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THE NEW MADONNA/WHORE SYNDROME: FEMINISM, SEXUALITY, AND SEXUAL HARASSMENT

CATHY YOUNG*

I. WOMEN AS VICTIMS OF SEX: VIEWS FROM LEFT AND RIGHT

The alliance between the anti-pornography wing of the feminist movement and the religious right in the battle for censorship of sexually explicit materials often has been described as an odd coalition, with inevitable puns about politics and strange bedfellows. But, in fact, this alliance is neither a purely incidental nor an opportunistic one. It is rooted in striking, yet rarely noted, similarities between the two groups' views of sexuality and of women as the weaker sex.

Much has been written recently about the "victim mentality" in feminism.¹ Indeed, most of the feminist stories of the 1990s that have taken on mythic dimensions—from *Thelma and Louise* and Susan Faludi's *Backlash* to Anita Hill and the Palm Beach rape trial—feature an image of women as victims of men or of a (male) societal conspiracy. Meanwhile, on the right, advocates of traditional sex roles have created a parallel myth of female victimology. In *Enemies of Eros*,² conservative writer Maggie Gallagher argues that by normalizing premarital sex, divorce, and maternal employment, the combined forces of the sexual revolution and feminism allowed irresponsible men to abandon women, devalued the work of homemakers and mothers, and pushed unwilling women into the workplace.³

The feminist Faludi suggests that if many women worry about having children before it's too late or, worse yet, decide to put their careers on hold to stay home with those children, it is only because they have been

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1. See, e.g., KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* (1993); Jean Bethke Elshtain, *Battered Reason*, *NEW REPUBLIC*, Oct. 5, 1992, at 25; Jean Bethke Elshtain, *Trial by Fury*, *NEW REPUBLIC*, Sept. 6, 1993, at 32; Cathy Young, *Victimhood is Powerful*, *REASON*, Oct. 1992, at 19.

2. MAGGIE GALLAGHER, *ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT* (1989).

3. See *id.* As Gallagher asserts, "[w]omen who must work also suffer from the great disjunction between the amount of praise and respect they receive for working outside the home, and the contempt society has for their work as mothers." *Id.* at 61.

brainwashed by the media and by insidious conservative influence.⁴ The anti-feminist Gallagher suggests that if many women put their careers first, find full-time motherhood unsatisfying, or, worse yet, decide to forgo marriage and children altogether, it is only because they have been brainwashed by the media and by insidious feminist influence.⁵ To both authors, choices they find baffling and unpalatable must be proven not merely wrong but somehow involuntary.

Clearly, feminists and traditionalists disagree emphatically on what constitutes victimization of women, and often each side sees the other as the victimizer. Gallagher finds victimization in the expectation that women should pursue careers outside the home;⁶ Faludi, in the expectation that they should put home and children ahead of careers.⁷ But there is one area in which the "new feminist" and anti-feminist versions of female victimhood converge almost uncannily: sex.

A man exploits a woman every time he uses her body for sexual pleasure while he is unwilling to accept the full burden of paternity That is to say, single men (and frequently married men) exploit women almost every time they make love. [The woman] may consent, fully, knowledgeably, enthusiastically to her exploitation. That does not change the nature of the transaction.⁸

Physically, the woman in intercourse is a space inhabited, a literal territory occupied literally: occupied even if there has been no

4. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991). For instance, Faludi suggests that "[a]t the same time that '80s TV was busy saluting the domestic angels of '50s TV, it was maligning mothers who dared step outside the family circle." *Id.* at 155.

5. See GALLAGHER, *supra* note 2. For example, Gallagher writes that when women enter the working world, "[w]omen's magazines, TV shows, [and] network anchors will laud her decision to return to work; she is a modern-day heroine, a harbinger of the New Woman, an example of female progress." *Id.* at 61-62.

6. See *id.* Gallagher states that "[w]omen with children who do not work for pay overwhelmingly report being made to feel intellectually and socially inferior." *Id.* at 60. In addition, she posits that "[w]omen today are being punished . . . for supplying what everyone wants and what society in fact needs us to provide: a strong, dependable love, an emotional commitment that children can count on." *Id.* at 69.

7. See FALUDI, *supra* note 4. For example, Faludi believes that "[w]omen who resist baby fever, by controlling their fertility or postponing motherhood, are shamed and penalized." *Id.* at 133.

8. GALLAGHER, *supra* note 2, at 260-61.

resistance, no force; even if the occupied person said yes please, yes hurry, yes more.⁹

The first of these passages is from Gallagher's *Enemies of Eros*; the second, from Andrea Dworkin's *Intercourse*.

Of course, the two viewpoints are not the same. Dworkin (whom Gallagher criticizes for seeing femininity as negative but praises for understanding that sex is "dangerous")¹⁰ presumably makes no distinction between marital and non-marital intercourse.¹¹ To Gallagher, sex is exploitation only when the man is not prepared to support the child that may be conceived (even if the woman, because of something like "false consciousness," is equally unwilling—to paraphrase her words—to accept the burden of maternity).¹² But the underlying logic is the same: women are exploited even when they don't know they are being exploited; women are raped even when they don't know they are being raped.¹³

Sexual conservatives subscribe to the view that, generally speaking, men are interested in easy sex and women are interested in love and intimacy, and that therefore strict sexual standards benefit women by enabling them to withhold sex until they obtain commitment from men. "Sexual liberation' . . . has turned out to be—as it was destined to be—a

9. ANDREA DWORKIN, *INTERCOURSE* 133 (1987).

10. See GALLAGHER, *supra* note 2, at 257-58.

11. See DWORKIN, *supra* note 9, at 125-26, 164-67 (arguing that intercourse always occurs in a context in which men have power over women, and that married women are further dominated by the act of intercourse in that they have no right to refuse it).

12. GALLAGHER, *supra* note 2, at 260-61.

13. The most recent expression of the left-right convergence is found in conservative writer Charlotte Allen's guarded praise for feminist legal scholar (and Dworkin's frequent ally) Catharine MacKinnon:

What is most attractive, and unsettling, about MacKinnon is the premise from which she extrapolates—or, rather, the big lie she is taking on. MacKinnon forces us to face the unpleasant fact that although we have created a fiction of gender-blind egalitarianism, biology—along with the palpable differences between the sexes it entails—remains intractable

. . . .

. . . [S]he is certainly right that the essence of pornography is the depiction of sexual submission. . . . Men's fascination with pornography, moreover, is a classic instance of the divergence between men and women over sex.

Charlotte Allen, *Penthouse Pest: Why Porn Crusader MacKinnon Is Right*, WASH. POST, Nov. 28, 1993, at C1, C2. Allen also claims that sexual liberation left women with "no effective vocabulary for turning down unwanted sex," citing as an example of coercion an incident in which a man whose advances she rejected called her "middle class." *Id.* at C2.

male scam," writes neo-conservative commentator Irving Kristol.¹⁴ "Easy, available sex is pleasing to men and debasing to women, who are used and abused in the process."¹⁵ Syndicated columnist Mona Charen believes that the sexual revolution has led to

a profound loss of bargaining power for single women.

. . . .
In the twinkling of an eye (a male eye), women abandoned standards of sexual conduct which had protected them from untempered male lust for millennia. . . . Only [later] . . . did women look at their hands and recognize that they had given away their trump.¹⁶

In this scheme, female sexuality is a commodity to be traded to men in exchange for guarantees of commitment (and presumably economic support).

Meanwhile, the prominent feminist writer Germaine Greer also characterizes sex, at least as currently practiced in our society, as a male imposition on women:

Female sexuality still depends upon male demand, and male demand is more genital-centered and more specific than women's urge to express sensuality and tenderness. . . . The kind of sex that leaves women pregnant is not the kind that gives them the most intense pleasure, but it is the kind that they usually get.¹⁷

While Greer appears to be saying that women most enjoy stimulation other than intercourse, rather than that they are naturally chaste, her vision of "genital-centered" male sexuality in contrast to women's "desire for affection and closeness"¹⁸ is not very far removed from Kristol's or Charen's.

Thus, in his essay, Kristol, while averring that he has no sympathy for such "militant" feminist goals as equal representation in government, admits that "there are aspects of contemporary feminism that do evoke a sympathetic response" in him—specifically, the ones that represent a

14. Irving Kristol, *Reflections on Love and Family*, WALL ST. J., Jan. 7, 1992, at A10.

15. *Id.*

16. Mona Charen, *Paying Dues for the Sexual Revolution*, N.Y. NEWSDAY, Jan. 22, 1990, at 46.

17. Germaine Greer, *The Backlash Myth*, NEW REPUBLIC, Oct. 5, 1992, at 20, 21.

18. *Id.* at 21.

backlash against "sexual liberation" including "a hostility toward pornography" and "a keen sensitivity to a phenomenon known as 'date rape.'"¹⁹ Most feminists, says Kristol, finally seem to have realized that "true equality between men and women can only be achieved by a moral code that offers women some protection against male predators—and all men are, to one degree or another, natural predators when it comes to sex."²⁰

II. "PROTECTIVE FEMINISM": THE LEGAL PRESUMPTION OF FEMALE VULNERABILITY

This view of men as sexually predatory and women as sexually vulnerable was at the root not only of traditional moral codes but of much traditional legislation. These legal norms were vigorously challenged by feminists in the 1970s. Thus, in the 1977 study *Sex Bias in the U.S. Code*,²¹ future Supreme Court Justice Ruth Bader Ginsburg and Brenda Feigen-Fasteau urged the repeal of the 1910 Mann Act,²² which prohibited the interstate transportation of women and girls "for the purpose of prostitution or debauchery, or for any other immoral purpose."²³ They cited not only "the invasion of privacy issue" but the underlying paternalistic assumptions about women: "The Mann Act . . . is offensive because of the image of women it perpetuates. . . . [T]he act was meant to protect weak women from bad men."²⁴ The authors also called for a "sex-neutral" definition of statutory rape to replace the traditional language describing the victim as an underage female.²⁵ It is noteworthy that Ginsburg's position sparked vehement attacks both from anti-ERA activist Phyllis Schlafly, who accused Ginsburg of promoting "extremist feminist concepts,"²⁶ and from "new feminist" legal scholars

19. See Kristol, *supra* note 14, at A10.

20. *Id.*

21. RUTH BADER GINSBURG & BRENDA FEIGEN-FASTEAU, U.S. COMM'N ON CIV. RIGHTS, *SEX BIAS IN THE U.S. CODE* (1977).

22. See *id.* at 97-99, 103.

23. White-Slave Traffic [Mann] Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1988)).

24. GINSBURG & FEIGEN-FASTEAU, *supra* note 21, at 98-99.

25. See *id.* at 95, 102.

26. *Ruth Bader Ginsburg's Feminist World View*, PHYLLIS SCHLAFLY REPORT, July 1993, § 1.

such as Mary Becker of the University of Chicago, who accused her of promoting "assimilationist" and "phallogocentric" doctrines.²⁷

The "new feminism," in its preoccupation with the sexual "harm" inflicted on women by men—pornography, sexual harassment, and rape (all of which are conflated into a single "continuum" of sexual violence)—inevitably mirrors and reinforces traditional paternalism toward women. It might be appropriate, then, to characterize the "new feminists" as "protective feminists."

To the extent that the process of legal reform initiated by the "equality feminism" of the 1970s continues, it often collides in paradoxical ways with the legal initiatives of protective feminism. Thus, in May of 1993, the South Carolina Supreme Court struck down a state law prohibiting "any obscene, profane, indecent, vulgar, suggestive or immoral message" that was spoken or written to a "woman or woman child"²⁸ on the grounds that it constituted unequal protection and was based on "'old notions'" of sex differences.²⁹ (The case concerned a teenage male convicted of using obscenity to threaten a fifteen-year-old girl.³⁰) At the same time, however, the California State Assembly is considering a bill that would impose a fine for sexual harassment,³¹ such as obscene remarks.

On the surface, the new protective laws are frequently gender-neutral. For example, a Massachusetts bill proposed in 1992, which defines pornography as "a practice of sex discrimination . . . that differentially harms and disadvantages women"³² and allows women to bring discrimination complaints against producers or distributors of sexually explicit materials, contains the provision that "[a]ny man, child, or transsexual who alleges injury by pornography in the way women are injured by it may also complain."³³ However, this is obviously no more than a pro forma concession to equal protection.

27. See Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 207-09, 211-17, 219-24.

28. S.C. CODE ANN. § 16-15-250 (Law. Co-op. 1985).

29. *In re Joseph T.*, 430 S.E.2d 523, 524 (S.C. 1993) (quoting *Craig v. Boren*, 429 U.S. 190 (1976)).

30. See *id.* at 524.

31. S. 612, 1993-94 Sess., § 1.5(1)-(2) (1993). The bill states that all people have a right to be free from "unwelcome and persistent, or severe sexual advances" that are intimidating or threaten violence. *Id.*

32. An Act to Protect the Civil Rights of Women and Children, H.R. 5194, Mass. 177th Gen. Ct., 1992 Sess., § 1 (1992) (unenacted; not yet refiled as of 1993 Session).

33. *Id.* § 2(2)(e).

The issue of sexual harassment, at least insofar as "hostile environment" harassment cases are concerned, is closely linked to the issue of restrictions on sexual expression. It is no coincidence that Catharine MacKinnon, the leading protective feminist theorist on both issues, speaks of a legal tendency to see "a convergence of pornography and sexual harassment."³⁴ "Pornography" is seen both as leading to sexual harassment (as in the lawsuit against Stroh's Brewery, in which two female employees alleged that the company's "Swedish bikini team" beer commercials, not legally obscene but certainly "objectifying" women, created a harassment-supportive atmosphere³⁵) and as *constituting* sexual harassment. Current sexual-harassment law and feminist theory, therefore, offer a good opportunity to examine the thin line that separates protecting women's individual rights from affording women special safeguards, as well as the way in which these safeguards can reinforce stereotypes about women and female sexuality.

III. SEXUAL HARASSMENT: THE "REASONABLE WOMAN" AND THE VIRTUOUS WOMAN

At a birthday party in my office, the celebrant was feted with a cake in the shape of male genitals. The cake was devoured with great gusto, to the mirth and entertainment of many of those present and the intense discomfort of others. The cake was presented to a woman by the other women in the office. Those most uncomfortable were men.³⁶

This episode was recounted by a male television producer struggling to make sense, in the wake of the Clarence Thomas hearings, of the new rules governing sexual conduct between men and women at the office. In another incident described to me personally, a young male employee at an office Christmas party was rather startled to receive from several female co-workers a "gag gift" of a pair of red silk undershorts with a card inscribed "To the sexiest guy at the office." If the roles had been reversed—that is to say, if the men in an office had conspicuously enjoyed a cake shaped as a woman's breast or genitals, or presented a female co-worker with erotic lingerie—it is likely that in the current social climate,

34. Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991, § 6 (Magazine), at 28, 29 (quoting MacKinnon discussing her amicus curiae brief in *Thoreson v. Penthouse*, 583 N.Y.S.2d 213 (App. Div.1992)).

35. See Rorie Sherman, *Stroh's Case Plaintiffs Take Case to Public*, NAT'L L.J., Dec. 30, 1991, at 7.

36. William Broyles Jr., *Public Policy, Private Ritual*, N.Y. TIMES, Oct. 16, 1991, at A25.

such behavior would have been widely perceived as sexual harassment. But could the men in either incident have made such a complaint?

So far, no court has given a definitive answer to that question. However, in a passage in the 1990 *Drinkwater v. Union Carbide Corp.* opinion,³⁷ the Court of Appeals for the Third Circuit considered the possibility that in cases of this nature only women can bring a valid claim of harassment:

In the quid pro quo cases, sexual harassment claims are equally available to men and women, but non-quid pro quo hostile environment cases depend on the underlying theory that "[w]omen's sexuality largely defines women as women in this society, so violations of it are abuses of women as women." . . . The theory posits that there is a sexual power asymmetry between men and women and that, because men's sexuality does not define men as men in this society, a man's hostile environment claim, although theoretically possible, will be much harder to plead and prove.³⁸

In the landmark 1991 case *Ellison v. Brady*,³⁹ a Ninth Circuit panel ruled two-to-one that sexual-harassment claims (involving female plaintiffs) should be reviewed under a "reasonable woman" standard rather than the gender-neutral "reasonable person" standard under which the case had previously been dismissed by the district court.⁴⁰ In his ruling, Judge Robert K. Beezer stated that "a sex-blind reasonable person standard tends to . . . systematically ignore the experiences of women."⁴¹ Citing the work of feminist legal scholar Kathryn Abrams, Beezer wrote of women's "common concerns" based on their disproportionately high risk of victimization by sexual assault.⁴² Therefore, it was reasonable for the plaintiff to have felt threatened by a co-worker's persistent "love letters" indicating an obsessive and somewhat delusional infatuation with her, even though a man might have found the same behavior trivial and harmless.⁴³

Thus, under a "reasonable woman" standard, it appears that the proposed California law against sexual harassment would be no more

37. 904 F.2d 853 (3d Cir. 1990).

38. *Id.* at 861 n.15 (quoting CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 174 (1979)).

39. 924 F.2d 872 (9th Cir. 1991).

40. *See id.* at 878-81.

41. *Id.* at 879.

42. *See id.*

43. *See id.* at 880.

gender-neutral in its application than the traditional laws prohibiting the use of obscene language toward women. The argument would be that sexual remarks or even leers in the street harm women because they raise legitimate fears of sexual violence; a man subjected to such conduct would not suffer the same harm and therefore would not be entitled to the same protection.

In an interesting analysis of the "reasonable woman" standard, University of Iowa College of Law professor Martha Chamallas writes, "[u]ndeniably, the reasonable woman standard is asymmetric; it is premised on an explicit gender distinction and calls for nonidentical treatment of men and women."⁴⁴ This asymmetry is not discriminatory but desirable, "because it would promote substantive equality for women."⁴⁵ Chamallas admits, however, that the danger of a conservative interpretation of sex differences as natural and rooted in biology "is present each time gender difference is discussed, unless very careful attention is paid to the social origins of the differences."⁴⁶ She expresses concern that some of the language in *Ellison* implies that there may also be a male perspective in cases involving male plaintiffs, which suggests a "two-way street image of sexual harassment"⁴⁷ and "would seem to require parallel treatment of men and women"⁴⁸ rather than a specific effort to redistribute power from men to women. Finally, Chamallas worries that the hypothetical "reasonable woman" might be equated with the actual average woman "who has found a way to cope with, but not to challenge, sexually harassing conduct."⁴⁹ The standard that she proposes (and for which she finds partial support in Judge Howell W. Melton's opinion in *Robinson v. Jacksonville Shipyards, Inc.*,⁵⁰ decided in 1991) would define a reasonable woman's perspective as one that "might reasonably be taken by women consciously interested in improving their status in the workplace."⁵¹ The underlying assumption is that such a "reasonable woman" would take the view that "sexualization" in the workplace is inevitably detrimental to women's status.

One obvious problem with Chamallas' approach is that it explicitly rejects the protection of individual rights as the animating force behind

44. Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 108 (1992).

45. *Id.*

46. *Id.* at 124.

47. *See id.* at 125.

48. *Id.*

49. *Id.* at 135.

50. 760 F. Supp. 1486 (M.D. Fla. 1991).

51. Chamallas, *supra* note 44, at 135.

sexual-harassment laws; the only legitimate goal is to promote the interests of women as a group.⁵² There is, however, no reason to assume that the collective interests of women as perceived by Chamallas or MacKinnon are any more genuine than the collective interests of women as perceived by Charen or Schlafly; therefore, they are no more suitable as a basis for legislation.

Moreover, the belief that in modern Western societies men and women are divided by an absolute "sexual power asymmetry" and shaped completely by their membership in "dominant and subordinate groups" is just as questionable as the traditional view of immutable male-female differences and naturally ordained sex roles. Oft-cited examples of this "asymmetry" are open to challenge as well. Thus, Chamallas points out that "criticisms of women often involve . . . discussions of sexual preferences and experiences"⁵³ as evidence of society's tendency to define women, but not men, by their sexuality. Yet one may argue that insults directed at men, too, are often couched in sexual terms. And to take a specific case, many men would undoubtedly quarrel with the assumption in *Ellison* that obsessive sexual pursuit by a woman with delusional fantasies would not be threatening or at least highly disturbing to them. (One could even point to some recent films as proof that the fear of such pursuit is clearly present in the male psyche.⁵⁴)

Indeed, some commentators on gender issues have proposed that it is women who have superior "sexual power" (whether because of biology or culture), insofar as sex is perceived as a favor women grant to men, and female beauty is prized more highly than male beauty.⁵⁵ In a study

52. For a discussion of an individual-oriented approach to sexual-harassment claims, see Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

53. Chamallas, *supra* note 44, at 116 n.110 (citing the testimony of expert witness Dr. Susan Fiske in *Jacksonville Shipyards*).

54. See, e.g., FATAL ATTRACTION (Paramount 1987); THE TEMP (Paramount 1993); THE CRUSH (Warner Bros. 1993); see also ROIPHE, *supra* note 1, at 166 (explaining that this common ambivalence about sex is depicted in several recent feature films in which "[m]orality mixes with the fear of sex to produce a new kind of erotic thriller . . . with the message that killing is sexy and sex kills").

55. See, e.g., WARREN FARRELL, THE MYTH OF MALE POWER 85 (1993) ("female beauty is the world's most potent drug. . . . Throughout history, the only constant about female beauty and female sex was that they were more valued than male beauty and male sex."); CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE 62 (1992) ("We have what they want. I think woman is the dominant sex. Men have to do all sorts of stuff to prove they are worthy of a woman's attention."); DAVID THOMAS, NOT GUILTY: THE CASE IN DEFENSE OF MEN 162-63 (1993) ("Women initiate sex, really. It's the woman who's in charge. We make all the choices, we make the decisions, because we invest all the time involved in producing a baby." (quoting Claire Rayner)).

of female sexuality, sex researcher Carol Cassell asserts that many women have absorbed the subconscious message that sex is their most important asset if rationed: "To be blunt, sex has historically been a commodity. It's a valuable source of power Sexual power is . . . the female commodity,"⁵⁶ writes Cassell. "A man may ask [for sex], but a woman controls through her answer. So a woman not only has the real power, she wields it over a man when he is most vulnerable, in having given in to his need for her."⁵⁷ "Men's advocates" could claim that a "male perspective" on sexual harassment should incorporate an understanding of the discomfort or tension that sexually provocative female dress or body language produces in men.⁵⁸ While this complaint can be easily interpreted as a "she was asking for it" defense for assaultive behavior, materials in popular women's magazines can be cited to support the contention that clothes and body language are indeed used to send sexual signals.⁵⁹ If sexual harassment can include so physically intangible an invasion as a leer, why not a miniskirt? Or, to take a different angle, if women's greater risk of sexual violence puts them in need of special protection from remarks or stares that have the potential to inspire fear of such assault, could men's higher risk of non-sexual physical assault (coupled with social pressure not to back away from a fight) require special legal protections against aggressive verbal or body language directed at men?

Although Chamallas is reluctant to accept the real-life "average woman" (whoever she is) as a fitting "reasonable woman" to serve as a yardstick in sexual harassment claims, she is quite willing to invoke the apparent views of real-life women when exploring gender differences in perceptions of sexual conduct in the workplace. Both she⁶⁰ and another

56. CAROL CASSELL, *SWEPT AWAY: WHY WOMEN FEAR THEIR OWN SEXUALITY* 34-35 (1984).

57. *Id.* at 150. Of course, this power is a rather self-defeating one in that it involves the woman's denial of her own pleasure in sex.

58. *See, e.g.,* FARRELL, *supra* note 55, at 289-91, 299-300 (arguing that "workplace flirtation," which the author defines as "[s]uggestive dress, flirtatious eye contact," etc., is a form of harassment that "has been totally ignored by the EEOC and, therefore, can be done by women, free of risk"); THOMAS, *supra* note 55, at 136 (explaining that many men "feel that the overt sexuality of some women's clothes . . . constitutes a form of . . . passive harassment. It exploits a man's sexual responses, despite the women's claim to have quite different intentions."). For a woman's comment supporting this view, see BETH MILWID, *WORKING WITH MEN* 119-20 (Berkley Books 1990) (originally published as *WHAT YOU GET WHEN YOU GO FOR IT* (Dodd, Mead & Co. 1987)).

59. *See, e.g.,* *How to Make an Impact on a Man*, *COSMOPOLITAN*, Feb. 1989, at 177.

60. *See* Chamallas, *supra* note 44, at 111-17.

leading feminist legal theorist on sexual harassment, Kathryn Abrams,⁶¹ refer to studies, particularly the work of Barbara A. Gutek,⁶² showing that most women consider sexual overtures in the workplace offensive while most men consider them flattering,⁶³ and that women tend to find sexualized behavior in the workplace (such as lewd jokes) more objectionable than do men.⁶⁴ Both Abrams and Chamallas emphasize that these differences should be seen as rooted not in nature, or even in socialization, but in the imbalance of power between men and women (even those of ostensibly equal status at work). When Chamallas refers to differences between the sexes, she pauses to add, "or, more properly, between dominant and subordinate groups."⁶⁵ Sex is thus made analogous to race or ethnicity, suggesting that, just as racial humor or teasing in the workplace is clearly offensive and discriminatory toward minorities, so sexual humor is invariably offensive and discriminatory toward women.

In a concurring opinion in the recent sexual harassment case, *Harris v. Forklift Systems, Inc.*,⁶⁶ Ruth Bader Ginsburg appears to be leaning toward such a standard when she writes, "The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁶⁷ This suggests that any behavior by a male co-worker or supervisor that treats a female employee differently than a male employee—for instance, compliments having to do with attractiveness—can be considered discriminatory and harassing. Yet the analogy is reductive. It discounts the fact that sexuality is an important and legitimate part of life and that a particular sexual dynamic between men and women is likely to persist even in a fully egalitarian society. If this is accepted, then sexual equality means not liberating women from being viewed by men at least partly in sexual terms, but liberating women to treat men as "sexual objects." Curiously, this approach was illustrated by none other than Justice Ginsburg herself when, during her confirmation hearings, she

61. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1198 n.57 (1989).

62. BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* (1985).

63. *See id.* at 96-98.

64. *See id.* at 125-27.

65. Chamallas, *supra* note 44, at 99.

66. 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring).

67. *Id.* at 372.

related an anecdote about a case, *Diaz v. Pan American World Airways*,⁶⁸ in which a man sued an airline for refusing to hire him as a flight attendant:

I was having lunch with some law school colleagues at the U.N. dining room. . . . And one of the men said to me, "I understand what you are doing, Ruth, and it is great you are all for equality, and we are, too. But some of this is getting beyond reason. You know about that case of a guy who wants to be a stewardess? Isn't that silly?"

The waitress serving our table came to my aid. She said, "Pardon me, but I couldn't help overhearing your conversation. I just came back to the United States on Alitalia, and on that plane there was the most adorable steward." The men turned to me, and one said, "Ruth, do women look at men that way?" And I said, "You're darn right we do."⁶⁹

The analogy between sexualized conduct toward women and differential treatment based on race also ignores the fact that, while racial humor is invariably racist, sexual humor is not invariably sexist, unless one assumes that anything sexual is invariably degrading to women but not to men. (In 1992, the commander of the U.S. Navy Pacific Fleet, Adm. Robert Kelly, was reprimanded for making a sexually explicit joke at a staff meeting.⁷⁰ News reports said that the joke "made reference to male genitals," yet it was characterized as "sexually demeaning behavior *toward women*."⁷¹)

Feminist theorists often argue that laws against sexual harassment target coercion and abuse of power rather than flirting or sexual interaction,⁷² and feminist commentators have made the same point in the media in response to accusations of puritanism: "Sexual harassment isn't

68. 442 F.2d 385, 389 (5th Cir. 1971) (holding that the airline's policy of excluding men from flight-attendant positions solely because of their gender violated the 1964 Civil Rights Act).

69. *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 135 (1993).

70. *See Pacific Fleet Commander Rebuked for Sexual Joke*, N.Y. TIMES, Oct. 25, 1992, at 32.

71. *Id.* (emphasis added).

72. *See, e.g.*, Barbara A. Gutek & Vera Dunwoody, *Understanding Sex in the Workplace*, in 2 WOMEN AND WORK: AN ANNUAL REVIEW 249, 253 (Ann Stromberg et al. eds., 1987); Abrams, *supra* note 61, at 1199-1200; Chamallas, *supra* note 44, at 99-103; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 821 (1991).

about sex. It's about the abuse of power,"⁷³ writes New York journalist L.A. Winokur. Yet common definitions of harassment include any sexual overtures or comments perceived by the woman as offensive,⁷⁴ and personal accounts of what is regarded as harassment often appear to involve nothing more than unwanted expressions of sexual interest. Thus, Winokur describes an incident in which a man who had been one of her regular sources for three years told her over drinks that he had always wanted to have an affair with her. "Whether or not it constituted harassment may be up for grabs, though I certainly know where I stand on the matter,"⁷⁵ she states—despite acknowledging that once she had made it clear that she was not interested, "that [was] all it took to fend him off."⁷⁶

Some scholars take a similarly broad view of what sort of sexual interactions should be restricted. Gutek and Dunwoody make a distinction between harassment and "nonharassing" behaviors such as sexual compliments, jokes, or requests for dates by co-workers. But, in a curious choice of words, they label these behaviors as "sexual nonharassment"⁷⁷ (which is somewhat akin to referring to consensual sex as "sexual nonassault" or "nonrape") and suggest, on the basis of one of Gutek's studies, that such interactions may be detrimental to women even if the women are not aware of any harm.⁷⁸ Susan Estrich is quite blunt about her view that all opportunities for sexual interaction in the workplace are bad for women and are something that "most women . . . do not even want."⁷⁹

For my part, I would have no objection to rules which prohibited men and women from sexual relations in the workplace, at least with those who worked directly for them. Men and women could, of course, violate the rule; but the power to complain, once in the

73. L. A. Winokur, *The Sexual-Harassment Debates*, PROGRESSIVE, Nov. 1993, at 37, 39.

74. See Abrams, *supra* note 61, at 1206-09; Estrich, *supra* note 72, at 841-42.

75. Winokur, *supra* note 73, at 37.

76. *Id.* at 38.

77. See Gutek & Dunwoody, *supra* note 72, at 255.

78. See *id.* at 258.

79. Estrich, *supra* note 72, at 860. Estrich refers to studies that supposedly support her contention. However, the fact that most women would find it offensive to be directly propositioned for sex does not mean that they are not at all interested in sexual/romantic relationships with co-workers.

hands of the less powerful, might well "chill" sexual relations by evening the balance of power between the two.⁸⁰

It appears to be true that women are far more likely than men to consider at least certain forms of sexualized conduct in the workplace objectionable⁸¹—although, as with all gender differences, this one should not be absolutized. In one recent survey, fifty-one percent of working women (albeit compared to eighty percent of their male counterparts) admitted to having had sexual thoughts about their co-workers.⁸² There is also much anecdotal evidence that women do engage in sexually tinged behavior at work.⁸³ For example, the same commentator whose account of the office birthday party with the naughty cake was cited above (and who is admittedly male, which one hopes is not a disqualification) observes:

Over the past 20 years, I have seen a steady increase in frank language and sexual innuendo, much of it coming from the women, no matter whether they were my boss or the lowest subordinate. The tougher the job and the greater the pressure, the franker the language and the more intense the sexual atmosphere.⁸⁴

To the extent, however, that a gender gap exists in this area, it stems not only, and perhaps not primarily, from "power asymmetry" but from a number of conventional notions about male and female sexual norms and sexual natures— notions that have been considerably eroded by feminism but are by no means extinct. First, there is the assumption of male promiscuity and female selectivity. A man is assumed to be interested in sex with just about any attractive woman; when he propositions a woman, especially outside the context of a romantic relationship, she can be expected to read it as a signal that he considers her sexually available—i.e., "cheap"—and reasonably feel offended. A woman, on the

80. *Id.* It is hard to know whether Estrich is being ironic when she adds that "in cases of true love, one could . . . transfer to another department, or even trust the woman not to file a lawsuit." *Id.*

81. According to one of Gutek's surveys, 67 percent of men, but only 17 percent of women, said that they would be flattered if a co-worker propositioned them. See GUTEK, *supra* note 62, at 96-98.

82. EXEC., Summer 1993, at 56.

83. See, e.g., Susan White, *Infidelity: Women Who Cheat*, NEW WOMAN, Jan. 1992, at 50-53 (arguing that magazines directed at "liberal" women often treat the workplace as a sexual playground).

84. Broyles, *supra* note 36, at A25.

other hand, is assumed to be selective; when she propositions a man, he can be expected to read it as a signal that she has singled him out, and reasonably feel flattered. In addition, sex is traditionally seen as possession of the woman by the man. When psychologist and management consultant Dr. Beth Milwid interviewed 125 professional women for a book on women in the workplace, this point was emphasized by several of her subjects:

[I]t's all right for a man to meet a woman at work, because it's perfectly acceptable for a man to sleep around. But it is definitely not acceptable for a woman. . . . If you go out with somebody from the office, and it gets around that you slept with the guy, you're automatically labeled a whore.⁸⁵

You've got to remember that when a woman gets sexually involved with a man, the man is conquering. . . . The woman is seen as the person giving in. . . . It may sound terrible, but the double standard still exists.⁸⁶

Consequently, comments from a man to a woman indicating that he sees her as an object of sexual attention are perceived as degrading, while indications of sexual attention from a woman are not seen as degrading to a man. An interesting example of this double standard is found in the autobiography of Rush Limbaugh, the right-wing radio talk show host:

I had a bad sore throat and my voice was somewhat weak. This woman called and said she had the *perfect* cure. I said, "Hmm, what is it?" She said: "A throat massage. With my tongue." I was stunned and incredulous, totally taken aback. But—and this is the important thing—I was not offended. I laughed and told her I found her idea intriguing. . . . I confess, I liked that exchange. . . .

Well, I got [an electronic mail] note . . . from a guy who asked me to imagine how much outrage there would have been if a female talk show host had been told that by a male caller. The guy was right. Think about it. There would have been hysterical accusations of sexism, vulgarity, and obscenity.⁸⁷

To Limbaugh, this is an example of God-given differences between men and women—"[j]ust another one of those natural differences that

85. MILWID, *supra* note 58, at 115.

86. *Id.* at 123.

87. RUSH H. LIMBAUGH, III, *THE WAY THINGS OUGHT TO BE* 144 (1993).

feminists find offensive and bothersome,"⁸⁸ he adds (blissfully unaware of the extent to which many feminists have emphasized gender differences in this area). He is right, of course, that a gender role reversal would have cast such a comment in an entirely different light. But, God-given differences aside, why? Clearly, what is at work here is the residual belief that when a man treats a woman as a sexual object, he establishes his dominance over her; when a woman treats a man as a sexual object, she places herself in his service.

Another aspect of this dichotomy is the "madonna/whore syndrome," which translates into the more modern "bimbo/brain syndrome": a woman can be either respectable or sexually desirable, either a "sex object" or a professional, but not both. Gutek and Dunwoody write:

[B]eing sexual and being a sex object are aspects of the female sex role that frequently are carried over to the workplace by both men and women. . . .

Unfortunately, women do not seem to be able to be sex objects and analytical, rational, competitive, and assertive at the same time because femaleness is viewed as "not-maleness" . . . and it is the men who are viewed as analytical, logical, and assertive.⁸⁹

Restricting what Abrams calls "devaluative sexualization"⁹⁰ in the workplace will do nothing to change these stereotypes or these social standards. It may even strengthen them by reinforcing the perception that sexuality devalues women. "Treatment that sexualizes women workers prevents them from feeling, and prevents others from perceiving them, as equal in the workplace,"⁹¹ writes Abrams.⁹² Yet arguably, from the

88. *Id.*

89. Gutek & Dunwoody, *supra* note 72, at 262. It is interesting to note that all the studies cited by Gutek and Dunwoody as evidence of these sexual stereotypes date back to the 1970s.

90. Abrams, *supra* note 61, at 1211 & n.116.

91. *Id.* at 1209.

92. Abrams' argument is based on the premise that sex generally tends to be, for women, a negative experience: "Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." *Id.* at 1205. She concedes that "many women hold positive attitudes about uncoerced sex," *id.*, but seeks to "balance" this statement with a reference to Dworkin's *Intercourse*, as if positive female attitudes toward consensual sex and Dworkin's view—which Abrams summarizes as "sexual intercourse is inherently coercive and contributes inevitably to the subordination of women"—were equally widespread. *Id.* at

feminist point of view, these standards are not beneficial insofar as they prevent women from combining sexuality and personhood—which even Gutek and Dunwoody regard as “troublesome,”⁹³ and which was a subject of frustration for many of those interviewed by Milwid. (“This is about never letting your hair down, never letting them see that you’re really a fun person. . . . It’s sad, because I find you can’t be yourself a lot of the time.”⁹⁴)

Moreover, some have argued that hypersensitivity to possible perceptions of sexual impropriety makes men feel ill at ease when there are “ladies present,” thus inhibiting women’s professional advancement and resulting in subtle exclusion from the workplace social environment.⁹⁵ This is not to say that men who do not feel at ease unless they are free to utter sexist slurs or to fondle any woman who happens to be nearby should be accommodated (and it is hard to see what women could gain from inclusion in such a social environment). But when male college professors feel that they must leave the office door open when a female student comes in for a teacher–student conference,⁹⁶ when male supervisors hesitate to invite a female employee for a social drink, or even when a ribald story or joke is shared by male employees but female co-workers are left out, such an atmosphere can harm women in very real ways. In addition, given that women too engage in sexualized conduct in the workplace—from sexual jokes and innuendo to displays of calendars featuring male models—it seems likely that many women may eventually find themselves on the receiving end of complaints over essentially harmless behavior. On the other hand, if the application of differential rules suggested by the “reasonable woman” standard⁹⁷ means that women are allowed to engage in conduct prohibited for men, this is likely to create even greater resentment in male workers and lead to a truly hostile environment.

n.94.

93. Gutek & Dunwoody, *supra* note 72, at 262.

94. MILWID, *supra* note 58, at 124. Chamallas, too, acknowledges that “[n]o consensus exists among feminists . . . about whether apparently consensual relationships between supervisors and employees or between co-workers should be prohibited because of the potential they pose for creating a sexualized workplace that encourages sexual harassment” and that “women possess many differing interests.” Chamallas, *supra* note 44, at 136.

95. See ROIPHE, *supra* note 1, at 90-95 (arguing that fear of accusations of sexual harassment leads to suspicion and distrust among co-workers and among male faculty and female students, resulting in fewer professional and academic opportunities for women).

96. See *id.* at 92.

97. See *supra* notes 36-65 and accompanying text.

Of course, changing a centuries-old double standard is far more difficult than cracking down on alleged sexual misconduct in the workplace or in the streets. But if empowering women to combine sexuality and personhood and challenging stereotypes of male and female sexual sensibilities are legitimate feminist goals, then perhaps the "reasonable woman" is not someone acutely aware of the dangers of "sexualization," but rather someone more like the manager who gave Milwid this account of dealing with sexual advances from co-workers and customers:

The first time it happened, it bothered me a lot. . . . I thought that to them I wasn't a whole person anymore. I was just the person in the centerfold. I felt then that somehow their interest in me sexually meant that I wasn't powerful or that I wasn't being professional.

Now, I just think it means that I'm attractive. And I like that. . . . If I'm not interested in them, I'm not interested. But being a sexually alive person doesn't mean you're not powerful, and it certainly doesn't mean you aren't capable.⁹⁸

IV. PROTECTIVE FEMINISM VERSUS PATERNALISM: ATTEMPTING TO DRAW THE LINES

Is it possible to establish gender-specific, special protections for women from sexual harassment or pornography without boosting traditional "essentialist" ideas of male and female natures?

Many protective feminists who address this issue, such as Chamallas and Abrams, believe that such a risk can be avoided as long as women have a strong voice in formulating the new legal norms, and as long as these norms are clearly based, not on traditional concepts of biological differences or female virtue and chastity, but on feminist concepts of power, inequality, and harm.⁹⁹ Thus, it is acceptable to say that women "hold more restrictive views [than men] of both the situation and the type of relationship in which sexual conduct is appropriate"¹⁰⁰ because women are at higher risk of sexual assault; it would be unacceptable, however, to make the same generalization about women on the grounds that women's childbearing role makes them more predisposed to invest emotionally in relationships and to regard casual sex as harmful.

98. MILWID, *supra* note 58, at 126.

99. See, e.g., ABRAMS, *supra* note 61, at 1188-89; CHAMALLAS, *supra* note 44, at 104-05.

100. ABRAMS, *supra* note 61, at 1205.

However, this seems to be a dubious distinction. Chamallas herself writes that although *Ellison v. Brady*¹⁰¹ (which was handed down by two Reagan appointees¹⁰²) employs ostensibly feminist language about women's distinct perspective rooted in experience, it also contains passages that seem to endorse some version of a "separate spheres" philosophy.¹⁰³ Moreover, there is ample evidence that social conservatives who favor traditional sex roles are remarkably comfortable with the language of protective feminism. Kristol's comment that "true equality between men and women can only be achieved by a moral code that offers women some protection against male predators"¹⁰⁴ echoes—in all probability, unwittingly—the argument of Christine Littleton, Martha Chamallas, and other protective feminists that "asymmetric" treatment for women is needed to achieve "substantive equality."

Further to the right, syndicated columnist and former Moral Majority director Cal Thomas praises the 1992 ruling of the Canadian Supreme Court¹⁰⁵ that for the first time gave a stamp of judicial approval to the theory that pornography is a form of anti-woman bias: "In addition to upholding the obscenity provision . . . [the] Canadian court redefined obscenity to mean that which subordinates or degrades women. . . . [It] found that the right of women to be protected from men who would cause them harm is greater than the right of these same men to purchase pornography" ¹⁰⁶ Enumerating the ways in which women are victimized by pornography, Thomas speculates that "men who are consumers of pornography will . . . tend to view their female co-workers and subordinates as less than equal."¹⁰⁷

Of course, in the eyes of many feminists, the Bible "subordinates and degrades women" too; one may certainly suppose that men who accept Biblical teachings about women will "tend to view their female co-workers and subordinates as less than equal." But Thomas, evidently, is not bothered by such contradictions.

101. 924 F.2d 872 (9th Cir. 1991).

102. *See id.* at 873 (The opinion was handed down by Judges Beezer and Kozinski, both Reagan appointees).

103. *See Chamallas, supra* note 44, at 125.

104. Kristol, *supra* note 14, at A10.

105. *R. v. Butler*, [1992] 1 S.C.R. 452, 479 (Can.) (stating that "degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation" and "run against the principles of equity and dignity of all human beings").

106. Cal Thomas, *No Free Speech for Pornographers in Canada*, *BALT. SUN*, Mar. 6, 1992, at A13.

107. *Id.*

To the extent that our thinking is influenced by existing social norms, it is a natural temptation to slide into traditional concepts when considering restrictions on sexual conduct. A striking example of this tendency was provided by a *Time/CNN* poll taken days after Anita Hill's testimony before the Senate Judiciary Committee, testimony widely regarded as a national "teach-in" on the feminist perspective on sexual harassment. In this survey, a male supervisor "discussing pornographic acts" with a female subordinate was more likely to be perceived as guilty of sexual harassment than a male supervisor who pressured a female subordinate for sex.¹⁰⁸ If the feminist perspective on the issue is that sexual harassment is not about decency but about coercion, for a large portion of the public the "teach-in" had obviously failed.

A recent cartoon on the subject shows an agitated man telling a female co-worker about his frustration with the new rules: "If I ask you for a date and you *want* to go, it's an office romance! But if you *don't* want to go, it's sexual harassment! . . . How's a guy supposed to KNOW?" With a pert smile, the woman retorts, "Beats me . . . why don't you ask your wife?"¹⁰⁹ Again, the offensiveness of a man's sexual behavior is measured not by its coerciveness but by its adherence to traditional morality. This is not to disparage the value of marital fidelity. However, men might be forgiven if they are still confused when some feminist leaders laud a book celebrating infidelity by wives¹¹⁰ and when women's magazines feature such titles as *Wives Just Wanna Have Fun*¹¹¹ and *For Some Single Women, There's Nothing Like a Married Man*.¹¹²

True, the cartoon described above was the work of a man. But, all things considered, the belief that legal standards formulated by women will necessarily avoid the "essentialist" or neo-traditionalist trap seems naive. In a typical comment, Florida state Representative Kathy Chinoy, a lawyer specializing in sexual-harassment litigation, told *Time* that she recommends "a simple litmus test for men who are seeking guidance on what is appropriate and what is not: 'Would you want your mother, sister

108. Nancy Gibbs, *Office Crimes*, TIME, Oct. 21, 1991, at 52, 64. Ninety-one percent of those surveyed think sexual harassment occurs when a male supervisor "insists on discussing pornographic acts with" a female subordinate, while only 87% think that sexual harassment occurs when he "asks her to have sex with him." *Id.*

109. David Horsey, SEATTLE POST INTELLIGENCER, Dec. 10, 1992.

110. See James R. Petersen, *Infidelity Chic*, PLAYBOY, Nov. 1992, at 56, 56 (describing Gloria Steinem's commentary on Dalma Heyn's book *The Erotic Silence of the American Wife*).

111. Linda Kay, *Wives Just Wanna Have Fun*, CHATELAINE, Mar. 1993, at 91.

112. Courtney Farrell, *For Some Single Women, There's Nothing Like a Married Man*, COSMOPOLITAN, Mar. 1993, at 198.

or daughter exposed to that?"¹¹³ Clearly, this "litmus test" appeals to the most "patriarchal" of instincts, invoking three categories of women whose sexual virtue men traditionally have been expected to protect. Many socially conservative men would probably be intensely disturbed by the idea of their mothers, daughters, or sisters being "exposed" even to the most consensual (but "illicit") sexual interaction. This tactic is especially ironic since many women in the business world have complained that a major obstacle to their advancement is the unconscious tendency of men to treat women at the office as they would treat their female intimates.¹¹⁴

Finally, it is difficult to imagine that when feminists promote ideas that appear to reflect traditional notions of sex differences, advocates of such notions will not seize on the chance to argue that they were right all along. This is exactly what Rush Limbaugh does in the passage cited above, when he discusses differences between the way women and men view sexual harassment and sexual images and sums up, "It just proves how men and women instinctively and naturally look at events differently."¹¹⁵

"Generalizations about the way women or men are . . . cannot guide me reliably in making decisions about particular individuals,"¹¹⁶ Judge Ruth Bader Ginsburg remarked in 1988. This is no less true if such generalizations—whether traditionalist or feminist—have some basis in statistical fact. For example, one survey shows that when high school students are exposed for the first time to X-rated materials, two-thirds of the boys but only about forty percent of the girls have a positive reaction (including a desire to imitate some of the behaviors depicted), while nearly two-thirds of the girls and only one-third of the boys feel "disgust and

113. Gibbs, *supra* note 108, at 63. This theme has surfaced elsewhere. For instance, when Dr. Bernadine Healy, future director of the National Institutes of Health, and then a professor at Johns Hopkins University Medical School, met with officers of a campus eating club to voice her grievances about a bawdy skit satirizing her in the club's annual show, she recounts asking them "how they would have felt if [the skit] was about their sister, their mother or their wife." Malcolm Gladwell, *The Healy Experiment*, WASH. POST, June 21, 1992 (Magazine) at 9, 10.

114. Jaclyn Fierman, *Why Women Still Don't Hit the Top*, FORTUNE, July 30, 1990, at 40, 42. One female executive explained, "Corporate males still don't know how to deal with women. They are afraid to yell at them or give them negative feedback. It's as though they think they are yelling at their mothers or their wives." *Id.* (quoting Ellie Reynolds, a partner at the headhunting firm Ward Howell International).

115. LIMBAUGH, *supra* note 87, at 145.

116. Jeffrey Rosen, *The Book of Ruth*, NEW REPUBLIC, Aug. 2, 1993, at 19, 31 (quoting Ginsburg).

revulsion."¹¹⁷ The gender gap is wide enough to assert that most teenage males find hardcore sexual materials appealing and most teenage girls find them revolting, and that greater restrictions on teenagers' access to such materials would therefore benefit girls.¹¹⁸ Yet such a conclusion would ignore the experience of two out of five girls (and one out of three boys), a substantial minority. This is an especially ironic position to take for a movement that emphasizes relying on women's real-life experiences rather than on fixed, abstract categories.

The point is not to claim that all junior high school students of both sexes ought to become enthusiastic consumers of X-rated materials, but rather to suggest that whatever approach is taken needs to be far more subtle and flexible than a clear-cut division by gender—whether based on biological sex or on presumed power differences.

V. DOES SEXUAL VICTIMHOOD ENDANGER REPRODUCTIVE RIGHTS?

If the central theme of protective feminist victimology is the triad of rape/sexual harassment/pornography, the central theme of the conservative victimology of women (in addition to pornography) is abortion. Over the last decade in right-to-life rhetoric, the image of the woman who terminates a pregnancy has shifted from one of promiscuous, selfish murderess to the less threatening one of victim. A 1992 full-page advertisement in the *New York Times*, entitled *A New American Compact: Caring about Women, Caring for the Unborn*,¹¹⁹ asserts that the right to abortion "has ushered in a new era of irresponsibility toward women."¹²⁰ Increasingly, right-to-life advocates claim that a woman faced with the crisis of an unwanted pregnancy needs compassion and help (including day care, maternity leave, and other social programs) but instead is left to fend for herself and forced to rely on the false solution of abortion.¹²¹ If she had the support she needed to raise a baby, she

117. U.S. ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY: Hearings in Houston, Tex. 7 (Sept. 11, 1985) (testimony of Dr. Jennings Bryant). This study was based on 600 telephone interviews conducted in a mid-size Midwestern city. Its scientific validity is somewhat compromised by the high refusal rate (60% of all calls). *Id.*

118. *Id.* However, males in the same survey were more likely than females to say that their first exposure to hardcore materials was "harmful." Forty-one percent of junior high school males responded "harmful," while 21% responded "appealing." Females were more likely to describe it as "neutral." *Id.*

119. Advertisement, N.Y. TIMES, July 14, 1992, at A23.

120. *Id.*

121. *See id.* ("Abortion is defended today as a means of ensuring the equality and independence of women, and as a solution to the problems of single parenting The sad truth is that the abortion license has proven to be a disaster for women").

would undoubtedly want to be a mother. (And if she still doesn't, she should just try harder: "The simplest solution to the problem of unwanted children is to *want* them,"¹²² writes anti-abortion activist Joan Andrews, who was imprisoned for vandalizing an abortion clinic.)

On the feminist side, Greer takes much the same view:

Abortion is the last in a long line of non-choices that could begin . . . with the time and the place and the manner of love-making.

. . . .
 . . . [T]he choice to end [a pregnancy] can only be a genuine choice if the pregnant woman has other alternatives. If she will lose her lodgings and her job or her educational opportunities if she has a baby, then she has no choice at all. If her boyfriend threatens to leave her if she does not accept termination . . . her right to choose is being ignored.¹²³

Abortion is thus redefined as exploitation of women by profiteering abortionists, by selfish boyfriends or husbands, and by other (usually male) villains. Pro-life women's groups bear such names as Women Exploited by Abortion and American Victims of Abortion.¹²⁴ "Of all the things which are done to women to fit them into a society dominated by men, abortion is the most violent invasion of their physical and psychic integrity,"¹²⁵ argues pro-life writer Daphne de Jong, who describes herself as a feminist. "It is a deeper and more destructive assault than rape, the culminating act of womb-envy and woman-hatred . . ."¹²⁶ This reinterpretation has also allowed the right-to-life movement to find a victim group that can speak for its cause: women who regret having had an abortion.

122. GALLAGHER, *supra* note 2, at 245.

123. Greer, *supra* note 17, at 21-22. Like the most extreme of the right-to-lifers, Greer appears to reject not only abortion but birth control as well: "To accept contraception is to choose between two unacceptable alternatives, forced pregnancy or temporary infertility with a greater or lesser degree of present discomfort or malaise and unknown . . . long-term consequences." *Id.* at 22.

124. Women Exploited by Abortion is a national organization that claimed to have 30,000 supporters in 1985. See Marilyn Balamaci et al., *Eight Other Women's Stories*, PEOPLE, Aug. 5, 1985, at 82, 83. American Victims of Abortion is a "post-abortion support system for women" that claims to have members in every state. See Janet Cawley, *The Stakes Are High, and So Are Emotions*, CHI. TRIB., Apr. 26, 1989, at C14.

125. Daphne de Jong, *Legal Abortion Exploits Women*, in ABORTION: OPPOSING VIEWPOINTS 183, 185 (Charles P. Cozic & Stacey L. Tipp eds., 1991).

126. *Id.*

"My child died because of *Roe v. Wade*," Olivia Gans, the head of American Victims of Abortion, declared on an NBC News panel following the broadcast of a television movie about the historic abortion rights case.¹²⁷ When an opposing panelist pointed out that it was she who made the choice and *Roe* merely enabled her to do so, Gans retorted, "It was a choice I was forced to make, because of the pressure of the abortionist."¹²⁸ To Gans and other right-to-lifers who frame their opposition to abortion in a feminist language, no woman could make a truly voluntary choice to "kill her baby."

Uncannily, this logic echoes that of the anti-pornography feminists who claim that no woman could make a truly voluntary choice to participate in sexually explicit performances. In a Harvard lecture, Catharine MacKinnon sarcastically inquired why it is that "when a woman spreads her legs for a camera, she is assumed to be exercising free will?"¹²⁹ How different can it be when a woman spreads her legs for a suction machine? If, according to the Massachusetts bill on pornography,¹³⁰ a woman can be found to have been coerced into pornography even if she "signed a contract, or made statements affirming a willingness to cooperate in the production of the pornography"¹³¹ and "no physical force, threats, or weapons were used in the making of the pornography,"¹³² could the same type of law allowing women to sue for "coercion into abortion" be used to shut down abortion clinics?

In more ways than one, the view of women as victims of abortion is inextricably bound to the view of women as victims of sex. Significantly, in her own writings on the issue, MacKinnon explicitly eschews, even condemns, the traditional feminist perspective that stresses choice and privacy: "When the law of privacy restricts intrusions into intimacy, it bars change in control over that intimacy. . . . This right to privacy is a right of men 'to be let alone' to oppress women one at a time."¹³³ MacKinnon declares that she supports the right to abortion, but on the grounds that the exception most abortion opponents make for cases of rape should be extended to all sexual intercourse because "[f]eminist

127. *NBC News Panel* (NBC television broadcast, May 15, 1989).

128. *Id.*

129. Strebeigh, *supra* note 34, at 53 (quoting MacKinnon).

130. An Act to Protect the Civil Rights of Women and Children, H.R. 5194, Mass. 177th Gen. Ct., 1992 Sess. (1992) (unenacted; not yet refiled as of 1993 Session).

131. *Id.* § 2(2)(a)(11).

132. *Id.* § 2(2)(a)(12).

133. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 93, 101-02 (1987) (citation omitted).

investigations suggest" that sex seldom is "meaningfully voluntary for women."¹³⁴

But if the "forced sex" argument can be used to support abortion rights, it can also be used to oppose them. The availability of abortion, many conservatives argue, removes one reason women had for saying no to sex. According to "A New American Compact,"¹³⁵ access to abortion has "encouraged irresponsible or predatory men, who find abortion a convenient justification for their lack of commitment."¹³⁶ And, in fact, MacKinnon concurs:

So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. . . . [U]nder conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression. The availability of abortion removes the one remaining legitimized reason that women have had for refusing sex besides the headache.¹³⁷

(Here, the logic—such as it is—of MacKinnon's argument begins to disintegrate: if "male sexual aggression" could be deterred by a woman's fear of pregnancy, how coercive could it be?) She also suggests that the real motive behind the legalization of abortion was "subordinating women's collective needs to the imperatives of male supremacy,"¹³⁸ pointing to the sinister fact that the Playboy Foundation has been a longtime supporter of abortion rights. One senses that if MacKinnon could be persuaded that banning abortion would be an effective means of making women less heterosexually available, pornography might not be the only grounds of her alliance with the right.

Of course, one could point out that the right to abortion allows women to say yes to sex—even sex without commitment—when that is what they want. But as we have seen, both the conservatives and the protective feminists appear to believe that women rarely do. And if they think they do, they just don't know what's good for them.

134. *Id.* at 94-95.

135. Advertisement, *supra* note 119.

136. *Id.*

137. MACKINNON, *supra* note 133, at 99.

138. *Id.* at 97.

VI. THE PLEASURES AND PERILS OF VICTIMHOOD: FROM THE WEAKER SEX TO THE POWERLESS SEX

In a society where a strong commitment to righting past wrongs—or at least the desire to create the appearance of such a commitment—exists in many institutions, from legislatures and courts to the media, a claim of “victim status” confers certain privileges. This is one of the seductions of the victim mentality.

For a parallel, one may consider Shelby Steele’s insightful analysis of the role of victimhood in the black community.¹³⁹ “Like all victims, what blacks lost in power they gained in innocence—innocence that, in turn, entitled them to pursue power,”¹⁴⁰ writes Steele.

Victimization is a broad, somewhat sloppy word that one can apply to oneself in the most subjective of ways. And when we do think of ourselves as victims, we are released from responsibility for some difficulty, spared some guilt and accountability. Our innocence is restored because an injustice was done to us.¹⁴¹

In the hands of protective feminists, victim power can become an entitlement to censor materials others can read or watch, to control such nonviolent behaviors as winks in the street, to excuse crimes committed by women,¹⁴² or to demand that charges of sexual violation made by women against men be exempt from the scrutiny normally required by the legal system.¹⁴³ In political discourse, it can also be used to demand that

139. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990).

140. *Id.* at 14.

141. *Id.* at 67.

142. See, e.g., Bill Riley et al., *Irene Seale Sentenced to 20 Years*, *THE STAR-LEDGER* (Newark, N.J.), Jan. 26, 1993, at 1. In the 1993 New Jersey case of Irene Seale, convicted of kidnapping in the abduction and death of Exxon executive Sidney Reso, Dr. Lenore Walker, the prominent expert on battered woman syndrome, submitted a report for the defense. Dr. Walker’s report argued that Seale was a victim of her husband (with whom she participated in the kidnapping and extortion scheme), and, as a battered wife, had become so numb to her feelings that “Sidney Reso was not a real person to her.” *Id.* at 19. There appeared to be no evidence that Seale had been abused. *Id.*

143. It is true that traditional standards of proof in rape cases, such as the requirement of “earnest resistance,” imposed on women a burden that was not imposed on victims of other violent crimes (such as robbery). The increasingly popular view that an accused rapist can be convicted solely on the victim’s word, even when there is a plausible scenario of consent, however, raises thorny issues of the presumption of innocence and proof beyond a reasonable doubt. So, to an even greater extent, do some recent legal developments suggesting that mere absence of “expressed consent” on the

the arguments of persons claiming victimization be exempt from normal scrutiny, criticism, or the requirements of consistency or logic.

Again, a parallel from Steele is appropriate: "[W]hen blacks take the floor and point to their difficulties as evidence of victimization, refutation is not easy—it feels like a continuation of the act of victimizing, like blaming the victim."¹⁴⁴ When a victim of gang rape passionately insists that *Hustler* was partly responsible for her violation; when a woman emotionally manipulated into unwanted sex equates her experience with sexual assault; when a woman pressured by a boyfriend into terminating a pregnancy says that legal abortion has killed her child, a rational counter-argument in the face of such intense personal pain seems cold and insensitive. However, as Steele also points out, "victim power" has serious drawbacks: "It is a formula that binds the victim to his victimization Social victims may be collectively entitled, but they are all too often individually demoralized."¹⁴⁵ When women workers or students are told that because of their gender they have less power than men who appear to be their social equals, or that they should feel demeaned, threatened, and intimidated when a man shows sexual interest in them, surely that can have a demoralizing effect.

If a woman who submits to unwanted sex without indicating her unwillingness can be considered a rape victim because, in the words of a campus sexual-assault counselor, women are "'culturally indoctrinated to not question people in authority'" and "'[c]ulturally, men are in a position of authority just by virtue of being men,'"¹⁴⁶ more women may really feel that they cannot say no.

Assumptions of female passivity and psychological helplessness cannot fail to have a damaging, if not devastating, effect on how women are perceived in society. If a woman can be considered a victim of "coercion into pornography" even when she has signed a contract, was compensated, and was not physically threatened or intimidated, this calls into question women's competence to sign any contract. To be held not responsible for one's actions is to be treated as a child. The way women perceive themselves is affected as well.

It is commonly accepted that certain, often subtle, gender-based social disadvantages continue to affect women. Yet the relative diversity of social norms that has existed in the United States in the last several decades

part of the alleged victim can be sufficient for a finding of rape. *See State ex rel. M.T.S.*, 609 A.2d 1266, 1279-80 (N.J. 1992).

144. STEELE, *supra* note 139, at 67.

145. *Id.* at 14.

146. Cathy Young, *Beyond 'No Means No': Redefining Date Rape*, INSIGHT, Aug. 16, 1993, at 16, 18 (quoting Ruth Anne Koenick, Coordinator of Sexual Assault Services at Rutgers University in New Jersey).

ensures that all women are not affected similarly by the same socialization processes, and that many women as individuals have remarkable opportunities to overcome the debilitating effects of socialization. We can seek to achieve female empowerment either by expanding such opportunities or by formally recognizing women's powerlessness as grounds for active redistribution of power in their favor. To some, the latter approach would seem more efficient. Yet adopting it would mean discounting the experience of at least two generations of women whose professional and educational achievements, while not yet numerically on a par with those of men, make the label of "powerless" dubious, if not insulting. It would also mean, regardless of intentions, resegregating women into a protected class. The powerless sex may be only an updated and politicized euphemism for the "weaker sex."

Protective feminists argue that women's position as "relative newcomers" in the workplace, whose professional status is more vulnerable and therefore more likely to be undermined by ridicule or attention to sexuality, makes them legitimately more sensitive to such behavior than men.¹⁴⁷

Empirically, this observation is undoubtedly true. But facts can lead to different conclusions. Take, for instance, an episode from the career of Dr. Bernadine Healy, later the director of the National Institutes of Health. In 1982, as a cardiologist at Johns Hopkins University medical school—and, in her own words, "one of the leaders of that institution"¹⁴⁸—Healy became the subject of a bawdy skit in the annual show of a campus eating club, which also ridiculed her ex-husband, who was a faculty member as well. But it was only Healy who tenaciously complained, insisting that the skit constituted sexual harassment and an attack on her reputation; she demanded a list of the participants' names and finally threatened a lawsuit. (Resulting tensions with colleagues eventually led Healy to leave the university.)¹⁴⁹

It is certainly understandable that, as one of a relatively small number of women occupying a high position in a traditionally male institution, Healy would see the satire as damaging in a way that a man would not. Nonetheless, her reaction cannot fail to suggest some disturbing conclusions, such as: women are too delicate to take the same ridicule as

147. See, e.g., Abrams, *supra* note 61, at 1205 ("[M]any women view their position in the workplace as marginal or precarious[; thus, t]hey are likely to construe disturbing personal interactions, stereotypical views . . . , or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment.").

148. Gladwell, *supra* note 113, at 10 (quoting Healy).

149. See *id.*

men,¹⁵⁰ or women in positions of power are less tolerant of challenges to their authority than men. To legitimize and institutionalize such an approach poses its own dangers. Writes Katie Roiphe:

To declare that [women's] authority is vulnerable to a dirty joke from someone of inferior status just because that person happens to be a man is to undermine their position. Female authority is not (and should not be seen as) so fragile that it shatters at the first sign of male sexuality. Any rules saying otherwise strip women, in the public eye, of their hard-earned authority.¹⁵¹

Thus, the "powerlessness" of women can become a self-fulfilling prophecy.

VII. CONCLUSION

Many people sympathize with certain aspects of protective feminism, including the call for censorship, because they are genuinely appalled by the violent victimization of women in contemporary American society. The horrific reality of sexual and nonsexual assault many women experience is undeniable, although there are many reasons to believe that the scope of this violence has less to do with gender bias than with the general prevalence of violence in our culture. Women are ill-served when the physical dangers they face are exaggerated while those faced by men are downplayed.¹⁵²

To acknowledge the reality of sexual coercion, and to take it seriously, should not lead us to turn sexual assault and sexual danger into the central and normative fact of women's lives—or, more dangerously still, to recast any expression of male sexual interest as a possible prelude to rape. Nor do women benefit when their greater sexual vulnerability is absolutized and made into a basis for protected legal status. Ultimately, a

150. Explaining her reaction, Healy told the *Washington Post*, "I had just gone through a divorce. I was very vulnerable." But so, presumably, was her husband. *See id.*

151. ROIPHE, *supra* note 1, at 90.

152. Not only are men more likely to be victims of all personal violence, but they are not as immune to sexual assault as much feminist discourse of rape would seem to suggest: 5 to 10% of victims of rape *outside of prisons* may be male. *See, e.g.,* Bruce D. Forman, *Reported Male Rape*, 7 *VICTIMOLOGY* 235, 236 (1982); Arthur Kaufman, et al., *Male Rape Victims: Noninstitutionalized Assault*, 137 *AM. J. PSYCHIATRY* 221, 221-23 (1980); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FEMALE VICTIMS OF VIOLENT CRIME* 7 (1991) (reporting that on average, 13,200 men fall victim to rape each year, out of a total annual average of 167,700 victims).

female identity rooted in violation is hardly compatible with a female identity rooted in competence and autonomy—an identity that, today, is within women's reach as never before in human history.

