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September 10th – Introduction to the class – Rosh Hashanah (class will be recorded)

- Nancy Levit and Robert R.M. Verchick, *Feminist Legal Theories*, in Feminist Legal Theory 11 (New York University Press, 2016)
- Chloe Malle, [*Imperial Pink? The Wing Gears Up to Go Global*](#), Vogue Magazine August 8, 2018

September 17th – Lecture on Gender Justice

- Kathleen Neal Cleaver, *Racism, Civil Rights, and Feminism*, in Critical Race Feminism: A Reader (Wing ed. 1997)
- Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in Pleasure and Danger 267 (Carole S. Vance ed., 1984)

Feminist Legal Theory

A Primer

SECOND EDITION

Nancy Levit and Robert R. M. Verchick

Foreword by Martha Minow



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*To Tim, Aaron, Dylan, and Jon,
with love and gratitude.*

N. E. L.

*To my mother, Sue,
and my wife, Heidi.*

R. V.

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Feminist Legal Theories

Feminism is a dirty word. . . . Misconceptions abound. Feminists are portrayed as bra-burners, manhaters, sexists, and castrators. Our sexual preferences are presumed. We are characterized as bitchy. . . . aggressive, confrontational, and uncooperative, as well as overly demanding and humorless.

—Leslie Bender, “A Lawyer’s Primer on Feminist Theory and Tort”

[W]oman is the Other.

—Simone de Beauvoir, *The Second Sex*

My life is a sheer privilege because my parents didn’t love me less because I was born a daughter. My school did not limit me because I was a girl. My mentors didn’t assume that I would go less far because I might give birth to a child one day. These influences are the gender equality ambassadors that made me who I am today. They may not know it but they are the inadvertent feminists needed in the world today. We need more of those.

—Emma Watson, Hermione from *Harry Potter* and UN Goodwill Ambassador, speech to UN HeForShe Campaign

What is distinctive about feminist *legal* theory? Do criteria exist for who can be a “feminist”? Are there compulsory feminist beliefs? What is the meaning of equality?

The development of feminist legal theory was intertwined with the growth of feminism generally. Many of the first rights the women’s movement fought for were political rights, like the right to vote. Some of the early strategies—such as Sojourner Truth’s claim to equal treatment because she had “ploughed and planted” just like a man—

foreshadowed visions of equality that would emerge as important *legal* theories in later years. Often, feminist political action preceded feminist legal theory. While feminist lawyers were urging courts in the 1960s and early 1970s to address gender inequalities, it was not until the later 1970s and early 1980s that legal scholars developed distinct branches of feminist legal theory.

Feminist legal theory comes in many varieties, with some overlap. But all the theories share two things—the first an observation, the second an aspiration. First, feminists recognize that the world has been shaped by men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. If American law historically gave men a leg up, this news can hardly come as a surprise. Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and about how to achieve it.

Equal Treatment Theory

Sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man.

—Wendy W. Williams, “Equality’s Riddle”

The first wave of feminist legal theory began in the early 1960s with the emergence of equal treatment theory (also referred to as “liberal” or “sameness” feminism). Equal treatment theory is based on the principle of formal equality that inspired the suffrage movement, namely, that women are entitled to the same rights as men. The theory drew from liberal ideals in philosophy and political theory that endorse equal citizenship, equal opportunities in the public arena, individualism, and rationality.¹ The equal treatment principles were simple: the law should not treat a woman differently from a similarly situated man. Also, the

law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group.

Early efforts to attain equal treatment for women pursued two goals. The first was to obtain equivalent social and political opportunities, such as equal wages, equal employment, and equal access to government benefits. The second was to do away with legislation intended to protect women by isolating them from the public sphere. Examples of such protective legislation included limiting women’s career options or employment hours. Perhaps in part as a reaction to the historical treatment of women as in need of special protection, equal treatment theorists stressed the ways women were similar to men, and used this as the platform for claiming equal employment and economic benefits.

In the 1970s and 1980s, organizations such as the American Civil Liberties Union (ACLU), the National Organization for Women, and the League of Women Voters won a series of lawsuits in the Supreme Court that helped dismantle barriers for women as breadwinners, property owners, and economic players. In the 1970s, the ACLU created a Women’s Rights Project (WRP) to bring sex discrimination lawsuits. Under the direction of future Supreme Court Justice Ruth Bader Ginsburg, the WRP followed the strategy of civil rights pioneers in seeking formal equality. To obtain equal treatment under the Constitution, women had to establish that they were “similarly situated” to men, so the WRP argued that women did not differ from men in ways that should matter legally. In 1971 in *Reed v. Reed*, they persuaded the Supreme Court that men and women were equally qualified to administer estates, so a law that preferred male relatives over female relatives as administrators of a decedent’s estate was unconstitutional.² Two years later, in *Frontiero v. Richardson*,³ the WRP argued in an amicus brief⁴ that female members of the military deserved the same family benefits as male service members. In *Frontiero* the Supreme Court held unconstitutional a benefits policy in the military that presumed that all wives of servicemen were financially dependent on their husbands but did not make the same presumption in the case of *wives of service women*. In his opinion for the Court, Justice Brennan observed that “our Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”⁵

The WRP initially adopted a strategy that used male plaintiffs to challenge laws that, at least superficially, favored women. WRP lawyers surmised that since most judges were men, they would see discrimination best if they could envision themselves as its possible victims. The strategy produced mixed results. The Court upheld a law giving widows, but not widowers, a property tax exemption. The state tax exemption, in the Court's view, was an appropriate equalizing measure for the discrimination that women encounter in the job market, because the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁶ On the other hand, the Court struck down a law that prohibited the sale of low-alcohol beer to females under the age of eighteen and males under the age of twenty-one, basing its decision on the supposedly greater traffic-safety risks posed by underage males.⁷ When the state presented only weak empirical evidence of a correlation between gender and driving drunk (0.18 percent of females and 0.2 percent of males between eighteen and twenty-one were arrested for driving under the influence), the Court rejected the stereotype that young men were more reckless than young women.

One of the strengths of Ginsburg's approach in litigating the equal treatment cases was that she directly attacked the notion that "natural" differences justified dissimilar treatment under the law. She showed that many of these differences were socially constructed—that social norms prescribed different roles for men and women. She also argued that if biological differences distinguished the sexes, discrimination based on these immutable differences justified a higher level of judicial scrutiny.

During the late 1970s and the 1980s, the formal equality tactic was usually successful in eliminating explicit barriers to equal treatment. The Supreme Court found that a statute imposing obligations only on husbands to pay alimony violated equal protection, as did a congressman's discharge of a female administrative assistant because of her sex.⁸ Nursing schools could not reject potential students because they were male; attorneys could not reject potential jurors because they were female.⁹ In some cases, though, the Court permitted women to recoup such benefits as extra Social Security allotments as compensation for market disadvantages they experience.¹⁰

Equal treatment theory achieved immense gains in access for women, particularly in the areas of education and employment. Its rationale was easy to understand and was accepted by the mainstream. Part of the reason the strategy won public support was that it targeted individual instances of inequality and sought only gradual change. But, this meant the theory was tame, incremental, and slow moving. In addition, equal treatment lawsuits remained focused on public activities—such as taxes, liquor sales, and education—rather than on the more controversial realm of personal behavior.

Equal treatment theory accepts male experience as the reference point or norm. Women attain equality only to the extent that they are similarly situated with men. One flaw in this symmetrical approach is that its emphasis on similarity disadvantages women on issues related to pregnancy, childbirth, and allocation of property at divorce.¹¹ In response, a second group of theorists challenged the equal treatment framework, arguing that women's rights should be defined without reference to a male baseline. This premise gave rise to cultural feminism.

Cultural Feminism

I will never be in a man's place, a man will never be in mine.

Whatever the possible identifications, one will never exactly occupy the place of the other—they are irreducible to the one to the other.

—Luce Irigaray, *An Ethics of Sexual Difference*

Cultural feminism (also called "difference theory" or, sometimes pejoratively, "special treatment theory") argues that formal equality does not always result in substantive equality. Cultural feminists criticized the sameness model as male-biased, serving women only to the extent that they could prove they were like men. Purely formal equality of opportunity did not lead to equality of results. People judged women harshly on the basis of their inability to conform to the male norm. Gender-neutral laws can keep women down if they do not acknowledge women's different experiences and perspectives. This theory emphasizes the differences between men and women, whether the differences in question are biological differences related to childbearing or cultural

differences reflected in social relationships. Cultural feminists note that many institutions, such as the workplace, follow rules based heavily on male-dominated experiences, which can disadvantage women. For instance, the voluntary-quit rules of unemployment compensation typically disqualify from receiving benefits people (predominantly women) who leave their jobs because of work-family conflicts. Damages in most tort cases are based on anticipated losses of future earning capacity, so female plaintiffs often receive damage awards discounted by anticipated work absences during childrearing years. Traditional self-defense rules in criminal law, which require an imminent threat before a defense is allowed, offer limited protection to a battered woman who, though she lives in constant fear of a domestic attack, is unable to predict exactly when her partner will strike.

Cultural feminists argue that men and women should not be treated the same where they are relevantly different and that women should not be required to assimilate to male norms. They urge instead a concept of legal equality in which laws accommodate the biological and cultural differences between men and women. Some cultural feminists see the connectedness of women as rooted in biological as well as cultural origins. They maintain that women are “essentially connected” to other humans, through the physical connections of intercourse, pregnancy, and breastfeeding, and to humanity, through an ethic of care. The problem with legal theory, then, is that it “is essentially and irretrievably masculine” because it treats humans as distinct, physically unconnected, and separate from others.¹²

Cultural feminist theory in law drew on the “different voice” scholarship of educational psychologist Carol Gilligan.¹³ Gilligan challenged the dominant theory in psychology, associated with Lawrence Kohlberg, that use of abstract concepts of justice and rights was correlated with higher stages of moral development. She advanced the theory that boys and girls learn different methods of moral reasoning. Girls are taught to value empathy, compassion, preservation of harmony, and a sense of community, while boys are taught to privilege abstract moral principles, rights, autonomy, and individualism. Girls grow into women who reason with “an ethic of care,” emphasizing connections and relations with other people; boys become men who reason with “an ethic of justice” that values abstract rights, rules, and autonomy.

Advocates of special treatment urged a model that focuses on differences between the sexes, whether rooted in culture or biology: differences in reproductive functions, caretaking responsibilities, and even emotions and perceptions, such as the ways women perceive rape, sexual harassment, and various aspects of reproduction. Cultural feminists say that significant differences between men and women should be acknowledged and compensated legally where they disadvantage one sex. They have favored special maternity leaves, flexible work arrangements, or other workplace accommodations for women. Further, cultural feminists have advocated for female-centric standards in the law, such as the reasonable woman standard in sexual-harassment employment-discrimination cases, whereby the harassed female plaintiff has the option to instruct the jury to examine her claim from a woman’s point of view, rather than a person’s (arguably a male’s) point of view.¹⁴

Some feminists have criticized Gilligan’s methodology as anecdotal, arbitrary in its assignment of characteristics as masculine or feminine, and based on an inadequate sample of privileged subjects. A number of these critics deny that many differences exist along gender lines, and point out that more variation exists among women than between men and women.¹⁵ Others say that creating social policies with an emphasis on differences will reinforce gender stereotypes. Gilligan has replied to these methodological critiques, and others have supported her findings, although the empirical support has not been strong.¹⁶ But, intriguingly, these criticisms have not diminished the general acceptance of her theories.

Cultural feminism does more than identify women’s differences; it applauds them: “Cultural feminists, to their credit, have reidentified these differences as women’s strengths, rather than women’s weaknesses. Women’s art, women’s craft, women’s narrative capacity, women’s critical eye, women’s ways of knowing, and women’s heart, are all, for the cultural feminist, redefined as things to celebrate.”¹⁷ In other words, “Vive la différence!”

Legal theorists argued that this distinctively feminine approach to moral and legal reasoning had been omitted, or at least discounted, in law. Feminist legal theorists used Gilligan’s work to argue for a rethinking of some long-accepted rules of law. For instance, under traditional tort law, which values individual autonomy, citizens have no obligation

to assist strangers in need, even when they can do so without putting themselves in any jeopardy. In almost all states, one can watch a blind person walk into traffic with no legal obligation even to yell out a warning. (It is not nice, but it's not tortious.) Using the idea that law ought to encourage communal responsibilities of care, feminist legal scholars advocated the creation of tort duties to assist strangers who are in peril. Some cultural feminists argued that women, who more often organize their lives around caregiving relationships, have been harmed by gender-neutral custody standards. Others have advocated less adversarial, more cooperative styles of lawyering, such as a greater use of mediation as opposed to litigation. More generally, cultural feminists argued for a movement away from a male-oriented rights model and a greater incorporation into law of an ethic of care.

A primary criticism of cultural feminism is that it values women only if they adopt conventional social roles. In celebrating attributes associated with women—empathy, nurturing, caretaking—cultural feminism reinforces women's stereotypical association with domesticity. Another objection is that it characterizes women as needing special protection. As the Supreme Court observed, protectionist laws historically have disadvantaged women by putting them “not on a pedestal, but in a cage.”¹⁸

The question of which model—formal equality or celebration of difference—leads to more fairness is known as the “equal treatment-special treatment” or “sameness-difference” debate. A key disagreement between equal treatment theorists and cultural feminists concerns pregnancy and maternity leave. A 1987 Supreme Court case, *California Federal Savings & Loan Association v. Guerra* (“*Cal Fed*”),¹⁹ illustrates the positions of the two camps. In *Cal Fed* a California statute required employers to provide women up to four months of unpaid maternity leave, but did not require similar leave for other temporary disabilities. Cultural feminists and equal treatment theorists filed “friend of the court” briefs on opposite sides of the case. Equal treatment theorists, including the ACLU's Women's Rights Project and NOW's Legal Defense and Education Fund, argued that the state law violated federal Title VII provisions, because employers refused similar leaves to workers with other temporary “disabilities.” They contended that special treatment for pregnant women reinforced stereotypes that women in the workforce need protective legislation. In support of the state law, a cultural femi-

nist group, the Coalition for Reproductive Equality in the Workplace (CREW), argued that biological differences between men and women justified different leave policies and that accommodation of pregnancy would actually promote Title VII's goal of workplace equality: “without the statute, women were forced to choose between having children and maintaining job security—a choice not imposed on men.”²⁰

Thus, equal treatment theorists maintained that pregnancy should be treated the same as other disabilities, while cultural feminists countered that a pregnancy-specific disability policy was constitutional and sensible because pregnancy is a unique condition that burdens only women. The Supreme Court upheld the state law, noting that “[b]y taking pregnancy into account, California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs.”²¹

Following the *Cal Fed* debate, the sameness and difference camps attempted to join hands in support of the Family and Medical Leave Act (FMLA). Recent scholarship, though, demonstrates the recurrent divide between equal treatment and cultural feminist groups. For example, with respect to the FMLA, theorists have observed that, in practice, “only mothers take leave,” which means that the statute “only accommodates women's caretaking, protection that gives them a measure of job security but at the same time preserves employers' incentive to prefer male employees.”²² One possible resolution is to require paid family leave, which would remove part of the disincentive for men to assume primary caregiving responsibilities.

Theorists continue to argue about which model better promotes true equality: the assimilation model that emphasizes the sameness between women and men or the accommodation model that stresses their differences. The debates continue with respect to such issues as a parent track that permits working parents to work less than full-time so that they can devote time to childrearing; custody rules that favor the “primary caregiver” (or the question of whether that presumption discriminates against men); and the issue of whether the principles of formal equality that underlie dramatic decreases in maintenance (alimony) result in poverty for nonworking mothers. Some feminists have tried to move beyond the equal treatment—special treatment divide by questioning basic institutional structures and the social ideas that perpetuate them. Joan Williams, for example, asks whether the work world needs to be built around

the norm of an “ideal worker” who can work full-time plus overtime and has no childcare responsibilities.²³ Theorists have recognized that equal treatment poses difficulties by ignoring real differences while different treatment “is a double-edged sword permitting unfavorable as well as favorable treatment against an historic background of separate spheres ideology.”²⁴ For law professor Martha Minow, the difference dilemma boils down to a single question: “When does treating people differently emphasize their difference and stigmatize and hinder them on that basis, and when does treating people the same become insensitive to their differences and likely to stigmatize or hinder them on that basis?”²⁵

Dominance Theory

Take your foot off our necks, and then we will hear in what tongue women speak.

—Catharine A. MacKinnon, *Feminism Unmodified*

Dominance theory rejects the sameness/difference debate and departs from equal treatment theory and cultural feminism, noting that both used the male standard as the primary benchmark—with equal treatment theorists emphasizing how similar women are to men and cultural feminists celebrating how different women are from men: “Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure,” while “[u]nder the difference standard, we are measured according to our lack of correspondence with him.”²⁶ The goal of both equal treatment theory and cultural feminism is equivalence between women and men; the goal of dominance theory is liberation from men.

Dominance theorists focus instead on the difference in *power* between women and men. First introduced in 1979 by Catharine MacKinnon, dominance theory (or radical feminism) focuses on the power relations between men and women. Dominance theory argues that the inequalities women experience as sex discrimination in the economic, political, and familial arenas result from patterns of male domination. This theory says that men are privileged and women are subordinated, and this male privileging receives support from most social institutions as well as a complex system of cultural beliefs. Law is complicit

with other social institutions in constructing women as sex objects and inferior, dependent beings. Dominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women.

In particular, dominance theory provided a different perspective on violence against women and children in areas such as rape, intimate violence, sexual harassment, and child pornography.²⁷ For instance, in 2011, when a police officer in Toronto observed that to “not be raped, women should ‘avoid dressing like sluts,’” he inspired a series of grassroots protest rallies called SlutWalk that took place in Canada, India, Singapore, Mexico, Finland, Germany, South Africa, and numerous cities in the United States.²⁸ Equality theories were ill equipped to address these experiences, since they “failed to address the patriarchal structures of power that led to and perpetuated them.”²⁹ Patriarchy means the rule or “power of the fathers.” It is a system of social and political practices in which men subordinate and exploit women. The subordination occurs through complex patterns of force, social pressures, and traditions, rituals, and customs. This domination does not just occur in individual relationships, but is supported by the major institutions in society.

Within the family, men, as “heads of the household,” control women. Domestic violence is domination in an extreme form. This dominance is tolerated, since the criminal justice system imposes lenient sentences on people who perpetrate violence against women. In the employment sphere, a gendered division of labor occurs whereby women are segregated into low-status jobs at lower wages. Dominance theorists have demonstrated the ways that laws, most of which have been drafted by men, assist in reinforcing male domination. For instance, in most states, a rape victim must prove she did not consent, even where violence occurs. As another example, in the law of unemployment insurance, if women are forced to quit jobs for family reasons (such as a lack of child-care), they are not eligible for compensation.

Patriarchy is created and reinforced by a system of beliefs that says men should be superior in education, employment, politics, and religion. It is “a political structure that values men more than women.”³⁰ Women are relegated to the status of second-class citizens. Catharine MacKinnon describes the ways men are dominant and privileged:

Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.³¹

The media display degrading images of women that treat women as possessions, while the legal system supports these demeaning depictions as protected speech. Women are forced into stereotypic molds that demand that they present themselves as feminine and deferential and that they assume a disproportionate share of the responsibility for housework, childcare, and eldercare. Patriarchy gives men control of women's sexuality, their reproductive freedom, and their lives.

Patriarchy includes sexual domination by men and sexual submission by women. Sexuality in this society focuses on men's desires and satisfaction. Women live with the fear of rape and sexual abuse. They learn to trade on their sexuality for advancement. Women are treated in the work environment as objects of attraction rather than as professional peers. Women are represented, in everything from fashion ads to pornography, as sexual objects or commodities.

In 1983, Andrea Dworkin and Catharine MacKinnon proposed an antipornography ordinance that created a cause of action for sex discrimination for pornography that showed "the graphic sexually explicit subordination of women, whether in pictures or in words" and women being "presented as sexual objects."³² The outcome of the antipornography campaign is discussed in chapter 6, but for present purposes, this attempt to translate one type of feminist legal theory into law is an example of dominance theory's sweeping critique of patriarchy and the search for systematic and institutional remedies.

Patriarchy shapes men, too, when it values characteristics associated with traditional definitions of masculinity, so that men learn to reject intimacy and repress emotions. Both men and women are socialized toward stereotypic gender behaviors characteristic of their sex. Men who do not conform to traditional images of manliness and who act

in effeminate ways are considered a threat to masculinity and are not only subordinated like women but also often punished for their gender transgressions.³³

One method of promoting the traditional patriarchal structure is to discourage same-sex relationships and compel heterosexuality. "Compulsory heterosexuality"³⁴ operates through legal rules, such as the military's former "Don't Ask, Don't Tell" policy, and through much more subtle forms of cultural indoctrination, ranging from the male fear of all things pink to the epidemic use of "fagot" among high school boys (just as popular in our day). Politicians, better than most, understand our subconscious attraction to the alpha male. Thus, in the 2004 Republican National Convention, California governor Arnold Schwarzenegger mocked critics of his party's economic plan by calling them economic "girlie men."³⁵

When women live in a patriarchal society, they may internalize the beliefs of the dominant group. They may seek out, choose, and even enjoy dependent or submissive relationships or caretaking roles. "Women value care," according to MacKinnon, "because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men."³⁶ This psychological aspect of oppression is called "false consciousness."

To create awareness of oppression and expose this system of internalized beliefs, MacKinnon suggests that women engage in "consciousness-raising"—that they join women-only groups and discuss their experiences with housework, sexuality, caregiving, and menial jobs. Through this process women will make visible to themselves and each other the daily micro-inequities that are the product of male privilege and build collective knowledge about their experiences of oppression.

Other feminists have criticized the idea of false consciousness—that women cannot make independent choices—as "infuriatingly condescending," and the remedy of consciousness-raising as unworkable because relating personal experiences will not inevitably lead to political solutions.³⁷ Dominance theory has also drawn criticism for "gender essentialism"—the assumption that all women share the same experience, namely, that of victims. Critics have also charged that dominance theory mistakenly "universalize[s] the experience of white women as the experience of all women, ignoring differences of race, class, and ethnic-

ity,” and that it devalues women’s experiences as mothers.³⁸ Nonetheless, the theory has powerfully influenced legal thinking—particularly on the subjects of rape, sexual harassment, and pornography.

Anti-Essentialism

[I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us.

—Angela P. Harris, “Race and Essentialism in Feminist Legal Theory”

Critical Race Feminism

In the mid- to late 1980s, a number of legal theorists, principally women of color and lesbians, complained that feminist legal theory omitted their experiences and concerns. By pointing the spotlight only on gender, traditional white feminists ignore important differences that exist *among* women, most notably, differences of race. They charged that feminist legal theory doted excessively on the needs of privileged white women. Mainstream feminists made universal assertions about women’s experiences (for example, that all women experienced subordination or that women are generally more nurturing and compassionate than men). This phenomenon of “feminist essentialism”—that “a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”—stifled the voices of lesbians and minority-race women “in the name of commonality.”³⁹

Opponents of essentialism—who call themselves “anti-essentialists”—argue that discrimination is best understood, not from the center of an oppressed group’s membership (meaning, for women, white, middle-class, and heterosexual), but from the margins. In other words, discrimination functions differently depending on a person’s combination of personal characteristics. Sexism surely affects all women, from Rosa Parks to Taylor Swift. But it is the *intersection* of characteristics like sex, race, wealth, and sexual orientation that really suggests how people will treat you.⁴⁰

Critical race feminists argue that legal doctrines in various areas, such as rape, sexual harassment, and domestic violence, do not adequately address discrimination based on the intersections of these categories. As just one example, the requirement in employment discrimination for a black woman to identify either as a woman or as a racial minority and to claim either sex or race discrimination ignores the ways racism and sexism intertwine. In the job market, poor women of color must overcome a “triple” disadvantage, as they confront challenges of income, sex, and race. Immigrant women suffer intimate violence at higher rates than other populations; and, faced with threats of deportation, they lack support services, shelters, and legal representation. Men of color are prosecuted more often, convicted more readily, and sentenced more harshly than white men or women.⁴¹ Critical race theorists reject formal equality as being empty, because formal guarantees of equality accept current measures of merit, such as one-dimensional standardized tests and traditional employment credentials.

The multiple categories of human identity suggest another insight of critical race feminism—that people exhibit multiple consciousness. A person occupies various positions or relationships all at once and slips seamlessly into many roles: daughter, perhaps mother, student, banker, Latina, and lesbian. This kaleidoscope of roles means not just that people feel oppression at different pressure points but that, with practice, people can begin to understand oppression from perspectives other than their own. This ability, which law professor Mari Matsuda calls “multiple consciousness,” is more than (to use her words) “a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed.”⁴²

Multiple consciousness is important to the study and practice of law: it enables outsiders to use formal legal discourse without losing their empathic understanding—their consciousness—of oppression. This way of thinking makes it possible for lawyers to contemplate laws beyond current rigid doctrines that do not acknowledge powerlessness: to think about tort damages for racial hate speech, to understand the needs of same-sex clients who want to adopt, to envision reparations for slavery. Critical race feminism draws from the critical legal studies movement the idea that many laws are not neutral or objective, as they purport to be, but are actually ways that traditional power relationships are main-

tained. For example, traditional First Amendment law prohibits people who have been the victims of virulent hate speech from suing for damages. In allowing the vilification of women and people of color, law has been instrumental in continuing hierarchies of gender and race.

Critical race feminists sometimes employ a more personal kind of storytelling or narrative scholarship to explain how multiple forms of oppression shape the lives of people of color.⁴³ The experiences of women of color are not the experiences of most women. One way to blend minority experiences into legal analysis is to tell “stories.” Such stories, or personal narratives, introduce readers to challenges and emotions that might otherwise not be considered by majority-group members.

When law professor Patricia Williams went Christmas shopping in New York City one year, a white teenager (chomping bubble gum) refused to press the buzzer to admit her to a Benneton store. In a well-known essay, Professor Williams later used this experience to explore the social connections among race, sex, crime, and commerce.⁴⁴ Adele Morrison tells stories of lesbian victims seeking shelter from intimate violence but having their batterers admitted to the safe house because they are also women.⁴⁵ Law professor Anthony Alfieri, a former legal aid lawyer, recalls an interview he once had with a woman seeking food stamps. In addition to legal need, the woman’s story revealed to him the dignity and pride she felt caring for children and foster children.⁴⁶ As Richard Delgado observes, “Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”⁴⁷ The idea is to make law acknowledge the experiences of these outsiders.

Critical race theorists challenge the view that race is a biological phenomenon. Of course, if biological differences among races lead to innate performance differences, this would undermine affirmative action measures as an instrument in the movement toward equality. It also affirms *Bell Curve* concepts of educational tests as reflective of “merit.”⁴⁸ Flatly, it justifies racism as a benign product of naturally occurring differences.

The very notion of race presents deep challenges. There is no question that many characteristics associated with race—skin color, hair, facial features, and other physical traits—are rooted in biology and evolutionary history. But biologists do not recognize genetic categories for human

racers.⁴⁹ Indeed, the boundaries between one human race and another have frequently varied over time and across societies. In this way, race may be viewed as more of a social construct—a belief system about the importance of an individual’s particular package of outward physical characteristics. This process of social construction means that the inferior and negative meanings attached to various races are also social inventions. The biological view of race led to laws in the recent past prohibiting interracial marriage and justifies contemporary resistance to transracial adoption. Critical race feminists have extended this critique of biological race to demonstrate its continuing influence on laws and legal decisions. They have shown how this belief in genetic race influences courts to make surrogate decisions that view black women acting as gestational surrogates simply as breeders. They have also exposed how pregnant women of color who use drugs are more likely than white women to be prosecuted on drug charges or for child endangerment, abuse, or neglect.⁵⁰

Critical race feminists believe that a jurisprudential method recognizing “that differences are always relational rather than inherent” can lead to liberation.⁵¹ They also emphasize the instrumental value of storytelling or narrative. Because legal cases always begin with human stories, making sure the stories of oppression are told—“speaking truth to power”—is a first step toward equality.⁵²

Lesbian Feminism

Lesbian legal theory focuses on the legal issues confronted by persons who identify as lesbian, gay, bisexual, or transgender (collectively “LGBT”). Beginning in the 1970s, some lesbian feminists wrote that sexual orientation is more about politics than desire. Lesbian theorists rejected the portrayal of LGBT people as deviant by drawing on scientific evidence about sexuality that showed the prevalence of same-sex inclinations and the spectrum of different sexualities. In law, numerous gay and lesbian theorists catalogued the basic civic rights that the government denies to nonheterosexuals: rights to marry, to serve openly in the military (the “Don’t Ask, Don’t Tell” policy), to adopt, and to hold jobs without discrimination. As this book goes to press in 2015, it is still legal in most states to fire lesbians, gay men, bisexuals, and the transgendered because of their sexual orientation or gender identity.⁵³

Denounced in the 1970s by Betty Friedan, then president of the National Organization for Women, as the “lavender menace,” lesbian feminists and their concerns have long been dismissed by the mainstream feminist movement. This marginalization is an example of the larger phenomenon of dominant subgroups excluding a subordinate one in order to leverage their own acceptance. Other theorists have made the point that lesbian feminists have excluded gay men and bisexuals from their analyses, given minimal attention to the voices of poor lesbians and gays and those of color, and have entirely omitted the impact of laws on transsexuals.⁵⁴

Early lesbian and gay legal theorists revealed the links between heterosexism and sexism. They showed how traditional ideas of masculinity demanded segregation of the sexes, repression of feminine traits in men, and the exclusion, harassment, and vilification of those assumed to be sexually deviant. This promoted the supremacy of “masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality.”⁵⁵ They traced the penalties law imposes on lesbians and gay men and explained that this condemnation was tied to social meanings of gender that approve only of traditional familial arrangements (think: Ward, June, Wally, and the Beave). To escape the oppression, subordination, and exclusion, gay and lesbian legal theorists have tried a range of arguments, from constitutional (debating whether gays and lesbians are a suspect class deserving heightened scrutiny under the Equal Protection Clause) to communitarian (emphasizing the common humanity of all people).⁵⁶

Concerns of lesbian feminists in law may differ from those of straight feminists—the latter may be trying to get male partners to assume more childcare responsibilities, while the former are fighting to obtain custody of their children. The daily lives of lesbians are affected in myriad ways by state exclusions from basic benefits, familial arrangements, and employment rights that straights take for granted. If you are gay or lesbian, disclosure of your sexual orientation can justify termination of employment. At the moment, same-sex marriage exists in most, but not all states. Thus, some same-sex partners are not entitled to the same insurance, property, inheritance, custody, or adoption rights as straight couples. The General Accounting Office has identified 1,049 federal laws in which “benefits, rights and privileges” are dependent upon marriage.⁵⁷ For this reason,

gays and lesbians have worked hard campaigning and litigating for marriage equality. We’ll look more at these issues in chapter 6.

Some legal theorists have written on whether sexual orientation has a biological basis. They have drawn on evidence from the sciences concerning the genetic and biological origins of sexuality: Simon LeVay’s autopsy study revealing that a part of the brain, the hypothalamus, was twice as large in heterosexual men as in homosexual men; twin studies showing that if one twin is gay, a 50 percent chance exists that the other is as well; research showing that gays and lesbians who undergo “conversion therapy” or “reparative counseling” for the purpose of changing their sexual orientation experience a high failure rate.⁵⁸ Lesbian, gay, bisexual, and transgender (LGBT) legal theorists have used these scientific findings to argue that if sexual orientation exerts a strong biological influence, it should be a suspect classification, like race and gender, and should command heightened constitutional scrutiny. If sexuality originates in biology, how can a legal blame system be justified? Others, like law professor Sam Marcossan, argue that sexual orientation is “constructively immutable”—it is a characteristic that is immutable for “all relevant legal and political purposes . . . even if it is a product of social construction.”⁵⁹ The point is that sexual orientation, perhaps like religious orientation, is so intimately connected to personal identity that even if it is not purely biological, it must be treated as something beyond voluntary choice. The social meanings attached to sexual orientation are so powerful in maintaining a disfavored social class that LGBT individuals need constitutional protection from discrimination.

In one sense, the structure of lesbian and gay legal theory has followed a pattern reminiscent of the sameness/difference debate in feminist legal theory. Some formal equality theorists have tried to show that LGBT couples are similar to the “ideal”—the heterosexual norm—as committed partners and loving parents. They try to demonstrate that LGBT identity is not just about sexuality and that differences in sexual orientation should not make a difference, socially or legally. Difference theorists (called, in this context, antisubordination theorists) critique the heterosexual norm as they challenge the ways society has artificially constructed sexual nonconformists as deviants. But perhaps it is not surprising at all that discussions of equality often return to concepts of sameness and difference, since one version of equality is treating similarly situated people alike.

Ecofeminism

My first step from the old white man was trees. Then air. Then birds. Then other people. But one day when I was sitting quiet . . . it came to me: that feeling of being part of everything, not separate at all. I knew that if I cut a tree, my arm would bleed.

—Alice Walker, *The Color Purple*

Ecofeminism describes women's rich and varied relationships with society and nature. First advanced in the 1970s,⁶⁰ ecofeminism has since flowered into a stunning array of variations, with emphases ranging from economics to spiritualism, from animal rights to international human rights. The most recent and, perhaps, most promising version of ecofeminism emphasizes the intersections of human oppression (sexism, racism, and so on) and environmental destruction. The analysis begins where all ecofeminism begins: with the premise that the oppression of nature and the oppression of women are closely connected.⁶¹ In this view, sexism and environmental destruction flow from the same problem: a false duality in Western thought that favors the human mind and spirit over the natural world and its processes. Because Western culture often associates the masculine with mind and spirit (science, reason, Descartes) and the feminine with the natural world (sex, instinct, Mother Nature), this dualism casts a double whammy, subordinating nature and women at the same time. This hierarchy—as old as Adam⁶²—has been used to explain everything from the country's obsession with damming rivers to the pope's opposition to premarital sex.

Most ecofeminists challenge this dominance of masculine ideals by promoting greater respect for the feminine, “nature-based” values, a strategy reminiscent of cultural feminism.⁶³ Other ecofeminists argue that the duality between male and female is overemphasized and should give way to a more unified attack on oppression in general. This strategy is reminiscent of dominance theory. For many ecofeminists, the dynamics of separation and control that enable sexism and environmental destruction also perpetuate other forms of oppression. This leads to a multilayered analysis of sexism and the abuse of power. As Ellen O'Loughlin explains, because most women “experience [discrimination]

in more than one way (that is, through the dynamics of racism, classism, heterosexism, and ageism, as well as sexism), ecofeminism, in order to fight the oppression of women and nature, must look at more than just the ways in which sexism is related to naturism.”⁶⁴

Some of the affirmative contributions of environmental philosophy are its appreciation of aesthetics, its contemplation of equal access to natural resources, and its valuing of ecological ethics over human-centered utilitarianism. These ideas inform environmentalists' projects, such as efforts to preserve the Arctic National Wildlife Refuge for future generations instead of drilling it now in hopes of oil discovery. These same considerations of connections among living things and valuation of community over self dovetail in ecofeminism with feminist principles of respect, inclusion, and compassion for others.

One might be tempted to see ecofeminism as just a “green” interpretation of anti-essentialism. But the ecofeminist view of compound oppression contributes something new. First, ecofeminism holds *as its core principle* a recognition of shared oppression between women and nature. This principle not only encourages the examination of other shared oppressions but also makes avoidance of compound oppressions conceptually impossible: to take the “eco” or the “feminism” out of ecofeminism negates the whole idea.

Second, ecofeminism provides an important metaphor for understanding shared oppression: the ecological system. In fact, the concept of ecology provides us with an almost poetic image for understanding many difficulties that women face. Ellen O'Loughlin writes,

An ecologist cannot just add up the parts of a pond and think she is coming close to describing that ecosystem and how it functions. A fish in a pond and a fish in an ocean, looked at ecologically, must be understood as inhabiting different, maybe similar but not the same, places. Likewise women are in different places. Whether I am in a field or an office, what I do there, my niche, is at least partially determined by the interconnection of societal environmental factors.⁶⁵

It is precisely this emphasis on compound oppressions in the context of an ecological whole that makes the theory so useful in building coalitions among legal organizers.

Some good examples come from the environmental justice movement, a grassroots movement concerned with environmental dangers affecting the poor and people of color. In the United States, the environmental justice (EJ) movement is mainly populated and directed by women. This was a grassroots movement that in part grew up around kitchen tables across the country, as women compared notes on the illnesses their children were suffering and traced these shared ailments to contaminated well water or landfills that leached toxins into the ground.⁶⁶ As a result, EJ advocates emphasize pollution problems affecting families and children—childhood asthma in the inner city (which is aggravated by air pollution), lead-based paint in old houses, or contamination in the drinking water. Flexible collaborators, EJ advocates have joined forces with mainstream environmentalists, public health advocates, and poverty lawyers. The factor that holds these groups together is not necessarily love of nature, although that may be a part, but rather love of justice—the commitment to fight oppression in all its forms.

A social-justice perspective enables these new environmentalists to draw connections between contamination and discrimination. When national studies show correlations between neighborhood pollution and wealth or race,⁶⁷ EJ advocates question zoning laws that perpetuate the segregation of poor single mothers and minorities. When the federal government warns women of childbearing years to lower their intake of tuna because of mercury contamination,⁶⁸ EJ advocates question pollution limits that were made strict enough to protect men but not women.

The ecofeminist movement received a *global* boost when, in 2004, Kenyan activist Wangari Maathai won the Nobel Peace Prize for leading thousands of African women in crusades against deforestation, poverty, and authoritarian government. Each of these problems posed important challenges to women. Deforestation, for instance, deprived rural communities of firewood, requiring women and girls to trek miles in search of cooking fuel. In addition, many legal and social traditions limit African women's participation in the workforce and public life, making them particularly vulnerable to poverty and corrupt autocrats. Describing that year's choice, a representative of the Nobel Committee said, "We have added a new dimension to the concept of peace. We have emphasized the environment, democracy building, and human rights and especially women's rights."⁶⁹

Maathai exhibited ecofeminist ideals through her work in the Green Belt Movement, which, among other things, assisted women in planting more than forty million trees on community properties and farms and around schools and churches in an effort to assist in poverty reduction for women through environmental conservation. While the ecofeminist movement appears to have its strongest following outside of the United States, its American advocates have proved to be very enthusiastic and creative. In the United States, ecofeminists have campaigned for animal rights, security for migrant farmworkers, better healthcare for women, and environmental protection for Native Americans.

Pragmatic Feminism

We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep redeciding as time goes on. . . . [We must] confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most. The pragmatic feminist need not seek a general solution that will dictate how to resolve all double bind issues.

—Margaret Jane Radin, "The Pragmatist and the Feminist"

Pragmatic legal feminism offers as a primary insight that a search for contextual solutions is typically more useful than abstract theorizing. Feminist legal pragmatists draw on the works of the classical pragmatists in philosophy, such as John Dewey and Charles Sanders Peirce, especially their understanding that "truth is inevitably plural, concrete, and provisional."⁷⁰ This means that pragmatists reach tentative conclusions and know that their truths are usually incomplete and open to change. Feminist legal pragmatists criticize the universalism (e.g., all men dominate women) of some of the other types of feminist legal theories, and stress instead the importance of context and perspective. They recognize that "all observations are relative to a perspective," including "the time and place where they occur . . . [and] the set of prior beliefs and attitudes that are held by the observing party."⁷¹

Pragmatists generally steer away from abstractions: for them, abstract concepts do not dictate real-world practical solutions. Feminists as pragmatists do not look for solutions in formal legal rules, but instead view legal rules as partial explanations for outcomes in individual cases. Pragmatic feminists recognize that many of the debates among feminists are about different visions of an ideal means to reach the goal of equality. They also recognize that subordinated groups often face a “double bind” and that an outcome along ideal dimensions may leave individuals without a remedy. For instance,

When we single out pregnancy, for example, for “special treatment,” we fear that employers will not hire women. But if we do not accord special treatment to pregnancy, women will lose their jobs. If we grant special treatment, we bring back the bad old conception of women as weaker creatures; if we do not, we prevent women from becoming stronger in the practical world.⁷²

Different times and contexts may necessitate different approaches or outcomes. Many feminist issues are presented in concrete, specific settings. For example, the issue might be whether a particular law firm should institute a nonpartnership track to allow parents more family time with their children. A concern of some feminists might be that this would become a “mommy track,” a form of second-class citizenship utilized primarily or even exclusively by female lawyers. A pragmatic feminist might view the parent track not as a perfect outcome (a more ideal outcome might be to modify billable-hour requirements for all the lawyers in a firm), but as the best possible among less-than-ideal choices: a way of expanding the choices and assisting in the reconciliation of family/work conflicts for some individuals who are most affected at that place and time. Pragmatic feminists recognize the danger of universals and look for context-specific solutions.⁷³

Some have criticized pragmatism generally for its emphasis on individual perspective, its uncertainty, and its refusal to commit to abstract theorizing. “Being a legal pragmatist,” jokes law professor Jack Balkin, “means never having to say you have a theory.”⁷⁴ The serious challenge, though, is finding, in the absence of any foundational theory, a workable standard of morality.

Consider, for example, how a pragmatic feminist’s approach might differ from that of an equal treatment theorist. In some tribal societies, land is generally inheritable only by male heirs, but customary norms impose an obligation on families to care for unmarried daughters by giving them a piece of land. An unmarried or divorced daughter who has children of her own to care for might argue for an extension of those cultivation or occupancy rights to her situation—not on the basis that she should have rights equal to her brothers but on the basis that families have an obligation to care for all their daughters. The latter strategy has a much better chance of success in this culture than the former approach. This pragmatic approach may produce a favorable outcome in the individual case, but might not contribute to theoretically satisfactory or lasting egalitarian results: “For long-term gender equality, however, this recognition of customary rights is not a real victory. It is premised on the perception that women’s interests in property belonging to their natal families are contingent. . . . Daughters are only accommodated in exceptional circumstances, namely when they fail to marry, or when their marriages fail.”⁷⁵

Pragmatism comes with no firm convictions but does offer perhaps an improved set of methods for coming to conclusions—tentative and partial though they might be. Feminist pragmatism contributes less in the way of concrete legal solutions and more in terms of methodological suggestions. Since one aspect of feminist methodology is to look at the realities of experience, pragmatic feminists find truths in the particulars of women’s daily realities. Thus, for pragmatists, personal experiences help build theories, and theories need to incorporate the concrete situations of diverse individuals.

Postmodern Feminism

I am in favor of localized disruptions. I am against totalizing theory.

—Mary Joe Frug, “A Postmodern Feminist Legal Manifesto”

We have been thinking about different feminist legal theories as if they were so many flavors of ice cream. Some swear by vanilla; others like rocky road. But postmodern feminist theory (and to a lesser extent

pragmatism) is more of an interpretive tool than a uniform flavor. It's like an ice cream scoop.

Postmodern feminist legal theory presents another attempt to move beyond the categories of sameness and difference. Postmodern feminists argue that the comparative approaches of equal treatment ("women are like men") and cultural feminism ("women are *not* like men") inaccurately assume that *all* women are roughly the same, as are *all* men. This assumption is particularly false—and damaging—when one speaks of women or men across the lines of race, economics, or country of origin. Postmodern feminist legal theorists therefore reject notions of single truths and recognize instead that truths are multiple, provisional, and thus linked to individuals' lived experiences, perspectives, and positions in the world.

Postmodern feminism shares with critical feminist theories and with pragmatism a rejection of essentialism—the idea that all women share any single experience or condition. But postmodernists play on a whole different level of abstraction. Unlike anti-essentialists who find truth in a harmony of many voices, postmodernists think harmony is impossible. And truth, well, that's a figment of your imagination too.

As the name implies, postmodernism emerged as a response to modernism, an intellectual movement that rejected the formal structures of Victorian art (narrative in literature, realism in painting) in hopes of capturing a more immediate, less stylized picture of human experience. Modernists wanted truth boiled down to the bone. Postmodernists also reject traditional styles and forms but go further by rejecting the very notion of objective knowledge or experience. Postmodernists challenge the very possibility of truth or objectivity. In the postmodern view, knowledge can never be certain or empirically established since, as Peter Schanck explains, "[W]hat we think is knowledge is always belief"—and "[b]ecause language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality."⁷⁶ Boil truth down to the bone, and all that's left is steam.

Postmodern analysis begins with a technique called "deconstruction." Developed in the 1960s and '70s by French philosopher Jacques Derrida, deconstruction entails taking a hard look at historical, artistic, or linguistic details to reveal the political messages and biases hidden within. Textual accounts always encode hidden messages because language is unavoidably packed with explicit and implicit information that changes

with context. Consider the "Whites Only" signs of the Jim Crow South. One could say (as some politicians did) that the message was one of separation only, not subordination, but most people today would agree that the stronger, hidden message was about class power. This is the postmodern thesis: that when you get down to it, there is no such thing as justice, beauty, or truth—only power and the quest to maintain it. Pull up the floorboards of any opera, treatise, or constitution, and you will find a foundation built on the geometry of power. Every document, text, piece of language, work, or discussion contains hierarchies. Justice (or what passes for justice) belongs not to the ages but to today's ruling class, who define and shape it to their advantage, until, of course, a new class topples the first and imposes its own version. (If this reminds you of the French Revolution, you are getting the idea.) The trick for postmodernists is to identify these power structures through deconstruction and then to reverse those structures through political action.

Postmodern feminists use the tools of deconstruction to challenge the modernist idea of an unchangeable rule of law. Laws are not objective or impartial—they are crafted from political biases, so reliance on laws, and on traditional ways of practicing law, can reinforce inequalities. Postmodern practices critique many subtle hierarchies of power—even power hierarchies between lawyers and their clients. These strategies are intended to reveal the nonobvious ways that power works in relationships.

Postmodernism reveals that language, knowledge, and power are connected in ways that transmit cultural norms of gender. Because postmodernism focuses on oppression, it is especially concerned with how hierarchies are created and passed on in culture. Postmodernists suggest that we create and transmit hierarchies such as gender oppression by subtle and pervasive systems of speaking and acting (discourse and so-called discursive practices). For instance, women may internalize the expectations of advertisements that depict them as anorexically thin, perfectly coifed, and able to expertly wield cleaning products, just as they understood the messages of some older protectionist laws that limited the number of hours women could work in order to protect women from strenuous labor.

The postmodern strategy of understanding the connections between discourse and power is used to prompt rethinking of traditional gender

identities so that they are more fluid and less attached to biological sex or to cultural norms. Feminists influenced by postmodernism view gender not as natural, fixed, or objective but as socially constructed, relative, dependent on experiences, and mutable over time and according to situations. They stress that individuals have multiple identities and roles that they play. Gender is performed or presented (through, among other things, clothing, work, and mannerisms) differently each day. As an example of the ways language constructs identities, consider Judith Butler's postmodern explanation of how gender identity is "performatively constituted" by expressions:

If I claim to be a lesbian, I "come out" only to produce a new and different "closet." The "you" to whom I come out now has access to a different region of opacity. Indeed, the locus of opacity has simply shifted. . . . so we are out of the closet, but into what? What new unbounded spatiality? The room, the den, the attic, the basement, the house, the bar, the university, some new enclosure. . . . For being "out" always depends to some extent upon being "in"; it gains its meaning only within that polarity. Hence, being "out" must produce the closet again and again in order to maintain itself as "out."⁷⁷

Sometimes postmodern analysis, like the above paragraph, looks more like performance art than legal critique. The response is that such "transgressive" rants, or riffs, are riffs of resistance. By challenging the language of social relationships, and resisting proper forms of speaking and writing, postmodernists say they can neutralize subliminal messages of inequality transmitted by the dominant culture. Perhaps. Still, it's hard to locate and fight injustice if we can't even agree on the meaning of "out" or "in." In the words of Catharine MacKinnon, "Postmodernism as practiced often comes across as style—petulant, joyriding, more posture than position. . . . Postmodernism imagines that society happens in your head."⁷⁸

Some feminists find postmodernism neither liberating nor effective. For them, the postmodern challenge of foundational truths undermines the stark realities of discrimination, intimate violence, and subordination that women have been trying to document. They worry that the emphasis on multiple perspective reduces the realities of rape, sexual

abuse, prostitution, and sexual harassment to just another set of "narratives." Furthermore, critics say that postmodernism operates at too a high a level of theory to be of political use:

According to postmodernism, there are no facts; everything is a reading, so there can be no lies. Apparently it cannot be known whether the Holocaust is a hoax, whether women love to be raped, whether Black people are genetically intellectually inferior to white people, whether homosexuals are child molesters. To postmodernists, these factish things are indeterminate, contingent, in play, all a matter of interpretation.⁷⁹

Postmodernists and dominance theorists have also battled over whether women have "agency"—free will to choose, for example, sadomasochistic sex. In the postmodern view, S/M might be "a potentially pleasurable and subversive sexual practice,"⁸⁰ while a dominance theorist might dismiss the idea that S/M practices can ever be freely chosen or argue that any such "choice" is actually a product of false consciousness.

This is just one example of the larger debate about postmodern approaches. Postmodernism counsels that people should adopt "subversive practices" and try to escape oppression. It rallies citizens to fight chauvinism and resist autocracy but shows little interest in what equality or democracy should really look like. When the oppressed have finally broken their chains and slipped through the bars, how will they know they are free?

Questions for Discussion

1. At the turn of the twenty-first century, the movement for gender equality seems to have stalled. Some of the most significant battles, such as the fight for suffrage, *Roe v. Wade*, basic equal pay cases, and men's rights to sue for sexual harassment, have already been fought. Many of the issues that remain are second-generation discrimination issues—such as the glass ceiling in employment, the absence of paid family leave, women doing a disproportionate share of unpaid domestic work, or simply societal beliefs about appropriate gender roles. Can you identify some others of these smaller second-

generation issues: the more subtle forms of discrimination that are not clearly proscribed by existing laws and the micro-inequities that it is difficult for law to even reach? Do any major or landmark legal issues still remain to be fought?

2. The diversity among feminist legal theorists raises the difficulties of building coalitions among oppressed groups. Some anti-essentialists call for greater coalition building. Others caution against it, because alliances among minorities or between minority and dominant groups usually operate to serve the more powerful groups, whose interests may diverge. Choose one of the issues you identified in question 1. Would coalition building be a critical strategy in addressing that issue?

3. Are some of these philosophies of feminism too bleak to gain many adherents or too critical to provide a positive platform? For instance, dominance theory seems to suggest that most, if not all, women are subordinated in many ways—and that they may not even know it (the problem of false consciousness). Individuals, in the postmodern view, are almost purely social and cultural creations. If, as postmodernism seems to suggest, women's experiences are not "homogeneous," this raises the question whether they "can ever ground feminist theory."⁸¹ Will dominance theory gather supporters or will it be perceived as relegating women to permanent victim status? Will postmodernism lead to more fluid gender roles or create such anxiety over ambiguity that the status quo remains the preferred model of interpreting gender roles? Even if neither theory gains more adherents, how does its presence in the field of feminist theory affect other, more generally accepted theories?

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CHAPTER 1. FEMINIST LEGAL THEORIES

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CHAPTER 2. FEMINIST LEGAL METHODS

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Imperial Pink? The Wing Gears Up to Go Global

AUGUST 8, 2018 8:00 AM

by CHLOE MALLE



Wing cofounders Lauren Kassan (left, in Chloé) and Audrey Gelman (in Sara Battaglia) in the Jardin du Luxembourg.

Photographed by Olivia Arthur of Magnum Photos

Audrey Gelman climbs the curling marble staircase of a stately Haussmann address in a vintage paisley sundress, the clap of her Gucci mules kicking up a thin layer of dust. It is the longest day of the year, and she and Lauren Kassan, cofounders of the women's social-and-co-working club the Wing, have been touring Paris real estate since 9:00 a.m. They will visit eleven locations by the end of the day.

This one is a corner building on the Champs-Élysées with exquisite marble work in the stairwell and Rococo wall murals in the conference rooms. The first-floor tenant is Ladurée, the megalith *macaronier* whose pastel hues match the Wing's decor. There was a time when a box of the meringue cookies was a coveted gift from France; now that Ladurée is everywhere from Baku to D.C.'s Union Station, they feel decidedly less special. I ask how the Wing, a phenomenon since the first club opened in Manhattan's Flatiron district in October 2016, can avoid that fate as they gear up to go global.

"It's a delicate balance," concedes Kassan, a "Her Way or The Highway" T-shirt peeking out under her jean jacket.

"I mean, we are ambitious," says Gelman unapologetically. "The goal is to create spaces that women have never had before and to do it all over the world. From Detroit to Abu Dhabi."

She slips her cat-eye sunglasses back on as we emerge into the throng of tourists on the boulevard. How many Wings will there be by the end of this year? Gelman tallies outposts on her fingers, her nails painted a bright-yellow gingham: Flatiron, SoHo, Dumbo, D.C., San Francisco, and Los Angeles. In 2019, they will more than double that number, with openings planned in Williamsburg (Brooklyn), Chicago, Seattle, Boston, Toronto, London, and here in Paris.

"The bones are beautiful," says Kassan of the building we've just seen, "but I just think the location is too hectic." And with that we are off to the next, a newly renovated site near the Parc Monceau, where the drop ceiling cannot be opened. "No?" Kassan asks the French broker. "Ashvack," he replies mournfully. Kassan looks confused, then understands: "HVAC."

It's a bit of a Goldilocks exercise—one space has a trellised terrace but is deemed too sleepy a location; another is well situated but lacking in charm. "You have to kiss a lot of frogs," says Gelman as we glide past the Arc de Triomphe. "You definitely get an 'aha' moment, and you know in two minutes." That "aha" moment does arrive, in fact, in the form of a seventeenth-century limestone *hôtel particulier* in the heart of the Marais. The ground floor will be retail space, but the two stories above, with exposed wood beams and original ironwork railings overlooking an ivy-clad courtyard, will be 12,000 square feet of Wing world. The building was once the home of Louis XIV's famed mistress Madame de Montespan, who, legend says, forbade all men except servants to enter the premises. Too good to be true? This keeps happening—the Flatiron Wing is located in the historic Ladies' Mile, and the London location will be next door to what was once

Britain's first women's club. "My dream is to one day open in a former strip club," says Gelman.

"It feels like they can't open them fast enough," says ex-Planned Parenthood president and tote-carrying Wing member Cecile Richards. Indeed, the Wing's wait list has always rivaled its membership (the current member tally of 5,000 will likely double by the end of the year). I was an early joiner and have to admit I felt soothed the minute I settled in. Was it the thermostat fixed to 74 degrees, significantly warmer than most public spaces set to suit men, or the relief of interacting only with other women? "It becomes subconscious because we adapt to it even as young girls," says Gelman of the pressure of the male gaze. "To get to leave that at the door is such a freeing feeling." Everything inside is designed to buoy one's mood: The library (all books by or about women) is arranged into a rainbow by spine color, the plants are always green (they're plastic), the Spotify playlists are peppy and familiar, and the language of the place is injected with moxie—stickers in the bathroom stalls remind members to "Flush It Like You Mean It," a freekeh-and-poached egg dish is the "Fork the Patriarchy Bowl," and a cucumber-kombucha mocktail is "Reclaiming My Thyme" (another is the "Virgin Woolf").

Kassan and Gelman understood early that in our current gig economy, a co-working space is more than a desk and free coffee—it defines you in the way a choice of gym might have in the nineties. Gelman's original idea, hatched while working for the political PR firm SKDKnickerbocker, was a practical-minded third space for women between "work & werk"—as the broadsheet posters tacked to the wall in the Flatiron location proclaim—but when she met Kassan, then at the fitness app ClassPass, a grander idea of a women's community emerged. "Lauren's take was, Yes, a shower's great, but that wasn't why women would join a place like this," explains Gelman. And the Wing has become more and more far-reaching in its mission. Its networking events are packed, and its speaker series has featured everyone from Jennifer Lawrence to Hillary Clinton to Alexandria Ocasio-Cortez. All in all it has raised \$42 million in funding—its latest round mostly from the co-working giant WeWork. Some have snarked that there is an irony in a feminist space that excludes men but is built largely on male venture-capital funds. Gelman is unfazed: "All money is touched by men one way or another."

It is almost 9:00 p.m. in Paris, but the summer solstice means it feels like late afternoon. We sit down to dinner at the ancient bistro Chez L'Ami Louis. Gelman drinks Coca-Cola Light while Kassan sips Sancerre. Both are petite, with long, coffee-colored hair; they wear matching gold Jennifer Fisher *W* necklaces ("They're like our Vice ring," jokes Gelman). They share two entrées, lamb and poulet rôti, followed by a flourless chocolate torte. "I'd be bullshitting if I said I wasn't exhausted," Gelman admits when asked how they have handled the brand's rapid growth. To decompress she searches cats on Instagram (she has three Persians) and shops on TheRealReal. Perusing StreetEasy relaxes Kassan. "I'm a psycho; I read everything," says Gelman of her media diet. "Audrey learns about things the minute they happen on Twitter; it's amazing!" says Kassan.

“You sound like my grandmother,” teases Gelman, plucking up a runaway fraise des bois from the linen tablecloth and popping it in her mouth.



Pastel hues prevail at The Wing in Dumbo, Brooklyn, which opened in early 2018.
Photo: Tory Williams

While Gelman is the face and voice of the brand, it quickly becomes clear that the Wing would not exist without the thoughtful, detail-oriented Kassan, whose natural inclination is to remain behind the scenes, a perfect foil to her partner. Gelman emerged in her early 20s as that rare Venn-diagram overlap of a “real woman with a serious job”—she worked as press secretary to Scott Stringer and on Hillary Clinton’s 2008 presidential campaign—who was also beautiful, stylish, and sample-size and so was pounced upon by every women’s magazine. Her love life (in 2016 she married Genius cofounder Ilan Zechory in a hipster fantasia in a former Ford factory in Detroit) and fraught friendship with Lena Dunham (she was the inspiration for the character Marnie on *Girls*) have been reported on and followed by a certain sector of New York cognoscenti with the same relish the rest of the country dedicates to the Real Housewives.

To some, Gelman’s many facets present a bewildering contradiction: Two weeks after watching the Golden Globes in a time’s up T-shirt with a group of fellow women’s-rights activists, she sat front row at Chanel couture, her many tattoos peeking out from her metallic mini. “You can exist as a person of substance in the world and enjoy those things,” she says. She’s right, of course, but she is also a victim of the tendency among some women to be harshest on their own sex. “Audrey’s a go-getter, and if you’re a go-

getter you're bound to ruffle some feathers," says Wing founding member Tina Brown. "Plenty of men are go-getters, but people tend to express great consternation when that's allied to an attractive young woman who's got the same kind of business brio."

Then there are the questions around the way the club markets its quippy brand of Instagrammable feminism: Wing merch currently includes a pale-pink "internet herstory" baseball cap and a "no-man-icure" and "sharpen your claws" emery-board set. "I think a lot of women have been skeptical of the Wing, like 'What is this millennial-pink feminism actually going to *do* for us?'" says actress Hari Nef, also a founding member. "But if you look closely at who is showing up, it puts those anxieties to rest." She means people like Valerie Jarrett and the feminist writer Jessica Valenti, who speaks to me from the Wing Dumbo. "I feel like feminism is the only social-justice movement where the aesthetic of it comes into question," she says. "Can you imagine someone in the environmental movement being like 'This is too green'?"

Rebecca Traister, author of the forthcoming *Good and Mad: The Revolutionary Power of Women's Anger*, is ambivalent about a company's profiting from a social-justice movement but notes the political importance of the Wing's kind of accessible feminism. (She is the proud owner of one of the club's best-selling Andrea Dworkin pins.) "Are they laughing all the way to the bank? Sure," she says. "Did Al Gore? Did Michael Moore? Whom do we hold to account for profiting from probably fundamentally good politics?"

"If we can accept that the Wing is what it is, which is one business among many, and one that happens to sell women something that they really want, then that's great," says feminist blogger and bellwether Sady Doyle, who says she would love to work out of the Wing but balked at the membership fees (\$2,350–\$2,700 a year). "It's when we start placing the burden on what is essentially a profit-driven business to represent what feminism is in the twenty-first century that we start running into trouble."

Indeed, the Wing's price tag limits the club's economic diversity. Most co-working spaces cost the same or more, but this one's feminist mission can add new expectations of inclusivity. In May, the Wing introduced a scholarship program offering 100 free two-year memberships as well as professional mentoring. It has received over 10,000 applications so far.

"Historically women of color and the LGBTQ community have been left out of the feminist movement," says Atima Lui, a member who was brought on as a diversity consultant, "and the Wing is intentional about making sure people like me—and people who don't look like me—feel comfortable here." Diversity has been a priority and is addressed in Wing programming and staff resources—there is a full-time diversity manager and community managers who track the demographics of each space. The beauty rooms are stocked with hair products for different hair textures, and the wallpaper depicting trios of naked nymphs in the SoHo "pump room" was customized to include women with different skin tones.

Men, however, are not welcome, and this has proved more controversial than perhaps anyone anticipated. In March, Jezebel reported that the New York Human Rights Commission was investigating the Wing for potential violation of the city's Human Rights Law barring certain public businesses from gender-based discrimination. Almost immediately, everyone from Roxane Gay to Monica Lewinsky tweeted her fealty with the hashtag #IStandWithTheWing. Mayors of other cities came out with public statements of support, including Rahm Emanuel, who went so far as to send a letter inviting them to open in Chicago (winter 2019). When asked for an update, a spokesperson from the commission would say only that it "continues its investigation into the Wing." According to Gelman, "they sent us a letter—on the first day of Women's History Month—wanting to learn more about the business. It's not like the Mueller investigation. They've backed off."

Others have not. "I think in 2018 for a company to have a business model that is discriminatory, even if seems in a benign sort of way, feels very untimely," says Katherine Franke, Sulzbacher Professor of Law, Gender, and Sexuality Studies at Columbia University and author of a petition advocating for the commission's enforcement of the Sex Discrimination Law (it was signed by a dozen lawyers and gender-studies and law professors). There's also the evolving question of who qualifies as a woman. "We have just tried to lean into having the most broad definition possible," Gelman says, noting that membership is not restricted only to people who are born female or identify as female but also includes those outside the gender binary.

Global expansion will present its own set of challenges. In Paris, H el ene Bidard, Mayor Anne Hidalgo's deputy for women's equality, feels "quite certain there will be a place for this kind of business," noting that there have already been others of its kind popping up on a smaller scale. But Lauren Bastide, a feminist journalist and podcast producer, wonders if the French tradition of prioritizing universalist versus communitarian values may provoke pushback to a club that is self-segregating. For example, last summer Mayor Hidalgo blocked the Afro-feminist group MWASI from hosting workshops exclusively for black women. "*Communautarisme* in France is a very bad word," explains Bastide. "It sounds like you want to destroy the republic to say you're doing something with your community."

"We're not advocating for a world in which genders cease to interact with each other," says Gelman, slouched but alert in the backseat of a taxi on the way to Charles de Gaulle. She's removed the makeup from a *Vogue* photo shoot earlier in the day and has changed into an eyelet Ulla Johnson dress for the flight home. But she admits that "one day the Wing could look different." Other female co-working spaces (of which there are a few—California's Hera Hub, Toronto's Shecosystem) accept men on a selective basis, and Gelman concedes such a thing "could be a reality in the future. I think our attitude has been to keep an open mind."

As we sit at the gate waiting for our flight home, Kassan stares at her phone maternally. I ask if she's looking at photos of her five-month-old, Quincy, but she is in fact checking Luma camera monitors at the Wing. Gelman eagerly logs in to hers as well. "I check at least once a day," admits Kassan. They toggle between the different areas of the four

locations, and coos of “Oh, SoHo’s not that crowded!” and “Dumbo’s so pretty” erupt from our corner of the waiting area. It is the end of a weeklong trip that included a three-day vacation with their husbands in Portofino on the way to the Cannes Lions festival, where Gelman was a speaker. It is the first time they have both been away from the Wing. “I miss it,” says Gelman wistfully, watching the screen as if it were a baby monitor.

In this story:

Fashion Editor: Michael Philouze.

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CRITICAL
RACE
FEMINISM

A Reader

**Edited
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Racism, Civil Rights, and Feminism

Kathleen Neal Cleaver

The roots of the extraordinary protest movement culminating with the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act reach deep into the century-long struggle blacks waged to end slavery and secure full citizenship.¹ Feminists have drawn inspiration and legal ammunition² from those passionate struggles during both the nineteenth and twentieth centuries. Yet despite appropriating legal gains paid for in blood during the civil rights era, and benefiting in great numbers from legislation banning employment discrimination, white women who represent the dominant voice of American feminists seem nearly inaudible in their opposition to racism. The perceptions that motivated the radical feminists, Third World feminists, and progressive women devoted to ending racial oppression have become peripheral among leading feminist authors.

This silence, which seems especially paradoxical to me in light of the crucial role women played in the modern civil rights movement, demonstrates how profound efforts at collective transformation can remain trapped within deeply entrenched boundaries. For in many ways, the Southern-based struggle to end segregation during the 1950s and 1960s, which can be seen as a human rights movement, a struggle for community empowerment, or a collective effort to expand democracy, was a women's movement. If it were not for black women, there would have been no Montgomery Bus Boycott, few voting rights campaigns, far less marvelous educational impact—in short, the civil rights movement as we know it could not have occurred.

Black women supported the churches that sustained the movement; raised money for the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), and other groups; encouraged their children to become plaintiffs in desegregation suits, and fed and sheltered the young student activists who took the challenge against white supremacy to the countryside. Women sat in at lunch counters, boarded the buses that became Free-

dom Rides, walked in the boycott lines, marched in demonstrations, went to jail, and became civil rights leaders in their communities. The visual record always documents the presence of women, but in the printed texts of academic accounts women's participation tends to fade. Yet it was the women in the movement who insisted on the more radical approaches, showed the most determination, and kept the fires for radical change lit. And it was black women in the movement whose example transformed white women's understanding of what women could do.³

Ella Baker, whose lifelong civil rights career spanned the NAACP, the Urban League, the SCLC, and the Student Nonviolent Coordinating Committee, has stated that "the number of women who carried the movement is much larger than the number of men."⁴ Baker, raised in North Carolina by grandparents who had been enslaved, continued that spirited resistance that animated the struggle against slavery in her lifework. And it was that concrete, real-time devotion to the destruction of oppression, which I think characterized the socialization of daughters in many Southern black families, that accounted for their deep attraction to the civil rights struggle. For the movement of that era was about *Freedom*—praying, singing, marching, planning, reaching, and organizing for freedom. And in Southern black communities it was patently obvious that freedom was not withheld simply because of gender, but denied to every man, woman, and child who was black.

What the women who financed, mobilized, and joined civil rights campaigns knew, what those whose community work empowered the charismatic leaders who rose to represent the civil rights cause knew was that the price of black women's freedom was freedom for the entire community. Historical accounts concentrate largely on national leadership figures, but most of the mass protests and insurgencies that exploded during the 1950s and 1960s were grassroots movements that emerged with little direction from national organizations or leaders.⁵ And where there were grassroots, there were women, as Kay Mills wrote in her biography of Fannie Lou Hamer.⁶ The intertwining of the concerns of women and the struggle to end black oppression have a long history. As far back as 1892, the African American feminist, scholar, and human rights activist Anna Julia Cooper wrote that "only the *Black Woman* can say 'when and where I enter, in the quiet, undisputed dignity of my womanhood, without violence and without suing or special patronage, then and there the whole Negro race enters with me.'"⁷

I was in high school when I first saw defiant young women engaged in civil rights protest. Those students who went to jail in Albany, Georgia, during the early voter registration campaigns impressed me immensely. The courage it took for them to challenge white racist laws and their determination not to let jail or mob violence turn them away were awe-inspiring. I learned what heroism and leadership meant from Diane Nash, who led student demonstrations in Nashville, Tennessee, and later organized Freedom Rides, from Gloria Richardson, who mobilized the black community to fight segregation in Cambridge, Maryland, and from Ruby Doris Robinson, who helped coordinate the 1964 Mississippi Summer Project. It never once entered my head that women could not be civil rights leaders or organizers.

Like hundreds of women of my generation, I was thrilled to get a chance to join the

movement. Shortly after the Meredith March, which galvanized national attention on the cry of "Black Power" in the summer of 1966, I began working at the Student Nonviolent Coordinating Committee's office in New York. I moved on to the national office in Atlanta, where I helped organize a black student conference held at Fisk University. Eldridge Cleaver was invited to speak at the conference. We fell in love and were married at the end of 1967. I became the communications secretary of the Black Panther Party and devoted most of my effort to our campaign to prevent Huey Newton, the defense minister of the Black Panther Party, from going to the gas chamber on charges of murdering an Oakland policeman.

My involvement with the Black Panther Party began during a turbulent era marked by frequent urban rebellions, profound dissent over the Vietnam War, and extremist political violence. Leaders with progressive views—from the Democratic president Kennedy to the NAACP leader Medgar Evers to Malcolm X to Black Panther Fred Hampton—were all assassinated because their eloquent pleas for change inspired a generation. The Black Panthers were being subjected to constant police surveillance, harassment, and terrorism. By that I mean people were followed, our telephones were tapped, our mail was opened, our homes were raided, our offices were shot up, and our organization was infiltrated. Members were frequently arrested and jailed, our leaders were framed, and our organization was sabotaged by a secret counterintelligence program spearheaded by the director of the FBI.⁸ The news media were enlisted to portray Black Panthers as dangerous criminals instead of young people engaged in a struggle for self-determination. We sought power for the people, and in return the power of the state came crashing down on our heads.

Such conditions made it obvious to women within the Black Panther Party that liberation was not something we could obtain separately, nor would consciousness-raising groups serve as an appropriate channel for our rage. Of course, as in the larger community, conflicts occurred between men and women, and sexism was an issue that Panthers struggled to confront. Yet we could see how these conflicts arising from sexism within our community were subordinate to the overwhelming violence of the domination imposed on our community by the armed representatives of the state.

The women's liberation movement was coalescing around this same time, but women in the Black Panther Party did not believe that the discussions white women were launching would derive solutions to the difficulties we faced. While white women were addressing the specific form of oppression they experienced within the dominant culture, we came to fight side by side with men for black liberation. In fact, the way we engaged the culture in our struggle against racism deeply encouraged white women to strike out against sexism.

As revolutionaries, we rejected the conventional definition of our economic, political, and social relationship to the dominant society as "second-class citizenship." That citizenship extended after the Civil War continued the subjugation historically enforced during slavery, and we analyzed the regime of segregation as a variant of colonialism. Instead of being separated by land, as was Angola from Portugal, for example, black colonies were dispersed throughout the American "mother country"

in separate communities that police controlled like occupying armies. Under international human rights law, we saw blacks as colonial subjects just as entitled to fight for human rights and self-determination as Africans, Asians, and Latin Americans who were waging revolutionary wars against imperialist domination.

The first point in the Black Panther Party Ten Point Program stated, "We want power to determine the destiny of our own black community." Our colonized status was the basis on which we organized for liberation; therefore all members of the Black Panther Party were drawn from the colonized community. We worked with other peoples and groups on the principle of coalition, not combination within the same organization. We formed coalitions with the electoral Peace and Freedom Party, which was predominantly white, with the Chicano Brown Berets, with the Puerto Rican Young Lords, and with the Asian Red Guards. We challenged racism with solidarity, and violence with self-defense.

While the ultimate domination that we all struggled to destroy during that era may have been the same, that did not mean its distinct historical and social articulations were interchangeable. The ancient dynamic that elevated white men over white women was not rooted in the same historical economic processes that allowed them to extract forced labor from African slaves and their descendants in North America. Although both unequal power relationships were embedded within hierarchical structures of authority, the barbarism involved in constructing New World slave societies transcended the bounds of patriarchy and laid the foundation for imperialist domination of the world.⁹ Nothing has so profoundly chiseled the contours of our national heritage as those formative centuries of American slavery. The central paradox of American history is that the rise of liberty and equality was accompanied by the rise of slavery.¹⁰ And the stigma of that social death inherent in the slave condition has imprinted itself on the entire cultural fabric.¹¹

When Supreme Court justice Roger Taney, a former slaveowner, refuted Dred Scott's claim to freedom in the middle of the nineteenth century, he wrote that blacks were "beings of an inferior order . . . altogether unfit to associate with the white race in either social or political relations."¹² Their social position was so degraded, Taney wrote, "that they had no rights which the white man was bound to respect."¹³ He did not support his assertion with legal citations, but instead pointed to the fact that "the negro [was] justly and lawfully . . . reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise . . . whenever a profit could be made by it."¹⁴

In a society defined by its creation of a class of human property, gender has maintained the demarcation that race historically imposed between those who owned that property and those who became property. The alleged benefits of the cult of femininity did not accrue to the black woman, who was neither protected within the white patriarchal structure nor excluded from the market.¹⁵ When the slave woman's children, her labor, and her person legally became a commodity, white women were both protected and subordinated by the authority, autonomy, and property of their fathers or husbands. An irony of the system that extracted the greatest labor benefits conceivable from its workers was that it released enslaved women from the conven-

tions evoked by gender among the dominant group. But, as Angela Davis has cautioned, the onerous nature of this brutal equality with black men should never be overlooked.¹⁶

Eliminating gender discrimination in itself does not remove the contortion blighting the lives of women whose color, race, national origin, or economic marginalization causes them such pain. As a rule, the subtleties of entrenched racism are no better understood by whites, women or men, than sexual harassment is by men, whether they are black or white, rich or poor. Until white feminists discover how to see the insidious way that racism constricts the lives of millions of women, they cannot oppose it. Worse, they may blindly fail to perceive how their ancestry positions them to benefit passively from racism's perpetuation, and remain oblivious to the racialized nature of gender.¹⁷ Cultural, political, and economic institutions that mask deeply entrenched patterns of thought and action sustain white superiority almost automatically, as they have sustained male power. This enables racism to function with very little conscious individual attention.

Educated, well-meaning whites will insist, "I am not a racist," which is quite true if one accepts their fragmentary definition of "racist."¹⁸ But what is the source of those slights, remarks, insults, or overt behavior that blacks interacting with them interpret as revealing a belief in black inferiority? What explains the gross media stereotypes that pervert the image of blacks? Why are blacks singled out for suspicious or fearful treatment because of their appearance, even in the hallowed halls of the Ivy League? How did it happen that over 80 percent of white Americans live where they have no black neighbors?

Just like sexism, racist behaviors flourish unless conscious, systematic, organized opposition to their manifestation, including but not limited to administrative and legal regulation, is in place. Thirty years of civil rights law have not eliminated those social conditions molded by three centuries of black subjugation. Feminism does not inoculate women against racism, because gender for black women has represented a category differentiated from white women,¹⁹ whose race reserved them a place within the dominant society from which black women were barred.²⁰ Not only did gender limit the earning power of black women pushed to the lowest rungs of the economic ladder, but it left them outside the realm of glorified white womanhood. Patriarchal norms, economic exploitation, and racial denigration give a polydimensional character to the sexism that oppresses black women, which one-dimensional feminism cannot combat. Instead, the feminism appropriate to African Americans requires a complex recognition of the gendered dimension of racial subjugation.

The social isolation, economic deprivation, and blatant terrorism meted out to blacks make it difficult for many to appreciate the subtler subordination and intimidation that women within the dominant community endure. Lacking an appreciation of these women's realities, many black people fail to recognize that women whom they perceive as privileged may in fact feel weak, and therefore they discredit the validity of the feminist movement. Further, the sexist attitudes that belittle and exclude women's contributions from major black institutions, including churches, colleges, and reform organizations, is rarely given the public acknowledgment and

condemnation it deserves. The presence of a significant underclass, masses of solid working people, and an affluent middle class among blacks shows that we are neither liberated nor integrated, but have become a fragmented population, scattered through all levels of society from the Pentagon to the prison yard. To elevate awareness of feminist concerns within black communities requires facing hostile opposition and uncomprehending denial. Yet this work may become a new focus for black women's activism. Concern for gender equity knows no color line, and women of every community desperately need more respect.

Unless we intend to remain locked up in self-righteous boxes, it is time to replace cross-racial silence and hostility on gender with communication. But no one can speak truth to power until they find out what is true. The weaknesses, aspirations, and histories that divide as well as unite us need to be examined, understood, and demythologized. That may get us to the starting gate to look for the solution that seems to elude us. Those progressive organizations that advocate on behalf of black concerns must adopt stronger antisexist positions if they intend to mobilize their constituencies and retain their relevance. More attention must be devoted to problems facing black women, particularly those juggling poverty and motherhood, fending off domestic violence and community crime waves.

These changes may take place before mainstream feminists become motivated to develop antiracist positions, because whites have a stake in failing to examine the interplay of racism with their cultural identity. During the heyday of European imperialism, when race became elevated to the primary indicator of cultural achievement, the hierarchical theory of race placed whites at the pinnacle of historical development.²¹ Masterfully fabricated justifications in science, religion, industry, politics, and art that entitled whites to live on the labor and property of the inferior colored peoples of the world distinguished the nineteenth century.²² Everything great, everything fine, everything really successful in human culture was seen as white.²³ As that legacy has yet to be repudiated entirely, it abets American feminist scholarship in which race remains peculiarly invisible.

The analytical task is to include gender and race within the same critique instead of polarizing them. If these constructs are extracted separately from the cultural matrix that defines them both, each category loses layers of its coherence. As we look back on the twentieth century, we see that W. E. B. Du Bois was prophetic when he wrote in 1903 that the problem of the twentieth century was the problem of the color line.²⁴ Race, particularly in the United States, has come to serve as a "metalanguage" for the construction of social relations.²⁵ Not only is race manipulated to subsume gender and class, but it blurs, disguises, and suppresses their interplay, precluding unity within gender and permitting cross-class solidarity.²⁶ Without an understanding of the complex encoding that our mutual and interdependent identities acquire within racism's language, those women who seek to engage America in social reconstruction will be left whistling in the dark.

NOTES

1. See Vincent Harding, *There Is a River: The Black Struggle for Freedom in America* (1981).

2. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-17 (1990). The Equal Employment Opportunity Act of 1972 amended Title VII to extend its protection to employees of state, local, and federal governments and expanded its coverage to include businesses of more than fifteen employees. 42 U.S.C. §§ 2000e(b) and 2000e-16 (1990). Title IX of the Educational Amendments to the Civil Rights Act of 1964 prohibited sex discrimination in any educational program or activity that received federal financial assistance. 20 U.S.C. §§ 1681-1688 (1990). Under the Civil Rights Act of 1991, Title VII was amended along with numerous other statutes affecting employment discrimination to further enable victims of discrimination to obtain redress.

3. Feminist author Sara Evans wrote about this early change in consciousness in *Personal Politics*:

The daring of younger women, the strength and perseverance of "mamas" in local communities, the unwavering vision, energy, and resourcefulness of an Ella Baker, opened new possibilities in contrast to the tradition of the "southern lady." Having broken with traditional culture, young white women welcomed the alternative they represented. For them these black women became . . . new models of womanhood.

Sara Evans, *Personal Politics* 53 (1980).

4. Paula Giddings, *When and Where I Enter: The Impact of Black Women on Sex and Race in America* 284 (1984).

5. Carson, *African American Leadership and Mass Mobilization*, *Black Scholar*, Fall 1994, at 2.

6. Kay Mills, *This Little Light of Mine* 45 (1993).

7. Anna Julia Cooper, *A Voice from the South by a black Woman from the South* (1892), in *The Schomburg Library of Nineteenth Century Black Women Writers* 31 (1988).

8. In his book *Racial Matters: The FBI's Secret File on Black America, 1960-1972*, Kenneth O'Reilly describes the FBI activities against the Black Panthers as "outrageous." According to O'Reilly, "only the Martin Luther King case rivaled the Panther case in its ferocity with FBI officials pursuing the most prominent proponents of violent resistance to white racism with the same zeal that had characterized their pursuit of the most prominent proponent of nonviolence." Kenneth O'Reilly, *Racial Matters* 293 (1989).

9. See, e.g., John Henrik Clarke, *Notes for an African World Revolution* 44 (1991). In the chapter *The Nineteenth Century Origins of the African and African American Freedom Struggle*, Clarke concluded that "the wealth obtained from African slave labor made the . . . Industrial Revolution possible and also created the basis for modern capitalism." In his study of the economic evolution of slavery predominantly in the West Indies, Eric Williams wrote that the discovery of America helped make international trade the central feature of the seventeenth and eighteenth centuries, and the slave trade was the parent of that prosperous triangular trade between Europe, Africa, and the Americas. "The profits obtained [in the triangular trade] provided one of the mainstreams of that accumulation of capital in England

which financed the Industrial Revolution." Eric Williams, *Capitalism and Slavery* 51-52 (1961).

10. Edmund Morgan, *American Slavery, American Freedom* 4 (1975).

11. See Orlando Patterson, *Slavery and Social Death* (1982), particularly chap. 2, *Authority, Alienation and Social Death*, at 35-76.

12. *Scott v. Sanford*, 60 U.S. 393, 407 (1856).

13. *Id.*

14. *Id.*

15. See Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, *Black Scholar*, Dec., 1971, at 3-15.

16. Davis examined what the "brutal status of equality" meant for a slave woman:

she could work up a fresh content for that deformed equality by inspiring and participating in acts of resistance of every form and color. She could turn the weapon of equality in struggle against the avaricious slave system which had engendered the mere caricature of equality in oppression. The black woman's activities increased the total incidence of anti-slavery assaults. But most important, without consciously rebellious black women, the theme of resistance could not have become so thoroughly intertwined in the fabric of daily existence. The status of black women within the community of slaves was definitely a barometer indicating the overall potential for resistance.

This process did not end with the formal dissolution of slavery. Under the impact of racism, the black woman has been continually constrained to inject herself into the desperate struggle for existence. She—like her man—has been compelled to work for wages, providing for her family as she was previously forced to provide for the slaveholding class. (*Id.* at 15)

17. The social dominance of whites allows them to relegate their racial distinctiveness to the realm of the subconscious, according to legal scholar Barbara Flagg. "Whiteness is the racial norm. . . . Once an individual is identified as white . . . his distinctive racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other whites." Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 970-71 (1993).

18. White Americans prefer to think of a racist as an individual motivated by a virulent hatred toward an "outcast" group. It is rare to find acceptance of a broader definition that would account for more of the manifest social hierarchies that racism promotes. Such a definition of a racist would be a person who subscribed to any set of beliefs that attributed a socially relevant quality to real or imagined genetic characteristics that made the ranking and discrimination of groups defined by their race necessary. See Pierre L. Van Den Berghe, *Race and Racism: A Comparative Perspective* 11 (1978).

19. Historian Evelyn Brooks Higginbotham wrote in her seminal article, *African American Women and the Metalanguage of Race*, that "in a society where racial demarcation is endemic to [the] sociocultural fabric . . . to laws, . . . economy . . . and everyday customs . . . gender identity is inextricably linked to . . . racial identity." Evelyn Higginbotham, *African American Women and the Metalanguage of Race*, that "in a society where racial demarcation is endemic to [the] sociocultural fabric . . . to laws, . . . economy . . . and everyday customs . . . gender identity is inextricably linked to . . . racial identity." Evelyn Higginbotham, *African American Women and the Metalanguage of Race*, 17 *Signs* 251, 254 (1992).

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20. During the century of segregated public accommodations, separate toilet facilities were provided for "White Ladies" and "Colored Women."

21. In an early work elaborating the theory of race as the primary explanation of development, Robert Knox, M.D., asserted the rank inferiority of Negroes and darker peoples, who, he wrote, had been "slaves of their fairer brethren" since "the earliest of times." Robert Knox, *The Races of Men* 150 (1850).

22. See W. E. B. Du Bois, *The White Masters of the World, in The World and Africa* 16-43 (1969).

23. *Id.* at 20.

24. In his introduction to *The Souls of Black Folk*, W. E. B. Du Bois wrote that he intended to reveal the strange meaning of being black at the dawning of the twentieth century, which was important because "the problem of the twentieth century is the problem of the color line."

25. Higginbotham, *supra* note 19, at 255.

26. *Id.*

PLEASURE and DANGER: exploring female sexuality

**Edited by
Carole S. Vance**



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To the memory of my father, William
T. Vance, and to my mother, Madlyn
L. Vance

- Press, vol. 31, no. 2, June 1979.
- 3 Reported in *Female Circumcision, Excision and Infibulation: The Facts and Proposals for Change*, Rep. no. 47, Minority Rights Group, London, 1980. (See also Abdalla, Raqiya, *Sisters in Affliction: Circumcision and Infibulation of Women in Africa*, Zed Press, London, 1980.)
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Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality

Gayle Rubin

I The sex wars

Asked his advice, Dr. J. Guerin affirmed that, after all other treatments had failed, he had succeeded in curing young girls affected by the vice of onanism by burning the clitoris with a hot iron. . . . I apply the hot point three times to each of the large labia and another on the clitoris. . . . After the first operation, from forty to fifty times a day, the number of voluptuous spasms was reduced to three or four. . . . We believe, then, that in cases similar to those submitted to your consideration, one should not hesitate to resort to the hot iron, and at an early hour, in order to combat clitoral and vaginal onanism in little girls.

Demetrius Zambaco¹

The time has come to think about sex. To some, sexuality may seem to be an unimportant topic, a frivolous diversion from the more critical problems of poverty, war, disease, racism, famine, or nuclear annihilation. But it 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 behavior 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.

The realm of sexuality also has its own internal politics, inequities, and modes of oppression. As with other aspects of human behavior, the concrete institutional forms of sexuality at any given time and place are products of human activity. They are imbued with conflicts of interest and political maneuvering, both deliberate and incidental. In that sense, sex is always political. But there are also historical periods in which sexuality is more sharply contested and more overtly politicized. In such periods, the domain of erotic life is, in effect, renegotiated.

In England and the United States, the late nineteenth century was one such era. During that time, powerful social movements focused on "vices" of all sorts. There were educational and political campaigns to encourage chastity, to eliminate prostitution, and to discourage masturbation, especially among the young. Morality crusaders attacked obscene literature, nude paintings, music halls, abortion, birth control information, and public dancing.² The consolidation of Victorian morality, and its apparatus of social, medical, and legal enforcement, was the outcome of a long period of struggle whose results have been bitterly contested ever since.

The consequences of these great nineteenth-century moral paroxysms are still with us. They have left a deep imprint on attitudes about sex, medical practice, child-rearing, parental anxieties, police conduct, and sex law.

The idea that masturbation is an unhealthy practice is part of that heritage. During the nineteenth century, it was commonly thought that "premature" interest in sex, sexual excitement, and, above all, sexual release, would impair the health and maturation of a child. Theorists differed on the actual consequences of sexual precocity. Some thought it led to insanity, while others merely predicted stunted growth. To protect the young from premature arousal, parents tied children down at night so they would not touch themselves; doctors excised the clitorises of onanistic little girls.³ Although the more gruesome techniques have been abandoned, the attitudes that produced them persist. The notion that sex *per se* is harmful to the young has been chiseled into extensive social and legal structures designed to insulate minors from sexual knowledge and experience.

Much of the sex law currently on the books also dates from the nineteenth-century morality crusades. The first federal anti-obscenity law in the United States was passed in 1873. The Comstock Act – named for Anthony Comstock, an ancestral anti-porn activist and the founder of the New York Society for the Suppression of Vice – made it a federal crime to make, advertise, sell, possess, send through the mails, or import books or pictures deemed obscene. The law also banned contraceptive or abortifacient drugs and devices and information about them.⁴ In the wake of the federal statute, most states passed their own anti-obscenity laws.

The Supreme Court began to whittle down both federal and state Comstock laws during the 1950s. By 1975, the prohibition of materials used for, and information about, contraception and abortion had been ruled unconstitutional. However, although the obscenity provisions have been modified, their fundamental constitutionality has been upheld. Thus it remains a crime to

make, sell, mail, or import material which has no purpose other than sexual arousal.⁵

Although sodomy statutes date from older strata of the law, when elements of canon law were adopted into civil codes, most of the laws used to arrest homosexuals and prostitutes come out of the Victorian campaigns against "white slavery." These campaigns produced myriad prohibitions against solicitation, lewd behavior, loitering for immoral purposes, age offenses, and brothels and bawdy houses.

In her discussion of the British "white slave" scare, historian Judith Walkowitz observes that: "Recent research delineates the vast discrepancy between lurid journalistic accounts and the reality of prostitution. Evidence of widespread entrapment of British girls in London and abroad is slim."⁶ However, public furor over this ostensible problem

forced the passage of the Criminal Law Amendment Act of 1885, a particularly nasty and pernicious piece of omnibus legislation. The 1885 Act raised the age of consent for girls from 13 to 16, but it also gave police far greater summary jurisdiction over poor working-class women and children... it contained a clause making indecent acts between consenting male adults a crime, thus forming the basis of legal prosecution of male homosexuals in Britain until 1967... the clauses of the new bill were mainly enforced against working-class women, and regulated adult rather than youthful sexual behaviour.⁷

In the United States, the Mann Act, also known as the White Slave Traffic Act, was passed in 1910. Subsequently, every state in the union passed anti-prostitution legislation.⁸

In the 1950s, in the United States, major shifts in the organization of sexuality took place. Instead of focusing on prostitution or masturbation, the anxieties of the 1950s condensed most specifically around the image of the "homosexual menace" and the dubious specter of the "sex offender." Just before and after World War II, the "sex offender" became an object of public fear and scrutiny. Many states and cities, including Massachusetts, New Hampshire, New Jersey, New York State, New York City and Michigan, launched investigations to gather information about this menace to public safety.⁹ The term "sex offender" sometimes applied to rapists, sometimes to "child molesters," and eventually functioned as a code for homosexuals. In its bureaucratic, medical, and popular versions, the sex offender discourse tended to blur distinctions between violent sexual assault and illegal but consensual acts such as sodomy. The criminal justice system incorporated these concepts when an epidemic of sexual psychopath laws swept through state legislatures.¹⁰ These laws gave the psychological professions increased police powers over

homosexuals and other sexual "deviants."

From the late 1940s until the early 1960s, erotic communities whose activities did not fit the postwar American dream drew intense persecution. Homosexuals were, along with communists, the objects of federal witch hunts and purges. Congressional investigations, executive orders, and sensational exposés in the media aimed to root out homosexuals employed by the government. Thousands lost their jobs, and restrictions on federal employment of homosexuals persist to this day.¹¹ The FBI began systematic surveillance and harassment of homosexuals which lasted at least into the 1970s.¹²

Many states and large cities conducted their own investigations, and the federal witch-hunts were reflected in a variety of local crackdowns. In Boise, Idaho, in 1955, a schoolteacher sat down to breakfast with his morning paper and read that the vice-president of the Idaho First National Bank had been arrested on felony sodomy charges; the local prosecutor said that he intended to eliminate all homosexuality from the community. The teacher never finished his breakfast. "He jumped up from his seat, pulled out his suitcases, packed as fast as he could, got into his car, and drove straight to San Francisco. . . . The cold eggs, coffee, and toast remained on his table for two days before someone from his school came by to see what had happened."¹³

In San Francisco, police and media waged war on homosexuals throughout the 1950s. Police raided bars, patrolled cruising areas, conducted street sweeps, and trumpeted their intention of driving the queers out of San Francisco.¹⁴ Crackdowns against gay individuals, bars, and social areas occurred throughout the country. Although anti-homosexual crusades are the best-documented examples of erotic repression in the 1950s, future research should reveal similar patterns of increased harassment against pornographic materials, prostitutes, and erotic deviants of all sorts. Research is needed to determine the full scope of both police persecution and regulatory reform.¹⁵

The current period bears some uncomfortable similarities to the 1880s and the 1950s. The 1977 campaign to repeal the Dade County, Florida, gay rights ordinance inaugurated a new wave of violence, state persecution, and legal initiatives directed against minority sexual populations and the commercial sex industry. For the last six years, the United States and Canada have undergone an extensive sexual repression in the political, not the psychological, sense. In the spring of 1977, a few weeks before the Dade County vote, the news media were suddenly full of reports of raids on gay cruising areas, arrests for prostitution, and investigations into the manufacture and distribution of pornographic materials. Since then, police activity against the gay

community has increased exponentially. The gay press has documented hundreds of arrests, from the libraries of Boston to the streets of Houston and the beaches of San Francisco. Even the large, organized, and relatively powerful urban gay communities have been unable to stop these depredations. Gay bars and bath houses have been busted with alarming frequency, and police have gotten bolder. In one especially dramatic incident, police, in Toronto raided all four of the city's gay baths. They broke into cubicles with crowbars and hauled almost 300 men out into the winter streets, clad in their bath towels. Even "liberated" San Francisco has not been immune. There have been proceedings against several bars, countless arrests in the parks, and, in the fall of 1981, police arrested over 400 people in a series of sweeps of Polk Street, one of the thoroughfares of local gay nightlife. Queerbashing has become a significant recreational activity for young urban males. They come into gay neighborhoods armed with baseball bats and looking for trouble, knowing that the adults in their lives either secretly approve or will look the other way.

The police crackdown has not been limited to homosexuals. Since 1977, enforcement of existing laws against prostitution and obscenity has been stepped up. Moreover, states and municipalities have been passing new and tighter regulations on commercial sex. Restrictive ordinances have been passed, zoning laws altered, licensing and safety codes amended, sentences increased, and evidentiary requirements relaxed. This subtle legal codification of more stringent controls over adult sexual behavior has gone largely unnoticed outside of the gay press.

For over a century, no tactic for stirring up erotic hysteria has been as reliable as the appeal to protect children. The current wave of erotic terror has reached deepest into those areas bordered in some way, if only symbolically, by the sexuality of the young. The motto of the Dade County repeal campaign was "Save Our Children" from alleged homosexual recruitment. In February 1977, shortly before the Dade County vote, a sudden concern with "child pornography" swept the national media. In May, the *Chicago Tribune* ran a lurid four-day series with three-inch headlines, which claimed to expose a national vice ring organized to lure young boys into prostitution and pornography.¹⁶ Newspapers across the country ran similar stories, most of them worthy of the *National Enquirer*. By the end of May, a congressional investigation was underway. Within weeks, the federal government had enacted a sweeping bill against "child pornography" and many of the states followed with bills of their own. These laws have reestablished restrictions on sexual materials that had been relaxed by some of the important

Supreme Court decisions. For instance, the Court ruled that neither nudity nor sexual activity *per se* were obscene. But the child pornography laws define as obscene any depiction of minors who are nude or engaged in sexual activity. This means that photographs of naked children in anthropology textbooks and many of the ethnographic movies shown in college classes are technically illegal in several states. In fact, the instructors are liable to an additional felony charge for showing such images to each student under the age of 18. Although the Supreme Court has also ruled that it is a constitutional right to possess obscene material for private use, the child pornography laws prohibit even the private possession of any sexual material involving minors.

The laws produced by the child porn panic are ill-conceived and misdirected. They represent far-reaching alterations in the regulation of sexual behavior and abrogate important sexual civil liberties. But hardly anyone noticed as they swept through Congress and state legislatures. With the exception of the North American Man/Boy Love Association and the American Civil Liberties Union, no one raised a peep of protest.¹⁷

A new and even tougher federal child pornography bill has just reached House-Senate conference. It removes any requirement that prosecutors must prove that alleged child pornography was distributed for commercial sale. Once this bill becomes law, a person merely possessing a nude snapshot of a 17-year-old lover or friend may go to jail for fifteen years, and be fined \$100,000. This bill passed the House 400 to 1.¹⁸

The experiences of art photographer Jacqueline Livingston exemplify the climate created by the child porn panic. An assistant professor of photography at Cornell University, Livingston was fired in 1978 after exhibiting pictures of male nudes which included photographs of her seven-year-old son masturbating. *Ms. Magazine*, *Chrysalis*, and *Art News* all refused to run ads for Livingston's posters of male nudes. At one point, Kodak confiscated some of her film, and for several months, Livingston lived with the threat of prosecution under the child pornography laws. The Tompkins County Department of Social Services investigated her fitness as a parent. Livingston's posters have been collected by the Museum of Modern Art, the Metropolitan, and other major museums. But she has paid a high cost in harassment and anxiety for her efforts to capture on film the uncensored male body at different ages.¹⁹

It is easy to see someone like Livingston as a victim of the child porn wars. It is harder for most people to sympathize with actual boy-lovers. Like communists and homosexuals in the 1950s, boy-lovers are so stigmatized that it is difficult to find defenders for their civil liberties, let alone for their erotic orientation. Conse-

quently, the police have feasted on them. Local police, the FBI, and watchdog postal inspectors have joined to build a huge apparatus whose sole aim is to wipe out the community of men who love underaged youth. In twenty years or so, when some of the smoke has cleared, it will be much easier to show that these men have been the victims of a savage and undeserved witch-hunt. A lot of people will be embarrassed by their collaboration with this persecution, but it will be too late to do much good for those men who have spent their lives in prison.

While the misery of the boy-lovers affects very few, the other long-term legacy of the Dade County repeal affects almost everyone. The success of the anti-gay campaign ignited long-simmering passions of the American right, and sparked an extensive movement to compress the boundaries of acceptable sexual behavior.

Right-wing ideology linking non-familial sex with communism and political weakness is nothing new. During the McCarthy period, Alfred Kinsey and his Institute for Sex Research were attacked for weakening the moral fiber of Americans and rendering them more vulnerable to communist influence. After congressional investigations and bad publicity, Kinsey's Rockefeller grant was terminated in 1954.²⁰

Around 1969, the extreme right discovered the Sex Information and Education Council of the United States (SIECUS). In books and pamphlets, such as *The Sex Education Racket: Pornography in the Schools and SIECUS: Corrupter of Youth*, the right attacked SIECUS and sex education as communist plots to destroy the family and sap the national will.²¹ Another pamphlet, *Pavlov's Children (They May Be Yours)*, claims that the United Nations Educational, Scientific and Cultural Organization (UNESCO) is in cahoots with SIECUS to undermine religious taboos, to promote the acceptance of abnormal sexual relations, to downgrade absolute moral standards, and to "destroy racial cohesion," by exposing white people (especially white women) to the alleged "lower" sexual standards of black people.²²

New Right and neo-conservative ideology has updated these themes, and leans heavily on linking "immoral" sexual behavior to putative declines in American power. In 1977, Norman Podhoretz wrote an essay blaming homosexuals for the alleged inability of the United States to stand up to the Russians.²³ He thus neatly linked "the anti-gay fight in the domestic arena and the anti-communist battles in foreign policy."²⁴

Right-wing opposition to sex education, homosexuality, pornography, abortion, and pre-marital sex moved from the extreme fringes to the political center stage after 1977, when right-wing strategists and fundamentalist religious crusaders discovered that

these issues had mass appeal. Sexual reaction played a significant role in the right's electoral success in 1980.²⁵ Organizations like the Moral Majority and Citizens for Decency have acquired mass followings, immense financial resources, and unanticipated clout. The Equal Rights Amendment has been defeated, legislation has been passed that mandates new restrictions on abortion, and funding for programs like Planned Parenthood and sex education has been slashed. Laws and regulations making it more difficult for teenage girls to obtain contraceptives or abortions have been promulgated. Sexual backlash was exploited in successful attacks on the Women's Studies Program at California State University at Long Beach.

The most ambitious right-wing legislative initiative has been the Family Protection Act (FPA), introduced in Congress in 1979. The Family Protection Act is a broad assault on feminism, homosexuals, non-traditional families, and teenage sexual privacy.²⁶ The Family Protection Act has not and probably will not pass, but conservative members of Congress continue to pursue its agenda in a more piecemeal fashion. Perhaps the most glaring sign of the times is the Adolescent Family Life Program. Also known as the Teen Chastity Program, it gets some 15 million federal dollars to encourage teenagers to refrain from sexual intercourse, and to discourage them from using contraceptives if they do have sex, and from having abortions if they get pregnant. In the last few years, there have been countless local confrontations over gay rights, sex education, abortion rights, adult bookstores, and public school curricula. It is unlikely that the anti-sex backlash is over, or that it has even peaked. Unless something changes dramatically, it is likely that the next few years will bring more of the same.

Periods such as the 1880s in England, and the 1950s in the United States, recodify the relations of sexuality. The struggles that were fought leave a residue in the form of laws, social practices, and ideologies which then affect the way in which sexuality is experienced long after the immediate conflicts have faded. All the signs indicate that the present era is another of those watersheds in the politics of sex. The settlements that emerge from the 1980s will have an impact far into the future. It is therefore imperative to understand what is going on and what is at stake in order to make informed decisions about what policies to support and oppose.

It is difficult to make such decisions in the absence of a coherent and intelligent body of radical thought about sex. Unfortunately, progressive political analysis of sexuality is relatively underdeveloped. Much of what is available from the

feminist movement has simply added to the mystification that shrouds the subject. There is an urgent need to develop radical perspectives on sexuality.

Paradoxically, an explosion of exciting scholarship and political writing about sex has been generated in these bleak years. In the 1950s, the early gay rights movement began and prospered while the bars were being raided and anti-gay laws were being passed. In the last six years, new erotic communities, political alliances, and analyses have been developed in the midst of the repression. In this essay, I will propose elements of a descriptive and conceptual framework for thinking about sex and its politics. I hope to contribute to the pressing task of creating an accurate, humane, and genuinely liberatory body of thought about sexuality.

II Sexual thoughts

"You see, Tim," Phillip said suddenly, "your argument isn't reasonable. Suppose I granted your first point that homosexuality is justifiable in certain instances and under certain controls. Then there is the catch: where does justification end and degeneracy begin? Society must condemn to protect. Permit even the intellectual homosexual a place of respect and the first bar is down. Then comes the next and the next until the sadist, the flagellist, the criminally insane demand their places, and society ceases to exist. So I ask again: where is the line drawn? Where does degeneracy begin if not at the beginning of individual freedom in such matters?"

(Fragment from a discussion between two gay men trying to decide if they may love each other, from a novel published in 1950.²⁷)

A radical theory of sex must identify, describe, explain, and denounce erotic injustice and sexual oppression. Such a theory needs refined conceptual tools which can grasp the subject and hold it in view. It must build rich descriptions of sexuality as it exists in society and history. It requires a convincing critical language that can convey the barbarity of sexual persecution.

Several persistent features of thought about sex inhibit the development of such a theory. These assumptions are so pervasive in Western culture that they are rarely questioned. Thus, they tend to reappear in different political contexts, acquiring new rhetorical expressions but reproducing fundamental axioms.

One such axiom is sexual essentialism – the idea that sex is a natural force that exists prior to social life and shapes institutions. Sexual essentialism is embedded in the folk wisdoms of Western societies, which consider sex to be eternally unchanging, asocial, and transhistorical. Dominated for over a century by medicine,

psychiatry, and psychology, the academic study of sex has reproduced essentialism. These fields classify sex as a property of individuals. It may reside in their hormones or their psyches. It may be construed as physiological or psychological. But within these ethnoscientific categories, sexuality has no history and no significant social determinants.

During the last five years, a sophisticated historical and theoretical scholarship has challenged sexual essentialism both explicitly and implicitly. Gay history, particularly the work of Jeffrey Weeks, has led this assault by showing that homosexuality as we know it is a relatively modern institutional complex.²⁸ Many historians have come to see the contemporary institutional forms of heterosexuality as an even more recent development.²⁹ An important contributor to the new scholarship is Judith Walkowitz, whose research has demonstrated the extent to which prostitution was transformed around the turn of the century. She provides meticulous descriptions of how the interplay of social forces such as ideology, fear, political agitation, legal reform, and medical practice can change the structure of sexual behavior and alter its consequences.³⁰

Michel Foucault's *The History of Sexuality* has been the most influential and emblematic text of the new scholarship on sex. Foucault criticizes the traditional understanding of sexuality as a natural libido yearning to break free of social constraint. He argues that desires are not preexisting biological entities, but rather, that they are constituted in the course of historically specific social practices. He emphasizes the generative aspects of the social organization of sex rather than its repressive elements by pointing out that new sexualities are constantly produced. And he points to a major discontinuity between kinship-based systems of sexuality and more modern forms.³¹

The new scholarship on sexual behavior has given sex a history and created a constructivist alternative to sexual essentialism. Underlying this body of work is an assumption that sexuality is constituted in society and history, not biologically ordained.³² This does not mean the biological capacities are not prerequisites for human sexuality. It does mean that human sexuality is not comprehensible in purely biological terms. Human organisms with human brains are necessary for human cultures, but no examination of the body or its parts can explain the nature and variety of human social systems. The belly's hunger gives no clues as to the complexities of cuisine. The body, the brain, the genitalia, and the capacity for language are all necessary for human sexuality. But they do not determine its content, its experiences, or its institutional forms. Moreover, we never encounter the body unmediated by the meanings that cultures

give to it. To paraphrase Lévi-Strauss, my position on the relationship between biology and sexuality is a "Kantianism without a transcendental libido."³³

It is impossible to think with any clarity about the politics of race or gender as long as these are thought of as biological entities rather than as social constructs. Similarly, sexuality is impervious to political analysis as long as it is primarily conceived as a biological phenomenon or an aspect of individual psychology. Sexuality is as much a human product as are diets, methods of transportation, systems of etiquette, forms of labor, types of entertainment, processes of production, and modes of oppression. Once sex is understood in terms of social analysis and historical understanding, a more realistic politics of sex becomes possible. One may then think of sexual politics in terms of such phenomena as populations, neighborhoods, settlement patterns, migration, urban conflict, epidemiology, and police technology. These are more fruitful categories of thought than the more traditional ones of sin, disease, neurosis, pathology, decadence, pollution, or the decline and fall of empires.

By detailing the relationships between stigmatized erotic populations and the social forces which regulate them, work such as that of Allan Bérubé, John D'Emilio, Jeffrey Weeks, and Judith Walkowitz contains implicit categories of political analysis and criticism. Nevertheless, the constructivist perspective has displayed some political weaknesses. This has been most evident in misconstructions of Foucault's position.

Because of his emphasis on the ways that sexuality is produced, Foucault has been vulnerable to interpretations that deny or minimize the reality of sexual repression in the more political sense. Foucault makes it abundantly clear that he is not denying the existence of sexual repression so much as inscribing it within a large dynamic.³⁴ Sexuality in Western societies has been structured within an extremely punitive social framework, and has been subjected to very real formal and informal controls. It is necessary to recognize repressive phenomena without resorting to the essentialist assumptions of the language of libido. It is important to hold repressive sexual practices in focus, even while situating them within a different totality and a more refined terminology.³⁵

Most radical thought about sex has been embedded within a model of the instincts and their restraints. Concepts of sexual oppression have been lodged within that more biological understanding of sexuality. It is often easier to fall back on the notion of a natural libido subjected to inhumane repression than to reformulate concepts of sexual injustice within a more constructivist framework. But it is essential that we do so. We

need a radical critique of sexual arrangements that has the conceptual elegance of Foucault and the evocative passion of Reich.

The new scholarship on sex has brought a welcome insistence that sexual terms be restricted to their proper historical and social contexts, and a cautionary scepticism towards sweeping generalizations. But it is important to be able to indicate groupings of erotic behavior and general trends within erotic discourse. In addition to sexual essentialism, there are at least five other ideological formations whose grip on sexual thought is so strong that to fail to discuss them is to remain enmeshed within them. These are sex negativity, the fallacy of misplaced scale, the hierarchical valuation of sex acts, the domino theory of sexual peril, and the lack of a concept of benign sexual variation.

Of these five, the most important is sex negativity. Western cultures generally consider sex to be a dangerous, destructive, negative force.³⁶ Most Christian tradition, following Paul, holds that sex is inherently sinful. It may be redeemed if performed within marriage for procreative purposes and if the pleasurable aspects are not enjoyed too much. In turn, this idea rests on the assumption that the genitalia are an intrinsically inferior part of the body, much lower and less holy than the mind, the "soul," the "heart," or even the upper part of the digestive system (the status of the excretory organs is close to that of the genitalia).³⁷ Such notions have by now acquired a life of their own and no longer depend solely on religion for their perseverance.

This culture always treats sex with suspicion. It construes and judges almost any sexual practice in terms of its worst possible expression. Sex is presumed guilty until proven innocent. Virtually all erotic behavior is considered bad unless a specific reason to exempt it has been established. The most acceptable excuses are marriage, reproduction, and love. Sometimes scientific curiosity, aesthetic experience, or a long-term intimate relationship may serve. But the 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.

What I call the fallacy of misplaced scale is a corollary of sex negativity. Susan Sontag once commented that since Christianity focused "on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture."³⁸ Sex law has incorporated the religious attitude that heretical sex is an especially heinous sin that deserves the harshest punishments. Throughout much of European and American history, a single act of consensual anal penetration was grounds for execution. In some states, sodomy still carries twenty-year prison sentences.

Outside the law, sex is also a marked category. Small differences in value or behavior are often experienced as cosmic threats. Although people can be intolerant, silly, or pushy about what constitutes proper diet, differences in menu rarely provoke the kinds of rage, anxiety, and sheer terror that routinely accompany differences in erotic taste. Sexual acts are burdened with an excess of significance.

Modern Western societies appraise sex acts according to a hierarchical system of sexual value. Marital, reproductive heterosexuals are alone at the top of the erotic pyramid. Clamoring below are unmarried monogamous heterosexuals in couples, followed by most other heterosexuals. Solitary sex floats ambiguously. The powerful nineteenth-century stigma on masturbation lingers in less potent, modified forms, such as the idea that masturbation is an inferior substitute for partnered encounters. Stable, long-term lesbian and gay male couples are verging on respectability, but bar dykes and promiscuous gay men are hovering just above the groups at the very bottom of the pyramid. The most despised sexual castes currently include transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models, and the lowliest of all, those whose eroticism transgresses generational boundaries.

Individuals whose behavior stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits. As sexual behaviors or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.

Extreme and punitive stigma maintains some sexual behaviors as low status and is an effective sanction against those who engage in them. The intensity of this stigma is rooted in Western religious traditions. But most of its contemporary content derives from medical and psychiatric opprobrium.

The old religious taboos were primarily based on kinship forms of social organization. They were meant to deter inappropriate unions and to provide proper kin. Sex laws derived from Biblical pronouncements were aimed at preventing the acquisition of the wrong kinds of affinal partners: consanguineous kin (incest), the same gender (homosexuality), or the wrong species (bestiality). When medicine and psychiatry acquired extensive powers over sexuality, they were less concerned with unsuitable mates than with unfit forms of desire. If taboos against incest best characterized kinship systems of sexual organization, then the shift to an emphasis on taboos against masturbation was more

apposite to the newer systems organized around qualities of erotic experience.³⁹

Medicine and psychiatry multiplied the categories of sexual misconduct. The section on psychosexual disorders in the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* of the American Psychiatric Association (APA) is a fairly reliable map of the current moral hierarchy of sexual activities. The APA list is much more elaborate than the traditional condemnations of whoring, sodomy, and adultery. The most recent edition, *DSM-III*, removed homosexuality from the roster of mental disorders after a long political struggle. But fetishism, sadism, masochism, transsexuality, transvestism, exhibitionism, voyeurism, and pedophilia are quite firmly entrenched as psychological malfunctions.⁴⁰ Books are still being written about the genesis, etiology, treatment, and cure of these assorted "pathologies."

Psychiatric condemnation of sexual behaviors invokes concepts of mental and emotional inferiority rather than categories of sexual sin. Low status sex practices are vilified as mental diseases or symptoms of defective personality integration. In addition, psychological terms conflate difficulties of psychodynamic functioning with modes of erotic conduct. They equate sexual masochism with self-destructive personality patterns, sexual sadism with emotional aggression, and homoeroticism with immaturity. These terminological muddles have become powerful stereotypes that are indiscriminately applied to individuals on the basis of their sexual orientations.

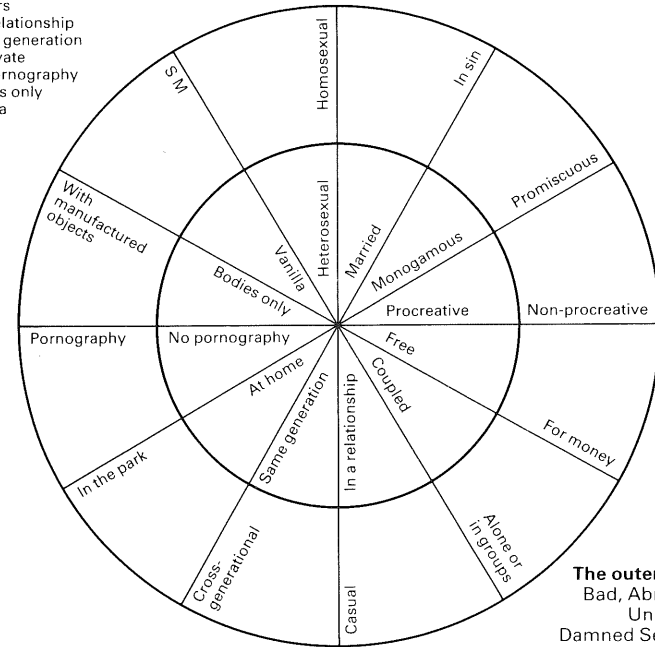
Popular culture is permeated with ideas that erotic variety is dangerous, unhealthy, depraved, and a menace to everything from small children to national security. Popular sexual ideology is a noxious stew made up of ideas of sexual sin, concepts of psychological inferiority, anti-communism, mob hysteria, accusations of witchcraft, and xenophobia. The mass media nourish these attitudes with relentless propaganda. I would call this system of erotic stigma the last socially respectable form of prejudice if the old forms did not show such obstinate vitality, and new ones did not continually become apparent.

All these hierarchies of sexual value – religious, psychiatric, and popular – function in much the same ways as do ideological systems of racism, ethnocentrism, and religious chauvinism. They rationalize the well-being of the sexually privileged and the adversity of the sexual rabble.

Figure 1 diagrams a general version of the sexual value system. According to this system, sexuality that is "good," "normal" and "natural" should ideally be heterosexual, marital, monogamous, reproductive, and non-commercial. It should be coupled, relational, within the same generation, and occur at home. It should

The charmed circle:
Good, Normal, Natural,
Blessed Sexuality

Heterosexual
Married
Monogamous
Procreative
Non-commercial
In pairs
In a relationship
Same generation
In private
No pornography
Bodies only
Vanilla



The outer limits:
Bad, Abnormal,
Unnatural,
Damned Sexuality

Homosexual
Unmarried
Promiscuous
Non-procreative
Commercial
Alone or in groups
Casual
Cross-generational
In public
Pornography
With manufactured objects
Sadomasochistic

Figure 1 The sex hierarchy: the charmed circle vs the outer limits

not involve pornography, fetish objects, sex toys of any sort, or roles other than male and female. Any sex that violates these rules is "bad," "abnormal," or "unnatural." Bad sex may be homosexual, unmarried, promiscuous, non-procreative, or commercial. It may be masturbatory or take place at orgies, may be casual, may cross generational lines, and may take place in "public," or at least in the bushes or the baths. It may involve the use of pornography, fetish objects, sex toys, or unusual roles (see Figure 1).

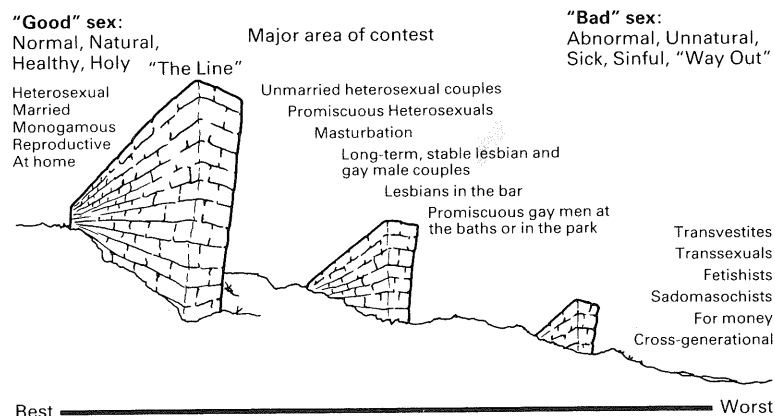


Figure 2 The sex hierarchy: the struggle over where to draw the line

Figure 2 diagrams another aspect of the sexual hierarchy: the need to draw and maintain an imaginary line between good and bad sex. Most of the discourses on sex, be they religious, psychiatric, popular, or political, delimit a very small portion of human sexual capacity as sanctifiable, safe, healthy, mature, legal, or politically correct. The "line" distinguishes these from all other erotic behaviors, which are understood to be the work of the devil, dangerous, psychopathological, infantile, or politically reprehensible. Arguments are then conducted over "where to draw the line," and to determine what other activities, if any, may be permitted to cross over into acceptability.

All these models assume a domino theory of sexual peril. The line appears to stand between sexual order and chaos. It expresses the fear that if anything is permitted to cross this erotic DMZ, the barrier against scary sex will crumble and something unspeakable will skitter across.

Most systems of sexual judgment – religious, psychological, feminist, or socialist – attempt to determine on which side of the line a particular act falls. Only sex acts on the good side of the line are accorded moral complexity. For instance, heterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human experience. In contrast, all sex acts on the bad side of the line are considered utterly repulsive and devoid of all emotional nuance. The further from the line a sex act is, the more it is depicted as a uniformly bad experience.

As a result of the sex conflicts of the last decade, some behavior near the border is inching across it. Unmarried couples living together, masturbation, and some forms of homosexuality

are moving in the direction of respectability (see Figure 2). Most homosexuality is still on the bad side of the line. But if it is coupled and monogamous, the society is beginning to recognize that it includes the full range of human interaction. Promiscuous homosexuality, sadomasochism, fetishism, transsexuality, and cross-generational encounters are still viewed as unmodulated horrors incapable of involving affection, love, free choice, kindness, or transcendence.

This kind of sexual morality has more in common with ideologies of racism than with true ethics. It grants virtue to the dominant groups, and relegates vice to the underprivileged. A democratic morality should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of the pleasures they provide. Whether sex acts are gay or straight, coupled or in groups, naked or in underwear, commercial or free, with or without video, should not be ethical concerns.

It is difficult to develop a pluralistic sexual ethics without a concept of benign sexual variation. Variation is a fundamental property of all life, from the simplest biological organisms to the most complex human social formations. Yet sexuality is supposed to conform to a single standard. One of the most tenacious ideas about sex is that there is one best way to do it, and that everyone should do it that way.

Most people find it difficult to grasp that whatever they like to do sexually will be thoroughly repulsive to someone else, and that whatever repels them sexually will be the most treasured delight of someone, somewhere. One need not like or perform a particular sex act in order to recognize that someone else will, and that this difference does not indicate a lack of good taste, mental health, or intelligence in either party. Most people mistake their sexual preferences for a universal system that will or should work for everyone.

This notion of a single ideal sexuality characterizes most systems of thought about sex. For religion, the ideal is procreative marriage. For psychology, it is mature heterosexuality. Although its content varies, the format of a single sexual standard is continually reconstituted within other rhetorical frameworks, including feminism and socialism. It is just as objectionable to insist that everyone should be lesbian, non-monogamous, or kinky, as to believe that everyone should be heterosexual, married, or vanilla – though the latter set of opinions are backed by considerably more coercive power than the former.

Progressives who would be ashamed to display cultural chauvinism in other areas routinely exhibit it towards sexual

differences. We have learned to cherish different cultures as unique expressions of human inventiveness rather than as the inferior or disgusting habits of savages. We need a similarly anthropological understanding of different sexual cultures.

Empirical sex research is the one field that does incorporate a positive concept of sexual variation. Alfred Kinsey approached the study of sex with the same uninhibited curiosity he had previously applied to examining a species of wasp. His scientific detachment gave his work a refreshing neutrality that enraged moralists and caused immense controversy.⁴¹ Among Kinsey's successors, John Gagnon and William Simon have pioneered the application of sociological understandings to erotic variety.⁴² Even some of the older sexology is useful. Although his work is imbued with unappetizing eugenic beliefs, Havelock Ellis was an acute and sympathetic observer. His monumental *Studies in the Psychology of Sex* is resplendent with detail.⁴³

Much political writing on sexuality reveals complete ignorance of both classical sexology and modern sex research. Perhaps this is because so few colleges and universities bother to teach human sexuality, and because so much stigma adheres even to scholarly investigation of sex. Neither sexology nor sex research has been immune to the prevailing sexual value system. Both contain assumptions and information which should not be accepted uncritically. But sexology and sex research provide abundant detail, a welcome posture of calm, and a well developed ability to treat sexual variety as something that exists rather than as something to be exterminated. These fields can provide an empirical grounding for a radical theory of sexuality more useful than the combination of psychoanalysis and feminist first principles to which so many texts resort.

III Sexual transformation

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

Michel Foucault⁴⁴

In spite of many continuities with ancestral forms, modern sexual arrangements have a distinctive character which sets them apart from preexisting systems. In Western Europe and the United States, industrialization and urbanization reshaped the traditional rural and peasant populations into a new urban industrial and

service workforce. It generated new forms of state apparatus, reorganized family relations, altered gender roles, made possible new forms of identity, produced new varieties of social inequality, and created new formats for political and ideological conflict. It also gave rise to a new sexual system characterized by distinct types of sexual persons, populations, stratification, and political conflict.

The writings of nineteenth-century sexology suggest the appearance of a kind of erotic speciation. However outlandish their explanations, the early sexologists were witnessing the emergence of new kinds of erotic individuals and their aggregation into rudimentary communities. The modern sexual system contains sets of these sexual populations, stratified by the operation of an ideological and social hierarchy. Differences in social value create friction among these groups, who engage in political contests to alter or maintain their place in the ranking. Contemporary sexual politics should be reconceptualized in terms of the emergence and on-going development of this system, its social relations, the ideologies which interpret it, and its characteristic modes of conflict.

Homosexuality is the best example of this process of erotic speciation. Homosexual behavior is always present among humans. But in different societies and epochs it may be rewarded or punished, required or forbidden, a temporary experience or a life-long vocation. In some New Guinea societies, for example, homosexual activities are obligatory for all males. Homosexual acts are considered utterly masculine, roles are based on age, and partners are determined by kinship status.⁴⁵ Although these men engage in extensive homosexual and pedophile behavior, they are neither homosexuals nor pederasts.

Nor was the sixteenth-century sodomite a homosexual. In 1631, Mervyn Touchet, Earl of Castlehaven, was tried and executed for sodomy. It is clear from the proceedings that the earl was not understood by himself or anyone else to be a particular kind of sexual individual. "While from the twentieth-century viewpoint Lord Castlehaven obviously suffered from psychosexual problems requiring the services of an analyst, from the seventeenth century viewpoint he had deliberately broken the Law of God and the Laws of England, and required the simpler services of an executioner."⁴⁶ The earl did not slip into his tightest doublet and waltz down to the nearest gay tavern to mingle with his fellow sodomists. He stayed in his manor house and buggered his servants. Gay self-awareness, gay pubs, the sense of group commonality, and even the term homosexual were not part of the earl's universe.

The New Guinea bachelor and the sodomite nobleman are only

tangentially related to a modern gay man, who may migrate from rural Colorado to San Francisco in order to live in a gay neighborhood, work in a gay business, and participate in an elaborate experience that includes a self-conscious identity, group solidarity, a literature, a press and a high level of political activity. In modern, Western, industrial societies, homosexuality has acquired much of the institutional structure of an ethnic group.⁴⁷

The relocation of homoeroticism into these quasi-ethnic, nucleated, sexually constituted communities is to some extent a consequence of the transfers of population brought about by industrialization. As laborers migrated to work in cities, there were increased opportunities for voluntary communities to form. Homosexually inclined women and men, who would have been vulnerable and isolated in most pre-industrial villages, began to congregate in small corners of the big cities. Most large nineteenth-century cities in Western Europe and North America had areas where men could cruise for other men. Lesbian communities seem to have coalesced more slowly and on a smaller scale. Nevertheless, by the 1890s, there were several cafes in Paris near the Place Pigalle which catered to a lesbian clientele, and it is likely that there were similar places in the other major capitals of Western Europe.

Areas like these acquired bad reputations, which alerted other interested individuals of their existence and location. In the United States, lesbian and gay male territories were well established in New York, Chicago, San Francisco, and Los Angeles in the 1950s. Sexually motivated migration to places such as Greenwich Village had become a sizable sociological phenomenon. By the late 1970s, sexual migration was occurring on a scale so significant that it began to have a recognizable impact on urban politics in the United States, with San Francisco being the most notable and notorious example.⁴⁸

Prostitution has undergone a similar metamorphosis. Prostitution began to change from a temporary job to a more permanent occupation as a result of nineteenth-century agitation, legal reform, and police persecution. Prostitutes, who had been part of the general working-class population, became increasingly isolated as members of an outcast group.⁴⁹ Prostitutes and other sex workers differ from homosexuals and other sexual minorities. Sex work is an occupation, while sexual deviation is an erotic preference. Nevertheless, they share some common features of social organization. Like homosexuals, prostitutes are a criminal sexual population stigmatized on the basis of sexual activity. Prostitutes and male homosexuals are the primary prey of vice police everywhere.⁵⁰ Like gay men, prostitutes occupy

well demarcated urban territories and battle with police to defend and maintain those territories. The legal persecution of both populations is justified by an elaborate ideology which classifies them as dangerous and inferior undesirables who are not entitled to be left in peace.

Besides organizing homosexuals and prostitutes into localized populations, the "modernization of sex" has generated a system of continual sexual ethnogenesis. Other populations of erotic dissidents – commonly known as the "perversions" or the "paraphilias" – also began to coalesce. Sexualities keep marching out of the *Diagnostic and Statistical Manual* and on to the pages of social history. At present, several other groups are trying to emulate the successes of homosexuals. Bisexuals, sadomasochists, individuals who prefer cross-generational encounters, transsexuals, and transvestites are all in various states of community formation and identity acquisition. The perversions are not proliferating as much as they are attempting to acquire social space, small businesses, political resources, and a measure of relief from the penalties for sexual heresy.

IV Sexual stratification

An entire sub-race was born, different – despite certain kinship ties – from the libertines of the past. From the end of the eighteenth century to our own, they circulated through the pores of society; they were always hounded, but not always by laws; were often locked up, but not always in prisons; were sick perhaps, but scandalous, dangerous victims, prey to a strange evil that also bore the name of vice and sometimes crime. They were children wise beyond their years, precocious little girls, ambiguous schoolboys, dubious servants and educators, cruel or maniacal husbands, solitary collectors, ramblers with bizarre impulses; they haunted the houses of correction, the penal colonies, the tribunals, and the asylums; they carried their infamy to the doctors and their sickness to the judges. This was the numberless family of perverts who were on friendly terms with delinquents and akin to madmen.

Michel Foucault⁵¹

The industrial transformation of Western Europe and North America brought about new forms of social stratification. The resultant inequalities of class are well known and have been explored in detail by a century of scholarship. The construction of modern systems of racism and ethnic injustice has been well documented and critically assessed. Feminist thought has analyzed the prevailing organization of gender oppression. But although specific erotic groups, such as militant homosexuals and sex workers, have agitated against their own mistreatment, there has been no equivalent attempt to locate particular varieties of sexual persecution within a more general system of sexual

stratification. Nevertheless, such a system exists, and in its contemporary form it is a consequence of Western industrialization.

Sex law is the most adamant instrument of sexual stratification and erotic persecution. The state routinely intervenes in sexual behavior at a level that would not be tolerated in other areas of social life. Most people are unaware of the extent of sex law, the quantity and qualities of illegal sexual behavior, and the punitive character of legal sanctions. Although federal agencies may be involved in obscenity and prostitution cases, most sex laws are enacted at the state and municipal level, and enforcement is largely in the hands of local police. Thus, there is a tremendous amount of variation in the laws applicable to any given locale. Moreover, enforcement of sex laws varies dramatically with the local political climate. In spite of this legal thicket, one can make some tentative and qualified generalizations. My discussion of sex law does not apply to laws against sexual coercion, sexual assault, or rape. It does pertain to the myriad prohibitions on consensual sex and the "status" offenses such as statutory rape.

Sex law is harsh. The penalties for violating sex statutes are universally out of proportion to any social or individual harm. A single act of consensual but illicit sex, such as placing one's lips upon the genitalia of an enthusiastic partner, is punished in most states with more severity than rape, battery, or murder. Each such genital kiss, each lewd caress, is a separate crime. It is therefore painfully easy to commit multiple felonies in the course of a single evening of illegal passion. Once someone is convicted of a sex violation, a second performance of the same act is grounds for prosecution as a repeat offender, in which case penalties will be even more severe. In some states, individuals have become repeat felons for having engaged in homosexual love-making on two separate occasions. Once an erotic activity has been proscribed by sex law, the full power of the state enforces conformity to the values embodied in those laws. Sex laws are notoriously easy to pass, as legislators are loath to be soft on vice. Once on the books, they are extremely difficult to dislodge.

Sex law is not a perfect reflection of the prevailing moral evaluations of sexual conduct. Sexual variation *per se* is more specifically policed by the mental-health professions, popular ideology, and extra-legal social practice. Some of the most detested erotic behaviors, such as fetishism and sadomasochism, are not as closely or completely regulated by the criminal justice system as somewhat less stigmatized practices, such as homosexuality. Areas of sexual behavior come under the purview of

the law when they become objects of social concern and political uproar. Each sex scare or morality campaign deposits new regulations as a kind of fossil record of its passage. The legal sediment is thickest – and sex law has its greatest potency – in areas involving obscenity, money, minors, and homosexuality.

Obscenity laws enforce a powerful taboo against direct representation of erotic activities. Current emphasis on the ways in which sexuality has become a focus of social attention should not be misused to undermine a critique of this prohibition. It is one thing to create sexual discourse in the form of psychoanalysis, or in the course of a morality crusade. It is quite another to graphically depict sex acts or genitalia. The first is socially permissible in a way the second is not. Sexual speech is forced into reticence, euphemism, and indirection. Freedom of speech about sex is a glaring exception to the protections of the First Amendment, which is not even considered applicable to purely sexual statements.

The anti-obscenity laws also form part of a group of statutes that make almost all sexual commerce illegal. Sex law incorporates a very strong prohibition against mixing sex and money, except via marriage. In addition to the obscenity statutes, other laws impinging on sexual commerce include anti-prostitution laws, alcoholic beverage regulations, and ordinances governing the location and operation of "adult" businesses. The sex industry and the gay economy have both managed to circumvent some of this legislation, but that process has not been easy or simple. The underlying criminality of sex-oriented business keeps it marginal, underdeveloped, and distorted. Sex businesses can only operate in legal loopholes. This tends to keep investment down and to divert commercial activity towards the goal of staying out of jail rather than the delivery of goods and services. It also renders sex workers more vulnerable to exploitation and bad working conditions. If sex commerce were legal, sex workers would be more able to organize and agitate for higher pay, better conditions, greater control, and less stigma.

Whatever one thinks of the limitations of capitalist commerce, such an extreme exclusion from the market process would hardly be socially acceptable in other areas of activity. Imagine, for example, that the exchange of money for medical care, pharmacological advice, or psychological counseling were illegal. Medical practice would take place in a much less satisfactory fashion if doctors, nurses, druggists, and therapists could be hauled off to jail at the whim of the local "health squad." But that is essentially the situation of prostitutes, sex workers, and sex entrepreneurs.

Marx himself considered the capitalist market a revolutionary,

if limited, force. He argued that capitalism was progressive in its dissolution of pre-capitalist superstition, prejudice, and the bonds of traditional modes of life. "Hence the great civilizing influence of capital, its production of a state of society compared with which all earlier stages appear to be merely local progress and idolatry of nature."⁵² Keeping sex from realizing the positive effects of the market economy hardly makes it socialist.

The law is especially ferocious in maintaining the boundary between childhood "innocence" and "adult" sexuality. Rather than recognizing the sexuality of the young, and attempting to provide for it in a caring and responsible manner, our culture denies and punishes erotic interest and activity by anyone under the local age of consent. The amount of law devoted to protecting young people from premature exposure to sexuality is breathtaking.

The primary mechanism for insuring the separation of sexual generations is age of consent laws. These laws make no distinction between the most brutal rape and the most gentle romance. A 20-year-old convicted of sexual contact with a 17-year-old will face a severe sentence in virtually every state, regardless of the nature of the relationship.⁵³ Nor are minors permitted access to "adult" sexuality in other forms. They are forbidden to see books, movies, or television in which sexuality is "too" graphically portrayed. It is legal for young people to see hideous depictions of violence, but not to see explicit pictures of genitalia. Sexually active young people are frequently incarcerated in juvenile homes, or otherwise punished for their "precocity."

Adults who deviate too much from conventional standards of sexual conduct are often denied contact with the young, even their own. Custody laws permit the state to steal the children of anyone whose erotic activities appear questionable to a judge presiding over family court matters. Countless lesbians, gay men, prostitutes, swingers, sex workers, and "promiscuous" women have been declared unfit parents under such provisions. Members of the teaching professions are closely monitored for signs of sexual misconduct. In most states, certification laws require that teachers arrested for sex offenses lose their jobs and credentials. In some cases, a teacher may be fired merely because an unconventional lifestyle becomes known to school officials. Moral turpitude is one of the few legal grounds for revoking academic tenure.⁵⁴ The more influence one has over the next generation, the less latitude one is permitted in behavior and opinion. The coercive power of the law ensures the transmission of conservative sexual values with these kinds of controls over parenting and teaching.

The only adult sexual behavior that is legal in every state is the placement of the penis in the vagina in wedlock. Consenting adults statutes ameliorate this situation in fewer than half the states. Most states impose severe criminal penalties on consensual sodomy, homosexual contact short of sodomy, adultery, seduction, and adult incest. Sodomy laws vary a great deal. In some states, they apply equally to homosexual and heterosexual partners and regardless of marital status. Some state courts have ruled that married couples have the right to commit sodomy in private. Only homosexual sodomy is illegal in some states. Some sodomy statutes prohibit both anal sex and oral-genital contact. In other states, sodomy applies only to anal penetration, and oral sex is covered under separate statutes.⁵⁵

Laws like these criminalize sexual behavior that is freely chosen and avidly sought. The ideology embodied in them reflects the value hierarchies discussed above. That is, some sex acts are considered to be so intrinsically vile that no one should be allowed under any circumstance to perform them. The fact that individuals consent to or even prefer them is taken to be additional evidence of depravity. This system of sex law is similar to legalized racism. State prohibition of same sex contact, anal penetration, and oral sex make homosexuals a criminal group denied the privileges of full citizenship. With such laws, prosecution is persecution. Even when they are not strictly enforced, as is usually the case, the members of criminalized sexual communities remain vulnerable to the possibility of arbitrary arrest, or to periods in which they become the objects of social panic. When those occur, the laws are in place and police action is swift. Even sporadic enforcement serves to remind individuals that they are members of a subject population. The occasional arrest for sodomy, lewd behavior, solicitation, or oral sex keeps everyone else afraid, nervous, and circumspect.

The state also upholds the sexual hierarchy through bureaucratic regulation. Immigration policy still prohibits the admission of homosexuals (and other sexual "deviates") into the United States. Military regulations bar homosexuals from serving in the armed forces. The fact that gay people cannot legally marry means that they cannot enjoy the same legal rights as heterosexuals in many matters, including inheritance, taxation, protection from testimony in court, and the acquisition of citizenship for foreign partners. These are but a few of the ways that the state reflects and maintains the social relations of sexuality. The law buttresses structures of power, codes of behavior, and forms of prejudice. At their worst, sex law and sex regulation are simply sexual apartheid.

Although the legal apparatus of sex is staggering, most

everyday social control is extra-legal. Less formal, but very effective social sanctions are imposed on members of "inferior" sexual populations.

In her marvelous ethnographic study of gay life in the 1960s, Esther Newton observed that the homosexual population was divided into what she called the "overts" and the "coverts." "The overts live their *entire* working lives within the context of the [gay] community; the coverts live their entire *nonworking* lives within it."⁵⁶ At the time of Newton's study, the gay community provided far fewer jobs than it does now, and the non-gay work world was almost completely intolerant of homosexuality. There were some fortunate individuals who could be openly gay and earn decent salaries. But the vast majority of homosexuals had to choose between honest poverty and the strain of maintaining a false identity.

Though this situation has changed a great deal, discrimination against gay people is still rampant. For the bulk of the gay population, being out on the job is still impossible. Generally, the more important and higher paid the job, the less the society will tolerate overt erotic deviance. If it is difficult for gay people to find employment where they do not have to pretend, it is doubly and triply so for more exotically sexed individuals. Sodomasochists leave their fetish clothes at home, and know that they must be especially careful to conceal their real identities. An exposed pedophile would probably be stoned out of the office. Having to maintain such absolute secrecy is a considerable burden. Even those who are content to be secretive may be exposed by some accidental event. Individuals who are erotically unconventional risk being unemployable or unable to pursue their chosen careers.

Public officials and anyone who occupies a position of social consequence are especially vulnerable. A sex scandal is the surest method for hounding someone out of office or destroying a political career. The fact that important people are expected to conform to the strictest standards of erotic conduct discourages sex perverts of all kinds from seeking such positions. Instead, erotic dissidents are channeled into positions that have less impact on the mainstream of social activity and opinion.

The expansion of the gay economy in the last decade has provided some employment alternatives and some relief from job discrimination against homosexuals. But most of the jobs provided by the gay economy are low-status and low-paying. Bartenders, bathhouse attendants, and disc jockeys are not bank officers or corporate executives. Many of the sexual migrants who flock to places like San Francisco are downwardly mobile. They face intense competition for choice positions. The influx of

sexual migrants provides a pool of cheap and exploitable labor for many of the city's businesses, both gay and straight.

Families play a crucial role in enforcing sexual conformity. Much social pressure is brought to bear to deny erotic dissidents the comforts and resources that families provide. Popular ideology holds that families are not supposed to produce or harbor erotic non-conformity. Many families respond by trying to reform, punish, or exile sexually offending members. Many sexual migrants have been thrown out by their families, and many others are fleeing from the threat of institutionalization. Any random collection of homosexuals, sex workers, or miscellaneous perverts can provide heart-stopping stories of rejection and mistreatment by horrified families. Christmas is the great family holiday in the United States and consequently it is a time of considerable tension in the gay community. Half the inhabitants go off to their families of origin; many of those who remain in the gay ghettos cannot do so, and relive their anger and grief.

In addition to economic penalties and strain on family relations, the stigma of erotic dissidence creates friction at all other levels of everyday life. The general public helps to penalize erotic non-conformity when, according to the values they have been taught, landlords refuse housing, neighbors call in the police, and hoodlums commit sanctioned battery. The ideologies of erotic inferiority and sexual danger decrease the power of sex perverts and sex workers in social encounters of all kinds. They have less protection from unscrupulous or criminal behavior, less access to police protection, and less recourse to the courts. Dealings with institutions and bureaucracies - hospitals, police, coroners, banks, public officials - are more difficult.

Sex is a vector of oppression. The system of sexual oppression cuts across other modes of social inequality, sorting out individuals and groups according to its own intrinsic dynamics. It is not reducible to, or understandable in terms of, class, race, ethnicity, or gender. Wealth, white skin, male gender, and ethnic privileges can mitigate the effects of sexual stratification. A rich, white male pervert will generally be less affected than a poor, black, female pervert. But even the most privileged are not immune to sexual oppression. Some of the consequences of the system of sexual hierarchy are mere nuisances. Others are quite grave. In its most serious manifestations, the sexual system is a Kafkaesque nightmare in which unlucky victims become herds of human cattle whose identification, surveillance, apprehension, treatment, incarceration, and punishment produce jobs and self-satisfaction for thousands of vice police, prison officials, psychiatrists, and social workers.⁵⁷

V Sexual conflicts

The moral panic crystallizes widespread fears and anxieties, and often deals with them not by seeking the real causes of the problems and conditions which they demonstrate but by displacing them on to 'Folk Devils' in an identified social group (often the 'immoral' or 'degenerate'). Sexuality has had a peculiar centrality in such panics, and sexual 'deviants' have been omnipresent scapegoats.

Jeffrey Weeks⁵⁸

The sexual system is not a monolithic, omnipotent structure. There are continuous battles over the definitions, evaluations, arrangements, privileges, and costs of sexual behavior. Political struggle over sex assumes characteristic forms.

Sexual ideology plays a crucial role in sexual experience. Consequently, definitions and evaluations of sexual conduct are objects of bitter contest. The confrontations between early gay liberation and the psychiatric establishment are the best example of this kind of fight, but there are constant skirmishes. Recurrent battles take place between the primary producers of sexual ideology – the churches, the family, the shrinks, and the media – and the groups whose experience they name, distort, and endanger.

The legal regulation of sexual conduct is another battleground. Lysander Spooner dissected the system of state sanctioned moral coercion over a century ago in a text inspired primarily by the temperance campaigns. In *Vices Are Not Crimes: A Vindication of Moral Liberty*, Spooner argued that government should protect its citizens against crime, but that it is foolish, unjust, and tyrannical to legislate against vice. He discusses rationalizations still heard today in defense of legalized moralism – that "vices" (Spooner is referring to drink, but homosexuality, prostitution, or recreational drug use may be substituted) lead to crimes, and should therefore be prevented; that those who practice "vice" are *non compos mentis* and should therefore be protected from their self-destruction by state-accomplished ruin; and that children must be protected from supposedly harmful knowledge.⁵⁹ The discourse on victimless crimes has not changed much. Legal struggle over sex law will continue until basic freedoms of sexual action and expression are guaranteed. This requires the repeal of all sex laws except those few that deal with actual, not statutory, coercion; and it entails the abolition of vice squads, whose job it is to enforce legislated morality.

In addition to the definitional and legal wars, there are less obvious forms of sexual political conflict which I call the territorial and border wars. The processes by which erotic minorities form communities and the forces that seek to inhibit them lead to

struggles over the nature and boundaries of sexual zones.

Dissident sexuality is rarer and more closely monitored in small towns and rural areas. Consequently, metropolitan life continually beckons to young perverts. Sexual migration creates concentrated pools of potential partners, friends, and associates. It enables individuals to create adult, kin-like networks in which to live. But there are many barriers which sexual migrants have to overcome.

According to the mainstream media and popular prejudice, the marginal sexual worlds are bleak and dangerous. They are portrayed as impoverished, ugly, and inhabited by psychopaths and criminals. New migrants must be sufficiently motivated to resist the impact of such discouraging images. Attempts to counter negative propaganda with more realistic information generally meet with censorship, and there are continuous ideological struggles over which representations of sexual communities make it into the popular media.

Information on how to find, occupy, and live in the marginal sexual worlds is also suppressed. Navigational guides are scarce and inaccurate. In the past, fragments of rumor, distorted gossip, and bad publicity were the most available clues to the location of underground erotic communities. During the late 1960s and early 1970s, better information became available. Now groups like the Moral Majority want to rebuild the ideological walls around the sexual undergrounds and make transit in and out of them as difficult as possible.

Migration is expensive. Transportation costs, moving expenses, and the necessity of finding new jobs and housing are economic difficulties that sexual migrants must overcome. These are especially imposing barriers to the young, who are often the most desperate to move. There are, however, routes into the erotic communities which mark trails through the propaganda thicket and provide some economic shelter along the way. Higher education can be a route for young people from affluent backgrounds. In spite of serious limitations, the information on sexual behavior at most colleges and universities is better than elsewhere, and most colleges and universities shelter small erotic networks of all sorts.

For poorer kids, the military is often the easiest way to get the hell out of wherever they are. Military prohibitions against homosexuality make this a perilous route. Although young queers continually attempt to use the armed forces to get out of intolerable hometown situations and closer to functional gay communities, they face the hazards of exposure, court martial, and dishonorable discharge.

Once in the cities, erotic populations tend to nucleate and to

occupy some regular, visible territory. Churches and other anti-vice forces constantly put pressure on local authorities to contain such areas, reduce their visibility, or to drive their inhabitants out of town. There are periodic crackdowns in which local vice squads are unleashed on the populations they control. Gay men, prostitutes, and sometimes transvestites are sufficiently territorial and numerous to engage in intense battles with the cops over particular streets, parks, and alleys. Such border wars are usually inconclusive, but they result in many casualties.

For most of this century, the sexual underworlds have been marginal and impoverished, their residents subjected to stress and exploitation. The spectacular success of gay entrepreneurs in creating a variegated gay economy has altered the quality of life within the gay ghetto. The level of material comfort and social elaboration achieved by the gay community in the last fifteen years is unprecedented. But it is important to recall what happened to similar miracles. The growth of the black population in New York in the early part of the twentieth century led to the Harlem Renaissance, but that period of creativity was doused by the Depression. The relative prosperity and cultural florescence of the gay ghetto may be equally fragile. Like blacks who fled the South for the metropolitan North, homosexuals may have merely traded rural problems for urban ones.

Gay pioneers occupied neighborhoods that were centrally located but run down. Consequently, they border poor neighborhoods. Gays, especially low-income gays, end up competing with other low-income groups for the limited supply of cheap and moderate housing. In San Francisco, competition for low-cost housing has exacerbated both racism and homophobia, and is one source of the epidemic of street violence against homosexuals. Instead of being isolated and invisible in rural settings, city gays are now numerous and obvious targets for urban frustrations.

In San Francisco, unbridled construction of downtown skyscrapers and high-cost condominiums is causing affordable housing to evaporate. Megabuck construction is creating pressure on all city residents. Poor gay renters are visible in low-income neighborhoods; multimillionaire contractors are not. The specter of the "homosexual invasion" is a convenient scapegoat which deflects attention from the banks, the planning commission, the political establishment, and the big developers. In San Francisco, the well-being of the gay community has become embroiled in the high-stakes politics of urban real estate.

Downtown expansion affects all the territorial erotic underworlds. In both San Francisco and New York, high investment construction and urban renewal have intruded on the main areas

of prostitution, pornography, and leather bars. Developers are salivating over Times Square, the Tenderloin, what is left of North Beach, and South of Market. Anti-sex ideology, obscenity law, prostitution regulations, and the alcoholic beverage codes are all being used to dislodge seedy adult businesses, sex workers, and leathermen. Within ten years, most of these areas will have been bulldozed and made safe for convention centers, international hotels, corporate headquarters, and housing for the rich.

The most important and consequential kind of sex conflict is what Jeffrey Weeks has termed the "moral panic." Moral panics are the "political moment" of sex, in which diffuse attitudes are channeled into political action and from there into social change.⁶⁰ The white slavery hysteria of the 1880s, the anti-homosexual campaigns of the 1950s, and the child pornography panic of the late 1970s were typical moral panics.

Because sexuality in Western societies is so mystified, the wars over it are often fought at oblique angles, aimed at phony targets, conducted with misplaced passions, and are highly, intensely symbolic. Sexual activities often function as signifiers for personal and social apprehensions to which they have no intrinsic connection. During a moral panic, such fears attach to some unfortunate sexual activity or population. The media become ablaze with indignation, the public behaves like a rabid mob, the police are activated, and the state enacts new laws and regulations. When the furor has passed, some innocent erotic group has been decimated, and the state has extended its power into new areas of erotic behavior.

The system of sexual stratification provides easy victims who lack the power to defend themselves, and a preexisting apparatus for controlling their movements and curtailing their freedoms. The stigma against sexual dissidents renders them morally defenseless. Every moral panic has consequences on two levels. The target population suffers most, but everyone is affected by the social and legal changes.

Moral panics rarely alleviate any real problem, because they are aimed at chimeras and signifiers. They draw on the pre-existing discursive structure which invents victims in order to justify treating "vices" as crimes. The criminalization of innocuous behaviors such as homosexuality, prostitution, obscenity, or recreational drug use, is rationalized by portraying them as menaces to health and safety, women and children, national security, the family, or civilization itself. Even when activity is acknowledged to be harmless, it may be banned because it is alleged to "lead" to something ostensibly worse (another manifestation of the domino theory).⁶¹ Great and mighty edifices have been built on the basis of such phantasms. Generally, the

outbreak of a moral panic is preceded by an intensification of such scapegoating.

It is always risky to prophesy. But it does not take much prescience to detect potential moral panics in two current developments: the attacks on sadomasochists by a segment of the feminist movement, and the right's increasing use of AIDS to incite virulent homophobia.

Feminist anti-pornography ideology has always contained an implied, and sometimes overt, indictment of sadomasochism. The pictures of sucking and fucking that comprise the bulk of pornography may be unnerving to those who are not familiar with them. But it is hard to make a convincing case that such images are violent. All of the early anti-porn slide shows used a highly selective sample of S/M imagery to sell a very flimsy analysis. Taken out of context, such images are often shocking. This shock value was mercilessly exploited to scare audiences into accepting the anti-porn perspective.

A great deal of anti-porn propaganda implies that sadomasochism is the underlying and essential "truth" towards which all pornography tends. Porn is thought to lead to S/M porn which in turn is alleged to lead to rape. This is a just-so story that revitalizes the notion that sex perverts commit sex crimes, not normal people. There is no evidence that the readers of S/M erotica or practicing sadomasochists commit a disproportionate number of sex crimes. Anti-porn literature scapegoats an unpopular sexual minority and its reading material for social problems they do not create.

The use of S/M imagery in anti-porn discourse is inflammatory. It implies that the way to make the world safe for women is to get rid of sadomasochism. The use of S/M images in the movie *Not a Love Story* was on a moral par with the use of depictions of black men raping white women, or of drooling old Jews pawing young Aryan girls, to incite racist or anti-Semitic frenzy.

Feminist rhetoric has a distressing tendency to reappear in reactionary contexts. For example, in 1980 and 1981, Pope John Paul II delivered a series of pronouncements reaffirming his commitment to the most conservative and Pauline understandings of human sexuality. In condemning divorce, abortion, trial marriage, pornography, prostitution, birth control, unbridled hedonism, and lust, the pope employed a great deal of feminist rhetoric about sexual objectification. Sounding like lesbian feminist polemicist Julia Penelope, His Holiness explained that "considering anyone in a lustful way makes that person a sexual object rather than a human being worthy of dignity."⁶²

The right wing opposes pornography and has already adopted elements of feminist anti-porn rhetoric. The anti-S/M discourse

developed in the women's movement could easily become a vehicle for a moral witch hunt. It provides a ready-made defenseless target population. It provides a rationale for the recriminalization of sexual materials which have escaped the reach of current obscenity laws. It would be especially easy to pass laws against S/M erotica resembling the child pornography laws. The ostensible purpose of such laws would be to reduce violence by banning so-called violent porn. A focused campaign against the leather menace might also result in the passage of laws to criminalize S/M behavior that is not currently illegal. The ultimate result of such a moral panic would be the legalized violation of a community of harmless perverts. It is dubious that such a sexual witch-hunt would make any appreciable contribution towards reducing violence against women.

An AIDS panic is even more probable. When fears of incurable disease mingle with sexual terror, the resulting brew is extremely volatile. A century ago, attempts to control syphilis led to the passage of the Contagious Diseases Acts in England. The Acts were based on erroneous medical theories and did nothing to halt the spread of the disease. But they did make life miserable for the hundreds of women who were incarcerated, subjected to forcible vaginal examination, and stigmatized for life as prostitutes.⁶³

Whatever happens, AIDS will have far-reaching consequences on sex in general, and on homosexuality in particular. The disease will have a significant impact on the choices gay people make. Fewer will migrate to the gay meccas out of fear of the disease. Those who already reside in the ghettos will avoid situations they fear will expose them. The gay economy, and the political apparatus it supports, may prove to be evanescent. Fear of AIDS has already affected sexual ideology. Just when homosexuals have had some success in throwing off the taint of mental disease, gay people find themselves metaphorically welded to an image of lethal physical deterioration. The syndrome, its peculiar qualities, and its transmissibility are being used to reinforce old fears that sexual activity, homosexuality, and promiscuity led to disease and death.

AIDS is both a personal tragedy for those who contract the syndrome and a calamity for the gay community. Homophobes have gleefully hastened to turn this tragedy against its victims. One columnist has suggested that AIDS has always existed, that the Biblical prohibitions on sodomy were designed to protect people from AIDS, and that AIDS is therefore an appropriate punishment for violating the Levitical codes. Using fear of infection as a rationale, local right-wingers attempted to ban the gay rodeo from Reno, Nevada. A recent issue of the *Moral*

Majority Report featured a picture of a "typical" white family of four wearing surgical masks. The headline read: "AIDS: HOMOSEXUAL DISEASES THREATEN AMERICAN FAMILIES."⁶⁴ Phyllis Schlafly has recently issued a pamphlet arguing that passage of the Equal Rights Amendment would make it impossible to "legally protect ourselves against AIDS and other diseases carried by homosexuals."⁶⁵ Current right-wing literature calls for shutting down the gay baths, for a legal ban on homosexual employment in food-handling occupations, and for state-mandated prohibitions on blood donations by gay people. Such policies would require the government to identify all homosexuals and impose easily recognizable legal and social markers on them.

It is bad enough that the gay community must deal with the medical misfortune of having been the population in which a deadly disease first became widespread and visible. It is worse to have to deal with the social consequences as well. Even before the AIDS scare, Greece passed a law that enabled police to arrest suspected homosexuals and force them to submit to an examination for venereal disease. It is likely that until AIDS and its methods of transmission are understood, there will be all sorts of proposals to control it by punishing the gay community and by attacking its institutions. When the cause of Legionnaires' Disease was unknown, there were no calls to quarantine members of the American Legion or to shut down their meeting halls. The Contagious Diseases Acts in England did little to control syphilis, but they caused a great deal of suffering for the women who came under their purview. The history of panic that has accompanied new epidemics, and of the casualties incurred by their scapegoats, should make everyone pause and consider with extreme scepticism any attempts to justify anti-gay policy initiatives on the basis of AIDS.

VI The limits of feminism

We know that in an overwhelmingly large number of cases, sex crime is associated with pornography. We know that sex criminals read it, are clearly influenced by it. I believe that, if we can eliminate the distribution of such items among impressionable children, we shall greatly reduce our frightening sex-crime rate.

J. Edgar Hoover⁶⁶

In the absence of a more articulated radical theory of sex, most progressives have turned to feminism for guidance. But the relationship between feminism and sex is complex. Because sexuality is a nexus of the relationships between genders, much of the oppression of women is borne by, mediated through, and

constituted within, sexuality. Feminism has always been vitally interested in sex. But there have been two strains of feminist thought on the subject. One tendency has criticized the restrictions on women's sexual behavior and denounced the high costs imposed on women for being sexually active. This tradition of feminist sexual thought has called for a sexual liberation that would work for women as well as for men. The second tendency has considered sexual liberalization to be inherently a mere extension of male privilege. This tradition resonates with conservative, anti-sexual discourse. With the advent of the anti-pornography movement, it achieved temporary hegemony over feminist analysis.

The anti-pornography movement and its texts have been the most extensive expression of this discourse.⁶⁷ In addition, proponents of this viewpoint have condemned virtually every variant of sexual expression as anti-feminist. Within this framework, monogamous lesbianism that occurs within long-term, intimate relationships and which does not involve playing with polarized roles, has replaced married, procreative heterosexuality at the top of the value hierarchy. Heterosexuality has been demoted to somewhere in the middle. Apart from this change, everything else looks more or less familiar. The lower depths are occupied by the usual groups and behaviors: prostitution, transsexuality, sadomasochism, and cross-generational activities.⁶⁸ Most gay male conduct, all casual sex, promiscuity, and lesbian behavior that does involve roles or kink or non-monogamy are also censured.⁶⁹ Even sexual fantasy during masturbation is denounced as a phallogocentric holdover.⁷⁰

This discourse on sexuality is less a sexology than a demonology. It presents most sexual behavior in the worst possible light. Its descriptions of erotic conduct always use the worst available example as if it were representative. It presents the most disgusting pornography, the most exploited forms of prostitution, and the least palatable or most shocking manifestations of sexual variation. This rhetorical tactic consistently misrepresents human sexuality in all its forms. The picture of human sexuality that emerges from this literature is unremittingly ugly.

In addition, this anti-porn rhetoric is a massive exercise in scapegoating. It criticizes non-routine acts of love rather than routine acts of oppression, exploitation, or violence. This demon sexology directs legitimate anger at women's lack of personal safety against innocent individuals, practices, and communities. Anti-porn propaganda often implies that sexism originates within the commercial sex industry and subsequently infects the rest of society. This is sociologically nonsensical. The sex industry is

hardly a feminist utopia. It reflects the sexism that exists in the society as a whole. We need to analyze and oppose the manifestations of gender inequality specific to the sex industry. But this is not the same as attempting to wipe out commercial sex.

Similarly, erotic minorities such as sadomasochists and transsexuals are as likely to exhibit sexist attitudes or behavior as any other politically random social grouping. But to claim that they are inherently anti-feminist is sheer fantasy. A good deal of current feminist literature attributes the oppression of women to graphic representations of sex, prostitution, sex education, sadomasochism, male homosexuality, and transsexualism. Whatever happened to the family, religion, education, child-rearing practices, the media, the state, psychiatry, job discrimination, and unequal pay?

Finally, this so-called feminist discourse recreates a very conservative sexual morality. For over a century, battles have been waged over just how much shame, distress, and punishment should be incurred by sexual activity. The conservative tradition has promoted opposition to pornography, prostitution, homosexuality, all erotic variation, sex education, sex research, abortion, and contraception. The opposing, pro-sex tradition has included individuals like Havelock Ellis, Magnus Hirschfeld, Alfred Kinsey, and Victoria Woodhull, as well as the sex education movement, organizations of militant prostitutes and homosexuals, the reproductive rights movement, and organizations such as the Sexual Reform League of the 1960s. This motley collection of sex reformers, sex educators, and sexual militants has mixed records on both sexual and feminist issues. But surely they are closer to the spirit of modern feminism than are moral crusaders, the social purity movement, and anti-vice organizations. Nevertheless, the current feminist sexual demonology generally elevates the anti-vice crusaders to positions of ancestral honor, while condemning the more liberatory tradition as anti-feminist. In an essay that exemplifies some of these trends, Sheila Jeffreys blames Havelock Ellis, Edward Carpenter, Alexandra Kollantai, "believers in the joy of sex of every possible political persuasion," and the 1929 congress of the World League for Sex Reform for making "a great contribution to the defeat of militant feminism."⁷¹

The anti-pornography movement and its avatars have claimed to speak for all feminism. Fortunately, they do not. Sexual liberation has been and continues to be a feminist goal. The women's movement may have produced some of the most retrogressive sexual thinking this side of the Vatican. But it has also produced an exciting, innovative, and articulate defense of sexual pleasure and erotic justice. This "pro-sex" feminism has

been spearheaded by lesbians whose sexuality does not conform to movement standards of purity (primarily lesbian sadomasochists and butch/femme dykes), by unapologetic heterosexuals, and by women who adhere to classic radical feminism rather than to the revisionist celebrations of femininity which have become so common.⁷² Although the anti-porn forces have attempted to weed anyone who disagrees with them out of the movement, the fact remains that feminist thought about sex is profoundly polarized.⁷³

Whenever there is polarization, there is an unhappy tendency to think the truth lies somewhere in between. Ellen Willis has commented sarcastically that "the feminist bias is that women are equal to men and the male chauvinist bias is that women are inferior. The unbiased view is that the truth lies somewhere in between."⁷⁴ The most recent development in the feminist sex wars is the emergence of a "middle" that seeks to evade the dangers of anti-porn fascism, on the one hand, and a supposed "anything goes" libertarianism, on the other.⁷⁵ Although it is hard to criticize a position that is not yet fully formed, I want to draw attention to some incipient problems.

The emergent middle is based on a false characterization of the poles of the debate, construing both sides as equally extremist. According to B. Ruby Rich, "the desire for a language of sexuality has led feminists into locations (pornography, sadomasochism) too narrow or overdetermined for a fruitful discussion. Debate has collapsed into a rumble."⁷⁶ True, the fights between Women Against Pornography (WAP) and lesbian sadomasochists have resembled gang warfare. But the responsibility for this lies primarily with the anti-porn movement, and its refusal to engage in principled discussion. S/M lesbians have been forced into a struggle to maintain their membership in the movement, and to defend themselves against slander. No major spokeswoman for lesbian S/M has argued for any kind of S/M supremacy, or advocated that everyone should be a sadomasochist. In addition to self-defense, S/M lesbians have called for appreciation for erotic diversity and more open discussion of sexuality.⁷⁷ Trying to find a middle course between WAP and Samois is a bit like saying that the truth about homosexuality lies somewhere between the positions of the Moral Majority and those of the gay movement.

In political life, it is all too easy to marginalize radicals, and to attempt to buy acceptance for a moderate position by portraying others as extremists. Liberals have done this for years to communists. Sexual radicals have opened up the sex debates. It is shameful to deny their contribution, misrepresent their positions, and further their stigmatization.

In contrast to cultural feminists, who simply want to purge sexual dissidents, the sexual moderates are willing to defend the rights of erotic non-conformists to political participation. Yet this defense of political rights is linked to an implicit system of ideological condescension. The argument has two major parts. The first is an accusation that sexual dissidents have not paid close enough attention to the meaning, sources, or historical construction of their sexuality. This emphasis on meaning appears to function in much the same way that the question of etiology has functioned in discussions of homosexuality. That is, homosexuality, sadomasochism, prostitution, or boy-love are taken to be mysterious and problematic in some way that more respectable sexualities are not. The search for a cause is a search for something that could change so that these "problematic" eroticisms would simply not occur. Sexual militants have replied to such exercises that although the question of etiology or cause is of intellectual interest, it is not high on the political agenda and that, moreover, the privileging of such questions is itself a regressive political choice.

The second part of the "moderate" position focuses on questions of consent. Sexual radicals of all varieties have demanded the legal and social legitimation of consenting sexual behavior. Feminists have criticized them for ostensibly finessing questions about "the limits of consent" and "structural constraints" on consent.⁷⁸ Although there are deep problems with the political discourse of consent, and although there are certainly structural constraints on sexual choice, this criticism has been consistently misapplied in the sex debates. It does not take into account the very specific semantic content that consent has in sex law and sex practice.

As I mentioned earlier, a great deal of sex law does not distinguish between consensual and coercive behavior. Only rape law contains such a distinction. Rape law is based on the assumption, correct in my view, that heterosexual activity may be freely chosen or forcibly coerced. One has the legal right to engage in heterosexual behavior as long as it does not fall under the purview of other statutes and as long as it is agreeable to both parties.

This is not the case for most other sexual acts. Sodomy laws, as I mentioned above, are based on the assumption that the forbidden acts are an "abominable and detestable crime against nature." Criminality is intrinsic to the acts themselves, no matter what the desires of the participants. "Unlike rape, sodomy or an unnatural or perverted sexual act may be committed between two persons both of whom consent, and, regardless of which is the aggressor, both may be prosecuted."⁷⁹ Before the consenting

adults statute was passed in California in 1976, lesbian lovers could have been prosecuted for committing oral copulation. If both participants were capable of consent, both were equally guilty.⁸⁰

Adult incest statutes operate in a similar fashion. Contrary to popular mythology, the incest statutes have little to do with protecting children from rape by close relatives. The incest statutes themselves prohibit marriage or sexual intercourse between adults who are closely related. Prosecutions are rare, but two were reported recently. In 1979, a 19-year-old Marine met his 42-year-old mother, from whom he had been separated at birth. The two fell in love and got married. They were charged and found guilty of incest, which under Virginia law carries a maximum ten-year sentence. During their trial, the Marine testified, "I love her very much. I feel that two people who love each other should be able to live together."⁸¹ In another case, a brother and sister who had been raised separately met and decided to get married. They were arrested and pleaded guilty to felony incest in return for probation. A condition of probation was that they not live together as husband and wife. Had they not accepted, they would have faced twenty years in prison.⁸²

In a famous S/M case, a man was convicted of aggravated assault for a whipping administered in an S/M scene. There was no complaining victim. The session had been filmed and he was prosecuted on the basis of the film. The man appealed his conviction by arguing that he had been involved in a consensual sexual encounter and had assaulted no one. In rejecting his appeal, the court ruled that one may not consent to an assault or battery "except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling."⁸³ The court went on to note that the "consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective," and that "It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."⁸⁴ Therefore, anyone who would consent to a whipping would be presumed *non compos mentis* and legally incapable of consenting. S/M sex generally involves a much lower level of force than the average football game, and results in far fewer injuries than most sports. But the court ruled that football players are sane, whereas masochists are not.

Sodomy laws, adult incest laws, and legal interpretations such as the one above clearly interfere with consensual behavior and impose criminal penalties on it. Within the law, consent is a privilege enjoyed only by those who engage in the highest-status

sexual behavior. Those who enjoy low-status sexual behavior do not have the legal right to engage in it. In addition, economic sanctions, family pressures, erotic stigma, social discrimination, negative ideology, and the paucity of information about erotic behavior, all serve to make it difficult for people to make unconventional sexual choices. There certainly are structural constraints that impede free sexual choice, but they hardly operate to coerce anyone into being a pervert. On the contrary, they operate to coerce everyone toward normality.

The "brainwash theory" explains erotic diversity by assuming that some sexual acts are so disgusting that no one would willingly perform them. Therefore, the reasoning goes, anyone who does so must have been forced or fooled. Even constructivist sexual theory has been pressed into the service of explaining away why otherwise rational individuals might engage in variant sexual behavior. Another position that is not yet fully formed uses the ideas of Foucault and Weeks to imply that the "perversions" are an especially unsavory or problematic aspect of the construction of modern sexuality.⁸⁵ This is yet another version of the notion that sexual dissidents are victims of the subtle machinations of the social system. Weeks and Foucault would not accept such an interpretation, since they consider all sexuality to be constructed, the conventional no less than the deviant.

Psychology is the last resort of those who refuse to acknowledge that sexual dissidents are as conscious and free as any other group of sexual actors. If deviants are not responding to the manipulations of the social system, then perhaps the source of their incomprehensible choices can be found in a bad childhood, unsuccessful socialization, or inadequate identity formation. In her essay on erotic domination, Jessica Benjamin draws upon psychoanalysis and philosophy to explain why what she calls "sodomasochism" is alienated, distorted, unsatisfactory, numb, purposeless, and an attempt to "relieve an original effort at differentiation that failed."⁸⁶ This essay substitutes a psycho-philosophical inferiority for the more usual means of devaluing dissident eroticism. One reviewer has already construed Benjamin's argument as showing that sodomasochism is merely an "obsessive replay of the infant power struggle."⁸⁷

The position which defends the political rights of perverts but which seeks to understand their "alienated" sexuality is certainly preferable to the WAP-style bloodbaths. But for the most part, the sexual moderates have not confronted their discomfort with erotic choices that differ from their own. Erotic chauvinism cannot be redeemed by tarring it up in Marxist drag, sophisticated constructivist theory, or retro-psychobabble.

Whichever feminist position on sexuality – right, left, or center

– eventually attains dominance, the existence of such a rich discussion is evidence that the feminist movement will always be a source of interesting thought about sex. Nevertheless, I want to challenge the assumption that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other.

In the English language, the word "sex" has two very different meanings. It means gender and gender identity, as in "the female sex" or "the male sex." But sex also refers to sexual activity, lust, intercourse, and arousal, as in "to have sex." This semantic merging reflects a cultural assumption that sexuality is reducible to sexual intercourse and that it is a function of the relations between women and men. The cultural fusion of gender with sexuality has given rise to the idea that a theory of sexuality may be derived directly out of a theory of gender.

In an earlier essay, "The Traffic in Women," I used the concept of a sex/gender system, defined as a "set of arrangements by which a society transforms biological sexuality into products of human activity."⁸⁸ I went on to argue that "Sex as we know it – gender identity, sexual desire and fantasy, concepts of childhood – is itself a social product."⁸⁹ In that essay, I did not distinguish between lust and gender, treating both as modalities of the same underlying social process.

"The Traffic in Women" was inspired by the literature on kin-based systems of social organization. It appeared to me at the time that gender and desire were systemically intertwined in such social formations. This may or may not be an accurate assessment of the relationship between sex and gender in tribal organizations. But it is surely not an adequate formulation for sexuality in Western industrial societies. As Foucault has pointed out, a system of sexuality has emerged out of earlier kinship forms and has acquired significant autonomy.

Particularly from the eighteenth century onward, Western societies created and deployed a new apparatus which was superimposed on the previous one, and which, without completely supplanting the latter, helped to reduce its importance. I am speaking of the deployment of *sexuality* . . . For the first [kinship], what is pertinent is the link between partners and definite statutes; the second [sexuality] is concerned with the sensations of the body, the quality of pleasures, and the nature of impressions.⁹⁰

The development of this sexual system has taken place in the context of gender relations. Part of the modern ideology of sex is that lust is the province of men, purity that of women. Women have been to some extent excluded from the modern sexual

system. It is no accident that pornography and the perversions have been considered part of the male domain. In the sex industry, women have been excluded from most production and consumption, and allowed to participate primarily as workers. In order to participate in the "perversions," women have had to overcome serious limitations on their social mobility, their economic resources, and their sexual freedoms. Gender affects the operation of the sexual system, and the sexual system has had gender-specific manifestations. But although sex and gender are related, they are not the same thing, and they form the basis of two distinct arenas of social practice.

In contrast to my perspective in "The Traffic in Women," I am now arguing that it is essential to separate gender and sexuality analytically to more accurately reflect their separate social existence. This goes against the grain of much contemporary feminist thought, which treats sexuality as a derivation of gender. For instance, lesbian feminist ideology has mostly analyzed the oppression of lesbians in terms of the oppression of women. However, lesbians are also oppressed as queers and perverts, by the operation of sexual, not gender, stratification. Although it pains many lesbians to think about it, the fact is that lesbians have shared many of the sociological features and suffered from many of the same social penalties as have gay men, sadomasochists, transvestites, and prostitutes.

Catherine MacKinnon has made the most explicit theoretical attempt to subsume sexuality under feminist thought. According to MacKinnon, "Sexuality is to feminism what work is to marxism . . . the molding, direction, and expression of sexuality organizes society into two sexes, women and men."⁹¹ This analytic strategy in turn rests on a decision to "use sex and gender relatively interchangeably."⁹² It is this definitional fusion that I want to challenge.

There is an instructive analogy in the history of the differentiation of contemporary feminist thought from Marxism. Marxism is probably the most supple and powerful conceptual system extant for analyzing social inequality. But attempts to make Marxism the sole explanatory system for all social inequalities have been dismal exercises. Marxism is most successful in the areas of social life for which it was originally developed – class relations under capitalism.

In the early days of the contemporary women's movement, a theoretical conflict took place over the applicability of Marxism to gender stratification. Since Marxist theory is relatively powerful, it does in fact detect important and interesting aspects of gender oppression. It works best for those issues of gender most closely related to issues of class and the organization of labor. The issues

more specific to the social structure of gender were not amenable to Marxist analysis.

The relationship between feminism and a radical theory of sexual oppression is similar. Feminist conceptual tools were developed to detect and analyze gender-based hierarchies. To the extent that these overlap with erotic stratifications, feminist theory has some explanatory power. But as issues become less those of gender and more those of sexuality, feminist analysis becomes irrelevant and often misleading. Feminist thought simply lacks angles of vision which can encompass the social organization of sexuality. The criteria of relevance in feminist thought do not allow it to see or assess critical power relations in the area of sexuality.

In the long run, feminism's critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism. But an autonomous theory and politics specific to sexuality must be developed.

It is a mistake to substitute feminism for Marxism as the last word in social theory. Feminism is no more capable than Marxism of being the ultimate and complete account of all social inequality. Nor is feminism the residual theory which can take care of everything to which Marx did not attend. These critical tools were fashioned to handle very specific areas of social activity. Other areas of social life, their forms of power, and their characteristic modes of oppression, need their own conceptual implements. In this essay, I have argued for theoretical as well as sexual pluralism.

VII Conclusion

... these pleasures which we lightly call physical. . .

Colette⁹³

Like gender, sexuality is political. It is organized into systems of power, which reward and encourage some individuals and activities, while punishing and suppressing others. Like the capitalist organization of labor and its distribution of rewards and powers, the modern sexual system has been the object of political struggle since it emerged and as it has evolved. But if the disputes between labor and capital are mystified, sexual conflicts are completely camouflaged.

The legislative restructuring that took place at the end of the nineteenth century and in the early decades of the twentieth was a refracted response to the emergence of the modern erotic system. During that period, new erotic communities formed. It became possible to be a male homosexual or a lesbian in a way it

had not been previously. Mass-produced erotica became available, and the possibilities for sexual commerce expanded. The first homosexual rights organizations were formed, and the first analyses of sexual oppression were articulated.⁹⁴

The repression of the 1950s was in part a backlash to the expansion of sexual communities and possibilities which took place during World War II.⁹⁵ During the 1950s, gay rights organizations were established, the Kinsey reports were published, and lesbian literature flourished. The 1950s were a formative as well as a repressive era.

The current right-wing sexual counter-offensive is in part a reaction to the sexual liberalization of the 1960s and early 1970s. Moreover, it has brought about a unified and self-conscious coalition of sexual radicals. In one sense, what is now occurring is the emergence of a new sexual movement, aware of new issues and seeking a new theoretical basis. The sex wars out on the streets have been partly responsible for provoking a new intellectual focus on sexuality. The sexual system is shifting once again, and we are seeing many symptoms of its change.

In Western culture, sex is taken all too seriously. A person is not considered immoral, is not sent to prison, and is not expelled from her or his family, for enjoying spicy cuisine. But an individual may go through all this and more for enjoying shoe leather. Ultimately, of what possible social significance is it if a person likes to masturbate over a shoe? It may even be non-consensual, but since we do not ask permission of our shoes to wear them, it hardly seems necessary to obtain dispensation to come on them.

If sex is taken too seriously, sexual persecution is not taken seriously enough. There is systematic mistreatment of individuals and communities on the basis of erotic taste or behavior. There are serious penalties for belonging to the various sexual occupational castes. The sexuality of the young is denied, adult sexuality is often treated like a variety of nuclear waste, and the graphic representation of sex takes place in a mire of legal and social circumlocution. Specific populations bear the brunt of the current system of erotic power, but their persecution upholds a system that affects everyone.

The 1980s have already been a time of great sexual suffering. They have also been a time of ferment and new possibility. It is up to all of us to try to prevent more barbarism and to encourage erotic creativity. Those who consider themselves progressive need to examine their preconceptions, update their sexual educations, and acquaint themselves with the existence and operation of sexual hierarchy. It is time to recognize the political dimensions of erotic life.

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A note on definitions

Throughout this essay, I use terms such as homosexual, sex worker, and pervert. I use "homosexual" to refer to both women and men. If I want to be more specific, I use terms such as

"lesbian" or "gay male." "Sex worker" is intended to be more inclusive than "prostitute," in order to encompass the many jobs of the sex industry. Sex worker includes erotic dancers, strippers, porn models, nude women who will talk to a customer via telephone hook-up and can be seen but not touched, phone partners, and the various other employees of sex businesses such as receptionists, janitors, and barkers. Obviously, it also includes prostitutes, hustlers, and "male models." I use the term "pervert" as a shorthand for all the stigmatized sexual orientations. It used to cover male and female homosexuality as well but as these become less disreputable, the term has increasingly referred to the other "deviations." Terms such as "pervert" and "deviant" have, in general use, a connotation of disapproval, disgust, and dislike. I am using these terms in a denotative fashion, and do not intend them to convey any disapproval on my part.

Notes

- 1 Demetrius Zambaco, "Onanism and Nervous Disorders in Two Little Girls", in François Peraldi (ed.), *Polysexuality, Semiotext(e)*, vol. IV, no. 1, 1981, pp. 31, 36.
- 2 Linda Gordon and Ellen Dubois, "Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth Century Feminist Sexual Thought", *Feminist Studies*, vol. 9, no. 1, Spring 1983; Steven Marcus, *The Other Victorians*, New York, New American Library, 1974; Mary Ryan, "The Power of Women's Networks: A Case Study of Female Moral Reform in America", *Feminist Studies*, vol. 5, no. 1, 1979; Judith R. Walkowitz, *Prostitution and Victorian Society*, Cambridge, Cambridge University Press, 1980; Judith R. Walkowitz, "Male Vice and Feminist Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain", *History Workshop Journal*, no. 13, Spring 1982; Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800*, New York, Longman, 1981.
- 3 G.J. Barker-Benfield, *The Horrors of the Half-Known Life*, New York, Harper Colophon, 1976; Marcus, op. cit.; Weeks, op. cit., especially pages 48-52; Zambaco, op. cit.
- 4 Sarah Senefield Beserra, Sterling G. Franklin, and Norma Clevenger (eds), *Sex Code of California*, Sacramento, Planned Parenthood Affiliates of California, 1977, p. 113.
- 5 *Ibid.*, pp. 113-17.
- 6 Walkowitz, "Male Vice and Feminist Virtue", op. cit., p. 83. Walkowitz's entire discussion of the *Maiden Tribute of Modern Babylon* and its aftermath (pp. 83-5) is illuminating.
- 7 Walkowitz, "Male Vice and Feminist Virtue", op. cit., p. 85.
- 8 Beserra et al, op. cit., pp. 106-7.
- 9 Commonwealth of Massachusetts, *Preliminary Report of the Special Commission Investigating the Prevalence of Sex Crimes*, 1947; State of New Hampshire. *Report of the Interim Commission of the State of New Hampshire to Study the Cause and Prevention of Serious Sex Crimes*, 1949; City of New York, *Report of the Mayor's Committee for the Study of Sex Offences*, 1939; State of New York, *Report to the Governor on a Study of 102 Sex Offenders at Sing Sing Prison*, 1950; Samuel Hartwell, *A Citizen's Handbook of Sexual Abnormalities and the Mental Hygiene Approach to Their Prevention*, State of Michigan, 1950; State of Michigan, *Report of the Governor's Study Commission on the Deviated Criminal Sex Offender*, 1951. This is merely a sampler.
- 10 Estelle B. Freedman, "'Uncontrolled Desire': The Threat of the Sexual Psychopath in America, 1935-1960", paper presented at the Annual Meeting of the American Historical Association, San Francisco, December 1983.
- 11 Allan Bérubé, "Behind the Spectre of San Francisco", *Body Politic*, April 1981; Allan Bérubé, "Marching to a Different Drummer", *Advocate*, October 15, 1981; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of the Homosexual Minority in the United States, 1940-1970*, Chicago, University of Chicago Press, 1983; Jonathan Katz, *Gay American History*, New York, Thomas Y. Crowell, 1976.
- 12 D'Emilio, op. cit., pp. 46-7; Allan Bérubé, personal communication.
- 13 John Gerassi, *The Boys of Boise*, New York, Collier, 1968, p. 14. I am indebted to Allan Bérubé for calling my attention to this incident.
- 14 Allan Bérubé, personal communication; D'Emilio, op. cit.; John D'Emilio, "Gay Politics, Gay Community: San Francisco's Experience", *Socialist Review*, no. 55, January-February 1981.
- 15 The following examples suggest avenues for additional research. A local crackdown at the University of Michigan is documented in Daniel Tsang, "Gay Ann Arbor Purges", *Midwest Gay Academic Journal*, vol. 1, no. 1, 1977; and Daniel Tsang, "Ann Arbor Gay Purges", part 2, *Midwest Gay Academic Journal*, vol. 1, no. 2, 1977. At the University of Michigan, the number of faculty dismissed for alleged homosexuality appears to rival the number fired for alleged communist tendencies. It would be interesting to have figures comparing the number of professors who lost their positions during this period due to sexual and political offenses. On regulatory reform, many states passed laws during this period prohibiting the sale of alcoholic beverages to "known sex perverts" or providing that bars which catered to "sex perverts" be closed. Such a law was passed in California in 1955, and declared unconstitutional by the state Supreme Court in 1959 (Allan Bérubé, personal communication). It would be of great interest to know exactly which states passed such statutes, the dates of their enactment, the discussion that preceded them, and how many are still on the books. On the persecution of other erotic populations, evidence indicates that John Willie and Irving Klaw, the two premier producers and distributors of bondage erotica in the United States from the late 1940s through the early 1960s, encountered frequent police harassment and that Klaw, at least, was affected by a congressional investigation conducted by the Kefauver Committee. I am indebted to personal communication from J.B. Rund for

- information on the careers of Willie and Klaw. Published sources are scarce, but see John Willie, *The Adventures of Sweet Gwendoline*, New York, Belier Press, 1974; J.B. Rund, "Preface", *Bizarre Comix*, vol. 8, New York, Belier Press, 1977; J.B. Rund, "Preface", *Bizarre Fotos*, vol. 1, New York, Belier Press, 1978; and J.B. Rund, "Preface", *Bizarre Katalogs*, vol. 1, New York, Belier Press, 1979. It would be useful to have more systematic information on legal shifts and police activity affecting non-gay erotic dissidence.
- 16 "Chicago is Center of National Child Porno Ring: The Child Predators", "Child Sex: Square in New Town Tells it All", "U.S. Orders Hearings On Child Pornography: Rodino Calls Sex Racket an 'Outrage'", "Hunt Six Men, Twenty Boys in Crackdown", *Chicago Tribune*, May 16, 1977; "Dentist Seized in Child Sex Raid: Carey to Open Probe", "How Ruses Lure Victims to Child Pornographers", *Chicago Tribune*, May 17, 1977; "Child Pornographers Thrive on Legal Confusion", "U.S. Raids Hit Porn Sellers", *Chicago Tribune*, May 18, 1977.
 - 17 For more information on the "kiddie porn panic" see Pat Califia, "The Great Kiddy Porn Scare of '77 and Its Aftermath", *Advocate*, October 16, 1980; Pat Califia, "A Thorny Issue Splits a Movement", *Advocate*, October 30, 1980; Mitzel, *The Boston Sex Scandal*, Boston, Glad Day Books, 1980; Gayle Rubin, "Sexual Politics, the New Right, and the Sexual Fringe", in Daniel Tsang (ed.), *The Age Taboo*, Boston, Alyson Publications, 1981; on the issue of cross-generational relationships, see also Roger Moody, *Indecent Assault*, London, Word Is Out Press, 1980; Tom O'Carroll, *Paedophilia: The Radical Case*, London, Peter Owen, 1980; Tsang, *The Age Taboo*, op. cit., and Paul Wilson, *The Man They Called A Monster*, New South Wales, Cassell Australia, 1981.
 - 18 "House Passes Tough Bill on Child Porn", *San Francisco Chronicle*, November 15, 1983, p. 14.
 - 19 George Stambolian, "Creating the New Man: A Conversation with Jacqueline Livingston", *Christopher Street*, May 1980; "Jacqueline Livingston", *Clothed With the Sun*, vol. 3, no. 1, May 1983.
 - 20 Paul H. Gebhard, "The Institute", in Martin S. Weinberg (ed.), *Sex Research: Studies from the Kinsey Institute*, New York, Oxford University Press, 1976.
 - 21 Phoebe Courtney, *The Sex Education Racket: Pornography in the Schools (An Exposé)*, New Orleans, Free Men Speak, 1969; Dr Gordon V. Drake, *SIECUS: Corrupter of Youth*, Tulsa, Oklahoma, Christian Crusade Publications, 1969.
 - 22 *Pavlov's Children (They May Be Yours)*, Impact Publishers, Los Angeles, California, 1969.
 - 23 Norman Podhoretz, "The Culture of Appeasement", *Harper's*, October 1977.
 - 24 Alan Wolfe and Jerry Sanders, "Resurgent Cold War Ideology: The Case of the Committee on the Present Danger", in Richard Fagen (ed.), *Capitalism and the State in U.S.-Latin American Relations*, Stanford, Stanford University Press, 1979.
 - 25 Jimmy Breslin, "The Moral Majority in Your Motel Room", *San*

- San Francisco Chronicle*, January 22, 1981, p. 41; Linda Gordon and Allen Hunter, "Sex, Family, and the New Right", *Radical America*, winter 1977-8; Sasha Gregory-Lewis, "The Neo-Right Political Apparatus", *Advocate*, February 8, 1977; Sasha Gregory-Lewis, "Right Wing Finds New Organizing Tactic", *Advocate*, June 23, 1977; Sasha Gregory-Lewis, "Unravelling the Anti-Gay Network", *Advocate*, September 7, 1977; Andrew Kopkind, "America's New Right", *New Times*, September 30, 1977; Rosalind Pollack Petchesky, "Anti-abortion, Anti-feminism, and the Rise of the New Right", *Feminist Studies*, vol. 7, no. 2, summer 1981.
- 26 Rhonda Brown, "Blueprint for a Moral America", *Nation*, May 23, 1981.
 - 27 James Barr, *Quatrefoil*, New York, Greenberg, 1950, p. 310.
 - 28 This insight was first articulated by Mary McIntosh, "The Homosexual Role", *Social Problems*, vol. 16, no. 2, fall 1968; the idea has been developed in Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, New York, Quartet, 1977, and in Weeks, *Sex, Politics and Society*, op. cit.; see also D'Emilio, *Sexual Politics, Sexual Communities*, op. cit.; and Gayle Rubin, "Introduction" to Renée Vivien, *A Woman Appeared to Me*, Weatherby Lake, Mo., Naiad Press, 1979.
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 - 30 Walkowitz, *Prostitution and Victorian Society*, op. cit.; and Walkowitz, "Male Vice and Female Virtue", op. cit.
 - 31 Michel Foucault, *The History of Sexuality*, New York, Pantheon, 1978.
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 - 33 Claude Lévi-Strauss, "A Confrontation", *New Left Review*, no. 62, July-August 1970. In this conversation, Lévi-Strauss calls his position "a Kantianism without a transcendental subject."
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- 48 For further elaboration of these processes, see: Bérubé, "Behind the Spectre of San Francisco", op. cit.; Bérubé, "Marching to a Different Drummer", op. cit.; D'Emilio, "Gay Politics, Gay Community", op. cit.; D'Emilio, *Sexual Politics, Sexual Communities*, op. cit.; Foucault, op. cit.; Hansen, op. cit.; Katz, op.cit.; Weeks, *Coming Out*, op. cit.; and Weeks, *Sex, Politics and Society*, op. cit.
- 49 Walkowitz, *Prostitution and Victorian Society*, op. cit.
- 50 Vice cops also harass all sex businesses, be these gay bars, gay baths, adult book stores, the producers and distributors of commercial erotica, or swing clubs.
- 51 Foucault, op. cit., p. 40.
- 52 Karl Marx, in David McLellan (ed.), *The Grundrisse*, New York, Harper & Row, 1971, p. 94.
- 53 Clark Norton, "Sex in America", *Inquiry*, October 5, 1981. This article is a superb summary of much current sex law and should be required reading for anyone interested in sex.
- 54 Bessera et al., op. cit., pp. 165-7.
- 55 Sarah Senefeld Beserra, Nancy M. Jewel, Melody West Matthews, and Elizabeth R. Gatov (eds.), *Sex Code of California*, Public Education and Research Committee of California, 1973, pp. 163-8. This earlier edition of the *Sex Code of California* preceeded the 1976 consenting adults statute and consequently gives a better overview of sodomy laws.
- 56 Esther Newton, *Mother Camp: Female Impersonators in America*, Englewood Cliffs, New Jersey, Prentice-Hall, 1972, p. 21, emphasis in the original.
- 57 D'Emilio, *Sexual Politics, Sexual Communities*, op. cit., pp. 40-53, has

- an excellent discussion of gay oppression in the 1950s which covers many of the areas I have mentioned. The dynamics he describes, however, are operative in modified forms for other erotic populations, and in other periods. The specific model of gay oppression needs to be generalized to apply, with appropriate modifications, to other sexual groups.
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- 59 Lysander Spooner, *Vices Are Not Crimes: A Vindication of Moral Liberty*, Cupertino, CA, Tanstaaf Press, 1977.
- 60 I have adopted this terminology from the very useful discussion in Weeks, *Sex, Politics and Society*, op. cit., pp. 14-15.
- 61 See Spooner, op. cit., pp. 25-9. Feminist anti-porn discourse fits right into the tradition of justifying attempts at moral control by claiming that such action will protect women and children from violence.
- 62 "Pope's Talk on Sexual Spontaneity", *San Francisco Chronicle*. November 13, 1980, p. 8; see also footnote 37 above. Julia Penelope argues that "we do not need anything that labels itself purely sexual" and that "fantasy, as an aspect of sexuality, may be a phallogocentric 'need' from which we are not yet free." in "And Now For the Really Hard Questions", *Sinister Wisdom*, no. 15, fall 1980, p. 103.
- 63 See especially Walkowitz, *Prostitution and Victorian Society*, op. cit., and Weeks, *Sex, Politics and Society*, op. cit.
- 64 *Moral Majority Report*, July 1983. I am indebted to Allan Bérubé for calling my attention to this image.
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- 69 Sally Gearhart, "An Open Letter to the Voters in District 5 and San Francisco's Gay Community", 1979; Adrienne Rich, *On Lies, Secrets, and Silence*, New York, W.W. Norton, 1979, p. 225. ("On the other hand, there is homosexual patriarchal culture, a culture created by homosexual men, reflecting such male stereotypes as dominance and submission as modes of relationship, and the separation of sex from emotional involvement - a culture tainted by profound hatred for women. The male 'gay' culture has offered lesbians the imitation role-stereotypes of 'butch' and 'femme', 'active' and 'passive,' cruising, sado-masochism, and the violent, self-destructive world of 'gay'

- bars."); Judith Pasternak, "The Strangest Bedfellows: Lesbian Feminism and the Sexual Revolution", *WomanNews*, October 1983; Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence", in Ann Snitow, Christine Stansell, and Sharon Thompson (eds), *Powers of Desire: The Politics of Sexuality*, New York, Monthly Review Press, 1983.
- 70 Julia Penlope, op. cit.
- 71 Sheila Jeffreys, "The Spinster and Her Enemies: Sexuality and the Last Wave of Feminism", *Scarlet Woman*, no. 13, part 2, July 1981, p. 26; a further elaboration of this tendency can be found in Judith Pasternak, op. cit.
- 72 Pat Califia, "Feminism vs. Sex: A New Conservative Wave", *Advocate*, February 21, 1980; Pat Califia, "Among Us, Against Us - The New Puritans", *Advocate*, April 17, 1980; Califia, "The Great Kiddy Porn Scare of '77 and Its Aftermath", op. cit.; Califia, "A Thorny Issue Splits a Movement", op. cit.; Pat Califia, *Sapphisty*, Tallahassee, Florida, Naiad, 1980; Pat Califia, "What Is Gay Liberation", *Advocate*, June 25, 1981; Pat Califia, "Feminism and Sadoomasochism", *Co-Evolution Quarterly*, no. 33, spring 1981; Pat Califia, "Response to Dorchen Leidholdt", *New Women's Times*, October 1982; Pat Califia, "Public Sex", *Advocate*, September 30, 1982; Pat Califia, "Doing It Together: Gay Men, Lesbians, and Sex", *Advocate*, July 7, 1983; Pat Califia, "Gender-Bending", *Advocate*, September 15, 1983; Pat Califia, "The Sex Industry", *Advocate*, October 13, 1983; Deirdre English, Amber Hollibaugh, and Gayle Rubin, "Talking Sex", *Socialist Review*, July-August 1981; "Sex Issue", *Heresies*, no. 12, 1981; Amber Hollibaugh, "The Erotophobic Voice of Women: Building a Movement for the Nineteenth Century", *New York Native*, September 26-October 9, 1983; Maxine Holz, "Porn: Turn On or Put Down, Some Thoughts on Sexuality", *Processed World*, no. 7, spring 1983; Barbara O'Dair, "Sex, Love, and Desire: Feminists Struggle Over the Portrayal of Sex", *Alternative Media*, spring 1983; Lisa Orlando, "Bad Girls and 'Good' Politics", *Village Voice*, Literary Supplement, December 1982; Joanna Russ, "Being Against Pornography", *Thirteenth Moon*, vol. VI, nos 1 and 2, 1982; Samois, *What Color Is Your Handkerchief*, Berkeley, Samois, 1979; Samois, *Coming to Power*, Boston, Alyson, 1982; Deborah Sundahl, "Stripping For a Living", *Advocate*, October 13, 1983; Nancy Wechsler, "Interview with Pat Califia and Gayle Rubin", part I, *Gay Community News*, Book Review, July 18, 1981, and part II, *Gay Community News*, August 15, 1981; Ellen Willis, *Beginning to See the Light*, New York, Knopf, 1981; for an excellent overview of the history of the ideological shifts in feminism which have affected the sex debates, see Alice Echols, "Cultural Feminism: Feminist Capitalism and the Anti-Pornography Movement", *Social Text*, no. 7, spring and summer 1983.
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- 76 B. Ruby Rich, op. cit., p. 76.
- 77 Samois, *What Color Is Your Handkerchief*, op. cit.; Samois, *Coming To Power*, op. cit.; Pat Califia, "Feminism and Sadoomasochism", op. cit.; Pat Califia, *Sapphisty*, op. cit.
- 78 Lisa Orlando, "Power Plays: Coming To Terms With Lesbian S/M", *Village Voice*, July 26, 1983; Elizabeth Wilson, "The Context of 'Between Pleasure and Danger': The Barnard Conference on Sexuality", *Feminist Review*, no. 13, spring 1983, especially pp. 35-41.
- 79 *Taylor v. State*, 214 Md. 156, 165, 133 A. 2d 414, 418. This quote is from a dissenting opinion, but it is a statement of prevailing law.
- 80 Bessera, Jewel, Matthew., and Gatov, op. cit., pp. 163-5. See note 55 above.
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- 82 Norton, op. cit., p. 18.
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