legalist ideals.

First, the hope of *Sex Equality* rests on a reformulation—not a re-invention—of our equality doctrine and the ideals on which it is based. Catharine MacKinnon has written a good bit on and devotes the first few chapters of her casebook to her now familiar critique of Aristotelian formal equality<sup>88</sup>—a familiar conception that basically demands of judicial decision-makers, in the name of equality, that they treat likes alike, and unlikes differently. To treat likes alike in the name of equality, as MacKinnon shows in this book and as she has shown in at least half-a-dozen earlier publications, does little for those who aren't alike in the first place due to their pervasive and defining social subordination—that is, virtually all women to virtually all men. The ideal of equality as traditionally construed, then, is just beside the point for those who have been rendered different by virtue of their inequality. In fact, it can be harmful: formal equality has the perverse effect of ratifying the acceptability of large swaths of social inequality, while correcting for the occasional exceptional case.<sup>89</sup> Here's a quick example (for those who can't recite this argument in their sleep): Buff, aggressive women who qualify and want to go, can now get into the Virginia Military Institute (VMI), thanks to formal equality and its constitutional correlates.<sup>90</sup> Such a victory however both fails to address and even perversely legitimates the degradation of women's physical self-defense skills and lack of familiarity with firearms, which prevent the vast majority of women from either qualifying or wanting to qualify to go to VMI. Surely, though, this difference in self-defense skills and lack of familiarity with firearms (relative to men) are themselves more significant

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87. Barack Obama, The Audacity of Hope, Keynote Address at the Democratic National Convention (July 28, 2004), available at <http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm>.

88. *Reflections on Sex Equality*, *supra* note 4.

89. MacKinnon spells out this argument in FEMINISM UNMODIFIED, *supra* note 13, at 32-45, 70-77; FEMINIST THEORY OF STATE, *supra* note 1, at 215-34; SEX EQUALITY, *supra* note 7, at 6-10, 20-24; *Reflections on Sex Equality*, *supra* note 4, at 1296-97.

90. See *United States v. Virginia*, 518 U.S. 515 (1996).



contributions to women's subordinate status than the existence of a privately run male-only military academy, even one that receives public funding.<sup>91</sup> Similar examples could depressingly easily be multiplied. This is a familiar critique, and it is against the backdrop of the inadequacies of formal, Aristotelian equality, that MacKinnon first asserted her alternative, substantive, anti-subordination model.

That is not, however, the whole story. MacKinnon does not simply urge the replacement of formal equality with anti-subordinationism. Rather, behind her critique of formal equality as it has been understood and adjudicated for two-thousand years MacKinnon asserts not its abandonment but its *reclamation*. Why, after all, should we care about or respond to women's subordination to men in the first place? Why does Catharine MacKinnon care? Why should her readers? MacKinnon never explicitly poses the "why should we care question," but she does answer it, and the answer is squarely within the aspirational vision of a fully Aristotelian understanding of what formal equality demands of us, as moral agents. Women's pervasive subordination to men matters, because women, like men, are human beings; therefore, women, like men, must be treated as such. Courts, furthermore, are peculiarly and particularly charged with the duty of ensuring that likes are treated alike. To do so, courts must embrace a substantive and anti-subordinationist rather than formal understanding of the particular demands of equality. Anti-subordination principles and remedies are not at odds with the moral aspiration of formal equality. They are, rather, what formal equality demands when that constraint is applied to the deepest inequalities of our social milieu: the subordination of one half of the human family by the other.

Let me give a homey analogy: A parent who loves his children equally will attend to their different needs and provide more resources, if needed, to improve the well-being of the weakest. No loving parent would simply formalistically regard his or her equal love of his children, as requiring only that the parent accord the weaker child privileges and resources that are comparable to those afforded the stronger, *only when* the weaker, by hook or by crook, manages to attain some measure of likeness so as to satisfy the demands of formality. Courts, of course, are not parents, and they are there to dispense justice, not unconditional love. But what does justice require? Again, not the unconditional love of a parent for a child. But, at least by the teachings of the liberal tradition—Locke to Rawls and Dworkin—it requires dignity and respect, to all, unconditionally, and in equal measure. And—by the teachings of

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91. Women are weaker, smaller, and less skilled in martial arts than men, on average. Exclusion from VMI certainly perpetuates this problem, but it did not cause it. A number of feminist scholars trace women's subordinate status to women's relative physical weakness vis-à-vis men, and accordingly see correcting that imbalance as central to ending the subordination. See, e.g., Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953; CATHARINE A. MACKINNON, *Women, Self-Possession and Sport*, in *FEMINISM UNMODIFIED*, *supra* note 13, at 117-126.

the western tradition, from Aristotle to the present—it requires as well equal treatment, or some measure of formal equality.

Here, then, is the heart of MacKinnon's legal formalism: If justice requires formal equality; and formal equality demands the like treatment of likes; and women like men are human, then women, like men, must be treated with equal dignity and respect. What MacKinnon has added to this syllogism is nothing other than the premise that treating women like men, with equal dignity and respect, requires an end to sexual terrorism. She hasn't attacked the edifice of the western tradition. What she has done is to articulate, and pretty powerfully, exactly what it requires. There is nothing here, then, that courts *should not* do. In fact, everything here courts *must* do. There is no attempt here to transcend history, occupy an Archimedian point outside it, upend anything, or turn the ideals of western culture inside out. Rather, by reference to the best understanding of formal equality, MacKinnon has articulated what that mandate requires: that women are human beings, and so must be treated as such.

What is it, though, to treat all as human? Here again, what is distinctive about Feminism, Modified as revealed in the structure as well as content of *Sex Equality* is its striking continuity with—rather than any earth-shattering challenge to—the western tradition. From the book's structure we learn the unexceptional claim that work, love, autonomy, family, education, political participation, and community are the components of the good life; enjoying them is what it means to be human.<sup>92</sup> We learn that sexual subordination, exploitation, appropriation, and terror are the obstacles to women's enjoyment of these human rights and capacities. We are presented with the ethically unassailable claim that the fact that women are so barred is unjust. We encounter the ethical mandate that women must have access to these lives. We re-encounter—meet anew—the familiar bromide that the work of law and the courts is to justice. We are led to conclude that law must be the vehicle of justice. The courts must ensure the delivery.

The core, albeit unstated, ethical commitments of *Sex Equality*, of Feminism, Modified, and of Catharine MacKinnon's life work are that justice is the ethical mandate that demands all of this, and that, because justice demands it, this equality is a legal entitlement, not simply a political goal. The point of the book, of the theory, and of all of this advocacy, is *not* the political point that women as an interest group operating within a decent political system ought to be able to extract some measure of equality from a more or less representative legislative assembly. The point of all of this work is *not* that the community, as a community, would be better off if women's labor were put to

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92. Thus, the "applications" of equality law to various aspects of women's lives, and aspects of women's inequality: family life, sexual subordination, lesbian and gay rights, reproductive control, and trafficking women. See chapters six through ten in *SEX EQUALITY*, *supra* note 7, at 565-1651.

better use, or if women's health were better protected, or if women's nurturing capacity were not so exploited, or if women's safety were better ensured. The point is certainly *not* that efficiency, or overall utility, or overall well-being, or social welfare would thereby be increased, or even that all of this—were it to transpire tomorrow—would simply be a very good thing, all things considered. All of that may be true, but it is so clearly just not the point. *The point is that justice demands it.* Justice demands that this be done. Sex equality is a mandate; it is an imperative. It is not just a good idea. It is not a policy that might ensure better governance. It is what justice requires, with as much force and potency, as much inevitability, as much universality, as much clarity, and as much power as propels the laws of arithmetic and logic from premises to inferences. Justice defines the end of law and the point of adjudication—not politics, legislation, education, or culture. The law must engage this project. Therefore the courts must.

Ought, though, implies can. If courts ought to do this, through law, then it must be the case that they can. So the text of *Sex Equality* turns out to be a lawyer's argument: This picture of equality is the deep and deeply forgotten meaning of two thousand years of western adjudication, two hundred years of American constitutionalism, and fifty-plus years of civil rights law. There are, no doubt, other possible readings of our law, of our constitution, and of our history, and Catharine MacKinnon has provided plenty of scathing ones: law as complicitous, law as mendacious, law as hypocritical, law as legitimation, and law as mystification. At the end of the day, though, the message of her casebook and life is not law's mendaciousness, but law's nobility.

Law, MacKinnon clearly believes, can do this audaciously hopeful thing that justice requires. Readers—judges and lawyers—must and can provide the ethical ballast. But the legal materials—the materials, that is, for a highly ethical reading of real equality, and sex equality, as at the heart of the impulse for justice—are there. They may be hidden, and they are not self-actualizing; they do not realize themselves. But they are there. Underneath the gauze of a dreary and familiar legal history that readily prompts despair—the legitimation, the mystification, the reification, the hypocrisy, the complicity, the mendacity, the mind-boggling stupidity, and the willful illogic, in which courts have engaged, all toward the end of securing women's inequality in cement—MacKinnon has found in law, in adjudication, in courts, and in legal process an ethical impulse. She has enlarged upon it, insisted upon it, used it, magnified it, and made it grow, in theory and in practice, in the world of ideas and in our lives.

There are, of course, reasons to doubt all of this. Let me just name two. First, it is not so clear that the legal materials of the Western tradition, of our two hundred years of constitutional doctrine, or of the last fifty years of civil rights law do in fact hold out the hope of sex equality. Neither is it clear that the

legal process could pursue it even if it were so inclined, or that judges as a group, even assuming their good will, are professionally or morally constituted so as to embrace this end. The false hope that the law, judges, and the judicial process must, can, and will pursue sex equality could be costly: It could well distract us from what might be the better wager, which is that we can infuse our politics, rather than our adjudicated law, with the sense of ethical purpose and the vision of equality that so clearly motivate this legalist work. Politics, surely, ought to be aimed toward achieving equal dignity and respect for law, and the tools of politics may be better, even far better, situated to interpret this aim as requiring the end of unjust subordination. Even if justice requires sex equality, in other words, it is not so clear that it is legal justice, rather than political justice, that does so; perhaps we would lose none of the ethical imperativism, or the moral urgency, of this large argument by casting it as political rather than grist for the litigation mill.

On the other hand, it is truly inspiring—even cleansing—to see such a strikingly romantic and hopeful depiction of law's potential being penned by one of law's deepest critics. *Sex Equality* begins with Aristotle's conception of formal equality—the like treatment of likes. The last chapters of the book deal with the most vividly brutal depictions of women's physical and sexual subordination to men: trafficking in women, prostitution, and pornography. These chapters also, however, carry the most unequivocal argument that law must, and can—equipped as it must be with a genuine and substantive commitment to women's deserved and lived equality—bring an end to the violence that underwrites the subordination. One will not find anywhere as analytically powerful, as historically astute, as passionately critical, yet as romantic a depiction of law's capacity for furthering justice. MacKinnon conceives of law as a scythe with which to clear the underbrush—the poisoned fruit—of our large culture's perverse, destructive, and two-thousand-year-long societal commitment to the domination of women. The long doctrinal argument that is the content of *Sex Equality* charts the hermeneutic path—the Path of Our Law—thus cleared.

## II. FEMINISM, MODIFIED AND ITS CRITICS

Let me summarize this summary. MacKinnon added to her signature account of the “point” of patriarchy and its staying power to central commitments drawn from Liberalism, Marxism, classical Feminism, and Legalism. The result of her theoretical labors is unmistakably a version of feminism, but it is one that is profoundly modified: modified by its fruitful embrace of some of the greatest products of the Western intellectual and political traditions loosely known as the “Enlightenment.” It is the synthesis of these classical traditions that gives this theory both its radical ambition and its

very deep conservatism; both its remarkable capacity to spark awareness, and ultimately, I believe, its lasting power.

Did Feminism, Modified however, at least as I have described it above, change the plot within feminist theorizing? Let me just reiterate: In the legal world *inside* law but *outside* feminist theory, as noted above, it has been MacKinnon's reconstruction of equality law and, at least until recently, her construction of sexual harassment law that has most clearly resonated. The arguments that both constitutional and statutory guarantees of equality must be understood to reference substantive rather than formal equality and that equality law must target subordination rather than discrimination strike many lawyers as sound for virtually all subordinated groups, not only women.<sup>93</sup> Her construction of sexual harassment law within the legal doctrine and theory of equal employment law has largely worked: Although still riddled with theoretical gaps and doctrinal complexities, the law has provided an employment relations structure that is not unduly difficult for compliant employers to implement or unduly awkward for lawyers to litigate when implementation is found wanting.<sup>94</sup>

This law has changed not just the contours of civil rights law; it has changed the workforce as well. The law works, so there's less sexual harassment than there had been previously. As important, it has changed women's sense of entitlement, or consciousness, as they say. At least much of the time, the pit-of-the-stomach feeling that "this is the way the world works," when harassed at work or school, has given way to: "I don't have to put up with this bullshit anymore."<sup>95</sup> Both of these contributions to law—a different understanding of equality and a constructed cause of action to improve the quality of life—are substantial. Both have moved legal mountains.

Outside law, it has been MacKinnon's specific claim regarding sexuality, and not Feminism, Modified that has attracted the greatest critical response.<sup>96</sup> Viewed most sympathetically, and perhaps in a sense minimally, MacKinnon's quite plausible argument regarding the teleological "point" of patriarchy—that the ubiquitous controls of women's work, reproduction, children, and property, across cultures and across time, are aimed at the appropriation of female sexuality—has introduced a healthy dollop of political skepticism, not only to all apolitical conceptions of sexuality—including both liberatory "pro-sex"

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93. For a particularly clear and general statement of the anti-subordination theory of equality and its general applicability beyond the sphere of gender, see Colker, *supra* note 23, at 1007-16.

94. For a good general account of the success of sexual harassment law and a defense of its basic coherence, see Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER (forthcoming Fall 2005). See generally DIRECTIONS, *supra* note 15, especially Reva Siegel, *Introduction: A Short History of Sexual Harassment* and Catharine A. MacKinnon, *Afterword* in that volume.

95. Render's piece gives the clearest sense of this shift. See Render, *supra* note 94.

96. See, e.g., PLEASURE AND DANGER (Carole Vance ed., 1992). This is in addition to the authorities cited, *supra* notes 14-15, many of which were prompted by the MacKinnon-Dworkin anti-pornography ordinances.

conceptions and conservative “anti-sex” moralistic accounts—but also to a sex-drenched popular culture, our sexual self-perceptions, our sexual practices, and the content of our sexual desires. The grounds for that skepticism, she insisted again and again, should be distinctively *political* not moral.<sup>97</sup> She urged us to view our sexual perceptions and practices neither as hedonistic, individual acts of self-expression, nor as (take your pick here) animalistic, innocent, sophisticated, mutual, liberatory, or transgressive acts of pleasure, nor as simply an instrumental means of marital reproduction or a benign mechanism for organizing family and social life, nor as the physical embodiment of an idealized (or religious) conception of marital or companionate affection, nor as potentially decadent impulses needing domestication through marriage and monogamy, but rather as sites of pain, injury, and violence (not pleasure) and of submission to and expression of authority, exploitation, and alienation (not mutual affection).<sup>98</sup>

Most important, she urged that sexuality—the field of sexual practices broadly defined—is a site of the social and political construction of women’s subordination to men, rather than a set of practices expressive of an inalterable human essence. Now, perhaps needless to say, that dollop of skepticism regarding sexuality, sexual desire, and eroticism has not been uniformly appreciated, and the invitation to share it has not been widely accepted. But it has certainly been heard. It has among much else produced a torrent of criticism from men and women across all conceivable left-right, gay-straight, conservative-liberal, democratic-republican, socialist-libertarian political spectra, much of it seemingly grounded in nothing more than a (sometimes articulate, sometimes not) fear of an impending loss of sexual power.

On the other hand, the same invitation—the invitation, that is, to view skeptically and politically the entire sphere of sexual relations between and among men and women—did plant a seed that took root and produced a tree with protective shading; the shade of that tree has been felt globally.<sup>99</sup> Some women owe their lives to that tree, and some of those women know it.<sup>100</sup> Many more women here and elsewhere owe their growing sense of self-ownership,

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97. See most notably her piece on pornography: Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321 (1984). For a critical review suggesting the distinction is not so clear, see West, *Feminist-Conservative Alliance*, *supra* note 14.

98. See generally FEMINISM UNMODIFIED, *supra* note 13, at 46-62, 81-102; FEMINIST THEORY OF STATE, *supra* note 1, at 126-54, 171-183.

99. See, e.g., COSSMAN ET AL., *supra* note 3; ORIT KAMIR, FEMINISM, RIGHTS, AND LAW IN ISRAEL (2002); DANY LACOMBE, BLUE POLITICS: PORNOGRAPHY AND THE LAW IN THE AGE OF FEMINISM (1994); ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT?: FROM CAPITOL HILL TO THE SORBONNE (2003); Susanne Baer, *Pornography and Sexual Harassment in the EU*, in SEXUAL POLITICS AND THE EUROPEAN UNION 51 (R. Amy Elman ed., 1996); Orit Kamir, *Dignity, Respect and Equality in Israel’s Sexual Harassment Law*, in DIRECTIONS, *supra* note 15, at 561.

100. Most famously, and most poignantly, perhaps, Linda Marchiano, who under the name Linda Lovelace was coerced into prostitution and various pornographic performances. See *The Minneapolis Hearings*, in IN HARM’S WAY, *supra* note 3, at 39, 60-63 (transcription of Marchiano’s testimony in favor of the MacKinnon-drafted Minneapolis ordinance).

their capacity for resistance to and defense against various forms of sexual terrorism, their awareness of themselves when violated as victims of injustice rather than as cultural or mental or emotional deformities, and their membership in a community of support rather than one of oppression or torture to the ideas, the social tumult, the new-found relationships, the shelters, the Women's Studies programs, the legal reforms, the changes in consciousness, and the newly negotiated terms of planetary cohabitation that have followed on the heels of Catharine MacKinnon's simple invitation. That invitation—that change in our cultural and social plot line—propelled a movement, and that movement changed a history. The single idea that sex—meaning sexual activity, behavior, and desire—is a site of politics did it.

But again, what of feminist theory, or more largely, of political theory? Any new plot line there? Within feminist theory MacKinnon clearly changed the plot in one limited sense: by claiming to speak for and of *feminism*—of a “feminism *unmodified*”—MacKinnon put in question the point as well as the intellectual foundations of a centuries-long movement, which had not theretofore been particularly rigorous about self- or theoretical reflection. In this limited sense her plot-changing ambitions have been realized; legal feminism at least has become insistently theoretical.<sup>101</sup> But whether or how Feminism, Modified itself has changed the plot, rather than simply making us more aware of the need to have a plot, is harder to say. Over the last thirty years, it is surely true that various parts of MacKinnon's Feminism, Modified have been celebrated by critical, radical, and liberal legal theorists and political activists alike<sup>102</sup>—particularly the reconstruction of equality as properly targeting harms of subordination rather than harms of discrimination. Nevertheless, the entirety of the theoretical reconstruction at its core—the Marxist account of subordination, the liberal Hobbesian reliance on the state, the feminist insistence on hearing and believing reports and stories of female and particularly sexual victimization, and the reliance on and even celebration of the aspirations and tools of legalism—has not so self-evidently taken hold.

My point is not that feminists have not critically or sympathetically engaged Feminism, Modified. Indeed, parts of Feminism, Modified have been meticulously—at times repetitively—criticized by scores (perhaps hundreds?) of feminist lawyers, constitutionalists, and legal theorists; feminist artists, writers, poets, and literary critics; feminist literary and cultural studies scholars;

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101. Some of this move toward theory has been a direct result of MacKinnon's modifications, and some has been a result of different and independent causes, such as the rise of postmodernism in the non-legal academy. Janet Halley's scholarship on MacKinnon is obviously both and is also influenced by Queer Theory. See Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7 (2004); Halley, *supra* note 15. I attempted a schematization of feminist jurisprudence as it had developed by the late 1980s in Robin West, *Jurisprudence & Gender*, 55 U.CHI. L. REV. 1 (1988).

102. Mari J. Matsuda, *Love, Change*, 17 YALE J.L. & FEMINISM 185 (2005); Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413 (1994); Students, *Open Letter to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177 (1991); Sunstein, *supra* note 25.

feminist legal and political historians; and, not least, feminist political activists of all stripes.<sup>103</sup> That critical intra-feminist scholarship, however, has been constrained by (or just characterized by) two broad features.

First, the vast bulk of it, including the most recent postmodern wave that I take up in detail below, has been responsive to particular legal events that are themselves arguably products of the political and legal successes of MacKinnon's transformations of feminist activism. The changes in rape law, for example, all of which would tend to broaden the criminalization of sex, and which are often only ambiguously endorsed by MacKinnon in her various discussions of rape law, but which are seemingly implied by her theoretical reconstruction of feminism, prompted a good number of critiques of Feminism, Modified. Feminist rape reformers were concerned that their own goals not be undercut by an over-broad indictment of heterosexuality and heterosexual penetration.<sup>104</sup> It is hard, under even ideal communicative circumstances, to convince a resistant public that there is more rape than they perceive and more than is prosecuted, and that the "more" that there "is" ought to be perceived and prosecuted as rape. Obviously, it is even harder to do so if the suggestion is mistaken for, and can be lumped with, a far broader claim that even ordinary sex is likewise coercive. Something must have gone amiss, reformers quite sensibly suggested, in the Feminism, Modified that prompted such an unhelpful claim. Likewise, formulation of anti-pornography ordinances responsive to the analysis of pornography spearheaded by MacKinnon and Andrea Dworkin prompted challenges to Feminism, Modified from liberal feminists concerned about the censorial impact of state regulation of sexual speech.<sup>105</sup> And similarly, MacKinnon's challenge to the privacy rationale of *Roe v Wade* prompted feminists committed to that value to criticize, again, the theoretical structure that would put into question, on women's behalf, the values at the heart of that decision.<sup>106</sup> In all three cases, critical responses to these proposed

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103. The breadth and depth of the critical response to MacKinnon's challenge to First Amendment doctrine is perhaps best illustrated by the signatory list of the F.A.C.T. brief, which includes a number of feminist poets and authors, as well as many law professors. Signatories include: Rita Mae Brown, Cheryl L. Clarke, Mary C. Dunlap, Thomas I. Emerson, Susan Estrich, Ann E. Freedman, Betty Friedan, David Kairys, Jonathon N. Katz, Kate Millet, Judith Resnik, Adrienne Rich, Sue Deller Ross, Gayle S. Rubin, Elizabeth Schneider, Alix Kates Shulman, Barbara Smith, Wendy Webster Williams. F.A.C.T. Brief, *supra* note 14.

104. See, for example, Susan Estrich's discussion of the problem in *REAL RAPE* (1987). Estrich had argued for an expansion of rape law so as to unambiguously include cases in which a woman said no, but the perpetrator persisted—a "no means no" standard. To make the case, she had to both distinguish and argue against the standard that she interpreted MacKinnon as advocating—in which yes would occasionally (often? always?) also mean no. See also Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1093 (1986).

105. See F.A.C.T. Brief, *supra* note 14; see also *supra* note 13.

106. See, e.g., April L. Cherry, *Roe's Legacy: The Non-consensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 *U. PA. J. CONST. L.* 723 (2004); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 *AM. U. L. REV.* 77 (1995); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992); Frances Olsen, *The Supreme Court 1988 Term: Unraveling Compromise*, 103 *HARV. L.*



or enacted changes in our law have brought with them renewed feminist examination of the assumptions—often ill- or non- or anti-liberal—of the movement that prompted the questioned reform.

Second, and until the postmodern critique, virtually *all* of this intra-feminist criticism of Feminism, Modified, regardless of what legal event or proposed legal reform triggered it as a theoretical matter, has been theoretically unidimensional. Again—virtually all of the ante-postmodern criticism that I can find has objected to MacKinnon's Feminism, Modified for its apparent illiberality—and therefore, implicitly, the debt it owes to Marxism.<sup>107</sup> Rape law scholars and reformers objected to MacKinnon's reformulated feminism, not only for the strategic reason that MacKinnon's willful blurring of the line that we experience "in life" between rape and sex would make more difficult their attempt to change the law's perception of that line, but also, fundamentally, for MacKinnon's suggestion that consensual heterosexuality bore an important family resemblance to that which either is or ought be perceived as rape.<sup>108</sup> Liberal feminists from a number of doctrinal fields (both inside and outside law) objected to the critique of pornography,<sup>109</sup> not only because of strategic fears that resulting laws might erroneously target *Our Bodies Our Selves*<sup>110</sup> in addition to *Debbie Does Dallas*,<sup>111</sup> but also for the fundamental ideological reason that the critique targeted the consumption and production choices of adult, competent women—thus violating liberal maxims of individual free choice.<sup>112</sup> Pro-choice activists and theorists worried not only that MacKinnon's critique of *Roe* would lead to a reversal of the decision, but also that her attack on privacy challenged a liberal value as vital to women's sense of well-being and their potential to create their own path to the good life as to men's.<sup>113</sup> Taken collectively, these criticisms, all of which are grounded in traditionally liberal and libertarian political world views, have now evolved into a fully developed liberal feminist critique of the Marxist underpinnings of

REV. 105 (1989); Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & LAW 147 (1996).

107. See Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995); Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CALIF. L. REV. 1171 (1992); authorities cited, *supra* note 15.

108. Lynne Henderson called this the "bad sex" problem. See Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 58-60 (1993).

109. See authorities cited, *supra* notes 14-15.

110. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *OUR BODIES, OUR SELVES: A BOOK BY AND FOR WOMEN* (1976).

111. DEBBIE DOES DALLAS (Explicit Studios 1978).

112. Anti-anti-porn material is full of this. For examples of this critique, see PAT CALIFIA, *SAPPHISTRY: THE BOOK OF LESBIAN SEXUALITY* (1981); KENSINGTON LADIES' EROTICA SOCIETY, *LADIES' OWN EROTICA* (1984); BURSTYN, *supra* note 14; PLEASURE AND DANGER, *supra* note 96.

113. See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995); Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153 (1993).

MacKinnon's feminism—and particularly its reliance on a socially constructed, rather than autonomous, confident, and self-affirming female essence: a socially constructed consciousness of self-denial and often times self-degradation, with self-denigrating preferences and, more tellingly, self-denigrating desires, often damaging to the interests and even safety of their holders. That image of the politically polluted, degraded self is diametrically opposed to the self-aware, competent, able, ingenious self whose desires match her interest, and whose preferences and choices match her desire—in short, the image of the self central to liberalism and, hence, to liberal feminism. That is a profound rift. It is also, however, a fairly limited bill of particulars, and one that now gives rise to predictable and at times clichéd dialogue. The anti-anti-porn movement, *Roe's* feminist defenders, and liberal feminist rape reformers all put MacKinnon's anti-liberalism under attack and all found it wanting. They did not, however, engage the larger jurisprudential picture.

In the last half decade, a quite different line of critique has emerged, that fits part, but only part, of the pattern noted above. As with earlier liberal feminist complaints, the latest wave of intra-feminist critique of MacKinnon's theoretical contribution to feminism has also been brought on by anxiety over the reach and theoretical grounding of a legal reform: sexual harassment law,<sup>114</sup> the most successful of the various legal reforms produced by MacKinnon's feminist transformations. In some regards the conclusions of this new line of critique, and the contours of the emerging debate it has engendered track the liberal-radical divide within feminism<sup>115</sup> (and more particularly echo the debate over pornography). Nevertheless, the roots of this postmodern critique are decidedly not liberalism *redux*, nor is its impact.

Spearheaded by Professors Janet Halley of Harvard Law School and Vicki Schultz of Yale, a number of awkwardly self-styled “postmodern” feminist critics are taking MacKinnon's theoretical feminism to task, not so much for its illiberality, but rather for its purportedly over-broad condemnation of heterosexuality and for its purportedly overly solicitous and credulous stance toward claims of female victimization.<sup>116</sup> The complaint from the new wave of critics, in other words, is not so much that Feminism, Modified fails to accommodate the liberal individual self or that it fails to honor the autonomy, choice, and sufficiency of those selves, but rather, that Feminism, Modified

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114. Thus, the two major pieces I discuss in the text, by Halley and Schultz, both take as their starting point existing sexual harassment law and then go on to make deeper, or broader, critical arguments. See Halley, *supra* note 15; Schultz, *supra* note 15.

115. Halley has also noted the parallel, indicating that the liberal-feminist and “pro-sex” critiques of the antipornography movement were precursors of contemporary queer theoretic critiques. See Halley, *supra* note 101.

116. Halley, *supra* note 15, at 182. For a critical point-by-point response to Halley's argument, see Marc S. Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004); Schultz, *supra* note 15; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

over-accommodates the injured self and its claims of sexual victimization.<sup>117</sup> More specifically, the worry is not (only) the liberal concern, voiced throughout the two decades-long pornography debate, that women's stated desires, preferences, and choices for sexual expression might be undercut by a radical critique of those choices, but the worry is, more broadly, that sexuality per se should not be understood as (primarily) a site of political exploitation and violence. It should be understood, rather, according to the new critics, as (primarily) a site of liberation and transgression.<sup>118</sup> Consequently, not only should women's sexual choices be embraced—thus the overlap with liberalism—but sex should be more or less valorized, and women's claims of sexual victimization should be viewed skeptically.<sup>119</sup>

The legal target of the critique, as noted, is sexual harassment law.<sup>120</sup> Like her earlier liberal critics, however, the new “postmodern” critics have two targets, or two agendas; beneath the primary critique of sexual harassment law itself lies a deeper, secondary critique of Feminism, Modified, or at least of a substantial part of it. In this Part, I want to first spell out the argument against both sexual harassment law and Feminism, Modified, which is complex and has at least two separate strands. I will then criticize it. In the next Part, I will partially endorse a part of the postmodern critics' case and then put forward my own suggested re-modification of Feminism, Modified, which accommodates the parts of the postmodern critique that I find compelling.

### *Postmodern, Queer-Theoretic, and Pro-Sex Critiques of Sex Harassment Law*

The postmodern critique of sexual harassment law and the law's feminist roots has two distinct strands, often confused. The first argument or theme I'll call the “skeptical” claim: The critics urge that we should take a more skeptical stance toward sexual harassment plaintiffs' claims of sexual victimization than sexual harassment law, Feminism, Modified, or feminism more generally have fostered or encouraged. The second I'll call the “libertine” claim: We should celebrate, not denigrate, sexual urges, including urges for sexual domination and sexual submission, but sexual harassment law either explicitly or implicitly counsels the contrary. In this Section, I will develop each of these arguments separately and then offer some critical observations about each.

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117. Halley, *supra* note 15, at 193-97; Janet Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, 1 UNBOUND 65 (2005), <http://www.law.harvard.edu/students/orgs/unbound/index.php>; Halley, *supra* note 101.

118. Halley, *supra* note 15, at 194-98; Halley, *supra* note 101, at 50-53. The point of departure for the valorization of sexual pleasure in queer theoretic work is likely Michel Foucault, and his claim in the *Introduction to the History of Sexuality* that “[t]he rallying point for the counterattack against the deployment of sexuality ought not to be sex-desire, but bodies and pleasures.” MICHEL FOUCAULT, *INTRODUCTION TO THE HISTORY OF SEXUALITY* 157 (1980).

119. Halley, *supra* note 15, at 196-97.

120. *See infra* notes 155 and 187.

First, the skeptical strand. Both Janet Halley and Vicki Schultz argue (albeit in very different ways) that the actual sexual harassment working women complain of in lawsuits is often, or is at least sometimes, either nonexistent or trivial.<sup>121</sup> Such legal complaints are often, or are at least sometimes, psychologically grounded not in real sexual injury at all, but rather in an untoward or unjustified aversion to sexuality itself, wrapped up as justified resistance to assaultive behavior. Thus, Halley and Schultz conclude, we should all be highly skeptical of these complaints.<sup>122</sup>

Now—why? Why might workers be susceptible to this aversion, and how, exactly, might such aversion lead to unjustified lawsuits? Halley and Schultz's arguments are very different. In Halley's articles on this issue, she details and then heavily relies on one hypothetical scenario to sustain the burden of this argument (though she does not identify an actual case that fits this pattern).<sup>123</sup> Consider, Halley suggests, a possible complaint of what is now called "same-sex" sexual harassment—harassment of an employee by an employer or co-employee of the same sex.<sup>124</sup> Such a suit, she argues, might simply be the end result of a "homophobic panic."<sup>125</sup> If the (hypothetical) complainant and (hypothetical) perpetrator are the same gender, and if the purported victim herself or himself harbors both unresolved and unacknowledged same-sex desires *and* homophobia—thereby suffering from homophobic self-loathing—and if such a (hypothetical) complainant is then faced with either a real or perceived sexual advance from a (hypothetical) perpetrator, such a complainant might feel a need to re-assert his own heterosexuality publicly and privately—to himself and others—by filing a lawsuit. In such a suit, the secretly desired overture, whether real or imagined, would be re-packaged as actionable aggression.<sup>126</sup> Given the plausibility, or at least the possibility, of this hypothetical scenario, "sexual harassment law"—intended as a body of law that targets sexual aggressors at work—has the potential to become, in Halley's brilliant short-hand, "sexuality harassment"—with the law doing the harassing and sexual minorities as the targets.<sup>127</sup>

Although the plausibility of this hypothetical relies on a fairly well-recognized psychological mechanism (homophobic self-loathing), itself dependent on a very well-recognized animus (homophobia), a similar, but not so well-recognized dynamic, might be at work in opposite-sex cases as well. A heterosexual female victim's perception of herself as injured by sexual

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121. Halley raises this possibility primarily through a re-imagining of the *Oncale* case as being about homophobia, and hence about "sexuality harassment," rather than as being about assaultive sexual behavior. Halley, *supra* note 15, at 192; Schultz, *supra* note 15, at 2105-19.

122. Halley, *supra* note 15, at 193-98.

123. *Id.* at 192-93.

124. *Id.* at 192-96.

125. *Id.* at 192-93.

126. *Id.* at 192.

127. Halley, *supra* note 15, at 196-97.

advances by a heterosexual male on the job, and the resulting lawsuit, might be the result of a loosely defined, culturally induced “sex panic,” triggered not by the self-loathing of homophobic potential plaintiffs, but by the sex-averse reactions of would-be plaintiffs to relatively harmless sexual overtures of either same-sex *or* opposite-sex co-workers.<sup>128</sup> Here, as well, even in a run-of-the-mill, opposite-sex sexual harassment case, the sex aversion of the potential plaintiff—and not the overture of the defendant (or the defendant’s employee)—is the real harm. Sexual harassment laws and policies seemingly assume the contrary, thus perpetuating rather than addressing that harm. In fact, they do more than perpetuate it: they facilitate and amplify it, give it voice, credibility and legal power.<sup>129</sup> Sexual harassment *law*, not sexual harassment, is what must be reined in—disciplined. Janet Halley aims to do so.

The argument for skepticism developed in Vicki Schultz’s most recent piece<sup>130</sup> is quite different, as is her recommended reform. Broadly, Schultz argues that policies adopted by employers over the last couple of decades in response to sexual harassment law over-police workplace sex, unnecessarily stifle workers’ expression, dull pleasures, thwart romance, and, in general, de-humanize and “sanitize” the workplace.<sup>131</sup> To that degree, her argument echoes Halley’s. She goes on, though, to argue that, by virtue of doing so, both employers and the law to which they respond have missed what ought to be the real target of anti-discrimination law *and* of sexual harassment law: undue sex segregation of workplaces.<sup>132</sup> Where women are vastly outnumbered by men, the sexual harassment of women by men may indeed be a discriminatory practice, as such harassment undermines women’s confidence and competency and drives them out of the workforce, further depleting the very presence of women, which is the only real safeguard against the harassment of the remaining women.<sup>133</sup>

Where, however, women are present in equal or greater numbers than men—where the workplace is well integrated at all levels—the behavior we have come to call “sexual harassment” rarely occurs, and, when it does, Schultz argues, its harms are trivial.<sup>134</sup> Where a workforce is balanced, therefore, we ought to be highly skeptical of claims that sexual interactions are “harassing,” and therefore harmful, to anyone.<sup>135</sup> Gender integration, not de-sexualization, of the workplace is and ought to be the goal of sexual harassment law, as it ought to be the goal of sex discrimination law quite generally. Correlatively,

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128. *Id.* at 196-97; Schultz, *supra* note 15, at 2167-71.

129. Halley, *supra* note 15, at 195-98.

130. Schultz, *supra* note 15.

131. *Id.* at 2064.

132. *Id.* at 2070-71.

133. *Id.* at 2140-41.

134. *Id.* at 2143-44.

135. Schultz, *supra* note 15, at 2168-69.

gender segregation, not sex itself, is the evil at which the law should be directed.<sup>136</sup>

Consequently, Schultz recommends a sort of sliding scale of evidentiary and substantive rules to replace our current, unidirectional approach to sexual harassment law.<sup>137</sup> The greater the numbers of women in the workplace, she argues, the more employer-friendly the rules governing sexual harassment ought to be.<sup>138</sup> Where a workforce is substantially integrated, we ought to regard claims of harassment very skeptically; sex, after all, is not the evil—gender segregation is. Where a workforce is integrated, it is just not likely either that the harassment occurred, or, if it did occur, that it was injurious. Our rules ought to reflect this reality: Where a workforce is integrated, a sexual harassment complainant ought to be held to a much higher standard of proof than where it is not.<sup>139</sup> In fact, however, and as Schultz amply shows, both the law and employers have gone in the opposite direction.<sup>140</sup> At the well-occupied far extreme, and regardless of the integration or segregation of their employment site, employers, encouraged by sexual harassment law itself, have embraced with gusto policies that seemingly aim to eliminate sexuality from the workplace altogether. The all-too-predictable result is over-regulation<sup>141</sup>—and over-sterilization—of the workplace. The result is a misdirection of precious legal resources. Because of sexual harassment law, not gender segregation (the true target of sex discrimination law), but rather *sex* has been driven out of our work sites.

None of this over-regulation, Schultz argues, is beneficial to anyone. In integrated environments—workplaces where women are present in roughly the same numbers as men—the injuries complained of even in successful sexual harassment cases are often trivial. Courts are holding employers liable for their employees' sexual horseplay, jokes, and banter—behavior that is not only not harmful, but that helps enliven and lighten an otherwise dreary and inhumane work environment.<sup>142</sup> But more importantly, she argues, the policies employers have embraced in response to these laws go well *beyond* the legal requirements. Judging by their employment handbooks and the personnel policies those handbooks require, she argues, employers now typically forbid even *welcome* affairs between co-workers and forbid all sexual ribbing and innuendo, not just those affairs and that ribbing which are perceived to be (fairly or not) injurious and unwelcome. Generally, employers and their policies, aided and abetted by the law, have created a “sterile workplace” that aims relentlessly for efficiency,

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136. *Id.* at 2172-73.

137. *Id.* at 2174-75.

138. *Id.*

139. *Id.* at 2176.

140. Schultz, *supra* note 15, at 2184.

141. *Id.*

142. *Id.* at 2186-87.

with no room for workers' humanity, including their sexuality. Sexual harassment law in practice, then, whatever might have been the good intentions of the drafters of the law, has become little more than another club in the never-ending war of the capitalist class on workers.<sup>143</sup> By virtue of these laws, workers must forego yet another source of pleasure and must put their muscle to the grindstone in relentless pursuit of greater productivity, all toward the end of maximizing corporate profits they will not enjoy. Sexual harassment law has simply strengthened the employer's hand in mandating that workers do so.

Despite the clear differences between these authors' arguments (just look at the footnotes: one article with hundreds of footnotes to scores of cases and social science sources; the other with only sparse footnotes to one case and a handful to a body of scholarship), and despite the apparent differences in their eventual reformist goals (Halley's article does not clearly specify a reform of sexual harassment law; Schultz, as noted above, wants to correlate employer liability for harassing behavior with the degree of gender integration in the workplace), Schultz's and Halley's arguments have much in common: They share a common narrative account of sex and sexual injury that is fast becoming an unmovable part of the core of both contemporary queer theory and pro-sex feminism. That narrative, I think might be summarized, I hope not unfairly, in this way: It may be true—*may* be true—that, as feminists assert, we have, as a society, downplayed women's injuries (sexual and otherwise). It is *also* true, however, that we have, as a society, a longstanding cultural aversion to sexuality of virtually all sorts beyond the most traditionally-sanctioned: missionary, heterosexual, pro-creative, and marital.<sup>144</sup> Aversion to pan-sexuality has taken many forms and has done much harm, one form of which is a too-quick willingness to see abuse and harm and injury in fully consensual but non-conventional sex in non-traditional forums. The consequence, often, is the criminalization of relatively innocuous or even socially beneficial behavior. Moralists, many state legislators, and much of the larger culture see (or in the recent past have seen) abuse, harm, and injury, for example, whenever and wherever sex is in exchange for pay, when it is in relatively public places such as bathhouses, when it occurs in adulterous relationships, when it is between even committed and monogamous members of the same sex, when it is outside of or precedes marriage, when it is anal or oral rather than coital, when it is between teenagers, when it is between three or more participants, when it involves whips, chains, or leather, when it is "casual" and motivated solely by a search for pleasure, or as an expression of friendship, rather than as an expression of long-term committed affection, when it occurs between co-workers at different rungs in an employer's ladder who both welcome and

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143. *Id.* at 2168-69.

144. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 195 (2000); Halley, *supra* note 15, at 196-97; Schultz, *supra* note 15, at 2168-71.

consent to it, and so on, and so on, and so on.<sup>145</sup> While we may indeed unduly and wrongly resist, trivialize, disbelieve, or just refuse to hear women's claims of sexual injury, we also over-credit claims of sexual harm wherever the sex is of a sort not favored and in a place other than a marital bedroom.<sup>146</sup>

According to the postmodern critics, the most recent manifestation of this generalized sex aversion over the last thirty years is the societal consensus, too quickly reached, that so-called sexual harassment at work ought to be regarded as an actionable civil rights violation of the woman (or man) harassed.<sup>147</sup> Such sex-at-work, when coerced or unwanted, *may* be injurious and may therefore have something in common with other sorts of behaviors that clearly discriminate and violate civil rights. Nevertheless, say the critics, whether or not it violates anyone's equality rights that same behavior *when it is not coerced or unwanted* also has something in common with the welcome and consensual paid-for sex, bathhouse sex, adulterous sex, non-coital sex, non-marital sex, same-sex sex, sadomasochistic sex, teenage sex, etc., etc., and etc., catalogued above. Sex-at-work, of the welcome and consensual variety, is yet another instance of non-conventional and non-marital sex that occurs in a non-traditional and non-marital venue.<sup>148</sup> So, this presents a dilemma. If we should be sensitive to both of these sorts of historical errors—the refusal to even hear much less attend to women's complaints of sexual injury on the one hand, and the tendency to see harm and injury where there is at most non-conventional but consensual sexual activity on the other—how should we view complaints about sexual harassment—unwanted sex and sexual advances at work—by working women?

It is virtually undeniable that such complaints, for decades, when voiced at all, were under-acknowledged and under-compensated.<sup>149</sup> After all, this is, for the most part, *women* complaining, and women complaining of sexual injury. The historical under-acknowledgement of these complaints, when they were pled and viewed as simple torts, tracks a sorry and well-known history of the under-acknowledgment of injuries disproportionately suffered by women, which has demonstrably misshapen both tort and criminal law.<sup>150</sup> It is also the case, though, that what is being complained of—sexual expression outside of domestic marriage—is indeed, for the most part, socially disapproved-of conduct, which is disapproved of whether or not it is welcome and consensual. So, women complaining of sex at work—calling it not sex but sexual harassment—*may* be the longsuffering victims of injuries only now recognized as such. Or not. Women who claim to be or even who sincerely think they are

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145. Halley, *supra* note 15, at 196-97; Schultz, *supra* note 15, at 2167.

146. Halley, *supra* note 15, at 195.

147. Schultz, *supra* note 15, at 2094-97.

148. Halley, *supra* note 15, at 193-196; Schultz, *supra* note 15, at 2019-31.

149. For a history of sexual harassment law, see Siegel, *supra* note 94.

150. *Id.* at 3-8.



being actionably harassed at work may be in the throes of a homophobic panic, if the alleged aggressor is of the same sex, or of a more general "sex panic," if not. Either way, the actual sexual harassment may be non-existent or trivial. The real harm is in the mind of the purported victim: homophobia, social Puritanism, or prudishness, shared by the larger like-minded sex-averse culture, but in no event caused by injurious acts of a sexual perpetrator at work.<sup>151</sup> Whatever else it has done, the "skeptical" postmodern critique of sexual harassment law has highlighted the second prong of this dilemma, which has been with us, unexamined and unmentioned, for some time.

The second strand of the postmodern critique of sexual harassment law I call (following David Kennedy) the "libertine" strand.<sup>152</sup> This argument begins (and ends?) with what clearly aims to be an earthy and racy affirmation (" 'Yes,' she said"<sup>153</sup>) of the overarching human value, the benignity, the virtue, the innocence, the pleasure, and the sheer thrill, of sexual desire itself in all of its manifestations: gay, straight, hierarchic, vanilla, sadomasochistic, public, private—whatever and wherever.<sup>154</sup> Loosely, although they both make both libertine and skeptical arguments, sex-affirmance is much closer to the heart of Halley's argument against sexual harassment law, while skepticism is, basically, at the heart of Schultz's. The libertine argument against sexual harassment law is a bit more convoluted than the skeptical. It involves (at least) three steps. The first, though, is implicit.

Rhetorically, although not explicitly, the libertine argument against sexual harassment law begins with a straightforward affirmation of the relative value of same-sex sexuality—a general egalitarian sentiment obviously shared not only by civil rights theorists and activists involved in all gay and lesbian activism or scholarship, but also by virtually all identity theorists, all liberals, all radicals, and many conservatives as well, at least in legal scholarship.<sup>155</sup>

151. Halley, *supra* note 15, at 195-98.

152. David Kennedy, *The Spectacle and the Libertine*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 279, 289 (Leonard V. Kaplan & Beverly I. Moran eds., 2001) [hereinafter *AFTERMATH*]. In a typical passage, Kennedy writes:

For the Libertine, sex on your knees, sex which is not reciprocated, sex by yourself, by yourself with another person, sex in a dog collar, sex when the parties are not equal in status and wealth and salary and job grade and beauty and age and height, can also be sex. Even sex that women want can be sex. For the Libertine, sex doesn't have to be equally chosen or equally desired by all the parties, may not even be chosen at all. You needn't require consent, needn't reimagine sexual partners as autonomous transactors to eliminate coercion. Compulsion, obsession, sex when you can't stop yourself. The Libertine leans toward it, wants to, defaults to its affirmation. Say yes to abjection. Shame. Vulnerability. Inequality. Danger. Lean toward the sadomasochist, the fetishist, the happy couple at home on a Sunday afternoon.

*Id.* at 293.

153. JAMES JOYCE, *ULYSSES* 732 (Oxford University Press 1998).

154. For at least Kennedy, this may include rape, if the passage in note 152 is to be taken at face value. Kennedy, *supra* note 152, at 293.

155. It goes without saying, but it is very much an essential part of the argument. For Halley, homophobia is the harm invited by the over-regulation of sex and sexual harassment law; same-sex sex is thus implicitly acknowledged as the norm to which cross-sex sex is eventually assimilated. Same-sex and cross-sex sex are to be equally valorized, and the differences between them minimized, with the

Within feminism, furthermore, there are and could not possibly be any dissenters; the affirmation of same-sex sex and same-sex sexual desire underscores, rather than undercuts, longstanding feminist critiques of compulsory heterosexuality.<sup>156</sup> There's no apparent conflict, and a good bit of apparent common ground, between a queer-theoretic celebration of same-sex sex and a feminist opposition to coerced heterosexuality and between a queer-theoretic celebration of non-marital and non-traditional sex between partners of the same sex and a feminist critique of the various and profound compulsions inside and surrounding the civil and religious institutions of heterosexual marriage. Blandly, but importantly, the affirmation of the value of same-sex sexual desire and behavior is the common ground between queer theoretic and feminist theoretic projects.<sup>157</sup>

The second step toward the affirmation of desire invokes a premise central to queer theory, but at odds with some versions of both feminism and identity theory more generally, at least insofar as the latter pertains to issues surrounding sexuality: the non-discreteness, artificiality, fluidity, and flexibility of sexual categories, including the central categories "male" and "female," but also "hetero"- and "homo"- sexuality. *Unlike* both old-fashioned identity theory, as well as an even older-fashioned civil rights approach to gay law and politics (those fuddy-duddies), queer theory distinctively eschews the notions, conceits, deceptions, or self-deceptions that heterosexuals and homosexuals occupy distinct psychic or sexual or psycho-sexual spaces, that individuals can be put on any sort of Kinseyian "spectrum," or that gays or straights have any fixed cultural identity.<sup>158</sup> The point is not the familiar one that such identities are socially, rather than biologically, constructed (this turns out to be neither here nor there), but, instead, queer theorists question whether such identities have or, more importantly, ought to have any *stability*.<sup>159</sup> What queer theory distinctively critiques or deconstructs is the distinction between gay and straight, not its biological cause or origin (as, analogically, critical theory

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conclusion that all women's claims of sexual assault—both same-sex and cross-sex—should be viewed skeptically. Halley, *supra* note 15, at 195-98.

156. The classic is Adrienne Rich's essay, *Compulsory Heterosexuality and Lesbian Existence*, in *LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS* 487 (Alison M. Jaggar ed., 1994).

157. And, of course, gay identity theoretical projects as well. Thus, early arguments for gay marriage were often put in feminist terms—same-sex marriage partners, lacking the baggage of patriarchal norms, would transform marriage from within, rendering it a more egalitarian institution. See Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J.L. & FEMINISM* 139 (2005); Chai R. Feldblum, *A Progressive Moral Case for Same Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 485 (1998); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 *FLA. ST. U. L. REV.* 705 (1998); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *L. & SEXUALITY* 9 (1991). Marc Spindelman tracks the relation between gay identity politics, queer theory, and feminism, all in relation to gay marriage, in Marc Spindelman, *Homosexuality's Horizon*, 53 *EMORY L.J.* 1361 (2005).

158. Halley, *supra* note 15, at 194-97.

159. *Id.* at 194.

distinctively critiques the distinction between public and private). There just isn't anything to the notion that one is "gay" or "straight."<sup>160</sup> It isn't something that someone "is." Politics, including gay and lesbian liberation politics, that assume there are such stable identities are misguided and disutile both.

If we put these two premises—the celebration of same-sex sex, and the dissolution of the distinction between same and opposite sex—together, what follows, is the libertine's celebration of all sex<sup>161</sup>—heterosexual as well as homosexual. What disappears, less noticed, is the conceptual ground for virtually any feminist critique of heterosexuality, and this is the reason, in brief, for the widening gap between queer theory and Feminism, Modified.<sup>162</sup> The conclusion is that sex generally—not just same-sex sex—is to be celebrated and is good; to think otherwise, is, through the re-winding of this argument, to engage in a weird form of homophobia. Sexual criticism itself—any criticism of sexuality, whether gay or straight—begins to look closely aligned with a Victorian and Puritanical homophobia and, hence, *verboten*.<sup>163</sup>

Notably, though, this still doesn't bring us to sexual harassment law. One can, after all, be *for* all forms of wanted, desired sex and still urge a clamp-down on non-consensual, unwanted, and assaultive sex. The third and critical step in the libertine critique of sexual harassment law, then (which, to recap, is the second of two arguments against sexual harassment law) is an extension of the affirmation of same-sex and opposite-sex sexuality to what is now sometimes called "hierarchic sex," by which is sometimes meant sexual pleasures that involve sadomasochistic rituals or sex involving persons on different levels of a social, economic, educational, or military hierarchy (Monica Lewinsky and Bill Clinton; professors and students; sergeants and privates).<sup>164</sup> This, then, finally gets us at least close to a point of intersection with sexual harassment law and the sex it targets. Harassing sex, as I will belabor below, is harassing because it is unwelcome, *not* because it is hierarchic. Nevertheless, harassing sex can obviously, in some sense, *also* be described as "hierarchic." Harassing sex does indeed oppress across hierarchic

160. *Id.*

161. *Id.* at 194, 196; Kennedy, *supra* note 152.

162. The widening gap has been noticed both by queer theorists and their critics. See Halley, *supra* note 15 at 196-198; Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS, *supra* note 15, at 201, 213-18.

163. Halley, *supra* note 15, at 197:

If same-sex sexual injury can be phantasmatic, and based as much on desire as its opposite, why not also its cross-sex counterpart? Indeed, sex2-affirmative feminism might even say that we insult women by attributing to them such milquetoast psyches that they can be imagined incapable of fomenting powerful phantasmatic cathexes and desires. And so we have queer and sex2-affirmative feminist projects of asking whether, when a woman claims that a male coworker or supervisor or teacher injures her by desiring her sexually, we should believe her, or think her claim of injury is reasonable. And here we are near the heart of the sexual-subordination feminist sexual regulatory project, which has been to change things so that women are believed when they claim sexual injury.

164. See, e.g., Halley, *supra* note 15, at 196 (on sadomasochism); Kennedy, *supra* note 152, at 293 (on hierarchic sex).

lines. It is a part of our civil rights law, after all, rather than a part of tort law, because it is an attack on equality, not just an attack on women's physical integrity. The libertine, queer theoretic argument against sexual harassment law plays on this—perhaps, puns on this—definitional family resemblance.

So, to summarize: The first premise of the libertine argument is just that hierarchic sex (like all same and opposite-sex sex) is good; it is conducive to pleasure, liberatory, playful, even, perhaps, subtly undermining of traditional roles and lines of gender domination. Second premise: sexual harassment *law*—not, perhaps, by legal definition, but certainly according to common sense, common understanding, and its prominent theorists—targets hierarchic sex. Ergo, conclusion: sexual harassment law is bad. Sexual harassment law, briefly, is nothing but the latest manifestation of the unfortunate and stultifying sexual Puritanism that has long twisted the American and western psyche.

This bare argument, if the target is sexual harassment *law*, as presently constituted, involves a huge non-sequitur: Neither sadomasochistic sex, nor sex involving members on differing rungs of social hierarchies, is, solely by virtue of being hierarchic, for that reason alone, sexual harassment. For sex to be “harassing,” by legal definition, it must be unwelcome,<sup>165</sup> not hierarchic, and the two are not the same thing. In fact, taken at face value, the argument summarized above is an almost classic example of bad doctrinal logic: the word “hierarchic” has slipped into the definition of sexual harassment as somehow both necessary and sufficient, when, as a matter of law, it is neither. The doctrine, furthermore, is about as clear as these things can ever be: for sexual advances at work to be even assaultive, much less harassing, they must be unwelcome.<sup>166</sup> If the libertine's primary complaint, or point, is that sexual harassment law ought not to target a sexual taste for hierarchy or sexual affairs between students, teachers, presidents, interns, bosses and secretaries, he should take comfort from the law itself: it doesn't.

So—why is the libertine argument made at all, and why does it have the prominence it has? Where, in other words, did the idea originate, that there is *any* connection, either negative or positive, between the target of sexual harassment law—unwelcome sex and sexual assaults and advances at work—and mutually desired, hierarchic sex? Again—not from the doctrine. On the other hand, it is assuredly not a chimera. Rather, as Janet Halley has fully spelt out in her seminal article on this point,<sup>167</sup> the argument that sexual harassment law *is* in some way concerned with hierarchic sex comes not from sexual harassment doctrine, but rather from Catharine MacKinnon's theoretical

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165. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

166. *Id.*

167. Halley, *supra* note 15, at 183-93.

elaborations of Feminism, Modified and inferences we might draw from them.<sup>168</sup>

Over the years, MacKinnon has argued strenuously that *both* unwelcome sex—hence, sexual harassment—and hierarchic sex (of both sorts), as well as even the desire for the latter, are symptomatic of sex inequality.<sup>169</sup> Furthermore, she has argued that the dismantling of *all* of it—not just of sexual harassment, but also of desired, welcome, but hierarchic sex—is a necessary step on the path to full sexual equality:<sup>170</sup> the former, through laws against sexual harassment, the latter, through both cultural evolution and civil sanctions for the production and dissemination (through pornography) of the desire itself.<sup>171</sup> Desires for non-hierarchic sex are, in effect, glimpses into the erotic subjective contours of a utopian and future psycho-social world. Desires for hierarchic sex, and the prevalence of those desires, on the other hand, are the fully predictable but dreary consequence of the violent inequality that characterizes both modern and historical sexual relations between men and women.

So, whatever might be its status in law, it is nevertheless clear that hierarchic sex of both sorts—both sadomasochistic sexual desire and mutually desired sexual relations between members on different rungs of various hierarchies—are targets of the generalized skepticism toward the erotic given voice in MacKinnon's Feminism, Modified. Sadomasochistic desire is targeted because such desire allegedly represents, constitutes, and is loosely—albeit indirectly—caused by an internalization of the contempt and humiliation and abuse of women accomplished through centuries of patriarchal control. Hierarchic sex is targeted because such relationships (whether or not they are legally cognizable as harassment) epitomize the generic inequality of men and women socially.<sup>172</sup>

It is, then, this larger argument—that both sexual harassment and desired hierarchic sex are symptomatic of sexual inequality—that provides the backdrop of what is otherwise a mysteriously illogical critique of sexual harassment law as wrongly targeting fully desired and quite welcome hierarchic sex. Again, sexual harassment law does not do that, nor do its architects—including Catharine MacKinnon. MacKinnon has never argued (that I can find, and I have looked) that sexual harassment law should target hierarchic sex. MacKinnon has, however, *also* targeted hierarchic sex, as well as unwelcome sex, and has linked them through the assertion that both manifest the cultural

168. *Id.* at 183-93.

169. FEMINISM UNMODIFIED, *supra* note 13, at 54; FEMINIST THEORY OF STATE, *supra* note 1, at 140-142.

170. FEMINIST THEORY OF STATE, *supra* note 1, at 126-54.

171. FEMINISM UNMODIFIED, *supra* note 13, at 163-97; FEMINIST THEORY OF STATE, *supra* note 1, at 178-79, 195-214.

172. See MacKinnon, *Afterword*, *supra* note 94, at 692-93.

realization of political sex inequality.<sup>173</sup> And, most assuredly, a number of other equality feminists have taken up the suggestion and argued that we ought to, in effect, drop the “unwelcomeness” or “unwanted” requirement of sexual harassment law and, instead, directly target hierarchic sex at the workplace that, whether or not it is welcome, turns out to impede employment equality.<sup>174</sup> It is really that specific theoretical claim, then, regarding the implications of this law and the possible expansion of sexual harassment law proposed by others, that has prompted the libertine postmodern critics’ rejoinder that sexual harassment law has cast too broad a net.

So, we should recast the libertine argument at least somewhat, if only toward the end of assuring its relevance. The libertine argument is properly targeted not so much against sexual harassment law, as against the political conception of sex that arguably underlies it, and against reforms proposed by some—but by no means all—of the law’s architects. Viewed as such, the libertine argument is considerably narrower, although, perhaps, deeper than the skeptical argument; it is not an argument against current sexual harassment law, so much as an argument against never-enacted reforms, and against one possible theoretical account of the law. Feminists, and MacKinnon in particular, criticize hierarchic sex and have rendered sexual harassment on the job illegal and actionable; sex on the job is often hierarchic and harassing. Therefore sexual harassment law, although it doesn’t target hierarchic sex, assumes such sex to be undesirable—and, at least some of its proponents, defenders and architects, clearly wish it would.

So, having redirected the libertine argument, what is its content? Basically, queer, postmodern, libertine, and pro-sex theorists in effect turn the radical feminist denunciation of hierarchic sex—assumed to be at the heart of sexual harassment law—on its head. Sadoomasochistic desires, far from evidencing political debasement, the postmodern critics argue are, like all sexual desires, good for their own sake so long as they are ultimately pleasure-inducing.<sup>175</sup> But, more important, what these desires evidence politically is hardly internalized debasement; rather, they evidence (and encourage?) a rebellious imagination, a capacity for pleasure, a playfulness with roles and role-reversals, and an entirely admirable postmodern capacity for mixing things up in intimate spheres of life.<sup>176</sup> Likewise, desires for hierarchic sexual relations of the Clinton-Lewinsky sort ought to be celebrated rather than censored: They reveal a capacity for connection across hierarchy and a celebration of the

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173. At least she has done this with respect to sadoomasochism; it is not clear to me that she has done likewise with respect to wanted sex between individuals with unequal workplace or school power. See *id.*

174. See, e.g., Louise F. Fitzgerald, *Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, in DIRECTIONS, *supra* note 15, at 94.

175. Halley, *supra* note 15, at 196; Kennedy, *supra* note 152, at 293.

176. Halley, *supra* note 15, at 196; PLEASURE AND DANGER, *supra* note 96.

salaciousness of hierarchy that can be transformative and liberating, not oppressive.<sup>177</sup> Hierarchical sex, no less than heterosexual sex, and no less than same-sex sex, ought to be enjoyed if one is so inclined and celebrated even if not. It ought not to be the target of feminist critique. And it certainly ought not to be the subject of lawsuits. Like all sex and like all desire, hierarchic sex and the desire for it is innocent at least and liberatory at best, albeit in a playfully anarchic, mix-it-up, postmodern kind of way.

### *Critique*

The first thing worth noting about the postmodern critique of sexual harassment law and its theoretical grounding is what it is not: Neither the skeptical nor the libertine strand of this critique is liberalism *redux*. Let me start with the skeptical. First, the postmodern critics are hardly celebrants of subjective individualism. Rather, they are as skeptical of women's professed subjectivity as any Marxist going. Not only women's claims of injury, but also their subjective *experiences* of injury are subjected to doubt.<sup>178</sup> Complained-of injuries are often fabricated, according to the critics, but even when they are not, the experience of injury is sometimes just flat out inauthentic, or false<sup>179</sup>: what is felt to be injurious is, in fact, not. There is nothing liberal about this skeptical stance toward the conscious experience of inflicted harm.

Second, the *ground* for skepticism is not the loosely liberal (or libertarian) complaint that a woman's choice to enter into a relationship, institution, practice, or contract must be honored, even when the freely chosen practice, etc., later leads to claims of injury. The claim is *not*, in other words, that we should honor women's choices even in the face of later regret, come hell or high water—that we should honor a woman's decision to go to work in an harassing environment, in the face of her later complaint of injury and harm, on the ground that the possibility of injury has been “priced in,” so to speak, to her wage demand. Rather, the ground for doubt is historical, descriptive, and sociological (not definitional or philosophical, as liberal arguments tend to be): We should be skeptical of complaints of sexual harassment because of the

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177. Kennedy, *supra* note 152, at 296:

Monica Lewinsky. Libertine Hero. There's Barbara Walters asking her in all earnestness if she didn't agree, looking back, that it had all been pretty degrading. Unreciprocated, on her knees, with the President. Well, actually, she said, no. It wasn't degrading. It was a mistake, but you just had to be there . . .

Through all that she was put, somehow she never lost that fresh dignity: she managed to embrace abjection and shame and humiliation without conceding that all that had happened was anything other than human. Maybe I see the world through rose-colored glasses, but somehow our cities seem full of young Monicas. The students and waitresses and sales personnel, there's her haircut, her lipstick, and above all, her firm sexual confidence.

I hope they also share mantras with Monica. It doesn't have to be private or pretty, can be laced with power and pain, but that doesn't mean it's not fun . . .

178. Halley, *supra* note 15, at 196-97.

179. *See id.* at 197.

cultural overhang of centuries of pan-sex aversion<sup>180</sup>—not because of a general liberal valorization of choice. The reason for skepticism, in short, is a perception of a societal sickness, not an insistence on individual well-being.

The libertine strand, likewise, is also more illiberal than not. There are, of course, obvious overlaps between the two. Nevertheless, the libertine argument against sexual harassment law, or in defense of the desire that in their view is the target of that law, is *not* that these desires are private, inconsequential, beyond politics, or nobody's business, or that their expression is protected by First Amendment rights. Nor is the point the more general liberal axiom that desire, and the expression of desire, invariably point us toward pleasure and self-interest.

Rather, what the postmodernists' celebration of same-sex, opposite-sex, non-conventional, conventional, and hierarchic sex seems to be rooted in, theoretically, is a synthesis of a Freudian and Nietzschean worldview. Following Freud, according to the libertine account, sex seeks expression and release; following Freud, sexual desire is always present and near-always denied; following Freud, claims of sexual injury are often the mask for deeper and truer impulses rooted in sexual desire; following Freud, the greatest sexual harm is not sexual injury, violence, or violation, but rather the denial of sexual desire and interest and the subsequent self-loathing that is consequent to it.<sup>181</sup> Following Nietzsche, power and its use are admirable, while ethical or moral constraint evidence at best small-minded resentment; following Nietzsche, the expressions of unadulterated power are admirable and noble; following Nietzsche, their censorship on the grounds of either Christian moralism or a moralistic equalitarianism is damaging.<sup>182</sup> Put these two sets of claims together, and what you get, in a nutshell, is contemporary libertine queer theory: sexual constraint, whether on old-fashioned moral grounds or contemporary egalitarian grounds, is a mask of twisted and denied desire.<sup>183</sup> It

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180. See *id.*

181. See e.g., Sigmund Freud, *Infantile Sexuality*, in THE BASIC WRITINGS OF SIGMUND FREUD 580 (Random House, A.A. Brill ed., 1938).

182. See generally Friedrich Nietzsche, *From The Dawn*, in THE PORTABLE NIETZSCHE 76 (Walter Kaufmann ed., Viking Press 1980); *From Beyond Good and Evil*, *id.* at 443; Friedrich Nietzsche, *From Toward a Genealogy of Morals*, *id.* at 450.

183. Thus the hostility to sexual regulation of virtually all forms. The inspiration for this seems to be Foucault and his now-famous insistence that all sexual behavior should be deregulated—including, apparently, sex with very young children—in the absence of a strong showing of both expressed non-consent and violence. Foucault writes:

There are children who throw themselves at an adult at the age of ten—so? There are children who consent, who would be delighted, aren't there? . . .  
I'd be tempted to say: from the moment that the child doesn't refuse, there is no reason to punish any act. . . .

Then there are cases involving an adult who is in a position of authority in relation to the child—as parent, guardian, teacher, or doctor. There again one would be tempted to say: it isn't true that one can get a child to do what it doesn't really want to, simply by exercising authority.

MICHEL FOUCAULT, POLITICS, PHILOSOPHY CULTURE: INTERVIEWS AND OTHER WRITINGS, 1977-1984, at 204-205 (1988).



is a disastrously sublimated craving for control.<sup>184</sup> Expressive honest sex, by contrast, in whatever and all forms, is pretty much good by definition, as is power likewise. Accordingly, sex informed by a taste for hierarchy—either the desire to dominate or submit, to be top or bottom, to inflict or receive pain, to issue or obey command—is downright sublime.<sup>185</sup>

I would venture the following critical observations about these postmodern critiques of sexual harassment law, although, as I will suggest below, I also find much of value in their theoretical interventions. First, Halley's argument from skepticism, and to a lesser extent Schultz's as well, seems to turn on a peculiarly postmodern form of question-begging. Again, Halley's claim is that if we recognize, as we should, the possibility that a self-loathing homophobic plaintiff might be anxious to bring a law suit against a would-be same-sex harasser so as to reassert his own heterosexuality, *and if* we dissolve, as we should, the distinction between queer and straight, then what should follow is a broad-based suspicion of all plaintiffs, on the grounds that a "sex panic" may so motivate victims of opposite-sexual harassment.<sup>186</sup> But there is no evidence offered to support this hypothesized extension and no reason that I can see to presume that it's a sensible one. The existence of homophobia, and of the self-loathing it can induce on the part of many, is a widespread, recognized, and recognizable phenomenon. By contrast, it is not at all obvious that this culture is *now* in the midst of a general "sex panic" that might induce workers of either sex to ward off sexual advances in the workplace through the torturous route of filing specious law suits or by falsely claiming that a sexual advance made on the job was assaultive, harassing, and the proper subject of a lawsuit, rather than mutually desired. Where is the evidence of the panic that might support this? To all appearances, this culture is *sex-drenched*, not *sex-phobic*. We still seem more inclined to silence victims of sex assault than otherwise. It might be hard to say, either hermeneutically or quantitatively, whether the well-publicized alleged assaults of Michael Jackson, of the Colorado football team, of who knows how many priests, of Kobe Bryant, of William Kennedy Smith, and so on and so on and so on, represent a panic over sex or a panic over the possibility that such sex might someday be actionable. But the question surely should not be answered simply by definitional fiat.

Schultz's more general argument—that even when genuine, these complaints are of largely trivial behavior, at least when the behavior occurs in gender-integrated workplaces—is harder to assess, resting, as it clearly does, on somewhat idiosyncratic interpretations of the facts of a large number of cases, with all the room for interpretive difference that such arguments invariably

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184. Michael Warner expresses this conception of sex most clearly in WARNER, *supra* note 144, at 64-80.

185. See *id.*; Foucault, *supra* note 183, at 200-206; Halley, *supra* note 15, at 196; Kennedy, *supra* note 152, at 290-294.

186. Halley, *supra* note 15, at 194-97.

invite.<sup>187</sup> It seems fair enough to assume that sexual harassment law may well need policing for its excesses, as does any body of law, constitutional or otherwise. Minimally, though, some comparative data would be helpful here. People have been known to file trivial lawsuits out of greed or spite. We don't think across the board that all civil law should therefore be scrapped. On the other hand, particularly given our sorry historical tendency to proclaim complaints disproportionately brought by women to be "trivial," we should be wary of overkill here. Similarly, we should watch out for non-falsifiable claims that these cases, or at least some very large but unspecified percentage of them, are somehow polluted by a black cloud of "sexual panic," the consequence of which is that not only are some of these women just lying, but even those who aren't lying are in denial about their own pan-sexual desires. These claims all echo an ugly and Freudian history of misogyny. Although it should be obvious, it's worth remembering that there is no more *prima facie* reason to credit the new-fashioned claim that women lie or are deluded when complaining of sexual injury because they are in the grip of a "sex panic" than there was to credit the old-fashioned claim that women lied when complaining of sexual injury because women as a sex were just too obtuse to appreciate the moral value of truth. It's imperative here that we avoid generality.

The stakes, furthermore, are fairly high. If the postmodern critique is successful in weakening support for sexual harassment laws, and if it is successful in doing so on the specific grounds that women, overly inclined to be sex-averse, are also overly inclined to invent or exaggerate claims of sexual injury, then the critique portends a huge setback for women's equality, not only in the area of sexual harassment law and policy. Simply put, the attack on the integrity of these women complainants puts us back, yet again, in the familiar—but no-win—posture of debating women's trustworthiness, sense of fairness, and basic integrity when they complain of sexual injury. Again, this would hardly be modern or postmodern; indeed, there has *never* been a time when women's allegations of sexual assault have not been refuted as either contrived or trivial.<sup>188</sup> There is nothing postmodern about the suggestion that we should trivialize them now, albeit in the name of sexual freedom rather than patriarchal power. It's like a recurrent nightmare, not a pleasurable *déjà vu*.

Let me turn now to the libertine strand. The libertine argument—that we should affirm and celebrate all sexual desire, including hierarchic desire, and that sexual harassment law that directly or at least indirectly targets hierarchic sex is therefore overbroad—is at once both less and more powerful than the

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187. Compare Schultz's careful recounting of the facts of sexual harassment cases in her first major piece on sexual harassment law, *Reconceptualizing Sexual Harassment*, *supra* note 116, in which she argues that sexual harassment law has developed to the detriment of complaints of non-sexual forms of gender discrimination in the workplace, with MacKinnon's response in *Afterword*, *supra* note 94, at 696-97.

188. See generally Hasday, *supra* note 65; Siegel, *supra* note 48; Siegel, *supra* note 94, at 11-18.

skeptical argument. It is less powerful simply because—and it bears repeating—there is just no logical or doctrinal connection between the affirmation of sexual desire and sexual practice, on the one hand, and the conclusion that sexual harassment law as it is currently constituted cuts too broad a swath, on the other. Sexual harassment law does not depend on a denial of the value or benignity of traditional heterosexuality, of hierarchic sex, of same-sex sex, of non-conventional sex, of sadomasochistic sex, of workplace sex, of bathhouse sex, of casual sex, or of the desires of anyone for any of that. The target of sexual harassment law is *unwanted* sex, not same-sex sex, not heterosexuality, not sadomasochism, not hierarchic sex, and not wanted, mutually desired relationships between persons on differing rungs of employment hierarchies. To the contrary, an affirmation of the value of sexual desire, or of mutually desired sexual relations regardless of the status of the participants and no matter what the nature of their sexual toys, has *no* implications, one way or the other, for sexual harassment law. The target of sexual harassment law is unwanted sexual assaults at work, not sadomasochistic pleasure or mutually desired relationships between professionals and staff, or doctors and nurses, or students and teachers. There may be reason to worry about sadomasochism and the apparently widespread desire for it (although I don't think so), and there may be good pragmatic and moral reasons to avoid intra-office or school hierarchic sexual affairs (I think there are). But that they are definitional instances of sexual harassment is *not* one of the reasons to worry, and *no one*, to my knowledge, has claimed otherwise. One more time: harassing, actionable sex on the job, as a legal matter, is *not* harassing because it is "hierarchic;" it is harassing because it is unwelcome.

Nor does an affirmation of non-traditional hierarchic sexual desire or behavior logically imply the wisdom of a skeptical stance toward the claims of women (or men) who have suffered sexual assaults on the job. In other words, the libertine and skeptical strands of the postmodern critique are logically independent, not mutually supportive. The moral or political wrongness of hierarchic sex (if it is wrong) does not imply a reason to be overly solicitous of claims of sexual harassment on the job, but neither does the benignity of such sex suggest a reason to be skeptical. Hierarchic sex (of either sort—sadomasochistic or between persons on different rungs of a ladder in a hierarchy) can be harassing or non-harassing, depending upon whether or not it is *welcome*, while harassing sex can be either hierarchic or non-hierarchic. That some women and some men may desire hierarchic sex with wanted others suggests nothing—one way or the other—about the status of unwanted sexual assaults.

Nor does classical feminism—the feminism relied upon by MacKinnon, at least in her initial formulations of Feminism, Modified—suggest much of a link

between these two claims. Political feminism counseled greater regard for claims of sexual assault—meaning, primarily, non-consensual sex—in a host of venues in which the existence of such non-consensual sex had been viewed, by perpetrators, victims, and the larger public, as either trivial or oxymoronic: acquaintance rape, date rape, and marital rape. MacKinnon and others introduced the novel and radical idea that this attention should extend to those complaining of unwanted and unwelcome—not just non-consensual—sex, thereby picking up sexual harassment on the job as well.<sup>189</sup> By so doing, she broadened widely our awareness of the ways women may formally consent to unwanted sex and sexual advances at work, because employment demands it, and at home, because domestic peace requires it. Unwanted, as well as non-consensual, sex thus became a target of political reform and legal action and that, I think, is the radical impulse behind both sexual harassment theory and doctrine. But neither classical feminism, nor the architects of the reconstruction of sexual harassment law, ever suggested that such a heightened regard should entail or lead to a skepticism regarding the genuineness of felt sexual desires of any description.

So contrary to the apparent assumptions of both the law's critics and some of its defenders, neither sexual harassment law nor at least one strand of its theoretical underpinning requires any views one way or the other about the status of welcome, wanted, fully-desired hierarchic sex. Both sides, I believe, wrongly implicate hierarchic sex in the explication of the wrongs of sexual harassment, on the one side, and the wrongs of sexual harassment law, on the other. The libertine's endorsement of hierarchic sex and the desire for it is simply irrelevant to the doctrine and logic of sexual harassment law.

### III. QUEER THEORY, THE CRITIQUE OF DESIRE, AND FEMINISM, RE-MODIFIED

As was the case with earlier liberal-feminist critiques of pornography law, the contemporary postmodern attack on sexual harassment is only partially concerned with sexual harassment law per se. It is also (and for Halley, primarily) concerned with the logic and breadth of Feminism, Modified. Here, the argument between MacKinnon and her critics is more fully joined. Thus, entirely aside from sexual harassment law, MacKinnon has argued quite broadly and in any number of publications that sexual desire, particularly for hierarchic sex, is inconsistent with equality and is both a consequence of inequality as well as a manifestation of it.<sup>190</sup> Our desires are constructed by our social milieu; our milieu, thus far, has been one of nearly unrelenting

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189. See Siegel, *supra* note 94.

190. FEMINISM UNMODIFIED, *supra* note 13, at 54; FEMINIST THEORY OF STATE, *supra* note 1, at 138, 148.

patriarchal sexual control.<sup>191</sup> Our desires, including our desires for hierarchic sex, simply reflect that political position. We might call this part of MacKinnon's Feminism, Modified the "critique of desire."

Halley and Schultz both, in response, argue not so much the illiberality of these assumptions (as had anti-censorship liberal feminists during the pornography debates) but rather, for a different understanding of the desires themselves: The desires both represent and constitute a playfulness and an exercise of power that should be commended, not simply left alone (as per liberalism) or critiqued (as per Feminism, Modified). They are even a subtle challenge to hierarchy, insofar as they evidence a willingness to depart from traditional and patriarchal alignments of gender and power.<sup>192</sup> More generally, they evidence an erotic attraction to power and hierarchy that should leave us dubious about an over-broad (and statist) insistence on the constitutive relation between political, social, and sexual equality in intimate spheres of pleasure.<sup>193</sup> Pleasure, not equality, is what is to be affirmed.<sup>194</sup> Many people take physical pleasure in sex, in power, and in the mingling of the two. There is no reason to censor those pleasures, and very good reason not to. They evidence a relation to power, its pleasures, its physicality, and its eroticism that is itself something to celebrate, regardless of its gender alignment, particularly since (or perhaps because) gender alignments are fluid.<sup>195</sup> So long as these eroticized roles—butch, femme, top, bottom, dominator/trix, submissive, master, slave, etc., etc., etc.—are subject to reversal, or are the product of free play, or are the product of desire rather than social construct, they are hardly something to worry over. Rather, they are something to embrace.<sup>196</sup>

One way to characterize the dynamics of this debate, I don't think unfairly, is as follows: MacKinnon uses the ubiquity (still), the invisibility (until recently), and the (now) relatively unassailable wrongness of rape, sex trafficking, sex abuse of children, sex slavery, and sexual harassment to cast doubts on both the naturalness and the benignity of desires for sex generally and for hierarchic sex in particular. Thus, both sex harms and desires for hierarchic sex, she argues, are products of sex inequality. Both the harms and

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191. This is deeply embedded in the theoretical structure. In the first chapter of *Toward a Feminist Theory of the State*, MacKinnon states:

As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its social structure, *desire its internal dynamic*, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.

*Id.* at 3-4.

192. Halley, *supra* note 15, at 196; Schultz, *supra* note 15, at 2150-52, 2191.

193. Halley, *supra* note 15, at 194-98.

194. See also Foucault's early remark that pleasure and bodies should be the rallying cry around the resistance to discourses of sexuality. FOUCAULT, *supra* note 118, at 197.

195. Halley makes this contingency explicit. Halley, *supra* note 15, at 196.

196. *Id.* at 194-98; Schultz, *supra* note 15, at 2193.

the desires are a product of hierarchy and are an obstacle to women's full quest for social and economic equality. Halley and Schultz, by contrast, use the intuitive wrongness of censorial stances toward something as seemingly harmless, ubiquitous, victimless, and self-regarding as welcome hierarchic sex, as a stepping stone toward skepticism of sexual harassment law and, by inference, sex equality and Feminism, Modified quite generally. Hierarchic sex shares with same-sex sex the quality of being the subject of societal opprobrium—people generally don't approve of it. Yet, it involves, for the most part, victimless behavior—it's largely no one's business, for well-understood, liberal-sounding, Millian reasons.<sup>197</sup> If the entire equality edifice rests on something as flimsy as a political, moral, or aesthetic distaste for a non-conventional sexual desire, there is something wrong with the political vision and not just with the legal reform that has been its most successful product.

Both positions assert a dubious connection, criticized above, between hierarchic sex, the desire for it, and the phenomenon of unwanted sex. But both also assert a deeper connection, harder to assess, between hierarchic sex, the desire for it, and the project of political and social sexual equality. For MacKinnon, the connection is clear and suggests the problematic nature of desire. For Halley, the connection is equally clear and suggests the problematic nature of the project of sex equality. The contribution I want to offer to this stand-off is simply to notice that there is a third possible position that, although not free from doubt, might have a lot to commend it: There may be no connection one way or the other between the desire for hierarchic sex and *any* quest for equality no matter how defined. If that's right, perhaps the conclusion to draw is that equality feminists could and should drop the critique of sexual desire, and postmodernists could and should drop the celebration of it. Perhaps neither the critique nor the celebration is warranted. Let me briefly elaborate.

Begin with the critique of desire that, at least on first blush, is so seemingly central to Feminism, Modified, and to the project of sexual equality as defined in the larger theory. Is it really? I think not. First, it clearly does not follow from the analogical borrowing from Marx that women's felt desires for sex, or for any particular type of sex, are false, or politically polluted, or the product of subordination. The analogy of sex to work, and women to laborers, provides grounds for skepticism regarding the authenticity, genuineness, and self-regarding nature of women's *choices*; women's consent to the sex they choose, if MacKinnon is right, is very often grounded in something *other than* their own desire, and, when it is, it can be injurious. What MacKinnon borrowed from Marx, was the challenge to the line drawn, within liberalism, from the worker's desires to the choice he makes and to the creation of value. Likewise, and analogically, the liberal vector from a woman's desires to her preferences

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197. MILL, *supra* note 30.

and, ultimately, to her choice to engage in sex is and ought to be severed by feminist skepticism.

But the object of skepticism in both is the connection between the worker's or the woman's well-being and desires, on the one hand, and preferences and choices on the other; the object of skepticism is *not* the substance of the desire. The worker's preferred choice, under capitalism, "maximizes" the capitalist's "value" rather than the worker's—the capitalist captures labor from the worker and converts it into surplus value. Likewise, the woman's choice, and preference, maximizes the man's pleasure rather than her own—the man captures sex from the woman and converts it into surplus pleasure—his pleasure, at her expense. If we take Marx seriously, then we should indeed be skeptical of the claim that satiated choices necessarily increase value for the subordinated party in each of these pairings, and we should do so for the simple reason that workers choose to work, and women choose to have sex, for reasons that do not entail an increase for them of value, well-being, or pleasure. The "choice" may be free, but it rests on preferences grounded in necessity, and, as such, it is aimed toward satisfying or increasing the well-being—in terms of either value or pleasure—of the dominant, not the chooser. Yet, none of this suggests the necessary inauthenticity of felt sexual desire on the one hand, or the desire to work on the other.

To state this more directly and entirely apart from fidelity to Marx: The radical core of Feminism, Modified remains, and is even clarified, if the critique of desire is dropped. The target, from the outset, of the equality understood by Feminism, Modified, in its strongest formulation, has been the alienation, the appropriation, and the exploitation of women's sexuality. Translated legally, such alienation, appropriation, and exploitation of sexuality encompass far more sorts of sexual behavior than that targeted by (traditionally understood) rape laws, and far *less* than the entire sphere of desired sexual behavior that MacKinnon is so often (rightly or wrongly) understood to be condemning. What *is* clearly targeted by MacKinnon's formulation of the issue is precisely what, in a more limited way, is targeted by sexual harassment law itself—that is, unwanted and unwelcome sex: sex that women engage in because of institutional, economic, cultural, and coercive forces; sex that they do not desire, *but to which* they do not necessarily withhold legally viable "consent"—usually (but not always), because they lack the power to do so. Such sex is not rape, because it is not necessarily non-consensual. But neither is it desired, welcome, wanted, pleasurable, or benign. It is often injurious, and it is a huge obstacle to full social equality. When it happens at work or at school, it is called sexual harassment and it is sometimes actionable; when on the street, its called sex hassling and almost never actionable. We don't have a phrase for what to call it when it happens at home. That doesn't mean it doesn't happen.

What, descriptively and objectively *is* the “unwelcome sex” that I urge should be not only the target of sexual harassment law when it occurs at work, but also the target of Feminism, Modified more broadly? Let me define it by reference to that which it is not: It is not desired, welcome sex, on the one hand, nor is it rape, on the other. Take the latter first. Unwelcome sex is often, perhaps even very often, non-consensual; when it is so, it is indeed rape. But unwelcome sex is not *always* non-consensual; thus, it is not *always* rape. Far more often, unwelcome, undesired sex is fully consensual—the product, that is, of a consensual transaction between competent adults at work, at home, at school, or elsewhere. But in *both* cases—the narrow category of sex that is unwanted and violently expropriated, meaning rape, and the broader category of sex that is unwelcome but expropriated with a woman’s consent—the sex that is appropriated from a woman is appropriated *in the absence of her desire*. What MacKinnon’s radical modification of feminism uniquely and powerfully revealed was the harms done to women, *not* so much by *rape*—the unwanted sex to which we do not consent, and which is taken from us by violence force—but, more insidiously, and certainly more pervasively, by the unwanted sex to which we *do* consent. What Feminism, Modified exposes, in other words, is the harms done to women by the sex that is taken from us, with our complicit consent, by that overbearing and toxic brew of imperatives drawn from moral duty, the need for physical survival, and brute necessity, which we sometimes collectively call patriarchy.

How might such unwelcome and unwanted sex be described in terms of the experiences of people? Sex that is neither rape, on the one hand, nor welcome and desired, on the other, is that sex to which women consent, but which is unwelcome, unwanted, undesired, and often both painful (rather than pleasurable) and injurious (rather than beneficial). Why does that sex happen? It happens because of expropriation, alienation, and exploitation—it happens by dint of felt and real necessity. It might be procured through economic leverage, through societal expectation, through marital institutions, through internalized religious duty, through interpersonal duress, through peer pressure, or just through that bland thing we call “role-definition.” It might “happen,” more concretely, because if it doesn’t happen, he will be in an unbearable snit the next day, or he will be abusive to the children, or he will not leave enough money for the kids’ lunches, or he will deny me a raise that I need and I deserve or a grade that I’ve earned. I consent to the sex I don’t want and don’t desire, because, if I don’t, he will be physically abusive to me, or humiliate me, or embarrass me. I consent because, if I don’t, I’ll lose status at the high school, or I won’t be liked, or I won’t like myself. This kind of sex happens because my friends expect it to and will think less of me if it doesn’t. I consent because God counsels me that when my Husband wants sex it is my duty to give it. And so on, and so on, and so on. None of this sex is rape, but none of this sex is



welcome, pleasurable, or beneficial to the woman who "gives" it. Nor is the sex desired, or desirable. Whatever induces it, the fact that women so often consent to sex they do not want and do not welcome is a manifestation of their subordination. *That* is the radical, political, and novel insight of Feminism, Modified.

Unwelcome sex, clearly, by definition, is not *desired* sex of any description, regardless of content, regardless of hierarchy, regardless of its flavor. There is no overlap between the two. Unwanted sex, and not mutually desired sex, is the obstacle (or an obstacle) to women's equality, and it is an obstacle, furthermore, that is at least partly amenable to legal redress. The ubiquity of unwanted, undesired, and unwelcome sex and sexual behavior constitutes, evidences, and promotes women's inequality to men, no less than the ubiquity of unwanted, undesired, and unwelcome work—shit jobs, as we used to call them—constitutes and evidences laborers inequality to capital. This no more renders Feminism, Modified as liberalism *redux* than the parallel insight reduces Marxism to liberal capitalism. Liberalism celebrates and enforces and relies upon the choices, the acts of consent, and the manifest preferences of extant individuals; Feminism, Modified, like Marxism, critiques those choices, those consensual acts, and those preferences on the grounds that and to the extent that they reflect the interests of the stronger, rather than the interests, well-being, and the desires of the subordinated. The radicalism of Feminism, Modified, in other words, stems from its critique of the social institutions that generate our choices and our preferences, including the implicit and explicit violence that fuels those institutions. A critique of sexual desire, including the desire for hierarchic sex, is not a necessary part of critical theory (of course, neither is it incompatible with critical theory). But a critical stance toward our manifested choices and felt preferences is necessary, particularly when those choices and preferences reflect not our own desires and interests, but those of the stronger Other who subordinates us. Folding in a critique of desire does little but obfuscate (or trivialize) that radical insight.

There are also substantial pragmatic costs to the critique of desire. The claims in Feminism, Modified as it is presently and, I think, unfortunately constituted—that hierarchic sex and the desire for it signify a subordinated status, that we ought to forego those desires if it's possible to do so (even if not, adopting instead . . . what? Celibacy?), that we should purify all expressions of power from our sexual practices—prompt, among those who harbor these desires and many who don't, guffaws and eye-rolling. Those guffaws and eye-rolling went a long way toward sinking the anti-pornography campaign. We really shouldn't want to go there—again. If we become mired—again—in a debate over the content of our sexual desires, we stand to lose Feminism, Modified's singular, path-breaking, and historical focus on the alienation and expropriation of women's sexuality as the linchpin of women's subordination

and inequality both. Catharine MacKinnon's statement that women's sexuality is "that which is most one's own, yet most taken away"<sup>198</sup> was a laser-like, monumental, stomach-wrenching insight that changed the course of our cultural, political, and legal history and that portends still greater revolutionary and even evolutionary change. It would be an historical shame if the full opportunity to reap the benefit of that insight were lost, if the light that it casts were to be overshadowed by an overwrought set of claims and counter-claims regarding the content of sexual desires, rather than shining on the practices, institutions, and consciousness that perpetuate the continuing, and often violent, expropriation of women's sexuality.

Some caveats are naturally in order. Consent to sex that maims, or kills, or otherwise causes severe bodily harm should not be a barrier to the criminalization of those acts, and it typically is not. Nor should the *desire* on the part of the victim be a barrier to the criminalization of those acts. Thus, the intentional, knowing, or reckless killing of a human being through strangulation in the course of a sexual act, as well as the intentional or reckless transmission of AIDS or HIV, whether or not the victim was desirous of the act, might nevertheless be criminal; in my view it should be. Resolution of where to draw the line between justified, paternalistic intervention into consensual and desired sexual activity that is injurious or lethal is a concededly difficult question, but it is by no means an unfamiliar one; the underlying issues are no different from those that require resolution wherever paternalistic state intervention is required to protect people from the harmful consequences of their own desires. Limiting our ability to buy dangerous lawn mowers at low prices through non-waivable warranties might be justified paternalism; I think it is. It does not follow that such a limit rests on or presupposes that our desires for consumer products are corrupted by the power imbalance between manufacturers and consumers. In other words, limited recognition of the justified scope of paternalism in private, consensual, and welcome sexual behaviors that cause serious injury or death hardly requires or rests upon a full-scale critique of all sexual desires that rest on power imbalances, nor does it suggest the corruption of all desires for hierarchic sex. The desire for hierarchic sex might be relatively benign and inconsequential, even though hierarchic sex that turns lethal may be the target of paternalistic state intervention, for familiar and well-rehearsed reasons. The desire for it on the part of the victim should be no barrier.

But the rare and clearly self-destructive desire for death or injury is just not the same thing as the apparently quite widespread desire for the pleasures that come from non-traditional, sadomasochistic sex that is, aside from unproven psychological harms, objectively and physically harmless. It is just not at all clear that the latter, unlike the former, does traceable damage either to our psyche or our political standing. By contrast, what is so vividly clear, I think,

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198. FEMINIST THEORY OF STATE, *supra* note 1, at 3.

and still such a fresh claim as to move hearts, bodies, and minds, is what *Feminism Unmodified* and *Toward a Feminist Theory of the State* so powerfully argued and what sexual harassment law as presently constituted heroically assumes: The phenomenal degree to which women's actions, "preferences," and "choices," in and out of the workplace, do *not* track our interests, our pleasures, *or* our desires—or our self-understanding of any of that. If we could focus on and repair the damaging institutions that so distort our capacity to actually choose what we desire, what pleases us, and what is in our interest, the content of our sexual desires, over time, may change—or it may not. In a world in which women's sexuality is *not* that which is most our own and most taken away, we may or may not find ourselves fiercely desirous of "egalitarian sex." Either way, it wouldn't much matter.

Let me look critically now, and much more briefly, at the other side of the coin. What of queer theory's celebration of desire? Leaving aside sexual harassment law, is hierarchic sex, and the desire for it, something to *valorize*? Let me break this down into the two types of hierarchy noted above: affairs between persons on different rungs of various hierarchies and sadomasochistic sex. I've written on hierarchic sexual affairs (Bill and Monica) at length elsewhere, and won't repeat the arguments here—my conclusion in that writing is that sexual harassment law does not and should not target such affairs, but these affairs nevertheless are often, although certainly not always, injurious.<sup>199</sup> For various reasons, all pragmatic, it seems to me the injury they do, when they do it, is not one particularly amenable to legal compensation. I've also written on sadomasochism, apparently much to everyone's consternation.<sup>200</sup> All I want to stress here is a very limited point: there is a sizeable conceptual space between a censorial stance and a celebratory one with respect to sadomasochistic sexual desires. Sadomasochistic desires, even if they are entirely harmless and, when satiated, thoroughly pleasurable, have no positive *political* valance.

The insistence by pro-sex devotees of hierarchic sex that these sexual desires signify a willingness or desire to abandon, reverse, play with, or subvert socially prescribed sex or gender roles<sup>201</sup> hardly fits the *experience* of these sexual encounters: the absolute non-negotiable rigidity of role is very much a part of the appeal. Indeed, the counter-claim that sadomasochistic desires are somehow anarchic or signify an admirably rebellious postmodern sensibility tends to invoke as much eye-rolling as the claim that they signify subordination. At the risk of belaboring the obvious, I think its worth pointing out that people don't generally engage in sadomasochistic sex in order to

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199. Robin L. West, *Sex, Harm and Impeachment*, in *AFTERMATH*, *supra* note 152, at 129; Robin L. West, *Unwelcome Sex: Toward a Harm-Based Analysis*, in *DIRECTIONS*, *supra* note 15, at 138.

200. West, *Feminist-Conservative Alliance*, *supra* note 14; West, *Fifteenth Anniversary Celebration*, *supra* note 14. For critique, see Coughlin, *supra* note 15.

201. Halley, *supra* note 15, at 196.

subvert, mock, imitate, play with, or invert heterosexism, patriarchy, marriage, or traditional gender roles. Postmodern and pro-sex and queer-theoretic depictions of these sexual practices are at least as peculiar and certainly as counter-experiential as feminist claims that, by foregoing them, we are striking a blow for women's equality.

In short, both the skepticism toward sexual harassment plaintiffs and the valorization of hierarchic sex by postmodernists, pro-sex feminists and queer theorists way overshoot the mark. The postmodern critique of Feminism, Modified, read generously, takes that theory to task for its undue condemnation of the content of our sexual desires and the welcome and mutually wanted "hierarchic" sexual practices of many. However, by coupling that critique with, first, a denigration of the credibility of women who complain of harassment or rape and, second, a valorization of the taste for hierarchic sex, the critique courts, perversely, both disaster and triviality. There is no reason, based in either spurious claims of "sex panics" or overly-broad depictions of sexual harassment complaints as Victorian or prudish, to categorically doubt the veracity of these complainants. This is the disaster courted by this critique. But neither is there any reason to impute to those who enjoy hierarchic affairs or harbor or act on sadomasochistic desires some set of revolutionary, anarchic, playful-or-otherwise-postmodern set of political ambitions (or accomplishments). That is the courting of triviality.

The damage wrought by this debate may be greater than any danger, any debasement, any self-denigration, as well as any pleasure, any liberty, or any anarchic equality that could possibly be either had or threatened from either sadomasochistic sexual practices and desires, or from hierarchic but welcome sexual affairs at work. Minimally, this side debate has wrought a debilitating confusion both in the understanding and the reform of sexual harassment law. It has also, though, damaged feminist theory, if only by excluding a possible middle position. I want, now, to put that position on the table. It's a three-tiered claim. First, when sex is coerced, through violence, force, or the threat of it, it is rape and properly regarded as a serious crime. Second, when sex is unwanted and unwelcome, it is harassment and evidence of institutional and personal oppression—this is the basic, and radical, insight of Feminism, Modified. Third: when sex is mutually desired and welcome, it is, at least much of the time, pleasurable, companionate, expressive, rewarding to the participants, and pretty much just ridiculous to everyone else. Some people have sexual tastes that run to leather, whips, and chains. Some people have sexual tastes that run to toothpaste spread all over the body. Sexual tastes run the gamut, and that fact signifies nothing at all. Without some concrete showing otherwise, it just seems foolish to critique political ideals on the basis of the content of sexual desires, no less than to ground political vision on their critique.

## IV. SOME CONCLUSIONS

Catharine MacKinnon, who has never eschewed grand narratives, did indeed invent a new plot—I've called it *Feminism, Modified*. Like many plots, however, this one is a bit unfinished, and the larger narrative within which this new plot is encased, like all narratives, requires interpretation. In my interpretation, surely not the only possible one, the new plot MacKinnon invented for the grand narrative of human existence concerns, largely, the role of private violence and subordination in perpetuating women's submission to male dominance. Moreover, it concerns women's increasing and still-surprising witness to all of that, as they re-capture their voice; the state's obligation, upon hearing women's testimony, to put an end to the violence that prompts it and to do so as a matter of liberal principle; the law's duty, once the state has acted, to insure the resulting peace and to do so as a matter of fundamental justice; and the possibility of a liberatory and egalitarian denouement, if such an ultimately happy story should ever come to unfold. That, at least, is one *possible* interpretation of the new plot that Catharine MacKinnon has invented, and that I have called, correcting the clear misnomer in the title of her third book, *Feminism, Modified*.

Even so interpreted, however, some of the subsidiary plot lines of this invented story are left dangling. One such unfinished plot line—and I'm sure there are others—revolves around the ambiguities of women's sexual desires, the ambiguities in the consensual sexual practices in which women engage, and the relation, or lack thereof, between the two. How we resolve those ambiguities will determine whether and how we can make sense of the very phenomenon of "unwanted" or unwelcome sex. So, leaving metaphor and narrative aside: What, precisely, *is* the relation? Do we always desire the sex to which we consent—do we do so, furthermore, "by definition"? If so, there is little room for critique of, much less legal recourse for, unwanted sex. Or, at the other extreme, do we *never* give meaningful consent to the sex we have, but do not desire? Is all the undesired sex we have, by virtue of that lack of desire, non-consensual and therefore rape? If so, then the scope of rape law has exploded exponentially, as many critics of both MacKinnon and Dworkin fear was their real intent all along. And furthermore, if so, "unwelcome sex" as distinct from rape is a null set: if sex is undesired and unwelcome, it is always non-consensual, and it is therefore rape. Let me suggest two not-so-promising, but quite prevalent, resolutions of these questions—of this subsidiary plot—and then opt for a third.

The first, less-than-promising unfolding of this story—suggested at various points in her writing by MacKinnon herself—lies in a full-throttle distrust of women's professed and felt sexual desires.<sup>202</sup> From the discovery (or re-

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202. MacKinnon writes:

discovery) of the violence and coercion in women's lives, particularly surrounding sexuality, and, likewise, from the discovery that—accordingly—women's sexual preferences and choices often tend toward the satisfaction of the desires and interests of their stronger mates, surely it is not unreasonable to infer that women's sexual appetites—women's felt desires—effectively bear the polluted mark of this oppression. Not unreasonable, perhaps, but is it accurate? *Do* women's sexual desires actually bear the polluted mark of this oppression? Where is the evidence?

Perhaps—just perhaps—the broad-based distrust of sexual desire is not warranted, even granted the case for a broad-based skepticism directed toward women's sexual choices and preferences. The violence and coercion at the core of the new plot MacKinnon has unearthed unquestionably force women into sex that is non-consensual. Less visibly, violence and coercion constitute background conditions—MacKinnon's Day One—that facilitate the expropriation of undesired, unwanted sex from women in particular transactions that may nevertheless be baldly consensual. There is no doubt in my mind that all of that non-consensual, as well as consensual but unwanted sex has undermined women's quest for equality, liberty, and human dignity. That, I have argued, is the central and vital message of Feminism, Modified. However, it does not logically follow from that central message, nor from any of the actual sexual histories Catharine MacKinnon has uncovered, nor from the activism or scholarship that her new plot has triggered, that all of that non-consensual, undesired, and unwanted sex has in some deep way reconfigured women's sexual desires or that the unwanted sex has paradoxically become an object of desire for women. It certainly doesn't follow, nor is it evidenced by those sexual histories, that some women's desire for non-conventional sex, including for sadomasochistic sex, has in any way thwarted women's political path toward full equality. There seem to be neither instrumental nor intrinsic harms in sex that is consensual and desired, no matter how non-vanilla, and no matter how "hierarchical."

The insistence that there is—the insistence, in other words, particularly when put on purely theoretical rather than empirical grounds, that women's sexual desires are themselves the root of the problem—is just a giant non-sequitur threatening to derail an incredibly worthy project. The sex prompted by women's felt desires is not what harms women. What harms women is the

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I think that sexual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self-annihilation. That is, our subordination is eroticized in and as female; in fact, we get off on it to a degree, if nowhere near as much as men do. This is our stake in this system that is not in our interest, our stake in this system that is killing us. I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest. Such a critique of complicity . . . does not come from an individualistic theory.

FEMINISM UNMODIFIED, *supra* note 13, at 54. See also FEMINIST THEORY OF STATE, *supra* note 1, at 129-131.

sex that happens in the absence of desire: the stranger rapes, marital rapes, date rapes, and violent rapes; but also the harassment, the assaults, the street hassling, the trafficking, the teenage prostitution, the child prostitution, and so on, and so on, and so on. The sex that is non-consensual *and* the sex that is consensual but unwelcome, unwanted, and undesired are *both* harmful, hurtful, oppressive, inequalitarian, self-alienating, and (not to be forgotten) painful. We should be targeting the institutions, practices, and cultural beliefs that so efficiently produce *both* protections around rape *and* all that consent to all of that sex that envelops us but that we do not desire and that objectively harms us.

At the core of the second, less-than-promising resolution—suggested by MacKinnon's current postmodern critics—lies a full-throttle distrust of women's testimony to their own violation. As discussed above, such a distrust might have two different yet overlapping roots: first, a libertine embrace of sexuality in all its guises, including when it is aggressive, domineering, and enmeshed in plays for and of power, so long as it skirts laws against rape; and second, a distrust of women's capacity for telling the truth, particularly whenever allegations of sexual assault are made,<sup>203</sup> on the grand and heroic assumption that women have so internalized societal norms against non-sanctified sexuality that they willfully or unconsciously vilify all non-marital sexual interactions as unwanted. This Halley-Schultzian story, like MacKinnon's distrustful story, is not a completely unreasonable resolution of a half-told plot. Yet, also like MacKinnon's story, it isn't warranted. Women don't seem to have a particularly strong capacity to lie about their own violation. We may impose and face greater sanction for false stories of sexual abuse than for lying generally. And surely consensual sex—the sex that is not rape—is not so demonstrably and invariably productive of so much unadulterated pleasure for all participants that we should always blindly applaud it, *even when* it is unwanted. Unwanted sex is not so harmless, nor women so deceitful, as to warrant either blanket distrust or, perhaps more to the point, a world-wide and world-weary dismissive shrug of the shoulders: "All of this is just too damned trivial for me to care, particularly if it threatens the hot pleasure of the expropriator."

A third possible unwinding of this narrative sub-plot would be truer to both the feminist and the Marxist roots of Feminism, Modified than either story told above: We should respect women's claims of unwanted sex, no matter how trivial they may sound, and we should honor (as in, *leave be*) women's felt

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203. Halley equivocates somewhat on whether she believes women are willfully lying, when making claims of sexual assault, abuse, rape, or harassment, or whether she thinks women are misconstruing facts to further their own falsely puritanical version of their own self-understanding of their own sexuality. She is clear, though, that for whatever reason, we should from here on out be skeptical of women's claims, whenever they claim sex abuse—thus, queer theory's deep departure from feminism. Halley, *supra* note 15, at 197.

sexual desires, no matter how non-vanilla. Thus, we should take very seriously—far more seriously than do the postmodern critics—not only women’s allegations of rape, but also women’s claims of unwanted, unwelcome sexual harassment, on the job and otherwise. On the other hand, we should quit taking so seriously—in fact, we should take with a sizable grain of humor—the sexual forms, including sadomasochistic forms, in which women’s felt sexual desires are manifested. If you want it, desire it, and welcome it, well then go for it, take it, or submit to it—or not—and enjoy. If you don’t want it, though, and you don’t desire it, and you don’t welcome it, but you suffer it anyway, and if you do so out of the need to work, or survive, or eat, or raise your children, or get along with your neighbors or your family or your peers or your God, then you should change course radically and, if certain legal conditions are met, you should also complain when you can—and loudly. And what of the rest of us? It seems to me we should trust a woman’s right to seek the sex she desires, and we should honor her right to resist the sex that is unwelcome, as well as the sex that is coerced.

This third plot, which tracks the law we now have, counsels the lawmaker and theorist to avoid two (I believe twinned) pitfalls: first, the over-regulation of desire—the risk at the heart of virtually all of the earlier liberal feminist critiques of Feminism, Modified, as well as a good bit of the postmodern; and second, the over-valorization of desire. There is nothing to be gained and much to lose in holding desire to the critical lamp of political rectitude. There is even more to lose, though, in holding politics to a critical lamp fueled by the content of sexual desire. Reflection on the content of our sexual desires might fruitfully inform our story-telling, our therapy, our memoirs, our fiction, perhaps our self-understanding, and certainly our gossip. It is just not clear how it can possibly inform or be reflected in our law.

By the same token, though, sex that is not desired ought to indeed be criticized and, if objectively (and convincingly) harmful, should be the predicate for legal recourse. The sexual practices and institutions within which women consent to sex they do not desire, want, or welcome, as well as the choices women make under conditions of inequality to partake in those practices and institutions, should likewise be subject to critique. The new plot MacKinnon invented, re-modified in this way, avoids both these pitfalls. It subjects not only the heretofore unseen violent rape, but also the heretofore unseen harms of unwelcome sex and the practices that produce it, to political scrutiny and, if well-specified conditions are met, to legal compensation—should that sex happen to occur at work.

Let me finish by elaborating on the powerful analogy with which MacKinnon opened *Toward a Feminist Theory of the State*. Wage labor, as Marx helped us to see, can be extraordinarily harmful, alienating, and subordinating, even though it is not slavery. Unwelcome, unwanted, and



undesired work, even that which is consensual within the terms of labor markets, can cause tremendous harm. That wage labor is consensual might make it “not slavery,” but it does not make it *good*. In a system that permits the accumulation of capital and, hence, the exploitation of laborers, it is the necessity of self-preservation, not the pleasure of productive engagement with the world's resources, that prompts a worker's consent to arrangements profoundly not in his own interest. Albeit consensual, the work is not objectively “good” for the laborer or for the society that tolerates his exploitation. That is the essential, radical message heard round the world, which emanated from Volume One of Marx's *Capital*.

Likewise, consensual sex, when motivated by necessity and self-preservation, rather than by pleasure, can objectively be tremendously harmful, de-humanizing, self-alienating, and physically injurious. The institutions and practices that structure our lives, our choices, and our sexual histories—the conditions that engender unwelcome sex in all spheres, not just employment—ought rightfully to be subject to feminist critique, no less than the institutions and practices that engender wage labor ought to be subjected to Marxist critique. That is the essential message of Feminism, Modified: The regime of consensual sex, under the sexual system for which we have no name, should in essence be subjected to the same sort of radical critique as the regime of consensual labor under the economic system called capitalism. What Marx so stunningly subjected to criticism was not slavery but, rather, the regime of consensual labor traded as a commodity for a price in capitalist markets. The new plot that Feminism, Modified introduces, likewise, focuses our critical attention on the regime of consensual sex traded for security, or perseverance, or survival, or peace of mind, in a patriarchal world. That the object of that consensual trade is unwelcome, undesired, unwanted, undesirable, and profoundly injurious is the radical insight at the heart of both Marx and MacKinnon.

The “new plot” that Marxism interjected into western liberalism, however, did not disdain the genuineness of the human being's desire to work; to impact upon the world; to interact with and reshape the given; to provide for one's dependents; to create shelter, clothing, and sustenance for oneself; to produce and enjoy art, culture, industry, transportation, high literature, or popular music; or to mix one's labor with the earth's resources. What Marx taught us to hold at critical distance was not the *desire* to work, but the undesired, unwelcome, and harmful work to which workers proffer their consent because it is essential to their survival in a world of capital and labor. He counseled skepticism of their free choices to engage in such labor, when the work is sought out by the laborer not because it is desirable, but because of its preservative promise.

Likewise, the best interpretation of Feminism, Modified pushes us to hold at critical distance the full panoply of sexual choices women make and the sexual lives to which we consent, when those lives and those choices are objectively harmful and injurious and subjectively *without* desire, *without* welcome, *without* want. When we hold this firmly in the mind's eye, we can see that the incentives, the demands, the threats, and the undermining of self-interest and self-worth that prompts those sexual lives and choices are coercive and unjust, that the lives which they create are unequal, that the "free choice" they evidence is illusory, and that the pleasures that supposedly legitimate those choices all are non-existent. The lesser quality of life, when such sex is at the center of it, is what MacKinnon's new plot directs to the center-stage of our attention. With critical inquiry thus honed, the institutions that create and protect these paltry and inhuman choices might someday be thoroughly discredited. With due help from law, the master's house may even be dismantled as well. If so, it will be done with the tools of the legal trade that, in large part due to Catharine MacKinnon's extraordinary labors, may yet belong to us all.