

## QUEER THEORY BY MEN

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In this essay I present parts—not all—of my argument that it would be good for left pro-sex intellectual and political work, including feminist work of this kind, if people doing it could occasionally Take a Break from Feminism.<sup>1</sup> The essay has four main parts and an Appendix. In Part I, I attempt a minimalist definition of feminism as it is now practiced and produced in the United States, and draw some rudimentary distinctions among various forms of feminism that fall within this definition. The basic idea here is that a minimalist definition of feminism actually maximizes the range of projects that can be described as feminist, and makes it harder to Take a Break from them. In Part II, I give an extremely cursory genealogy of feminism, gay-identity politics and queer theory. In Part III, I analyze two examples of queer theory by men. These are close readings; by that means I attempt to find with some precision the trajectory of these postmodernizing, sex-positive, left analytics of sexuality and the precise points of their debt to and departure from feminism. The basic idea here is to travel deeply into the domain that could be called queer theory and to start the journey as far as possible from feminism; it seemed to me likely (and I think it turned out to be the case) that my two male authors—one a gay man, the other a straight one—would place themselves *in relation to feminism* rather than *in it* and would therefore make manifest some conceptual and/or political possibilities for Taking a Break from Feminism (and would also give me the pleasure of identifying publicly with them and disseminating their work). In Part IV, I give

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1. This essay is part of a book in progress, *SPLIT DECISIONS: FEMINISMS, GAY IDENTITY POLITICS AND QUEER THEORY IN THE LEGAL MANAGEMENT OF SEX* (forthcoming) [hereinafter HALLEY, *SPLIT DECISIONS*]. Some parts of the argument, and of the text included here, also appear in the following essays: Janet Halley, *Take a Break from Feminism*, in *GENDER AND HUMAN RIGHTS* (Karen Knop ed., forthcoming 2004) [hereinafter Halley, *Take a Break from Feminism*]; *Roundtable on Subversive Legacies, with Karen Engle, Elizabeth Schneider, Vicki Schultz, Adrienne Davis and Nathaniel Berman*, 12 *TEX. J. WOMEN & L.* (forthcoming 2004); Brenda Cossman, Dan Danielsen, Janet Halley & Tracy Higgins, *Gender, Sexuality and Power—Is Feminist Theory Enough?*, 12 *COLUM. J. GENDER & L.* 601 (2003). I am grateful to the organizers of and participants in all the conferences underlying these volumes, and particularly to Cossman, Danielsen and Higgins for their extremely astute contributions to the Columbia symposium; the last part of this paper could not have been written without them. Thanks also to Leo Bersani and Duncan Kennedy for reading my readings of their work with such engaged intelligence. For their gorgeously intense engagement with and against the piece, thanks to Jane Gaines, Ranjana Khanna and Robyn Wiegman. For struggling through and with it without surcease, special thanks to Nathaniel Berman, Dan Danielsen, David Kennedy, and Duncan Kennedy. Thanks, finally, to audiences, colleagues, friends, lovers and opponents, too numerous to mention, who have helped me frame the overall project.

a close reading of a fascinating legal decision, *Twyman v. Twyman*,<sup>2</sup> following a “re-reading protocol” I have developed that allows highly divergent theoretical hypotheses to generate highly divergent re-readings of legal texts. The point here is to see whether there can be any conceptual upsides to re-reading the case deploying hypotheses that Take a Break from Feminism. For legal readers this section should provide whatever “payoff” they might be able to derive from all the preceding analytic work. Finally, in the Appendix I deduce from the experience of writing Part III (and of reading in the field more broadly) some maxima for queer theory, feminist and otherwise.

### I. A MINIMALIST DEFINITION OF FEMINISM, AND SOME DISTINCTIONS

Here are some observations about how feminism defines and taxonomizes itself in the United States today. I am not claiming that these attributes are essential in the sense that they are absolute or natural; rather that they are essential in the sense that current conventions seem to require them as a disciplinary matter.

First, to be feminism, a position must make a distinction between M and F. Different feminisms do this differently: some see men and women, some see male and female, some see masculine and feminine. While “men” and “women” will almost always be imagined as distinct human “groups,” the other paired terms can describe many different things: traits, narratives, introjects. However a particular feminism manages these subsidiary questions, it is not “a feminism” unless it turns in some central or core way on a distinction between M and F.

Second, to be a feminism in the United States today, a position must posit some kind of subordination as between M and F, in which F is the disadvantaged or subordinated element. At this point feminism is descriptive and not normative: M>F.

And third (here is the normative turn), feminism opposes the subordination of F. It frames itself as a justice or emancipatory project. As between M and F, and possibly because M>F, feminism carries a brief for F.

I think these attributes are noticeable in virtually every form of feminism in the United States today, and will treat them as definitional—as essential in an Aristotelian sense.<sup>3</sup>

Beyond that, feminisms can be distinguished in many ways. It has been helpful to me to suppose that about half of feminism in the United States today concerns itself with male power and female subordination in sexuality, and that the other half concerns itself primarily with reproduction, care work, work in the paid economy, and related matters. Of course these overlap, but people

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2. 855 S.W.2d 619 (Tex. 1993).

3. In Cossman et al., *supra* note 1, Higgins and Cossman convinced me that the current range of feminist possibility includes feminism that turns on M/F and that carries a brief for F, but that is not a subordination theory and does not definitionally require M>F. Instances of feminism like that are extremely rare; I think if you push hard enough, almost any currently available feminist text will eventually manifest its commitment to M>F. I attempt to articulate a feminism that doesn't go there in Part IV of this article, before Taking a Break from Feminism altogether. See *infra*, at IV.

seem more or less comfortable with treating them as the “phyla” of this intellectual kingdom.

Further, across the full range of these issues, feminism often concerns itself in very sustained ways with powers that operate not across the M/F distinction, but along the many distinctions that we refer to when we speak of “class,” “race,” and “empire.” We could call the results socialist, antiracist, and post-colonial feminisms. I like to think of these as “hybrid” feminisms, because they set out to examine (at least) two incommensurate modalities of power at once.

So assuming I can proceed with those givens, I will also note that, on the sexuality side, feminism finds itself in alliance with and in conflict with other left/liberal/progressive projects that take sexuality and power as their domain of operation but that often lack a primary focus on M/F and often do not primarily concern themselves with M>F. Chief among these are gay identity politics, transgender and transsexual politics, sex liberationism that is not primarily feminist, and queer theory. In this essay I will examine some aspects of the relationship between feminism as a theory about sexuality and power, and queer theory.

At this point (and always in the hybrid feminisms), a person framing a conceptual, descriptive, normative, and/or political project can choose between *converging* the two or more modes of conceptual or social organization or *diverging* them. That is, we could decide that normatively it would be terrible to have a theory of homosexuality that was not ultimately feminist, or a feminism that did not wholly encompass our theory of homosexuality; we would then be aiming for complete convergence. Or we could say that it is better for some reason to have some division or autonomy or even conflict between the two projects; we would then be aiming for some degree of divergence.

My overall goal in this discussion is to make a case for the proposition that divergence in left thinking about sexuality and power can get us some conceptual gains that seem unavailable from convergence. Specifically, I think we don't always need feminism in order to have meaningful left projects about sexuality. I hope to show that left/liberal/progressives can Take a Break from Feminism in their theorizing, their alliance formation, and their activism from time to time, and that the results can be (not that they must be—only that they *can* be) good, not only for projects that fall outside the domain of feminism, but for feminism, too.

There are many reasons to think this is a bad idea, and there is a large literature, that will certainly continue to grow, on the upsides and downsides. I am working on several papers and a book that will take up some of the more normative, consequentialist and discursive dimensions of this fascinating debate.<sup>4</sup> In this essay I hope it will be permissible to circumscribe my goal: I want to provide an elaboration, in a somewhat high degree of detail, of some conceptual moves that may be possible only if one pursues a divergence between feminism and queer theory as I imagine it. *Some*, not *all*; and *a*, not *the*. To be sure, if the instances of divergence that I expose here seem valuable, perhaps we will decide we want to find or produce more of them. The argument is not that the

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4. See note 1, *supra*.

convergence of feminism with queer theory is impossible or undesirable; it is merely that divergence is both possible and possibly highly valuable.

## II. FEMINISM 101 AND BEYOND

### A. Male/Female Model and Cultural Feminism

By far the most brilliant, comprehensive and forceful thinker about sexuality in American feminist legal theory for the last twenty years has been Catharine A. MacKinnon. Her formulation—which, for shorthand, I will call the “male/female model”—has become the paradigmatic understanding of sexuality in sexual-subordination feminism in the United States. The chief alternative source of descriptive and normative insights is cultural feminism.

It took me a long time to understand how profoundly MacKinnon altered several of her basic positions between 1982–1983, when *Signs* published two articles by her that fully deserve the name “radical feminist,”<sup>5</sup> and the mid-1980’s, by which time she was fully engaged as a feminist legal activist. As I show elsewhere, *Feminism Unmodified*, the 1987 volume on which most readers rely for a restatement of MacKinnon’s thought *tout court*, significantly modifies MacKinnon’s position as of 1983 on a whole array of crucial points.<sup>6</sup> All the feminists who want to resist the influence of the Late MacKinnon should consider whether their own reasons for resistance appear as *MacKinnon’s own position* in the *Signs* articles. As I see it, many of them do.

The Early MacKinnon argued that male dominance was not merely a social subordination of women by men, but an almost total capture of reality and knowledge themselves by male dominance and female subordination. Male dominance and female subordination did not merely *rank* the genders: they *produced* them (that is, the very existence of men and women may well derive from this domination), and, because they also produced the eroticization of domination by everyone so constituted, they also produced the consciousness by which we might apprehend these arrangements. Our very desire and our very modes of knowledge are inhabited throughout by the epistemology of this power structure. Men emerge as objective knowers, and women as known objects; and this turns us all on and is our basic grammar of action: man fucks woman, subject verb object. Feminism is a project in *quest for* women’s point of view, which, because it is already constituted as *its subordination*, is not only a profoundly deferred but also a deeply problematic starting place.

On this understanding, male dominance was so complete that no aspect of gender could be distinguished, ultimately, from rape. MacKinnon did not claim that every act of heterosexual intercourse was a rape. Rather, she made the

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5. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter MacKinnon, *An Agenda for Theory*]; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*].

6. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987). Part of my argument that this book represents a significant alteration in MacKinnon’s position is set forth in Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002). Other elements of the analysis will appear in *Split Decisions*, *supra* note 1.

much more interesting and subtle claim that, because of the constitutive role of male dominance and female subordination in producing all the existing people, in generating the very rudiments of our knowledge and desire, there is no one alive who can distinguish meaningfully between rape and not-rape.

I call the result a male/female model because those terms map the entire field of analytic possibility for this feminism. Male power produces female subordination, which *is* gender, which is the eroticization of this hierarchy; all of this generates rather than arises from the conceptual and social difference between men and women. The model is highly convergentist: it causes MacKinnon to say that, if a man rapes a man, the latter has been sexually dominated and is therefore feminized. The homosexuality of the event does not elude, but must rather merge into the male/female model.

All of this led the Early MacKinnon to embrace a critique of the state and of the law. The state and the law were, she proposed, *male*—not in the sense that men ran them, but in the sense that they fully recapitulated male ontological and epistemological powers and were in a sense therefore fully dependent on female subordination to be what they were. The state could not be used against something so constitutive of it as male power; and female subjectivity, which was a constitutive element of male power, provided no way out of the dilemma. Criminalizing rape would merely legitimate all the dominance in sexuality that escaped the definition of the crime; deciding particular rape cases on the basis of the woman's instead of the man's testimony merely recapitulated the subject/object, subjectivity/objectivity distinction of male dominance; asking trial courts to find that some acts of heterosexual intercourse were "rape" imputed to others a legitimacy feminism should deny them. Insight into equality and the political will to seek it could come only from consciousness-raising—the painful search for a transformation of consciousness achieved at the most micro level.

It was not too long before MacKinnon significantly departed from some of these claims. She retained the structural view of male domination: it is horizonless; it produces men and women; it relates them to each other in gender, which is eroticized domination. But by the mid-1980s she claimed to know many, many things, and to know them because women's point of view had disclosed them to her without distortion. Rape, sexual harassment, domestic abuse, pornography—all the lurid catalog of sexual nastiness—these are the core elements in male domination. *Rights* against them enforced by the state would be feminist. Women who disagree with any part of this line, MacKinnon was willing to suggest, have been co-opted by male consciousness. It is possible to deploy the Early MacKinnon against the Late.<sup>7</sup>

It also took me a long time to realize that MacKinnon has consistently refused to be a cultural feminist in the sense I use that term. To be sure, male/female-model and cultural feminism have a lot in common. Both insist on M/F, on M>F and on carrying a brief for F. Both are structural subordination projects. Both see equality as the almost-exclusive vocabulary for their justice ambitions. But while MacKinnon focuses our attention on the unjust male

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7. I am not saying that one or the other is more "right," or that MacKinnon's work is somehow less compelling just because it has evolved. I myself vastly prefer—in fact am wildly enthusiastic about—the Early MacKinnon, but that is a political decision, not a logical or moral necessity.

domination of women through *power*, cultural feminism emphasizes the unjust male derogation of women's traits or points of view or values or experiences through male-ascendant *normative value judgments*. If MacKinnon's equality project is a massive attack on power as it constructs everything, cultural feminism is an effort to transvalue values—to find women's or feminine values (like care, or intersubjectivity, or particularity) and to restore them to a place at least equal to, probably superior to, the corresponding male values (like self-interest, or objectivity, or generality) that have unjustly pushed their way to the top. Cultural feminism is not nearly as likely as MacKinnon's thinking to be structural in form: after all, women exist as exemplars of a better way; and if we could put them in charge, or make men more like them, things would get better fast. But it is equally ambitious on the social dimension it cares about: MacKinnon would like to get men by the balls because she does not believe their minds and hearts *can* follow; whereas cultural feminism has detailed plans for their hearts and minds. Cultural feminism is a fighting faith seeking the moral conversion of a little less than half the human race.

Both the male/female model and cultural feminism support women's identity politics. That is, they see women as a human identity group with a common problem—subordination to men. Though cultural feminism roughly speaking divides its attention between the cultural re-valuation of women's distinctive relationship to care and the cultural re-valuation of women's distinctive engagement in sexuality, when it focuses on sexuality, cultural feminism agrees with the male/female model in characterizing male sexuality as a vast social problem. Women are the client base of these feminisms, and women are the people they would help first if they had to pick. M/F, M>F, and carrying a brief for F.

#### B. Gay Identity Politics, Sex-Positive Feminism, Postmodernism, Queer Theory

At the same time that these sexual-subordination feminisms were developing themselves as important elements in American legal thought and practice, another identity-based movement became important in the United States: homosexuals. They (we, actually) borrowed a lot of ideas about how to have an identity movement from the black civil rights movement (as did feminism), but the focus of my story here is the way the gay movement borrowed ideas about having a *subordinated-sexuality movement* from feminism. Roughly speaking, gay identity politics in the United States can be construed to take forms resembling the common elements of the male/female model and cultural feminism: homosexuals are a real social group subordinated in sexuality to heterosexuals; justice requires ending that form of social ranking. Moreover, gay identity movements tend to take either a MacKinnon-like form, looking with a wary eye for traces everywhere of heterosexual dominance and seeking its overthrow; or a cultural-feminist-like form, emphasizing the moral virtues of homosexuals and seeking their normative inclusion in the center.

To be almost unbearably reductive, three things happened "then." First, AIDS. In the United States, AIDS first emerged as an epidemic among gay men. For about ten years starting in the early 1980s, the death toll—a youthful population then fomenting ecstatic politics of sexual liberation and otherwise expecting to live for decades—was a huge social fact. Social conservatives and defenders of heterosexual virtue quickly stigmatized the epidemic as the prod-

uct of “gay male promiscuity”—a move which put to gay-identity movements the question whether they could continue to affirm sexual liberation as a defining goal. Gay centrism moved towards marriage rights, and gay liberationism moved towards sexual liberty and the world-making (bathhouses, elaborate sexual subcultures, and so on) that might sustain it; the movement split, intellectually and politically.

Second, MacKinnonite feminists and cultural feminists began in the early 1980s to converge on some fairly specific targets of activism—rape and other forms of direct violence, pornography, intergenerational sex, sex between social unequals (for example, boss/secretary, teacher/student), sex in public—as leverage points for the de-subordination of women.<sup>8</sup> They formed important alliances with social and religious conservatives morally opposed to these practices, and together these allies made significant progress in articulating and enforcing legal sanctions against a wide array of sexual relations. This simultaneous turn “to the state” and “against sex” broke alliances between MacKinnonite and cultural feminists on the one hand and radical, sexual-liberationist feminists on the other. The result was the “sex wars.” In them, the radical, sexual liberationist feminists precipitated abruptly and with great energy *out* of male/female-model and cultural feminism, and, looking back to the radical feminist sources from which MacKinnon’s early work emerged, formed a distinct “sex-positive” feminism specifically *in struggle with* Late-MacKinnonite and cultural feminism.

Where sex-positive feminism and sex-liberationist gay male politics came into contact with each other, there was a third element: postmodernism arrived on the United States intellectual scene, bringing with it a whole array of new (to the left/liberal United States intelligentsia) brainwaves. The antifoundational, libertine, irrationalist, ecstatic, antimoralistic tendencies in postmodernism provided powerful new insights that seemed to promise a return to critical and radical potential. The postmodern critique of the enlightenment subject brought the already uneasy fit between identity politics and liberal individualism into question. The postmodern emphasis on subject formation rather than brute domination as the really trenchant application of power to persons called into question the subordination paradigm. The postmodern critique of deontological moral claims and, in particular, of the dignified liberal individual as historical and political artifacts called into question the sufficiency of moral outrage and individual or group dignity as a basis for political work. Where identity *and* subordination *and* moralism come under left critique, we find a rich brew of pro-gay, sex liberationist, gay-male, lesbian, bisexual, transgender, and sex-practice-based sex-radical, sex-positive, anti-male/female model, anti-cultural-feminist political engagements, some more postmodernizing than others, some feminist,

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8. For some moments in MacKinnon’s turn to the state, see *Indianapolis Ordinance, 1984*, in *HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARING 438* (Andrea Dworkin & Catharine A. MacKinnon eds., 1997); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *MACKINNON, FEMINIST THEORY*]; Catharine A. MacKinnon, *Not a Moral Issue*, 2 *YALE L. & POL’Y REV.* 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 *HARV. C.R.-C.L. L. REV.* 1 (1985); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 *MICH. J. GENDER & L.* 13 (1993); Catharine A. MacKinnon & Ronald Dworkin, *Pornography: An Exchange*, in *THE NEW YORK REVIEW OF BOOKS*, Mar. 3, 1994, 47-48, *reprinted in FEMINISM AND PORNOGRAPHY* 121-29 (Drucilla Cornell ed., 2000).

others not. The term “queer theory” is often invoked to describe this complex array of projects.

I argue here that a very rich and valuable piece of the resulting politics Takes a Break from Feminism. This is not at all to deny or to describe in any way the *feminist* possibilities that emerge in the astonishingly complex political, intellectual and theoretical array I describe as queer theory. My goal in these pages is simple (though I admit the analysis is somewhat detailed): I want to test for conceptual and political openings that suspend feminism at the intersections of postmodernism, gay male politics, pro-sex leftism, and so on.

Often this move has been misunderstood to be anti- or post-feminist. This misunderstanding is a very interesting symptom of some of the current weaknesses, as I see them, in feminism, and in other related papers I devote considerable attention to the argument structures that support it. Here I will only say that Taking a Break from Feminism is anti- or post-feminist only if feminism *requires* convergentism on all matters relating to sexuality; that is, if M/F, M>F, and carrying a brief for F *must* be the ultimate ground of all work in this wide and politically, historically and intellectually riven domain. The premise of this criticism of my project *must be* that feminism, far from requiring only M/F, M>F and carrying a brief for F, also requires that those terms (or perhaps some of them) are structurally definitive of all of sexuality. That is a huge claim, and I would be surprised if many feminists were willing to follow it to its structuralist premises.

### III. QUEER THEORY BY MEN

Onward then. I have selected two texts, both written specifically from the point of view of male authors who insist on their sexual interests in the face of feminist denunciation. The homologies between them are even more remarkable given the facts that one articulates a gay male, the other a heterosexual male, sex-positive position, and that one is structured around a crisis in normativity while the other reveals a crisis in decision. I am referring of course to Leo Bersani’s 1987 essay *Is the Rectum a Grave?*,<sup>9</sup> and Duncan Kennedy’s 1992 article *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*.<sup>10</sup> The former is widely read as canonical queer theory; the latter is—sorry, folks!—the only sophisticated *legal* analysis of American sexual regulation that I am tempted to call queer.

#### A. Is the Rectum a Grave?

In this celebrated essay, Bersani reconfigured Stonewall-era gay male sexual liberation for the era of AIDS. He asked gay men whether their then-overwhelmingly-distinctive exposure to the epidemic would lead them in the direction of gay-identity liberalism of the sort exemplified in legal studies by the

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9. Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197 (1987), *reprinted in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 197 (Douglas Crimp ed., 1988).

10. Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309 (1992), *reprinted in* DUNCAN KENNEDY, SEXY DRESSING ETC. 126 (1993). I will refer to the essay throughout as *Sexy Dressing*.

work of William Eskridge (marriage, monogamy, and equality as equal respect) or back to the bathhouse; whether they would disavow or find new affirmations of male/male promiscuity, what Bersani would later call male “love of the cock,”<sup>11</sup> gay men’s yearning for male/male anal sodomy, and the peculiarly intense new association of sex with death. Bersani urged the second, sex-affirmative option.

In affirming sex, however, Bersani performed an unusually strongminded embrace of abjection. The essay begins<sup>12</sup> with angry reflections on the intense homophobic mobilization against gay men that attended the early years of the AIDS epidemic in the United States (it is helpful to remember that people seriously proposed “chemical castration” and quarantine of gay men to protect “the general population” from the virus) and finds both in them *and* in gay male sexual desire a homophobic and misogynist association of gay male anal receptivity with female sexual subordination. Bersani is interested to show that, in misogyny, in anti-gay-male homophobia, *and* in gay male erotic longing, the vagina and the anus are figured as sexually insatiable and as animated erotically by a desire for annihilation. Bersani observes an agreement between Michel Foucault, who at one point affirmed that “[m]en think that women can only experience pleasure in recognizing men as masters,”<sup>13</sup> and MacKinnon, who decried “the male supremacist definition of female sexuality as lust for self-annihilation.”<sup>14</sup> He then adds his own affirmation that this lust is an aspect of gay male eroticism. In these moves, Bersani takes MacKinnon’s gay-male-feminization argument to fever pitch.<sup>15</sup> He fully accepts—as a *pro-gay male description* of “the hygienics of social power”—the proposition that “[t]o be penetrated is to abdicate power.”<sup>16</sup>

11. LEO BERSANI, *HOMOS* 103 (1995).

12. I am going to analyze *Is the Rectum a Grave?* in the present tense—the Bersani who “speaks” in these pages is the Bersani implied by the text as understood by me—so it is all the more important to note not only that it was written *before* the critique of feminism, offered by Judith Butler and Eve Sedgwick almost simultaneously in 1981, but also that, to the extent that it relied on and confirmed M/F, it was in some fundamental sense *heterosexual*. See JUDITH BUTLER, *GENDER TROUBLE* 27-35 (1990) [hereinafter BUTLER, *GENDER TROUBLE*]; EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22-23 (1990). I argue in *Split Decisions*, *supra* note 1, that Butler represents the route from this crisis back *into* feminism; that Sedgwick represents a route I describe here as Taking a Break from Feminism; and that both routes are largely constitutive of gender-related queer theory as practiced so far. Bersani reformulated and extended his 1987 argument in light of Sedgwick’s and Butler’s work and related developments in feminism, postmodernism and elsewhere, and also expressed a different understanding of the political stakes of his project, in his 1995 book *HOMOS*, see *generally* BERSANI, *supra* note 11, and he further reformulated his understanding of the self and its masochism in *Sociality and Sexuality*, 26 *CRITICAL INQUIRY* 641 (2000).

13. Michel Foucault, *Sexual Choice, Sexual Act: An Interview with Michel Foucault*, 58 *SALMAGUNDI* 10, 21 (1982).

14. MACKINNON, *FEMINIST THEORY*, *supra* note 8, at 212 (1989).

15. Bersani’s images are pretty gripping. In both the Victorian representation of female prostitution and the contemporary representation of gay male transmission of HIV, “[w]omen and gay men spread their legs with an unquenchable appetite for destruction.” Bersani, *supra* note 9, at 211. Homophobia was motivated to exile hemophilic Ryan White because it supplanted the image of his childish innocence with “the infinitely more seductive and intolerable image of a grown man, legs high in the air, unable to refuse the suicidal ecstasy of being a woman.” *Id.* at 212.

16. *Id.*

That acceptance manifests a decided appetite for paradox and the problematic. Bersani admires in MacKinnon's thought precisely her "indictment against sex itself."<sup>17</sup> He treasures in her work a capacity to hold the power in sex under a steady, unblinking gaze:

[MacKinnon and Dworkin in their antipornography analysis and activism] have given us the reasons why pornography must be multiplied and not abandoned, and, more profoundly, the reasons for defending, for cherishing the very sex they find so hateful. Their indictment of sex—their refusal to prettify it, to romanticize it, to maintain that fucking has anything to do with community or love—has had the immensely desirable effect of publicizing, of lucidly laying out for us, the inestimable value of sex as—at least in certain of its ineradicable aspects—anticoncommunal, antiegalitarian, antinurturing, antiloving.<sup>18</sup>

What could Bersani be thinking? How could one have a normative vision of human life (or any part of it) that *wants it to be* "anticoncommunal, antiegalitarian, antinurturing, antiloving"?

The argument is both descriptive and prescriptive, and I will attempt to lay it out as if these were distinct "parts" (in Bersani's essay they are not distinguished). The descriptive argument has wonderful simplicity. Bersani claims that we all already do have such a vision, that it animates an important part of our erotic desires, that it cuts sex off from politics as usual in a deeply radical way, and that we shouldn't shoot the messenger. To anchor this argument, Bersani draws from Freud the idea that the very possibility of human selfhood emerges in the "shifting experience that every human being has of his or her body's capacity, or failure, to control and to manipulate the world beyond the self."<sup>19</sup> And it runs even deeper than that: the "human being" who aspires to a relationship of control over "the world beyond the self" experiences "his or her body" as ambiguously the self and/or the world: "the sexual . . . involv[es] . . . the source and locus of every individual's original experience of power (and of powerlessness) in the world: the human body."<sup>20</sup> Sexuality broadly conceived is a special domain of human experience, one in which a profoundly inchoate, constitutive, infantile but inescapable narrative of the unstable wish both for mastery and dissolution is continually in play, never subject to closure. Bersani thus insists that the self has a double relation to mastery: it both comes into being through, or as, mastery (over the body, over the social world); and does so at the expense of an ideal state of dissolution into the body, into the social world, which it retains as a memory of its origin and goal. And in it the penis has a distinctive symbolic relation to mastery. "The penis" does not bestow mastery on men—far from it; "the idea of penis envy describes how men feel about having one"<sup>21</sup>—but rather presents—for gay male and heterosexual interactions at least—a bodily correlate especially capable of representing (perhaps sometimes by mocking) the desire of every self for mastery over the body and of every embodied self for mastery over the world.

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17. *Id.* at 214.

18. *Id.* at 215.

19. *Id.* at 216.

20. *Id.* at 221.

21. *Id.* at 216.

And yet (or should I say, perhaps, “and so”?) there is also dissolution, and that is a distinctive part of sexual experience. The “*jouissance* of exploded limits,” the deep savoring of “that sexual pleasure [which] occurs whenever a certain threshold of intensity is reached, when the organization of the self is momentarily disturbed by sensations or affective processes somehow ‘beyond’ those connected with psychic organization”—for Bersani these are so characteristic of the orgasmic aim that he is led to propose that “[s]exuality . . . may be a tautology for masochism.”<sup>22</sup> It is precisely phallocentrism which has engineered discursive limits which make it almost impossible for our publicly respectable selves to do anything with that last sentence but disavow it:

Phallocentrism is . . . not primarily the denial of power to women (although it has obviously also led to that, everywhere and at all times) but above all the denial of the *value* of powerlessness in both men and women. I don’t mean the value of gentleness, or nonaggressiveness, or even of passivity, but rather of a more radical disintegration and humiliation of the self.<sup>23</sup>

Obviously this argument depends heavily on, and to some extent reenacts, male/female-model feminism. Most explicitly, Bersani lays hold of MacKinnon as to a lifeline. On sexuality, on dominance, and on desire, he is MacKinnon all over again: he fully embraces her theory of sexuality as power, and as constitutive of the self through the modalities, not of Kantian subjectivity, but through and as sheer domination; he pushes us back to her early idea that in the eroticization of domination we experience the unspeakable thrill of encountering our own metaphysical and experiential dissolution. He does not see *gender* in anything like the same way, however: the strong link he draws between the penetrable vagina and the penetrable anus leaves implicit one feature of gay male erotic life that escapes MacKinnon’s resentful analysis of gay male eroticism. For Bersani the “love of the cock” (the cock that one has, that one wishes one had, that that man over there has or might have) simply never goes away. And MacKinnon was a subordination-theory structuralist throughout her management of the male/female model, whereas for Bersani the project is to fracture the structural totalism of male/female model feminism and, picking among the pieces, to redeem for euphoria some of the most apparently irredeemably dysphoric elements of her sexual world.

I have been tempted to say Bersani “flips” the male/female model, but, because of this fracturing, his procedure is something more akin to *bricolage*.<sup>24</sup> Still, within that fractured frame, we could say Bersani offers us a classic example of the “perverse” in queer argumentation: there is a peculiar torque, a strong and nasty reversal, in Bersani’s agreement that phallocentrism is a social calamity because it blocks *men’s* access to the “humiliation of the self” *enjoyed* by women.<sup>25</sup> But even if fragmentary and self-consciously paradoxical, his affirmation of MacKinnon’s feminist analysis of the eroticization of domination always reverses (and thus reveals) his normative judgment: not bad but good.

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22. *Id.* at 217.

23. *Id.*

24. See CLAUDE LÉVI-STRAUSS, *The Science of the Concrete*, in *THE SAVAGE MIND* 1, 1-33 (1966).

25. For my own modest etymology of “perversion” as a term of approbation, see Janet Halley, *In Memoriam: David Charny*, 114 *HARV. L. REV.* 2232 (2001).

Though initially, therefore, *Is the Rectum a Grave?* seems utterly opposed to and “outside” cultural feminism—one of the pleasures of reading it, for me, is imagining the indignation and offense it probably arouses in cultural feminist readers—it repeats the central trope of cultural feminist moralism. There is something good in sex, something that has been devalued, and the reform project is to revalue it back “up”—if not “over” its competitor value, at least “equal” to it. That is, cultural feminism and Bersani are engaged in serious combat over the value of degradation and human erasure in sex: cultural feminism says these have been overvalued because they have been allocated exclusively to women; Bersani replies that they have been vastly undervalued *through* their association with women. But Bersani and cultural feminists agree, it seems, that the combat is waged on the field of “value”—a field which MacKinnon pushed over and beyond the horizon of her understanding.

Is there anything left that is not feminist in Bersani’s invocation of sexual erasure? I can think of two things. First, *Is the Rectum a Grave?* intervenes in a specifically *gay male* political crisis, to push interests that are not necessarily those of women, gay or straight. These are the interests of *gay men*: on their behalf, Bersani reproaches Foucault for leaching gay male identity of its sexual specificity.<sup>26</sup> It really does matter for Bersani whether one is a man or a woman, gay or straight; this is not because these identities are a source of authenticity and dignity, but because they provide distinctive inroads into the dissolution of the very self that would bear them.<sup>27</sup> Thus, although Bersani concedes that male masculinity may be “socially determined,” he insists that it is nevertheless of crucial importance to the projects of male sexual desire and, even more to the point, of male/male sexual desire;<sup>28</sup> it provides for men a peculiarly intense vocabulary in which to seek the frenzy of dissolution. So the essay *Takes a Break from Feminism* in the everyday political sense that it is not primarily “for” women.

Nevertheless, as we have seen, at every crucial turn Bersani claims his theory of sexuality for “men *and* women.”<sup>29</sup> We have already encountered the virtual equation, in his psychic economy of dissolution, of the gay male anus with the heterosexual female vagina. Gay men, and men generally, have full psychic

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26. In *THE HISTORY OF SEXUALITY, VOLUME ONE* and numerous essays and interviews, Foucault evinced what I like to describe as a “post-identitarian yearning”—a desire to understand and inhabit sexuality without the strictures of identity—male or female, gay or straight—and without the strictures tying it to crescendo narratives teleologically aimed at fucking and at orgasm. See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME ONE: AN INTRODUCTION* (Robert Hurley trans., Oxford Univ. Press 1978) (1976). The shorthand for this desire, both descriptive and utopian, is the term “bodies and pleasures,” under which Foucault organizes some of his ideas about resistance at the end of *Volume One*. *Id.* at 157, 159. I argue in *SPLIT DECISIONS*, *supra* note 1, that the deep response we have seen in U.S. queer theory to this aspect of Foucault’s work animates the “trouble” over identity which can be found in Butler and Sedgwick’s work referred to above, see *supra* note 12; controversy over it pervades the queer field. Bersani’s argument here is an early entry in an intellectual and political rumble that’s not over yet.

27. In *HOMOS*, *supra* note 11, at 31-76, Bersani later reaffirmed the distinctive status of male and gay male sexuality especially with respect to the penis, masculinity, misogyny, etc., and resisted Sedgwick’s and Butler’s queer anti-identitarianism.

28. Bersani, *supra* note 9, at 209.

29. *Id.* at 222.

and political access to the abjection in sexuality which feminists attribute (Bersani would say, with veracity, and enviably) to women (though men reach it through broken denial and women through denied appetite), because access to that abjection is a distinctive virtue of *sexuality generally*. He conversely also insists that women, heterosexual men, and gay men too, have access to the will to dominate that introduces the self into its being. The crux of the theory—one he derives from his most important nonfeminist theoretic source, Freud—seems to be the infantile psyche confronting, not a sexed or gendered body, but “the” body as an object of erotically crucial but unsustainable mastery—“the sexual . . . invol[es] . . . the source and locus of every individual’s original experience of power (and of powerlessness) in the world: *the human body*”<sup>30</sup>—and the embodied self confronting “the world” with the same anxious need. In this narrative, gender is temporally and analytically secondary; primacy is given to a complex associating a string of mobile dyads (self/body, embodied self/outside world, mastery/dissolution); and annihilation though the anus or the vagina is annihilation still. This formulation definitely Takes a Break from Feminism in the sense that it stakes sexuality to something *other than* M/F.

My exposition of Bersani’s argument thus far has limited itself to its affirmation of a shamed desire and a shamed pleasure because they *are* a desire and a pleasure: it’s as if he had said “we desire it, and love it when we get it, so it’s good.” But Bersani goes further, to lay out a moral politics that *justifies* this desire. This will seem paradoxical to readers familiar with the essay, because in one sense Bersani offers a dark view of the value of sexual desire precisely in order to renounce any possibility of its smooth incorporation into liberal politics and into subordination-theory identity politics of all kinds (feminist, gay and race-based). In this Bersani is an extreme “divergentist,” insisting that the form and value of power in sexual abjection are unique to it, nonhomologous to and analytically nontransferrable to other forms of power. The central goal of *Is the Rectum a Grave?*, as Bersani persistently notes, is to figure out “the extremely obscure process by which sexual pleasure *generates* politics.”<sup>31</sup> He rejects gay-subordination theories *of the sexual* precisely for what I dub their convergentism. He is particularly anxious to scotch gay utopian dreams that “sexual inequalities are predominantly, perhaps exclusively, displaced social inequalities”:<sup>32</sup> because sexual experience is *primordially* about the struggle of the self for mastery over the body and the world, it cannot *derive* its paradoxes of power from the social subordinations, “as if . . . [it] were, so to speak, belatedly contaminated by power from elsewhere.”<sup>33</sup>

Bersani thus argues that the power that infuses sexuality is quite discontinuous with social power of the sort emphasized in left-multicultural subordination theories. The dark side of sexual experience, especially perhaps male/male sexual experience, *is different*. He takes it as a given that blacks as a group, women as a group and the poor as a group are socially subordinated to whites, men and those with material means; he affirms as his own the normative

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30. *Id.* at 221 (emphasis added).

31. *Id.* at 208.

32. *Id.* at 220.

33. *Id.* at 221.

ambition to resist these social hierarchies. But he carefully un-performs what has become a classic left trope at this point in the analysis, of asserting that one writes on behalf of “sexual minorities” implicitly “like” blacks, women, and the poor and thus smoothly solidarized with them. This is a convergentist impulse, and Bersani resists it. And in the course of this refusal he achieves an unusually high number of politically incorrect *bon mots*: far from serving as an example of “Whitmanesque democracy,” gay male bathhouses are (were?) “one of the most ruthlessly ranked, hierarchized, and competitive environments imaginable”;<sup>34</sup> the parody of women and femininity that pervades gay male camp, far from subverting gender norms, is “a way of giving vent to the hostility toward women that probably afflicts every male.”<sup>35</sup> Male homosexual pleasure does not track directly into antistubordination politics: “To want sex with another man is not exactly a credential for political radicalism”; AIDS surprised gay men, the vast majority of whom otherwise expected to live their lives “without modifying one bit their proud middle-class consciousness or even their racism”;<sup>36</sup> in suggesting otherwise “we have been telling a few lies.”<sup>37</sup>

Instead, Bersani forces to a limit the split between the social and the sexual:

“AIDS,” [Simon] Watney writes, “offers a new sign for the symbolic machinery of repression, making the rectum a grave.” But if the rectum is the grave in which the masculine ideal (an ideal shared—differently—by men *and* women) of proud subjectivity is buried, then it should be celebrated for its very potential for death.<sup>38</sup>

Wow—the rectum—it’s *dark* in there. So dark that Bersani launches a critique of Foucault and MacKinnon for being too sunny! In MacKinnon’s utter and complete disaffirmation of the power that constitutes male dominance, female submission and their subsumption in and as the sexual, Bersani sees an implicit affirmation of sex without it: “What bothers me about MacKinnon and Dworkin is not their analysis of sexuality, but rather the pastoralizing, redemptive intentions that support the analysis.”<sup>39</sup> And he rejects Foucault’s “bodies and pleasures” ambitions as no less pastoral, recommending instead an enthusiastic plunge into the specific intensities of those eroticized parts of the body—especially the penis, anus and vagina—from which Foucault wished to “untie” sexuality.<sup>40</sup> I think Bersani here misses the horizonlessness of male dominance in MacKinnon’s *Signs* articles, the critique of consciousness there—in sum the *radicalness* of the theory (though he may refer to some ameliorative pronouncements in her later, law reform mode). And on the Foucaultian side, he misses the procedural, almost heuristic, quality of the “bodies and pleasures” agenda suggested by Foucault in his own deep critique of consciousness at the end of

34. *Id.* at 206.

35. *Id.* at 208.

36. *Id.* at 205.

37. *Id.* at 206.

38. *Id.* at 222 (quoting SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS, AND THE MEDIA* 126 (1987)).

39. *Id.* at 215.

40. *Id.* at 219–20.

*Volume One* (though he does refer to some quite complacent formulations Foucault elsewhere offered the gay press.)

Much more plausibly, the pastoralizing models of sexuality he's concerned about come from the gay identity project in its "cultural-feminist" mode. There, and also in some early sex-wars defenders of lesbian sadomasochistic sex, Bersani locates "a hidden agreement about sexuality as being, in its essence, less disturbing, less socially abrasive, less violent, more respectful of 'personhood' than it has been in a male-dominated, phallogentric culture."<sup>41</sup> The flip side of Bersani's failure to notice the deeply critical stance taken by the Early MacKinnon and in Foucault's *Volume One* is his indifference to his own repetition of the basic argumentative trope of cultural-feminist gay identity arguments. Those arguments basically urge that the oppressed, highly distinctive sexuality, however despised and subordinated, is actually a site of equal, possibly superior *virtue*. Though neither the Early MacKinnon nor the Foucault of *Volume One* could imagine sexual politics in these terms, Bersani's essay pervasively does so. The shattered self strives to capture political virtue, a paradoxical argumentative trajectory that produces Bersani's feminism at its most sublime. Here's how it happens . . .

The self-shattering which Bersani finds in our sexual intensities is to be valued as a *political* project because it gestures to a state of being in which the self/other structure of social life is suspended and the political will to dominate rendered inarticulate and helpless. The social and the political *inevitably* involve domination or at least the struggle for it, but sexuality has a fleeting existence prior to and free of them: "For it is perhaps primarily *the degeneration of the sexual into a relationship that condemns sexuality to becoming a struggle for power.*"<sup>42</sup> MacKinnon, not Foucault: social power is *puissance* not *pouvoir*, bad not neutral (or good). In seizing it, the self inserts itself inescapably into the mutually constitutive pairing of purity and brutality, virtue and sheer domination, arrogating one and alienating the other. Whereas we could try to see "[t]he self [as] . . . a [mere] practical convenience," instead we allow it to be "promoted to the status of an ethical ideal, [where] it is a sanction for violence."<sup>43</sup> The basic structure of this idea is deconstructive: in the articulation of brutality through its opposite (purity), of domination through its opposite (virtue), and vice versa, the self makes itself both a moral force and a deadly one.

But as we have seen, that deadly force is precisely what Bersani proposes we should grant his dark vision of sexual *jouissance* and his own moral advocacy for it. He argues that the very self respect which, in liberal theory, is supposed to check social subordinations in the sexual domain—homophobia, misogyny and sexual moralism being his examples—actually produces them and every form of power struggle. They cannot be traced to mastery or submission, but to the self which would transcend its own relentless problematic. Sexual abjection with its momentary disorientation of the self offers to interrupt this generation of social dominance through the self, and constitutes a vast critique of political and social power. Indeed, gay male abjection is situated with enviable precision

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41. *Id.* at 215.

42. *Id.* at 218.

43. *Id.* at 222.

exactly at the nexus of masculinity and *heterosexism* and thus may offer redemption not only from homophobia, but also from sexism:

An authentic gay male political identity therefore implies a struggle not only against definitions of maleness and of homosexuality as they are reiterated and imposed in a heterosexist social discourse, but also against those very same definitions so seductively and so faithfully reflected by those (in large part culturally invented and elaborated) male bodies that we carry within us as permanently renewable sources of excitement.<sup>44</sup>

The claim is only ostensibly gay supremacist; more accurately, it is abjection supremacist and ultimately convergentist at the highest level. It bids to be a sweeping critique of social dominance, of which male dominance of women becomes only one example, and thus to be more feminist than feminism.

This explains why Bersani's critique of social violence does not undermine even a little his own deployment of social violence. His analysis of homophobia, racism, sexism, and pastoralism are full of certainties, moral denunciations, and mandatory affirmations. The convergence of the political with the moral becomes important early in the essay, and, as I've indicated, basically adopts a certain cultural feminist style of political antistatist thinking.<sup>45</sup> The essay's moralistic violence emerges early, as Bersani attempts to evade the strictly paradoxical implications of its delightful first line: "There is a big secret about sex: most people don't like it."<sup>46</sup> Later in the essay he will need all the paradoxical power of Freud's theory of the self, constituted in the tension between mastery and dissolution, to explain the aversion packed into desire. But here in the opening pages, Bersani attempts to *distinguish* benign from malignant aversion to sex: we should affirm our own dysphoric experience of sex, especially male/male homosexual sex, because it is benign; and condemn the social manifestation of it in anti-gay sentiment, because, although propositionally identical, the latter is malignant. A fully queered and critical engagement with this problem would admit, I think, that the very distinction between benign and malignant is constitutive of sexual moralism and cannot be relied on to resolve the problematics of shamed desire. But that is not Bersani's approach here. Instead, he proceeds as though, faced with the homophobia that animated "the general population" in the early days of the AIDS crisis, one can easily decide what to condemn and why: "morally, the only *necessary* response to all of this is rage."<sup>47</sup> Gay men in the HIV crisis are "[f]requently on the side of power, but powerless; frequently affluent, but politically destitute; frequently articulate, but with *nothing but a moral argument* . . . to keep themselves . . . out of the quarantine camps."<sup>48</sup> Bersani never actually articulates the moral argument, but the indignant urgency of his tone strongly suggests he doesn't have to because it's obvi-

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44. *Id.* at 209.

45. Bersani evidently became critical of this moment in his work; the moves I am about to describe are almost completely absent from *Homos*, which frames the relationship between the erotic and the political in much more oblique and minoritizing terms. See BERSANI, *supra* note 11.

46. Bersani, *supra* note 9, at 197.

47. *Id.* at 201.

48. *Id.* at 205.

ous. Implicit in this kind of argumentation is a threat: if *you* don't *also* already know the moral argument, you must be *very very* anti-gay.

Bersani tracks certain forms of feminism in another way as well. One of the most breathtaking tropes in MacKinnon's structuralist rhetoric, as well as in those dark cultural feminisms that take patriarchy as a transhistorical truth, is the simple word "and." Rape *and* pornography *and* sexual harassment *and* domestic abuse *and* prostitution *and* "trafficking in women" *and* marriage *and* makeup *and* the Boy Scouts—they are all mere *instances* of the structure of male dominance and are basically all alike. Following Judith Butler, we could designate this basic trope the *copula*;<sup>49</sup> following Sharon Marcus we could call it the fallacy of the "collapsed continuum."<sup>50</sup> It is the rhetorical form of many of MacKinnon's most breathtaking statements: "Socially, femaleness means femininity, which means attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms. What defines woman as such is what turns men on."<sup>51</sup> The tendency is, if anything, more pronounced in her later work. For instance:

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49. Judith Butler, *Against Proper Objects*, in *FEMINISM MEETS QUEER THEORY* 1, 12 (Elizabeth Weed & Naomi Schor eds., 1997) [hereinafter Butler, *Against Proper Objects*] ("MacKinnon's view of feminism is one which makes free use of the copula in which causal relations are elliptically asserted through the postulation of equivalences, i.e. within the structures of male dominance, conceived exclusively as heterosexual, sex is gender is sexual positionality.")

50. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385, 389 (Judith Butler & Joan W. Scott eds., 1992). Marcus offers a critique of the feminist modeling of a rape on a "collapsed continuum" which

links language and rape in a way that can be taken to mean that representations of rape, obscene remarks, threats and other forms of harassment should be considered equivalent to rape. . . . In a "continuum" theory which makes one type of action, a verbal threat, immediately substitutable for another type of action, sexual assault, the time and space between these two actions collapse and . . . rape has always already occurred. . . . [But] occlud[ing] the gap between the threat and the rape . . . [risks closing] the gap in which women can try to intervene, overpower and deflect the threatened action.

*Id.*

51. MacKinnon, *An Agenda for Theory*, *supra* note 5, at 530-31. The quoted passage sums up an even more capacious list:

If the literature on sex roles and the investigations of particular issues are read in light of each other, each element of the female *gender* stereotype is revealed as, in fact, *sexual*. Vulnerability means the appearance/reality of easy sexual access; passivity means receptivity and disabled resistance, enforced by trained physical weakness; softness means pregnability by something hard. Incompetence seeks help as vulnerability seeks shelter, inviting the embrace that becomes the invasion, trading exclusive access for protection . . . from the same access. Domesticity nurtures the consequent progeny, proof of potency, and ideally waits at home dressed in saran wrap. Woman's infantilization evokes pedophilia; fixation on dismembered body parts (the breast man, the leg man) evokes fetishism; idolization of vapidty, necrophilia. Narcissism insures that woman identifies with that image of herself that man holds up: "Hold still, we are going to do your portrait, so that you can begin looking like it right away." Masochism means that pleasure in violation becomes her sensuality. Lesbians so violate the sexuality implicit in female gender stereotypes as not to be considered women at all.

Socially, femaleness means femininity, which means attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms. What defines woman as such is what turns men on.

*Id.*

Because pornography affects all women and connects all forms of sexual subordination, so does [MacKinnon's favored discrimination-based legislative attack on pornography]. . . . The way subordination is done in pornography is the way it is done in prostitution is the way it is done in the rest of the world: rape, battering, sexual abuse of children, sexual harassment and murder are sold in prostitution and are the acts out of which pornography is made.<sup>52</sup>

To make distinctions is to be fooled by male dominance; as between the various items assembled here, there is no difference that any living human being has an adequately "raised" consciousness to discern.

Borrowing the *copula* from MacKinnon's structuralism (or perhaps from cultural feminism, which, in its stronger "patriarchy" forms, is equally prone to it<sup>53</sup>), Bersani collapses into a single monolithic oppression quite disparate and possibly distinguishable political events. In the most sweeping example, he argues that, when federal public health officials proposed mandatory reporting and registration of the name of anyone who tested positive for HIV, they demonstrated that they "might not find the murder of a gay man with AIDS (or without AIDS?) intolerable or unbearable"; and that makes them *just like* German citizens who, in the runup to the Holocaust, "failed to find the idea of the holocaust unbearable"; and that makes mandatory registration of HIV-positive patients or, indeed, any other policy initiative regulating rather than benefitting the HIV-positive population *just like* the Holocaust: "by relegating the protection of people infected with HIV to local authorities, [officials] are telling those authorities that anything goes, that the federal government does not find the idea of camps—or perhaps worse—intolerable."<sup>54</sup> Let us leave aside the Holocaust analogy, which is a convergentist trope to be sure, but not exactly my focus just now: the thing I'm interested in here is the "collapsed continuum," the *copula*, *within* pro-gay-male argumentation. Along that axis, a policy decision to have local rather than federal officials decide HIV policy *is the same* as a policy decision to establish a registry (a federal one, we might note) listing people who test positive for HIV *is the same* as a willingness to murder an HIV-positive gay man *is the same* as a willingness to murder any gay man *is the same* as a willingness to put all gay men in camps and thus *is the same* as a willingness to kill them all in a genocidal paroxysm.

This instance sounds hectic today only because the panic that produced it has subsided. However maladroit it would now seem to deploy the *copula* in this way on behalf of United States gay men, the trope is still very much in vogue in some feminist and some antiracist circles, and may even have migrated with HIV to Africa and Asia to affect some postcolonial discursive projects. I will defer to the last section of this paper my argument, which I merely want to flag now, that there are the descriptive, political and strategic advantages to framing social hypotheses that dissolve, rather than massify and structuralize oppression, and that deployment of the *copula* foregoes them. I hope it suffices

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52. See MacKinnon, *Prostitution and Civil Rights*, *supra* note 8, at 31.

53. For an example of cultural feminist deployment of the *copula*, see part IIIB., *infra*, particularly note 72 and accompanying text.

54. Bersani, *supra* note 9, at 201–02 (emphasis omitted).

for now to point out that this trope could not emerge, at least in this way, in the more fully critically queer passages of Bersani's argument.

What Bersani's political descriptions borrow from feminism, they also return to it, affirming representations of gender and power that, I have argued, were soon to be contested by sex-positive, sex-radical, postmodernizing and queer feminisms (and that are not endorsed in *Homos*, where Bersani explicitly engaged Butler and Wittig and their postmodernizing explosion of the female subject).<sup>55</sup> The main gesture here is to put outside the reach of critique not only subordination-theory, minoritizing framings of gay male existence in the AIDS crisis, but similar representations of women's existence under male dominance.<sup>56</sup> One form of it is what you might call the *a priori* gesture: "timing" political subordination theory so that its conclusions have been reached *before* the present analysis begins ("I mention these [examples of malignant homophobia] . . . simply as a *reminder* of where our analytical inquiry *starts*");<sup>57</sup> another is to state its claims as obvious (it would "*of course* be obscene" to claim that gay men are more oppressed than poor blacks).<sup>58</sup> With respect to women and feminism, this gesture produces an affirmation of the complete, wall-to-wall domination of women by men *as an assumption that is also true*: "the hostility towards women that probably afflicts every male (and which male heterosexuals have *of course* expressed in infinitely nastier and more effective ways);"<sup>59</sup> phallogentrism, though "not primarily the denial of power to women . . . has *obviously* also led to that, *everywhere and at all times*";<sup>60</sup> gay men should not imitate heterosexual monogamy, that "*unrelenting* warfare between men and women, *which nothing has ever changed*."<sup>61</sup>

Listening to that 1987 voice now, I have to say how glad I am that its social authority in left sexuality theory has been so substantially eroded.

That sense of relief, however, leaves me with a hard question. What is a politically engaged queer theoretic take on sexuality going to do instead? How could *Is the Rectum a Grave?* be rewritten today? My own idea is that the distinctively queer features of the paper—its willingness to affirm sexuality as carrying an appetite for deep threats to integrated selfhood, its willingness to lose touch of propositional ethical logic to do so, its plunge into a profoundly irresolvable problematic of desire, and its fragmentation not only of the self but of the gendered self—*can* be maintained in politically acute work.

In order to move, ever so tentatively, in the direction of this object, I'd like to extrapolate from the "queer" dimension of *Is the Rectum a Grave?* some representations of sex, gender and power that might lodge well under the descriptors "queer feminism" and "queer thought that Takes a Break from Feminism."

55. See BERSANI, *supra* note 11, at 37–52.

56. And of race, although Bersani is much more willing to probe and question antiracist than feminist presumptions.

57. Bersani, *supra* note 9, at 199 (emphasis added).

58. *Id.* at 204 (emphasis added).

59. *Id.* at 208 (emphasis added).

60. *Id.* at 217 (emphasis added).

61. *Id.* at 218 (emphasis added).

Here goes. Queer feminism might claim, without *necessarily* denouncing or romanticizing it, women's subordination in the eroticization of domination. It might suspend normative judgment and merely descriptively insist that it's there. This could lead to a descriptive re-reversal of gender: female masculinity could become just as crucial as the feminine abandon Bersani attributes to a gay man, "legs high in the air, unable to refuse the suicidal ecstasy of being a woman"<sup>62</sup>—oops, I mean, "of being a gay man." The status of female femininity with respect to power could become quite uncertain; female masochism, furthermore, could be understood sometimes to be "on top." If this logic were part of *lesbian* sexual politics, it would necessarily involve an exploration of the degree to which female masculinity is drag or deadly serious. Such an exploration might be even more necessary, and more capable of new uncertainties, if our starting point were *heterosexual women's* engagement with men. In either case, it might well contribute to Judith Butler's programme for feminist queer theory: "*when and where feminism refuses to derive gender from sex or from sexuality, feminism appears to be part of the very critical practice that contests the heterosexual matrix. . . .*"<sup>63</sup> There would be some clear gains for the critique of MacKinnon and cultural feminism: the attribution to women, as to men, of the psychic stamina to sustain experience this challenging could be deployed against the feminist and social conservative images of women as "always rapeable," structurally vulnerable, and perpetually in need of some kind of protective custody. Whether the representation of women's relationship to power in sex would be uniformly "good for them" would be really hard to decide, however. So much would depend on so much.

Let's try the same thought experiment in a queer mode that Takes a Break from Feminism. In this queer mode, it is the confrontation of the self with its embodiment, with its will to power over and its utter lack of control over that object, the body; its pleasurable and frightening ability to wield itself as embodied to control the world, and the utter, persistent fragility and reversibility of that project (the world against the body, against the self) that *is* erotic; both assertion and dissolution are compellingly familiar, mutually contingent, and constantly yielding to one another in the body's very capacity for experience of itself as human; gender is secondary, derivative, and (however highly useful as a vocabulary) definitive of exactly *nothing* in the tremulous project of the self. Indeed, if the implicit masochism of the orgasmic aim involves a will to be shattered, disoriented, erased, then gender would be one of the things that one lost track of. This hypothesis could help explain lots of things that don't make much sense under the descriptive mandates of the male/female model and cultural feminism: for example, the fact that masculinity *and* femininity have fairly rich vocabularies for "getting wasted" in this way; and the hunch that male and female persons probably have, at least in theory, equal access to the power and danger of such experience. This idea would seem, moreover, to deliver on Butler's agenda for a feminist queer theory—"when and where feminism refuses to derive gender from sex or from sexuality, feminism appears to be part of the very critical practice that contests the heterosexual matrix"—but with the (possibly perverse)

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62. *Id.* at 212.

63. Butler, *Against Proper Objects*, *supra* note 49, at 12.

additional feature that it need not also *be feminist!* Whether it would connect to other politics in good ways would depend on whose welfare you cared about, and (given the deep problematic into which the theory places the very *idea* of sexual welfare) what you would do about the vast increase in uncertainty.

At this point the queer theoretic contribution of Bersani's gripping essay to a reformulation of the politics of sex and power kind of runs out. My next example, Duncan Kennedy's *Sexy Dressing*, coming at some of the same issues in sexuality from an explicitly regulatory and legalistic perspective and with the aid of Butler's postmodernizing feminism, can perhaps help light a few more steps along the way.

## B. Sexy Dressing

Duncan Kennedy dedicated *Sexy Dressing* to Mary Joe Frug, a legal scholar murdered in 1991 as she was finishing her distinctively pro-sex, postmodernizing and feminist book *Postmodern Legal Feminism*.<sup>64</sup> By all accounts Frug was a very sexy dresser.

Moreover, Kennedy wrote *Sexy Dressing* after and, in a sense, into, a decisive rupture among left intellectuals in legal studies which Robin West (a key figure in legal cultural feminism) had described six years earlier as the "CLS-FEM Split."<sup>65</sup> Critical Legal Studies, or CLS, lives of course; this essay is an example of it. But the CLS *conference* is dead. Active in the late 1970s and early 1980s, the CLS conference was, I'm told (I was elsewhere at the time) a vital and internally riven intellectual and social movement among left law teachers; both Kennedy and West played prominent roles in it. As I've suggested in my genealogy of intra-feminist conflict in Part I, at about this time across many domains of feminist encounter, and certainly within CLS, male/female model and cultural feminism took the turn away from radicalism and critique and towards law, certainty, and the rigorous regulation of sexual life in the name of women; and sex-positive and postmodernizing feminism emerged to resist this turn. Towards the end of her life, I understand, Frug was a powerful figure mediating the conflict. Long before her death, West and Kennedy had come to represent it.

In 1985 Kennedy had published a short essay entitled *Psycho-Social CLS* in which he analyzed the relationship between erotic desire and intellectual politics inside the CLS conference.<sup>66</sup> He said some things in that paper which West thought to be *so bad* that, unless he retracted (and other men in CLS renounced) them, CLS could no longer be thought "a congenial atmosphere for feminist work, nor . . . a healthy environment for women, and women should therefore get out."<sup>67</sup> What were those things?

First, there is desire—between men and women and also between men and between women. . . .

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64. MARY JO FRUG, *POSTMODERN LEGAL FEMINISM* (1992).

65. Robin West, *Deconstructing the CLS-FEM Split*, 2 *WIS. WOMEN'S L. J.* 85 (1986).

66. Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 *CARDOZO L. REV.* 1013 (1985) [hereinafter Kennedy, *Psycho-Social CLS*].

67. West, *supra* note 65, at 91.

Second, there is the historical fact of the oppression of women by men. . . .

Third, there is feminism, a self-conscious reaction against the oppression of women. . . . [T]he internal structure of the [CLS] conference is unmistakably reflective of the larger patriarchy.<sup>68</sup>

Kennedy then addressed the sum, as it were, of these three parts: in CLS, more powerful men and less powerful women had erotic relations, relations of desire, often in the roles of mentor/mentee; and the feminism of many women in the conference was, from the perspective of the men, both a welcome and a frightening element of those relations.<sup>69</sup>

West's criticism of Kennedy's 1985 paper is a short classic in cultural feminism. She construed Kennedy's "First, there is desire" as a claim that heterosexual desire is *natural* and thus beyond political criticism, and as a claim that, because it is reciprocal it is also *equal*, and thus (again) beyond political criticism.<sup>70</sup> Against those claims (not directly observable in Kennedy's argument), she proposed that desire was movable, and that men and women in CLS should direct theirs *outside* the conference: "We can, after all, eroticize *other* things."<sup>71</sup> And she predicated this call on a counterclaim that heterosexual desire in the conference, far from being equal, was seamlessly of a piece with patriarchal domination. The erotic desire of more powerful men and less powerful women in CLS was an eroticization of domination precisely fitted, via the *copula*, into male domination everywhere:

The societal and institutional commitment to the notion that powerless women naturally desire powerful men—that heterosexual desire is reciprocal, symmetrical and natural even though it is between *concededly* unequal partners—*accounts for* this society's inability to "see" marital rape as rape rather than as "bad sex." *It accounts for* the societal belief that women who don't desire men are "frigid." *It accounts for* the societal inability to see that sexual harassment in the workplace is indeed harassment rather than the soft "personal" touch of an office. *It accounts for* the societal inability even to consider the possibility that teenage pregnancy is a function of teenage male coercion rather than a breaking of societal "taboos" against "natural" promiscuity. *It accounts for* the belief that rape victims asked for it. *It accounts for* the belief that pornography causes no harm other than an imagined and illusory offense to a Victorian sensibility. *It accounts for* the belief that wolf whistles and sexual jeers on the streets are compliments rather than assaults.<sup>72</sup>

Indeed, it accounts for Kennedy's ability "to bemoan the demise of behavior which many feminists and many more women now understand to be sexual harassment on the job, plain and simple."<sup>73</sup>

West here offers us a convenient synopsis of the cultural feminist politics against which *Sexy Dressing* was written. She categorically precludes, largely on

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68. Kennedy, *Psycho-Social CLS*, *supra* note 66, at 1020.

69. *Id.* at 1020-23.

70. West, *supra* note 65, at 87-88.

71. *Id.* at 91.

72. *Id.* at 89.

73. *Id.* at 90.

moral grounds, any possibility of women thriving in their subordinated desire for men who have power over them; she seamlessly merges the resulting power hierarchy into an M>F structure; she knows exactly what women's interests in that situation are and announces them with indignant finality. *Sexy Dressing* is in one sense a response to every element of West's declamation of Kennedy for his actual historical engagement in intellectual politics as a powerful heterosexual man.

*Sexy Dressing* takes women's sexy dress as a semiotic system that registers, in subtle and dynamic ways, the degree to which women are able to enter as strong, self-interested bargainers into sex and sexually fun symbolic play with other women and with men. He argues from a position of highly identified "erotic interests"—his own—which he bluntly characterizes as those of a heterosexual white middle-class male who wants there to be women (on the street, in the media, at work) who can afford to be erotically thrilling to *him*. And he attempts to design an algorithm for deciding how to regulate sexual abuse (rape, sex harassment, domestic violence, date rape, sexual intimidation of women by men) to maximize women's safe, and minimize their endangered, engagement in sexy dressing, sexually meaningful play, and sex with men. The project is unequivocally pro-sex.

To me, moreover, it is distinctly "queer" in its analysis of sexuality, power, and knowledge. It fragments and "flips" the male/female model in a way that is highly reminiscent of Bersani's operation in *Is the Rectum a Grave?*; however, because its reasons for doing so emerge not from Freud, but from social theory, the resulting pattern of sexual complexities is more explicitly political. Even more than Bersani's partisanship on behalf of gay men, to which most feminists defer out of a convergentist sympathy with minoritized, subordination-theory formations generally, Kennedy's stance has been scandalous among feminists; it is difficult to get feminist students even to read the essay. His decisions to write explicitly from the standpoint of "a straight white male middle-class radical,"<sup>74</sup> to take into account the erotic interests of a person so situated, to turn postmodernizing feminism against the male/female model, and nevertheless to declare that "I do not think of myself as a feminist,"<sup>75</sup> severally or together, somehow absolutely disauthorize Kennedy in many feminist circles. So be it. It's not feminist. It Takes a Break from Feminism. Moreover, seeing it as "queer" instead—because of its embrace of male heterosexual erotic interests—provides deep satisfaction to my own ambition that queer work would be able to Take a Break not only from these feminist strictures, but also the homo- and bisupremacy that more or less go with the term so far.

Like Bersani, Kennedy embraces the male/female model, and relies heavily, again like Bersani, on MacKinnon for a set of understandings of sexuality and power. He affirms that men (even those who don't abuse women) eroticize women's subordination, suspects that women do too, and acknowledges multiple male interests in the underenforcement of rules against men's sexual abuse of women. Moreover, he attempts a more-or-less complete description of those interests: they include not only the free range some men find within this margin

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74. Kennedy, *supra* note 10, at 126.

75. *Id.* at 129.

of underenforcement—the tolerated residuum of abuse—to abuse women; but also the reduction, for all men, of the risk that they will be falsely or mistakenly accused of abuse, and the considerable cultural repose and bargaining advantage all men gain by being able to shift the burden of taking precautions regarding abuse to women.<sup>76</sup> He shares MacKinnon's view that the eroticization of domination provides a pervasive language and power form for the relations between men and women. He takes it as a given (and also as a personal observation) that women suffer wide-reaching social subordination because some men abuse some women.

But Kennedy departs substantially from the structuralist premise of the male/female model as MacKinnon frames it. Recall what that structuralism means in MacKinnon's thought: the eroticization of domination precipitates women as women and men as men; it produces women as subordinated to men, *by definition*. In MacKinnon's thought, this is not only a social, but also a metaphysical and ontological achievement, so that no human consciousness is free of it. Sexuality as women's subordination and men's superordination pervades human reality, such that rape is merely the paradigmatic form of heterosexual interaction; and it pervades human consciousness, such that no one is in a position to say for sure that a given act of "voluntary" or "ordinary" heterosexual intercourse (or watercooler flirtation) is not precisely homologous to what we call rape. The copula, the decision to attribute to the woman who files a complaint the "truth" of all women.

Kennedy splits from MacKinnon by substituting politics imagined in economic terms, for what he would later call her "paranoid structuralism."<sup>77</sup> There are several moving parts to the resulting analytic approach, many of which are rare to the vanishing point in the queer cannon and in liberal feminist work, so I will attempt to spell them out in some detail.

First, law in Kennedy's formulation is not nearly as mystified, monolithic, temporally smooth, unilaterally productive, or normative as it is in the male/female model or in cultural feminism. Rules governing sexual abuse are embedded in noisy enforcement systems which produce some punishment of abusers, some punishment of perfectly innocent men, and the tolerated residuum of abuse.<sup>78</sup> The deterrent effects of the rules are therefore seriously complicated. They arise not only from the "hits" but also the "misses"—indeed, they arise as well from the *perception* of the *ratio* of hits to misses. The deterrent effects arise, moreover, not only from the real circumstances that lead some cases to become "hits" and others to become "misses," but also from ideologically saturated "causation" narratives ("she was asking for it"; "frat boys are suave

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76. Note the exchange of danger supposed by this formulation. Shifting the line between punished and tolerated abuse towards the latter shifts the burden of taking precautions against abuse from women to men. That is, if we punish more abuse and tolerate less, then we lift some of the burden off of women to avoid abuse, and impose a corresponding additional burden on men. This burden includes that of more compliance with anti-abuse rules: when we do this, men also end up with heavier burdens of protecting themselves from false and mistaken accusations of abuse, and of splitting their interests among themselves.

77. Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1169, 1173 (2001) [hereinafter Kennedy, *A Semiotics of Critique*].

78. Kennedy, *supra* note 10, at 134-38.

rapists”), the descriptive power of which is itself an object of political struggle. The properly *legal* question is how to design and enforce rules that get the “right” balance among punishments, immunities, and deterrences, but this is going to be hard. (More on “deciding under conditions of extreme difficulty” below.)

This idea of law is almost entirely foreign to any work that commits itself to the male/female model or to cultural feminist tenets; it is even more unknown in queer theoretic work. There, the institutional noisiness of legal enforcement is usually blinked, in favor of an idea of law as a prohibition or a right that is vindicated in some sense merely by existing. In MacKinnon’s more radical work, law imagined this way becomes the “maleness” of law: the capacity of its very neutrality and abstraction to vindicate male interests in a highly mystified way.<sup>79</sup> In her “rights” phase, it becomes the capacity of a legal prohibition or a right to instantiate, more or less unilaterally, “women’s point of view.”<sup>80</sup> In cultural feminism, the tolerated residuum is a male right to be morally wrong; women’s right to be free of abuse, and the reform goal of complete and seamless prohibition of abuse, would reformulate law as the effective expression of feminist moralism; every rule change is seen as a moral *dictat*. Even where queer theoretic texts question the monolithic picture of power and of norms that these understandings provide, they almost never put into question the accompanying picture of law. Kennedy’s understanding of law—which, as we will see, is much more capacious for a postmodernizing fragmentation of reality than the idea, typically assumed in left humanities work on sexuality, of “the law” as a consolidated entity imposing its norms unilaterally on a social world made up simply of obedient and disobedient subjects—finds its precursors not in feminism or queer theory but in American legal realism.<sup>81</sup>

Second, the real action is not in law *per se*, but in wildly differently interested players who participate in wildly complex social interactions, calibrating their own activities according to their perception of the balance of punishments, immunities and deterrences that the rules, as enforced, happen to produce. They engage in cost/benefit calculations and then engage in social interactions with other people doing the same. This *mutual* calculatedness can be imagined as *bargaining*, and the players can be imagined as *bargaining in the shadow of the law*. This term, taken from the title of a key contribution to legal studies by Robert Mnookin and Lewis Kornhauser, carries the idea that social interactions happening far far away from the scene of legal enforcement—conceptually, geographically and narratively—are pervasively informed by the parties’ sense of what the law, with all its hits and misses, means for their pursuits.<sup>82</sup> Kennedy uses the idea of bargaining in the shadow of the law to notice, for instance, that, if a woman perceives the tolerated residuum of abuse to expose her to the possibility of abuse without protection *ever*, even once, it weakens her bargaining po-

79. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 5, at 644-45, 655-58.

80. For a particularly consolidated statement, see Catharine A. MacKinnon, *Points Against Post-modernism*, 75 CHL-KENT L. REV. 687, 688-89, 691-93 (2000).

81. For the traditions upon which Kennedy’s approach rests, see Kennedy, *supra* note 10, at 236-37, n.9, n.12. Put them together and you have a short list of classics in legal realism.

82. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

sition with *this man now* in a myriad ways: sometimes, possibly on average, and not necessarily in any single case, but surely more than would be the case if the tolerated residuum were smaller, it will induce her to dread being single more than men do; to take less desirable lovers than she otherwise would; to concede more to her partners during relationships than she otherwise would and than her partners concede in return; to regard breaking relationships off as more costly to her than she otherwise would and than her partners do in turn; to “pay more” for a breakup than she otherwise would or than her partners do; etc.<sup>83</sup> The tolerated residuum strengthens the bargaining position of abusive husbands, of course, but also of perfectly lovely ones. It alters the amount of battering that women take at home from bad men (upwards) and the amount of the housework they can extract from all men (downwards).

Something like this analysis has been important in radical feminism and cultural feminism for a long time. It has produced insights like “The State as a Male Protection Racket” and “the lesbian continuum”—the ideas that the threat of rape benefits all men at the expense of all women by requiring each woman to secure a single committed man to protect herself from all the other men<sup>84</sup> and the idea that, faced with a life structured by bargaining from a position of overdetermined weakness, women have more in common with each other, and against all men, than they do with their supposedly dearest heterosexual love objects.<sup>85</sup> Even for feminists who balk at or pay no attention to MacKinnon’s expansive ontological and metaphysical claims for male dominance, this form of subordination-theory structuralism makes the male/female model seem basically “right.”

Kennedy drops some flies into the feminist ointment, however, when he posits (my words, not his) that wildly differently interested players participate in wildly complex social interactions. As we’ve seen in Part I above, the feminist penchant for convergence means that, when feminism thinks about what Kennedy (following Mnookin and Kornhauser) calls “bargaining in the shadow of the law,” it persistently sees women and men, respectively, as consolidated social groups with fairly smooth, uninterrupted, and, *inter sese*, opposed interests. Kennedy punctures this smoothness, first, by insisting that some, many, men have an interest in reducing the tolerated residuum—not because they are good converts to cultural feminist normativity who would sleep better at night if they knew that all human beings were safer—but because they are erotically self-interested heterosexual men who could be more restless at night if women knew it was safer to be sexy *to them*.<sup>86</sup> Reducing the tolerated residuum would not only create conflicts of interest among men by requiring more of them to side with women against other men; it would also retile the playing field in an already existing conflict of interest among men, one in which the abusers are ex-

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83. Kennedy, *supra* note 10, at 146-47.

84. Susan Rae Peterson, *Coercion and Rape: The State as a Male Protection Racket*, in *FEMINISM AND PHILOSOPHY* 360, 368-69 (Mary Vetterling-Braggin et al. eds., 1977).

85. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980).

86. Kennedy, *supra* note 10, at 138, 208-13.

tracting the social goods of women's sexual safety, not only from women, but from men.<sup>87</sup>

The next fly draws its pedigree from postmodern, pro-sex feminism, most explicitly the work of Butler and Frug and thus, indirectly, from Foucault. Here, Kennedy agrees that the eroticization of domination has "taken" in the sense that human heterosexual life seems unimaginable without it, definitely in the sense that the eroticization of domination involves all men and all women in a highly dangerous and oppressive sexual system. But the "seamless quality" of that system as it is described by the structuralist feminisms cannot account for "the fissures of gendered existence within liberal patriarchy."<sup>88</sup> They miss three "puzzling aspects of eroticized hierarchy": the over-determined quality of male dominance (it does not seem to *need* sexuality to secure its place) (here we have a brief nod in the direction of socialist feminism); the capacity even for strong critics of male dominance to affirm the "egalitarian and even redemptive" quality of some heterosexual experience *within the vocabulary of eroticized domination*;<sup>89</sup> and "the persistence of resistance, compromise and opportunism as strategies for negotiating the regime, rather than buying into it without reserve, so that the image of a fully rationalized, totalitarian gender system seems paranoid."<sup>90</sup>

Before proceeding further into Kennedy's argument, it might help to notice some similarities to Bersani's, in the register of the queer critique of identity. Like Bersani, Kennedy insists that there are, in politics and in sexual life, a huge variety of highly particularized and interested sexual positions *that are male*, and in the course of the essay he performs himself as inhabiting many of them, at least in possibility. So they both stake themselves very definitely to identity positions. But also like Bersani, Kennedy insists that sexuality produces politics without sustaining simple identitarian framings like "gay men" and "heterosexual men." In pretending otherwise, Bersani intones, "we have been telling a few lies";<sup>91</sup> in supposing that men (for example, social conservative and sexually libertine heterosexual men), or women (for example, social conservative women and butch lesbians), have undifferentiated stakes in the regulation of sexual abuse, Kennedy concludes, feminism mistakes its own interests.<sup>92</sup> And like Bersani, Kennedy deploys this fragmentation of identitarian interests not only against group consolidation—*wildly differently interested players*—but also against the simple consolidation of an interested self—*participate in wildly complex social interactions*. At this point both Bersani and Kennedy draw upon social theoretical resources of high modernism—Freud and, in Kennedy's case, Ferdinand de

87. *Id.* at 144.

88. *Id.* at 157.

89. To support this claim Kennedy cites a passage from MacKinnon that falls just a bit short of it: "Sex feeling good may mean that one is enjoying one's subordination; it would not be the first time. Or it may mean that one has glimpsed freedom, a rare and valuable and contradictory event." MACKINNON, *supra* note 6, at 218. A wonderful passage, but strictly speaking it does not affirm the egalitarian possibilities of women's heterosexual experience; rather, in it MacKinnon rigorously maintains her stance of *not knowing* the difference between rape and a good fuck.

90. Kennedy, *supra* note 10, at 157.

91. Bersani, *supra* note 9, at 206.

92. Kennedy, *supra* note 10, at 181-85.

Saussure as well<sup>93</sup>—to produce a postmodernist explosion of the self and a highly paradoxical account of human sexual interests and welfare.

We can see this fracturation if we follow Kennedy as he multiplies the possible meanings of women's sexy dress. He defines "sexy dress" semiotically, so that, for instance, a particular pair of women's shoes might signal sexiness at a family dinner party or a church prayer meeting but not at a nightclub or even at work, and so that, if dress is sexy at all, it refers ultimately (let's face it) to fucking. The "meaning" of a particular act of sexy dressing is deeply contingent on the semiotics of locale and male/female performativity in which it occurs, as those are understood (that is, intended, experienced *and* interpreted) by the men and women involved.<sup>94</sup>

Kennedy agrees with male/female model feminists and cultural feminists that a woman's sexy dress can indicate her vulnerability to sexual abuse by men; indeed, in traditional conservative sexual morality, a woman who dresses sexy and is abused is *actually* understood to have "asked for it." Kennedy goes further, and affirms that sexy dress invokes women's and men's capacity to be sexually excited by the possibility of abuse.<sup>95</sup> But to follow male/female-model and cultural feminism at this point, and hold sexy dress to a monolithic meaning (women's sexual objectification and subordination), to attach it by the copula to the eroticization of women's actual, chronologically unbroken sexual subordination, is both "speculative and paranoid"—"not," he is careful to add, "that it *couldn't* be true"—but it *need not* be.<sup>96</sup>

So, women's sexy dress can "mean" sexual objectification and vulnerability in ways that are substantively related to women's subordination. But Kennedy construes Madonna's *Open Your Heart* video to discover in sexy dress a splendid fissuring of power and gender.

Here is a summary of his reading of the music video's representation of sexy dress and the powers it organizes. *For men*, it can refer to the erotic imagery that men deploy in masturbation, and thus, along with excitement, can produce in them a whole range of feelings that do not sound in domination—dirtiness, shame, secrecy, confusion, guilt, fear, embarrassment and anxiety about getting caught. It can refer to locales (red-light districts, tough urban settings) with working-class associations and thus produce in middle- and upper-class men not only excitement but the dread of getting hurt there. It can refer to, or even make possible, a direct exercise of women's sexual power *over* men—a power to grant and withhold, a power to overpower, a power to "drive men crazy." And it can refer to or enact out-and-out female defiance of patriarchal sexual codes, indifference to male needs and fears, male powers and threats; female sexiness as female sexual autonomy and *invulnerability*. Of course, female sexual autonomy and *invulnerability* are modes of female existence that are highly prized in sex-positive feminism, so their emergence in

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93. For Bersani's investment in Freud, see LEO BERSANI, *THE FREUDIAN BODY: PSYCHOANALYSIS AND ART* (1986). For Kennedy's reliance on FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Secheyay eds., Wade Baskin trans., P. Owen 1974), see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

94. Kennedy, *supra* note 10, at 163-208.

95. *Id.* at 194.

96. *Id.* at 196.

the analysis provides Kennedy with a moment for convergence. But he sticks to his identity position within male heterosexual interests by insisting that they might well provoke in some men, sometimes, a will to dominate or retaliate, *and* they might just also, for some men sometimes, provoke a sense of powerlessness, fear, doom, envy or disorientation. They provide also to men the basis for pleasurable fantasies that are not exactly what male/female model feminism attributes to them, for instance, the fantasy of setting down the good man's burden of being careful and protective; the fantasy of being absolved from worry about whether the woman really wanted it, had a good time, came; the fantasy of a borrowed self, of an introjected powerful female other, a self that is as narcissistic and as powerfully embodied as the sexy-dressing woman. Of course the very same act of sexy dressing might actually *mean, to the woman*, that she has failed to produce any of those happy outcomes: it might be "shadowed by the possibility that no one, not one person, experiences it as she would want—that the whole audience consists of 'dirty old men,' abusers lying in wait, and critics who think she is a slut or politically incorrect or too old or not pretty enough or doesn't really know how to do it right."<sup>97</sup>

Shame is deeply embroidered into this image of erotic life. It has the place in Kennedy's "queered" analysis that abjection does in Bersani's. And again like Bersani, though Kennedy acknowledges the pain that shame involves, he nevertheless represents it as intrinsic to female *and* male hetero-eroticism; wherever it appears it *reverses* the basic presupposition of the male/female model that, in the eroticization of domination, men and masculinity dominate women and femininity. Men responding erotically to sexy dress (or to the nexus between some sexy dress and pornography) may experience not only a will to dominate women, but also loss of control, direct humiliation and a relinquishment of erotic responsibility—and all of these can produce the allure of subordination, a highly pleasurable eroticization of *female* domination; while women dressing sexy in order to accrue the corresponding powers may experience humiliation, not because they are eroticized by men, but because they aren't.

At this point Kennedy *almost* produces the uncertainty and will to paradoxical irresolution that are crucial to Bersani's most "queer" analytic moment:

I think nonetheless that some of the time, some sexy dressers and some of their audience are engaged in pleasure/resistance in the interstices of the regime. They are eroticizing female autonomy. . . .

This must be always an uncertain form of politics because the signifying woman may be doing more harm than good, feeding the conventional view in which the tease deserves what she gets and men get off on woman-wanting mixed with woman-hating. For both men and women, the experience is compromised because it occurs within, is indeed dependent for its meaning on, the larger web or references to male sexual abuse of woman and male degradation in relation to them. *It is never just 'the truth' . . . that the experience is indeed pleasure/resistance rather than something else, something bad, instead.*<sup>98</sup>

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97. *Id.* at 206.

98. *Id.* (emphasis added).

Kennedy's idea that some male/female interactions—even though they refer, through sexy dress, to male abuse of women—nevertheless involve not domination, but “pleasure/resistance in the interstices of the regime” is a Foucaultian one, drawing directly on the vocabulary of *Volume One*.<sup>99</sup> As he explores the “fissures of gendered existence,” Kennedy here turns (quite appropriately, it seems to me) from MacKinnon's top-down model of power, to an idea of its “interstitial” form, and even to the formulation of “pleasure/resistance” operating, not against power from below, but from within it. Moreover, he posits as the basic linguistic dichotomy against which male/female sexual semiotics are played out, not male sexual abuse of women and *women's subordination*, but male sexual abuse of women and *male degradation in relation to it*. In such a context, finally, “[i]t is never just ‘the truth’” that an act of sexy dressing achieves pleasure/resistance or confirms women's subordination in the eroticization of domination: Kennedy affirms “uncertain[ty]” at exactly the point in his argument where MacKinnon would *know*.

I note with a certain reluctance that (again, and finally, like Bersani) Kennedy draws back from the not-feminist implications of this formulation, cutting male/female model feminism and knowingness some slack that his own argument would, if followed through, deny them. Let me push the argument more decisively into an engagement with the *unknowing* dimension of postmodernist thought, and further into its trajectory towards Taking a Break from Feminism.

The basic legal algorithm of the paper, as I have suggested, is cost-benefit policy analysis. Determining that we want one legal rule about sexual abuse rather than another involves minimizing the tolerated residuum of sexual abuse and discouraging sexy dress on one hand, and maintaining the tolerated residuum of abuse while engaging in sexy dress and eroticizing it on the other, until we “do more harm than good.” As I have suggested, the resulting fracturation of the legal project is highly amenable to the postmodernizing complexification that sexual regulation, I think, requires. But Kennedy doesn't go all the way.

The paper takes us carefully through the ways in which bargaining in the shadow of the law between men and women, performed as it is against the background of the tolerated residuum, starts from women's weaker bargaining position and thus, not structurally but on average and over the whole range of bargains men and women strike, produces their subordination. The analysis is grippingly convincing. But Kennedy does not return to this calculus after establishing the ambiguities of male/female power. If he had, he might have had to add that, if heterosexual men experience women's sexual autonomy as a threat—not only their power to deny men something they want very much, but also their ability, in providing it, to humiliate, disorient, and abject them—then there is a second tolerated residuum of risk to take into account: men's. And he would have had to acknowledge that women can secure a bargaining advantage whenever men want them to produce the effect of bold, indifferent female sexual autonomy and are willing to make concessions to get it. On this side of the ledger, if Kennedy had filled it in, he would have said that men not only come into bargaining with women with a distinct source of bargaining disadvantage,

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99. FOUCAULT, *supra* note 26, at 92-96, 157, 159.

but they also seek complex erotic goods, so that they might, over the full range of bargains that they make with women, find *themselves* in subordination.

How would we ever know how to add it all up, balance it all out? By putting “the truth” in scare quotes, and mockingly demoting it as “*just* ‘the truth,’” Kennedy strongly suggests that we may be on the verge of an epistemic crisis here. Too bad that Kennedy uses feminism to draw back from the brink. Consider the passage just quoted. It posits a heterosexual interaction in which a woman’s sexy dress is experienced by her and perhaps even taken up by one or more men as “pleasure/resistance.” Kennedy is right to say that it may also, elsewhere presumably, “feed[] the conventional view” that she “deserves what she gets” and has ratified male erotic misogyny. If that happens, she may be “doing more harm than good”—a judgment about relative values that could be sustained only on feminist sexual-subordination premises. And as the passage draws to a close, Kennedy seems to endorse those premises: “It is never just ‘the truth’ . . . that the experience *is indeed* pleasure/resistance *rather than* something else, something bad, instead.” In this formulation, the feminist construal can cast doubt on the Foucaultian one, but not the other way around. The gesture hinges on “rather”—only one *or* the other can be true—and, within that dichotomy, if the harm occurs, the event was “instead” and “indeed” not pleasure/resistance in the first place.

The not-feminist queer theoretic move, I think, is to insist that these two understandings cast profound doubt *on each other*. Thus the not-feminist queer theoretic project, taken in its purest form, would resist the way in which here, in petit point, and throughout the paper’s concluding arguments, the male/female model produces “facts” for policy balancing, while the claim that heterosexual interactions produce pleasure/resistance occupies the slippery grammatical status of hypothesis and evanescent speculation. It would see a failure of follow-through when, at points involving a contest between feminist and Foucaultian construals of power as it plays out between men and women, the normative and epistemic weight ends up on the side of male/female model feminism. And it would see that Kennedy lost an opportunity to explore the “fissures of gendered existence” when he *didn’t* ask whether the erotic/power dynamics between “men” and “women” arise *outside gender tout court*.

So let me gather together the various strands of Kennedy’s analysis of the “dark side” of sexy dressing and the semiotics of heterosexual desire, and say what I think he would have said if he hadn’t been working overtime to stay in alliance with Frug’s effort to mediate the conflict between sexual-subordination feminists on the one hand and sex-positive and postmodernizing feminists on the other. As long as the semiotics of sexiness makes every sign contingent on all other signs in an ever-shifting set of cross-references; as long as “meaning” resides problematically in intention, experience *and* uptake; as long as men and women do find intense pleasure inside the eroticization of domination; as long as pleasure sometimes takes the form of pain, and pain of pleasure; as long as desire can extend its reach to shame; as long as gender as power-over is subject to complex psychic reversals; as long as the resulting highly volatile system is understood to provide the raw material *both* for domination *and* for “resistance, compromise, and opportunism”; as long as all of these conclusions about our life in sexuality hold, it could never be “just ‘the truth’” that the scenario we are

construing was only pleasure/resistance and not something bad as well, or only something bad and not pleasure/resistance as well. “The truth” and “the real” are not the ground upon which we can base our cost/benefit assessments, but *effects* in a sexual semiosis that is pervasively riven with paradox and knowable only through the murky epistemes of desire and politics.

Why does that logic sound “queer”? I think (see Appendix) it’s because it is sex-positive, shame/abjection affirmative, irrationalist, and capable of seeing the paradoxical, fractured and/or “flipped” capacities in M, F, desire and power. Surely approaching questions of sexual politics or sexual regulation with that logic would lead us strongly away from the equality-is-freedom, victim’s-truth model of legal reform that has become Catharine MacKinnon’s, and would alienate us quite completely from the legal moralism that characterizes cultural feminism. A much better fit, it seems to me, is the neorealist picture of law set out in *Sexy Dressing*, understood as a setting for what Kennedy elsewhere describes as “decisionism.”<sup>100</sup> Here is a decisionist sentence: “Making decisions about what legal rule we want to use in the domain of sexual abuse—or even which political direction to go in—is hard.” Hard because sexuality is dark, unknown to us, riven by paradox and reversal. Hard because legal rules operate in social contexts, not only of subordination-theory, but also of Foucaultian power. We might have to decide without knowing that our understanding of the situation is right, without knowing how our decision will play out, and even convinced that, in a system in which any decision will transfer some social goods from, say, women to men or men to women, there *is* no decision that we could possibly make that will not hurt vast numbers of real, actual people, possibly the very people on whose behalf we think we are acting. One reason to bracket feminism as we struggle to decide is suggested by the gesture of queer theoretic yearning that Kennedy makes, and then interrupts in the name of feminism, in *Sexy Dressing*: presupposing male/female model or cultural feminist “takes” on sexual abuse is precisely *not* deciding.

### C. What Next?

So far I’ve tried to show that Queer Theory by Men both Takes a Break from Feminism and avoids some of its own analytic consequences by Cutting Feminism Some Slack. Kennedy’s decisionism, moreover, suggests an analytic matrix—a specifically *legal* matrix, and one adequate to the neorealist and post-modernizing views of the complexity with which legal rules and social actors interact—in which we might decide whether Taking a Break or Cutting Feminism Some Slack is a good thing to do or not. In the final section of this paper I propose to try that matrix out on an actual legal decision feminists and others have had to make: should we allow divorcing spouses to sue their spouses for intentional (or negligent) infliction of emotional distress? My hope is that I can crisply demonstrate that certain costs and benefits of the rule choice at stake here can become visible *only* if we Take a Break from Feminism; and that some very weighty costs to some feminist projects might arise if we Cut Feminism (too much) Slack.

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100. See Kennedy, *A Semiotics of Critique*, *supra* note 77, at 1147–89.

## IV. TWYMAN V. TWYMAN

Sheila and William Twyman were married in 1969. Sheila filed for divorce in 1985, and not long thereafter amended her claim to include a tort action that the trial court construed as a claim for negligent infliction of emotional distress. The factual crux of the claim seems to have been that William had “intentionally and cruelly” imposed “deviate sexual acts” on her.<sup>101</sup> I work through the details below; for now it is sufficient to know that the trial court found that these acts involved bondage and that William had attempted to coerce Sheila to perform them.

The court awarded the divorce, divided the marital assets and granted Sheila an additional \$15,000 damages for her emotional distress on the tort claim.<sup>102</sup> William appealed. The court of appeals affirmed, saying that negligent infliction of emotional distress was actionable in Texas and was a claim that could be sustained by spouse against spouse.<sup>103</sup> Meanwhile, however, the Texas Supreme Court held in another case that no claim for *negligent* infliction of emotional distress was permissible in Texas.<sup>104</sup> When the Texas Supreme Court took up William’s further appeal, a majority of the Justices, split into a plurality and several concurrences, remanded the case for a new trial on a new legal theory: *intentional* infliction of emotional distress was held to be actionable, even between spouses, in Texas.<sup>105</sup> The remand seems to be motivated by two conclusions common to enough Justices to sustain it: the facts in the record were sufficient to support a reasonable factfinder’s finding that William had intentionally inflicted emotional distress on Sheila, and that Sheila was entitled to retry her case because she could not have known how to litigate it until the Texas Supreme Court’s opinion was handed down.<sup>106</sup>

So the case was remanded on what amounts to a ruling that the facts in the record were sufficient to sustain findings: (1) that William’s conduct was “‘outrageous . . . beyond all possible bounds of decency . . . atrocious . . . and utterly intolerable in a civilized society’”;<sup>107</sup> (2) (at this point there is some legal uncertainty, so I include all the options considered important by various Justices) that, when he engaged in that conduct, he *intended* to cause Sheila severe emotional distress and/or he *knew* he might cause her severe emotional distress and *recklessly* ran the risk, and/or he *recklessly ignored the risk* of emotional distress;<sup>108</sup> (3)

101. Twyman v. Twyman, 855 S.W.2d 619, 620 (Tex. 1993).

102. *Id.*

103. *Id.* at 621.

104. See Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).

105. Twyman, 855 S.W.2d at 620. The opinions were divided this way: Justice Cornyn wrote the plurality decision and issued the majority’s remand order; Justice Gonzalez filed a concurring opinion; Chief Justice Phillips concurred and dissented in a separate opinion; Justice Hecht (joined by Justice Enoch) also filed a concurring and dissenting opinion; Justice Spector (joined by Justice Doggett) filed a dissenting opinion.

106. *Id.* at 620-21.

107. See *id.* at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

108. The RESTATEMENT (SECOND) OF TORTS does not include any requirement that the defendant knew of the risk or even that he recklessly ignored the risk of emotional distress. See *id.* at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)). Justice Cornyn nevertheless supposes that the fact finder on remand would have to find that William had such knowledge or was reckless when he

that his conduct did cause; (4) Sheila's severe emotional distress.<sup>109</sup> No one disputed that Sheila was "devastated," etc.; the dicey questions seem to be: what was the outrageous conduct, exactly, and what causally linked it to Sheila's distress.

All the Justices who give us any facts agree that William first introduced "bondage" into his and Sheila's sexual relationship. We learn from Justice Hecht that both Sheila and William tied each other up in those early encounters;<sup>110</sup> her willing participation in those scenes and the mobility of "top" and "bottom" roles in them, fall out of the narrative for all the remanding Justices. Sheila then told William that she had been raped before they married, and told him that she did not want to engage in sadomasochistic sex with him any more; the Justices represent this moment very differently. There is no inconsistency between the Justices on the basic facts of the rape, however. Sheila testified that she had been raped before her marriage, at knifepoint, had been cut with the knife and had feared for her life.<sup>111</sup>

Some years later Sheila discovered that William was in psychotherapy and, confronting him to find out why, was told that he was having an affair with a woman who was willing to engage in bondage. At this point he indicated the marriage was in crisis: as Justice Hecht put it, he told Sheila that "if she could only have done bondage, nothing else would have mattered."<sup>112</sup> As Justice Spector put it, "he told Sheila that if she would not satisfy his desires by engaging in bondage, there would be no future to their marriage."<sup>113</sup> Justice Hecht further tells us that:

For the remainder of the year the couple sought counseling . . . . On their counselor's advice, William and Sheila discussed William's bondage fantasies, and Sheila again tried to participate in bondage activities with William. But she found the activity so painful and humiliating that she could not continue it. Their last encounter, which did not include bondage activities, was so rough that she was injured to the point of bleeding.<sup>114</sup>

Like Justice Hecht, Justice Spector understands that it was these last bondage encounters, and not the final sexual event in which Sheila sustained gynecological injuries, that are at the heart of Sheila's claim to actionable mental distress:

Sheila experienced "utter despair" and "devastation," as well as physical problems—weight loss and, after one encounter, prolonged bleeding that necessi-

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failed to think about it. *Id.* at 623-24. As Justice Hecht points out, the idea that the liability requires *intentional* conduct is significantly eroded by the "recklessness" proviso. *Id.* at 630. The same view of the underlying conduct that classifies it as "outrageous" could well supply all a fact finder needed to conclude that the defendant recklessly ignored the likelihood that it would produce distress. Indeed, "outrage" is "distress."

109. *Id.* at 621.

110. *Id.* at 636.

111. Justice Cornyn tells us that Sheila was raped at knifepoint. *Id.* at 620 n.1. Justice Hecht tells us the same thing. *Id.* at 636. Justice Spector adds that Sheila was actually cut with the knife and placed in fear for her life. *Id.* at 641.

112. *Id.* at 636.

113. *Id.* at 641.

114. *Id.* at 636.

tated gynecological treatment. The *pain and humiliation of the bondage activities* caused her to seek help from three professional counselors.<sup>115</sup>

It is the bondage, not the last night of rough sex, that the Justices continually return to as the crux of William's conduct. We are left, then, with this basic narrative configuration: William repeatedly solicited Sheila's participation in bondage scenes; faced with the divorce threat, Sheila reluctantly but willingly engaged in them, decided during or after them that they were intolerable to her, also had some very rough sex which the Justices apparently agreed she did not claim was humiliating, and suffered intense anguish.

So there are three fact clusters in the record which various Justices regarded as irrelevant, relevant but not legally sufficient, or legally sufficient to sustain findings that William's conduct was outrageous etc., and/or that he had the sufficient degree of intent to be responsible for the emotional distress that Sheila suffered. First is William's desire for and solicitation of sadomasochistic sex. I'll call this the "sadomasochistic solicitations." Second is Sheila's narrative to William of a rape that occurred before the marriage and her refusal (apparently rescinded near the end of their life together) to engage in bondage for that reason. I'll call this the "rape disclosure." The third element is William's inability/refusal to relinquish his kink, his pursuit of it with a lover and his telling Sheila, when she discovered that he was seeing a psychotherapist, that the marriage would fail if she could not participate in bondage with him. I'll call this the "divorce threat."

For one Justice, the divorce threat and the sadomasochistic solicitations are crucial and the rape disclosure seemingly irrelevant. Justice Gonzalez indicates that the element of "outrageousness" was fully met by William's solicitation of and participation in bondage activities with her, "under the rationale that such activities were necessary to the future of their marriage."<sup>116</sup> He makes no reference to the claims that these solicitations, episodes or arguments had a severe emotional impact on her because of the rape, or that William should incur liability for them because she had warned him that they would. He almost suggests that the solicitation of mild sadomasochistic sex with a spouse, especially if you really need it and she later finds this out, is itself outrageous and can be presumed to cause any emotional distress that follows. It is a draconian anti-kink stance and not intrinsically feminist (though some feminists would no doubt endorse it, for feminist reasons that do not appear to have motivated Justice Gonzalez).

For the other Justices who reflect substantially on the facts, all three fact clusters—the sadomasochistic solicitations, the rape disclosure and the divorce threat—matter and there are indelible marks of feminism in the Justices' understanding of their interrelation in a causal progress from William's "intent" to Sheila's distress. They differ, moreover, in the inflections they give each of these clusters, so a close reading will be rewarding. Justice Cornyn (writing the plurality opinion concluding that the action for intentional infliction should be allowed and the case remanded) summarized the record thus: "Sheila testified that William pursued sadomasochistic bondage activities with her, even though

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115. *Id.* at 641 (emphasis added).

116. *Id.* at 626.

he knew that she feared such activities *because she had been raped at knife-point before their marriage.*"<sup>117</sup> This logic must exclude the bondage scenes that happened before William knew about the rape. Justice Hecht (who would have rejected all infliction actions as indeterminate and thus not capable of being brought within the rule of law)<sup>118</sup> narrates the moment of disclosure thus: "She revealed to him that she *associated the activities with the horrible experience of having been raped at knifepoint* earlier in her life."<sup>119</sup> And Justice Spector (who would have endorsed a rule allowing negligent infliction actions because of the disproportionate harm insensitive men cause more emotionally alert women and who would not have remanded but rather *affirmed* the judgment for Sheila even on an intentional infliction rule)<sup>120</sup> basically repeats Justice Hecht's narrative here: after William "introduced bondage activities into their relationship after their marriage[,] Sheila told William that *she could not endure these activities because of the trauma of having been raped* several years earlier."<sup>121</sup>

Justices Cornyn, Hecht and Spector (though they agree about little else) agree that Sheila's special sexual history was crucial to her claim, and the latter two (though they agree about almost *nothing* else) agree that it made her particularly vulnerable to harm in sexual exchange with her husband. They use a strange temporal locution—"the experience of having been raped," "the trauma of having been raped"—that locates the moment of injury in a perpetual present. Sheila is *always* undergoing the experience of having been raped, *always* suffering the trauma of having been raped. In much feminist rape discourse, this is exactly right. Once raped, always raped. Contemporary feminist rape discourse repeatedly insists that the pain of rape extends into every future moment of a woman's life; it is a note played not on a piano, but on an organ. Justice Spector's cultural feminism probably supplies this understanding; Justice Hecht, who, as we will see, attempts to reconstitute Sheila as a responsible agent with considerable powers, resorts to it in a gesture that seems almost compensatory.

At this point Justices Spector and Hecht part company, and as the latter departs from Justice Spector's cultural feminist line I feel strongly tempted to follow him. On the question "what did William know about Sheila's likely emotional reaction to a bondage solicitation," Justice Hecht tells us that, after the first experiments with neckties, "Sheila told William she did not like this activity and did not want to participate in it further."<sup>122</sup> Strong, decisive, self-knowing. An agent. But not a person with a plausible claim that her husband's desire for what she did not desire constituted "intentional infliction of emotional distress." Justice Spector, however, understands the disclosure quite differently: after the rape disclosure "William understood that Sheila *equated* bondage with her prior experience of being raped"; "Sheila told William that she *could not endure* these activities."<sup>123</sup> Once again Justice Spector deals in standard cultural feminist rape

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117. *Id.* at 620 n.1 (emphasis added).

118. *See id.* at 634.

119. *Id.* at 636 (emphasis added).

120. *Id.* at 643.

121. *Id.* at 641 (emphasis added).

122. *Id.* at 636.

123. *Id.* at 641 (emphasis added).

tropes: the deathlike pall of sexual injury and the literal equation of every rape-like event with *rape itself*. If bondage reminded Sheila of her rape, it was the rape all over again; and because the rape was death, being reminded of it was also death: she *could not endure it*.

And what about the divorce threat? Justice Hecht gives it a somewhat pathetic cast: “William told Sheila that if she could only have done bondage, nothing else would have mattered.”<sup>124</sup> None of the other renditions of this fact have anything like this wistful sound. Justice Spector quotes the trial court, which found that William had “engaged in a continuing course of conduct of attempting to coerce [Sheila] to join in his practices of ‘bondage’ by continually asserting that [their] marriage could be saved” only if she participated in them.<sup>125</sup> Justice Cornyn also quoted the trial court’s finding that William “attempted to emotionally coerce [Sheila] in ‘bondage’ on an ongoing basis.”<sup>126</sup> Perhaps this is where the rape-likeness of the last bondage scenes finally emerges: the threat of divorce is like the threat of a knife. Under threats like this a woman loses her agency and, if she consents to sex, it is nevertheless coerced. This, too, is a completely familiar element of feminist rape discourse. Why so many feminisms want women to experience themselves as completely devoid of choice when they bargain their way past a knife by having sex they really don’t want, I don’t know. But wait! Justice Spector has just extended this agency-less construction of women to situations involving the threat, not of physical mutilation or death, but of *divorce*. *Divorce* is represented as so life-threatening that, faced with the possibility of it, women cannot be regarded as agents.

This image of male power and female subordination—the utter pathos of Sheila, submitting to sex with her husband that he wants but that they both know will humiliate and anguish her, all to save her marriage precisely to the author of her suffering—is of course not at all required by any particular strand of feminism. Nor need feminism endorse or seek the remedy granted by the Texas Supreme Court in this case.<sup>127</sup>

But can feminism accommodate a completely reversed image of the Twymans’ marriage? Imagine it: the utter pathos of William, begging for sex he can’t get from his wife, guiltily sneaking off to have it with another woman, whipped through round after round of psychotherapy to figure out why he is such a pervert and finally submitted to the public humiliation of testifying about his hopeless intimacies and suffering a published opinion deciding that his marital conduct is very likely outrageous, beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized society. As against that, imagine: the astonishing powers of Sheila, laying down the moral law of the couple’s sex life, pursuing William like a Fury for breaking it and extracting not only a fault based divorce, but possibly also money damages specifically premised on her alliance with the state against him. Imagine further: *Twyman* as a

124. *Id.* at 636.

125. *Id.* at 641.

126. *Id.* at 620 n.1.

127. Brenda Cossman, Dan Danielsen and Tracy Higgins give acute readings of the ways in which the Justices incorporate various forms of feminism in their legal and policy calls and amply demonstrate that many feminisms would object to the outcome in this case. See Cossman et al., *supra* note 1.

background family law rule that husbands with enduring ineradicable desires for sex that their wives find humiliating must either stay married to those wives or, if they seek a divorce (which they might well want to do simply to remarry and have nonadulterous sex with women who do not find their desires humiliating), pay a heavy tax in shame, blame and cash. Can feminism acknowledge that women emerge from the court's decision with new bargaining power in marriage and a new role as enforcers of marital propriety? And can feminism see how costly this "bargaining endowment" might be *to women*, who can tap into it only if they find the sex in question painful and humiliating? Can feminism read the case as male subordination and female domination—and *still* as bad for women?

Very possibly. There might well be a place for feminism that carries a brief for F, without presupposing M>F. I think this is where Brenda Cossman and Tracy Higgins see the possibility for substantial gains for feminism.<sup>128</sup> But my project here is to expose some of the distinctive attractions of Taking a Break from Feminism. To do that, I'm going to reduce Friedrich Nietzsche's *On the Genealogy of Morals*<sup>129</sup> and Foucault's *The History of Sexuality, Volume One*<sup>130</sup> to a set of counter-hypotheses and offer brief re-readings of *Twyman v. Twyman* designed to exploit the explanatory power of the resulting hypotheses. I propose to read each text as forcefully as possible away from the many possible deployments of it within feminism, even the most minimal feminism I know, which is, as I've said, basically M/F, M>F, and carrying a brief for F. It is very important to note that, when I turn to *Twyman* to re-read its facts, as much as possible, to exemplify the hypotheses I've generated from *Genealogy of Morals* and *Volume One*, I am not making any claims about the real human beings Sheila and William Twyman; instead, working from the highly artful constructions of them that we receive from the Justices of the Texas Supreme Court, I'm going to bracket feminism and reconnect all the dots à la Nietzsche and à la Foucault.

First, let's consider the moralistic character of Sheila's project with William. Note that she was not content to seek a fault-based divorce and apparently did not seek damages or pursue criminal charges against him for that last night of sex between them that left her bleeding. Instead, she sought a judge's finding that—through the sadomasochistic solicitations, the rape disclosure and the divorce threat—William engaged in conduct that was outrageous, beyond all possible bounds of decency, atrocious and utterly intolerable in a civilized society. What can we say about Sheila's decision if we take Nietzsche's *Genealogy of Morals* as our theoretical ground? In the following extractions, I rewrite the "slave revolt in morals"<sup>131</sup> as if it were achieved not over the broad sweep of human history but by an individual:

1. The historical starting point of slave morality is the slave's perception of himself as dominated and as suffering under the will of the master. He sees his

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128. See *id.*

129. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS: A POLEMIC* (Douglas Smith trans., Oxford Univ. Press 1996) (1887).

130. FOUCAULT, *supra* note 26.

131. NIETZSCHE, *supra* note 129, at 22.

as a *passive* location in the world: the master is *active*; and in his passivity the slave suffers.

2. Though originally the slave could have understood his suffering as bad and the master's activity as good (and could have sought to be active too), this is not what happens. Instead, he translates the power relation into a moral one: he is good and the master is evil. It is now a relationship of dominated virtue and dominating vice. Morality is born as a covert mechanism of power, a sublimated form of domination.

3. This translation removes any reason for the slave to experience himself as having a *will*. Will is now evil. The rage of the slave against his suffering—his own will to power—is now denied.

4. His will, his activity, do not go away, though. Instead, translated yet again into *ressentiment*, they are rerouted both *out*, against the master, in gestures of meek but biting vengeance, and *in*, against the slave himself, in a new form of suffering, under the whip of his own morality, the new innerness of a *guilty conscience*.

5. Slave morality wreaks itself with splendid sadism on the master, and with stupefying intensity it also punishes the slave himself for his own active impulses—impulses without which the whole terrible cycle would never have started. It establishes a third human class, the priestly class, with powers that are made more uncanny because they are waged under the sign of weakness and use not the pathetic devices of physical coercion but the intimate stringencies of conscience and inner pain. “Bad air! Bad air!”<sup>132</sup>

It is not at all difficult to re-read Sheila Twyman as the intense sufferer and wielder of slave morality. Her rapist, that blond beast, could have been her enemy, but (possibly with the assistance of feminism) became her master. His power to rape her at knifepoint became *a*, if not *the*, central fact of her life. Experiencing herself as utterly dominated, she determined to oppose him with the power of the weak: he was bad, not in the sense that he acted inimically to her will, but in the sense that he was evil. And her moral project of punishing him, in its ferocious will for revenge, failed to notice that William was—well—a different guy. Wielding the moral code of good sex, Sheila made William grovel, but she also suffered intensely herself. Justice Spector (of course) provides us with the gruesome details: Sheila “experienced ‘utter despair’ and ‘devastation,’” lost weight, accepted sex with William that left her bleeding: “the pain and humiliation of the bondage activities caused her to seek help from three professional counselors.”<sup>133</sup> (It is an amazing detail that Justice Spector’s *and* Justice Hecht’s Sheila seems to find sex with neckties, but not sex that produces gynecological injuries, to be painful and humiliating. A Nietzschean reading of this discrepancy would propose that this Sheila was devoid of a self-preservative impulse, could not attend to the well being of the body, so devoted was she to quickening of her wounded soul.) She experienced her self as utterly

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132. *Id.* at 28.

133. *Twyman*, 855 S.W.2d at 641.

powerless, utterly broken, and the more intensely she sought and obtained vengeance on William, the more deeply she became embedded in the stringencies of the suffering that justified it.

I can think of many reasons why Taking a Break from Feminism so as to be able to read the case in this way is a good idea. *If* this reading of her is right—and the reading itself is no empirical warrant—I have several important political insights I would not have without it. First, it brings strongly to my attention the possibility that Sheila Twyman is no ally of mine. Second, it warns me to think of her as no weakling, but rather as a formidable enemy who will pursue her goals with fierce drive. Third, it suggests that she nevertheless suffers terribly with every new access of subordinated sensibility. And fourth, it helps me to see that *feminism* might be partly responsible not only for her power, but also for the terrible suffering that grounds it.

But maybe my *ressentiment* of Sheila's *ressentiment* is torquing my reading too much. Let's look for something milder, something that suspends completely the idea that power must take the form of domination and subordination and something that lifts us out of moralism and the temptation to fall into a moralistic rage against it. As I read *Volume One* of Foucault's *The History of Sexuality*, it offers some theoretic hypotheses that differ very strikingly from those I have attributed to United Statesian feminism<sup>134</sup> and to Nietzsche. In what follows I proceed as though Foucault's hypotheses about power were simple and straightforward rather than contradicted, ambivalent and in tension throughout this text.<sup>135</sup>

Four key points:

1. For the Foucault of *Volume One*, the task was to imagine power not as the relation of dominance and subordination, but as a highly fragmented and temporally mobile "field of force *relations*." Power could be *micropouvoir*: it could achieve vast social and consciousness effects not by dropping down on people from on high, but by being constantly moved about among them; and not only through physical violence, but also through formations and reformations of the possibilities for organized experience. Discourses.
2. For the Foucault of *Volume One*, power was not necessarily bad. It might be *pouvoir*, the capacity to create effects, rather than *puissance*, the capacity to dominate or coerce.
3. For the Foucault of *Volume One*, sexuality emerged historically as a dis-

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134. Of course I know that there have been many efforts, some quite successful, to converge *Volume One* into feminism. I nevertheless offer this divergentist reading, trusting that pushing feminism and Foucault as far apart as I can will also be productive, albeit in a different way.

135. Thus Foucault describes power as *both* sovereign and fragmented; liberation as *both* desirable and a ruse; historical forms of power and social life as *both* superceded and enduring. For a brilliant reflection on the nonpropositional quality of *Volume One*, see Andrew Parker, *Foucault's Tongues*, 18 *MEDIATIONS* 2 (1994). For some perhaps adequate reflections on Foucault's ambivalent periodizations, see Janet E. Halley, Bowers v. Hardwick in the Renaissance, in *QUEERING THE RENAISSANCE* 15 (Jonathan Goldberg ed., 1994).

course and produced as its effect the people we are—people who think that our lives crucially involve knowledge of our deepest sexual selves. There is something excruciating and “stuck” about this; a more mobile relationship to sexuality not as a truth but as a practice might be better. Foucault did not imagine liberation, but rather a perpetual search for the *rearrangement* of powers in the social and experiential fields.

4. Very few of the chief discourses of sexuality in the modern era turn in any sustained way on M/F. None of them bears the mark of sustained male dominance. Instead, the organization of knowledge and knowledge practices are far more likely to be the way in which power constitutes sexuality. These will not oppress particular persons or groups, so much as produce differentiations within the population, spread it out in mobile but patterned arrays. Biopower.

These hypotheses would allow us to Take a Break from Feminism in two ways: they propose that sexuality can be understood without reference to M and F; and they propose that power can be understood without >.

So let's read the *Twyman* facts as if these hypotheses were the only ones available. The first thing that “goes” is the presumption, silently carried along in all the opinions of the court, that Sheila Twyman has a meaningful moral claim that William's conduct was wrong. The question addressed by the Justices is whether that claim is *legally cognizable*; Justice Hecht comes closest to the claim that the power relationships between husband and wife are indeterminate, but even he fell for the “trauma of having been raped” line. Reading the case as if it were an example of how right Foucault's hypotheses in *Volume One* could be, however, requires us to give that presumption up.

One of the things that then immediately emerges is the intense, and formally almost identical, sexual pathos of both Sheila *and* William. Both are committed to the idea that they have deep, inner, injured sexual selves beyond which they cannot move one micron and which they must enact with near-fatal completeness. William *must* live out the affliction of a perverse implantation, a deeply resisted fetishistic desire. He is a classic subject of the psychiatrization of perversions. Sheila *must* live out the affliction of rape trauma. Rape trauma is her deep inner truth, and her experiential life must make it manifest. In a terrible way, William and Sheila are perfectly matched to provoke the complete manifestation of their diametrically opposite desires, but oddly, this is because they are basically the same.

Moreover, Foucault always seems to think that this experience of deep inner truth is introduced into modern consciousness by a discourse—a power/knowledge—that imposes it on us while distracting us from the real action, the real place where power connects with sexual life. The suffering of the shamed fetishist is pathetic—indeed, it is cruel and quite one of the terrible wrongs inflicted on the tremulous human spirit by the psychiatric discourse of sexual truth; and the suffering of the rape survivor is similarly pathetic—indeed, it is cruel and quite one of the terrible wrongs inflicted on the tremulous human spirit by the feminist discourse of sexual truth. But both are distractions from

the real game, the real place where power meets the population. (This is *Foucault's* paranoid structuralism.)

And where might we look in the *Twyman* facts for a warrant of the hypotheses of *Volume One*? We are looking for something broadly regulatory, not M/F, and capable of complex biopoweristic and micropoweristic deployments. I propose marital monogamy. Marriage provides spouses with an amazing power over each other: the power to perform (and inflict), and to prohibit (and punish), infidelity. The monogamy rule and all the possible ways of breaking it provide rich social scripts, carefully elaborated at every level of cultural detail. Those scripts provide many ways of seeing a relationship of "power over" in the *Twyman* facts. It is very easy to say that William has breached his promise of sexual continence, indulged in gratifications inconsistent with adult self-discipline and decent regard for Sheila's dignity, and cracked one of the building blocks of civilization. Also easy to articulate is an idea that he has unleashed the brute force of sexual yearning against the fragility of civilization. But we could see the subordination as running the other way: William enacts that immemorial figure, the Hapless Adulterer; he is the helpless bumbling dupe of a dozen trite tropes in the adultery script; the deep purpose of his affair was realized only when Sheila discovered it and gained the upper hand; Sheila as the wronged wife, the enforcer of marriage vows, fiercely restores the fidelity rule to its proper place, with the avid assistance of almost every judge involved in the case.

But let's try one more time, for a third reading without a victim and a victimizer, without dominance and submission, without M/F—but *with* power. What if the struggle between the two over William's infidelity—their divorce had been pending for eight years by the time the Texas Supreme Court remanded the case *for a new trial!*—was for both of them a paroxysm of intimacy, a sustained crescendo of erotic interrelatedness, which, if it should ever end, would leave both of them aimless and lonely to the last degree? Would that be a benefit or a cost of a monogamy rule?

#### IV. CONCLUSION

So, why should we Take a Break From Feminism? Here would be some decisionist responses to that question, couched in terms of the *Twyman* case and its re-readability.

It might be that these alternative readings of the facts recorded in *Twyman* just don't have any real-world plausibility. Maybe Sheila is never the fomenter of slave morality; maybe Sheila and William never seek love in power without domination, suffering without subordination, in the cruel coils of divorce. There is both strength and danger in framing the possibilities described by these readings. Only if we articulate and explore them, will we ever look into the world and see if it matches them. Our political desires and projects could be significantly rerouted, in very good ways, if we found a match: noticing that slave moralistic Sheila Twymans are not my allies has meant a profound reorientation of my feminism and my stance towards feminism, one that I think has been very helpful to me. I admit there is danger here too, in the form of a spiral: if our axiom is "I'll see it when I believe it," theory can change reality by changing

what we can notice in it; and maybe feminism is right to close its eyes. As I've suggested, I'm strongly inclined to think otherwise.

And maybe there is something terrifying about losing one's grip on a "moral compass" or in admiring a cruel marriage rule *because* people can use it for intense crazy masochistic love. Very possibly critical disorientation is an unaffordable luxury, especially in times, like these, of acute consolidation of conservative power. Again, I'm strongly inclined to think otherwise; and hope my hunch turns out to be right.

The intersections of the erotic with power and pain might just not always line up under the minimal terms required by feminism today (M/F, M>F, and carrying a brief for F). But *if* these are possible features of our world—if even only *some* Sheila and William Twymans are like that, or even if some possible Sheila and William Twymans are like that only *some* of the time—it would be a good thing for us (here I speak to left, sex-positive, postmodernizing lovers of justice) to consider the possibility and take it into account. We'll never *know*: our theory predetermines what we *can* know. But we could *decide under the inevitable condition of not knowing* with a wider scope of political sympathies and a finer calibration of the perverse ways in which desire—everyday desire, the desire of entirely normal people—encounters legal rules.

(Appendix on page 50.)

## APPENDIX

There is no consensus on the essential or even characteristic attributes of queer theory. For a while, in the early days of the project, anyone willing to be called “queer” was, by acclamation, entitled to the term; after all, association with the sobriquet could ruin your career and if you were willing to risk paying that price to develop the work, other players tended to cede you a lot of authority to define it. A strong bias in the project against field territorialization, “categories” and rules generally also led to many utopian statements that queer theory would be the first enduring academic enterprise that had no internal regulatory ambitions, that would be forever open, exploratory, self-transforming and new. The heyday of these antidefinitive norms seems to have passed; while being associated with “queer theory” continues to ruin many academic careers, it is also making others; and the idea of queer theory as an intellectual perpetual motion machine seems to be well advanced into its first half-life. Things are settling down; it is no longer intrinsically funny—as it was in 2000—to ask “What Was Queer Theory?”<sup>136</sup>

While writing about *Is the Rectum a Grave?* and *Sexy Dressing*, I asked myself again and again: Why do I regard these texts as “queer theory”? I was aiming for a list of (Aristotelian, again) essential characteristics, like the ones I have deduced from feminism. So far the list is maximalist: it stipulates for a lot, and so would deny the moniker “queer” to many projects that now claim it. Still, unlike M/F, M>F, and carrying a brief for F, these essential characteristics resemble *tendencies* rather than conceptual, descriptive or normative *commitments*. And some projects seem to me to be “queer” even if they don’t manifest all of them.

Queer theory is:

*Sex affirmative.* As I’ve suggested, we probably wouldn’t *have* queer theory if there had not been the need for articulate pro-sex opposition to cultural feminist moralism and to male/female model regulatory ambitions (e.g., antipornography ordinances).

but also,

*Shame affirmative.* In its sex affirmations, queer theoretic work is curious about, involved in and indeed often positively affirmative with respect to shame and abjection. I see two interesting consequences of this “bent” in queer theory.

- It is not sex affirmative in the cultural feminist sense that it has a normative definition of “good sex” which it promotes to the detriment of “bad sex.” Rather, it ends up affirming sex “dark side and all.” Deeply appreciative, therefore, of MacKinnon’s determination to construe sex,

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136. When Neville Hoad did so in 2000, the query had more or less the form: “What happened to tomorrow?” Personal Communication with Neville Hoad (February 11, 2000).

from wall to wall, in terms of power and domination (though, because of its critique of identity, unable to accept her structural rendering of sexual power as male/female and top/down at all times, everywhere). This characteristic makes it very difficult for queer theory to “know” how to distinguish rape from habitual, Sunday afternoon, missionary position, marital intercourse: MacKinnon had this problem too, but for other, distinct reasons.

- Shame affirmativity makes queer theoretic work highly liable to contradiction in all its affirmative projects. It is not possible to affirm one’s shame—even descriptively, much less normatively—except on some paradoxical register.

And so queer theoretic work tends also to be

*Irrationalist.* Not only with respect to its affirmative stance towards the shame/abjection that awaits us in sex, but in general and overall, queer theoretic work seeks and values paradox, contradiction, catachresis, crisis. This trend in queer theory borrows heavily from the postmodern effort to put “enlightenment rationality” under historicizing critique—an effort that is represented in this study by Foucault and Nietzsche, but which could easily involve us in genealogical explorations of Immanuel Kant, Jacques Derrida and the postmodern Socrates.<sup>137</sup> Symptoms are: utopian about “negative capability”; appreciative of a good *mise en abyme*; eulogistic in its use of the term “problematic.” Work in this tradition will try to be at least partly immune to the liberal command to be rational; it will risk explorations and elaborate ideas that might impede “progress,” etc., will face up to some really painful experiences of uncertainty, disorientation and irresolution. At its worst, this characteristic can lead queer theory into positions that are bratty, disengaged, narcissistic, idiotically dedicated to *puer senex* performances of the *enfant terrible*. At its best, this characteristic holds out promise for intellectual, political and social revival of radical and critical practices.

and

*Affirming practices/performativity/mobility, disaffirming identities/essence/stability.* Before launching on this project, I had always thought that the critique of identity was *the* definitive feature of *queer* work. Formulations like Sedgwick’s (feminism presupposes a heterosexist conceptual order; gay identity is anti-gay)<sup>138</sup> and Butler’s (feminism exists to contest the very mandate of women’s existence as such)<sup>139</sup> are nearly definitively queer; and else-

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137. On Immanuel Kant, see, e.g., Michel Foucault, *What Is Critique, in THE POLITICS OF TRUTH*, (Sylvère Lotringer & Lysa Hochroth eds., 1997); on Jacques Derrida, see, e.g., BARBARA JOHNSON, *THE CRITICAL DISTANCE* (1981); and on the postmodern Socrates, see, e.g., Jacques Derrida, *Plato’s Pharmacy, in DISSEMINATION* 61 (Barbara Johnson ed., 1981).

138. SEDGWICK, *supra* note 12.

139. BUTLER, *GENDER TROUBLE*, *supra* note 12.

where, from David Halperin's *One Hundred Years of Homosexuality* (giving homosexuality, and thus heterosexuality, a very recent birthday)<sup>140</sup> to Dan Danielsen's and Karen Engle's *After Identity* (looking forward over the current identity-saturated landscape for a politics framed in other terms),<sup>141</sup> *really* left gay work consistently regards homosexual identity as one of the most subtle, pervasive and constitutive forms of homosexual suffering. Nevertheless queer theoretic work—including work by every single person just named—pervasively respects the rich linguistic power of sexual orientation and gender identities, and often affirms them descriptively, strategically and even normatively. Perhaps the queer appetite for paradox sustains this contradiction; perhaps we just haven't, maybe even we can't, think it through completely.

So the anti-identitarian impulse that seems to me essential to the project has complex, not simple manifestations. I would now say that queer work will be more interested, descriptively and normatively, in practices than identities, in performativity than essences, and in mobility than stabilities. That is,

- it will be less affirmative of gay identity, which it frequently merely tolerates as a strategic and historical contingency, than of intense cathexes on sexual practices and affective states like desire, abjection, vigor, etc.;

and

- it will be less interested in and affirmative of gay male and lesbian separatist identity or various heterosexual subject positions as such than of gender performativity against, across *and within* them; identity itself becomes a *practice*;

and

- with respect to both sex acts and gender performativity, it will tend to affirm mobility over fixity, though this tendency always leads a queer theoretic project to contradict its anti-identitarian aspirations by turning mobility itself into a new, highly regulatory identity or a model for all fixities to envy.

And, finally, queer theoretic work wants to be

*Politically engaged towards the left.* Left/progressive/liberal in political orientation. If I'm right that what now bears the label "queer theory" can trace its genealogy back to (*inter alia* of course) pro-gay and feminist sexual liberation movements of the 1960s and 1970s and gained a strong *raison d'être* in the need for left resistance to the sexual regulatory projects of male/female

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140. DAVID HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* (1990).

141. DAN DANIELSEN & KAREN ENGLE, *AFTER IDENTITY: A READER IN LAW AND CULTURE* (1995).

model and cultural feminism, that does not commit it in any way to a strong theory of the state or stance towards, say, libertarianism or rights. Nor does its affiliation with postmodernism and critique commit it to nihilism and political paralysis. *Is the Rectum a Grave?* rightly insists that affirming sex, “dark side and all,” has very obscure and indeterminate consequences for political affiliation and initiative—but that does not mean it has *no* consequences. I propose Kennedy’s neorealist, postmodernizing decisionism as a way we could figure out those consequences and make the decisions they press upon us every day.

That’s how I want to see it, at the moment, anyway.