

SEX EQUALITY PANIC⁺

MARC SPINDELMAN*

*What are all the creatures of
the earth in comparison with
a single one of our desires!*

—Sade

*The question . . . is whether queer theory
comprises a set of “master’s tools” as it
straps on the master’s theories,
whether or not (or to what extent)
queer theory opposes “the master’s house,”
and at what point queer theory itself becomes
the house that screams for dismantling.*

—Linda Garber

For B.K.

The Supreme Court’s announcement in Oncale v. Sundowner Offshore Services, Inc.,¹ that same-sex sexual harassment can be actionable sex discrimination under federal anti-discrimination 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 de-sexualize same-sex sexual violence or render it legally invisible, Oncale disrupts the conventional social meanings that that violence has had. After Oncale, one cannot quite be certain how “boys will be boys,” or how one is supposed to

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* Assistant Professor of Law, Michael E. Moritz College of Law, The Ohio State University. I owe a huge debt of thanks to many people—too numerous to mention by name—for their help in one form or another with this article. Institutionally, I am equally indebted to the Moritz College of Law and the ever helpful research librarians at the Moritz Law Library, especially Kathy Hall, for making this work possible. In the interest of “full-disclosure,” I want to note up-front that I worked with Catharine MacKinnon on the brief she wrote and filed in Oncale, Brief of Amici Curiae National Organization of Male Sexual Victimization, Inc. et al., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96-568), reprinted in 8 UCLA Women’s L.J. 9 (1997)—a brief around which an important part of the following discussion centers. This is a substantially revised and expanded version of Marc Spindelman, Discriminating Pleasures, in Directions in Sexual Harassment Law 201 (Catharine A. MacKinnon & Reva Siegel eds., 2003).

¹ 523 U.S. 75 (1998).

“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 those who identify or are identified as lesbians and gay men.² For the first time *ever*, the Supreme Court has made anti-gay discrimination, in the form of sexual violence at least, subject to judicial scrutiny and action as a matter of sex equality law. Judicial decisions in Oncale's wake have already begun to acknowledge this transformative potential.³ As Janet Halley observes: “a gay-friendly analysis has to welcome the Court’s [Oncale] 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.”⁴

² Instead of this perhaps accurate but awkward locution, I will from here on simply speak of “lesbians and gay men.” For further explanation of my use of terminology, which is in part indebted to Janet Halley, see Marc S. Spindelman, Reorienting Bowers v. Hardwick, 79 N.C. L. Rev. 359, 368 n.15 (2001) [hereinafter Spindelman, Reorienting Hardwick].

³ See L. Camille Hébert, Sexual Harassment As Discrimination “Because of . . . Sex”: Have We Come Full Circle?, 27 Ohio N.U. L. Rev. 439, 459 (2001) (“[A]t least some courts [after Oncale] have suggested that it might be possible for even an individual who is gay or lesbian, or who is perceived to be gay or lesbian, to make out a claim of harassment on the basis of sex.”); *id.* at 459-60 & nn.89-93 (collecting sources); see also, e.g., Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1211 (9th Cir. 2001) (Nelson, J., dissenting) (“While gay-baiting insults and teasing are not actionable under Title VII, a line is crossed when the abuse is physical and sexual.”). Judge Nelson added:

Rene has alleged that his attackers shoved their fingers into his anus and grabbed at his genitals. If his attackers were women or if they were gay men—or if Rene were a lesbian attacked by straight men—there is no question that the plaintiff’s openly gay status would not be a complete defense to his Title VII claim. Nor would sexual orientation provide a defense for a gay male who harasses a female employee. That Rene’s attackers were ostensibly heterosexual men is no basis for a different outcome—the attack was homosexual in nature, and his case involves allegations of sexual abuse that female employees did not have to endure. Rene’s attackers may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming their own heterosexuality, or any combination of a myriad of factors, the determination of which falls far beyond the competence of any court. The effect was to humiliate Rene as a man. Enforcing Title VII in the mixed-gender context does not involve determining which pleasure center in the attackers’ brains was stimulated by the attacks, nor should it in this case.

Id. at 1211-12. Judge Nelson’s bottom line was vindicated in a recent *en banc* panel of the Ninth Circuit, see Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (*en banc*), though the judges in the majority did not settle on a single legal theory to justify it.

⁴ Janet Halley, Sexuality Harassment, in Directions in Sexual Harassment Law 183 (Catharine A. MacKinnon & Reva Siegel eds., 2003) [hereinafter Halley, Sexuality Harassment]. A substantially revised version of Sexuality Harassment can be found as Janet Halley, Sexuality Harassment, in Left Legalism/Left Critique 80 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Halley, Sexuality Harassment II].

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 are no warrant for judges or juries to police same-sex sexual interactions in anti-gay 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 the rules of sexual harassment law, Oncale has the potential to help straight and gay victims of same-sex sexual harassment in the workplace, in schools, in public housing, even in the streets. Nor is that all. As a case addressing the structures of sex inequality, Oncale offers victims of same-sex rape,⁵ sexual assault, domestic violence,⁶ stalking,⁷ and

⁵ See generally, e.g., Richie J. McMullen, Male Rape: Breaking the Silence on the Last Taboo (1990); Michael Scarce, Male on Male Rape: The Hidden Toll of Stigma and Shame (1997); Elizabeth J. Kramer, When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape, 73 N.Y.U. L. Rev. 293 (1998).

⁶ The literature on male same-sex domestic violence is small. See, e.g., Patrick Letellier, Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence, 9 Violence & Victims 85 (1994). Discussing Letellier's work, the authors of one case book in feminist jurisprudence explain:

According to Letellier, based upon his own personal experience and clinical experience in the San Francisco District Attorney's Domestic Violence Project, gay and bisexual men are unable to see themselves as victims, in part because this role is inconsistent with a male social role, in part because they are more likely to fight back, and in part because of their own internalization of our society's widespread homophobia and resulting belief that they are somehow being rightfully punished. . . . As a result, male battery victims are unlikely to seek help; and even if they do, there are virtually no resources (no shelters, few organizations) available to assist them.

Mary Becker et al., Feminist Jurisprudence: Taking Women Seriously: Cases and Materials 396 (2d ed. 2001). Perhaps best known in this tiny universe is David Island & Patrick Letellier, Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence (1991), which describes itself as the "first book on gay men's domestic violence." *Id.* at 1. In contrast to this still largely under-theorized literature on male same-sex domestic violence, is a relatively larger, and more intellectually sophisticated, corpus of work on domestic violence in the lesbian women's community. For examples just in the legal academic literature, see Mary Eaton, Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence, in The Public Nature of Private Violence: The Discovery of Domestic Abuse 195 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence, 64 Geo. Wash. L. Rev. 582 (1996); Ruthann Robson, Lavender Bruises: Intra-Lesbian Violence, Law, and Lesbian Legal Theory, 20 Golden Gate U. L. Rev. 567 (1990). See also, e.g., Leslie K. Burke & Diane R. Follingstad, Violence in Lesbian and Gay Relationships: Theory, Prevalence, and Correctional Factors, 19 Clinical Psychol. Rev. 487 (1999); Carolyn M. West, Leaving a Second Closet: Outing Partner Violence in Same-Sex Couples, in Partner Violence: A Comprehensive Review of 20 Years of Research 163 (Jana L. Jasinski et al. eds., 1998); Violence in Lesbian and Gay Domestic

the sex industry,⁸ a new vehicle through which to lay claim to—and to name⁹—what it is that 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.¹⁰

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

I. QUEER CHOICES

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

Partnerships (Claire M. Renzetti & Charles Harvey Miley eds., 1996) (all cited in Catharine A. MacKinnon, Sex Equality 1065 n.15 (2001)).

⁷ Cf. Orit Kamir, Every Breath You Take: Stalking Narratives and the Law (2001).

⁸ Theoretical work on the relationship between male supremacy and (gay) male sex work is virtually non-existent, at least within the published legal academic literature. Important initial efforts in this direction can be found in Christopher N. Kendall, Gay Male Pornography: An Issue of Sex Discrimination 160-76 (discussing circumstances of sex workers involved in the gay male pornography industry) (unpublished manuscript on file with author); McMullen, *supra* note 5, at 41-48 (highlighting the vulnerability of “rent boys” to rape). In recent years, popular presses have published a series of books about (gay) male sex work, regularly written as first-hand liberationist narratives from a decidedly “pro-sex” perspective. See, e.g., Aaron Lawrence, Suburban Hustler: Stories of a Hi-Tech Callboy (1999); Scott O'Hara, Autopornography: A Memoir of Life in the Lust Lane (1997). For more serious and less self-promoting accounts of the, at most, episodically glamorous lives, histories, and experiences of same-sex sex workers, see, for instance, Charles Isherwood, Wonder Bread and Ecstasy: The Life and Death of Joey Stefano (1996), and Donald J. West, Male Prostitution (1993).

⁹ See Andrea Dworkin, Pornography: Men Possessing Women 17-18 (1989) (dealing with the importance of the practice of “naming,” and its relationship to the structures and distribution of sexual power).

¹⁰ Eric Fassin has lately proposed that “the sexual series inaugurated by the Thomas Affairs seems by the time of the Lewinsky Affair to have exhausted its pedagogical possibilities.” Eric Fassin, Sexual Events: From Clarence Thomas to Monica Lewinsky, 13 *Differences* 127, 152 (2002). The pedagogical possibilities of Oncale do not appear as such on the analytic grid of sexual events that Fassin offers. This may make *some* sense if one believes, as Fassin apparently does, that “[s]exual politics . . . reached its limits in the Lewinsky Affair.” *Id.* at 153. What follows should make plain that I do not.

itself with male supremacy's critics.¹¹ But with few notable exceptions¹² it

¹¹ See, e.g., William B. Turner, A Genealogy of Queer Theory 10 (2000) ("Agreeing with the French philosopher Michel Foucault, queer theorists would generally argue that power and knowledge, far from being distinct, mutually antagonistic realms in modern western culture, in fact operate very much in tandem."); Michael Warner, Introduction, in Fear of a Queer Planet: Queer Politics and Social Theory vii, xiv (Michael Warner ed., 1993) (observing that "[o]ne of [Eve Kosofsky] Sedgwick's best-known theses is that 'homosocial' forms of domination are constituted in part by the repudiation of erotic bonds among men," and that "[a] more recent addition to this view is her argument that the strategic separation of mutually implied knowledges—secret knowledge, superior insight, disavowal, science, coded knowledge, open secrets, amnesia, the unsayable—is a medium of domination not reducible to other forms of domination, and one that finds its paradigmatic case in the homosexual and the closet") [hereinafter Warner, Introduction]; Steven Seidman, Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes, in Fear of a Queer Planet: Queer Politics and Social Theory, supra, at 105, 132 ("Indeed, I detect a disposition in the deconstruction of identity to slide into viewing identity itself as the fulcrum of domination and its subversion as the center of an anti-identity politic. For example, although Judith Butler often elaborates complex understandings of identity as both enabling and self-limiting, she, at times, conflates identity as a disciplining force with domination and a politics of subversion with a politics against identity."); Warner, Introduction, supra, at xxiii-xxiv ("Even the concept of oppression has to be reevaluated here, because in queer politics the oppression of a class of persons is only sometimes distinguishable from the repression of sexuality, and that in turn is a concept that has become difficult to contain since Foucault."); Seidman, supra, at 130 ("The social productivity of identity is purchased at the price of a logic of hierarchy, normalization, and exclusion.").

¹² The work of Francisco Valdes, which links up "queer theory," "queer legal theory," and anti-subordination theory and politics, is one example. See, e.g., Francisco Valdes, Outsider Scholars, Critical Race Theory, and "Outcrit" Perspectivity: Postsubordination Vision as Jurisprudential Method, in Crossroads, Directions, and a New Critical Race Theory 399 (Francisco Valdes et al. eds., 2002); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 3 (1995).

I do recognize that "queer theory," including "queer legal theory," is diverse. See, e.g., David M. Halperin, Saint Foucault: Towards a Gay Hagiography 62 (1995) ("'Queer,' in any case, does not designate a class of already objectified pathologies or perversions; rather, it describes a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be delineated in advance."); Annamarie Jagose, Queer Theory 1 (1996) ("[Q]ueer is very much a category in the process of formation . . . it is not simply that queer has yet to solidify and take on a more consistent profile, but rather that its definitional indeterminacy, its elasticity, is one of its constituent characteristics."); Max H. Kirsch, Queer Theory and Social Change 35 (2000) (talking about "indeterminacy [as] a basic tenet of those things queer"); Turner, supra note 11, at 9 ("If queer theorists have anything in common, it might be that they consistently celebrate the unformed, inchoate, provisional character of the field, and that they look with suspicion on the possibility that, after a tumultuous, boisterous, and unfocused adolescence, queer theory will settle into the adulthood of traditional disciplinarity."); Seidman, supra note 11, at 133 ("Queers are not united by any unitary identity but only by their opposition to disciplining, normalizing social forces."). Nevertheless, I set out here only to discuss and criticize one particular set of theoretical impulses, nonetheless prominent in my view, within that work identified or identifiable as "queer." Questions applicable to this strand of queer theory that I leave for another day include: if queer theory is defined, at least in part, by its "antinomianism," see, e.g., Warner, Introduction, supra note 11, at xxvii ("[Q]ueers . . . can be understood as protesting not just the normal behavior of the social but the *idea* of normal behavior.")

hasn't. Queer theory, as I will begin to show in the pages that follow, 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.

Against the normalization of sexuality, Michel Foucault famously proposed that "[t]he rallying point for counterattack against the deployment of sexuality ought not to be sex-desire but bodies and pleasures."¹³ Less cryptically, while discussing the decriminalization of rape as a crime of sexuality, he offered: "One can always produce the theoretical discourse that amounts to saying: in any case, sexuality can in no circumstances be

(emphasis omitted); Halley, *Sexuality Harassment*, *supra* note 4, at 197 (discussing queer "antinomianism"), can it have a constructive theory of "law"? Cf. Warner, *Introduction*, *supra* note 11, at xxvii ("Following Hannah Arendt, we might even say that queer politics oppose society itself."). Assuming it could, would a queer, antinomian theory of law rely on some ideal of legal "neutrality" or "objectivity"? Consistent with its antinomianism, could it? Also, does queer theory's oft-professed "anti-identitarianism," (*see, e.g.*, Halley, *Sexuality Harassment*, *supra* note 4, at 194 (discussing queer theory as "anti-identitarian"); *but see, e.g.*, Seidman, *supra* note 11, at 133-34 (noting "a turn in poststructuralist gay theory beyond a critique of identity politics to a politics of identity," which "seems driven by its centering on a politics of identity subversion . . . [whose] limit, if you will, is the continuing practical efficacy of the resisting gay subject"); *id.* at 134 ("[T]o the extent that some post-structuralists reduce the regulating and disciplining force of identity constructions to modes of domination and hierarchy, I would object. This rendering edges toward a politics of identity, to a sort of negative dialectics. As disciplining forces, identities are not only self-limiting and productive of hierarchies but are enabling or productive of social collectivities, moral bonds, and political agency.")), effectively function as a denial that "non-identity" itself can and does operate as a form of identity? *See, e.g.*, Jacques Derrida, *Before the Law*, in *Acts of Literature* 183, 211-12 (Derek Attridge ed., 1992) ("Neither identity nor non-identity is natural, but rather the effect of a juridical performative."). *But see, e.g.*, Judith Butler, *Sexual Inversions*, in *Feminist Interpretations of Michel Foucault* 59, 68 (Susan J. Hekman ed., 1996) ("And though Foucault and Irigaray would agree that sex is a necessary precondition for human intelligibility, Foucault appears to think that any sanctioned sex will do, whereas Irigaray would argue that the only sanctioned sex is the masculine one [*see* Luce Irigaray, *This Sex Which Is Not One* (Catherine Porter & Carolyn Burke trans., 1985)]; that is, the masculine that is reworked as a 'one,' a neuter, a universal. If the coherent subject is always sexed as masculine, then it is constructed through the abjection and erasure of the feminine. For Irigaray, masculine and feminine sexes are not similarly constructed as sexes or as principles of intelligible identity; in fact, she argues that the masculine sex is constructed as the only 'one,' and that it figures the feminine other as a reflection only of itself; within that model, then, both masculine and feminine reduce to the masculine, and the feminine, left outside this male autoerotic economy, is not even designatable within its terms or is, rather, designatable as a radically disfigured masculine projection, which is yet a different kind of erasure.") (footnote omitted). Cf. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *Yale L.J.* 2009 (1995).

¹³ Michel Foucault, *The History of Sexuality, Vol. I: An Introduction* 157 (Robert Hurley trans., 1990). *See also* Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *The Politics of Law: A Progressive Critique* 115, 140-41 n.2 (David Kairys ed., 3d ed. 1998) ("Though disparate and internally disputatious, queer theory is probably all alike in being unimaginable without Michel Foucault's *The History of Sexuality, vol. I.*") [hereinafter Halley, *Gay Rights and Identity Imitation*].

the object of punishment.”¹⁴ In step with now standard interpretations of these thoughts,¹⁵ queer theory has embraced a sexual politics that

¹⁴ Michel Foucault, Confinement, Psychiatry, Prison, in Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984 178, 200 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988). For an important feminist reply, see Monique Plaza, Our Costs and Their Benefits, in Sex in Question: French Materialist Feminism 178 (Diana Leonard & Lisa Adkins eds., 1996).

¹⁵ See, e.g., Halley, Sexuality Harassment, *supra* note 4, at 198 (sympathetically discussing the notion that rape should not be treated as a sexual crime); see also, e.g., Ladelle McWhorter, Bodies and Pleasures: Foucault and the Politics of Sexual Normalization 100-227 (offering a fairly conventional reading of Foucault’s idea that “the rallying point for counterattack against the deployment of sexuality ought not to be sex-desire but bodies and pleasures,” *id.* at 107); Ann J. Cahill, Rethinking Rape 2 (2001) (addressing “Michel Foucault’s suggestion that rape be considered legally merely an act of assault, with no significance given to the sexual nature of the crime”). As an aside, Cahill’s reading of Foucault is not, in my view, nor I believe, in hers, necessary for the success of her scholarly efforts. See also Carlos A. Ball, Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory, 26 *Law & Soc. Inquiry* 271, 276 (2001) (“For Foucault, the key to a transformative process in the area of sexuality is the rejection of desire and the affirmance of bodies and pleasures. . . . The idea that sex should be governed by desire is so ingrained in our consciousness that it is at first glance difficult to imagine sex without desire. But that is precisely what Foucault asks us to entertain: to take sex out of the sphere of desire and place it in the sphere of pleasure.”).

The now standard interpretations of Foucault’s remarks are by no means required by Foucault’s thoughts themselves. Didier Eribon, for instance, has lately offered a reading of the *dictum* from the first volume of The History of Sexuality, see text accompanying note 13, that contrasts—perhaps, we can say, quite starkly—with its standard interpretation by queer theorists. See Didier Eribon, Michel Foucault’s Histories of Sexuality, 7 *GLQ: J. Lesbian & Gay Stud.* 31, 67-73 (2001). Compare *id.* at 73 (“Against Hocquenghem, against the discourse of sexual liberation, Foucault affirms that it is not so much in the ‘sexualization’ of society, of cruising, of public sex—not in the multiplication of partners, and so forth—that we should look for the mechanism that destabilizes the established order. Rather, we should look to the invention of new modes of life, to new modes of relations between individuals.”), with, e.g., Halperin, *supra* note 12, at 93 (“The distinction [between desire and pleasure implicit in Foucault’s comments on sadomasochism] may help to explain the specifically political significance Foucault attached to the invention of the new pleasures produced by fist-fucking or recreational drugs as well as to the invention of new sexual environments, such as saunas, bathhouses, and sex clubs, in which novel varieties of sexual pleasure could be experienced.”), and *id.* at 97 (“Fist-fucking and sadomasochism appear in this light as utopian political practices, insofar as they disrupt normative sexual identities and thereby generate—of their own accord, and despite being indulged in *not* for the sake of politics but purely for the sake of pleasure—a means of resistance to the discipline of sexuality, a form of counterdiscipline—in short, a technique of ascesis.”), and Leo Bersani, Homos 80-81 (1995) (“For the moment, I want to return to those two happy men and, without wishing to explain or interpret their happiness, at least conjecture about how they spent the night. Given what Foucault says about S/M, it is not at all improbable that a few moments before Foucault’s observer passed them, they checked out the much-lamented Slot, an S/M bathhouse in San Francisco, now closed, where one of the two—and roles may have been switched during the night—whipped, fistfucked, verbally abused, and singed the nipples of the other. Far from making such a suggestion in order to question the unreadability of their post-torture tenderness, I want instead to propose—as I think Foucault meant to—that the intolerable promise of ‘unforeseen kinds of relationships’ which many

sometimes seemingly above all eschews sexual regulation, particularly when it issues from the state,¹⁶ and pursues instead the proliferation of bodily—including “sexual”—pleasures.¹⁷

people see in gay lifestyles cannot be dissociated from an authentically new organization of the body’s pleasures; and to suggest that such a program may necessarily involve some radical, perhaps even dangerous, experimentation with modes of what used to be called making love.”).

¹⁶ See Halley, Sexuality Harassment, *supra* note 4, at 195-98 (discussing queer theory’s opposition to sexual regulation, especially when it comes from the state); Janet Halley, The Construction of Heterosexuality, in Fear of a Queer Planet: Queer Politics and Social Theory, *supra* note 11, at 82, 98-99 (“Once we shift our attention from the dynamics that constitute the class of homosexuals to those that form and police the class of heterosexuals, a problem unanticipated in purely textualist critical theory emerges: the use of incoherent and multiple identities not to deconstruct a monolithic cultural binarism, but to enforce one. . . . The assumption that relations of dominance and subordination are purely discursive must give way to an analysis of the ways in which concrete exertions of power intervene to determine whether consolidations or dispersals of identity will, in a particular time and place, be liberating or oppressive. . . . The next generation of constitutional arguments for gay, lesbian, and bisexual rights must accommodate the complexities suggested by these formulations. These arguments must be supple enough to explain why official imposition of fixed identities *and* the official administration of incoherent and labile ones undermine civic values; they must be capacious enough to claim constitutional protection not only for assertions of consolidated and even essentialist gay, lesbian, bisexual, and queer identities, but also for the choice to be queer.”).

¹⁷ See, e.g., Michael Warner, The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life 88-89 (1999) (noting that “[q]ueer thought both before and after Stonewall rested on . . . principles” that include: “especially resist[ing] the notion that the state should be allowed to accord legitimacy to some kinds of consensual sex but not others, or to confer respectability on some people’s sexuality but not others”; “insist[ing] that much of what was taken to be morality, respectability, or decorum was, in practice, a way of regulating sexual pleasures and relations”; and teaching “that any self-esteem worth having must not be purchased by a disavowal of sex; it must include esteem for one’s sexual relations and pleasures, no matter how despised by others”) [hereinafter Warner, The Trouble with Normal]. Warner’s historicization of queer theory—and Halley’s, too (see Halley, Sexuality Harassment, *supra* note 4, at 196-97 (linking queer theory to “sex-affirmative” feminism and second wave feminism) (citing Pamela Haag, Putting Your Body on the Line: The Question of Violence, Victims, and the Legacy of Second-Wave Feminism, 23 *Differences* 35 (Summer 1996)))—may be understood in part as a reaction to the de-historicization of early queer theory texts. Linda Garber, seeking to reconcile queer theory with what she understands—interestingly—to be its lesbian feminist roots, provides thoughts on these problems. See generally Linda Garber, Identity Poetics: Race, Class, and the Lesbian Feminist Roots of Queer Theory (2001). But as Halley’s Sexuality Harassment shows, the search for, and production of, a domestic (feminist) intellectual lineage to which queer theory can lay claim need not yield any reconciliation between queer theory and lesbian feminism, including radical feminism. This much those of us in the legal academy can appreciate in general terms, based on our experiences with the competing appeals to the foundational myth of Legal Realism made by “the crits” on the left and the “law and economics” adherents on the right. See Laura Kalman, The Strange Career of Legal Liberalism 77-85 (1998) (analyzing the claims by both critical legal studies and law-and-economics scholars to the Legal Realist tradition).

But what does queer theory mean by “sexual regulation”? How does that meaning differ from the restrictions and limitations on sexual abuse, hence on sexuality, that feminists have long opposed?¹⁸ 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 apparently find pleasurable?

A close reading of Janet Halley’s Sexuality Harassment, which ventures a queer critique of sexual harassment law, offers some answers to these and other questions.¹⁹ Having examined Halley’s text for what it can

Queer theorists often treat state intervention into “the sexual” as if it were totalitarian, in tendency or actual effect. Linda Martin Alcoff provides relevant insights into the thinking that may animate the reasons why, where she observes that:

The members of the panel [Michel Foucault, Guy Hocquenghem, and Jean Danet] were careful to distinguish their views on this topic [of pedophilia] from the issue of (adult) rape, although they bemoan the fact that feminists’ agitation around rape has reinforced the power of the state over sexuality. Foucault expressed the concern that “sexuality will become a threat in all social relations”; that is, that sex will always be seen as a potential danger, which will then authorize the state to constitute “dangerous individuals” and “vulnerable populations” and to enforce massive policies of oversight and intervention. The result will be, in Foucault’s words, “a new regime for the supervision of sexuality”, or a new totalitarianism. In order to avert this result, sexual practices, in whatever form they take, should not be within the punitive jurisdiction of the state. As Hocquenghem warned, “The constitution of this type of criminal [the ‘pedophile’], the constitution of this individual enough to do a thing that hitherto has always been done without anyone thinking it right to stick his nose into it, is an extremely grave step from a political point of view.”

Linda Martin Alcoff, Dangerous Pleasures: Foucault and the Politics of Pedophilia, in Feminist Interpretations of Michel Foucault, *supra* note 12, at 99, 104. See also, e.g., Alcoff, *supra*, at 102 (“Foucault is very much troubled by the view that sexuality is ‘the business of the law.’”) (citation omitted).

¹⁸ Cf. Alcoff, *supra* note 17, at 101 (“What are the implications of [Foucault’s] declaration that ‘sexuality’ does not exist for an account of sexual violence?”)

¹⁹ Halley, Sexuality Harassment, *supra* note 4, at 193-98. For related, and arguably “queer,” discussions or critiques of sexual harassment rules, sometimes both, see, for example, Judith Butler, Gender Trouble: Feminism and the Subversion of Identity xii-xiii (1999) (“Katherine Franke . . . makes innovative use of both feminist and queer perspectives to note that by assuming the primacy of gender hierarchy to the production of gender, [Catharine] MacKinnon also accepts a presumptively heterosexual model for thinking about sexuality. Franke offers an alternative model of gender discrimination to MacKinnon’s, effectively arguing that sexual harassment is the paradigmatic allegory for the production of gender. Not all discrimination can be understood as harassment. The act of harassment may be one in which a person is ‘made’ into a certain gender. But there are other ways of enforcing gender, as well. Thus, for Franke, it is important to make a provisional distinction between gender and sexual discrimination. Gay people, for instance, may be discriminated

teach about queer commitments *against* sexual regulation and *for* sexual pleasures, I conclude by considering its position on sexual violation, highlighting some of its more conspicuous dangers.

against in positions of employment because they fail to 'appear' in accordance with accepted gender norms. And the sexual harassment of gay people may well take place not in the service of shoring up gender hierarchy, but in promoting gender normativity.") [hereinafter Gender Trouble]; Jane Gallop, Feminist Accused of Sexual Harassment (1997); Jane Gallop, Resisting Reasonableness, 25 Critical Inquiry 599, 608 (1999) (describing her position, among other things, as "queer" and "perverse"); Ann Pellegrini, Pedagogy's Turn: Observations on Students, Teachers, and Transference-Love, 25 Critical Inquiry 617 (1999) [hereinafter Pellegrini, Pedagogy's Turn]; see *id.* at 617 & n.1 ("The territory of sexual harassment is getting more crowded. Increasingly, universities have come to amend their sexual harassment policies to include so-called third party allegations of sexual harassment. In essence, as Janet E. Halley has pointed out, the new turn in sexual harassment (or, in her formulation, sexuality harassment) policies is 'to allow someone to complain about someone else's sexual relationships.'") (quoting Janet E. Halley, Sexuality Harassment, paper presented at the conference on "Queer Publics, Queer Privates," New York University, New York, May 1, 1998); Pellegrini, Pedagogy's Turn, *supra*, at 617 ("With Halley, I argue that the ongoing evolution of university guidelines and policies on sexual harassment does not so much reflect their increasing refinement as their steadily increasing reach."); *id.* at 622 ("This disavowal is of particular consequence for the lesbian and gay studies and queer theory classrooms. . . . Instead of acceding to this demand [that any teacher, queer or otherwise, disarticulate pedagogy and desire] and its diminishing conception of pedagogy, instead of seeking more fully to hold the line against unruly desire, practitioners of lesbian and gay studies and queer theory might rather take advantage of queer theory's unique vantage points to theorize and work through these vexed crossings of identification and desire, eros and knowledge."); *id.* at 622 n.10 (citing Halley approvingly). For a smart and sharp reply to Gallop's Resisting Reasonableness and Pellegrini's Pedagogy's Turn, see Tania Modleski, Fight the Power: A Response to Jane Gallop, James Kincaid, and Ann Pellegrini, 26 Critical Inquiry 591 (2000). For Pellegrini's reply, which again repeatedly draws on Halley's work, see Ann Pellegrini, Interested Third Parties: A Response to Tania Modleski, 26 Critical Inquiry 619 (2000) [hereinafter Pellegrini, Interested Third Parties]. For a discussion of sexual harassment law that is both critical of its focus on sexuality and seemingly receptive to Halley's view of sexual harassment law as, at least potentially, "sexuality harassment," see Vicki Schultz, Talking About Harassment, 9 J.L. & Pub. Pol'y 417 (2001); *id.* at 430-31 ("This problem of the normalization of some kinds of sexuality at the expense of others raises the prospect that conventional sexual models of harassment may tread too heavily on free expression—especially the sexual expression of unpopular groups. Of course, this is a complex subject about which people of good will can disagree. But it is not only conservatives who should be worrying about this issue; I believe feminists and liberals should also be doing so. We should make sure that harassment law does not give employers an incentive—or excuse—to fire ordinary workers for engaging in benign sexual expression in the name of protecting women.") (footnotes omitted); see also Vicki Schultz, Life's Work, 100 Colum. L. Rev. 1881, 1959 (2000) (citing and describing Sexuality Harassment as "criticizing conventional sexual harassment theories from a queer theory perspective"). Cf. Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 268 n.321 (2001) (citing Halley, Sexuality Harassment, for the proposition that "[p]ower [in Foucault's view] works only marginally through repression and prohibition; it exerts itself most strongly through the tools of apparent liberation"); Robyn Wiegman, The Possibility of Women's Studies, available at <http://info-center.ccit.arizona.edu/~ws/conference/wiegman-paper.html> (last visited Feb. 19, 2004).

II. OPPOSING SEXUAL REGULATION

The queer critique of sexual harassment law that Halley offers begins with the Supreme Court's decision in Oncale v. Sundowner Offshore Services, Inc.²⁰ By "complacently dedicat[ing] the reach of hostile environment liability in same-sex cases to the 'common sense' of judges and juries," we are warned, Oncale has "opened Title VII to . . . a homophobic project"²¹ of "antigay regulation."²² Oncale, in the queer imagination, thus threatens us with a very scary prospect. Now that "[t]he Supreme Court has held that same-sex sex harassment may be sex discrimination within the ambit of Title VII,"²³ 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."²⁴

Queer theory is not only concerned that sexual harassment law may regulate sexual acts that cause sexual harm, though it is concerned about that. It is also concerned with sexual harassment law's regulation of sexual desire. Understood as different aspects of queer opposition to sexual regulation, what might appear to be 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,"²⁵ serves as one way, more or less, to recapitulate the complaint that, "Title VII operat[es] to regulate *sexual interactions* in the workplace. . . ."²⁶

²⁰ 523 U.S. 75 (1998). As Ann Pellegrini observes: "In her forthcoming essay, [Janet] Halley shows how this heterosexualizing logic underwrote the Supreme Court's extension of sex discrimination doctrine to cover incidents of same-sex sexual harassment. The relevant case here is Oncale v. Sundowner Offshore Services." Pellegrini, Pedagogy's Turn, *supra* note 19, at 622 n.10. For a more precise sense of what Pellegrini means when referring to "the heterosexualized and heterosexualizing logic" of sexual harassment law and its feminist, theoretical underpinnings, *id.* at 619, see Pellegrini, Interested Third Parties, *supra* note 19, at 621-22. Pellegrini appears to echo Halley's concerns—concerns I take up in greater detail *infra*.

²¹ Halley, Sexuality Harassment, *supra* note 4, at 193.

²² *Id.*

²³ *Id.* at 182.

²⁴ *Id.* at 183; Halley, Sexuality Harassment II, *supra* note 4, at 82 ("Sexual harassment law *has become*, I argue, sexuality harassment. . . .") (emphasis added).

²⁵ Halley, Sexuality Harassment, *supra* note 4, at 197 (emphasis added).

²⁶ *Id.* at 193 (emphasis added). Radical feminists, it is true, do have a *critique* of sexual desire under pervasive conditions of male dominance. E.g., Sandra Lee Bartky, Femininity and Domination: Studies in the Phenomenology of Oppression 51 (1992) ("A thorough overhaul of desire is clearly on the feminist agenda."). But the existence of that critique should not be mistaken for a radical feminist agenda specifically to regulate desire. It

Once “sexual regulation” is defined in these expansive and doctrinally inexact terms—terms that, by and large, do not treat sexual harassment itself as the practice of sexual regulation that it is²⁷—queer theory sees the occasion for such regulation woven throughout the fabric of sexual harassment law.²⁸ Like others before,²⁹ queer theory contends that

is the male supremacy that conditions most existing forms of desire, as well as the effects of that desire, that have and do concern radical feminists. *See, e.g.*, Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, in The Signs Reader: Women, Gender & Scholarship 227 (Elizabeth Abel & Emily K. Abel eds., 1983). Queer theory, which often seems to lack both a critique of male supremacy and how it structures, hence regulates, sexual desire, *see, e.g.*, Warner, The Trouble with Normal, *supra* note 17, at 7 (“So sexual autonomy requires more than freedom of choice, tolerance, and the liberalization of sex laws. It requires access to pleasures and possibilities, since people commonly do not know their desires until they find them. Having an ethics of sex, therefore, does not mean having a theory about what people’s desires are or should be.”), may miss this point. *Cf.* Donald E. Hall, Is there a Queer Ethics?, 38 *Victorian Poetry* 467, 471-73 (2000) (offering a commentary productively critical of queer theory for its apparent lack of any meaningful ethics).

²⁷ *See generally, e.g.*, Catharine A. MacKinnon, Sexual Harassment of Working Women (1979); *see also, e.g.*, Katherine Franke, What’s Wrong With Sexual Harassment?, 49 *Stan. L. Rev.* 691, 767 (1997). In this sense, one might trace the genealogy of Halley’s analysis back not only to the sources that helped give rise to queer theory, but also to early sexual harassment cases like Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977) (no liability for sex discrimination where sexual conduct of a supervisor based on a “personal urge”), and Tomkins v. Public Service Electric & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977) (no sex equality remedy for “what amounts to a physical attack motivated by sexual desire”). I’ll presently defer discussion of various ways one could say that these cases did, and if they remained good law, would, serve to normalize, even regulate (heterosexual) desire as a matter of law, and what that would mean for queer theory.

²⁸ Halley, Sexuality Harassment, *supra* note 4, at 193 (“Title VII operating to regulate sexual interactions in the workplace is *extremely porous to existing antigay attitudes*, and can become another form of antigay regulation.”) (emphasis added).

²⁹ According to Richard Storrow:

Scholars, particularly those concerned with gay and lesbian rights, contradict the views of gay rights activists and claim that same-sex harassment claims operate to the detriment of gays and lesbians in the workplace. These commentators believe that courts will use these claims to exacerbate the already regrettable state of gay and lesbian civil rights by perpetuating notions of “normal” sexuality. The feared result is that gays and lesbians will continue to suffer disproportionate censure of their sexual expression and, in the absence of legislation prohibiting discrimination on the basis of sexual orientation, will encounter escalating discrimination in the workplace.

Richard F. Storrow, Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct, 47 *Am. U. L. Rev.* 677, 679 (1998) (footnotes omitted). His answer is that:

[C]ommentators fearful of the negative effects of litigating same-sex claims argue from empirically unsupportable [I might say,

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.³⁰

Halley adds to this the newish argument that sexual harassment lawsuits themselves (and not just their elements) may become a legitimated vehicle for homophobic expression, a tool for “sexuality harassment,”³¹ especially after Oncale.³² 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.³³

It would, of course, be worrisome if homophobic plaintiffs, wrongly claiming sexual harassment that never occurred, were permitted to sue. But Halley gives us no reason to think they have been or will be.³⁴ She

“unsupported”) premises, ultimately overstating the dangers that the existence of same-sex harassment claims poses to gay and lesbian rights and failing to note the more serious problems of a legal system devoid of such claims.

Id. at 680 (footnote omitted).

³⁰ See *supra* note 29. See also, e.g., Halley, Sexuality Harassment, *supra* note 4, at 195 (Halley substitutes the expression “abusive working environment” for the more standard locution “hostile work environment”); *id.* at 195 (unwelcome); *id.* at 192, 195 (severe); *id.* at 197 (unreasonable). For an earlier exploration of some of the themes found in Sexuality Harassment, see, for example, Mary Coombs, Title VII and Homosexual Harassment After Oncale: Was It a Victory?, 6 Duke J. Gender L. & Pol’y 113 (1999).

³¹ One can see in this argument reflections of reports by those who have been sexually harassed, as well as those who have suffered from other forms of sexual abuse. As they have explained, the legal treatment of their sexual injuries, and trials concerning the legal status of those injuries, function as a kind of unwanted public sex. See, e.g., Lee Madigan & Nancy C. Gamble, The Second Rape 7 (1991) (discussing experience of sexual violation at trial). I consider the dangerous and regressive uses to which perpetrators of sexual violence might put queer theory’s “insights” into sexual harassment law in Part IV, *infra*.

³² Halley, Sexuality Harassment, *supra* note 4, at 193.

³³ See, e.g., *id.* at 192, 195-96. As Halley clarifies in the more recent version of her Sexuality Harassment, “On this . . . rereading of the case, we would have to understand Oncale as the aggressor, the other men on the oil rig as the victims, and the lawsuit (not any sexual encounter on the oil rig) as the wrong.” Halley, Sexuality Harassment II, *supra* note 4, at 94. Whether this wrong is “sexual” or not remains somewhat unclear.

³⁴ See Storrow, *supra* note 29, at 680 (noting lack of empirical support for claimed “negative effects of litigating same-sex [harassment] claims”). Halley suggests that part of the problem may be attributed to “a recent change in the Rules of Evidence, sought and hailed by feminists, barring admission of evidence of [a] plaintiff’s sexual history in civil cases involving ‘sexual assault.’” Halley, Sexuality Harassment, *supra* note 4, at 195-96. “[A] lot of sex harassment cases are governed by this new rule [412],” she explains. *Id.* “[The] new rule [412]” concerns Halley, because she believes it “would make it difficult to undermine the credibility of a homosexual-panic complainant.” *Id.* Assuming for argument’s

“predict[s]” that this “alarming class of cases . . . will make it to trial under Oncale,”³⁵ but cites not one example. Indeed, so far as is discernable from Halley’s text, not a single case from the more than twenty years of reported sexual harassment decisions with which Oncale is consistent, and criticized by Halley as consistent,³⁶ has. Not after Oncale either.

To deliver on her prediction, Halley playfully serves up a fantasy reconstruction of the “disturbing”³⁷ facts of Oncale which, she claims,

sake that Halley is right to believe that Rule 412 *could* be improperly used this way, how shall we identify the problem? Is the problem with the text of the Rule, as Halley seems to suggest? Or is it with feminist efforts that led to its enactment, as she also might be understood to mean? Or is it with homophobia, used as a source of interpretation of the Rule? Whatever the answer, the text of Rule 412 does not in any way require courts to give homophobic plaintiffs wrongly claiming sexual harassment that never occurred the benefit of its protections. Indeed, there is authority for finding Rule 412 inapplicable in such circumstances beyond the seemingly transparent one that the Rule’s underlying sex equality principles recommend that it be disabled when used by homosexual panic claimants attempting to deploy it as a sword rather than a shield. *See* Joseph M. McLaughlin et al., Weinstein’s Federal Evidence: Commentary on Rules of Evidence for the United States Courts 412-15-412-18 & nn.16-18 (2d ed. 2001); *id.* at 412-16 (“Other courts hold that prior false allegations of rape by the complainant are admissible under certain circumstances. For example, the admission of evidence of prior sexual activity may be constitutionally required when the evidence is offered to show the victim’s bias or motive to testify falsely.”) (footnote omitted); *see also* United States v. Coumover, 118 F.3d 1279, 1282 (8th Cir. 1997) (dealing with Advisory Committee’s Note that, “evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412”). Perhaps it is worth noting that, after raising these concerns over Rule 412, Halley does not present us with any evidence that the problems she fears have materialized.

There is a good deal to be said—along similar lines—in reply to the concern Halley expresses about a plaintiff-sensitive standard of reasonableness in same-sex sexual injury cases. “What’s next?” Halley asks. Halley, *supra*, at 196. “Are we going to refer these elements in male/male cases to the ‘reasonable (thus presumably the heterosexual) man’? I hope not.” *Id.* For now it will have to be enough to notice that, aside from being oxymoronic, *cf.* Carol Sanger, The Erotics of Torts, 96 Mich. L. Rev. 1852, 1854 n.9 (1998) (“Indeed, it has been suggested that the phrase ‘sexual academic’ is an oxymoron, like ‘jumbo shrimp’ or ‘Greater Cleveland.’”) (citing Regina Barreca, Contraband Appetites, in The Erotics of Instruction 1, 4 (Regina Barreca & Deborah Denenholz Morse eds., 1997)), a “reasonable homophobe” standard of the sort we are presumably asked to imagine, would be in violation of the equality principles that may be thought to animate the articulation of plaintiff-sensitive standards of reasonableness in civil sexual violence cases. *Cf.* Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1224 (1998). But no sooner might one begin to think about the issue Halley raises than one might think to ask: Given the inevitable normativity of standards of reasonableness and queer theory’s “certain antinomianism,” Halley, *supra*, at 197, is there *any* standard of legal reasonableness queer theory would like? Should there be?

³⁵ Halley, Sexuality Harassment, *supra* note 4, at 192.

³⁶ *See, e.g., id.* at 182-83 (treating Oncale as consistent with sexual harassment doctrine and theory).

³⁷ *Id.* at 189. It is interesting that Halley places such heavy weight on the “facts” of Oncale to do this work. On one level, in doing so, she might seem to be treating Oncale’s claim in just the way she criticizes radical feminist method for doing: as “flawlessly

“none of the facts published in the various court decisions in the case preclude.”³⁸ 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 co-workers, 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.³⁹

reveal[ing] the injury,” *id.* at 188, that a sexual harassment law regime, fueled by homophobia, can produce. Having noticed the formal similarities between the move Halley makes and the radical feminist move Halley criticizes, I myself would distinguish between them in terms of substance or effects, specifically, as each relates to sexual inequality.

³⁸ *Id.* at 192. Cf. Janet E. Halley, Heresy, Orthodoxy, and the Politics of Religious Discourse: The Case of the English Family of Love, 15 *Representations* 98, 104 (1986) (“I’ve been unable to discover a Familist text that rules out one of these readings.”) [hereinafter Halley, Heresy and Orthodoxy]. The problem is more basic than that, obviously, “none of the facts published in the various court decisions in” Oncale actually calls for her reconstruction of it. There is reason to believe that the “facts” of the case, such as they were at the stage of the legal proceedings at which they were produced, do indeed “preclude” Halley’s rereading of Oncale. Those facts included evidence—one might say, ample evidence—that the sexual conduct to which Joseph Oncale was subjected, was unwanted. Halley’s text deflects attention from this by not mentioning those facts and by insisting that her rereading of Oncale should not be understood as “saying anything about the human being Joseph Oncale, or making any truth claims about what happened on the oil rig.” Halley, Sexuality Harassment, *supra* note 4, at 192; see also Halley, Sexuality Harassment II, *supra* note 4, at 93-94 (“I am not saying anything about the human being Joseph Oncale, or making any truth claims about what actually happened on the oil rig.”). With this caveat in place, Halley’s text casually “put[s] [Joseph Oncale’s] allegation of unwantedness aside, as a mere allegation,” Halley, Sexuality Harassment, *supra* note 4, at 192 (emphasis added), and then proceeds to “connect the remaining dots.” *Id.* This heuristic does not “produce[] the equivalent of a court’s knowledge of a same-sex harassment case of this type [either] up to [or] beyond summary judgment.” *Id.* (emphasis added). Lacking any allegation of “unwantedness,” as this reading does, one has not—and cannot—make out a sexual harassment claim, much less survive a summary judgment motion. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”) (citing 29 CFR § 1604.11(a) (1985)). In Oncale—and for Joseph Oncale, from aught that appears in the record—the unwantedness of the sexual conduct he alleged was a key element of his experience of sexual violation, as well as his cause of action for sexual harassment. Moreover, erasing Oncale’s “allegation” of unwantedness—“put[ting it] aside, as a mere allegation”—does not avoid taking an epistemic position; doing so ignores facts in the record supporting it. Halley’s heuristic, that is, is epistemically informed; the episteme being a “queer” one, inflected with deep substantive skepticism about claims of sexual violation, including same-sex sexual violation. See *infra* Part III. Such skepticism can be understood as a way of knowing (or more exactly, refusing to know) about sexual injury.

³⁹ Halley, Sexuality Harassment, *supra* note 4, at 192. Actually, it’s far from apparent (as Halley suggests) that the case was thought of as being about “homosocial hijinks” gone awry. The Fifth Circuit’s decision in Oncale reveals that that court, at least,

Later, referring to Joseph Oncale's deposition testimony—where he says about his harassers, "I feel that they made homosexual advances toward me. I feel they are homosexuals."⁴⁰—we are pointedly 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?"⁴¹

These questions are provocative—as is the cavalier disregard for Oncale's fact-based allegations that the harassment he suffered was unwanted.⁴² But Joseph 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 Oncale is a typical "closet case": both homophobic and gay. What 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 John Lyons, Oncale's supervisor, had made good on his multiple threats to rape Oncale,⁴³ or if Lyons and Danny Pippin, one of Oncale's co-workers, had carried through on their attempted gang rape of Oncale in that shower stall?⁴⁴ 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? And if not, what would we have called it? Fantasy? Just sex?⁴⁵ Are gay men unrapable because they're gay? (Because they are men?) Does the closet make its occupant unharassable? Following Halley's reconstruction

without any help, managed to think of what happened to Joseph Oncale as a form of homosexual sexual predation. *See, e.g., Sundowner Offshore Servs., Inc. v. Oncale*, 83 F.3d 118, 118 (5th Cir. 1996) ("threats of homosexual rape"). Why this does not highlight, rather than diminish, the political importance of engaging the male supremacist construction of sexual violence, as the MacKinnon brief does, Halley's text does not explain.

⁴⁰ Catharine MacKinnon, Brief of Amici Curiae National Organization of Male Sexual Victimization, Inc. et al. at 23 n.7, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) [hereinafter MacKinnon, *Oncale* Brief].

⁴¹ Halley, *Sexuality Harassment*, *supra* note 4, at 192.

⁴² *See supra* note 38.

⁴³ *Oncale*, 83 F.3d at 118 ("threats of homosexual rape by Lyons and Pippin").

⁴⁴ *Id.* at 118-19 (discussing "the use of force to push a bar of soap into Oncale's anus while Pippin restrained Oncale as he was showering on Sundowner premises"). For a nimble commentary on the homophobic erotics of the "shower scene," and its relationship to "the closet," see Kendall Thomas, *Shower/Closet*, 20 *Assemblage* 80 (1993).

⁴⁵ *Cf.* Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When is Sexualized Violence Our Path to Liberation?*, in *Directions in Sexual Harassment Law*, *supra* note 4. *See also* Marc Spindelman, "Harm" at Work, But "Hot" at Home?, paper presented at the Lavender Law Conference, Los Angeles, California, Oct. 1997 (draft manuscript, on file with author).

of Oncale as a raging closet drama, 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*?⁴⁶

I think not. But as importantly, 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.⁴⁷ Indeed, the two perspectives (which since Oncale won, converge) present a single clear answer to these questions, and a response to Halley’s wonder about what Joseph 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.⁴⁸ Whether acts of harassment are sexual or sex-based does not—and should not—depend on whether the perpetrators of sexual harassment or its victims “were” or “are” or “could be” gay, whether self-identified or in denial.

Having catalogued the homophobic perils of sexual harassment law she sees, Halley sets out to show that “[s]exual subordination feminism, and especially [radical feminism], underwrite the regulation of sexuality through sex harassment law.”⁴⁹ Largely in between the lines of what she writes, Halley hints that the homophobic potential of sexual harassment law exposes it as the province of radical feminist theorizing.⁵⁰ One version of

⁴⁶ Halley’s account of “homosexual panic”—“*panic* over the possibility of homosexual engagement [that] he or she both didn’t *and did* want,” Halley, Sexuality Harassment, *supra* note 4, at 195—is capacious enough to enable it to be used to dismiss the claim of an openly gay man that he has been raped as an instance of homophobic panic. *Cf.* Judith Butler, Imitation and Gender Insubordination, in Inside/Out 13, 15 (Diana Fuss ed., 1991) (“Is the ‘subject’ who is ‘out’ free of its subjection and finally in the clear? Or could it be that the subjection that subjectivates the gay or lesbian subject in some ways continues to oppress, or oppressed most insidiously, once ‘outness’ is claimed? . . . Can sexuality even remain sexuality once it submits to a criterion of transparency and disclosure[?]”).

⁴⁷ Halley, Sexuality Harassment, *supra* note 4, at 192 (“Merely asking the question indicates that same-sex sex harassment cases are going to be profoundly misread if we assume that sex, gender, sexual orientation, and sexual power have social meaning, and should have legal meaning, inasmuch as they are fixed to particular persons by a male/female distinction.”).

⁴⁸ Halley recognizes this point when describing the argument of MacKinnon’s Oncale brief. *See id.* at 190 (describing the radical feminist argument that “[h]arassment is harassment no matter who does it to whom”). Why she does not regard it as the answer to her question about Oncale’s “feeling” about his attackers, or believe that it isn’t, which I take it she doesn’t, I can’t say. Neither does she.

⁴⁹ *Id.* at 195.

⁵⁰ *Cf.* Eve Kosofsky Sedgwick, Epistemology of the Closet 36 (1990) (“Thus, women who loved women were seen as more female, men who loved men as quite possibly more male, than those whose desires crossed boundaries of gender. The axis of sexuality, in this view, was not exactly coextensive with the axis of gender but expressive of its most heightened essence: ‘Feminism is the theory, lesbianism is the practice.’ By analogy, male homosexuality could be, and often was, seen as the practice for which male supremacy was the theory.”) (footnote omitted) (emphasis omitted); *id.* at 37 (“Indeed, the powerful impetus

this argument, certainly, bursts forth in the observation that “it 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 Joseph Oncale as a “scene” of “homosexual predation.”⁵¹

The march toward this remarkable conclusion effectively begins with a gloss on an argument that is found in MacKinnon’s Oncale brief.⁵² 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.”⁵³ Her partial response to

of a gender polarized feminist ethical scheme made it possible for a profoundly antihomophobic reading of lesbian desire (as a quintessence of the female) to fuel a correspondingly homophobic reading of gay male desire (as a quintessence of the male).”). See also, e.g., Biddy Martin, Femininity Played Straight: The Significance of Being Lesbian 73 (1996) (“At its worst, feminism has been seen as more punitively [punishing] than mainstream culture.”).

⁵¹ Halley, Sexuality Harassment, *supra* note 4, at 192 (“Alternatively, of course, Oncale’s deposition testimony could support a reading of the scene as homosexual predation. It is difficult to escape the conclusion that the MacKinnon Brief aimed to induce the Court to adopt just such a reading.”). For an earlier queer allegation along the same basic lines, see Butler, Gender Trouble, *supra* note 19, at xiii (“Whereas MacKinnon offers a powerful critique of sexual harassment, she institutes a regulation of another kind: to have a gender means to have entered already into a heterosexual relationship of subordination. At an analytic level, she makes an equation that resonates with some dominant forms of homophobic argument. One such view prescribes and condones the sexual ordering of gender, maintaining that men who are men will be straight, women who are women will be straight.”).

⁵² The first step Halley makes toward this conclusion begins by drawing attention to the New York City Gay and Lesbian Anti-Violence Project’s statement of its interest in Oncale as an *amicus*—a statement that appears in MacKinnon’s brief on the organization’s behalf. Halley asks why this organization’s “pro-gay stance [would] cause this group to differ in a way from every other amicus on the [B]rief?” Halley, Sexuality Harassment, *supra* note 4, at 191. The question, as she poses it, depends on the NYC AVP being “the only explicitly gay organization on the Brief.” *Id.* It is not. The Community United Against Violence, Inc., describes itself in the brief at the same location as “a community-based organization dedicated to creating an environment free of violence and oppression for the lesbian, gay, bisexual, and transgender communities of San Francisco.” MacKinnon, Oncale Brief at A-6.

⁵³ Halley, Sexuality Harassment, *supra* note 4, at 191 (footnote omitted). The language from MacKinnon’s brief that Halley seems to be glossing appears in the brief during the course of MacKinnon’s argument that “[a]ccess to sex equality relief for acts of sexual abuse depends on the acts, not on the sexual preference of the actors.” MacKinnon, Oncale Brief at 23-24. Here is the language from the brief, which does not say what Halley attributes to it:

The emerging rule is to regard sexual orientation as not determinative of the legal sufficiency of same-sex claims as a matter of law but to admit it as relevant on the facts. Perpetrator sexual orientation does not make

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 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.⁵⁴

There is something to this point.⁵⁵ One needn't struggle to imagine

unwanted sexual initiatives sex-based any more than victim sexual orientation makes unwanted advances welcome, although both can be relevant (if sometimes only minimally) to both factual determinations. See Yeary [v. Goodwill Indus.-Knoxville, Inc.], 107 F.3d [443,] 447-48 [(6th Cir. 1997)]. It is not categorically irrelevant because "[w]hen a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment." E.E.O.C. v. Walden Book Co., Inc., 885 F. Supp. 1100, 1103-1104 (M.D. Tenn. 1995); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (sexual preference of the harasser irrelevant to summary determination). See also Vanderenter [v. Wabash Nat'l Corp.], 887 F. Supp. [1178,] 1180 [(N.D. Ind. 1995)]. Although care must be taken that this approach does not create an opening for homophobic attacks, the rule itself merely applies the same standard to everyone.

Id.

⁵⁴ Halley, Sexuality Harassment, *supra* note 4, at 191 (footnote omitted) (emphasis added). Cf. Sedgwick, *supra* note 50, at 36 ("The axis of sexuality, in this view, was not exactly coextensive with the axis of gender but expressive of its most heightened essence: 'Feminism is the theory, lesbianism is the practice.' By analogy, *male homosexuality could be, and often was, seen as the practice for which male supremacy was the theory.*") (footnote omitted) (emphasis added and omitted). Though Halley refers to those accused of sexual harassment as "defendants" in this passage (and elsewhere), she has not cited any case in which they—as opposed to the corporate entities for which they work—have been or are. The reason why may be that Title VII of the 1964 Civil Rights Act, as interpreted by federal courts, prohibits employers, not individuals, from engaging in sex discrimination, including sexual harassment, and makes them, when it does, liable for the conduct of harassing coworkers and supervisors. Thanks to Martha Chamallas for reminding me of this. Of course, talking about accused harassers as "defendants" is a powerful, if misleading, rhetorical formulation of the stakes of the sexual harassment regime.

⁵⁵ *Accord* MacKinnon, Oncale Brief at 24 ("[C]are must be taken that this approach does not create an opening for homophobic attacks."); *id.* ("Gay men do not initiate unwanted sex to all men any more than lesbian women welcome sexual attention from all women.").

that—or how—a putative harasser’s actual or presumed homosexuality in a same-sex sexual 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.”⁵⁶

The widespread circulation of this male supremacist myth sheds light on the reasons that lesbian and gay rights organizations, along with many feminists, have maintained that sexual identification is irrelevant to the determination whether sexual harassment in any given case is legally actionable sex discrimination.⁵⁷ As MacKinnon’s *Oncale* brief, in the course of *rejecting* the male supremacist vision of gay men as indiscriminate sexual predators, explains: “Sexuality 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,”⁵⁸ 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, does not 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, no one has seriously argued we should not be—or not, perhaps, until now.⁵⁹ Lesbian and gay rights organizations, and others, seem

⁵⁶ Guy Hocquenghem, *Homosexual Desire* 55 (3d ed. 1993). *See also supra* note 55.

⁵⁷ *See, e.g.*, Brief of Amici Curiae Lambda Legal Defense and Education Fund et al., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568) [hereinafter Lambda, *Oncale* Brief]; MacKinnon, *Oncale* Brief at 4, 12-14, 23-28. Two lesbian and gay rights organizations—the New York City Gay and Lesbian Anti-Violence Project and Community United Against Violence, Inc.—signed MacKinnon’s *Oncale* brief. *Id.* at A-6, A-8-A-9.

⁵⁸ MacKinnon, *Oncale* Brief at 24.

⁵⁹ On what grounds would one argue, for example, in favor of a rule of law giving lesbians and gay men the benefits of sexual harassment protections while giving us legal *carte blanche* to engage in sexual harassment? *Cf.* Franke, *supra* note 27, at 767 (“[I] suggest that in cases where the harasser is shown to be gay, and the harassment is an expression of his own personal sexual desire, the plaintiff should make out a Title VII disparate treatment *prima facie* case, not a sexual harassment case.”). Franke’s recommendation that we treat sexual harassment by lesbians and gay men as ordinary “disparate treatment” claims, rather than as sexual harassment claims, should not, I think, be understood as a rule giving lesbian and gay male victims sexual harassment protections while excusing lesbian and gay harassers from liability. However, whether, and if so, how, it avoids the kinds of homophobic problematics it seems designed to address is unclear, as is, frankly, the principle upon which it rests.

to agree with MacKinnon's Oncale brief, that: "[a]lthough care must be taken that protecting lesbians and gay men from sexual harassment does not create an opening for homophobic attacks, [holding lesbians and gay men up to sex equality obligations] merely applies the same standard to everyone."⁶⁰ In terms of equality of citizenship, 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,'"⁶¹ 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."⁶²

Inadequacies in the description of MacKinnon's Oncale brief aside, this does not 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 unwanted 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."⁶³ So far from "entirely miss[ing] the common-sense status of the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer,"⁶⁴ the brief doesn't miss it at all. It tackles the status of this inference directly, and denounces it explicitly.

Needless to say, this does not preclude a homophobic interpretation of Oncale. One can purchase such a text by drawing on the "energies of homophobia" as a substantive source of interpretation,⁶⁵ or, more circuitously, for example, by demanding that Oncale's author, Justice Antonin Scalia, though speaking for a unanimous Court, had homophobic

⁶⁰ MacKinnon, Oncale Brief at 24. In the *amicus* brief it filed in Oncale, on Oncale's side, the Lambda Legal Education and Defense Fund elaborated its view that "[s]exually harassing conduct is not stripped of its connection to sex when the harasser alleges or proves that he acted as he did because of homophobia," Lambda, Oncale Brief at 24 (footnote omitted), with the additional observation that, "[i]n the present case, as in any sexual harassment case, *the presence of indisputably sexual behavior establishes the requisite connection to sex (gender).*" *Id.* at n.18 (emphasis added). Although Lambda does reject the view that "sexual attraction, or potential sexual attraction, *determines* whether the same acts are or are not 'because of sex' [as] a fallacy," *id.* at 18 (emphasis added), its argument does not, without more, create a safe harbor for sexual harassers who happen to identify themselves or who happen to be identified as lesbian or gay.

⁶¹ Halley, Sexuality Harassment, *supra* note 4, at 191.

⁶² *Id.*

⁶³ MacKinnon, Oncale Brief at 24.

⁶⁴ Halley, Sexuality Harassment, *supra* note 4, at 191.

⁶⁵ *Id.* at 183, 195.

designs that control what Oncale means.⁶⁶ But none of this is to say—and Halley never does⁶⁷—that Oncale recommends, much less compels, its own homophobic interpretation. As Halley acknowledges in different ways, her anti-gay reading of Oncale is normative, not descriptive.⁶⁸ She fears that, with Oncale, “federal antidiscrimination law may implicitly declare open season on gay men and lesbians. . . .”⁶⁹ Presumably, homophobic interpretations of sexual harassment law could ensue. But what are we supposed to make of this possibility? Should we allow an inequality like the inequality homophobia promotes to determine sex equality rights? If so, should we maybe nullify laws against domestic violence and rape? Aren’t they—like other laws—subject to homophobic misinterpretation, hence capable of becoming “sexuality harassment,” too?

A similar issue, recall, arose around matters of race, when concerns were expressed that sexual harassment charges could be unjustly, including disproportionately, levied against men of color.⁷⁰ The answer was to fight the racism within society and law, not to succumb to it by eliminating the

⁶⁶ *Id.* at 193. *See also, e.g.*, Arthur S. Leonard, Ninth Circuit Revives Gay Harassment Claim Under Title VII, J. Lesbian/Gay L. Notes, at 159-60 (Oct. 2002) (“Furthermore, it is arguable that [dissenting] Judge Hug’s analysis of Oncale [in Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (*en banc*)] more accurately reflects the intent of Justice Scalia, who wrote that opinion, than does the analysis of Judge Fletcher.”). Catherine Lanctot has already provided what is in effect a potent reply to the suggestion that Justice Scalia’s unstated homophobic commitments should guide interpretations of Oncale. Catherine J. Lanctot, The Plain Meaning of Oncale, 7 Wm. & Mary Bill Rts. J. 913 (1999).

⁶⁷ Halley does propose to speak about the anti-gay possibilities that are “implicit” in the Court’s Oncale opinion, which Justice Scalia wrote. *See* Halley, Sexuality Harassment, *supra* note 4, at 193 (“If and when the possibilities implicit in his [Justice Scalia’s] position are realized, Title VII will take us beyond sex harassment to sexuality harassment.”). Given Halley’s understanding of interpretation, some views about which she expresses elsewhere, *see, e.g.*, Halley, Romer v. Hardwick, 68 Colo. L. Rev. 429, 434 (1997) [hereinafter Halley, Romer v. Hardwick], I think it’s a mistake to read Halley’s talk of what is “implicit” in Oncale the way it may sound: as if she intends for it to be a descriptive move.

⁶⁸ *See, e.g.*, Halley, Sexuality Harassment, *supra* note 4, at 183 (discussing Oncale and noting the possibility of a “gay-friendly” reading of the case, thus at least implicitly recognizing the interpretive choices available when reading Oncale); *id.* at 195 (expressly recognizing the normativity of her homophobic reading of Oncale: “From a gay identity perspective, Oncale should be read as a direct, disproportionate threat to the constituent group.”) (emphasis added). *See infra* text accompanying notes 92-95.

⁶⁹ Halley, Sexuality Harassment, *supra* note 4, at 183 (emphasis omitted). *Cf.* Sedgwick, *supra* note 50, at 5 (“Again, it is clear in political context that the effect aimed at—in this case, it is hard to help feeling, aimed at with some care—is the ostentatious declaration, for the private sector, of an organized open season on gay men.”).

⁷⁰ Thanks to Catharine MacKinnon for reminding me of this aspect of the history of sexual harassment law. For her not-unrelated reply to the charge that her work is “essentialist,” see Catharine A. MacKinnon, Keeping it Real: On Anti-“Essentialism”, in Crossroads, Directions, and a New Critical Race Theory, *supra* note 12, at 71.

sex equality tool.⁷¹ We aren't told why homophobia requires a different conclusion now.⁷² But that is what we need to know. Racism, after all, can operate as sexual discrimination.⁷³

⁷¹ For one important comment on the importance of "acknowledg[ing]" and "actively address[ing]" "[t]he intersections of racism and sexism" in order to make sure that "women of color are . . . empowered to struggle against sexual abuse," see Kimberlé Crenshaw, Race, Gender, and Sexual Harassment, 65 S. Cal. L. Rev. 1467, 1472 (1992).

⁷² This is a significant omission, particularly in light of Halley's own understanding of the network of relationships between and among identity categories. See generally Halley, Gay Rights and Identity Imitation, *supra* note 13.

⁷³ See, e.g., Crenshaw, *supra* note 71. This is one of those moments in which queer anti-identitarianism, Halley, Sexuality Harassment, *supra* note 4, at 194 (noting that queer theory is "anti-identitarian"), and its related "post-identity" project (see Halley, Gay Rights and Identity Imitation, *supra* note 13; Butler, Imitation and Gender Insubordination, *supra* note 46, at 13-14 ("[I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression. This is not to say that I will not appear at political occasions under the sign of lesbian, but that I would like to have it permanently unclear what precisely that sign signifies."); but see, e.g., Warner, The Trouble with Normal, *supra* note 17, at 164 ("The 'post-gay' rhetoric, however, can also mislead us into thinking that times have changed more dramatically than they have.")), are revealed as potentially dangerous for other anti-subordination efforts. What, for instance, are the implications of a queer approach to sexual harassment law for racially subordinated constituencies? See Garber, *supra* note 17, at 195-204 (commenting, *inter alia*, on the race-blind friendliness of queer theory); but see Siobhan B. Somerville, Queering the Color Line: Race and the Invention of Homosexuality in American Culture (2000). Is queer theory as post-race as it is post-gay? Warner, The Trouble with Normal, *supra* note 17, at 62 ("As [James] Collard's fellow panelist Kendall Thomas pointed out, no one would say that the appearance of some racially mixed club setting or the rise of a black bourgeoisie or the appearance of one black sitcom in any way meant that African Americans are now free to be 'post-black.' Why did the limited gains of some lucky gay people mean that we were suddenly 'post-gay'?). If so, does a queer approach to sexual harassment law potentially align itself with not only male supremacy, but white supremacy, as well? Compare Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 920, 923 (1989) (arguing that equal protection problems should be understood as problems of classification, not class), with Romer v. Evans, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'") (citing Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting)), with Adarand v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."), and *id.* at 241 ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."), and Halley, Gay Rights and Identity Imitation, *supra* note 13, at 140 ("Ever since the Supreme Court's decision in Adarand Constructors v. Peña, which held that race-based affirmative action can be subjected to the same degree of judicial scrutiny that courts must apply to acts of anti-black racism, there has been a strong strategic reason for equal protection rights claims to take a new form, 'not like race.' . . . This reversal in the normative content of

These considerations position us to consider the smoking gun submitted as evidence for the conclusion that the brief “virtually invites the Supreme Court”⁷⁴ to read what happened to Joseph Oncale homophobically, as an incident of homosexual predation—an invitation that the Court, through Justice Scalia, apparently declined: a footnote in MacKinnon’s Oncale 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.”⁷⁵

In order to conclude that homophobic intentions animated this footnote in MacKinnon’s Oncale brief, one has to downplay—or ignore—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.⁷⁶ But the brief just the same 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.”⁷⁷

intragroup comparisons could hardly have been anticipated twenty years ago, but it is now part of the context of any ‘like race’ claim. In a situation this volatile, in which so many different kinds of social harms are so finely connected, it seems important to exercise considerable caution. Working within the coherentist identity constituencies is not enough; forming coalitions across them, though crucial, is also not enough. When identity can be deployed to harm its own subjects, the search for equal justice also requires that we move beyond identity politics altogether.”). What are the implications of queer anti-identitarianism and post-identitarianism for straight and lesbian women, and gay men, of color? *See, e.g.*, Suzanna Danota Walters, From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (or, Why Can’t a Woman Be More Like a Fag?), 21 *Signs* 830, 842-43 (1996). *Cf.* Janet Halley, Culture Constrains, in Is Multiculturalism Bad for Women? 100, 101 (Joshua Cohen et al. eds., 1999) (recognizing in parentheses that, “The point should be familiar to left-multiculturalists and left-liberal critics, who raise it when the Supreme Court refuses to find racial discrimination without proof of intent. What, the Left quite properly asks, about the strenuous support for white privilege contributed when whites invidiously but unintentionally undervalue and undercompensate people of color *without meaning to?*”). For politics? *See, e.g.*, Warner, The Trouble with Normal, *supra* note 17, at 62 (“Post-gay rhetoric appeals to those gay men and lesbians who were least happy to be political in the first place, who have enough of a safe place in the world—thanks in part to past struggle—to think of their own lives no longer in terms of struggle.”). For an important, related set of questions, see Martha C. Nussbaum, The Professor of Parody, *New Republic*, Feb. 22, 1999, at 37 (criticizing work of queer theorist Judith Butler for its politically enervating effects). Can queer theory consistently tolerate anti-discrimination projects that, through their remedial provisions, might be said (in queer argot) to “normalize” identity? *See* Judith Butler, Against Proper Objects, in Feminism Meets Queer Theory 1, 25 (Elizabeth Weed & Naomi Schor eds., 1997) (“[n]ormalizing the queer would be, after all, its sad finish”) [hereinafter Butler, Against Proper Objects].

⁷⁴ Halley, Sexuality Harassment, *supra* note 4, at 191.

⁷⁵ *See supra* note 40 (setting forth quote from Oncale, about his attackers).

⁷⁶ *See supra* note 57.

⁷⁷ MacKinnon, Oncale Brief at A-1 (Appendix A).

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.”⁷⁸ 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.”⁷⁹ “[N]either the rights of victims nor the liability of perpetrators of sexual harassment should turn on their sexual orientation.”⁸⁰

MacKinnon’s Oncale brief repeatedly highlights its position that sexual harassment law shouldn’t be allowed to embody male supremacy’s “heterosexualized and heterosexualizing”⁸¹ assumptions. The brief, for instance, both reveals and condemns the thinking animating the “denial that interactions among men can have a sexual component,”⁸² and the suspension of that denial when one of the men involved is (or is suspected of being) gay.⁸³

Moreover, the brief signals recognition that its critique of male dominance in the same-sex harassment context would not be complete 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. Halley apparently rejects this conclusion as “a big mistake,”⁸⁴ but never fully and persuasively engages it.⁸⁵ Strange though, isn’t it, this unexplained idea of a

⁷⁸ *Id.* at 23 (footnote omitted). *See infra* note 86.

⁷⁹ MacKinnon, Oncale Brief at 23 (footnote omitted) (emphasis added).

⁸⁰ *Id.*

⁸¹ Pellegrini, Pedagogy’s Turn, *supra* note 19, at 619; Pellegrini, Interested Third Parties, *supra* note 19, at 620-21.

⁸² MacKinnon, Oncale Brief at 11.

⁸³ Does the difference between “homoeroticism and homosexuality” to which Halley’s text adverts, Halley, Sexuality Harassment, *supra* note 4, at 190; *see also* Halley, Sexuality Harassment II, *supra* note 4, at 91 (“homoeroticism and homosexuality have no independence of its terms”), tacitly accept the terms of differentiation between them that male supremacy sets? *Cf.* Elizabeth Weed, The More Things Change, in Feminism Meets Queer Theory, *supra* note 73, at 266, 271 (“For Sedgwick, the closet is a site of generalized cultural anxiety produced by a society that is at once pervasively homoerotic and intensely homophobic. In the last century, in particular, she sees that anxiety intensified in the homophobic structuring of male homosocial bonds. . . .”) (quotation from Sedgwick, *supra* note 50, at 185, omitted).

⁸⁴ Halley, Sexuality Harassment, *supra* note 4, at 191.

⁸⁵ She does mention it, however. *See id.* at 190; *see also* Halley, Sexuality Harassment II, *supra* note 4, at 91 (“Harassment is harassment no matter who does it to whom; it always reproduces the paradigm of male-female harassment, and thus we need not take into account anything distinctive about the same-sex-ness of the parties. But at the same

pro-gay-rights homophobic invitation?

So, to put the question Halley's text answers without ever troubling directly to ask: what function does that footnote in MacKinnon's brief quoting Oncale's deposition testimony concerning his "feeling" about his attackers serve? Stated in the simplest terms possible: it underscores the brief's *opposition* to homophobia.⁸⁶ 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 sexual harassment cases.⁸⁷ Read in this context—the context in which it actually appears⁸⁸—the footnote illustrates the understanding of same-sex sexual harassment cases that 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 thus have left the remark completely 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 as such, through the position it took on sexual harassment law in the case—implications the case obviously raised

time homosexuality is really fundamentally male-female gender all over again. The sex of one's sexual object choice is a 'powerful constituent' of one's gender, and antigay discrimination fundamentally disadvantages people for deviating from gender expectations."). What, precisely, *is* "distinctive about the same-sex-ness of the parties," *id.*, in the queer imagination is not clear from what Halley writes. The importance of knowing what it is becomes transparent as that "distinctive[ness]" emerges in the very next paragraph as the "distinct components" of "sexual orientation," *id.* at 92, which are an important part of Halley's rejection of radical feminism's model of sexual harassment law (as she understands it). The idea that sexual orientations—homosexual and heterosexual, I guess—are distinctive is both curious and crucial, for as Halley explains, in a universalizing move, queer theory "tends to minimize rather than maximize the differences between same-sex eroticism and cross-sex eroticism." *Id.* at 100. Halley's text thus leaves us fishing for an answer to the question it begs: within queer theory, what independence of terms *do*—or should—heterosexual and homosexual eroticism have?

⁸⁶ See generally, e.g., Suzanne Pharr, *Homophobia: A Weapon of Sexism* (1988); Spindelman, *Reorienting Hardwick*, *supra* note 2, at 433-34 n.221 (collecting numerous sources endorsing the sex equality argument for lesbian and gay rights).

⁸⁷ MacKinnon, *Oncale* Brief at 23-28.

⁸⁸ Stanley Fish has offered a relevant thought on this particular point. "But while it is certainly true that context constrains interpretation," he writes, "it is also true . . . that context is a product of interpretation and as such is itself variable as a constraint." Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 108 (1989). But if Fish is correct to propose that appeals to "context" can themselves be extensions of interpretive disputes, as I think he is, so, too, are non-appeals to "context."

but that had not otherwise adequately been addressed by the parties to it⁸⁹—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 no less 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" the Supreme Court to indulge "the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer," "virtually" or not.⁹⁰ 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 Joseph Oncale's troubles.⁹¹ This is, in fact, exactly what the brief does not do.

Like her other work, Halley's Sexuality Harassment teaches us a good deal about the art and ethics of interpretation.⁹² But with Stanley Fish, we do well to remember that the texts she reads are the effects of interpretive choices she makes, but not their cause.⁹³ What, though, does cause Halley's readings?

A queer commitment to oppose "sexual regulation" could. Marshalling the forces of homophobia—an ideology of sexual regulation—

⁸⁹ This is, of course, an answer to Halley's formalistic charge that the footnote quoting Oncale's testimony that appears in MacKinnon's Oncale brief was "entirely unnecessary." Halley, Sexuality Harassment II, *supra* note 4, at 92. The reason Halley regards the footnote this way is, as she writes:

[N]either lower-court opinion in Oncale, and none of the brief submitted to the Supreme Court, brought this detail in the record to the Justices' attention. And the Justices did not ask for it: the questions they certified for their review made no mention of homosexuality. Oncale made its way up the appellate ladder as an "Animal House" case: the plaintiff's allegations of cruel, repeated, and unwelcome sexual assaults were persistently read as male-male homosocial hijinks gone awry—in Justice Scalia's terms, "simple teasing or roughhousing among members of the same sex" that is aberrational only in that it has become "objectively severe."

Id.

⁹⁰ Halley, Sexuality Harassment, *supra* note 4, at 191.

⁹¹ *Id.* at 192.

⁹² See, e.g., Halley, Gay Rights and Identity Imitation, *supra* note 13; Halley, Romer v. Hardwick, *supra* note 67; Halley, Heresy and Orthodoxy, *supra* note 38.

⁹³ See, e.g., Stanley Fish, Is There a Text in the Class? The Authority of Interpretive Communities 340 (1980) ("One cannot appeal to the text, because the text has become an extension of the interpretive disagreement that divides[;] and, in fact, the text as it is variously characterized is a consequence of the interpretation for which it is supposedly evidence.").

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 is ultimately homophobia—not sexual harassment law *or* radical feminist theory—that’s the real danger Halley’s analysis identifies.⁹⁴

Recognizing this, there are a few questions we should think to press. Not the least of them is, how can homophobia provide any normative grounds for argument within a queer project when that is precisely something that queer theory professes to oppose?⁹⁵ With a thought cast in the direction of queer theory’s interest in the proliferation of bodies and pleasures, could the reason be that homophobia is not only a powerful source of sexual subordination, but of sexual pleasure as well?⁹⁶ Might success in challenging sexual harassment law as sexuality regulation thus help clear the space for queer pleasures to inhabit?

III. PROMOTING (SEXUAL) PLEASURE

Halley’s Sexuality Harassment doesn’t expressly talk much about pleasure nor yet pleasure’s virtues.⁹⁷ But it does provide a number of

⁹⁴ The same holds true for Halley’s criticism of Rule 412 of the Federal Rules of Evidence, as well as her concern about a victim-centered standard of legal reasonableness in sexual injury cases. See Halley, Sexuality Harassment, *supra* note 4, at 195-96. For an answer, see *supra* note 34.

⁹⁵ See, e.g., Warner, Introduction, *supra* note 11, at xiv (“In effect, Sedgwick’s work has shown that there are specifically modern forms of association and of power that can be seen properly only from the vantage of antihomophobic inquiry.”); see also, e.g., Sedgwick, *supra* note 50, at 27 (“The study of sexuality is not coextensive with the study of gender; correspondingly, antihomophobic inquiry is not coextensive with feminist inquiry.”).

⁹⁶ See Butler, Imitation and Gender Insubordination, *supra* note 46, at 24 (Gender “is a *compulsory* performance in the sense that acting out of lines with heterosexual norms brings with it ostracism, punishment, and violence, not to mention the transgressive pleasures produced by those very prohibitions.”); Gary Gutting, Foucault’s Philosophy of Experience, 29 *Boundary 2* 69, 75 (Summer 2002) (“In his reading of Bataille, Foucault seems to find the exhilarating limit precisely in the paradoxical relation of transgression to limit. ‘The limit and transgression depend on each other for whatever density of being they possess: a limit would not exist if it were absolutely uncrossable and, reciprocally, transgression would be pointless if it merely crossed a limit imposed of illusions and shadows.’”) (quoting Foucault) (citation omitted).

⁹⁷ A separate analysis of the pleasures of Halley’s text, such as they are, is beyond the scope of this work. Cf. Roland Barthes, The Pleasure of the Text (Richard Miller trans., 1980). It is enough for the moment to note that they are deeply bound up with the “queer” sexual politics her text advances. Halley’s text seems to perform its pleasure politics—it is, to borrow an apt phrase from Carol Sanger, a piece of “performance scholarship,” Sanger, *supra* note 34, at 1855—rather than discuss them as such, the only express mention of “pleasure” coming when Halley observes that “sex[-] affirmative feminism seeks *for women* a full-face encounter with (to track Carole S. Vance’s brilliant title) the pleasure and the danger of sexuality.” Halley, Sexuality Harassment, *supra* note 4, at 195 (emphasis in original).

sketches of the way that queer pleasures are arranged.⁹⁸ 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.”⁹⁹ 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.”¹⁰⁰ To bear out the point, Halley cites with unmitigated approval “[t]he phenomenon of lesbians wearing dildos,”¹⁰¹ claimed to “lead[] to heterosexual women wearing dildos.”¹⁰² Soon after that comes a rehearsal of Jessica Benjamin’s kvetchy lament (echoing that old line about “good help”) 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.”¹⁰³ These examples nicely serve to illustrate the deeply hierarchical structure of those sexual pleasures queer theory “exult[s]” for the way—or so we are told—they “rearrange[] conventional associations of the feminine with subordination and the masculine with power.”¹⁰⁴

Having so enthusiastically defined queer pleasures in terms of

⁹⁸ Halley’s rereading of the facts of *Oncale*, Halley, *Sexuality Harassment*, *supra* note 4, at 192, as well as her favorable discussion of “[t]he masculinity of women[, including] Judith Butler’s reflections on the lesbian phallus; Judith Halberstam’s on female masculinity—and the appetitive sexual abjection of men. . .” might similarly be mentioned in this regard. *Id.* at 194.

⁹⁹ *Id.* at 196.

¹⁰⁰ *Id.* For another explanation, which Halley’s discussion doesn’t preclude, consider Cheshire Calhoun’s suggestion that “lesbian and gay theorists [have] found it politically valuable to argue that the supposedly timeless abhorrence of homosexuality is not at all timeless, since there haven’t been homosexual subjects to abhor until quite recently.” Cheshire Calhoun, *Thinking About the Plurality of Genders*, 16 *Hypatia* 67, 71 (Spring 2001).

¹⁰¹ Halley, *Sexuality Harassment*, *supra* note 4, at 196.

¹⁰² *Id.*

¹⁰³ *Id.* (quoting Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism and the Problem of Domination* 64n (1998) (internal quotations omitted) (emphasis added)).

¹⁰⁴ *Id.* Because I am presently dealing with sexual harassment and sexual inequality more generally, I will not engage Halley’s remark that queer theory “takes within its purview same-sex love that does not express itself in sexual acts,” *id.* at 194, at any length, except to say that it is not immediately apparent whether queer theory regards this sort of love as “sexual” or not. If it does not—if, that is, “same-sex love that does not express itself in sexual acts” is itself not sexual—one might wonder about its relationship to male supremacy, according to which, same-sex intimacy shouldn’t be sexual. Generally, male supremacy alternately regards normative same-sex love comprised of sexual equality and intimacy as a fantasy, a nightmare, or an impossibility. One might launch the same (or a similar) set of interrogations into Michel Foucault’s suggestion that sadomasochism “has as one of its main features what I call the desexualization of pleasure.” Bersani, *supra* note 15, at 79 (quoting Michel Foucault). Dominance and subordination aren’t sexual? Oh, please.

sexual hierarchy, Halley can comment (and does) that “[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.¹⁰⁵

She’s right.¹⁰⁶ Feminist political rejection of such *nostalgie de la boue*,¹⁰⁷ evidently, is a mistake in the queer view, because it fails to recognize that such pleasures—to repeat the expression—“rearrange[] conventional associations of the feminine with subordination and the masculine with power.”¹⁰⁸

One can’t help but wonder how they do that. How, for instance,

¹⁰⁵ Halley, *Sexuality Harassment*, *supra* note 4, at 196 (“Feminism 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 a sentence like that.”). In contrast with state regulation of sexuality, which is often the subject of queer resistance and critique, “pleasure itself remains, in an important sense, untouched,” Alcott, *supra* note 17, at 109. Writing about Michel Foucault, for instance, Linda Martin Alcott observes, “Foucault does not engage in, and in fact argues against, the practice of doing a political and/or moral evaluation of various forms of pleasure.” *Id.*

¹⁰⁶ For one insightful feminist discussion of “the incursion of the dildo, a symbol of male power and the oppression of women, into lesbian culture,” see Sheila Jeffreys, *The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution* 30 (1993); see also *id.* at 28, 29-30, 56-57, 73, 128, 134, 135, 138 (same). For a discussion of lesbianism and sadomasochism from a feminist perspective, see, for example, *id. passim*; see also, e.g., Charlotte Croson, *Sex, Lies and Feminism*, *Off Our Backs*, June 2001, at 6-9; *Against Sadomasochism: A Radical Feminist Analysis* (Robin Ruth Linden et al. eds., 1982); Bartky, *supra* note 26, at 47-52. The literature written by gay men against the practice of sadomasochism is sparse. A few examples, however, include, Craig Johnson, *S/M and the Myth of Mutual Consent: Is S/M Just Another Word for Fascism?*, *N.Y. Native*, Aug. 11, 1985, at 29; Seymour Kleinberg, *Alienated Affections: Being Gay in America* 157-196 (1982) (cited in Seidman, *supra* note 11, at 141 n.49). For a radical feminist account, written by a self-identified gay man, see John Stoltenberg, *Sadomasochism: Eroticized Violence, Eroticized Powerlessness*, in *Against Sadomasochism: A Radical Feminist Analysis*, *supra*, at 124.

¹⁰⁷ See Warner, *The Trouble with Normal*, *supra* note 17, at 2 (“It might as well be admitted that sex is a disgrace. We like to say nicer things about it: that it is an expression of love, or a noble endowment of the Creator, or liberatory pleasure. But the possibility of abject shame is never entirely out of the picture.”). For a different—more structural and far less bleak view—see Martha C. Nussbaum, *Experiments in Living*, *New Republic*, Jan. 3, 2000, at 31 (reviewing Warner, *The Trouble with Normal*, *supra* note 17) (“Having a lot of shame about our own bodies—and disgust, too . . .—we seek to render our bodies less disturbing; . . . frequently [we project] our own emotions outward, onto vulnerable people and groups who come to embody a shameful and a disgustingness that we then conveniently deny in ourselves.”). See also Martha C. Nussbaum, “Secret Sewers of Vice:” *Disgust, Bodies, and the Law*, in *The Passions of Law* 19 (Susan A. Bandes ed., 1999) (analyzing the relationship between disgust and male perceptions of homosexuality, especially the identification of penetrability with a fear of mortality).

¹⁰⁸ Halley, *Sexuality Harassment*, *supra* note 4, at 196.

does positioning some women as 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 bugging 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? Why? 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 are 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.¹⁰⁹

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.¹¹⁰ And that the social meanings of such sexual

¹⁰⁹ In an important offering, Judith Butler has conceded that:

It is important for me to concede, however, that the performance of gender subversion can indicate nothing about sexuality or sexual practice. *Gender can be rendered ambiguous without disturbing or reorienting normative sexuality at all. Sometimes gender ambiguity can operate precisely to contain or deflect non-normative sexual practice and thereby work to keep normative sexuality intact.*

Butler, *Gender Trouble*, *supra* note 19, at xiv (emphasis added). *See also, e.g.*, Sally Haslanger, *On Being Objective and Being Objectified*, in *A Mind of One’s Own: Feminist Essays on Reason and Objectivity* 85, 112 (Louise M. Antony & Charlotte Witt eds., 1993) (“Fortunately, we are not omnipotent, we don’t have the power ‘to force the world to be any way [our] minds can invent.’ Men don’t have this power; neither do women; neither do ‘cultures,’ etc. The fantasy of such power may be useful in casting our current categories as open to critique, but believing in the fantasy, I submit, is as dangerous as supposing that our current categories capture Nature’s ‘givens.’”) (footnote omitted).

¹¹⁰ Halley complains about MacKinnon’s *Oncale* brief, that it “simultaneously evacuat[es] sexual orientation of any distinct components and flood[s] it with gender understood as male superordination and female subordination. This is, I think, a big mistake.” Halley, *Sexuality Harassment*, *supra* note 4, at 191. How MacKinnon—or radical feminism—could *do* that is never explained. Nor are we told why we would want either of them to if we could. (Halley’s charge, I think, is a fine example of queer theory’s post-structuralism as pre-modern idealism. *See* Catharine A. MacKinnon, *Points Against Postmodernism*, 75 Chi.-Kent L. Rev. 687, 701 (2000) [hereinafter MacKinnon, *Points Against Postmodernism*].) The most basic point that is missed, however, is that even if radical feminists wanted to empty sexual orientation of its distinct components (whatever Halley means by this) and fill it up with dominance and subordination, which we don’t, and had the power to rewrite sexuality in any way we could, which (again) we don’t, male supremacy, to the extent it has succeeded in providing gay male sexuality its substantive content, already would have beaten us to it.

acts cannot be rewritten without acknowledging the pervasive social reality of sexual inequality.¹¹¹

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 fantastically imagines it can, *ipse dixit*, “rearrange[.]”¹¹² 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?¹¹³ Taking up a gender role that's “inappropriate” for one's sex may be sexy, even *feel* naughty or subversive.¹¹⁴ But it does nothing to re-write 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.¹¹⁵

¹¹¹ This, despite Halley's assertion that “[q]ueer thought . . . is anti-identarian. *It dissociates* male bodies, masculinity, and superordination from each other, *rendering* sexuality a domain in which [bodily dimorphism], gender, and power are highly mobile.” Halley, *Sexuality Harassment*, *supra* note 4, at 194 (emphasis added). As Max Kirsch explains, “Because much of Queer theory confuses personal action with structural power, it asserts the primacy of the first or individual aspect, while ignoring its determinants. . . . [Ironically, t]o analyze aspects of interpersonal power and politics in isolation from the larger structural concerns and barriers they confront denies the agency of the individual in the social.” Kirsch, *supra* note 12, at 42-43.

¹¹² Halley, *Sexuality Harassment*, *supra* note 4, at 196. *But see* Lynne Segal, *Why Feminism?* 68 (1999) (“‘Rearranging the signs of gender too often becomes a substitute for challenging gender inequity,’ Susan Walters writes[,] ‘wearing a dildo will not stop me from being raped as a woman or being harassed as a lesbian . . . it will not, short of ‘passing,’ keep me out of the ghettos of female employment.’”) (quoting Walters, *supra* note 73, at 856); *id.* at 63 (“[A]n awareness that gender is ‘socially,’ ‘performatively,’ or ‘discursively’ constructed, is very far from a dismantling of gender.”).

¹¹³ *See, e.g.*, Seidman, *supra* note 11, at 133 (“Poststructuralists, like Queer Nationals, hope to avoid the self-limiting, fracturing dynamics of identification by an insistent disruptive subversion of identity. Yet, their cultural positioning, indeed their subversive politics, presupposes these very identifications and social anchorings.”); *id.* at 134-35 (“Although the poststructural problematization of identity is a welcome critique of the essentialist celebration of a unitary subject and tribal politic, poststructuralism's own troubled relation to identity edges toward an empty politics of gesture or disruptive performance that forfeits an integrative, transformative politic.”).

¹¹⁴ Warner, *The Trouble with Normal*, *supra* note 17, at 196 (“If sex were really to be made into a rational endeavor, something that we could never have to be ashamed of, would we not find that it had lost the very power that makes us value it: the appeal that we call, in a word, sexiness?”); *id.* at 213 (“The appeal of queer sex, for many, lies in its ability to shed the responsibilizing frames of good, right-thinking people.”).

¹¹⁵ *See, e.g.*, Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 *Harv. C.R.-C.L. L. Rev.* 1, 62 (2001) (“[A]s Foucault points out repeatedly, what subjects may experience as empowering and resistant may actually be examples of power's recuperative tendencies.”). Andrea Dworkin provided a fine example as long ago as 1974: “*We are*,

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?¹¹⁶—what does queer faith in existing mobilities available 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?¹¹⁷ 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,” as sexuality is currently defined.¹¹⁸ To radical feminists, however, these objectives look nothing remotely like “liberation projects.”¹¹⁹ Without a critique of sexual hierarchy they

clearly, a multi-sexed species which has its sexuality spread along a vast fluid continuum where the elements called male and female are not discrete.” Andrea Dworkin, Woman Hating 183 (1974) (footnote omitted) [hereinafter Dworkin, Woman Hating].

¹¹⁶ One needn't accept the radical feminist position that “the eroticization of relations of domination may not lie at the heart of the system of male supremacy,” Bartky, *supra* note 26, at 51, in order to recognize that “it surely perpetuates it.” *Id.* Leo Bersani ties the knot between the two, where he asks (rhetorically): “What is the game [of sadomasochism] without the power structure that constitutes its strategies?” Bersani, *supra* note 15, at 88.

¹¹⁷ If so, Halley's pleasure project may undermine whatever force there is to her own objection to sexual harassment law: that it has the potential to become “sexuality harassment.” If we do or ought to will our own sexual subordination, what's wrong with using the tools of sexual harassment law to achieve those ends? What is wrong with the homophobic abuse of sexual harassment law in the queer imagination: Doesn't queer theory embrace public sexual subordination? Public sex? Doesn't queer theory recognize the potential for “sexuality harassment” to produce pleasure? *See supra* note 96 and accompanying text; *see also infra* note 149. Halley's critique of sexual harassment law's homophobic potential thus sits in some unresolved tension with her affirmative embrace of hierarchy's pleasures.

¹¹⁸ Halley, Sexuality Harassment, *supra* note 4, at 194. Halley describes the “analytics and constituencies” of queer and “sex[-]affirmative feminism” as “substantially” overlapping. *Id.* at 198.

¹¹⁹ *Id.* at 197 (emphasis omitted). *Cf.* Janine Benedet, Same-Sex Sexual Harassment in Employment, 26 Queen's L.J. 101, 140 (2000) (“Same-sex sexual harassment requires us to confront the meaning of ‘sex’ and how it is constituted in our society. Doing

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 “pleasure[s] and the danger[s]”¹²⁰ of sex discrimination.¹²¹

These are not the only ways queer approval of hierarchical pleasure 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.¹²² In radical feminism, according to her, “[e]verything is accounted for; there is *nothing* left over.”¹²³ Similarly, she claims radical feminism holds that “sex[] and sexuality are *never* good; they are *always* tools by which women are assigned subordination and men either assign or suffer it.”¹²⁴ Indeed, her

so can help to identify and redress discrimination by men against women as well. Not doing so will lead to decisions that entrench inequality through an overly narrow and rigid classification scheme and the imposition of additional obligations on the complainant in proving his or her case. These decisions, through their assertions of universal application, in turn threaten to restrict recovery in cases of opposite-sex sexual harassment as well.”). Bersani calls sadomasochism “profoundly conservative in that its imagination of pleasure is almost entirely defined by the dominant culture to which it thinks of itself as giving ‘a stinging slap in the face.’” Bersani, *supra* note 15, at 87.

¹²⁰ Halley, *Sexuality Harassment*, *supra* note 4, at 195.

¹²¹ Leo Bersani reveals this logic wonderfully where he explains:

If there is some subversive potential in the reversibility of roles in [sodomasochism], a reversibility that puts into question assumptions about power inhering “naturally” in one sex or one race, [sodomasochism’s] sympathizers have an extremely respectful attitude toward the dominance-submission dichotomy itself. Sometimes it seems that if anything in society is being challenged, it is not the networks of power and authority, but the exclusion of gays from those networks. Michael Bronski calls “the explosion of private sexual fantasy into public view . . . a powerful political statement,” but it turns out that the content of that statement is a grab for power: “to consciously present oneself as a (homo)sexual being [and ‘this is particularly true of the [sodomasochistic] leather scene’] is to grapple with and grab power for oneself.” If that’s what you’re after, then there’s no reason to question the categories that define power.

Bersani, *supra* note 15, at 85 (footnote omitted). *See also, e.g.*, Walters, *supra* note 73, at 850.

¹²² *See, e.g.*, Halley, *Sexuality Harassment*, *supra* note 4, at 186 (“fix[ed]”); *id.* at 189 (“rigid, monolithic”); *id.* at 190 (“[t]he totalism of the male/female model”); *id.* at 192 (“Oncale transparently represents all men injured by this totalized gender system because the system frames all options for understanding his injury.”).

¹²³ *Id.* at 192 (emphasis added).

¹²⁴ *Id.*

summary of “the problem” with radical feminist theory is that it’s, well, just “so settled” and “so complete.”¹²⁵

We’ve heard this all before.¹²⁶ Radical feminism, however, sharply conflicts with Halley’s interpretation of it, though she (like others) does not discuss the conflicts at all. Happily, we do learn that radical feminists believe gender is socially constructed, a “historical contingency,”¹²⁷ in her words. But we do not similarly learn that sexuality, in radical feminism, isn’t “an overarching preexisting general theory that is appealed to[,] to understand or explain, but a constantly provisional analysis in the process of being made by the social realities that produce(d) it.”¹²⁸

¹²⁵ *Id.* In the more recent version of her Sexuality Harassment, Halley invokes the tired, old myth that radical feminism posits all sex is rape: “MacKinnon’s theory makes it impossible to know the difference between normal heterosexual intercourse and rape.” Halley, Sexuality Harassment II, *supra* note 4, at 88. From whose perspective, one should ask, the perpetrator’s or the victim’s, is it “impossible to know the difference between normal heterosexual intercourse and rape”? *Id.* For further discussion of this point, see *infra* Part IV.

¹²⁶ Among others, from queer theorist Judith Butler. As she has written:

Feminist arguments such as Catharine MacKinnon’s offer an analysis of sexual relations as structured by relations of coerced subordination and argue that acts of sexual domination constitute the social meaning of being a “man,” as the condition of coerced subordination constitutes the social meaning of being a “woman.” Such rigid determinism assimilates any account of sexuality to rigid positions of domination and subordination and assimilates these positions to the social gender of man and woman. But that deterministic account has come under continuous criticism from feminists not only for an untenable account of female sexuality as coerced by subordination, but for the totalizing view of heterosexuality as well—one in which all the power relations are reduced to relations of domination—and for the failure to distinguish the presence of coerced domination from pleasurable and wanted dynamics of power.

Butler, Against Proper Objects, *supra* note 73, at 9-10. See also, e.g., Elizabeth Rapaport, Generalizing Gender: Reason and Essence in the Legal Thought of Catharine MacKinnon, in A Mind of One’s Own: Feminist Essays on Reason and Objectivity, *supra* note 109, at 127, 134.

¹²⁷ Halley, Sexuality Harassment, *supra* note 4, at 190.

¹²⁸ MacKinnon, Points Against Postmodernism, *supra* note 110, at 695. For an earlier articulation of this idea, see Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 218 (1987) (“Sex feeling good may mean that one is enjoying one’s subordination; it would not be the first time. Or it may mean that one has glimpsed freedom, a rare and valuable and contradictory event. Under existing conditions, what else would freedom be?”). See also, e.g., Dworkin, Woman Hating, *supra* note 115, at 183 (“Sex as the power dynamic between men and women, its primary form sadomasochism, is what we now know. Sex as community between humans, our shared humanity, is the world we must build.”); *id.* at 184-85 (“This is not to say that ‘men’ and ‘women’ should not fuck. Any sexual coming together which is genuinely pansexual and role-free, even if between men and women as we generally think of them (i.e., the biological images we have of them), is authentic and androgynous. Specifically, *androgynous fucking requires the destruction of*

Nor, for that matter, do we discover from Halley's text, except perhaps very obliquely,¹²⁹ that radical feminism is not—*yes, not*—a critique of sexuality in its every form.¹³⁰ 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,"¹³¹ 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,¹³² is "nearly perfect,"¹³³ "almost completely occupies the horizon of [sexual] possibility," or worse.¹³⁴ Then again, maybe it's simply the extent of the hegemony of male dominance over sexuality that creates this impression.¹³⁵ 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 is distorted to caricature without them.¹³⁶

A similar point can be made about the skepticism we're urged to adopt toward claims of sexual violation. The argument for queer skepticism is deceptively simple: skepticism toward claims of same-sex sexual injury

all conventional role-playing, of genital sexuality as the primary focus and value, of couple formations, and of the personality structures of dominant-active ('male') and submissive-passive ('female')."); Rapaport, *supra* note 126, at 138 ("MacKinnon's feminism claims neither to be the only nor to be the fundamental theory of the oppressed."); *id.* at 139 ("MacKinnon . . . does not claim to describe fundamental or unchanging reality."). On this last count, see also Richard Rorty, *Feminism and Pragmatism*, in *Truth & Progress: Volume 3: Philosophical Papers* 202 (1998).

¹²⁹ See, e.g., Halley, *Sexuality Harassment*, *supra* note 4, at 184 ("Sex hierarchy is ontologically and epistemologically 'nearly perfect': by producing both its own reality and our every mode of apprehending that reality (with the sole exception of feminist method as MacKinnon defines it), it *almost completely* occupies the horizon of possibility.") (emphasis added).

¹³⁰ See *supra* note 125.

¹³¹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 153 (1989).

¹³² One might also, or alternatively, mention here radical feminism's broader goal of working "for the eradication of dominance and elitism in all human relationships." Barbara A. Crow, *Introduction: Radical Feminism*, in *Radical Feminism: A Documentary Reader* 1, 1 (Barbara A. Crow ed., 2000) ("Radical feminism is working for the eradication of domination and elitism in all human relationships.") (quoting Cellestine Ware).

¹³³ Halley, *Sexuality Harassment*, *supra* note 4, at 184.

¹³⁴ *Id.*

¹³⁵ See *supra* note 125.

¹³⁶ To quote from Judith Butler: "Perhaps the time has arrived to encourage the kinds of conversation that resist the urge to stake territorial claims through the reduction or caricature of the positions from which they are differentiated." Butler, *Against Proper Objects*, *supra* note 73, at 24-25.

propels us towards skepticism toward claims of sexual injury *tout court*. 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?”¹³⁷ 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.”¹³⁸ On this logic, recalling Halley’s reconstruction 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 *did not* 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 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.”¹³⁹

Now, one might properly 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 anti-gay sexual violence, hence an abuse of sex equality law. Under some circumstances, considering the sad 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.”¹⁴⁰

But, in an unreconstructed Freudianism, Halley advocates skepticism not of some, but of *all* claims of same-sex sexual harm.¹⁴¹ In one relevant sense, of course, we already do 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?¹⁴²

¹³⁷ Halley, *Sexuality Harassment*, *supra* note 4, at 197.

¹³⁸ *Id.* To similar effect is her insistence, *id.* at 195, that a queer approach to sexual harassment law “would want the doctrinal machinery applied at these points to be skeptical, resistant to the plaintiff.”

¹³⁹ *Id.* at 196-97.

¹⁴⁰ *Id.* at 195 (emphasis omitted). I myself would identify the harm differently than Halley does, as one of subordination, but for now that difference doesn’t seem to matter much.

¹⁴¹ Halley begins with talk of “skepticism to claims of same-sex injury,” *id.* at 196, but then drops “claims,” and refers to “same-sex sexual injury.” *Id.* at 197.

¹⁴² This sheds some light, I think, on Halley’s “problematic of unwantedness,” Halley, *Sexuality Harassment II*, *supra* note 4, at 95-98, according to which, apparently, we

But why should we assume that all same-sex injury claims are (to use her wonderful 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 non-homophobic claims. Halley, however, provides no such explanation.

Perhaps, with an anti-subordination theory of sexual injury in mind, it is supposed that all claims of same-sex sexual 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

should revel in our capacity to desire desire's confusion, including the desire for unwanted sex. *Id.* at 97. (Go figure.) See *supra* note 114. The idea isn't wholly unreminiscent of what Christopher Lane has described as Leo Bersani's “most radical vision of emancipated desire.” Christopher Lane, *Uncertain Terms of Pleasure*, 42.4 Mod. Fict. Stud. 807, 813 (1996). Glossing Andre Gide's *The Immoralist*, and along the way, giving us deeper insight into Halley's text, Bersani writes:

Michael's pederasty is the model for intimacies devoid of intimacy. It proposes that we move irresponsibly among other bodies, somewhat indifferent to them, demanding nothing more than that they be as available to contact as we are, and that, no longer owned by others, they also renounce self-ownership and agree to that loss of boundaries which will allow them to be, with us, shifting points of rest in a universal and mobile communication of being. If homosexuality in this form is difficult to know, this is because it no longer defines a self. At once much less and much more than a sexual preference, it may also, as Marceline perceptively remarks, “eliminate the weak”. But the way we live already eliminates the weak, and the familiar piety she expresses serves to perpetuate their oppression. Nothing could be more different from the strength of Michael's self-divestiture, from the risks he takes in loving the other as the same, in homo-ness. In that love (for want of a more precise word) he risks his own boundaries, risks knowing where he ends and the other begins. This is lawless pederasty—not because it violates statutes that legislate our sexual behavior, but because it rejects personhood, a status that the law needs in order to discipline us and, it must be added, to protect us. If Michael's immoralism defies disciplinary intentions, it also gives up the protection. And this should help us to see what is at stake in Michael's timid sexuality. He travels in order to spread his superficial view of human relations, preaching, by his anomalous presence among foreign bodies, a community in which the other, no longer respected or violated as a person, would merely be cruised as another opportunity, at once insignificant and precious, for narcissistic pleasures.

Bersani, *supra* note 15, at 128-29.

cases would render the claim of sexual harm homophobic *per se*.¹⁴³

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 exactly these directions.¹⁴⁴ 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 lead to the conclusion that to be for sex equality, including sex equality rights for lesbians and gay men, *pari passu*, is to be anti-gay.¹⁴⁵ 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 that they [have been or] are sexually injured by men"¹⁴⁶ 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 claims of same-sex sexual injury 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 anti-gay stereotypes about lesbian women's and gay men's capacity for truth telling, especially in matters sexual? Isn't that "heteronormative"?¹⁴⁷ 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?¹⁴⁸ Reasons for believing victims of sexual harm more generally? Can queer theory argue for unmodified skepticism toward same-sex sexual injury

¹⁴³ I engage this point in a slightly different way in Part IV *infra*.

¹⁴⁴ See *supra* note 104 (discussing Halley's reference to non-sexual acts of "same-sex love").

¹⁴⁵ See *supra* note 143.

¹⁴⁶ Halley, *Sexuality Harassment*, *supra* note 4, at 197.

¹⁴⁷ This is a term queer theorists not uncommonly use. See, e.g., Rosemary Hennessy, *Queer Theory: A Review of the differences Special Issue and Wittig's The Straight Mind*, 18 *Signs* 964, 967 (1993).

¹⁴⁸ Though not strictly necessary for my point, couldn't we count Halley's reasons among the considerations that would support a general rule (perhaps with the one exception we've been discussing) for *believing* those who maintain that they have been sexually harmed by someone of the same sex?

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 anti-gay implications, or that the case for queer skepticism is thus radically incomplete.

Feminists could have predicted the justificatory gap between the queer argument for skepticism about same-sex sexual injury 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 equality panic: panic over the possibility of meaningful sex equality, among others, 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 is 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 abuses sex equality law might otherwise *prevent*. More concretely, 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. But to do so would strip lesbian and gay male victims of sexual injury (among others) of the benefits of sex equality protections available now by law.¹⁴⁹

¹⁴⁹ This is no small change. Bear in mind that Halley's argument for skepticism applies by its own terms in all same-sex cases, no matter that the claim of sexual harm is a charge of sexual harassment, rape, or domestic violence or that the sex at issue was not otherwise consensual, wanted, or negotiated. Given its scope, how could Halley's same-sex skepticism *not* be expected to produce displeasure? In this and other respects, Halley's text may well be of concern even to those who have publicly defended consensual and negotiated sadomasochistic sexual practices between adults in the privacy of the home. *See, e.g.*, Jessica Benjamin, Master and Slave: The Bonds of Love, in Hegel's Dialectics of Desire and Recognition: Texts and Commentary 209, 211 n.3 ("Part of the failure of such [feminist] analyses, which are endemic to the feminist movement against pornography, is the denial of the difference between voluntary, ritual acts of submission that are subjectively considered pleasurable and acts of battery or violation that are terrifying and involuntary although they may occur within a theoretically voluntary contract like marriage."); Coming To Power (Samois eds., 3d ed. 1987). Alternatively, or as well, one might account for queer ambivalence toward skepticism about sexual injury claims on the grounds that a dense network of sexual regulations, such as those queer theory perceives sexual harassment rules to be, are capable of generating a much more intense kind of pleasure from their transgression than their absence would. De-regulating sexual harassment would thus have

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, as well—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- and sexuality-based injuries which—[it] readily admit[s]—men *sometimes* do inflict upon women."¹⁵⁰

And yet one strongly senses there's something more Halley wishes to say. With an approving nod, we're presented with Vicki Schultz's "solution," that we de-emphasize the sexual dimensions of the injury sexual harassment law addresses.¹⁵¹ 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."¹⁵² (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 a telling if enigmatic phrase, Halley adds, "Perhaps it's time

uncertain consequences for the production of pleasure. See Gutting, *supra* note 96, at 77 ("those middle-range pleasures that make up everyday life. . . are nothing for me. . . [a] pleasure must be something incredibly intense.") (quoting Michel Foucault) (citation omitted). See also *supra* note 96.

¹⁵⁰ Halley, Sexuality Harassment, *supra* note 4, at 198 (emphasis added). See also, e.g., Jana Sawicki, Feminism, Foucault, and "Subjects" of Power and Freedom, in Feminist Interpretations of Michel Foucault, *supra* note 12, at 159, 167-68 ("Foucault and Butler shift the focus of political analysis from the epistemological project of grounding political and social theories to analyzing the production of certain forms of subjectivity in terms of their costs. Both conclude that the costs associated with many modern practices of identity formation have been too high.").

¹⁵¹ Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998). For a more recent statement that moves more boldly (and problematically) in this direction, see Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061 (2003). See also Ruth Colker, Whores, Fags, Dumb-Ass Women, Surlv Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine, 7 Yale J.L. & Feminism 195 (1995).

¹⁵² Halley, Sexuality Harassment, *supra* note 4, at 198.

to break even more eggs than Schultz does.”¹⁵³

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 roll back, of sexual harassment law may well protect and release a considerable degree of pleasure—for perpetrators most of all.¹⁵⁴ But such a proposal would also protect and release a considerable degree of displeasure—especially for victims.¹⁵⁵ A queer commitment to the sexual pleasures of hierarchy, produced under conditions of male dominance, seem (enough) to condition this conflicted conclusion.¹⁵⁶

IV. ON SEXUAL VIOLENCE

The definition of sexual injury hasn’t much concerned queer theory, at least when viewed from the vantage point of a feminism interested in stopping sexual violence.¹⁵⁷ Queer theory—whether through its silence, its

¹⁵³ *Id.*

¹⁵⁴ Is this what Halley means when she calls for “sex harassment regulation . . . obtained in the most sexually liberating . . . terms possible”? *Id.*

¹⁵⁵ In terms that should register with radical queer theorists, see Turner, *supra* note 11, at 5 (“[I]t was feminist film theorist Teresa de Lauretis who first used the term ‘queer’ in 1991 to describe her intellectual endeavors.”); Kirsch, *supra* note 12, at 33 (“Hogan and Hodgson place the beginnings of a ‘Queer theory’ with Teresa de Lauretis’s [sic] use of the term for a 1989 conference at the University of California, Santa Cruz.”), Teresa de Lauretis helpfully explains: “To release ‘bodies and pleasures’ from the legal control of the state and relations of power exercised through the technology of sex, is to affirm and perpetuate the present social relations which give men rights over women’s bodies”—and, I’d say, over other men’s, as well. Even more, it “is to affirm and perpetuate the present social relations which give” some women, who are fortunate enough to occupy positions of male power and privilege, “rights over [other] women’s bodies.” Teresa de Lauretis, *Technologies of Gender* 37 (1987). See also, e.g., Bartky, *supra* note 26, at 65 (Foucault “is blind to those disciplines that produce a modality of embodiment that is peculiarly feminine. To overlook the forms of subjection that engender the feminine body is to perpetuate the silence and powerlessness of those upon whom these disciplines have been imposed. Hence, even though a liberatory note is sounded in Foucault’s critique of power, his analysis as a whole reproduces that sexism which is endemic throughout Western political thought.”).

¹⁵⁶ Such a commitment may also help explain the seeming conflict between her practical, political support for recognizing a cause of action for same-sex sexual harassment in *Oncale*, see Brief of Law Professors as Amici Curiae in Support of Petitioner at 32, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568), and her present theoretical concerns about the Court’s decision in the case.

¹⁵⁷ Monique Deveaux, *Feminism and Empowerment: A Critical Reading of Foucault*, in *Feminist Interpretations of Michel Foucault*, *supra* note 12, at 211, 225 (relying on the work of Monique Plaza, *supra* note 14, to challenge the Foucauldian “false dichotomy between violence and sex,” and explaining that “[r]ape, which is violent, forced sex, represents an imbroglio for Foucault, leading him to assert that the sexual part of rape should

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—including its sexual vectors—is a legitimate cause for concern and action.¹⁵⁸ But despite all this, feminists

be exempted from punishment, leaving only force as deserving of sanction—a preposterous distinction. Women’s unfreedom (as victims of rape) is thus superseded by the need to maintain men’s freedom; that is, their freedom not to be punished for sex or to have their sex repressed.”). Compare *id.* with Halley, *Sexuality Harassment II*, *supra* note 4, at 88 (“MacKinnon’s theory makes it impossible to know the difference between heterosexual intercourse and rape”); and *id.* at 97 (“we know we’re against *assault* [sic, not rape.] . . . On that reading, it was precisely the loss of certainty about wantedness that the players were seeking. That was their desire. It’s a risky desire: acting on it places one in the way of having *some unwanted sex*. Things can go wrong; we need to keep one eye on the cause of action for *assault*.”) (some emphasis added, some in original); and *id.* at 102 (“At the very least, gay identity and queer thinking would sever the doctrinal link making sexual harassment a first-order species of sex discrimination, sending the former out of the discrimination paradigm and reducing allegations of *sexual cruelties* at work to the status of mere evidence, no different in legal value from evidence that someone threw a stapler across the room.”) (emphasis added).

¹⁵⁸ Venturing an important brief against Foucault’s understanding of “pleasure,” Linda Martin Alcoff writes:

My argument is, then, that, despite appearances to the contrary, Foucault in fact does not hold that pleasure is ontologically constituted by discourse and exists in intrinsic and not only extrinsic relationship to structures such as patriarchy. Such a view would have allowed him to consider the ways in which certain pleasures are not merely redistributed but produced, such as the pleasure of violating, the pleasure of harming, and the pleasure in vastly unequal and nonreciprocal sexual relations. And most important, it would also work against the possibility that pleasure, in all its various forms, could serve as the haven or bulwark against the mechanisms of dominant power/knowledges. If pleasure is itself the product of discursive constitution, it cannot play the role of innocent outsider. It is because Foucault sees pleasure as playing this latter role that he repudiates the view that pleasures can and should be open to political and moral evaluation and assessment. Foucault argues that this would simply increase the hegemony of dominant discourses to intervene in the minute practices of everyday life, which in his view is the principal feature of contemporary domination.

But here we have a true note of discord between conflicting tendencies in his own work: on the one hand, the uncovering of the machinations of power at work in the multiple sites of “personal life”; on the other, the fear of striking a judgmental pose with respect to individual practice in any form. Despite the significant dangers of the latter, given that we live in a period of more efficient social discipline than perhaps the West has ever experienced, I would argue that a feminist Foucauldian cannot afford to repeat Foucault’s own disabling ambivalence. If we are persuaded by his (and others’) account of domination in “everyday life,” we must risk putting forward our judgments about when and where it occurs. It is a mistake to think that putting forward such judgments will necessarily result in an overall increase in repression: the repression of

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,"¹⁵⁹ and to "admit" that men "sometimes" do inflict these injuries on women.¹⁶⁰ After this 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 touchstone 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

adult-child sex may effect a decrease in the constraints by which children's own sexual energies are policed, managed, and deflected.

There is no necessary contradiction between a view that takes seriously the connection among discourse, power, and sexuality, and a politics of sexuality that repudiates various sexual pleasures.

Alcoff, *supra* note 17, at 110-11. Accord David M. Halperin, *Forgetting Foucault*, in *How to Do the History of Homosexuality* 24, 26 (2002) ("['B]odies' and 'pleasures' refer to two entities that have been taken up by the modern apparatus of sexuality, that form part of it and function specifically as its ground, but that modern sexual discourse and practice largely ignore, underplay, or pass quickly over, and that accordingly are relatively undercoded, relatively uninvested by the normalizing apparatus of sexuality, especially in comparison to more thoroughly policed and more easily pathologized items such as 'sexual desire.' (Or so at least it seemed to Foucault at the time he was writing[.] . . .) For that reason, bodies and pleasures represented to Foucault an opportunity for effecting . . . a means of resistance to the apparatus of sexuality. In particular, the strategy that Foucault favors consists in asserting, 'against the [various] holds of power, the claims of bodies, pleasures, and knowledges in their multiplicity and their possibility of resistance.' The very possibility of pursuing a body- and pleasure-centered strategy of resistance to the apparatus of sexuality disappears, of course, as soon as bodies and pleasures cease to be understood merely as handy weapons against current technologies of normalization and attain instead to the status of transhistorical components of some natural phenomenon or material substrate underlying 'the history of sexuality' itself. Such a notion of 'bodies and pleasures,' so very familiar and uncontroversial and positivistic has it now become, is indeed nothing if not eminently forgettable.") (footnotes omitted). See also, e.g., Deveaux, *supra* note 157, at 225 (dealing with relationship between Foucault's ideas and sexual abuse of women); Monique Plaza, *Our Damages and Their Compensation—Rape: The "Will Not to Know" of Michel Foucault*, 1 *Feminist Issues* 25 (Summer 1981) (same).

¹⁵⁹ Halley, *Sexuality Harassment*, *supra* note 4, at 198.

¹⁶⁰ *Id.*

of punishing someone else for desires that are properly one's own."¹⁶¹ 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.”¹⁶²

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 in the same place male supremacy does: 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 (or 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* Cover¹⁶³), that engaging in sexual violence is a way of “punishing someone else for desires that are properly one's own,”¹⁶⁴ and so conclude that complaints of sexual injury

¹⁶¹ *Id.* at 195.

¹⁶² *Id.* (emphasis omitted).

¹⁶³ See, e.g., Robert Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986). For a collection of Cover's work, along with some important commentary on it, see *Narrative, Violence, and the Law: Essays of Robert Cover* (Martha Minow et al. eds., 1992). See also, e.g., Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *Law's Violence* 211 (Austin Sarat & Thomas R. Kearns eds., 1995).

¹⁶⁴ Halley, *Sexuality Harassment*, *supra* note 4, at 195.

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 under-discussed, 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, for instance, 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 has 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.”¹⁶⁵ 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.¹⁶⁶

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?¹⁶⁷ 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.

¹⁶⁵ *Id.* at 198.

¹⁶⁶ Herbert Marcuse, Eros and Civilization: A Philosophical Inquiry Into Freud 3 (1966).

¹⁶⁷ Cf. Barbara Herman, Could It Be Worth Thinking About Kant on Sex and Marriage, in A Mind of One’s Own: Feminist Essays on Reason and Objectivity, *supra* note 109, at 49 (developing a Kantian account of radical feminism, including its opposition to sexual violence).

And so the time has, at last, come for us to ask: 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.¹⁶⁸

¹⁶⁸ As Sedgwick promised when she launched the queer project: “[w]hen another kind of intersection loomed—the choice between risking a premature and therefore foreclosing reintegration between feminist and gay (male) terms of analysis, on the one hand, and on the other hand keeping their relationship open a little longer *by deferring yet again the moment of their accountability to one another*—I have followed the latter path.” Sedgwick, *supra* note 50, at 16 (emphasis added).