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# Sex Wars as Proxy Wars

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Aya Gruber\*

## Abstract

The clash between feminists and queer theorists over the meaning of sex—danger versus pleasure—is well-trodden academic territory. Less discussed is what the theories have in common. There is an important presumption uniting many feminist and queer accounts of sexuality: sex, relative to all other human activities, is something of great, or grave, importance. The theories reflect Gayle Rubin’s postulation that “everything pertaining to sex has been a ‘special case’ in our culture.” In the #MeToo era, we can see all too clearly how sex has an outsized influence in public debate. Raging against sexual harm has become the preferred weapon of those attacking heterogenous power differentials. Focusing on sex, advocates wage proxy wars for other values, from equality in professor-grad student relationships to gender diversity on corporate boards. However, when we have our sex blinders on, it is difficult to seek remedies to—or even see—the problems for which sexual harm stood in as a proxy. In this essay, I make the case that combining queer-theoretical methods with a distinctly sex-indifferent stance brings a useful perspective to some of the thornier aspects of the contemporary debate over sex regulation.

*We must conduct our sexual politics in the real world.  
For women this is like advancing across a mined field.*

*Looking only to your feet to avoid the mines means  
missing the horizon and the vision of why the advance  
is worthwhile; but if you only see the future  
possibilities, you may blow yourself up.*

Ellen Carol DuBois & Linda Gordon<sup>1</sup>

## I. The Players: Feminist and Queer Theorists Signify Sex

The clash between feminist legal theorists and queer theorists over the meaning of “sex” (as in intercourse, not biology-gender)<sup>2</sup> became so polarized over the last several decades that it lends itself to caricature. With every vitriolic exchange, an increasingly vulgar vision of each camp emerged. Feminists are pearl-clutching, anxiety-ridden authoritarians, condemning men (and women who act like men) to the gallows and tsk-tsking at the patriarchy-blinded women who fail to recognize their subordination.<sup>3</sup> Alternatively,

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\* Professor of Law, University of Colorado Law School. I thank Janet Halley, Jennifer Hendricks, Duncan Kennedy, Ben Levin, Russell Robinson, and Ahmed White for their helpful feedback on ideas and drafts. Leah Travis provided excellent editorial assistance. I owe a special debt of gratitude to Joseph Fischel, who encouraged this queer-theory dilettante to take a risk and write this essay and who provided invaluable guidance with a deft editorial hand.

<sup>1</sup> Ellen Carol DuBois & Linda Gordon, Seeking Ecstasy on the Battlefield, in *Pleasure and Danger: Exploring Female Sexuality* 42 (Carole S. Vance ed., 1984) [hereinafter *Pleasure and Danger*].

<sup>2</sup> “Sex” will have this “sexual activity” meaning throughout.

<sup>3</sup> See Catharine A. MacKinnon, Trafficking, Prostitution, and Inequality, 46 *Harv. C.R.-C.L. L. Rev.* 271, 296 (2011) (describing sex workers rights activists’ characterization of anti-prostitution activists as “repressed

feminists are womyn-bonding, house plant-pruning female supremacists, insisting on “lesbian, entirely feminine,” yet hot-and-orgasmic sex, mostly with men.<sup>4</sup> Queer theorists are “POMO’d”-out,<sup>5</sup> gender-bending, sociopathic risk-seekers, with a dangerous moral relativism, or worse, a “rapeophile” ideology that sexual pain equals pleasure.<sup>6</sup> Queer theorists are leather, and feminists are lace—or macramé. The debate between feminism and queer theory often reduces to one camp defending itself from the hyperbolic charges of the other. And to outside observers of this mudslinging, it all looks decidedly white, female (or gay male), and privileged.<sup>7</sup>

Defenders of “dominance” feminism—the name ascribed to Catharine MacKinnon’s theory of sex and gender—dismiss the neo-Victorian caricature. They argue that MacKinnon’s sex-regulatory proposals, i.e., anti-pornography laws, are not about fear or moralism, but power.<sup>8</sup> Because sexual subordination organizes gender, the argument goes, only strict regulation of sexual harm can produce justice. Nevertheless, as I explore below, in justifying its theoretical frame, dominance feminism vividly describes a world rife with horrific sexual danger. Its remedial program involves rapturous power reversals and movie-ending justice. The theory is thus tailor-made to produce a readership of anxious, frightened women, who hope authoritarian laws will protect them from the sexual danger all around and extract a pound of flesh from bad men. Dominance feminism’s retributive/protective gestalt thrives in today’s #MeToo world, even if few could identify the theory’s structuralist foundation.

The caricature of the queer theorist is likewise extreme. Queer theorists do embrace postmodern analytic methods—notably the idea that power moves sneakily within interstices. Not all, however, are so POMO’d-out that they lapse into hopeless moral

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puritan sex-panicked whiners who just don’t have what it takes to make it as whores”); see also Biddy Martin, *Feminism, Criticism, and Foucault*, 27 *New German Critique* 3, 11 (1982).

<sup>4</sup> Janet Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice*, 1 *Unbound: Harv. J. Legal Left* 65, 89 (2005).

<sup>5</sup> “POMO” is a short (and snarky) name for “postmodern.” A “POMO’d-out” theorist, in my mind, tends to take “positions that are bratty, disengaged, narcissistic, idiotically dedicated to *puer senex* performances of the enfant terrible.” Ian Halley, *Queer Theory by Men*, 11 *Duke J. Gender L. & Pol’y* 7, 51 (2004) [hereinafter *Queer Theory*].

<sup>6</sup> See Robin West, *Desperately Seeking a Moralism*, 29 *Harv. J.L. & Gender* 1, 43 (2006) (calling queer theory “rapeophilic”) [hereinafter *Desperately Seeking*]. Queer theorist Janet Halley notes the ad hominem nature of some of these critiques: “It has even been suggested that feminist internal critique harbors some sick personal investment in aggression and/or pathos or in sadism and/or masochism . . . , and opponents have lodged those criticisms as criticisms of *me*.” Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* 313 (2006) [hereinafter *Split Decisions*].

<sup>7</sup> Which I am also, at least in part (bi-racial Asian and White cisgender straight woman). Biddy Martin foresaw this potential for caricature in 1982: “Traditionally, feminists have been labelled prudish by those liberationists who would force them into a position for or against sex; there is a sense of urgency within the women’s movement now of the importance of developing our understanding of ‘sexuality’ so that we can move beyond these false alternatives and shift the focus of attention to the relations which have produced ‘sexuality’ as we know it.” Martin, *supra* note 3, at 11.

<sup>8</sup> See Catharine A. MacKinnon, *Not a Moral Issue*, 2 *Yale L. & Pol’y Rev.* 321 (1984).

relativism or, worse, immorality where up is down. In this essay, I rely heavily on legal theorist Ian Halley's provocative and paradigm-shifting intervention *Queer Theory by Men* [*Queer Theory*].<sup>9</sup> Halley specifically identifies queer theory as a left/progressive project. Halley's goal is to open the reader to the larger range of sex's, even bad sex's, political, physical, ontological, and epistemic meanings. In turn, legal theory and practice can better approach the "hard" decision of "what legal rule we want to use in the domain of sexual abuse—or even which political direction to go in."<sup>10</sup> *Queer Theory*'s postmodern moves of disorienting strongly held moral instincts and undermining presumptions are in the service, not of superior truth or playful intellectualism, but of social justice.<sup>11</sup>

The cultural feminist (macramé) caricature is perhaps the most accurate, excepting the amateur botany. Cultural feminist writing forthrightly describes sex as it ought to be, in all its caring and hot splendor.<sup>12</sup> This vision of sex graces countless self-help publications, sexual health surveys, glossy girl magazines, and campus student health publications.<sup>13</sup> The notion that sex should be loving and intimate comports with preexisting gendered norms and "went down easy," in Martha Chamallas's words.<sup>14</sup> These norms of "feminine" sex make rough, uncaring, and forceful encounters terrifying to the feminist, tantalizing to the sex radical, and habitual to the domineering man. To be sure, it is difficult to view the women-need-intimacy definition of sex as "truly belonging to women, because it has been men who have done the defining."<sup>15</sup> Nevertheless, fearing their vision is just too "vanilla,"

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<sup>9</sup> *Queer Theory*, supra note 5. Halley's intervention in *Queer Theory* and later in *Split Decisions*, supra note 6, has proven so influential that it inspired a body of work on "feminism after" it. See, e.g., Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject*, 49 *McGill L.J.* 847 (2004); see also Lauren Berlant, *Neither Monstrous nor Pastoral, but Scary and Sweet: Some Thoughts on Sex and Emotional Performance in Intimacies and What Do Gay Men Want?*, 19 *Women & Performance* 261 (2009). Halley wrote *Queer Theory*, self-consciously adopting a male identity, perspective, and name (Ian), and I will attribute the article to Ian, a man. Ian Halley's iteration of queer theory is more political and prescriptive than Janet Halley's later iteration in *Split Decisions*. See infra note 11.

<sup>10</sup> *Queer Theory*, supra, note 5, at 38.

<sup>11</sup> When Ian Halley wrote *Queer Theory* in 2004, he resisted the entrenched presumption of feminism's unique and endless capacity to achieve a full, fair, and progressive politics of sexuality and endorsed "taking a break" from feminism to embrace queer theory. By the time Janet Halley wrote *Split Decisions* in 2006, she abandoned the argument that queer theory has more liberatory promise than feminism and instead endorsed a "politics of theoretic indeterminacy." See Janet Halley writing *sub nomine* Ian Halley, *Queer Theory by Men*, in *Feminist and Queer Legal Theory* 9, 28 n.3 (Martha Albertson Fineman et al. eds., 2009). Nevertheless, the politics of theoretic indeterminacy is not a value-neutral exercise in intellectual onanism. This postmodern move also "holds out promise for intellectual, political and social revival of radical and critical practices." *Queer Theory*, supra note 5, at 51. For Halley, accepting indeterminacy rather than rigid feminist orthodoxy produces "a disenchanting, coldly realist legal consciousness," but such must be the "attitude of a responsible power wielder." *Split Decisions*, supra note 6, at 304. Yet it also produces "a sense that legal rules can be decided not only by sober ethical mandate but with a thrilling will to power." *Id.*

<sup>12</sup> Robin West, *Caring for Justice* 286-88 (1997).

<sup>13</sup> See, e.g., J.R. Thorpe, *7 Ways to Make Practicing Affirmative Consent Sexy*, *Bustle* (Feb. 11, 2016) (<https://www.bustle.com/articles/138297-7-ways-to-make-practicing-affirmative-consent-sexy>).

<sup>14</sup> See Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 *Mich. J. Gender & L.* 157, 162 (2010).

<sup>15</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 *Cal. L. Rev.* 1279, 1333 (1987).

cultural feminists make room for some risk-play within the love. Still, few feminists would accept the queer theory claim that ecstasy can be achieved through “dysphoric” penile penetration—that “[w]omen and gay men spread their legs with an unquenchable appetite for destruction.”<sup>16</sup>

Today, dominance, cultural, and sex-positive positions are not neatly siloed. The feminist pro-sex and anti-sex lines have become so very blurred that there is a conflicted quality to the “feminist” view on sex. Young feminists celebrate norm-defying and exciting sex on the margins. At the same time, they proclaim that sex is traumatic assault without an affirmative and unambiguous expression of agreement.<sup>17</sup> Activists claim the “slut” label, proudly marching nearly naked or in scanty S/M garb. At the same time, they condemn actual commercial sex as modern-day slavery.<sup>18</sup> Feminist students at Stanford attend a Black Lives Matter rally on Monday and on Tuesday support higher sentences in sexual offenses because Brock Turner got off too lightly.<sup>19</sup> College sexual misconduct offices produce messages and images dictating that boys protect girls from their, other men’s, or the girl’s own sexual inclinations. The posters are head-scratchers. How could any program that stems from *feminist* antirape sensibilities produce a pictorial of a stumbling drunk girl in a short red dress and ankle-breaking heels, hair spilling to conceal her face, leaning helplessly on a well-groomed, in-control boy, with the caption, “Just Because You Help Her Home Doesn’t Mean You Get To Help Yourself”?



Figure 1. “Just Because” Ad Campaign.<sup>20</sup>

<sup>16</sup> Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: Cultural Analysis/Cultural Activism* 197, 211 (Douglas Crimp ed., 1988).

<sup>17</sup> See Kristen Sollee, *4 Sexy Ways To Ask For Consent, Because It Can Be A Turn-On*, *Bustle*, Oct. 16, 2015 (<https://www.bustle.com/articles/103236-4-sexy-ways-to-ask-for-consent-because-it-can-be-a-turn-on>); Ezra Klein, “Yes Means Yes” Is A Terrible Law, and I Completely Support It, *VOX*, Oct. 13, 2014 (<http://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it>).

<sup>18</sup> Leora Tanenbaum, *Topless Women at SlutWalk Demand Respect: Is This the Right Tactic?*, *Huffington Post*, Oct. 5, 2011 ([http://www.huffingtonpost.com/leora-tanenbaum/topless-women-at-slutwalk\\_b\\_993361.html](http://www.huffingtonpost.com/leora-tanenbaum/topless-women-at-slutwalk_b_993361.html)).

<sup>19</sup> See Christopher Brennan, *Stanford Students Protest Brock Turner Sentence, Sexual Assault on Campus During Graduation Ceremonies*, *Daily News*, June 13, 2016 (<http://www.nydailynews.com/news/national/stanford-students-protest-rape-brock-turner-graduation-article-1.2671260>).

<sup>20</sup> Meagan Simon, *Don’t Be That Guy*, *Sexual Assault Centre of Edmonton*, Dec. 6, 2010 (<https://sacetales.wordpress.com/2010/12/06/dont-be-that-guy/>).

Will a “new direction” in queer theory help navigate this morass of rape fear, sexuality reclamation, empowerment through victimhood, sexual tolerance, zero tolerance, anti-incarceration sentiments, and rape-punishment fervor? For me, the old queer theory has all the ingredients necessary to speak meaningfully to this sex and rape-preoccupied moment. It questions presumptions about good and bad sex; it finds the hidden distributions of power; it distinguishes between law-as-written and law-in-action; and it shows that discourse can produce real effects, for better or worse. There is, however, one feature of queer theory—a contestable feature I will have to argue exists—that is not so helpful. An important presumption often unites feminist and queer accounts of sexuality, as well as their recent amalgamations: sex, relative to all other human activities, is something of great, or grave, importance.<sup>21</sup> In this essay, I make the case that combining queer theory ingredients with a distinctly *sex-indifferent* stance brings a useful perspective to some of the thornier aspects of the contemporary debate over sex regulation and reform.

In the #MeToo era, we can see all too clearly how sex has an outsized influence on policy and public debate. Raging against sexual harm has become the preferred weapon of feminists and others trying to attack heterogenous power differentials. Focusing on sex, advocates wage proxy wars for other values, from equality in professor-grad student relationships to labor protection and gender diversity on corporate boards. The social prerogative to avoid bad *and* have good sex has engendered public health and other institutional bureaucracies in the business of managing danger and pleasure.<sup>22</sup> And in the ultimate insult to sex radicals, bureaucrats reconfigure the absence of danger *as* pleasure.<sup>23</sup>

There is a deeply entrenched belief that sex is inherently more important than other forms of human labor, other endorphin-producing physical actions, and other human interactions that risk disease, injury, and pregnancy.<sup>24</sup> Diverse societies from antiquity have singled out sex, investing it with a mythologic character in culture, art, and various social practices. Postmodern and queer theorists have long wrestled with the question of sexuality’s salience and the implications of its oversignificance. As Michel Foucault observed in Volume One of *The History of Sexuality*, “Under the authority of a language that had been carefully expurgated so that it was no longer directly named, sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite.”<sup>25</sup>

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<sup>21</sup> Of course, there are numerous queer and feminist theories and writings that have nothing to do with sex at all, although I would argue that both categories of theorizing are generally more sex-preoccupied than other schools of philosophy, such as liberalism, aesthetics, and ethics.

<sup>22</sup> Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 924-25 (2016).

<sup>23</sup> *Where is Your Line: Consent is Sexy!*, U. Wyo. ([http://www.uwyo.edu/stop/resources/10\\_stop\\_consentSexyBooklet.pdf](http://www.uwyo.edu/stop/resources/10_stop_consentSexyBooklet.pdf)) (last visited Oct. 24, 2016). The booklet is no longer available online. See also Gersen & Suk, *supra* note 22, at 928-29 for more examples.

<sup>24</sup> Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure and Danger*, *supra* note 1, at 143, 150 (“[T]he exercise of erotic capacity, intelligence, curiosity, or creativity all require pretexts that are unnecessary for other pleasures, such as the enjoyment of food, fiction, or astronomy.”).

<sup>25</sup> Michel Foucault, *The History of Sexuality Volume I: An Introduction* 20 (Robert Hurley trans., 1978).

Relatedly, in *Thinking Sex*, Gayle S. Rubin critiqued “sex essentialism,” the idea that sex is “eternally unchanging, asocial, and transhistorical,” and the “fallacy of the misplaced scale” where “everything pertaining to sex has been a ‘special case’ in our culture.”<sup>26</sup>

Queer theorists frequently object to the aggrandizement of sex by feminists, conservatives, and moralists seeking to control deviancy. Rubin engaged in a critical examination of the laws and cultural mores that place sex on a pedestal and the symbiotic and sustaining relationship between repressive regulation and sexual significance. She urged the reader to see past the law-versus-libido construction of most sexual liberation arguments. Instead, she maintained, we should be keenly aware of how the law creates privileged and minoritized sexual classes and practices. Still, for all its warnings about sex’s outsized meaning, *Thinking Sex* meticulously catalogues how law and society imbue deviant sexual practices with special *negative* meaning, leading to repression. Far less attention is paid to the flip side of the coin—the compulsory sexuality of “privileged” sex actors.

The picture of sex that emerges from the feminism-versus-queer theory debate alternates between a risk of utter devastation and an opportunity for Freudian ecstasy. In reality, the lion’s share of sex is, well, banal. Rubin, like many queer theorists, critiques the negative significance attributed to sex, arguing that in twentieth-century American culture, “Sex is presumed guilty until proven innocent.” Rubin offers as evidence the DSM—“a fairly reliable map of the current moral hierarchy of sexual activities”—which in the 1980s listed “fetishism, sadism, masochism, transsexuality, [and] transvestism” as “disorders.” But fast-forward to 2002. Sex researchers Hart and Wellings argued in the *British Medical Journal* that the “medicalisation model” replaced the “orthodoxy” of “restraint and moderation in sexual matters” with the mandate for “more and better sexual gratification”:

[T]he medicalisation of sexual behaviour has extended most recently into the domain of sexual pleasure. Doctors are wheeled in to place sex at the centre of a healthy lifestyle, and articles peppered with physiological and technical terms confirm and elaborate on the right way to perform “to please him or her.” Men and women are encouraged to protract their sexually active lives, regardless of desire.<sup>27</sup>

The authors close with the rumination that compulsory sexuality may well be the modern iteration of Herbert Marcuse’s “tyranny of genital sexuality.”

Writings that assume sex’s banality, ordinariness, and instrumentality are bit players in the feminism-versus-queer theory play. Queer theorists rightly worry about sex’s status as a site of concentrated danger, but we can also turn a skeptical eye toward its status as a site of concentrated pleasure.<sup>28</sup> Compulsory sexuality certainly tyrannizes many groups in contemporary society—incels, asexuals, the menopausal, teenage boys, and indeed *singles*.

<sup>26</sup> Rubin, *supra* note 24, at 150-51.

<sup>27</sup> Graham Hart & Kaye Wellings, Sexual Behaviour and Its Medicalisation: In Sickness and in Health, 324 *BMJ* 896, 898 (2002).

<sup>28</sup> See Joseph J. Fischel & Hilary R. O’Connell, Disabling Consent, or Reconstructing Sexual Autonomy, 30 *Colum. J. Gender & L.* 428, 525 (2016) (advancing a “claim for the ordinariness, not the extraordinariness, of sex”).

However, my main point, developed below, is that the feminist-queer theory debate has contributed to a dialogue in which the anxieties and controversies of the day are repackaged as sexual controversies, obscuring important stakes.<sup>29</sup> When we have our sex blinders on, it is difficult to seek remedies to—or even see—the problems for which sexual harm stood in as a proxy. In the next section, I look at the dominance feminism-queer theory debate over sex, specifically referencing MacKinnon and Halley. From that debate, I assemble an analytical toolkit to help navigate the murky waters of sex regulation and reform in this sex-preoccupied era. The final section offers some formative thoughts on how a queer theoretical and sex-indifferent approach sheds light on contemporary controversies, specifically on the Avital Ronell case.

## II. A Play in Two Acts: Feminist Pain and Queer Pleasure

*Sexual acts are burdened with an excess of significance.*

Gayle S. Rubin<sup>30</sup>

The seeds of queer theory were planted during the infamous “sex wars” of the 1970s when feminist reformers agitated for strict anti-pornography laws. Feminists waged bruising scholarly, political, and personal battles with sex radicals, who worried that the anti-porn regime mainstreamed and conservatized feminism, instantiated heteronormativity, stymied women’s sexual self-understanding, and thwarted sexual liberation.<sup>31</sup> In understanding this clash, from which queer theory partially sprang, a good place to start is with dominance feminism, the first act.<sup>32</sup>

### A. Act 1: Dominance Feminism

Dominance feminism offers a “structural” account of social power, involving a “patriarchy” that gravitationally pulls apparently autonomous liberal actors toward a male-dominant order.<sup>33</sup> In the early 1980s, the theory intervened in the two prevailing views of female empowerment: be the same as men or be different from men. Objecting to the liberal feminist idea of equal treatment, MacKinnon stated, “For each of [men’s] differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.”<sup>34</sup> Cultural feminists’ imperative to embrace

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<sup>29</sup> See *infra* Part III.

<sup>30</sup> Rubin, *supra* note 24, at 151.

<sup>31</sup> See generally *Pleasure and Danger*, *supra* note 1.

<sup>32</sup> The sex wars were, of course, not the only genesis of queer theory. Postmodern theorizing on sexuality, for example, Foucault, *supra* note 25, and gay-liberationist agitation in the wake of AIDS panic also contributed significantly.

<sup>33</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635 (1983) [hereinafter *Feminist Jurisprudence*].

<sup>34</sup> Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 45 (1987) [hereinafter *Discourses*].

women's difference was similarly fraught. So long as the patriarchy has its "foot [on] our necks," MacKinnon opined, we can never really know "in what tongue women speak."<sup>35</sup> Dominance feminism had epistemological ambitions, insisting that patriarchy is subject-forming. The identity "woman," MacKinnon insisted, cannot be separated from traits that evolved in a primordial soup of male dominance.<sup>36</sup>

These features of dominance feminism are analogous to portions of Immanuel Kant's metaphysical philosophy. The analogy is helpful to see how, in contrast to Kantian consistency, dominance feminism vacillates between transcendental and empirical deduction and between insisting on trans-human conditions of cognition and claiming access to "true" consciousness. Kant similarly posits *a priori* conditions of human cognition or "synthesis."<sup>37</sup> For Kant, there is an authentic truth, a philosophical necessity, a "thing in itself," but, by definition, it is unknowable to humans. Humans must necessarily cognize the world in terms of time and space.<sup>38</sup> They must necessarily adhere to certain "categories"—rules of reasoning involving quantity, quality, relation, and modality that make the cognition of objects possible.<sup>39</sup> Kant derives these conditions of human thought through "transcendental deduction," not empirical observation about human understanding.<sup>40</sup> He assumes the reader will be inclined to agree to his foundational principles about human perception, i.e., that there are trans-human conditions of perception. Kant's deduction succeeds in no small part because of the challenge to conceptualize objects outside of time and space. Just try it.<sup>41</sup>

Dominance feminism at times makes grand claims about human synthesis.<sup>42</sup> It argues that humans are insensible outside of gender and identifies trans-human rules of patriarchal logic that distinguish women from men.<sup>43</sup> Even those with earnest non-

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<sup>35</sup> Id. at 36.

<sup>36</sup> Feminist Jurisprudence, *supra* note 33, at 636 n.3 ("Because [the male view] is the dominant point of view and defines rationality, women are pushed to see reality in its terms, although this denies their vantage point as women in that it contradicts (at least some of) their lived experience. Women who adopt the male standpoint are passing, epistemologically speaking. This is not uncommon and is rewarded.").

<sup>37</sup> Immanuel Kant, *Critique of Pure Reason* (J.M.D. Meiklejohn trans., Colonial Press, 1900) (1781).

<sup>38</sup> Id. at 21-42, 279.

<sup>39</sup> Id. at 93-96.

<sup>40</sup> Id. at 68-69; see also Derk Pereboom, Kant's Transcendental Arguments, *The Stanford Encyclopedia of Philosophy*, Spring 2018 (<https://plato.stanford.edu/archives/spr2018/entries/kant-transcendental/>).

<sup>41</sup> I note that this essay has no ambitions as a philosophical disquisition on Kant.

<sup>42</sup> See Feminist Jurisprudence, *supra* note 33, at 636 n.3 ("The intractability of maleness as a form of dominance suggests that social constructs, although they flow from human agency, can be less plastic than nature has proven to be. If experience trying to do so is any guide, it may be easier to change biology than society.").

<sup>43</sup> Like Kant's view of time and space, MacKinnon views gender as a human construct. Unlike Kant, as we will see, MacKinnon's account equivocates between the view of gender as an *a priori* and trans-human prerequisite of cognition and a socially constructed framework that can be discarded under the right, albeit limited, political and discursive conditions.

patriarchal beliefs, like “women are the smarter sex,” form them with the background presumption that there is “woman” who has certain characteristics—characteristics dictated by patriarchy.<sup>44</sup> MacKinnon’s transcendental deduction has some appeal. Seeing people as genderless does not come naturally. And yet, cognizing a genderless subject is infinitely easier than conceptualizing objects outside of time and space. Halley, for example, is unpersuaded that the trans-human sex/gender construct is “intractabl[e],” “universal,” and “less plastic than nature,”<sup>45</sup> as MacKinnon opines, instead offering a Foucauldian-discourse account of its origins.<sup>46</sup>

At other times, dominance feminism adopts Kant’s rival David Hume’s approach of finding phenomena in the world.<sup>47</sup> When we “look into the world,”<sup>48</sup> we do see innumerable examples of the objective standard being the male standard, of gender being presumed as natural and inevitable, of women and men understanding themselves in terms of patriarchal logic. Nonetheless, Duncan Kennedy calls such a structuralist account “paranoid” because it assumes that the patriarchy has a consistent, intractable internal logic and is constantly reconfiguring itself to keep women down.<sup>49</sup> But even the paranoid version of the patriarchy, viewed within the long arc of history, seems plausible. Patriarchy in its *broadest* form is credible as an ontological and cognitive prior.

MacKinnon, however, makes a definitional move that undercuts the inherent persuasiveness of the ubiquitous patriarchy theory. She defines patriarchy solely by reference to women’s *sexual* subordination by men.<sup>50</sup> This transforms dominance feminism into a much more specific claim: that the sexual dominator-subordinate relationship defines men and women. The general idea of patriarchy was abstract enough to permit a reader to invest it with whatever she saw in the world. If the claim is, “Neutral standards are simply the male standard,” it is easy for an observer to gather everyday evidence of it, from sports and literature to business. However, once dominance feminism narrowed patriarchy to sexual subordination, it became quite a bit less intuitive.

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<sup>44</sup> Kant, *supra* note 37, at 637.

<sup>45</sup> See *supra* notes 36 & 42; see also *Feminist Jurisprudence*, *supra* note 33, at 636 n.8 (“[N]o woman escapes the meaning of being a woman within a gendered social system, and sex inequality is not only pervasive but may be universal (in the sense of never having not been in some form.)”).

<sup>46</sup> *Queer Theory*, *supra* note 5, at 47.

<sup>47</sup> See David Hume, *A Treatise of Human Nature* (P.H. Nidditch & L.A. Selby-Bigge eds., 2d ed. 1978) (1739-40).

<sup>48</sup> *Queer Theory*, *supra* note 5, at 48.

<sup>49</sup> Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 *New Eng. L. Rev.* 1309, 1338 (1992) [hereinafter *Sexy Dressing*].

<sup>50</sup> See A. MacKinnon, *Toward a Feminist Theory of the State* 109 & *passim* (1989) [hereinafter *Feminist Theory*].

Even one sympathetic to the ubiquitous patriarchy account could find evidence that women's oppression is not coextensive with sexual harm but is contextual and overdetermined.<sup>51</sup> Wendy Brown observes that the sexual subordination account ignores:

[T]he privatization and pervasive feminization of reproductive work; a gendered division of labor predicated on the exchange between household labor and socialized production; gendered religious, political, and civic codes; and other sharply gendered spheres of activity and social norms—in short, all elements of the construction of gender that are institutionalized, hence enforced, elsewhere than through the organization of desire.<sup>52</sup>

Brown asserts that MacKinnon's own preoccupation with sex and pornography aligned with larger social trends. Pornography and its emphasis on heterosexual male domination was patriarchy's crisis effort "to shore up or stabilize a sexual/gender dominance itself destabilized by the erosions of other elements of gender subordination in the late twentieth century."<sup>53</sup> MacKinnon's fixation on this system of heterosexual sexual dominance as constitutive of gender was less a response to than a *reflection of* this move: "MacKinnon's theory of gender unwittingly consolidate[d] gender out of symptoms of a crisis moment in male dominance."<sup>54</sup> The paranoid structuralist would say that dominance feminism is an example of the devilish way patriarchy perpetuates itself.

Women looked at their worlds and did not see sex and subordination as co-extensive. They found sexual pleasure and erotic interest in male-dominant sex. LGBTQ theorists saw sex wholly unrelated to male-female subordination. In response, MacKinnon retreated to transcendental logic: women who view sex as something other than oppression suffer from patriarchal consciousness. But recall that dominance feminism's transcendental deduction held that *all* beliefs are constituted by patriarchy. There is no outside or exceptional inside. This would indicate that dominance feminism's epistemological intervention runs out at the descriptive—that patriarchal logic *is*. Mackinnon indeed once recognized the paradox of false consciousness as the fundamental challenge to the feminist enterprise:

[I]f both feminism and antifeminism are responses to the condition of women, how is feminism exempt from devaluation by the same account? . . . The false consciousness approach begs this question by taking women's self-reflections as evidence of their stake in their own oppression, when the women whose self-reflections are at issue question whether their condition is oppressed at all. The second response proceeds as if women are free. Or, at least, as if we have considerable latitude to make, or to choose, the meanings if not the determinants of our situation. . . . Thus, the first approach is one-sidedly outside when there is no outside, the second one-sidedly inside when someone (probably a woman) is inside everything . . . . So our problem is this: the false consciousness approach cannot explain experience as it is experienced by those who experience it. The alternative can only

<sup>51</sup> See *Sexy Dressing*, supra note 49, at 1338.

<sup>52</sup> Wendy Brown, *States of Injury Power and Freedom in Late Modernity* 86 (1995).

<sup>53</sup> *Id.* at 87.

<sup>54</sup> *Id.*

reiterate the terms of that experience. This is only one way in which the object/subject split is fatal to the feminist enterprise.<sup>55</sup>

But MacKinnon wanted to move past the “unwillingness, central to feminism, to dismiss some women as simply deluded while granting other women the ability to see the truth,” so she tucked the paradox away. Dominance feminists proceeded to make the in-the-word-case for sexual subordination thesis “without an account of [their] capacity to do so or to imagine or realize a more whole truth.” Given that the subordination-is-sex thesis did not have intuitive appeal, such a case would have to be solid. Perhaps it could come in the form of a Foucauldian dialectic and genealogical account or a Marxian transhistorical “science of domination” analysis. Instead, dominance feminists’ in-the-world case consisted of an excruciatingly detailed, if anecdotal, laundry list of sexual horrors men inflict upon women. It also pointed to the very constitution of female bodies as smoking-gun evidence that gender is synonymous with sexual subordination. Andrea Dworkin argued, “The slit between [a woman’s] legs . . . which means entry into her—intercourse—appears to be the key to women’s lower human status.”<sup>56</sup> Wendy Brown observes that dominance feminism ended up with a “strikingly nonhistorical and nondialectical account of antagonistic social dynamics constitutive of an apprehensible social totality.”<sup>57</sup>

It comes as no surprise then that dominance feminism’s case failed to persuade many of the “gender = patriarchy = sexual subordination” equation. In defending against naysayers, MacKinnon dusted off “false consciousness,” transforming it from a transcendental truism into a selectively invoked trump card. An opponent’s assertion of pleasure or non-pain in domination, no matter the strength of their evidence or argument, is presumptively suspect.<sup>58</sup> As cultural feminist Robin West argued, “[W]omen have a seemingly endless capacity to lie, both to ourselves and others, about what gives us pain and what gives us pleasure.”<sup>59</sup> By contrast, woke feminists have access to Kant’s unknowable “thing in itself” because “living a subordinated status can give one access to its reality.”<sup>60</sup> They have license to proceed with scant evidence and maintain the sex-as-subordination stance *a fortiori*. Halley points out this inconsistency:

[MacKinnon] 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.

<sup>55</sup> Feminist Jurisprudence, *supra* note 33, at 638 n.5.

<sup>56</sup> Andrea Dworkin, Intercourse 122-23 (1987).

<sup>57</sup> Brown, *supra* note 52, at 83-84.

<sup>58</sup> See, e.g., MacKinnon, *supra* note 3, at 306 (dismissing pro-sex-work evidence as “ideological”).

<sup>59</sup> Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 15 *Wis. Women’s L.J.* 149, 214 (2000).

<sup>60</sup> See, e.g., Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 *Harv. C.R.-C.L. L. Rev.* 1, 59–60 (1985) (stating that law should reflect “authentic expressions of who we are”); Catharine A. MacKinnon, Points Against Postmodernism, 75 *Chi.-Kent L. Rev.* 687, 692 (2000) [hereinafter *Points Against Postmodernism*] (“[W]omen can access our own reality because we live it; slightly more broadly, that living a subordinated status can give one access to its reality.”).

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.<sup>61</sup>

The belief that dominance feminist views of sex are necessarily true, despite their formation under patriarchy, is not transcendental deduction, but transcendental *faith*. MacKinnon's move from the metaphysical-human cognition divide to the argument that she has access to things in themselves, made her less a Kantian than a spiritual prophet. Religious gurus familiarly start by claiming there are epistemic limits on humans' access to the true metaphysical nature of things, just as Kant did. But they follow up by declaring that a privileged few have direct access to the "truth" through a special relationship with God. This is a time-tested method of entrenching the ideology of the few, even when inconsistent with the experiences of the many.

The final dominance feminist move is normative. Its characterization of the world as rife with horrific sexual subordination morphed seamlessly into a moral imperative of zero tolerance for harmful sex, its participants, and its defenders. Dominance feminists, in turn, supported law reform to address feckless state regulation of sexual assault, prostitution, and pornography.<sup>62</sup> In this view, rights are not protections against an oppressive government, but guarantees *to* police or other regulatory enforcement against men. This sat uneasily with dominance feminism's claim that the state is the embodiment of male domination.<sup>63</sup> Like the carve-out for true consciousness, feminists carved out a domain of patriarchy-free state authority—the state authority they supported.

Dominance feminists appeared to have an abiding faith that laws directed against sexual harms would produce their intended results. Many held without reservation that commercial sex regulation would necessarily reduce sexual abuse, rather than rendering sexual labor riskier or decreasing commercial sex but increasing rape. For this group, there was little tolerance for the legal realist insight that "rules governing sexual abuse are embedded in noisy enforcement systems" which produce intended, anticipated, unintended, and unanticipated consequences.<sup>64</sup> Its intent-equals-effect conception of law ran up against the critique that "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 deterrence that the rules, as enforced, happen to produce."<sup>65</sup> But dominance feminism,

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<sup>61</sup> Queer Theory, supra note 5, at 11.

<sup>62</sup> Catharine A. MacKinnon, Engaged Scholarship as Method and Vocation, 22 Yale J.L. & Feminism 193, 202 (2010).

<sup>63</sup> Feminist Theory, supra note 50, at 161-62.

<sup>64</sup> Queer Theory, supra note 7, at 30 (citing Sexy Dressing, supra note 49).

<sup>65</sup> Id. at 31 (citing Sexy Dressing, supra note 49).

using transcendental logic, simply synonymized leniency and patriarchy. Every instance of under-enforcement was gender injustice. Law enforcement then became, not a tool whose use in dismantling patriarchy required careful consideration, but necessary *in itself*. As Halley puts it, dominance feminists treated “law as a prohibition or a right that is vindicated in some sense merely by existing.”<sup>66</sup>

Dominance feminist agitation, as a consequence, became virtually indistinguishable from moralist anti-sex activism. It advocated reform to address an ideologically defined sex “problem” with little evidence on how law would solve it. Activists strategically collected and presented evidence to support their foregone conclusions about sex and law. Dominance feminism’s moral imperative to fight patriarchy also moved its adherents to demonize anyone not with the program.<sup>67</sup> Vance argues:

Like religious orthodoxy, political ideology about sexual behavior contrasts lofty goals with gritty, or fleshy, reality, exhorting individuals to strive against the odds for perfection. Falls from grace may be tolerated for those who continue to believe; thus, actual practice can become quite discrepant from theoretically desired behavior, without posing any challenge to the empirical or logical foundations of sexual ideology. The ideology functions to set up new social categories and maintain strict boundaries between them: the good and the bad, believer and infidel.<sup>68</sup>

Even victims can slide into the category of patriarchy conspirators when they fail to act against perpetrators. One activist remarked in 1987, “When the sex war is won, prostitutes should be shot as collaborators for their terrible betrayal of all women.”<sup>69</sup> Dominance feminism’s radical message to pay close attention to the ever-shifting and complex operation of patriarchal power in various legal and nonlegal arrangements was and remains eclipsed by its punitive anti-sex program.

### ***B. Act 2: Queer Theory***

Halley locates queer theory in the sex-radical, sex-positive, LGBTQ responses to dominance feminist theory and its sex regulatory practice.<sup>70</sup> Halley observes:

Where identity, 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-

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<sup>66</sup> Id.

<sup>67</sup> Alice Echols recalls that antiprostitution feminist Kathleen Barry “characterized the feminist opposition to the anti-pornography movement as a cabal of leftist lesbian and heterosexual women who want to destroy the movement so that ‘male leftists can continue their sexual abuse of women without fear of censure.’” Alice Echols, *The Taming of the Id: Feminist Sexual Politics, 1968-83*, in *Pleasure and Danger*, supra note 1, at 50, 54 (quoting Kathleen Barry, “Sadomasochism”: *The New Backlash to Feminism*, 1 *Trivia* 77, 83-84 (1982)).

<sup>68</sup> Vance, supra note 1, at 23.

<sup>69</sup> Julie Burchill, *Damaged Gods: Cults and Heroes Reappraised* (1987). MacKinnon’s stance was more moderate, if convoluted. She stated, “Criminal laws against prostitution make women into criminals for being victimized as women . . . . This is not to argue that prostitutes have a sex equality right to engage in prostitution.” Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 *Mich. J. Gender & L.* 13, 20 (1993).

<sup>70</sup> Of course, this was not the sole origin of queer theory, which also responded to narratives of the AIDS crisis and the ascendant family values movement.

based sex-radical, sex-positive, anti-male/female model, anti-cultural-feminist political engagements, some more postmodernizing than others, some feminist, others not. The term “queer theory” is often invoked to describe this complex array of projects.<sup>71</sup>

Dominance feminists adopted a fixed view of sex and an ambition-equals-effect legal agenda. Sex radicals sought to destabilize this fixed view and scrutinize how top-down criminal and onerous regulatory laws affect sexual minorities, women involved in commercial sex, and marginalized sexual practices. Sex radicals emphasized sexual pleasure over sexual pain. They argued that sexual harm should not hold a monopoly on feminist attention, and feminist energy should be diverted toward understanding and fostering female sexual pleasure.<sup>72</sup> Gay identity politics also played a role in the sex radical response. LGBTQ critics objected to dominance feminism’s construction of gender in terms of heterosexual sex dynamics and its impugning of gay sex and gay sexual imagery.

The LGBTQ position was itself heterodox. Some lesbians adopted a cultural feminist perspective that egalitarian, loving, lesbian sex should be the exemplar for all sex—gay and straight alike—and supported the feminist anti-porn program.<sup>73</sup> This alienated other lesbians who resented the politicization and essentialist stereotyping of their sexuality.<sup>74</sup> LGBTQ activists pointed out that the dominance feminist activism robustly engaged in the discourse of sexual “deviance,” something that had long terrorized sexual minorities. As Alice Echols reminds us, at the height of the sex wars in 1980, NOW passed a resolution “to ensure that NOW does not work with any groups which might misconstrue pornography, s/m, cross-generational sex and public sex as ‘Lesbian Rights issues.’”<sup>75</sup> Some lesbian separatists called for a more radical expulsion of male sexuality from feminist theorizing and berated straight anti-porn feminists as “cocksuckers.”<sup>76</sup> Halley notes that gay identity politics tended toward “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.”<sup>77</sup> *Queer Theory* sought to move past the gay-rights moralism of subordinated identity politics and idealized sexuality.

*Queer Theory* reiterates MacKinnon’s structural caution that power hides silently and invisibly in neutral standards and “autonomous” choice. However, it rejects MacKinnon’s *a priori* presumption of gender, especially in its specific form as heterosexual male-on-female

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<sup>71</sup> *Queer Theory*, supra note 5, at 13-14.

<sup>72</sup> See generally Vance, supra note 1.

<sup>73</sup> See *id.* at 22 (noting that some feminists gave lesbianism a “privileged position as the most egalitarian and feminist sexual identity”).

<sup>74</sup> Echols, supra note 67, at 55.

<sup>75</sup> *Id.* at 61.

<sup>76</sup> *Id.* at 56.

<sup>77</sup> *Queer Theory*, supra note 5, at 12.

sexual dominance.<sup>78</sup> It further endorses Duncan Kennedy's legal realist insight that it is impossible to accurately map the power ripples when law is dropped into a complex social-sexual system. In his article *Sexy Dressing*, Kennedy laid out a detailed diagnostic of workplace sex, involving complicated calculations of desire and self-interest, executed under diverse power differentials, communicated through contested, hard-to-interpret signals.<sup>79</sup> Reform to intervene in the abusive aspects of this system with its shifting authority and opaque semiosis is therefore complicated work, making the *a priori* identification of sexual abuse and faith in the law particularly dangerous.

Another insight from *Queer Theory* is that discourse, including left/feminist discourse, impacts the meaning people attribute to sex and thus their experience of it. The article ruminates on the "wrongs inflicted on the tremulous human spirit by the feminist discourse of sexual truth."<sup>80</sup> Feminism produces harm, the argument goes, by establishing a necessary relationship between un-feminist sex and trauma. Imagine a college student whose previous engagement in get-it-over-with, dominating, or otherwise imperfect sex did not particularly trouble her. She reads feminist texts in class and comes to believe that she should reinterpret her past sexual experiences as harmful and life-altering. This student's consciousness has been raised, and she now has a less transgressive and more anxious relationship with sex.

This type of consciousness-raising, involving the reinterpretation of bad sex as deep harm and social injustice, has recently become a mainstay of the college bureaucracy. In 2015, Title IX administrators at the University of Colorado constructed a sexual assault survey "to fill gaps in our understanding of the frequency and types of sexual misconduct experienced by CU-Boulder students."<sup>81</sup> That survey classified as sexual assault acts ranging from anal penetration at gunpoint to stolen kisses. Unsurprisingly, it found that one third of freshman women had experienced sexual assault. In this and other surveys, the vast majority of "sexual assault" victims per survey definitions—90% in the CU survey—respond that they did not report or otherwise seek official intervention. In the CU Survey, the number one reason was "did not think it was serious enough to report."<sup>82</sup>

I asked one of the survey authors why the instrument adopted broad definitions that evidently did not match up with students' existing constructions of sexual assault. She explained that the instrument was designed to serve an "educational function" and teach students about what they *should* classify as sex assault. Indeed, the sheer volume of "not serious enough to report" responses did not move the administration to rethink its broad

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<sup>78</sup> Id. at 13.

<sup>79</sup> *Sexy Dressing*, supra note 49, at 1314.

<sup>80</sup> *Queer Theory*, supra note 5, at 47.

<sup>81</sup> Overview of the Fall 2015 Sexual Misconduct Survey, Univ. of Colorado Boulder (<https://www.colorado.edu/studentuccess/sexual-misconduct/overview-sexual-misconduct-survey>) (last visited Nov. 11, 2018).

<sup>82</sup> 2015 Campus Sexual Assault Survey, Univ. of Colorado Boulder (2015) (on file with author).

definitions, but instead produced bureaucratic “action items”: “[C]orrecting misperceptions about the seriousness of sexual misconduct issues through educational campaigns” and increasing “recognition of what constitutes sexual assault (‘Just Because’ campaign).”<sup>83</sup>

Halley’s rumination that feminists’ “discursive production of pain may well also produce the subjects who experience it; that feminism may be responsible for at least some of the trauma that real women really experience in their real lives,”<sup>84</sup> drew a strong response. Robin West fired back, “[T]he injury of rape is done by rapists, not texts, and is done to the jawbone, the pelvis, the reproductive organs, the stomach, the skin, the eyes, the vaginal walls, the anus, and the psyche.”<sup>85</sup> Of course, pleasurable, hotly desired, carefully negotiated sex can injure vaginal walls, just as fun nonsexual physical activities can cause pain. Moreover, women and men are constrained and compelled by various cultural norms and hierarchies to engage in nonsexual labor that physically exhausts the body—going into labor comes to mind.

For many feminists, power, consent, and social meaning, not injury, mark the line between permissible and unacceptable sex. In this account, sex is more harmful to women than men, and imperfect sex is more harmful than imperfect nonsexual interactions because culture and discourse have made it so. Now, this is not invariably true, and both Halley and Kennedy recognize that social mores produce sexual anxiety bordering on terror in some men. Nevertheless, the following gendered scenario is all too familiar: Two college students have sex while extremely drunk. The next day, the boy’s friends say, “Hey, do you realize you had sex with her last night?” He replies, “No—that’s awesome!” The girl’s friends say, “Hey, do you realize he had sex with you last night?” She replies, “No—that’s awful!” The sex is the same, but the meaning varies by gender.<sup>86</sup> Yet this recognition that sex is historically, traditionally, and patriarchally constructed as innately bad for women underscores the need for caution in promoting the sex-equals-female-trauma narrative. Even if feminist prohibitionist laws succeed in seriously leveling down the volume of sex in society, the distribution of sex-value and sex-harm will remain gender imbalanced—an imbalance aggravated by feminist discourse of trauma. Drucilla Cornell cautions, “Feminism, particularly in the complex area of sexuality, demands that we live with the paradox that we are trying to break the bonds of the meanings that have made us who we are as women.”<sup>87</sup>

Perhaps this is why West, like Dworkin, retreats to biology in construing women’s presumptively risky relationship to sex. If physical “invasion,” rather than psychological

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<sup>83</sup> Phase Two – Data Summary, Univ. of Colorado Boulder (<http://www.colorado.edu/studentsuccess/sexual-misconduct/phase-two-data-summary>) (last visited Nov. 11, 2018).

<sup>84</sup> Halley, *supra* note 4, at 82.

<sup>85</sup> West, *supra* note 6, at 16.

<sup>86</sup> See Paula England & Jonathan Bearak, The Sexual Double Standard and Gender Differences in Attitudes Toward Casual Sex Among U.S. University Students, 30 *Demographic Res.* 1327 (2014).

<sup>87</sup> Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* 99 (1995).

interpretation, is the root of sexual harm, one can maintain an anti-sex stance without worrying about contributing to women's culturally cultivated dread of imperfect sex. But the biology-invasion view of sexual harm carries its own dangers. This account of sex is a mainstay of conservative anti-contraception, anti-abortion discourse. For example, President Trump's deputy director of Health and Human Services, Teresa Manning, infamously stated, "The effects of abortion are very similar to the effects of rape."<sup>88</sup> One interpretation is that Manning was referencing the psychological effects of abortion. Jeannie Suk Gersen has traced the narrative overlap between feminists' sex-trauma arguments and conservatives' abortion-trauma arguments.<sup>89</sup> Another gloss is that Manning was talking about the physical invasion of the vagina. In this view, whether by genitals or objects, penetration is women's ruination. Criminal codes throughout the country severely punish nonconsensual or forcible vaginal penetration without similar penalties for nonconsensual or forcible "envelopment" of the penis.

Nevertheless, *Queer Theory*, at times, appears to also endorse the Dworkinian view of penetration as *sui generis*. In the reading of Leo Bersani's *Is the Rectum a Grave?*, Halley is most post-modern, flipping the pleasure-pain dichotomy into a pleasure-pain dyad. Bersani acceded to dominance feminism's truism that "to be penetrated is to abdicate power."<sup>90</sup> However, in opposition to feminism's value judgments, he saw sex's "ineradicable aspects"—its "anticommunal, antiegalitarian, antinurturing, antiloving" nature—as "reasons for defending, for cherishing the very sex [feminists] find so hateful."<sup>91</sup> Bersani drew on Freudian psychoanalytic theory to explain why. Selfhood, he argued, involves 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>92</sup> Only through sexual penetration can a person reach "a certain threshold of intensity . . . when the organization of the self is momentarily disturbed by sensations or affective processes somehow 'beyond' those connected with psychic organization"<sup>93</sup>—or, as Halley put it, "experience the unspeakable thrill of encountering our own metaphysical and experiential dissolution."<sup>94</sup> Bersani accepted dominance feminism's transcendental deduction but flipped its moral imperative: "not bad but good."<sup>95</sup>

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<sup>88</sup> Christina Cauterucci, *Trump Will Tap Woman Who Thinks Birth Control Doesn't Work to Lead U.S. Birth Control Program*, Slate, May 2, 2017 ([http://www.slate.com/blogs/xx\\_factor/2017/05/02/trump\\_will\\_tap\\_teresa\\_manning\\_a\\_woman\\_who\\_thinks\\_birth\\_control\\_doesn\\_t\\_work.html](http://www.slate.com/blogs/xx_factor/2017/05/02/trump_will_tap_teresa_manning_a_woman_who_thinks_birth_control_doesn_t_work.html)).

<sup>89</sup> Jeannie Suk, *The Trajectories of Trauma: Bodies and Minds of Abortion Discourse*, 110 Colum. L. Rev. 1193, 1237-38 (2010).

<sup>90</sup> Bersani, *supra* note 16, at 212.

<sup>91</sup> *Id.* at 215.

<sup>92</sup> *Id.* at 216.

<sup>93</sup> *Id.* at 217.

<sup>94</sup> *Queer Theory*, *supra* note 5, at 17.

<sup>95</sup> *Id.*

What are we to take from Halley's endorsement of Bersani's account of desire? Is it queer theory's discourse of sexual truth? If so, this truth also has potential to inflict grave wrongs on "the tremulous human spirit."<sup>96</sup> Halley indeed warned that "critical disorientation" about dominating sex and the loss of one's "moral compass" might well be an "unaffordable luxury."<sup>97</sup> Robin West characterized this POMO intervention as not just unaffordable, but treacherous for women. Halley, she said, "fantasized [a] 'rapeophile' society: plenty of violent but harmless sex, imposed regardless of want or desire on the part of she who would be raped, and all of it then metaphorically rhapsodized."<sup>98</sup> Mark Spindelman found the queer line of reasoning even more alarming: "[T]he ideology of sexual freedom entails a right to die for sex and also a right to kill in its name."<sup>99</sup> Halley did not rhapsodize *all* violent sex but admitted that much of it produces pain and harm to the penetrated person. Nevertheless, Halley appreciated that Bersani "redeem[ed] for euphoria" some of this "dysphoric" sex.<sup>100</sup>

Halley, point in fact, made the startling admission that "it [is] very difficult for queer theory to 'know' how to distinguish rape from habitual, Sunday afternoon, missionary position, marital intercourse."<sup>101</sup> Before anyone gets too upset, let me add that Halley said that we nonetheless must decide on good and bad sex, on what to and not to regulate, "under the inevitable condition of *not knowing*."<sup>102</sup> Acknowledging the possibility of pleasure in sexual abjection, Halley argued, fosters sexual decision-making with "a wider scope of political sympathies" than the narrow dominance feminist view permits.<sup>103</sup> "There is both strength and danger in framing [such] possibilities," Halley ruminated. "Only if we articulate and explore them, will we ever look into the world and see if it matches them."<sup>104</sup> In this reading, the emphasis on Bersani upends, rather than establishes, sexual truth. Flipping the moral meaning of MacKinnon's description of sex has synergy with the anti-subordination goal of protecting marginalized sexual actors from intrusive government regulation. As Carol Vance notes, the feminist presumption that sex is "guilty until proven innocent," is an "expensive" presumption given how easily sex provokes "negative sanctions."<sup>105</sup>

Given that queer theory originated in part as a political and adaptive response to intense, brutal, and unjustified government repression, it is no wonder that queer texts often

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<sup>96</sup> Id. at 47.

<sup>97</sup> Id. at 49.

<sup>98</sup> West, *supra* note 6, at 43.

<sup>99</sup> Marc Spindelman, *Sexuality's Law*, 24 Colum. J. Gender & L. 87, 112 (2013).

<sup>100</sup> Queer Theory, *supra* note 5, at 17.

<sup>101</sup> Id. at 51. This is MacKinnon's point without MacKinnon's moral recrimination of penetration. The queer theory argument is that it is hard to know whether rape is any less "OK" than missionary sex.

<sup>102</sup> Id. at 49 (emphasis added).

<sup>103</sup> Id. at 83.

<sup>104</sup> Id.

<sup>105</sup> Vance, *supra* note 1, at 7.

read as redemptive, even pastoral, manifestos on marginalized—indeed demonized—sexuality. Lauren Berlant observed, “The optimism of queer will ride the waves of the power of phantasy-in-practice to subvert the foreclosures sought by dominant institutions and norms.”<sup>106</sup> *Queer Theory*’s descriptions of penetration and gay male pleasure exhibit this pastoral quality. Halley rightly warned about the costs of law and culture disciplining society toward a universal “infantile, lesbian, entirely feminine sexuality.”<sup>107</sup> Nevertheless, *Queer Theory* often appears to counterbalance this vision with another universal truism—that penetration-abjection is the only avenue through which humans can experience the “*jouissance* of exploded limits.”<sup>108</sup>

It thus makes sense that theorists like Spindelman read queer theory’s phenomenological account of sex much like I do MacKinnon’s. Spindelman argued that in queer theory, “sex is re-imagined as prior to the social world, including its values and institutions . . . . In the forest’s fresh air, sex, unrestrained, must be allowed to be what it is, found in its becoming, unknown and unknowable before it is.”<sup>109</sup> Spindelman seethed against the vision of a queer-theoretic sex-supremacist society in which dysphoric sex has near religious importance:

Sex in this account is the value of all values. But, importantly, not because it is good. . . . The ideology of sexual freedom does not herald sex because it expresses affection or caring or nurturing or compassion, much less because of how it builds or affirms friendship, community—or love. Sex’s value is [as] an awesome power that commands esteem because it is selfish and wasteful and degenerate and wicked and violent and cruel and irresponsible and criminal.<sup>110</sup>

*Queer Theory*’s stated aim is disruptive—to counter the dominant (and dominance) feminist view of penetration-abjection, not to establish sex as a “value of values.” And yet, Halley’s claims go beyond simply denying the essentialist penetration-equals-trauma narrative. Disrupting the dominance feminist frame with the in-the-world observation that people have a range of feelings about sexual domination from trauma to *jouissance* is one thing. Claiming that domination is the key to the highest Freudian heights is fully another. Halley further intimates that penetration-abjection is the path to authentic egalitarianism—a self that is untethered from gender, race, age, class, and other attributes. Halley’s optimism about queer theory’s liberationist potential feels constructivist, as if it, rather than feminism, always had the key to the castle of sexual justice.

Within a few years of writing *Queer Theory*, Halley came to regard such optimism as “a profound error in intellectual and political strategy.” Halley became “more skeptical and critical” of queer theory’s “utopian possibilities” and instead embraced a “politics of

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<sup>106</sup> Berlant, *supra* note 9, at 264.

<sup>107</sup> Halley, *supra* note 4, at 89.

<sup>108</sup> *Queer Theory*, *supra* note 5, at 17 (quoting Bersani, *supra* note 16, at 217).

<sup>109</sup> Marc Spindelman, *Sexual Freedom’s Shadows*, 23 *Yale J.L. & Feminism* 179, 193 (2011).

<sup>110</sup> *Id.* at 193-94.

theoretic indeterminacy.”<sup>111</sup> Nevertheless—and here my argument is admittedly aesthetic and penumbral—the sheer number of words *Queer Theory* and its later iterations devote to transforming the pleasure-pain dichotomy into a dyad leaves the reader with the distinct impression that the alternative to dominance feminism’s “truth” that unloving penetration equals rape is queer theory’s truth that unloving penetration equals rapture. The latter truth can also produce real harm in the form of subjects who lament their failure to experience or who unwisely seek out sexual domination and policies that poorly calibrate the costs and benefits of eroticizing domination.

### III. The Finale: A Sex-Indifferent Truce in the Proxy War

*Celibacy is the new deviance.*  
Graham Hart & Kaye Wellings<sup>112</sup>

#### A. Sex Indifference in Theory

Halley uses the tools of queer theory—following diffuse power, shifting the frame, recognizing law’s “noisy” enforcement, and tracing the relationship between discourse and reality—to disrupt dominance feminism’s carceral stranglehold on sexual theorizing. I want to use these tools, but with a sex-indifferent gloss, to work through contemporary controversies and highlight the costs of the left increasingly using sex to fight proxy wars for other values. To be sure, I understand queer theory’s impulse to fight fire with fire. If sexual regulation is a matter of bean-counting pleasure and pain in the world, queer theory’s claim that sex, even sexual abjection, is hedonistically *necessary* helps to ensure that sexual liberty is not easily discarded for sexual security. Countering sex-as-spectacular-ruination with sex-as-spectacular-transcendence feels like the liberating move. In turn, declaring sex to be “meh,” rather than highlighting its *jouissance*, risks maintaining overregulation.

Nevertheless, fighting one spectacular narrative with another has drawbacks. Sexual over- and under-regulation have historically stemmed from the public preoccupation with sex’s potential for spectacular harm *and* its potential for spectacular pleasure. Think of the parent who tells a teen to abstain until marriage. The parent warns of rape and pregnancy risk *while* counseling that sex is so transcendent that one should “save it” for marriage. As Michel Foucault reminds us, pleasure is *power*: “Pleasure and power do not cancel or turn back against one another; they seek out, overlap, and reinforce one another. They are linked together by complex mechanisms and devices of excitation and incitement.”<sup>113</sup>

Political work is already done when we view sex in terms of polar endpoints of pleasure and pain, even where we are careful to map that pleasure and pain in a complex matrix: painful pain (violent rape), pleasurable pain (abjection-transcendence), pleasurable

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<sup>111</sup> See *supra* note 11.

<sup>112</sup> Hart & Wellings, *supra* note 27, at 899.

<sup>113</sup> Foucault, *supra* note 25, at 48.

pleasure (lesbian intimacy), and painful pleasure (feels good but emotionally devastating).<sup>114</sup> In her seminal article *Pleasure and Danger*, Vance begins by examining the threats posed by feminists and moralists to “sexual freedom.” Within a few pages, sexual liberation has transformed into “sexual *desire*.”<sup>115</sup> This overlooks that people should be liberated to not desire sex and to have sex without, or even against, desire. People can strike bargains in the shadow of desire/non-desire. Indeed, Vance elsewhere notes that pleasure-versus-pain is inaccurate because “[w]omen’s actual sexual experience is more complicated, more difficult to grasp, more unsettling.”<sup>116</sup> Queer theory need not limit its redemption efforts to fitting all the sex that feminists find unappealing—violent sex, instrumental sex, non-orgasmic sex—into the crabbed category of hedonistic desire.

When I look into the world, I see a lot of sex that is beneficial, but not pleasurable: sex to preserve a relationship; to feel adult; to make another person happy; to have a family; to survive in socioeconomic marginality.<sup>117</sup> To be sure, some of this undesired sex is “life-saving,” as Vance observes of sexual pleasure.<sup>118</sup> In addition, I see sex that is casual, quick, and soon forgotten. This sex is mundane. But there is no room in the popular contemporary vocabulary for instrumental or mundane sex. Sex is either good—and when it’s good it’s desired, pleasurable, even transcendent—or bad—and when it’s bad, it’s traumatic, outrageous, necessarily criminal.<sup>119</sup> The #MeToo movement directs women to confess their sexual victimhood to be part of the “solution,” starkly illustrating the “compulsory discursivity” phenomenon Wendy Brown described in 2005.<sup>120</sup> The confession becomes the case, even though the case was formulated prior to the solicitation of confessions. Brown observes:

In an age of social identification through attributes marked as culturally significant—gender, race, sexuality, and so forth—confessional discourse, with its truth-bearing status in a postepistemological universe, not only regulates the confessor in the name of freeing her . . . but extends beyond the confessing individual to constitute a regulatory truth about the identity group: confessed truths are assembled and deployed as “knowledge” about the group.<sup>121</sup>

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<sup>114</sup> See Vance, *supra* note 1, at 6 (noting “the rich brew of our experience contains elements of pleasure and oppression, happiness and humiliation”).

<sup>115</sup> *Id.* at 1-5.

<sup>116</sup> *Id.* at 5.

<sup>117</sup> See Charlene L. Muehlenhard & Stephen W. Cook, Men’s Self-Reports of Unwanted Sexual Activity, 24 *J. Sex Res.* 58 (1988); Lucia F. O’Sullivan & Elizabeth Rice Allgeier, Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships, 35 *J. Sex Res.* 234 (1998); Susan Sprecher et al., Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experiences in Three Countries, 31 *J. Sex Res.* 125 (1994).

<sup>118</sup> Vance, *supra* note 1, at 7.

<sup>119</sup> See Joseph Fischel, *Screw Consent* 4 (2018) (noting that the contemporary dialogue of consent “divides sex into the categories awesome and rape”).

<sup>120</sup> Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* 85 (2005).

<sup>121</sup> *Id.* at 91.

The *New York Times*, in its ever-expanding sojourn into #MeToo journalism, solicited stories from men who would go on the record with a *mea culpa* about their past bad sexual behavior.<sup>122</sup> Max Maples related an incident from 2005, when he was 16 or 17 and “coerced [his] then-girlfriend” into oral sex. “I don’t believe she voiced any explicit dissent,” he recalled, “but I had to cajole to get what I wanted. I clearly remember saying something to the effect of ‘Please, could you do that one thing again.’”<sup>123</sup> Maples lamented that his actions could have left her feeling “violated.” He contacted his ex to make sure it was ok to go public, and “interestingly, she didn’t even remember the incident in question.”<sup>124</sup> Still, he regarded his bad actions as *Times*-worthy because “I do know girls who have felt assaulted in that same situation.”<sup>125</sup>

Our current sexual sensibilities leave little room for forgetting. Not feminism, nor queer theory, nor left politics, nor right politics concern themselves with the many fleeting sexual interactions that produce indifference, frustration, or mild negative or positive emotions, and which are quickly forgotten or relegated to the lower recesses of the psyche. They leave out sex that is purely instrumental to other ends. They ignore entire demographic categories of people—i.e. post-menopausal women who do not want testosterone treatment—for whom sex is a low priority.<sup>126</sup> Government health messages and cultural norms link not having, not desiring, or not caring enough about sex to a host of physical and psychological disorders—the messages more ideological than scientific. Public health scholar Juliet Richters observed in 2009:

[E]mpirical sex researchers repeatedly encounter the fact that for many people sex is not very important at all, and perhaps has never given them much pleasure. They respond to the social expectation that sex is terribly desirable with boredom, avoidance, embarrassment or derision. . . . [M]ost people obey the social injunction to care about sex, to value it and they try to obey the rules . . . , especially the expectation that they should have sex regularly with their partner, if they have one.<sup>127</sup>

Sex researchers, in fact, have proclaimed that “celibacy is the new deviance.”<sup>128</sup> Given this, declaring sex to be “meh” may just be today’s most eccentric queer theoretic move. Understanding that sex’s importance is not pre-political, natural, or empirically based creates a better vantage point from which to determine when sex is a pretext or proxy for other value contests and when sexual histrionics substitute for careful analysis of complex social phenomena.

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<sup>122</sup> Alicia P.Q. Wittmeyer, Eight Stories of Men’s Regret, *N.Y. Times*, Oct. 18, 2018 (<https://www.nytimes.com/interactive/2018/10/18/opinion/men-metoo-high-school.html>).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Vance, *supra* note 1, at 17 (“[S]exuality may be thought about, experienced, and acted on differently according to age, class, ethnicity, physical ability, sexual orientation and preference, religion, and region.”).

<sup>127</sup> Juliet Richters, Bodies, Pleasure and Displeasure, 11 *Culture, Health & Sexuality* 225 (2009).

<sup>128</sup> Hart & Wellings, *supra* note 27, at 899.

In our current political atmosphere of polarization and insecurity, where feminist or “due-process” stances on sexual wrongdoing have become markers of political virtue, we might expect sex to play an ever-larger role in the expression of social anxiety. Rubin observes:

[I]t is precisely at times such as these, when we live with the possibility of unthinkable destruction, that people are likely to become dangerously crazy about sexuality. Contemporary conflicts over sexual values and erotic conduct have much in common with the religious disputes of earlier centuries. They acquire immense symbolic weight. Disputes over sexual behaviour often become the vehicles for displacing social anxieties, and discharging their attendant emotional intensity. Consequently, sexuality should be treated with special respect in times of great social stress.<sup>129</sup>

In the case of now-Justice Brett Kavanaugh, the political left rightly worried about his dishonesty, partisan hackery, and threat to minority empowerment. However, all these concerns were filtered through the lens of alleged forty-year-old sexual misconduct. Democrats lost that sexual proxy war, and we are left with a Supreme Court that poses an existential threat to civil liberties *and* a political left more willing than ever to abandon their civil libertarian, due-process sentiments when it comes to accusations of past sexual wrongdoing.<sup>130</sup>

Today, #MeToo and its rapid takedown of men accused of sexual misbehavior are touted as the road to women’s fair representation in the halls of power. The *New York Times* recently proclaimed, “#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.”<sup>131</sup> *Elle Magazine* featured awkward profiles of some of the women who received these plum positions and struggle to describe their “objective” qualifications for the job. In dominance feminists’ ultimate capitalist triumph, men’s inherently sexual (and sexually assaultive) nature is giving women a leg up in a neoliberal market. “Women have always been seen as risky, because they might do something like have a baby. But men are now being seen as more risky hires,” law professor Joan Williams observed.<sup>132</sup> Echoing these sentiments, Michigan attorney general candidate Dana Nessel ran an ad emphasizing the need for more women in power, explaining, “Who can you trust

<sup>129</sup> Rubin, *supra* note 24, at 143.

<sup>130</sup> See, e.g., Mark Moore, “We Believe Survivors”: Brett Kavanaugh Website Becomes Sex Crime Victims Resource, N.Y. Post, Oct. 10, 2018 (<https://nypost.com/2018/10/10/we-believe-survivors-brett-kavanaugh-website-becomes-sex-crime-victims-resource/>); Ian Schwartz, Sen. Hirono: Men Need to “Shut Up,” Kavanaugh Accuser Needs to be Believed and I Believe Her, RealClear Politics, Sept. 18, 2018 ([https://www.realclearpolitics.com/video/2018/09/18/sen\\_hirono\\_on\\_kavanaugh\\_men\\_need\\_to\\_shut\\_up\\_accuser\\_needs\\_to\\_be\\_believed\\_and\\_i\\_believe\\_her.html](https://www.realclearpolitics.com/video/2018/09/18/sen_hirono_on_kavanaugh_men_need_to_shut_up_accuser_needs_to_be_believed_and_i_believe_her.html)). For an interesting take on the left/right sex arguments, see Robby Soave, From “Believe All Victims” to “Who Cares If It’s True,” the Brett Kavanaugh Accusation Has Produced Shameful Certainty, Reason.com, Sept. 20, 2018 (<https://reason.com/blog/2018/09/20/brett-kavanaugh-ford-sexual-assault>).

<sup>131</sup> Audrey Carlsen, et. al., #MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements are Women, N.Y. Times, Oct. 29, 2018 (<https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>).

<sup>132</sup> *Id.* (quoting Joan Williams).

most not to show you their penis in a professional setting<sup>133</sup> Dominance feminism lost the sex wars, but it may now be winning the battle of the sexes.

However, when sex is the proxy for women's battle for economic equality, something very important is lost. Women's status as non-harassers may confer some market power, but it obscures that unconstrained capitalism *is* a primary barrier to women's economic quality. In fact, some have begun to tout unconstrained managerial power as necessary for employers to quickly dispatch sexual harassers. Elizabeth Nolan Brown, founder of "Feminists for Liberty," remarked, "The modern American capitalist system . . . has delivered social justice more swiftly and effectively than supposedly more enlightened public bodies tend to. As we observe and adjust to the sociosexual storm we're all in, let's appreciate the powers and paradigms making it possible: feminism, but also free markets."<sup>134</sup>

Given that men remain disproportionately empowered within the free market system, #MeToo's message that men and women cannot co-work without the interposition of a penis may backfire. On December 3, 2018, *Bloomberg* published "Wall Street Rule for the #MeToo Era: Avoid Women at All Cost," reporting on interviews with more than thirty senior executives. In diametric opposition to professor Williams's sentiments, one exec remarked that "just hiring a woman is an unknown risk." Further, "A late-40-something in private equity said he has a new rule, established on the advice of his wife, an attorney: no business dinner with a woman 35 or younger."<sup>135</sup>

### B. Sex Indifference in Practice

Avital Ronell, a queer female NYU professor, was disciplined by the institution for sexually harassing her queer male graduate student, Nimrod Reitman. The case sparked national headlines and public outrage at Ronell, with only a few critics expressing skepticism toward Reitman. Some of the facts of the case are hotly contested, such as whether Ronell groped and sexually touched Reitman without consent.<sup>136</sup> What is not contested is that during their several years of working together, Ronell established—Reitman would say coerced—an intimate personal relationship with Reitman and sent him numerous over-the-top emails.<sup>137</sup> "My sweet delight, dear Nimrod," she wrote, "I will hold you close to my

<sup>133</sup> See "Who can you trust to NOT show you their penis???" Youtube.com (<https://www.youtube.com/watch?v=w4rswsu55oM>); Michelle Goldberg, A Cure for Political Despair, N.Y. Times, Oct. 19, 2018 (<https://www.nytimes.com/2018/10/19/opinion/midterms-democrats-women-michigan.html>).

<sup>134</sup> Elizabeth Nolan Brown, NBC Didn't Fire Matt Lauer. We Did, N.Y. Times (Nov. 29, 2017) (<https://www.nytimes.com/2017/11/29/opinion/matt-lauer-sexual-harassment-nbc.html>).

<sup>135</sup> Gillian Tan & Katia Porzecanski, Wall Street Rule for the #MeToo Era: Avoid Women at All Cost, *Bloomberg*, Dec. 3, 2018 (<https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>).

<sup>136</sup> Zoe Greenberg, What Happens to #MeToo When a Feminist is the Accused?, N.Y. Times, Aug. 13, 2018 (<https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>).

<sup>137</sup> *Reitman v. Ronell*, No. 157658/2018, 2018 WL 3954356 (N.Y. Sup. Ct. Aug. 16, 2018).

heart silently, as I once did, and just listen to your intimate rhythm, heart, heart, your breathing, heart, heart. I liked when you would drift off and I could lose myself in your soft breathing.”<sup>138</sup> Some of the communications were laced with sexual innuendo, for example, “I’ll see you at the orifice, I mean office,” and “It’s your cock-er-spaniel calling.”<sup>139</sup>

## 1. The Feminist Sex-as-Danger Gloss

The *sexual* nature of Ronell’s overreach destined the case for spectacular controversy. The Ronell-Reitman relationship existed within several structures of power and hierarchy, but the sexual subordination structure was surely not foremost among them. The shadow that loomed over Reitman’s bargaining with Ronell was not patriarchal false consciousness or the “tolerated residuum” of men’s sexual abuse of women.<sup>140</sup> Rather, he bargained from an unequal position as the student of a powerful professor who, according to Reitman and others, had unfettered power to make or break his career.<sup>141</sup> Reitman accused Ronell of using her *academic* power to force an inappropriately personal relationship, which is certainly a far cry from the penile penetration held out as the ultimate manifestation of patriarchal dominance. As one commentator put it, “Although Reitman experienced an abuse of power, his experiences do not represent the structural sexism that the feminist movement has long been fighting.”<sup>142</sup>

A dominance feminist might make the argument, as MacKinnon has elsewhere, that anyone who engages in harmful sexual contact operatively becomes male and the victim female. Thus, punishing women offenders and protecting male victims furthers the goal of dismantling patriarchy. But this definitional argument feels particularly tortured. Why wouldn’t women standing up to men and sexually dominating them be the quickest route to toppling male supremacy? It sure seems more direct than relying on masculinist police officers to cabin male dominant sexuality. Perhaps one could make a distributional argument that strict and gender-neutral sexual harassment laws sacrifice some women, but they have the larger effect of taking down men who form the bulk of harassers. On the other hand, focusing on women’s sexual misconduct might produce a false equivalence that lets men off the hook. Ronell herself made this argument, stating that focusing on her “allows for patriarchy to say, ‘See, there’s a predator woman—they have libidos, too—so

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<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> *Sexy Dressing*, supra note 49, at 1314.

<sup>141</sup> Without the overlay of the workplace structure, Reitman would not have been the disempowered party. See David Neumark, Ian Burn, & Patrick Button, *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment 1-2* (Nat’l Bureau of Economic Research, Working Paper No. 21669) (issued in October 2015, revised in November 2017); Carolyn A. Harrison, *Older Women in Our Society: America’s Silent, Invisible Majority*, 17 *Educ. Gerontology* 111 (1991).

<sup>142</sup> Fefertiti Takla, *Reitman vs. Ronell: Rethinking the Role of Gender and Patriarchy in Sexual Harassment Cases*, *Bully Bloggers*, Sept. 7, 2018 (<https://bullybloggers.wordpress.com/2018/09/07/reitman-vs-ronell-rethinking-the-role-of-gender-and-patriarchy-in-sexual-harassment-cases/>).

now leave us alone so we can go around and have our encounters with 18-year-old girls.”<sup>143</sup>

In any case, feminists with an inclination to view the Ronell case differently than a heterosexual male-on-female sexual assault case were immediately put on the defensive. Conservative pundits reported with glee that Judith Butler and others, whom they designated “feminists,” wrote a letter defending Ronell, another “feminist.”<sup>144</sup> This was smoking-gun evidence that feminists were hypocrites who would betray their anti-rape philosophy to protect their own. Butler et al. penned a tone-deaf character reference for Ronell, emphasizing Ronell’s “international standing and reputation” and warning that sanctions would “invite widespread and intense public scrutiny” of NYU.<sup>145</sup> Lisa Duggan rationalized the letter as a “hastily concocted” strategy to persuade NYU not to take the “draconian” penalty of termination.<sup>146</sup> Duggan’s strategic diagnosis may be correct, but I prefer the take of Amy Elizabeth Robinson (quoting Derrida):

It strikes me that in writing and signing and sending the letter these privileged scholars were deploying a rough and urgent form of justice (we seek to register in clear terms our objection to any judgment against her), held up against the calculations of law, perhaps acting with a sort of panicked madness, at a moment of “anxiety-ridden suspense,” in “the night of non-knowledge and non-rule.”<sup>147</sup>

After a barrage of criticism and the emergence of additional facts, Butler fell on the sword: “In hindsight, those of us who sought to defend Ronell against termination surely ought to have been more fully informed of the situation.”<sup>148</sup> Still for many, like blogger Brian Leiter, that letter was conclusive proof of feminist hypocrisy.<sup>149</sup> Leiter warned that the “feminist”

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<sup>143</sup> Katherine Mangan, NYU Scholar Accused of Harassment Assails Rush to Judgment as Sign of “Sexual Paranoia,” *Chron. Higher Educ.*, Aug. 17, 2018 (<https://www.chronicle.com/article/NYU-Scholar-Accused-of/244308>).

<sup>144</sup> See, e.g., Christine Rosen, What Happens When It’s #HimToo?, *Weekly Standard*, Aug. 21, 2018 (<https://www.weeklystandard.com/christine-rosen/asia-argento-avital-ronell-and-the-dangers-of-metoo-hypocrisy>); Glenn Harlan Reynolds, Hypocritical Politically Motivated Feminism is Killing #MeToo. Just Ask Keith Ellison, *USA Today*, Aug. 21, 2018 (<https://www.usatoday.com/story/opinion/2018/08/21/feminism-metoo-hypocrisy-sexual-harassment-keith-ellison-avital-ronell-column/1042010002/>); Sarah Cowgill, Feminist Double Standard on Sexual Harassment, *LibertyNation.com*, June 17, 2018 (<https://www.libertynation.com/feminist-double-standard-on-sexual-harassment/>).

<sup>145</sup> Letter from Judith Butler, et al. to Alexander Hamilton, NYU President, May 11, 2018 (<https://leiterreports.typepad.com/files/butler-letter-for-avital-ronell.doc>) [hereinafter Butler Letter].

<sup>146</sup> Lisa Duggan, The Full Catastrophe, *Bully Bloggers*, Aug. 18, 2018 (<https://bullybloggers.wordpress.com/2018/08/18/the-full-catastrophe/>).

<sup>147</sup> Amy Robinson, On Power and Aporia in the Academy: A Response in Three Parts, *Medium*, Aug. 18, 2018 (<https://medium.com/@amyelizabethrobinson/on-power-and-aporia-in-the-academy-a-response-in-three-parts-f7387c346ffa>).

<sup>148</sup> Judith Butler, Judith Butler Explains Letter in Support of Avital Ronell, *Chron. Higher Educ.*, Aug. 20, 2018 (<https://www.chronicle.com/blogs/letters/judith-butler-explains-letter-in-support-of-avital-ronell/>).

<sup>149</sup> Brian Leiter, Blaming the Victim is Apparently OK When the Accused in a Title IX Proceeding Is a Feminist Literary Theorist, *Leiter Reports: A Philosophy Blog*, June 10, 2018 (<https://leiterreports.typepad.com/blog/2018/06/blaming-the-victim-is-apparently-ok-when-the-accused-is-a-feminist-literary-theorist.html>) [hereinafter Leiter, Blaming].

letter, which did not name Reitman, made the signatories “liable for retaliation” and even defamation.<sup>150</sup> Yet not so long before, he excoriated Northwestern’s “Kafkaesque” treatment of author Laura Kipnis after she publicly criticized the school’s disciplining of a male philosophy professor for sexual misconduct. Leiter lamented, “If Kipnis’s opinion piece about sexual paranoia on campus, in which the graduate student is not even named and barely referenced, constitutes adverse ‘treatment,’ then there is no right for any faculty member . . . to offer any opinions.”<sup>151</sup> What seemed to particularly offend Leiter about Butler’s letter was that it designated Ronell a philosophy “rock star.”<sup>152</sup> “Her most-cited authored work . . . has been cited about 560 times, less than, for example, my 2002 book on Nietzsche,” he remarked.<sup>153</sup> Indeed, Leiter’s most bitter indictment of Ronell and her supporters was that they engage in postmodern theory, “as they call bad philosophy in literature departments.”<sup>154</sup>

Feminists went on the defensive, but not by arguing that the heterodox movement is more complicated than right-wingers realized and could accommodate a range of views on sexual harassment and Title IX. Instead, the “real” #MeToo activists responded that Ronell is no feminist, and her defenders are no different from the rape-culture-promoting male defenders of bad men.<sup>155</sup> #MeToo sympathizers were more than happy to pile on to Ronell, adamantly insisting that her egregious conduct toward Reitman was indistinguishable from a heterosexual male CEO’s actions toward a female subordinate. What emerged was a mainstream feminist condemnation of Ronell’s sexual misconduct that completely removed gender and sexual orientation, or any context other than academic power, from the equation. Conservative commentators also highlighted Ronell’s *sexual* deviance to stoke suspicion—perhaps well-founded—that #MeToo was more about taking down men than neutrally policing “real” sexual predation. For mainstream feminists and conservatives alike, Ronell became the very exemplar of how a gay older woman could also be a sexual predator.

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<sup>150</sup> Id.

<sup>151</sup> Brian Leiter, Speaking of Title IX “Madness”. . . (Moving to Front from Yesterday—Updated, Leiter Reports: A Philosophy Blog, May 30, 2015 (<https://leiterreports.typepad.com/blog/2015/05/speaking-of-title-ix-madness.html>).

<sup>152</sup> Brian Leiter, Another Set of Updates on L’Affaire Ronell, Leiter Reports: A Philosophy Blog, Aug. 19, 2018 (<https://leiterreports.typepad.com/blog/2018/08/another-set-of-updates-on-laffaire-ronell.html>).

<sup>153</sup> Id.

<sup>154</sup> Leiter, *supra* note 149.

<sup>155</sup> See, e.g., Josephine Livingstone, Asia Argento, Avital Ronell, and the Integrity of #MeToo, *New Republic*, Aug. 21, 2018 (<https://newrepublic.com/article/150791/asia-argento-avital-ronell-integrity-metoo>); Chitra Adkar & Abhiruchi Ranjan, When “Feminists” Tolerate Sexual Harassment in Academia, *The Wire*, Sept. 2, 2018 (<https://thewire.in/rights/feminism-me-too-avital-ronell-nyu-academia-sexual-harassment>); Andrea Long Chu, I Worked with Avital Ronell: I Believe Her Accuser, *Chron. Higher Educ.*, Aug. 30, 2018 (<https://www.chronicle.com/article/I-Worked-With-Avital-Ronell-I/244415>).

## 2. The Queer Sex-as-Play Gloss

Ronell advanced several claims to paint her communications as something other than a sexually exploitative exercise of power. She protested that, in her mind, this was the “zany and affectionate,” *belle époque*, continental, creative, eccentric—and I might add caring-yet-sexually-playful in a cultural feminist way—language.<sup>156</sup> She used it with all her West Village friends, who desired liberation from the boring vernacular of the day. Ronell’s more political argument sounded in queer identity. She asserted, “Our communications—which Reitman now claims constituted sexual harassment—were between two adults, a gay man and a queer woman, who share an Israeli heritage, as well as a penchant for florid and campy communications arising from our common academic backgrounds and sensibilities.”<sup>157</sup>

Some equality-minded commentators did not take so kindly to the recasting of the allegedly harassing statements as queer communicative practice. One commentator lashed out against Ronell’s characterization of the communications as “gay coded,” arguing that it “equates queer sexuality with harassment and abuse, a thoroughly homophobic characterization.”<sup>158</sup> An alternative argument is that Ronell’s speech may have the trappings of gay code, but it could also be a case of “‘queer kinship’ being used to mask a coercive dynamic.”<sup>159</sup> To be sure, there may be a distinction between the emotionally freighted Ronell-Reitman exchanges and what people think of as typical—or stereotypical—gay banter.<sup>160</sup>

Still, many theorists bristled at mainstream feminists’ basic instinct to retrofit the floridly intimate communicative practices between a queer adult woman and man with a heterosexual male-dominance verbal sexual harassment frame. I would venture that most queer left academics do not communicate with close professional associates, much less students, through Flaubert-tinged love-speak and sexual innuendos. Nevertheless, in the world of academic communications, those between and among queer left academics are probably more comparatively sexually playful, than those between and among other scholars. Duggan argues:

The nature of the email exchange resonates with many queer academics, whose practices of queer intimacy are often baffling to outsiders. Forms of intimacy well outside the parameters of heterosexual (and homosexual) courtship and marriage are commonplace among queers . . . . The correspondence between Ronell and Reitman, full of literary

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<sup>156</sup> Mangan, *supra* note 143.

<sup>157</sup> Greenberg, *supra* note 136.

<sup>158</sup> Nisha Bolsey, What Should Feminists Say About the Ronell Case?, *Socialistworker.org*, Aug. 22, 2018 (<https://socialistworker.org/2018/08/22/what-should-feminists-say-about-the-ronell-case>).

<sup>159</sup> Lili Loofbourow, Some Things Aren’t Complicated, *Slate*, Aug. 20, 2018 (<https://slate.com/news-and-politics/2018/08/avital-ronell-harassment-case-some-things-arent-complicated.html>).

<sup>160</sup> And Reitman’s legal team may ultimately prove that the emails are confessional proof of the sexually prurient conduct Ronell had committed and wanted to commit.

allusions [alternatively,] can be read literally as an indicator of a sexual relationship. This is a culture clash.<sup>161</sup>

Moreover, Duggan argues, viewing sex-laced communication through a dominance feminist heterosexual-subordination lens, without any “gay-code” contextualizing, poses disproportionate risks to queer academics, especially given the still-extant vulnerabilities of those considered deviant. She notes:

Because queers are hypersexualized in the public imagination, they are targets for sexual accusations. For example, a queer femme accused of being seductive, for wearing skirts and speaking in a “throaty voice” in class. A trans man accused of inappropriate advances toward a colleague, not a student and not at the same institution. A faculty member charged for the content of a queer studies class. It is remarkable as well that the majority of cases in my small but growing collection involve faculty of color, particularly black faculty.<sup>162</sup>

### 3. The Sex-Indifferent Gloss

Duggan criticizes the mainstream feminist position that Ronell is indistinguishable from other sexual harassers for being inattentive to the stigmatization of queer sexuality. At the same time, Duggan’s (and Ronell’s) “playfulness” defense of the sex-tinged speech exhibits the redemptive, pastoral quality of many queer defenses of sexuality. Others have been less sanguine about, even disquieted by, Ronell’s behavior toward Reitman, but remain reluctant to deem Ronell a “sexual” harasser and deviant. The real problem, they contend, is not sexual abuse but the abuse of power that runs rampant in professor-graduate student relationships. Indeed, one of the foremost insights that emerged from the commentary on the Ronell “catastrophe” is that the archaic master-servant relationship between Ph.D. advisors and advisees has long outlived its propriety.<sup>163</sup> Corey Robin wrote in *The Chronicle of Higher Education*, “Depending on whom you believe, Ronell’s claims on Reitman may or may not have been for sex, but the sex was only one part of the harassment. Ronell’s largest claims were on his time, on his life, on his attention and energy, well beyond the legitimate demands of an adviser on an advisee.”<sup>164</sup> Masha Gessen noted, “It matters that he identifies as gay and she as a lesbian, because it makes us question how important the sexual really is in sexual harassment.”<sup>165</sup>

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<sup>161</sup> Duggan, supra note 146.

<sup>162</sup> Id.

<sup>163</sup> See, e.g., Corey Robin, The Unsexy Truth About the Avital Ronell Scandal, *Chron. Higher Educ.*, Aug. 20, 2018 (<https://www.chronicle.com/article/The-Unsexy-Truth-About-the/244314>); Colleen Flaherty, Harassment and Power, *Inside Higher Education*, Aug. 20, 2018 (<https://www.insidehighered.com/news/2018/08/20/some-say-particulars-ronell-harassment-case-are-moot-it-all-comes-down-power>); Katha Pollitt, Power in the Ivory Towers: What on Earth is Going On at NYU?, *thenation.com*, Aug. 29, 2018 (<https://www.thenation.com/article/power-in-the-ivory-tower/>).

<sup>164</sup> Robin, supra note 163.

<sup>165</sup> Masha Gessen, An N.Y.U. Sexual-Harassment Case Has Spurred a Necessary Conversation About #MeToo, *New Yorker*, Aug. 25, 2018 (<https://www.newyorker.com/news/our-columnists/an-nyu-sexual-harassment-case-has-spurred-a-necessary-conversation-about-metoo>).

This body of commentary is, in fact, sex-indifferent. For these observers, whether Ronell's overreach was *sexual* in nature is beside the point. Let me add the important caveat that Reitman appears not to have been indifferent to the sexual nature of the relationship. Moreover, had NYU sustained the claim that Ronell coerced him into sexual *acts*, commentators would not easily dismiss sex as “not the issue.” Nevertheless, many of these sex-indifferent commentators entertain the picture of a Ronell who was emotionally but not necessarily sexually needy and a Reitman who resisted that type of relationship, including the sexual/intimate communications within it, but did not voice his views, or voice them strongly, because he feared professional repercussions. One Facebook post, ostensibly by a student insider, identified Ronell's means of manipulation, not as masculine sexual coercion, but distinctly *feminine* fragility:

When people talk about sexual harassment it's within the logic of the symbolic order—penetration, body parts—I doubt you will find much of this here. But . . . AR [Avital Ronell] pulls students and young faculty in by flattery, then breaks their self-esteem, goes on to humiliate them in front of others, until the only way to tell yourself and others that you have not been debased, that you have not been used by a pathological narcissist as a private slave, is that you are just so incredibly close, and that Avi is just so incredibly fragile and lonely and needs you 24/7 to do groceries, to fold her laundry, to bring her to acupuncture, to pick her up from acupuncture, to drive her to JFK, to talk to her at night, etc.<sup>166</sup>

In this view, Ronell's students are compelled into non-sexual labor by her power combined with female-style emotional manipulation, not male-style sexual dominance.

The account of Ivy-league graduate education that emerged in the wake of the Ronell scandal is troubling. I will put aside the contested issues of whether Ph.D. advisers are so invariably powerful that advisees can never freely consent to anything and whether we should celebrate or denigrate these close, messy, generative, complex, admiration-laden, resentment-creating relationships.<sup>167</sup> Even so, the disturbing picture is one of elite professors with discretion to pick and develop students, applying the criteria of their choosing. Those students go on to be the .001%, who then reproduce the pattern. It is not unlike Hollywood, where elite producers have total discretion to decide who will become a famous star and make millions of dollars.<sup>168</sup> The coercive force that allows these professors and producers to extort sex, labor, or false affection is distinctly neoliberal—people are coerced by the temptation to be at the top of an unequal socioeconomic order. The prized

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<sup>166</sup> Id. (quoting anonymous Facebook post).

<sup>167</sup> Apparently, there is an abundance of scholarly and popular rumination on this topic. See, e.g., Clauzet et al., Systematic Inequality and Hierarchy in Faculty Hiring Networks, 1 *Sci. Advances*, Feb. 12, 2015 (<http://advances.sciencemag.org/content/1/1/e1400005.full>); Christopher Shea, Academic Inequality and the Star System, *Chron. Higher Educ.*, Apr. 14, 2014 (<https://www.chronicle.com/article/Academic-Inequalitythe/145843>); David Shumway, The Star System in Literary Studies, 112 *PMLA* 85-100 (1997); Joe Moran, Cultural Studies and Academic Stardom, 1 *Int'l J. Cultural Stud.* 67 (1998); cf. Duncan Kennedy, Legal Education and the Reproduction of Hierarchy, 32 *J. Legal Educ.* 591 (1982).

<sup>168</sup> See *infra* note 174; Amanda Marcotte, Actors' Unions and Harvey Weinstein: Could He Have Been Stopped?, *Salon*, Oct. 17, 2017 (<https://www.salon.com/2017/10/17/actors-unions-and-harvey-weinstein-could-he-have-been-stopped/>).

spot as an advisee of an academic celebrity is made all the more valuable by a collapsing academic market and the “adjunctification” of the professoriate. Reitman’s lawsuit, indeed, emphasizes Ronell’s elite connections and highlights her email to him stating, “Half our department was hired by Yale and Harvard, etc. So the plan is for you to get a super job wherever and whenever you want, and I am talking about the realm of possibility, even probability here.”<sup>169</sup>

That those with power coerce those who seek power is certainly a cost of these discretion-based elite hierarchies.<sup>170</sup> Discretionary hierarchy also creates the potential that those who seek power will mistreat those with it. Indeed, some of Ronell’s defenders cast Reitman as the wrong-doer, manipulating a trusting, loving older woman—essentially leading her on emotionally—to secure an unfair advantage.<sup>171</sup> But these are far from the only costs of a discretionary system of power and money. The graduate school and Hollywood stories of people “doing anything” to please the star decision-maker highlight the vast inequality between those who make it and those who do not.<sup>172</sup> In a more egalitarian world, the coercive temptation of fame and riches—or any stable employment in the precarious worlds of entertainment and graduate studies—would naturally decrease. Unfettered discretion perpetuates elitism, classism, and the unequal concentration of wealth. Reitman’s complaint against Ronell details the pressure and harms he felt, but it also reads like a novel set in the belle époque. There is Paris—her apartment, his friend’s pied-a-terre. There is Israel—he of a prominent family, she of the glorious intelligentsia. There is the West Village, New York opera with his mother, champagne and kisses, Princeton, Harvard, and Yale. This is not the stuff of hierarchical repression. It is the stuff of hierarchy reproduction.

And this circles back to the problem of sex wars as proxy wars. In a practical sense, #MeToo might be today’s best substitute for a program of gender affirmative action in power positions. Yes, Dr. Blasey-Ford’s testimony might have taken down Kavanaugh. Yes, the Ronell sexual harassment case might have provoked a “necessary” conversation about the structure of graduate education. However, if sexual harm is the portal through which to reach other issues, we will always have tunnel vision. Commentators say that the Ronell case will produce a positive reexamination of graduate school structure. However, the inherent she-said/he-said, perpetrator-versus-victim structure of sexual harassment law and

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<sup>169</sup> Reitman v. Ronell, *supra* note 137.

<sup>170</sup> This is not to say that people who want success “willingly” submit to abuse, such that abusers bear no culpability. For my take on “institutional” versus individual reasoning, see Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. Colo. L. Rev. 129 (2014).

<sup>171</sup> Slavo J. Zizek, *Yes, It’s Really About Power!*, *The Phil. Salon*, Sept. 2018 (<https://thephilosophicalsalon.com/yes-its-really-about-power/>).

<sup>172</sup> See Jeet Heer, *Hollywood’s Inequality Enables Harvey Weinstein*, *New Republic*, Oct. 13, 2017 (<https://newrepublic.com/article/145269/hollywoods-inequality-enabled-harvey-weinsteinCf>); Alex N. Press, *The Union Option*, *Jacobin*, Oct. 6, 2017 (<https://www.jacobinmag.com/2017/10/harvey-weinstein-sexual-harassment-women-union>) (arguing that official collective labor action is the remedy to workplace problems like sexual harassment).

policy makes this unlikely.<sup>173</sup> We are so concerned about who is the bad actor, we forget about the script. Duggan laments, “If we focus on this one case, these details, this accuser and accused, we will miss the opportunity to think about the structural issues. If we are social justice feminists and not neoliberals, we care about the broad structures of power, and not individual bad apples case by case.”<sup>174</sup>

Consider this bad-apple analysis from Jo Livingstone in *The New Republic*:

The Ronell cheerleaders are almost universally intellectuals who once upon a time considered themselves cultural outsiders—queer theorists, postcolonial scholars, feminist thinkers. They act as if they are a politicized coalition defending a vulnerable person, without the awareness that they are now the tenured, the published, the well-off, the powerful: precisely the demographic that #MeToo proposes to investigate.<sup>175</sup>

For Livingstone, anyone in the powerful “demographic” is suspect and a candidate for retributive wrath for alleged sexual impropriety. I think left-feminists should fight the temptation to see every case as a race to the bottom, where the party who appears to reside there has a moral claim to toppling the one above. As we know from those postmodernists so trashed by conservatives during the Ronell affair,<sup>176</sup> power is “contextual” and “riven with paradox.”<sup>177</sup> Power is not easy to trace or understand, and it does not necessarily map on to a “demographic” like “tenured.” Livingstone sees professors as empowered vis-à-vis students, just as crime victims’ rights advocates see criminal defendants as empowered vis-à-vis victims. But the consumerist university disrupts that linear model.<sup>178</sup> Add to this a powerful Title IX bureaucracy bent on protecting the university from lawsuits and a #MeToo social media movement powerful enough to make anyone *civiliter mortuus*, and the idea that Ronell is vulnerable seems a bit less outrageous.

More importantly, even if Livingstone is correct that Ronell is a fully culpable and powerful abuser, disciplining her for sexual harassment does not disrupt the structure that made such abuse possible. Taking down a powerful person on sex grounds may provide a sense of righteous justice to victims and their supporters and, if one believes in deterrence, stop powerful people from doing bad sex things in the future. It does not, however, alter the structure that makes sexual abusers and nonsexual abusers so powerful. One can imagine that in the wake of the Ronell case, professors will not engage in banter that is remotely intimate or sexual. There will probably be official policies on it. However, I doubt that the discretionary “rock star” system of Ph.D. advising will be much altered. The professors who are disciplined for harassment will continue to be those whose behavior

<sup>173</sup> For more of my opinion on this, see Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *Fordham L. Rev.* 3211 (2015).

<sup>174</sup> Duggan, *supra* note 146.

<sup>175</sup> Livingstone, *supra* note 155.

<sup>176</sup> Gilbert T. Sewall, *Bonfire of Humanities*, *Am. Conservative*, Aug. 28, 2018 (<https://www.theamericanconservative.com/articles/bonfire-of-the-humanities/>).

<sup>177</sup> *Queer Theory*, *supra* note 5, at 38.

<sup>178</sup> See William L. Smith, *Teaching in a Consumeristically Charged Environment*, 14 *Mich. Soc. Rev.* 58 (2000).

was tinged with sex—running the gamut from queer to creepy to criminal. It will not be the abusive, rigidly hierarchical, totally unfair bosses, who, for example, adopt the “Pence Rule.”<sup>179</sup>

With that, I rest my very preliminary case in favor of a queer, but sex-indifferent, approach to contemporary sex regulation. Queer theory and early dominance feminism’s caution to keep an eye on invisible structures of hierarchy and how law interacts with those structures is more important than ever as the sex regulation discussion is ruled by feminist dogma, viral social-media sloganeering, and authoritarian sentiments. We should be careful to follow the interstitial tides of power as people operate in the shadow of regulatory regimes created by sex concerns. In our #MeToo moment, sexual harm claims have political traction, and those with various normative agendas, from left to conservative, increasingly package their agendas as sex claims. The focus on sexual harm as a proxy naturally leads to broadening the concept of sexual harm so it has more power to create normative (non-sexual) change. Although #MeToo activists’ collapsing of the continuum creates a dangerously capacious notion of sexual assault, sex radicals and queer theorists should not invariably respond with charges of moralistic sex panic. Rather, we can be attuned to the larger agendas at stake, how filtering them through sex undermines or furthers them, and whether those sex wars are unnecessary and costly proxy wars.

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<sup>179</sup> David French, In the Age of Sexual Misconduct, How is Mike Pence a Problem?, Nat’l Rev., Nov. 17, 2017 (<https://www.nationalreview.com/2017/11/mike-pence-marriage-rules-make-workplace-professional/>).