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*Directions in  
Sexual Harassment  
Law*

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*Discriminating Pleasures*

MARC SPINDELMAN

The Supreme Court's announcement in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>1</sup> that same-sex sexual harassment can be actionable sex discrimination under federal antidiscrimination law, changes the social context against which it was decided. No longer, for instance, are men guaranteed all the protections male supremacy has traditionally offered them when they sexually subordinate other men. In refusing to desexualize same-sex sexual violence or render it legally invisible, *Oncale* disrupts the conventional social meanings that that violence has had. After *Oncale*, one cannot be certain how "boys will be boys," or how one is supposed to "take it like a man."

As a strike against male supremacy, *Oncale* is an important step forward for sex equality rights, including the rights of lesbians and gay men. For the first time *ever*, the Supreme Court has made antigay discrimination, in the form of sexual violence at least, subject to judicial notice and action as a matter of sex equality law. Judicial decisions in *Oncale's* wake have already begun to acknowledge this transformative potential. As Janet Halley observes: "a gay-friendly analysis has to welcome the Court's decision that same-sex sex harassment is actionable sex discrimination: without it, federal antidiscrimination law would have explicitly declared open season on gay men and lesbians, leaving us unprotected from sexual interference that can threaten our very ability to work and learn."<sup>2</sup>

To be sure, the time hasn't come for lesbians and gay men to let down our guard. It's always possible courts will allow themselves to be blinded by their own commitments to male supremacist norms, and so not recognize that the context-sensitive judgments *Oncale* mandates don't warrant policing same-sex sexual interactions in antigay ways. Notwithstanding this possibility, *Oncale* is cause for cautious celebration. It puts a new legal tool in the hands of those lesbians and gay men who have been sexually subordinated because of their sex.

As a case clarifying sexual harassment law, *Oncale* may help straight and gay victims of same-sex sexual harassment in the workplace, in schools, in public housing, and even in the streets. Nor is that all. As a case addressing sex inequality's structures, *Oncale* offers victims of same-sex rape, sexual assault, domestic violence, stalking, and the sex industry a new vehicle through which to lay claim to—and to name—what they've endured. We may thus finally begin to learn, through the previously silenced voices of its victims, what life under male supremacy, with its safe harbors for perpetrators of same-sex sexual violence, means *for them*: as human beings who have been harmed because of, and through, their sex. In part as a result of feminist efforts—efforts that helped produce sexual harassment law, *Oncale*, and the analysis and social movements that, in turn, produced them—the world looks better than it did before.

But just as we begin to cross the threshold *Oncale* has opened up—beyond which is fresh knowledge of power and its sexual use—“queer theory” appears in the doorway, shooing us away.

Perhaps it could have been otherwise. Acknowledging the centrality of concepts like “power,” “knowledge,” “domination,” “oppression,” and “hierarchy,” and their relation to sexuality, queer theory could have aligned itself with male supremacy's critics. But, with few notable exceptions, it hasn't. Queer theory, as I begin to show here, has in significant ways aligned itself with male supremacy and its regulation of the general erotic economy that gives meaning to women's and men's sexual lives.<sup>3</sup>

Against the normalization of sexuality, Michel Foucault famously proposed that: “[t]he rallying point for the counterattack against the deployment of sexuality ought not to be sex-desire, but bodies and pleasures.”<sup>4</sup> Less cryptically, while discussing the decriminalization of rape as a sexual offense, he offered: “One can always produce the theoretical discourse that amounts to saying: in any case, sexuality can in no circumstances be the object of punishment.”<sup>5</sup> Following now standard interpretations of these thoughts, queer theory has embraced a sexual politics that, sometimes seemingly above all, eschews sex-

ual regulation, particularly when it comes from the state, and pursues, instead, the proliferation of bodily — including sexual — pleasures.

But what does queer theory mean by “sexual regulation”? How does that meaning differ from the limitations on sexual abuse, hence on sexuality, that feminists have long opposed? What is its relation to ending sexual abuse and the role of the state in *that* — something feminists have, at times, proposed? What is the queer conception of “pleasure,” and how does it relate to queer efforts to deregulate sexuality? Or to feminist efforts to end sexual violence, which some perpetrators assuredly find pleasurable?

A close reading of Janet Halley’s “Sexuality Harassment” in this volume, which ventures a queer critique of sexual harassment law, offers some answers to these — and other — questions. Having examined Halley’s text for what it can teach about queer commitments *against* sexual regulation and *for* sexual pleasures, I consider its position on sexual violation, highlighting some of its dangers.

The queer critique of sexual harassment law that Halley offers begins with *Oncale*. By “complacently dedicat[ing] the reach of hostile environment liability in same-sex cases to the ‘common sense’ of judges and juries,” we’re advised, *Oncale* “open[s] Title VII to . . . a homophobic project” of “antigay regulation.”<sup>6</sup> *Oncale*, in the queer imagination, thus threatens a very scary prospect: “The Supreme Court [having] held that same-sex sex harassment may be sex discrimination within the ambit of Title VII,” sexual harassment law is poised to become — if it hasn’t already — a doctrine of sexuality regulation, a dangerous, oppressive “mechanism” of sexual “surveillance” and “social control.”

Queer theory isn’t only concerned that sexual harassment law may regulate sexual acts that cause sexual harm. It’s also concerned with sexual harassment law’s regulation of desire. Understood as different aspects of queer opposition to sexual regulation, what might appear an unfortunate (perhaps Freudian) slip turns out to have deeper shades of meaning: the observation that queer theory wishes (and wishes us) to ask “whether, when a woman claims that a male coworker or supervisor or teacher injures her *by desiring her sexually*, we should believe her, or think her claim of injury is reasonable[.]” serves as one way, more or less, to recapitulate the complaint that, “Title VII operat[es] to *regulate sexual interactions* in the workplace[.]”

Once “sexual regulation” is defined in these expansive and doctrinally inexact terms, queer theory sees the occasion for such regulation woven throughout sexual harassment law. Like others before, queer theory contends that different elements of sexual harassment claims — what’s legally “unwelcome,”

“severe,” even “unreasonable,” for example — are all forms of “sexual regulation” susceptible of homophobic interpretation by judges and juries.

Halley adds to this the new argument that sexual harassment suits themselves (and not just their elements) may become a legitimated vehicle for homophobic expression, a tool for “sexuality harassment,” especially after *Oncale*. As well, she proposes that bringing a sexual harassment suit can itself be a homophobic sexual act, bound up with, and perhaps even motivated by, the same sexual dynamics that are usually the target of sexual harassment prohibitions.

It would, of course, be worrisome if homophobic plaintiffs, wrongly claiming sexual harassment that never occurred, were permitted to sue. She predicts just such an “alarming class of cases” will arise under *Oncale*, but cites not one example. Indeed, so far as is discernible from Halley’s text, not a single case over the more than twenty years of reported sexual harassment decisions with which *Oncale* is consistent, and criticized by Halley as consistent, has. Not after *Oncale* either.

To deliver on her prediction, Halley serves up a fantasy reconstruction of the “disturbing” facts of *Oncale*. This is how we are to imagine Joseph Oncale’s sexual violation: “In this version, it was Oncale, as well as or possibly not his coworkers, who were homophobic. We can imagine that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in Oncale’s complaint, or engaged in some of that conduct and fantasized the rest, or, indeed, fantasized all of it — and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.”<sup>7</sup> Later, referring to Oncale’s deposition testimony — where he says about his harassers, “I feel that they made homosexual advances toward me. I feel they are homosexuals”<sup>8</sup> — we are asked: “Does [Oncale’s] ‘feeling’ about his attackers tell us that they are homosexuals or that he might be? That they attacked him on the oil rig or that he attacked them by invoking the remarkable powers of the federal court to restore his social position as heterosexual?”<sup>9</sup>

These questions are provocative. But Oncale’s “feeling” about his attackers’ sexual orientation tells us nothing about whether he was — or wasn’t — sexually harassed. Whether he is or isn’t gay doesn’t either.

All the same, Halley bids us to suppose that Oncale is a typical closet case: both homophobic and gay. If we do, would that mean he wasn’t sexually harassed because of his sex? That he wasn’t sexually harassed at all? What if Oncale’s supervisor had made good on his multiple threats to rape Oncale, or if Oncale’s supervisor and one of his coworkers had carried through on their attempted gang rape of Oncale in that shower stall? Would the rape not have been sex-based if Oncale had been an openly gay man? Would it not (or no

longer) have been rape? If not, what would we have called it: Fantasy? Just sex? Are gay men unrapable because they're gay? Does the closet make its occupant unharassable? Following Halley's reconstruction of *Oncale*, are we to pretend that gay men who fantasize about rape are self-hating or homophobic — or both — when they *are* sexually violated *and complain*?

I think not. But as important, neither current law nor an understanding of sexuality as unjustly structured by male dominance finds such questions about same-sex cases “profoundly” difficult to read.<sup>10</sup> Indeed, these two perspectives (which, since *Oncale* won, converge) present a single answer to these questions, and a response to Halley's wonder about what *Oncale*'s “feeling” reveals: No one's right not to be sexually harassed turns on the sexual identity, conscious or otherwise, of the perpetrator or the victim.<sup>11</sup> Whether harassing acts are sexual or sex-based doesn't — and shouldn't — depend on whether the perpetrators of sexual harassment or its victims “were” or “are” or “could be” gay, whether self-identified or self-denied.

Having catalogued the homophobic perils of sexual harassment law she sees, Halley sets out to show how “[s]exual subordination feminism, and especially [radical feminism], underwrite the regulation of sexuality through sex harassment law.”<sup>12</sup> Largely between the lines, Halley hints that sexual harassment law's homophobic possibilities expose it as the province of radical feminist theorizing. One version of this argument, certainly, bursts forth in the observation that “[i]t is difficult to escape the conclusion that [the *amicus* brief Catharine MacKinnon filed in *Oncale*] aimed to induce the Court to adopt . . . a reading” of what happened to *Oncale* as a “scene” of “homosexual predation.”

The march toward this conclusion effectively begins with a gloss on an argument found in MacKinnon's *Oncale* brief.<sup>13</sup> According to Halley, the brief maintains that “the homosexual orientation of [a] ‘perpetrator’ [of sexual harassment] . . . may be relevant because it would make a male-male harassment case homologous to a male-female case. This would be a good thing for the plaintiff, the Brief acknowledges, because the court would then be in a position to say that the defendant would not have selected a woman as his target.”<sup>14</sup> Her partial response to this is that:

This is a quick and easy route to a legal finding of sex discrimination, one that the Supreme Court explicitly opened up in its decision in *Oncale*. Gay rights organizations have fought to foreclose this route ever since circuit courts first opened it, however, because it is also a quick and easy route to homophobia via the inference that because the defendant is homosexual, he probably has done this bad sexual thing. In a male-male case the inference is even richer, borrowing as it does from [MacKinnon's sex equality] model: because the defendant is a male homosexual, he is a sexual dominator.<sup>15</sup>

There's something to this point. One needn't struggle to imagine that—or how—a putative harasser's actual or presumed homosexuality in a same-sex harassment case could lead to an inference that he has (probably) engaged in inappropriate sexual conduct. The gay man's sexual "proclivities"—the male supremacist (*not* radical feminist) belief that he is invariably indiscriminate in his sexual interest in other men and will have sex with any man if only given the chance—are mythic. "As if," Guy Hocquenghem writes, "the homosexual never chose his object and any male were good enough for him."<sup>16</sup>

The widespread circulation of this male supremacist myth sheds light on the reasons lesbian and gay rights organizations, along with many feminists, have maintained that sexual orientation is irrelevant to the determination whether sexual harassment in any given case is legally actionable sex discrimination.<sup>17</sup> As MacKinnon's *Oncale* brief, rejecting the male supremacist vision of gay men as indiscriminate sexual predators, explains: "Sexual orientation on its face disposes of nothing. Gay men do not initiate unwanted sex to all men any more than lesbian women welcome sexual attention from all women. Needless to say, from knowing a person is [lesbian or] gay, one cannot deduce that [she or he] sexually harassed another person,"<sup>18</sup> or, for that matter, that she or he was sexually harassed.

Proposing that sexual orientation doesn't or shouldn't determine sexual harassment liability, of course, doesn't mean that lesbians and gay men won't be liable for sexual harassment if and when they commit it. But so far as I'm aware, nobody has seriously argued we should not be—or not, perhaps, until now. Lesbian and gay rights organizations, and others, seem to agree with MacKinnon's *Oncale* brief, that "[a]lthough care must be taken that [protecting lesbians and gay men from sexual harassment doesn't] create an opening for homophobic attacks, [holding lesbians and gay men up to sex equality obligations] merely applies the same standard to everyone."<sup>19</sup> In terms of equality of citizenship, of rights *and responsibilities*, this is only common sense.

Halley curiously suggests otherwise. After telling us, for instance, that MacKinnon's *Oncale* brief "warns that courts may be institutionally unable to make findings of parties' sexual orientations, and counsels courts to prevent 'homophobic attacks,'" she insists that the brief "entirely misses the common-sense status of the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer."<sup>20</sup>

Inadequacies in the description of MacKinnon's brief aside, this doesn't follow. In general terms, the brief propounds a feminist case against male supremacy, including its position that homosexuals are, characterologically, sexual wrongdoers. It expressly argues that: "Gay men do not initiate un-



wanted sex to all men any more than lesbian women welcome sexual attention from all women. Needless to say, from knowing a person is gay, one cannot deduce that they sexually harassed another person." So far from "entirely miss[ing] the commonsense status of the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer," the brief doesn't miss it at all. It tackles the status of this inference directly, and denounces it explicitly.

Of course, this doesn't preclude a homophobic interpretation of *Oncale*. One can generate such an interpretation by appealing directly to the energies of homophobia as a substantive source of interpretation,<sup>21</sup> or, more circuitously, for example, by demanding that *Oncale*'s author, Justice Antonin Scalia, though speaking for a unanimous Court, had homophobic designs that control what *Oncale* means.<sup>22</sup> But none of this is to say — and Halley never does — that *Oncale* recommends, much less compels, its own homophobic interpretation. As she acknowledges in different ways, her antigay interpretation of *Oncale* is normative, not descriptive.<sup>23</sup> She fears that, with *Oncale*, "federal antidiscrimination law may implicitly declare open season on gay men and lesbians[.]"<sup>24</sup> Presumably, homophobic interpretations of sexual harassment law could follow. But what does that mean? That we should allow an inequality like the inequality homophobia promotes to determine sex equality rights?

A similar issue, recall, arose around matters of race, with the possibility that sexual harassment charges could be unjustly levied against men of color. The answer was to fight the racism within society and law, not succumb to it by eliminating the sex equality tool. We aren't told why homophobia requires a different conclusion now. But that's what we need to know. Racism, after all, can operate as sexual discrimination.

These considerations position us to consider the smoking gun submitted as evidence for the conclusion that the brief "virtually invites the Supreme Court"<sup>25</sup> to read what happened to *Oncale* homophobically, as an incident of homosexual predation — an invitation that the Court, through Justice Scalia, apparently declined: a footnote in MacKinnon's brief, quoting *Oncale*'s deposition testimony. About his harassers, again, *Oncale* said: "I feel that they made homosexual advances toward me. I feel they are homosexuals."

In order to conclude that homophobic intentions animated this footnote in MacKinnon's *Oncale* brief, one has, at a minimum, to downplay the brief's unequivocally argued commitment to sex equality rights for lesbians and gay men, and that of the fourteen groups that signed and filed it. But the brief affirms that collective commitment early on: "Other legal requisites being met, if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties."<sup>26</sup>

Supporting this argument, the brief exposes the social reality that “[t]he sexual orientation of the parties inevitably arises in, and is implicated in ruling on, same-sex harassment.”<sup>27</sup> The brief mentions this social fact in order to criticize it: “The sexual orientation of the parties is, however, properly irrelevant to the legal sufficiency of sexual harassment claims.”<sup>28</sup> “[N]either the rights of victims nor the liability of perpetrators of sexual harassment should turn on their sexual orientation.”<sup>29</sup>

MacKinnon’s brief repeatedly highlights its position that sexual harassment law shouldn’t be allowed to embody male supremacy’s heterosexual assumptions. The brief, for instance, both reveals and condemns the thinking animating the “denial that interactions among men can have a sexual component,”<sup>30</sup> and the suspension of that denial when one of the men involved is (or is suspected of being) gay.

Moreover, the brief indicates that its critique of male dominance in the same-sex harassment context would be incomplete without explaining how such dominance causes discrimination against lesbians and gay men. Accordingly, the brief provides an independent account of why discrimination against lesbians and gay men is sex discrimination in violation of sex equality law. Prominently among the briefs in the case and in important ways uniquely, it argues that its analysis compels the conclusion that gay rights *are* sex equality rights, a conclusion Halley, apparently, rejects as “a big mistake”<sup>31</sup> but never fully and persuasively engages. Exactly how the brief, given its argument squarely to the contrary, issues a pro-gay rights homophobic invitation is never explained.

So, what function does that footnote in MacKinnon’s brief, quoting Oncale’s deposition testimony on his “feeling” about his attackers, serve? Its purpose is to emphasize the brief’s *opposition* to homophobia. The footnote appears in the course of the brief’s reminder that some courts, improperly, had allowed male dominance to guide their understanding of what could be counted as actionable sex discrimination in same-sex harassment cases.<sup>32</sup> Read in this context — the context in which it actually appears — the footnote illustrates the understanding of same-sex harassment cases the brief repudiates: that Oncale’s attackers, like other perpetrators of same-sex harassment, “must be” gay because the harassment at issue was *sexual*.

But there’s more. Had it not mentioned Oncale’s remark, MacKinnon’s brief would have failed to acknowledge an unsympathetic fact about the plaintiff on whose behalf it was filed. It would have thus left the remark undisavowed by those lesbian and gay rights advocates supporting his side in the case. As well, given the brief’s express argument for lesbian and gay rights, it would have been deceptive for the brief to be silent about this aspect of the record.

One can only imagine what later commentators would have said had the brief left such a homophobic statement lurking in the record — and in the mouth of the plaintiff whose legal position it supported — without mention.

Properly understood, then, it's hard to see how anyone could argue that the footnote — or, more generally, MacKinnon's *Oncale* brief — “invites”<sup>33</sup> the Supreme Court to indulge “the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer,” “virtually” or not. Equally baffling is why “[i]t is difficult to escape the conclusion that [MacKinnon's brief] aimed to induce the Court to adopt” a homophobic reading of *Oncale*'s troubles. This is exactly what the brief *does not do*.

Like her other work, Halley's “Sexuality Harassment” teaches us about the art and ethics of interpretation. But we should remember that the texts she reads are the *effects* of interpretive choices she makes, but not their cause. What, though, *does* cause her readings?

A queer commitment to oppose “sexual regulation” could. Marshalling the forces of homophobia — an ideology of sexual regulation — *against* sexual harassment law may make it possible to portray sexual harassment law and radical feminist theorizing in the area as dangerous, related forms of sexual control. But it's homophobia — not sexual harassment law *or* radical feminist theory — that's ultimately the real danger Halley's analysis identifies,<sup>34</sup> raising the question: How can homophobia provide any normative grounds for argument within a queer project when it is something queer theory professes to oppose? Might it be that homophobia is not only a powerful source of sexual subordination, but of sexual pleasure, as well? Might success in challenging sexual harassment law as a form of sexual regulation help clear the space for queer pleasures to inhabit?

Halley's “Sexuality Harassment” doesn't expressly talk much about pleasure nor yet pleasure's virtues.<sup>35</sup> But it does provide a number of sketches of the way queer pleasures are arranged.<sup>36</sup> What may be the crispest diagram emerges in the course of the explanation why queer theory “tends to minimize . . . the differences between same-sex eroticism and cross-sex eroticism.”<sup>37</sup> The “chief” reason for this, it is suggested, is the queer “sense that gender and power circulate far more complexly and with far more contingency than is thought in most women's-subordination feminisms.” Cited with approval in support of this point is “[t]he phenomenon of lesbians wearing dildos,” claimed to “lead[] to heterosexual women wearing dildos[.]” Soon after that comes a rehearsal of the lament that “a good sadist is hard to find: he has to intuit his victim's hidden desires, protect the illusion of oneness and mastery that stem from *his* knowing what *she* wants.” These examples nicely illustrate

the deeply hierarchical structure of those sexual pleasures queer theory “exult[s]” for the way — or so we’re told — they “rearrange[] conventional associations of the feminine with subordination and the masculine with power.”<sup>38</sup>

Having defined queer pleasures in terms of sexual hierarchy, Halley can comment: “[f]eminism focused on the badness of women’s sexual pain at the hands of men, and committed to the idea that women’s sexual subordination is the core reason for women’s social subordination, has trouble liking” discriminating pleasures like these. Feminist rejection of such *nostalgie de la boue* is, evidently, a mistake in the queer view, because it fails to recognize that such pleasures — to repeat — “rearrange[] conventional associations of the feminine with subordination and the masculine with power.”

One wonders how. How, for instance, does some women “being” masochists who will their own sexual subordination rearrange *any* of the conventional associations between gender and hierarchy? How does a woman who sexually subordinates a man by buggering him orally or anally — or both — with a strap-on dildo disrupt the “conventional association” between either “the masculine” and dominance or “the feminine” and subordination? Are penises, strap-on or not, not gendered? Is “fucking”? Are women, because they’re sexed female, entirely excluded from male sexual subject positions? Can women, because they’re gendered female, ever fully occupy them? What about the person dominated by a penis? Are we to believe that, socially speaking, men cannot be sexually subordinated because they’re sexed as men? How about women sexually dominating men like men more typically do women? How any of these possibilities would “rearrange” rather than reinforce gender hierarchy is, at best, obscure. All that’s “rearranged” — when that — is the biological sex of the participants.

Though ready to endorse the pleasures of sexual hierarchy and to assert that they can discombobulate gender norms, Halley’s analysis overlooks how those pleasures are conditioned and flooded with social meaning by male supremacy. And that one can’t simply rewrite the social meanings of such sexual acts without acknowledging the pervasive social reality of sexual inequality.

Indeed, the pleasures of sexual hierarchy may depend in important ways — ways queer theory hasn’t so far adequately theorized — on the continuing vitality of the social meanings of sexual acts that, on the level of social meaning, queer theory proposes it can, *ipse dixit*, “rearrange.” What’s sexy about a woman acting like a man by fucking a man thus being treated like a woman, if not its seeming violation of male supremacy’s definition of sex-appropriate gender roles in sex? Taking up a gender role that’s “inappropriate” for one’s sex may be sexy, even feel subversive. But it does nothing to rewrite gender roles or dissociate them from gender. At most, perhaps, doing so may give

further proof (if any were needed) that gender roles aren't biological, but rather, as Foucault and MacKinnon recognized long ago, the product of social relations.

A more basic point, however, must be made. By stressing that women, including lesbians, can be sexually dominant, and that men, presumably including gay men, can be sexually dominated, Halley's normative enthusiasm for the pleasures of sexual hierarchy risks making it seem that the sexual subordination forced upon members of these groups is the product of our own unwillingness to pursue the hierarchical pleasures we should. From this it's a small step to claiming that our social subordination is a matter of our own choosing, too. After all, if our position in sexual hierarchy helps to determine our position in social hierarchy — and who has shown that they're entirely separate? — what does queer faith in existing mobilities within sexuality imply? That we've had meaningful — dare one say, “unoppressed”? — choices about our position in both sexual *and social* hierarchy? Had we only made different sexual choices, lesbians and gay men could have been socially dominant instead? Is gender inequality a mass, collective sexual fantasy?

Hierarchy seems pervasively to frame the options for the normative queer understanding of the social world. So it's no surprise that queer theory would align itself (or has) with “sex[-]affirmative feminism,” and its “insist[ence] that . . . ‘women’ have a vital interest in gaining access to all the power that characterizes sexuality,”<sup>39</sup> as sexuality is presently defined. To radical feminists, however, these objectives look nothing remotely like “liberation projects.” Without a critique of hierarchy, they perpetuate it, animated by the *unliberating* and *unimaginative* aspiration of giving queers “access to all the power that [presently] characterizes sexuality,” meaning, “all the power” of male dominance, hence (ever-greater) access to being on top and enjoying all the pleasures and dangers of sex discrimination.

These aren't the only ways queer approval of hierarchical pleasures leads analysts like Halley astray. Consider, for example, the confident, critical description of radical feminism as MacKinnon is said to have articulated it. Halley calls it a “neat,” “tight,” “fix[ed],” “rigid,” “monolithic,” “exhaustive,” “total,” and “totalized” theory of sexuality. In radical feminism, according to her, “[e]verything is accounted for; there is *nothing* left over.” Similarly, she claims radical feminism holds that “[s]ex[] and sexuality are *never* good; they are *always* tools by which women are assigned subordination and men either assign or suffer it.” Indeed, her summary of “the problem” with radical feminist theory is that it's, well, just “so settled” and “so complete.”

We've heard this all before. Radical feminism, however, sharply conflicts with Halley's interpretation of it, though she (like others) discusses the

conflicts not at all. We do learn that radical feminists believe gender is socially constructed, a “historical contingency,”<sup>40</sup> in her words. But we don’t learn that sexuality, in radical feminism, isn’t “an overarching preexisting general theory that is appealed to in order to understand or explain, but a constantly provisional analysis in the process of being made by the social realities that produce(d) it.”<sup>41</sup> Nor do we discover from Halley’s text, except perhaps very obliquely,<sup>42</sup> that radical feminism is not—*yes, not*—a critique of sexuality in its every form. Within radical feminism’s theory of sexuality abides that oppositional sexuality built of equality, mutuality, and respect, which can exist on the social level and, though maybe only in “truly rare and contrapuntal glimpses,”<sup>43</sup> sometimes already does.

Interpreting radical feminist theory through the normative queer lens of hierarchical pleasures may make it appear that radical feminism, with its radical sexual egalitarianism, is “nearly perfect,”<sup>44</sup> “almost completely occupies the horizon of [sexual] possibility,” or worse. Then again, maybe it’s simply the extent of the hegemony of male dominance over sexuality that creates this impression. Whatever the reason, a queer reading of radical feminism seems inclined either not to notice or to dismiss radical feminism’s contingency and principled limits, along with its visionary dimensions. But it’s distorted to caricature without them.

A similar point can be made about the skepticism we’re urged to adopt toward claims of sexual violation. The argument is deceptively simple: skepticism toward claims of same-sex sexual injury propels us toward skepticism toward claims of sexual injury across the board. The moment of transition from same-sex to cross-sex cases arrives interrogatorily: “If same-sex sexual injury can be phantasmatic, and based as much on desire as its opposite, why not also its cross-sex counterpart?” This question is the analytic bridge built to the queer project of “asking whether, when a woman claims that [she has been sexually injured], we should believe her, or think her claim of injury is reasonable.” On this logic, recalling Halley’s reconstruction of the facts of *Oncale*, the reason to be skeptical of women who say men harmed them sexually is the same as the reason to be skeptical of (homophobic) men who say that they have been sexually injured by other men: they may *profess* that they didn’t want it, but actually—they did. The basic point is developed when we’re formally presented with the call for queer “skepticism to claims of same-sex sexual injury,” predicated in the analysis on a queer understanding of “the historical fate of same-sex love” and “of the complexities and ambivalences of eroticism[.]”

Now, one might be at least slightly skeptical of some same-sex cases, based on a claimant’s homophobia or homosexual panic. Claims comprised of anti-

gay motives constitute antigay sexual violence, hence an abuse of sex equality law. Under some circumstances, and considering the history of same-sex love and the “complexities and ambivalences of eroticism,” we might thus decide to ask whether a homophobic claimant’s allegations of sexual harm reflect same-sex sexual desires denied. If they do, the homophobic allegations could be treated as being “in bad faith.”

But, in an unreconstructed Freudianism, Halley advocates skepticism not of some, but of *all* claims of same-sex sexual harm. In one relevant sense, of course, we already view all claims of same-sex injury — indeed, all claims of sexual injury — skeptically: they require proof. The only issue *Oncale* resolved was whether victims of same-sex sexual abuse would be *permitted to prove their claims in fact*, as cross-sex claimants already were. Halley’s skepticism, by contrast, is total, extending beyond factual proof. If it was sexual, why should we believe the victim didn’t want it?

But why should we assume that all same-sex injury claims are (to use her excellent term) homologous to claims brought by homophobic or homosexual panic claimants? Without justifying this assumption, the queer reasons for skepticism of homophobic claimants can’t properly be used to underwrite skepticism of nonhomophobic claims. No such explanation, however, is provided.

Perhaps with an antisubordination theory of sexual injury in mind, it is supposed that that all claims of same-sex injury are homophobic insofar as they make sexual subordination a — or *the* — cognizable legal harm. This could be so if “homophobia” were to be defined to include (any) opposition to same-sex sexual inequality — a definition queer theory might well embrace if it wanted to hold that same-sex sexuality is *always* normatively good when hierarchical in form. Under these circumstances, queer theory could maintain that any claim for same-sex sexual injury will be homophobic, even if none of the parties “is” lesbian or gay. Why? The definition of sexual harm *as* sexual subordination in every one of these cases would render the claim of sexual harm homophobic *per se*.

Halley’s approval of the sexual pleasures of hierarchy, her interpretation of radical feminism, including her misreading of MacKinnon’s *Oncale* brief, and her imaginative reconstruction of *Oncale*’s facts, to give some examples, appear to move in these very directions. But “homophobia” defined to include opposition to sexual hierarchy would seem to make it homophobic to treat “homophobia” as a wrong of sexual subordination. Indeed, such a definition might even compel the conclusion that to be for sex equality, including sex equality rights for lesbians and gay men, is to be antigay. Since Halley doesn’t expressly define “homophobia” in just these terms, this queer definition —

with all it implies — may or may not be hers. Lacking it, however, the basis for saying that queer theory “undermine[s] our reasons for believing women who assert they [have been or] are sexually injured by men”<sup>45</sup> is questionable.

Even if it defined homophobia in such a peculiar fashion, queer theory would have some difficult questions to answer. To mention a few: Doesn’t queer skepticism in all same-sex cases hold the credibility of victims of homophobic violence captive to the bad faith of its actual or would-be perpetrators? Doesn’t queer skepticism in same-sex cases, as applied to lesbians and gay men, perpetuate antigay stereotypes about lesbian women’s and gay men’s capacity for truth telling, especially in matters sexual? Isn’t that heteronormative? Isn’t there room in queer theory to recognize that lesbians and gay men may know — and be able truthfully to tell — the difference between sexual pleasure and sexual harm?

These questions spawn others which some feminists might also wish to ask: Given that the reasons offered for queer skepticism are reasons for not protecting perpetrators of homophobic violence, why aren’t they also already reasons for believing those whom such violence harms? Believing victims of sexual harm, more generally? Can queer theory argue for unmodified skepticism toward same-sex sexual injury claims and completely avoid cooperation with male supremacy? We needn’t answer these questions to notice that Halley doesn’t consider that the reasons she gives don’t fully support queer skepticism toward claims of same-sex sexual violation. Nor does she consider that those reasons may undermine such broad skepticism, with its patently antigay implications, or that the case for queer skepticism is thus radically incomplete.

Feminists could have predicted the justificatory gap between the queer argument for same-sex skepticism and the reasons given on its behalf. Feminists committed to believing those who claim sexual injury (for all the reasons we do) are likely to see queer (or any other) skepticism to claims of sexual injury, same-sex or cross-sex, as a product of “sex panic”: panic over the possibility of meaningful sex equality for women, lesbian and not, and gay men, which is to say, panic over the elimination of male dominance, and with it, the sexualization of hierarchy *per se*.

But it’s also possible to read the discrepancy in queer thinking as a reflection of unstated ambivalence toward the very skepticism it’s proposed we should endorse: an ambivalence that may be produced by a queer commitment to promote the proliferation of hierarchical sexual pleasures. Skepticism of cases of same-sex sexual harm may have the potential to create further space for, and to unleash, the sexual pleasures that sex equality law might otherwise “police.” At the same time, however, queer skepticism has the potential to create the space for, and to unleash, the sexual displeasures sex equality law



might otherwise *prevent*. Given its scope, how could same-sex skepticism *not* be expected to produce displeasure? Disbelieving those who claim same-sex sexual injury may decrease the likelihood that homophobic plaintiffs could prevail at law, hence that their abuse will ever be publicly visible. To do so, however, would strip lesbian and gay victims of sexual injury (among others) of the benefits of sex equality protections available now by law.

It's precisely because queer skepticism in same-sex sexual injury cases may lead to the production not only of pleasures, but also displeasures, that a queer commitment to pleasures could—and should—cause ambivalence about skepticism to the range of same-sex sexual injury claims. If pleasure matters to queer theorists, displeasure should, too. Queer ambivalence about a rule of skepticism toward claims of sexual harm thus ought to increase, the wider the reach of such a skeptical rule. As queer skepticism expands—from homophobic cases to all same-sex cases, to cross-sex cases, too—the stronger the currents of pleasure may flow. But likewise the stronger the pull of displeasure's undertow.

Ambivalence may also help explain why, although Halley's analysis reads as a call to erase, or to roll back, existing sexual harassment rules, her conclusion loses its radical steam, failing expressly to call for any actual modification to the current sexual harassment regime. Instead, we're told, it "seek[s] a new understanding of the tradeoffs we make when we seek to punish and deter the sex-[based] and sexuality-based injuries which—[it] readily admit[s]—men *sometimes* do inflict on women."<sup>46</sup>

And yet one senses there's something more Halley wishes to say. With an approving nod, we're presented with Vicki Schultz's "solution," to deemphasize the sexual dimensions of the injury that sexual harassment law addresses. Schultz's proposal, Halley writes, "allows us to imagine refocusing sex harassment regulation to emphasize women's equal participation in the workforce obtained in the most sexually liberating, rather than the most sexually regulatory, terms possible." (Unmentioned is the fact that sex discrimination law already prohibits the gender harassment Schultz seeks to cover, if not always as fully as we might like.) In an enigmatic phrase, Halley adds: "Perhaps it is time to break even more eggs than Schultz does."

Halley's conclusion thus seems conflicted: unprepared to occupy the terrain that the queer critique of sexual harassment law and theory has endeavored to clear, but equally unprepared to abandon it. A queer commitment to the production of pleasures could produce precisely this position. For reasons suggested a moment ago, the erasure, or the rollback, of sexual harassment law may well protect and release a considerable degree of pleasure—for perpetrators most of all. But such a proposal would also protect and release a

considerable degree of displeasure—especially for victims. A queer commitment to the sexual pleasures of hierarchy, produced under conditions of male dominance, seems (enough) to precipitate this conflicted conclusion.

The definition of sexual injury hasn't much concerned queer theory, viewed from the vantage point of a feminism interested in stopping sexual violence. Queer theory—whether through its silence, its disagreement with sexual regulation (particularly by the state), its talk of pleasure (long a colony of gender privilege), or its refusal to confront male supremacy as such—has all too often seemed to deny that opposition to the entire matrix of sexual violence is a legitimate cause for concern and action. But despite all this, feminists have long suspected—or at least I have—that queer theorists couldn't seriously deny the existence and pervasiveness of sexual violation: of women by men, men by men, women by women, and sometimes, by women of men.

Halley shows that queer theory isn't utterly insensitive to these concerns. Within it, she tells us, there's room for recognizing the utility of feminist projects that “seek to punish and deter sex-[based] and sexuality-based injuries.”<sup>48</sup> And to “admit” that men “sometimes” do inflict these injuries on women. After this grand gesture, however, we are not told under exactly what conditions queer theory does (or will) recognize that sexual harm has been done. But we can venture an informed guess. Within its own project, queer theory has offered some ideas about one form of sexual violence—homophobia—that might serve as the basis for queer thinking about other forms of sexual harm. Halley's analysis, for instance, can be read to posit that what's wrong with homophobic violence is that it's the product of sexual desires denied and projected outward, hence is “thought to be a way of punishing someone else for desires that are properly one's own.” Substantively, it looks like this is why queer theory says homophobic violence—epitomized by the person who has an experience of homosexual panic and attacks a lesbian or gay man as a result—is “deemed to be in bad faith.”

On its own, this queer understanding of the wrong of homophobic violence might not be terrifically worrisome, even though it locates the origin of the harm of sexual violation where male supremacy locates it: in the head of its perpetrators, rather than in the meaning and impact of the acts in the lives of its victims. But as the fountainhead of a general definition of sexual injury, the queer understanding of homophobia is dangerously volatile, even regressive. Should it become the legal understanding of sexual injury, law could become a set of psychological immunities for perpetrators of sexual violence to deploy, spreading skepticism of claims of sexual injury across the board.

Drawing on the queer understanding of the wrongfulness of homophobia,

male perpetrators of sexual violence against women, for example, might offer that they shouldn't be held legally accountable for committing the acts of which they stand accused. Invoking queer theory, couldn't these perpetrators maintain that, in raping women, they demonstrate their own desires to have sex with (maybe be sexually dominated by) other men? If so, couldn't they contend that holding them legally liable for the manifestation of their closet fantasies is to regulate same-sex desires? Is legal accountability under these circumstances homophobic? "Sexuality harassment"? Should there thus be no liability here at all? No liability unless or because perpetrators didn't act "in bad faith" — with, that is, the "right" wrong state of mind?

Alternatively, couldn't sexual perpetrators invoke queer theory to argue that, in pressing charges, those claiming to be victims of sexual violence show *their* secret willingness to engage in precisely the sort of sexual "play" they now seek to describe, legally, as "harm"? With queer theory, couldn't these perpetrators propose that suits for sexual injury can themselves be a form of sexual violence (*pace* Cover), that engaging in sexual violence is a way of "punishing someone else for desires that are properly one's own,"<sup>49</sup> and so conclude that complaints of sexual injury should give rise to skepticism that "the victim" has actually suffered harm? If that, why not flat-out disbelief?

In these and other ways, the queer understanding of homophobia threatens to breathe life back into the *ancien* (read: male supremacist) *régime*. Underscoring the seriousness of this threat is queer theory's commonly maintained silence about existing, but underdiscussed, forms of same-sex sexual harm, including same-sex domestic violence, stalking, prostitution, and rape. Male supremacy, for years, legislated a certain silence around these acts, rendering them, until recently, ineffable in life and in law. It implied that gay men, *qua* gay, tacitly consented to acts of sexual violence or even that they actually desired them. A queer understanding of sexual injury, built on the queer vision of the wrong of homophobia, could make it that much more difficult than it's recently started to become, to hold perpetrators of these crimes legally accountable for committing them. But it hasn't.

Perhaps as a hedge against the unsavory possibilities its psychologized understanding of homophobia opens up, queer theory hasn't called for the eradication of sex equality law — *yet*. As we've seen, what it seeks, instead, is a so-called "new understanding of the tradeoffs we make when we seek to punish and deter . . . sex-[based] and sexuality-based injuries."<sup>50</sup> But this call for a "new" accounting of sex equality rules poses some deep problems for queer theory. Among them, that there's nothing "new" about treating sexual injury as a harm that takes place in perpetrators' heads or doubting the truthfulness of those who maintain they've been sexually harmed. Nor is the impulse to

regard sex equality law, including sexual harassment law, as a form of surplus repression.

But the problems run even deeper than that. To be blunt, the calculation that queer theory seems to call on us to make—How much sexual violence should we tolerate to have sex with pleasure?—makes no sense. How can queer theory (or anyone else) say how much sexual abuse we should accept for the absence of abuse? Much less say so under the sign of “liberation”?

One of radical feminism’s many lessons is that we don’t have to tolerate *any* sexual violence in the name of good sex—or anything else. Notwithstanding widespread stories to the contrary, radical feminism opposes and seeks to end the definition of good sex and sexual violence, including sexual harassment and rape, as the same thing.

And so the time has come for us to ask at last: Having assailed feminist successes of recent years, including *Oncale*, will queer theory underwrite male supremacy’s definitions of sex and sexual injury? Victims and survivors of sexual violence deserve to know.

For B.K.

#### Notes

Given this chapter’s discussion of the brief Catharine MacKinnon wrote and filed on behalf of a coalition of grassroots organizations working against sexual violence in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), see Brief of National Organization on Male Sexual Victimization, Inc., et al., at 23 n.7, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (No. 96–568), it bears mention that I also worked on this brief. An extended and more comprehensively annotated version of this chapter is in progress.

1. 523 U.S. 75 (1998).

2. Janet Halley, “Sexuality Harassment,” this volume. This may illuminate Halley’s signature on the Law Professors’ Brief in *Oncale*. Brief of Law Professors as Amici Curiae in Support of Petitioner, at 32, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (No. 96–568).

3. I realize that “queer theory” is diverse; what follows is engagement with one important set of impulses within it.

4. Michel Foucault, *The History of Sexuality*, Volume I: *An Introduction* 157 (Robert Hurley trans., 1990).

5. Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984* 200 (Lawrence D. Kritzman ed., 1988).

6. For quotations in this and the next five paragraphs (unless otherwise clear from context), see Halley, this volume (some emphasis added).

7. *Id.* at 192.

8. See Brief of National Organization on Male Sexual Victimization, Inc., et al., at

23 n. 7, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (No. 96-568) ["MacKinnon"].

9. Halley, this volume, at 192.

10. *Id.*

11. Curiously, Halley, recognizing this point, doesn't treat it as a reply to her questions about what Oncale's "feeling" reveals.

12. For quotations in this paragraph, see Halley, this volume.

13. Halley emphasizes the N.Y.C. Gay and Lesbian Anti-Violence Project's statement, which appears in MacKinnon's brief. Halley's related argument depends on it being "the only explicitly gay organization on the Brief[.]" *Id.* at 191. It wasn't. See MacKinnon, at A-6.

14. Halley, this volume, at 191 (note omitted). *But see* MacKinnon, at 23-24.

15. Halley, this volume, at 191 (note omitted).

16. Guy Hocquenghem, *Homosexual Desire* 55 (Daniella Dangoor trans., 3d ed. 1993). *Accord* MacKinnon, at 24.

17. *See, e.g.*, Brief of Lambda Legal Defense and Education Fund et al., at 13, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (No. 96-568) ["Lambda"]; MacKinnon, at 4, 12-14, 23-28.

18. *Id.* at 24.

19. *Id.* (footnote omitted). *See, e.g.*, *Lambda*, at 18, 24-28.

20. Halley, this volume, at 191 (note omitted).

21. *See id.* at 183, 195.

22. *See id.* at 193.

23. *See id.* at 183, 189, 195.

24. *See id.* at 183 (emphasis removed).

25. *Id.* at 191.

26. MacKinnon, at 4.

27. *Id.* at 23 (note omitted).

28. *Id.*

29. *Id.*

30. *Id.* at 11.

31. Halley, this volume, at 191.

32. MacKinnon, at 23-28.

33. For quotations in this paragraph, see Halley, this volume.

34. The same holds true for Halley's criticism of Federal Rule of Evidence 412 (1995), and her concern about a victim-centered standard of legal reasonableness in sexual injury cases. Halley, this volume, at 195-196.

35. The one express mention of "pleasure" in Halley's text comes when she "track[s] Carole S. Vance's brilliant title," saying that "sex[]-affirmative feminism seeks for women a full-face encounter with . . . the pleasure and the danger of sexuality." *Id.* at 195 (emphasis in original).

36. Halley's discussion of *Oncale's* facts, *id.* 192, and of "the masculinity of women . . . and the appetitive sexual abjection of men," *id.* at 194, are to similar effect.

37. For quotations in this paragraph and the next one, see *id.* (some internal quotations removed and emphasis modified).

38. *Id.* at 196. Unclear is whether the “same-sex love that does[n’t] express itself in sexual acts,” *id.* at 195, within the queer purview, is sexual.

39. For quotations in this paragraph and the next one, see *id.* (some emphasis added).

40. *Id.* at 190.

41. Catharine A. MacKinnon, “Points Against Postmodernism,” 75 *Chi.-Kent L. Rev.* 687, 695 (2000).

42. See *infra* text accompanying note 44.

43. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 153 (1989).

44. For quotations in this paragraph and the next two, see Halley, this volume (some emphasis removed).

45. *Id.* at 197.

46. For quotations in this paragraph and the next one, see *id.* (some emphasis added).

47. For quotations in this paragraph, see *id.* (some emphasis removed).

48. For quotations in this paragraph, see *id.*

49. *Id.* at 195.

50. *Id.*