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## Desperately Seeking a Moralist

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# GEORGETOWN LAW

## Faculty Publications



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## DESPERATELY SEEKING A MORALIST

ROBIN WEST\*

In a recent issue of *Unbound*, Janet Halley reviews my book *Caring for Justice*,<sup>1</sup> criticizing it for exhibiting a broad range of the problems she sees in all forms of “identitarian” legal writing, and therefore worthy of detailed critique.<sup>2</sup> Halley begins her review by listing the representative missteps she finds in both my book and in identitarian politics generally, including, although certainly not limited to, an identification of the site of the subordinated group’s injuries—for women, reproduction and sexuality—with the site of its ethical lives and insights; a tendency to differentiate and present the interests of subordinate and dominant groups, such as women and men, as inevitably opposed, such that women’s injuries work to men’s advantage and vice versa; an inclination to substitute the language of harm, injury, and ethics for the language of subordination, exploitation, and the like; and both an unhealthy aversion to politics and an insistence that changing the hearts and minds of the dominant will somehow magically reduce the amount of suffering in the world.<sup>3</sup>

Whether or not the list accurately captures my views on these questions, or those of identitarian scholars for whom I did not purport to speak, it is misleading in a more fundamental sense: by the end of her review, it is clear that Halley finds much more troubling sins in *Caring for Justice*, sins that are assuredly much more particular to feminism, to my feminism, and maybe just to this book, than to identitarian politics across the board. Thus, in the bulk of the review, Halley suggests that *Caring for Justice* exhibits tendencies toward both “totalitarian[ism]”<sup>4</sup> and a “slave morality,”<sup>5</sup> asserts an ethical view that is “infantile,”<sup>6</sup> conveys a sense of sexual injury that is “panick[ed]”<sup>7</sup> (this latter is not just *a* sin; in Halley’s moral ordering, it has all the markings of original sin), shows frightful signs of

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\* Professor of Law, Georgetown University Law Center. Many thanks to Marc Spindelman for his comments on multiple drafts; to the editors of the *Harvard Journal of Law & Gender*; and to Janet Halley, who encouraged me to “fire away.”

<sup>1</sup> ROBIN WEST, *CARING FOR JUSTICE* (1997).

<sup>2</sup> Janet Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice*, *UNBOUND: HARV. J. LEGAL LEFT* 65 (2005) <http://www.law.harvard.edu/students/orgs/unbound/articles/1UNB065-Halley.pdf> [hereinafter Halley, *Review*] (critiquing ROBIN WEST, *CARING FOR JUSTICE* (1997)).

<sup>3</sup> *Id.* at 66.

<sup>4</sup> *Id.* at 79, 91.

<sup>5</sup> *Id.* at 79.

<sup>6</sup> *Id.* at 66.

<sup>7</sup> *Id.* at 87.

“female- . . . supremac[y],”<sup>8</sup> is politically “paranoid,”<sup>9</sup> and, *in toto*, amounts to something she calls derisively “mother feminism.”<sup>10</sup> The punishing epithets and psychoanalytic diagnoses flow promiscuously. Whatever else one might say about these charges, I cannot imagine why anyone would regard them as shared characteristics of identitarian scholarship.

In this response, graciously invited by the editors of *The Harvard Journal of Law & Gender*, I will address some of these charges, and I will respond in some detail to the thrust of Halley’s complaints about the “politics of injury.” However, what I want to focus on first, albeit briefly, is just one of Halley’s characterizations of my work that, on first blush, I found to be extraordinarily peculiar and on one “argument” of sorts that is built on top of this characterization. I believe that this argument is at the heart of much of Halley’s Freudian and Nietzschean lambasting of my work.

First, on the characterization: in one of the two major chapters of my book, the chapter entitled “The Concept of Harm,”<sup>11</sup> I attempted to describe a series of harms—I called them “invasive harms”—brought on by the sufferance, too common in women’s lives, of both unwanted sex and unwanted pregnancies. Halley’s review is largely a critical attack on the argument of this chapter. She suggests that the descriptive account I give of “invasive harms” rests covertly on my moral aversion to sadomasochism, and particularly to cross-sex sadomasochism.<sup>12</sup> In the course of pitching this claim, Halley ascribes to me a moralistic critique of some women’s desires for and enjoyment of cross-sex sadomasochism (a critique I have elsewhere called the “critique of desire”), a critique in which I do not believe and have criticized in the past.<sup>13</sup> Moreover, I do not assert, dispute, or discuss this critique in *Caring for Justice*; in fact (although there is no

<sup>8</sup> *Id.* at 76.

<sup>9</sup> *Id.* at 84, 88.

<sup>10</sup> *Id.* at 91.

<sup>11</sup> WEST, *CARING FOR JUSTICE*, *supra* note 1, at 94–178.

<sup>12</sup> Halley, *Review*, *supra* note 2, at 91.

<sup>13</sup> Critiques of sadomasochism (s/m) sex, particularly but not only cross-sex s/m, were a part of some versions of the anti-pornography movement of the 1980s and were widely identified with the writings, views, and advocacy of Catharine MacKinnon. During that decade, I repeatedly criticized both the anti-pornography movement and the feminist theoreticians on which it was based, for what I regarded as their condemnation of some women’s felt desires (for s/m sex) on the basis of a professed political ideal (equality). I thought then and continue to think that this critique of desire is not a central feature of radical feminism and is methodologically non-feminist, overdrawn, and counterproductive. See Robin L. West, *The Difference in Women’s Hedonic Lives*, 3 WIS. WOMEN’S L.J. 81, 118–39 (1987); Robin L. West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report*, 12 AM. B. FOUND. RES. J. 681, 703–05, 708–09 (1987); Robin West, *Pornography as a Legal Text*, in FOR ADULT USERS ONLY 108, 109–10 (Susan Gubar & Joan Huff eds., 1989). I have elaborated considerably on this position in ongoing scholarship, and have tried to show how an embrace of women’s desire is fully consistent with the best possible interpretation of MacKinnon’s radical feminism. See Robin L. West, *Law’s Nobility*, YALE J.L. & FEMINISM (forthcoming 2006).

reason Halley should have known this), I have spent the better part of the last two years trying carefully to refute this critique.<sup>14</sup>

It is not at all unusual of course (in fact it is well-nigh inevitable) to feel grievously misread by critics. But it is disorienting to be so vigorously, adamantly, insistently, spiritedly castigated for a view I do not hold and in fact actively oppose. Why, I wondered, would Halley or anyone read a part of a chapter that is all about the *undesired* sex and the *unwanted* sex and the *unwelcome* sex that women engage in, and the harms I claim they sustain precisely by virtue of the fact that this sex is undesired, unwanted, and unwelcome, as resting on a moral condemnation of *wanted* sex of any description or flavor at all? Why is Halley so desperately seeking a moralist?

I got over the vertigo. After a closer reading of her text and then a re-reading of my own, it is no longer such a mystery to me how Halley came to read my descriptions of the harms caused by unwanted, undesired, and unwelcome sex as a covert moral critique of women's sexual desires, whether for sadomasochism or any other wanted sexual or heterosexual pleasure. A part of the reason for this misreading was my own fault.<sup>15</sup> But

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<sup>14</sup> West, *Law's Nobility*, *supra* note 13.

<sup>15</sup> Halley finds the textual basis for her view of my view of *wanted* sex not in the chapter on harms that contains the argument that is the target of her review. Rather, the fulsome descriptions of wanted sex, from which she infers my ethical and sexual likes and dislikes, comes in the last few pages of the book, in which I approvingly quote passages from Luce Irigaray and Adrienne Rich. WEST, CARING FOR JUSTICE, *supra* note 1, at 286–92. Both of these writers do indeed put forward, in very different ways that still move me, loving descriptions of emotional, erotic, moral, and political bonds among women, and they both urge that those ties are a part of what is destroyed by compulsory heterosexuality. I do not think these passages support the interpretation Halley gives them. I thought then and think now that the *target* of both of those passages was patriarchal *compulsion*—and specifically a compulsive cultural shaping of women's sexual desires and, yes, ethical orientation as well—away from girls, away from women, and most importantly, away from a valuing of one's self, and toward men.

Adrienne Rich, in particular, went to lengths in her essay to make clear that she was not using the word “lesbian” to refer to women with either primary erotic attachments to women, a history of erotic relationships with women, or any particular sexual interest in women. Rather, she was using the word to refer to anyone with a political, emotional, moral, or sexual identification with women, individually or as a class. I read it that way, as did many others. Precisely because that was the way the argument was cast, intended, and received, the book in which the essay appeared was widely read at the time as “anti-identitarian”; and for that very reason it angered many women who *did* view themselves as lesbian, and importantly so, in the quite old-fashioned sense. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227, 239 (Henry Abelove et al. eds., 1993). I read, and may well have misread, some of Luce Irigaray's writing in the same way.

I valued both of those passages then, as I still do now, for the authors' loving descriptions of their own desires, for the importance they placed on them, their integration of their sexuality into their sense of their own being in the world, and their palpably authentic assertions of selfhood in the face of waves of denigration, as well as for their recognition of the difficulties of such a reclamation. I did not understand those passages or my endorsement of them sixteen years ago, when I wrote that piece, as a subtle or overt attack on either desired sadomasochism or on desired cross-sexuality. I do, though, see that at least the passage from Irigaray, as well as my quotation of it, can be read as an ethical endorsement of lesbianism and if that were all that Halley were objecting to, I would second the motion.

not all of it, by quite a margin. Rather, as is often the case I suppose, the logic of this bizarre misinterpretation became much clearer once the “interpretive construct” that guided it was made explicit. Halley does a pretty good job in her review of doing just that: of putting her interpretive cards on the table. She is not as forthright as she could have been, but she comes pretty close.

In Halley’s case—maybe in queer theory across the board—a single “interpretive construct” seems to guide and underlie the reading, not only of that part of my book about sexual harms, but also apparently of all texts that are about or allege sexual injury,<sup>16</sup> and this same “interpretive construct” guides Halley’s reactions to the sexual injuries that she might see in the world. It goes something like this: wherever one encounters tales, recountings, stories, histories, allegations, or apparent acts of sexual violation, this listener or witness should assume, in point of objective fact, that unless there has been demonstrable and extreme violence, there has been no real, worrisome harm. One should assume, that is, that no matter what is alleged or claimed or pleaded or narrated, no one has been truly harmed if the topic is sex. Only then should this listener or witness decide how to react or, even better, how not to react. My shorthand for this construct, with due apologies to Hippocrates: *assume no harm*. This is Halley’s first rule when reading anything at all that has to do with sexual violation, from which pretty much everything else flows. Of course, once we map that interpretive construct—*assume no harm*—onto those parts of my book that are ostensibly about sexual violation, then, of course, the book becomes a moralistic tract against sadomasochism. Take the harm and the injury out of sexual violation, and what you are left with is pretty much just hot sex. And nothing but moralistic reasons to oppose it.

Now, whether Halley ascribes to me moralistic and censorial views about edgy heterosexual sex that I do not hold does not matter all that much in the scheme of things. There are other and more interesting things going on in this review. We can, and I think we should, as Halley is so fond of saying in other contexts, just “put it aside,”<sup>17</sup> and I will do just that in the

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As I will explain in detail below, I do not think we should draw political insight or inspiration from the nature of the sex we enjoy or the content of our sexual desires.

How any of that, however—all concerned with the relation of wanted sex to self—becomes a lens through which to read arguments about the harms of sexual injury, rape, harassment, or unwanted sex is still a mystery to me. I suspect, although I am not sure, that Halley reads my interpretation of those texts (as well as the texts themselves) through the same interpretive lens as that identified in the text. Obviously, if one removes the “compulsory” component of Rich’s critique of compulsory heterosexuality, one is left with nothing but a free-standing ode to lesbian sexuality. That would be an odd reading of Rich indeed.

<sup>16</sup> See, e.g., Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 184–85 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 44–48 (2004) (this author also publishes as Janet Halley).

<sup>17</sup> In her piece on sex harassment law, Halley instructs the reader to simply “put . . . aside” Joseph Oncale’s claim of unwantedness when assessing the merits of his same-sex

remainder of this review. However, what we cannot and should not put aside is the interpretive construct that, at least in part, prompted her misreading. Both the so-called arguments about sexual violence that get dumped on top of this particular construct—*assume no harm*—and the construct itself are so depressingly widely shared in queer theory that they are in danger of becoming, as far as I can tell, constitutive of it. I think it is important to at least clarify the contours of this way of understanding, interpreting, and reacting to the world of sexual violation, as it appears and reappears in Halley's review and elsewhere. The picture of sexuality and of sexual harms that emerges from it, and the de-regulatory claims that follow, rest on a series of denials and erasures that queer theory, no less than the new left, could well do without. I will try to enumerate some of them in Part Three below.

The first two Parts of this Response address more general questions, either directly or indirectly raised in Halley's review, regarding the place of harm and sexual harm in our political and legal discourses. Halley's ire, at least as reported in this review, is triggered not only by what she regards as my overly protective stance toward victims of sexual harms, but much more generally by the serious regard with which I take and urge others to take what I have called, channeling H. L. A. Hart, "the concept of harm" (the phrase is taken from one of my chapter titles). Halley complains in this piece that a focus on harm reflects an unhealthy seduction by law, an aversion to politics, and a conservative moralism. Here, at least, I have not been completely turned into moralistic straw: *Caring for Justice* is indeed at least *about* law and the redemptive potential of its aspiration for justice. I do not think a focus on harm rests on an aversion to politics, but it is certainly worth discussing. In Part One, I briefly explore the role of harm, first quite generally, in legal criticism and reform movements, and then more specifically, with a focus on why attempts to understand and minimize the harms people sustain, with their attendant suffering, have largely disappeared from progressive legal projects and the damage that their absence may have done to left politics.

In Part Two, I discuss in some detail one type of gendered harm that I take up in the book: harms occasioned by women's sufferance of what I have called, in *Caring for Justice* and elsewhere, "unwanted (or unwelcome) sex." My sense—I could be wrong—is that Halley's review is largely motivated not so much by a general philosophical resistance to the very idea of harm, but by her belief, shared by other queer theorists, that harms caused by the sufferance of unwanted sex simply do not exist.<sup>18</sup> If I am

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sex harassment complaint. Unsurprisingly, once the "unwantedness" is put aside, what the reader is left with is a tale of homophobic panic. Halley, *Sexuality Harassment*, *supra* note 16, at 192.

<sup>18</sup> Foucault may have been the first of the queer theorists to have posited this as both a theoretic position and as a proposal for law reform: that rape should be understood to be criminal only if accompanied by serious violence. MICHEL FOUCAULT, *Confinement, Psy-*

right, then the quite real chasm between us does not lie, as she seems to think, in either our genuinely different beliefs about the utility of harm-focused discourses in leftist legal reform projects or in our trumped-up different moralistic stances toward sadomasochistic sex. Rather, the chasm is most likely a function of our different political stances toward the harms occasioned by unwanted sex. If that is right, then she has plenty of company on her side of this divide. Mainstream theorists, queer theorists, and liberal and radical feminists *all*, for very different sorts of reasons, have failed to articulate, and perhaps to see, these harms or the behavior that causes them. In Part Two, I clarify in some detail what those harms might be, what occasions them, and why they are so persistently denied, and by so many.

In Part Three, I take up Halley's suggestion, one that she makes somewhat more explicitly in this essay than elsewhere, that *all* claims of sexual injury—not only claims of harms occasioned by unwelcome consensual sex, but also claims of rape—are overdrawn, with real (although different) costs borne by men and women, on the heels of our undue solicitude for women's exaggerated complaints of sexual injury. In other scholarship that I am now completing, I have gone to lengths to delineate exactly what, in my view, queer theory has right and what I value in its intervention into feminist politics.<sup>19</sup> There is no need for such a digression here. The view of sexual injury, sexual violence, and sexual politics put forward in this part of this piece, and now a number of others, is, in my opinion, both false and dangerous, and it is one that is widely shared in queer theory. In Part Three of this Response, I hope only to clarify the utopian account of sex on which it rests and to point out the legitimation of harms that it so strikingly entails.

The Conclusion addresses Progressivism's need for explicitly moral criticism, whether identitarian or not. Halley has one thing in her essay exactly right: I do indeed believe that leftists and feminists need to retain a moral vision, centered on an empathic understanding of the pain of others, that will move us toward an urgent and sympathetic response both in law and politics. In my own accounting of my place in the so-called left of the legal academy, it is this ambition that puts my work at right angles to almost all of the identitarian, as well as non-identitarian, left scholarship with which I am familiar. But whether widely shared or not, I briefly state, by way of conclusion, what I take to be the connection between progressive politics, on the one hand, and the capacity for sympathetic care, on the other.

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*chiatry, Prison, in POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984* 178, 200–05 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988) [hereinafter *POLITICS, PHILOSOPHY, CULTURE*].

<sup>19</sup> West, *Law's Nobility*, *supra* note 13.



## I. HARMS AND LAW

Halley objects to my argument in Chapter Two of *Caring for Justice* that the recognition, address, and recompense of various harms, the pain they cause, and the injuries that follow should be central, not peripheral, to both critical legal feminism and to legal progressivism in general.<sup>20</sup> I want briefly to elaborate on my claim and then respond to just one part of Halley's argument regarding it. I take up some other threads of her complaint in Part Three below.

My claim in this part of *Caring for Justice* (which I have made in a number of other publications) is that when thinking of law as a vehicle for improving the quality of lives, we should focus hedonically on the harms and injuries people suffer: on the well-being that people enjoy or their lack of it, on the human happiness or the human misery that accompanies their lives, or on what some people now call "human flourishing." I argue in *Caring for Justice* and elsewhere that we should retain this focus on subjective well-being rather than focus, as most legal critics and reformers have done for the last third of a century, on more "principled" grounds of criticism and reform: on grand conceptions of equality or liberty, no matter how defined, on cramped but universalizable and quantifiable ideals of efficiency, or on rights and principles garnered from ambitious interpretations of our adjudicated Constitution.<sup>21</sup> We do not, in point of social fact, do this. Indeed, even the language by which we might do so—the hedonic language of harm, injury, pain, suffering, well-being, happiness, misery, flourishing, and so on—has been eclipsed in both contemporary discourse and in politics. One part of the chapter in the book most concerned with harm is given over to understanding why this is the case.<sup>22</sup>

Most tellingly, the idea of harm and suffering (likewise, hedonically, well-being and happiness) as a normative guide to action has been eclipsed even within that jurisprudential movement—legal instrumentalism—that one would expect to be its natural home. We hear very little these days, even from legal instrumentalists, of the hedonically described states that could sensibly be thought to be law's target: the undue suffering, misery, pain, or alienation of the human community. Likewise, we hear very little of the various humanistic ideals—goals grounded in claims regarding the necessary conditions of human happiness—that have been or could be understood as the teleological goal of law or legal reform. Thus, we hear

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<sup>20</sup> WEST, *CARING FOR JUSTICE*, *supra* note 1, at 164–78.

<sup>21</sup> See Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 766–67 (1992); Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413, 1454–55 (2003); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 278 (1986); Robin L. West, *Commentary: Are There Nothing but Texts in This Class? Interpreting the Interpretive Turns in Legal Thought*, 76 CHI.-KENT L. REV. 1125, 1158–59 (2000); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 242–43 (1993).

<sup>22</sup> WEST, *CARING FOR JUSTICE*, *supra* note 1, at 164–74.

very little of the sensate pleasures and pains that were central to Jeremy Bentham's hedonistic-utilitarianism.<sup>23</sup> We hear much less of the "higher pleasures" and the content of the "good life" celebrated in Mill's ideal-utilitarianism. Mill, contrary to Halley's reading,<sup>24</sup> defined the "good life" as the life that would be enjoyed by a citizen in a well-ordered society; this required a healthy dollop of socialism, radical income redistribution, the emancipation of women from the sovereignty of their husbands, publicly funded health care, and high-quality education.<sup>25</sup> Aside from Martha Nussbaum's important work<sup>26</sup> and that of a few fellow travelers, we hear almost nothing of the full robust human happiness, or flourishing, spelt out in Aristotle's *Politics* as the telos of communal life.<sup>27</sup> Continuing this trajectory, we hear nothing about the ideal unalienated self of Marx's early writings;<sup>28</sup> or for that matter, the "New Individual" of John Dewey's early twentieth-century progressive socialist thought;<sup>29</sup> or the "Man For Himself" that Erich Fromm, in his beautiful and classic critical text of mid-century, urged us to be, rather than the man that lives "for" commodities or "for" either the production or exploitation of surplus value through lifelong labor or the lifelong accumulation of wealth.<sup>30</sup> And so on. This entire mode of broadly hedonistic, overtly humanist, avowedly instrumentalist and idealist forms of political and moral reasoning in morals, law, and politics—a mode of reasoning that focuses attention on minimizing the suffering in the world and maximizing well-being, looks to the human animal's potential for an unalienated and happy life, implores citizens to work toward that goal through politics, and encourages lawmakers to protect the political gains thereby won toward that end through law—all of this has

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<sup>23</sup> See generally Robin West, *The Other Utilitarians*, in *ANALYZING LAW* 197 (Brian Bix ed., 1998) (discussing the disappearance of Benthamic utilitarianism from instrumentalism).

<sup>24</sup> Halley, *Review*, *supra* note 2, at 81–83.

<sup>25</sup> JOHN STUART MILL, *UTILITARIANISM* 46–51 (The Univ. of Chicago Press 1906) (1861); JOHN STUART MILL, *THE SUBJUGATION OF WOMEN* 70–72 (Stanton Coit ed., Longmans, Green, and Co. 1909) (1869).

<sup>26</sup> See generally MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (applying a liberal ethical philosophy rooted in Aristotle to the situations of women throughout the international community and proposing a list of human capabilities that deserve social protection such as health, bodily integrity, political participation, and equal employment rights).

<sup>27</sup> See generally ARISTOTLE, *POLITICS* (C.D.C. Reeve trans., Hackett Pub. Co., 1998) (analyzing the structure and workings of various kinds of states, with particular attention to the causes of stability and revolution).

<sup>28</sup> ERICH FROMM, *MARX'S CONCEPT OF MAN* (Frederick Ungar Pub. Co. 1966) (1961) 43–58 (describing Marx's concept of socialism as the emancipation from alienation, the return of man to himself, and self-realization).

<sup>29</sup> See generally JOHN DEWEY, *INDIVIDUALISM OLD AND NEW* (Prometheus Books 1999) (arguing that traditional liberalism rested on a false conception of the individual and that the new individual is an inherently relational being and something that is achieved with the aid and support of cultural, economic, legal, and political institutions).

<sup>30</sup> See generally ERICH FROMM, *MAN FOR HIMSELF: AN INQUIRY INTO THE PSYCHOLOGY OF ETHICS* (Rinehart and Co. 1947) (outlining Fromm's theory of human nature, where freedom is the central characteristic).

been conspicuously absent from academic writing on law for half a century now. To me, it has been most strikingly and most distressingly absent on the legal-academic left. Why?

I think a part of the answer has to do with intellectual fads in the various academic disciplines that influence legal theory. Some of this is familiar territory. In a story now often told, harm-focused, instrumental reasoning has been absent from normative and welfare economics since the 1940s, as the normative idea of “happiness” as that to be pursued—and misery or suffering as that to be minimized—gave way to the more quantifiable and (not just coincidentally) much more market-friendly notion of “benefits” and “costs.”<sup>31</sup> What we should aim to do by this reasoning is maximize benefits, not happiness, and minimize costs, not suffering, on the grounds that benefits and costs are much easier to measure. This transformation had decidedly conservative implications within utilitarian thought. On the heels of the shift to benefits and costs, the more overtly reactionary normative goals of wealth, efficiency, and preference-maximization predictably enough quickly followed. This development, by no means limited to a fringe of normative economic theorizing, basically substituted corporate profit for human pleasure, happiness, or well-being as that to be maximized by law. This was not a good development for women, men, children, or other living things.<sup>32</sup> The definitional shift from human well-being to profit maximization quite explicitly takes men, women, and children out of the center of law’s concern. Rather, human well-being is maximized by a wealth maximization regime to the extent and only to the extent that human beings are wealth maximizers in the same way as are corporations. To whatever considerable degree they are not, once well-being is equated with wealth, their well-being becomes not only inconsequential, but also non-cognizable.

Other disciplines that also touch on law, although for different sorts of reasons, have likewise moved away from hedonistic, harm-focused modes of moral and political reasoning. Thus, the notion that we ought to set things up so as to maximize the well-being of the community and reduce people’s suffering and pain has also largely disappeared from those branches of moral and political philosophy that concern themselves with law. In moral philosophy, consequentialist modes of criticism and reform of all stripes (utilitarian, ideal, welfarist, whatever) have been eclipsed by deontic “rights” and “principles.” In political science, a similar migration has occurred among the most theoretically inclined, this time away from consequentialism to various forms of game theoretic and social contract

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<sup>31</sup> See West, *The Other Utilitarians*, *supra* note 23, at 197 (tracing the shift from the hedonic and idealist utilitarianism of Bentham and Mill to a preference-based utilitarianism at the center of normative Law and Economics).

<sup>32</sup> See generally Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, 150 U. PA. L. REV. 1553 (2002) (criticizing the use of the cost-benefit analysis in evaluating environmentally protective regulations based on its inability to “price the priceless values of life, health, nature, and the future”).

thinking. Likewise, and closer to home for legal progressives, harm-focused reasoning is broadly absent in those branches of public law-inspired political theorizing most closely aligned with legal studies, at least in the United States. Here it seems the line of influence went from the legal academy to its cognate disciplines, rather than the other way around. Thus, starting roughly with the success of the *Brown* litigation in the 1950s, progressive legal interest in reformist movements in ordinary law and politics, defined by reference to the community's well-being, gave way to both a romantic anti-majoritarianism that posited community interest as oppositional to minority and individual rights and to the seductive allure of constitutional and litigational rather than political modes of change—the allure, that is, of improving social life through dramatic shifts in constitutional arrangements so as to accommodate individual and minority rights through adjudication and litigation, all consciously designed to rest on solidly anti-utilitarian premises.<sup>33</sup> Lastly, of course, harm-focused reasoning has been absent from the array of critical theoretic ideas that have most influenced both ongoing critical legal scholarship and the formation of that movement at its inception, as clearly evidenced by the explicit “anti-normativity” and the “anti-humanism” of the radical legal elite,<sup>34</sup> and as performed yet again by Halley's review. To sum it up: teleological, hedonistic, utilitarian criticism of law, politics, culture, and institutional life—a family of critical approaches to law and life that shares a focus on reducing harm and suffering and fostering happiness, pleasure, and well-being—and to a lesser extent, reform movements that are based on this sort of reasoning, is absent from the mainstream and non-mainstream legal academy, including especially those wings of it most influenced by other disciplines.

If we break this down by political orientation, we get to the same bottom line. Both old right and new right academic legal theorists and critics urge quantifiable calculations of the objective well-being of profitmakers (corporations mainly, and individuals secondarily, who are then presumed to be “like” corporations in this regard)—such as wealth, costs, and benefits—on decision-makers. Gentle liberals and stolid centrists still stick with their welfare-constraining individualistic rights and principles, ever hopeful that they will be enforced by increasingly hostile adjudicators. On the new left, both rights and principles and efficiency and wealth have been jettisoned, but only to be supplanted with Foucauldian “power” discourses. These power discourses on the critical left, in both “identitarian” and “non-

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<sup>33</sup> Perhaps the clearest evidence of this can be found in Ronald Dworkin's classic set of essays, *Taking Rights Seriously*, where he identifies rights as the province of the courts and then defines them in explicitly anti-utilitarian and anti-communitarian ways. RONALD DWOR-KIN, *TAKING RIGHTS SERIOUSLY* 150 (1977).

<sup>34</sup> See, e.g., Pierre Schlag, *Normative and Nowhere to Go*, 43 *STAN. L. REV.* 167, 187–91 (1990) (arguing that normative legal thought stands in the way of understanding political and moral situations).

identitarian” scholarship, are based on the quite explicit assumption that, since power is everywhere, there is no other object of legitimate critical discourse.<sup>35</sup> The “old left,” by contrast, did have a richly hedonistic and

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<sup>35</sup> The trend is so pervasive it is difficult to identify its source, but Foucault was clearly one of the major theorists of this direction in late twentieth-century critical discourse. Thus, in an interview in which he reflects on his classic study, *The History of Sexuality*, Foucault posits:

For me, the whole point of the project lies in a re-elaboration of the theory of power. . . . Between every point of a social body, between a man and a woman, between the members of a family, between a master and his pupil, between every one who knows and every one who does not, there exist relations of power which are not purely and simply a projection of the sovereign’s great power over the individual . . . .

I think one must be wary of the whole thematic of representation which encumbers analyses of power. . . . In general terms I believe that power is not built up out of wills (individual or collective), nor is it derivable from interests. Power is constructed and functions on the basis of particular powers, myriad issues, myriad effects of power. It is this complex domain that must be studied. That is not to say that it is independent or could be made sense of outside of economic processes and the relations of production . . . . The idea that the State must, as the source or point of confluence of power, be invoked to account for all the apparatuses in which power is organised, does not seem to me very fruitful for history . . . .

MICHEL FOUCAULT, *The History of Sexuality, in POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972–1977* 183, 187–88 (Colin Gordon ed., Harvester Press 1980). Later, in an interview discussing “Theories of the Political,” Foucault expanded on his understanding of the possibilities of resistance to power in response to an interviewer who asks, “All your analyses tend to show that there is power everywhere . . . . Can you . . . not be criticised for seeing power everywhere and, in the final analysis, of reducing everything to power?” Foucault responds, “For me, power is the problem that has to be resolved . . . .” MICHEL FOUCAULT, *On Power*, in *POLITICS, PHILOSOPHY, CULTURE*, *supra* note 18, at 104. In another interview, Foucault says,

[R]esistance to power is not a substance. It does not predate the power which it opposes. It is coextensive with it and absolutely its contemporary. . . . I am not positing a substance of resistance versus a substance of power. I am just saying: as soon as there is a power relation, there is a possibility of resistance. We can never be ensnared by power: we can always modify its grip in determinate conditions and according to a precise strategy . . . .

*Id.* at 123. The Foucauldian insistence on power, subordination, and domination as the exclusive or near exclusive tools of critical thought, particularly in legal critical thought, is pervasive. There is no discontinuity here between identitarian and anti-identitarian leftist thought. MacKinnon and countless radical feminists following her lead view women and men and all of their pornographic productivity as the product of power and the point of radical feminism as the unmasking of that power; Halley views lesbians and gay men likewise; Michael Warner, in *The Trouble with Normal*, argues at length that distinctions between conventional and queer sex are products of power; critical legal theorists such as Roberto Unger have all argued in various ways that the uncovering of power behind the purportedly apolitical claims of law or knowledge is the central task of critical thought in law; critical race theorists view race itself as a part of power’s productivity; all agree with Foucault that the primary task of intelligent criticism is the unmasking of power and then the corraling of forces to resist it. CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, 106–25, 195–214 (1989); Halley, *Queer Theory by Men*, *supra* note 15, at 12–14; MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 67–95, 99–103 (2000). See generally ROBERTO MANGABEIRA UNGER, *FALSE*

humanist orientation, but it has had virtually no presence in the legal academy, at least since the departures of Robert Hale, Jerome Frank, Morris and Felix Cohen and company.<sup>36</sup> Again, in sum, the notion that human happiness, well-being, or even welfare—to say nothing of suffering, harm, and pain—might provide a normative guide to the moral critique of law, and to the political activism required to reform law, has virtually disappeared. Leftist, progressive, and radical thought in any of the above realms has been no exception; power, or at its most humanist, “substantive equality”—rather than suffering or well-being—has become the new left’s coin of the realm, as efficiency has become that of the new right’s.

So what is the loss in all of this? I think we are all paying the price, but the damage is the greatest on what passes for the academic legal left. The left, in law and elsewhere, becomes unwilling to speak in any direct way about the quality of people’s lives, rather than about their relative position on varying poles of subordination. It becomes willfully incapacitated from the work of sparking sympathetic responses in listeners regarding undue or unnecessary human suffering that might prompt a felt imperative to act to reduce it. It has no way of countering the almost numbing effect of the right’s rhetorical commitment to the individual and corporate “liberties” that create the conditions that induce human suffering. It becomes incapable of understanding or communicating the narratives of those who are living out their lives in those conditions. It has no way of responding to the chilling and thanatos-like compulsion (to use a Freudian cliché of my own) on the mainstream and “new” right to reduce people’s lives, histories, fates, passions, and connections to a corporate balance sheet of costs and benefits—a compulsion that de-humanizes and can prove lethal. Perhaps most importantly, without a hedonic focus on harm, injury, and human suffering, the left becomes incapable of responding to or even conceptualizing the sufferings occasioned *not* by overtly coercive forms of oppression (such as slavery or rape), but by transactions and ways of life that are fully consensual (such as wage labor) and justified by what I

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NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987) (providing an alternative account of the rise of the main institutional features of mass society, with an emphasis on the role of power, and discussing a program for radical political, economic, cultural, and legal change). I discuss and criticize this focus on power, particularly in the context of the Critical Legal Studies movement, in the last chapter of *Caring for Justice*. WEST, *CARING FOR JUSTICE*, *supra* note 1, at 259–64.

In queer theoretic writing, the insistence on power-discourse is perhaps more pronounced than elsewhere. Against the flood of it, those who dissent are routinely characterized or diagnosed as motivated by a fear of politics, various phobias, or, at least in my case, an unhealthy smothering instinct, sickly rooted in maternalism. See, e.g., WARNER, *supra*, at 81–145 (dismissing Eskridge’s writing on gay marriage and Barbara Cox’s account of her own marriage celebration likewise). Halley levels all of these charges in her review: a fear of politics, a panicked reaction to sex and a smothering-mothering form of feminism. See *supra* notes 3–10.

<sup>36</sup> Cf. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2199–200 (1999) (discussing, in the context of the New Deal, the New Left’s disenchantment with liberalism from the 1930s to the 1960s).

elsewhere call an “ethic of consent”: a general, across-the-board claim that anything to which an individual has rendered consent must, for that reason alone, be productive of “value” and must therefore be “good.” It is left with no response to the insularity of the forces in our current culture that render the undue sufferings of people a function of ways of life that are created as well as justified by their “consensuality,” rather than by caste or rank ordering. Precisely at that point—at the point where the left has essentially *no counter* to the “ethic of consent” that insulates capitalism, much of patriarchy, a lot of contemporary white racism, and much else even from critique, much less reform—the “left” becomes something other than radical and something other than critical. What it *is*—what the academic left is discursively reduced to once it abandons interest in the quality of people’s lives—is a mechanistic, mind-bogglingly redundant, and almost absurdly abstract set of claims about structures of oppression and inequality as revealed through deconstructive readings of various texts. Its “politics” are reduced to an empty (or worse) valorization of an equally abstract “empowerment” likewise revealed, or not, in texts.

In *Caring for Justice*, I made the much more particular claim that less politically powerful persons and groups that suffer relatively unrecognized, not well understood, and unarticulated harms, who as a consequence are living out lives that are to varying degrees invisible as well as lesser (including poor people, women, non-whites, and many others), disproportionately suffer the consequences of this tectonic shift in our habits of thought.<sup>37</sup> Put the marginality of the concept of harm in the academic-like critique of law that considers itself in any way political together with the marginality of the harms suffered disproportionately by subordinated groups, and you get a pretty toxic brew. Gendered harms, raced harms, harms of poverty, and so on are marginalized within our understanding of harm, which is itself marginalized within consequentialist approaches to law and its creation and reform, which are themselves marginalized in mainstream legal thought and thoroughly disparaged in progressive thinking. So, for all of these reasons, the harms that women disproportionately sustain are at the edges of legal consciousness. They are way out there, furthermore, well before we go about the discomfiting business of factoring in the conflicting interests of powerful people who have a stake in trivializing or denying their seriousness.

In the chapter on gendered harms, I focus on four sorts of gendered harms, one of which I call “harms of invasion.”<sup>38</sup> By that phrase, I mean to include the harms—psychic, physical, economic, and political—that women disproportionately suffer by virtue of unwanted intrusions into their bodies, in the form of both unwelcome sex and unwelcome pregnancies. The

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<sup>37</sup> WEST, *CARING FOR JUSTICE*, *supra* note 1, at 100–38.

<sup>38</sup> *Id.* at 100–09.

invasiveness, both physical and psychic, that is often (not invariably)<sup>39</sup> a part of unwelcome sex and unwelcome pregnancy, I argue, is a dimension of harm that is not well recognized in mainstream legal theory or doctrine. This is not coincidental, I believe, because the psychic experience of being invaded is such a pervasive aspect of women's lesser lives. Again, I believe, although I could be wrong, that it is Halley's disagreement with the claims about unwanted sex that underlies much of the animus in her review. So, in the next Part, I want to spell out what I mean by "unwanted sex," why the harms it causes are so difficult to see, why the unwanted sex that occasions the harms happens and happens so much, and then what the harms might be that such sex produces. Here, I want to respond in a very abbreviated way to the thrust of Halley's argument regarding the overall politics of a focus on harm and injury; I will, though, retain focus on harms and injuries pertaining to gender.

What I have summarized above is roughly the heart of the focus on harm that I urge we reclaim and that Halley attacks. I have put the claim forward in numerous publications both before and after *Caring for Justice*.<sup>40</sup> Much of Halley's critique, in my view—though I am quite sure, not in hers—is internal to all of this, rather than foundational. Thus, Halley complains, sensibly enough, that my focus on harm in sexual contexts is one-sided, slighting various harms suffered by men by virtue of feminist interventions into law and politics. Men, meaning both rapists and non-rapists, both harassers and non-harassers, are burdened by feminist reforms that in effect shift some of the burden of preventing sexual assault off women's shoulders and on to men's; and in a truly harm-focused ethical ordering, those burdens, now borne by men, should count for something as well.<sup>41</sup> Likewise, boys on playgrounds who are ostensibly doing fine in a deregulated play atmosphere are burdened by increased surveillance urged by those concerned about the vulnerabilities of the not-doing-so-fine children; these burdens, too, should be weighed.<sup>42</sup> All of this strikes me as

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<sup>39</sup> Let me emphasize: I do not claim that invasiveness is the only harm of rape or that rape is the essential or central harm that women suffer. Nor do I believe, if this really needs saying, that women never hurt men or that men do not suffer. I have written six books and over a hundred articles; one book—this one—and a handful of those articles focus on harms women distinctively suffer. Obviously it does not follow from the observation, or from an interest in the harms women distinctively or disproportionately suffer, that men never get hurt.

<sup>40</sup> See, e.g., West, *The Other Utilitarians*, *supra* note 21, at 197, 208; Robin West, *Rationality, Hedonism, and the Case for Paternalistic Intervention*, 3 *LEGAL THEORY* 125, 127 (1997); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384, 391 (1985); Robin West, *Colloquy: Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 *HARV. L. REV.* 1449, 1453 (1986); Robin West, *Disciplines, Subjectivity, and Law*, in *THE FATE OF LAW* 119, 127 (Austin Sarat & Thomas R. Kearns eds., 1991); Robin West, *The Harms of Consensual Sex*, 94 *AM. PHIL. ASS'N NEWSL.* 52 (1995); Robin L. West, *Taking Preferences Seriously*, 64 *TUL. L. REV.* 659, 679 (1990).

<sup>41</sup> Halley, *Review*, *supra* note 2, at 81–88.

<sup>42</sup> *Id.* at 84.



logical, and if those burdens, etc., are not or have not been seen or counted they surely ought to be. If it is true that boys and men's interests are undervalued, then a corrective is in order. I do not think it is true, and nothing in Halley's review shows it to be, but it certainly *could* be. Feminism has largely been a corrective to various sorts of commonsensical perceptions of reality—common sense notions of what and who matters and how much—and if a compensatory move is now required then so be it. Again, all of this seems to me to be pretty friendly criticism. It hardly rests on a denial of the relevance of harm, injury, burdens, pleasures, pains, and the like to legal critique or reform.

Along with the tallying of neglected harms, though, Halley does suggest at least the contours of a somewhat deeper and decidedly external critique that merits at least a brief response. Halley's suggestion is that a focus on harm of the sort I propose risks creating and augmenting, rather than diminishing, the various harms on which it focuses. By "naming, claiming, and blaming" injury, feminists in particular (but I suppose the critique is meant more broadly to encompass all harm-focused political and legal perspectives) create the harm so named where there had in fact, earlier, been none.<sup>43</sup> By so doing, they induce a false sense of victimization, inhibit unduly the harm-causing actor, and infantilize or incapacitate the "victim" they wittingly or unwittingly create. Feminists concerned with rape and rape law reform are the specific targets of this complaint. Such feminists, the argument goes, create rather than redress the purported harms of rape. I will look at this "argument" regarding rape and its causes (and explain the scare quotes) in Part Three below.

The complaint about the politics of injury, however, as it pertains to feminism, and at least as articulated in Halley's review, is not limited to rape reform; rather, it is meant across the board of "harm" or "injury-based" feminist movements, interventions, and claims. So, presumably, the argument might proceed: all of those pampered and pedestalled wives in mid-century America and Australia read Betty Friedan's tract on the small, daily deaths of domesticity and not only learned to name, claim, and blame the cause of their ennui, but, precisely by virtue of that naming, claiming, etc., actually thereby *became* bored, dissatisfied, and diminished with and by their lives. The text they read created, not named, the injury. Before their encounter with that text, they had been—well, they had just always already been. Before reading *The Second Shift*,<sup>44</sup> likewise, 1990s working wives had just done all of those extra hours of housework, not knowing that the inequity of that second shift was any sort of injury whatsoever. The text, again, created the sense of injury, and therefore created the injury.

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<sup>43</sup> *Id.* at 83–84.

<sup>44</sup> See generally ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* (Avon Books 1997) (1989) (arguing that in dual-career households, women still perform the bulk of domestic work).

Perhaps women in the 1960s and 1970s read Shulamith Firestone's angry tract against pregnancy and childbirth,<sup>45</sup> and learned for the first time that childbirth actually hurts; again, the tract created the sense that this avoidable pain could be understood as injurious. To switch back to here and now, these experiences of sexual harassment are neither injurious, nor painful, nor harmful, not even annoying, apparently, until the law comes along and declares them to be such. Schoolyard bullying is perceived as harmful rather than good, clean fun only after the intervention of authoritative texts make it so, and so on. The endpoint of this—but it is a long, long spectrum, littered with copulas—is that it is those harm-obsessed feminists who agitate for rape and domestic violence reform who cause injury. And presumably by extension, it is all those feminist-inspired prosecutors, police forces, and legislators who have blood on their hands, not the domestic abusers who actually knock out teeth and break ribs, not the football players or midshipmen who actually drive women off of athletic teams and out of the military, and certainly not the rapists themselves, who by all appearances (but appearances are so deceiving) cause palpable and serious injuries. Rather, the causal chain works like this: women, girls, and I guess toddlers as well, overly influenced by harm-denouncing feminists, come to see those boundary-shattering, transcendent experiences as, dare one use the “b” word here, *bad*, and then come to feel it as injurious. The way to put an end to all of these so-called injuries, if the diagnosis of their cause is correct, is obvious: feminists should shut up and legislators should deregulate. Texts created these injuries; texts apparently can make them go away. Give it a rest, indeed.

Just shutting up about it would certainly be an efficient way to reduce the sum total of harm in the world if the diagnosis of harm's cause—harm is caused by harm-blathering—bears up under scrutiny. Does it? The diagnosis imparts a god-awful power, perhaps unmerited, to the Almighty Word. But maybe injuries are caused not by pontificating feminists and their injury-causing texts, but by interactions between people. And perhaps those interactions occur with or without—before, during, or after—the proliferation of all of those texts. Maybe the injury of rape is done by rapists, not texts, and is done to the jawbone, the pelvis, the reproductive organs, the stomach, the skin, the eyes, the vaginal walls, the anus, and the psyche. And maybe that harm is worsened, not alleviated, by the lack of texts that forthrightly say as much, to say nothing of the lack of law that forthrightly deters as much, outside of narrowly drawn boundaries. If this maybe story is credible, *then* what might happen should a girl or woman

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<sup>45</sup> See generally SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (William Morrow and Co., Inc. 1970) (arguing that as long as women are required to bear and rear children, they will lack the biological and economic independence required to be completely liberated).

encounter harm-caused-by-actors, rather than harm-caused-by-text, and all without a text that so names it?

Imagine a woman harassed on the street, a girl sexually abused by her stepbrother, a boy raped by his priest or bullied on the playground, a wife tired and bored and diminished by numbing domestic service, a woman exhausted by two low-paying jobs followed by a no-paying job at home, and all of that in a social context in which these “injuries” are unnamed, unclaimed, and unblamed. In such circumstances, the experiences are not injuries; they are, rather, the white noise of daily life. Now what if, contra Halley, that girl, woman, boy, or child somehow, god knows how, actually experiences all of that as pretty misery-inducing, even in the absence of social “texts” proclaiming it to be such? The effect of that combination—the suffering itself, and the experience of it as suffering, and all in the absence of communal or social or textual recognition of the suffering as a harm—is a radical, re-defining self-diminishment. I hurt, and someone did it. But that “it” that I am feeling, the “it” that someone did to me, does not count as an injury. The “it” does not register, socially, as a harm at all. The “it” is not even a compensable, deterrable wrong. The “it” is certainly not a crime. “It” does not trigger recognition, much less recompense, by those charged with the duty to protect me from harm, whether those so charged be parents, school officials, or the state. “It,” in fact, might well be not only not a “harm,” but valorized activity, constitutionally and otherwise. Yet those parents, school officials, and state actors are reasonable, well-meaning people. Some of them love me, many of them provide for me. What, then, should the “I” who is hurting conclude from all this? Simply: that I do not matter so much. I am hurting, but the injury and the harm that causes the hurt are not recognized; they do not exist. How can that be? Simple: it is the “I” that does not *count*. I do not count, so my suffering does not translate into cognizable harm. I do not count and so neither do my perceptions, views, thoughts, feelings, or desires. I am trivial; I am a triviality—as are those views, thoughts, feelings, and desires. Of course I have no voice, no political bearing, no seriousness, and no “point”; I have no standing. Note that if *this* is the phenomenological sequence, then the bottom line will be a bottom line that Halley would apparently *applaud*: a complacent, albeit diminished, girl, woman, or boy, ready and willing to comply, to take punishment, to take abuse, and to do so without calling it any of that, and without looking for ways to make it stop. And why all this compliance? Not because there is no injury. There has been an injury all right. Compliance is the end result, not because of a lack of injury, but because of self-diminishment in the face of the lack of its naming.

If this is the sequence—from hurt to self-diminishment—then the feminist texts (and others) that have intervened in this mess over the last twenty or thirty years are not creating injuries where before there were none. What they have created, when they have been effective, and when accom-

panied by popular agitation, is a change in law. What those changes in law, if only on occasion, have created, among much else, have been changes in a sense of entitlement among the victimized to the equal regard of those who wield power. What they have created, when confronting conditions, co-workers, husbands, dates, strangers, or employers that cause harm, is a migration in consciousness from the compliant stance of "that is the way the world works," to the entitled sense that "I do not have to take this shit." The sense of injury, in other words, may well have been brought on, albeit indirectly, by texts, feminist and otherwise. It does not follow that the injury itself had its genesis in the Word. The sense of one's entitlement to equal regard, by which one's suffering might be perceived as injurious, avoidable, deterrable, and compensable, though, might well have.

With legal entitlement and awareness of it come, no doubt, more than a few false positives: groundless lawsuits, false claims, prickliness-to-a-fault, badly motivated litigiousness, over-reaction. Is there a groundswell of this? To take Halley's most serious, although least explicitly communicated, charge: are there countless men serving time in prison because of rape convictions consequent to trumped-up charges brought by secretly desirous, lusting women in the destructive throes of sex panic? Or are there scores, hundreds, thousands of men serving real jail time for rape on the basis of charges brought by women who might or might not have enjoyed the sex, but who in no event would have labeled it "rape," but for a harm-obsessed larger world intent on de-sexing social life? That seems a tad panicky. New or expanded criminal laws regulating newly articulated injuries are not flawless; new regulatory regimes might "go too far." Of course, a new stream of regulation might lead to over-reaction. Vicki Shultz suggests, on the basis of very close readings of employers' guidelines and handbooks, that many large employers and some courts may have overreacted in just this way to sex harassment law, both in terms of what is being understood as "harassing," and in terms of what they view as necessary to regulate: not only harassment, but also non-harassing (because welcome) sexual activity in the workplace.<sup>46</sup> A number of feminists have urged that rape reform movements stand in need of various corrections. For example, Michelle Anderson has argued recently that the best defense a woman can wield against the possibility of even stranger, violent rape, and certainly against date or acquaintance rape, is *not* acquiescence, followed by trust in state and police intervention (as urged by some feminist rape law reformers and countless police departments), but rather old-fashioned self-defense. Competent, rudimentary self-defense does in fact deter rapists, Anderson argues, and does not unduly endanger potential victims.<sup>47</sup> In my view, Anderson's claim, Shultz's claim, and others

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<sup>46</sup> See, e.g., Vicki Shultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2088-90 (2003); Vicki Shultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1789-96 (1998).

<sup>47</sup> See Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953,

like them are credible, sensible, and important. But queer theoretic they are not. They are a far cry from what seems to be the confident assertion at the heart of so much queer theory: that the injury itself is a product of the text that names it, and thereby creates it. That claim, seductive in the extreme, seemingly squares with some bald facts: the number of assertions of sexual and non-sexual injury by women, both in law and elsewhere, go up as awareness of the availability of legal recourse rises. But more than a little caution is in order. That assertions of injury are on the upswing hardly testifies to their dubious origin. The same upward swing may instead evidence a long-overdue sense of entitlement, empowerment, and equality among the injured. It may also evidence a sense, shared in heartfelt fashion by the larger community, that life without those injuries can be less brutal, less short, and less nasty for all, albeit with a little more law.

## II. HARMS AND SEX

Let me turn now to my particular claim regarding the harms attendant to unwanted sex; again, I believe that, although not explicitly targeted in her review, it is Halley's disagreement with this quite specific claim (rather than a general disagreement about the utility of a harm-based discourse) that lies at the bottom of the canyon between us. I will begin with definitions because simple-sounding definitions turn out, in this context, to be a lot trickier than might first appear.

What *is* "unwanted sex," just in terms of familiar categories of thought? Sometimes unwanted sex is non-consensual, and when it is, it is rape. Sometimes, however, unwanted (or unwelcome, or undesired) sex is "consensual," in all the ways that matter to law, and when such, it is not rape, and, entirely properly, not the target of criminal rape law. However, even consensual sex that is unwanted—meaning, unwanted sex that *is not rape*—might nevertheless be harmful, injurious, and the product of not-so-subtle background conditions of necessity and coercion, just as Marx argued that *fully consensual, free exchanges* of labor for wages, although free, meaning although not slavery, are nevertheless harmful, injurious, and the product of background conditions of necessity and coercion.<sup>48</sup> Consensual unwelcome sex—like the consensual unwelcome wage labor in Marx's reckoning—occupies a very particular *conceptual* place, relative to consensual sex on the one hand, and rape on the other. Like rape, unwelcome sex is unwanted and undesired, and like rape, it can be harmful, injurious, and the product of severe power imbalances. Like desired sex, though, unwelcome sex is consensual. Think of a Venn diagram with two overlapping circles: the left circle is unwelcome sex. The right circle is

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959–60, 980–91 (1999).

<sup>48</sup> KARL MARX, *Capital*, in A HANDBOOK OF MARXISM 373, 451–52 (Emile Burns ed., International Publishers Co. 1935) (1867).

consensual sex. The left non-overlapping area is rape; the right non-overlapping area is welcome, consensual sex. Unwelcome but consensual sex occupies the area of overlap. My claim—and again, I think it is this claim with which Halley disagrees—is that *that* sex is also harmful.

Precisely because “unwelcome sex” occupies the spot it occupies on the Venn diagram, the very *idea* of unwelcome sex and its harm easily, readily, and routinely disappears from consciousness, and it is important to see why. Abstract for a moment away from sex. We tend in this culture to see the “category” of harmful, consensual acts of any description, not just sexual, as either oxymoronic or as occupying a conceptual space that is the political equivalent of a black hole—where once in that hole, you are sucked away. For a good number of reasons—this is indeed over-determined—in our here-and-now intellectual climate, we habitually identify the “consensual” transaction or state of affairs not only with the legal, the “legitimate,” and the “acceptable,” but also with the production of *value*, and, therefore, with the good and the non-injurious.<sup>49</sup> To spell it out in a little more detail: in our obsessively value-producing liberal culture, if something is “consensual”—meaning, if some state of affairs is the result of a consensual transaction—then for that reason alone it must maximize our well-being. Why? Because that is just how consent, well-being, and value *are defined*. And, if whatever we have consented to maximizes well-being in that way, then it must be of value, and if it increases value, then it must be good, and if it does all of that, well then obviously it cannot also be injurious. These ironclad claims about consent, harm, value, the production of value, injury, and selfhood leave no definitional room for an exploration of the harms that are caused by human enterprises—such as sex or work—that are consequential to free transactions between competent adults, consensual in every sense of the word, and nevertheless harmful. Libertarian constitutional decisions of the past thirty years, as well as of the first thirty years of the last century, that protect consensual transactions (sexual, in the last three decades;<sup>50</sup> labor, in the early 1900s<sup>51</sup>) from state intervention have made the contours of those harms all the more obscure, at least for the law-trained. You are just not allowed to talk about these harms: if you do so, you are either not making sense, or even worse,

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<sup>49</sup> See Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491–99 (1980).

<sup>50</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Connecticut law forbidding the use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

<sup>51</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a New York statute limiting the number of hours a baker works unconstitutionally interferes with the freedom of contract).

you are being unconstitutionally “paternalistic.” Or—Halley turns the voltage up here as elsewhere when she does not want to sound like an old-fashioned libertarian—you are “totalitarian.”<sup>52</sup>

When the consensual-but-harmful transaction under discussion is at work, the sledding is tough enough. Let us consider the effectiveness of a glib rejoinder to Marx’s three-volume masterpiece on the harms of consensual labor: “Okay, so maybe work sucks, but workers are adults, aren’t they? They agreed to this, didn’t they?” And that is the end of that discussion. When the harmful-but-consensual transaction you want to talk about is sex, though, the sledding gets tougher. This is only initially surprising; work and sex not only compare on this score, they also contrast. Consensual labor transactions are indeed surrounded by an almost impenetrable assumption that they maximize “value”; so, whoever’s exploiting whomever does not matter, those transactions ought to be left alone. We just should not (and do not) care about how laborers became laborers and employers became employers. To care about that would express what Halley identifies as an “infantile” interest in the pre-injury world, a lack of interest that Marx duly noted.<sup>53</sup> Consensual *sexual* transactions, though, do not *just* maximize “value” in our popular imagination, although they do that. Sex is more. Sex is, well . . . sexy, and labor is, well . . . laborious. As a consequence, the conceptual wall protecting consensual sex from critique is thicker, even a lot thicker, I think, than the conceptual wall protecting labor, at least in the minds of most everyone other than the Pope, his ardent followers, and some fundamentalist protestant sects. Consensual *sexual* transactions, after all, in addition to producing all that value solely by virtue of their consensuality, *also* (take your pick here) produce physical pleasure, emotional intimacy, familial well-being, nice happy children, personal liberation, political transgression, animalistic naturalism, a healthy anti-authoritarianism, anti-totalitarian individualism, a vague sort of anti-establishmentarianism, and, of course, an effervescent hipness. Whichever way your tastes go, from the only partial list given above, the bottom line result is the same: there is so much good and good feeling produced by all that consensual sex, way above the value it all creates “by definition,” that so long as there is consent, there cannot possibly be any attendant harm.

Feminism has not, for the most part, challenged this picture. In fact, strands of feminism itself, both liberal and radical, have also made these harms hard to see.<sup>54</sup> Let me start with liberal feminism. Needless to say,

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<sup>52</sup> Halley, *Review*, *supra* note 2, at 91.

<sup>53</sup> See MARX, *Capital*, *supra* note 48, at 353–55.

<sup>54</sup> For an elaborated argument on this subject, see Robin West, *The Harms of Consensual Sex*, in *THE PHILOSOPHY OF SEX* 263, 266–67 (Alan Soble ed., 3d ed. Rowman and Littlefield 1997) (arguing that both liberal feminist and radical legal feminist conceptualizations of sex, rape, force, and violence undermine the effort to articulate the harms that might be caused by consensual sexuality).

perhaps, liberal feminists have not been involved at all in the attempt to better articulate the harms of consensual sex, for reasons that track the above. They have, though, been heavily involved in the reform of rape law, and hence, in the articulation of rape's harms. One cost of the terms of their involvement, I believe, has been a further obfuscation of the harms of consensual sex. The harm of rape, according to what is now a well-established line of liberal feminist argument, is basically the incursion on women's autonomy—the threat of rape interferes with women's physical freedom in their social world.<sup>55</sup> This seems true enough. The problem, to my mind, with the liberal feminist understanding of rape's harms is with what is left unsaid. This is particularly true regarding its typically unstated premise on the nature of value: by negative inference, from the liberal feminist understanding of rape's harms, whatever does *not* interfere with autonomy, whatever occupies the space of free choice, must be very good, if what infringes on free choice, autonomy, and liberty is so very bad.

It is worth noting that this inference, from the autonomy-limiting harm of rape to the wondrous liberating value of everything else, is neither warranted nor logically required. Consensual sex, no matter what its other attributes, is not rape, so it does not impose rape's harms. However, nothing in fact follows from this regarding the goodness, badness, harmlessness, or harm of consensual sex, other than that if it is harmful, it must be for some reason other than coerciveness. (Likewise nothing follows from the wrongness of slavery regarding the goodness of free wage labor, other than that if the first is coerced and the latter is truly free then the latter, if harmful, is so for reasons other than coerciveness). Nevertheless, the inference is ubiquitous. Rape is harmful and bad because it is coerced and an infringement of autonomy. Therefore, consensual sex—welcome, wanted, desired, unwelcome, unwanted, not desired—that is not coerced and does not infringe autonomy is both harmless and, more importantly, a positive good. And this time, from a liberal feminist (as opposed to just a liberal) perspective, the possible harms of consensual sex get erased—all toward the end of better understanding the harms of rape.

Let me look now at radical feminism. The story here is more complicated, and I develop it in greater detail elsewhere.<sup>56</sup> Radical feminism has also obscured the harms of unwanted sex, but not by valorizing autonomy. Radical feminism has obscured these harms by its tendency to conflate the category of “unwanted consensual sex,” and hence the harms those acts might occasion, with other things that may or may not be harmful. It

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<sup>55</sup> See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1183 (1986) (arguing that what distinguishes rape from other assaults is the “assault to personal integrity involved in forced sex”).

<sup>56</sup> See West, *The Harms of Consensual Sex*, *supra* note 54, at 267–68 (arguing that the radical feminist equation of rape and sex indirectly burdens the attempt to articulate the harms caused by consensual sex); West, *Law's Nobility*, *supra* note 13.



has done so in two directions. First, as is widely observed, unwanted consensual sex is often conflated, or near-conflated, with rape in some radical feminist thought: if the sex is unwanted, then it is either indistinguishable from or very much like rape. Catharine MacKinnon correctly and repeatedly points out that she has never claimed that “all sex is rape.”<sup>57</sup> Nevertheless, she has frequently claimed that the harms of rape, for women, are not much different from their experiences of consensual intercourse.<sup>58</sup> She has been widely criticized by feminists (and others) for badly obfuscating the harms of rape by claiming this.<sup>59</sup> My objection here is different: the conflation of the harms of consensual sex and the harms of rape also obfuscates the far less visible (and less acknowledged) but perhaps more widespread harms of unwelcome but consensual sex. When this happens, the harms of unwelcome but consensual sex get over-identified with harms of coercion (I sometimes call this phenomenon the “coercion funnel”: if something is bad, it must be coercive). At that point, we lose not only a focus on the harms of unwelcome consensual sex, but also lose a focus on the harms of unwelcome sex that might be common to both unwelcome consensual sex and rape.<sup>60</sup> We lose, then, any way of understanding the harms not only of consensual unwanted sex, but also the harms of rape that are not connected to the infringement of autonomy highlighted by liberalism.

Second, the harms of unwelcome consensual sex are often conflated in some radical feminist writing with the purported harms of *welcome* consensual sex that enacts felt sadomasochistic desires and that might arguably be harmful for that reason alone.<sup>61</sup> Sadomasochistic sex, and the

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<sup>57</sup> See Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 143–47 (1995).

<sup>58</sup> See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 54 (1987) (arguing that it is difficult to sustain the customary distinctions between sex and rape); MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 35, at 146.

<sup>59</sup> See, e.g., Estrich, *supra* note 55, at 1093 (arguing that because this radical feminist view fails to distinguish between rape and permissible sex, it has the same policy implications as the most sexist views of rape).

<sup>60</sup> Part of the reason, I think, that feminists are inclined to equate unwelcome consensual sex with rape when trying to explain its harmfulness might simply lie in the downstream consequences of what I called above the ethics of consent: as the “good,” in mainstream legal thought, is increasingly equated with the consensual, in our intellectual milieu, likewise, harm is equated with coercion. If one’s instinct is that some cultural or personal behavior is harmful, then it follows as night follows day that it simply must have been coerced. We simply cannot imagine the harms that might be caused by consensual, uncoerced, anything. The consequence, both in feminist writing and non-feminist, if one is convinced that something is indeed harmful, is then to insist that it must be subtly coercive, if it is not obviously so. This puts a mighty strain on the concept of coercion.

<sup>61</sup> Catharine MacKinnon does this in many places. MACKINNON, FEMINISM UNMODIFIED, *supra* note 58, at 60–61, 82–83, 87–88; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 35, at 145–46, 148, 172–74, 177–78, 180–81. Marc Spindelman does the same thing, and much more explicitly, in some of his recent writing on this topic. Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 31–37 (2004); Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 201, 209–13 (Catharine A. MacKinnon & Reva Siegel eds., 2003) (arguing that queer theory’s cele-

desire for it, is assumed by many feminists and plenty of non-feminists as well to be an internalization of either prior real sexual abuse or general societal degradation of self—and for either reason deeply harmful, even when felt to be wanted and pleasurable. This is the position that Halley wrongly attributes to me, and what I have elsewhere called the feminist “critique of desire.”

The “critique of desire”—the target of which is fully wanted, welcome sex and the desire for it—has badly obfuscated the harms of consensual but unwelcome sex. Further, its presence in feminism has obscured even the logic of the claim that “consensual but unwelcome” sex might be harmful. If *all* consensual sex—welcome s/m sex as well as unwelcome sex—is harmful, then there is not much point in isolating the harms of the unwelcome stuff. The welcome stuff, one might say (and MacKinnon has said, repeatedly), given the depths of our internalized debasement, is what *really* evidences and re-enacts our degradation.<sup>62</sup> In other writings, I have urged that this position has obfuscated not only a category of harmful behavior, but has also obscured, rather than clarified, the radical root of radical feminism. At heart, radical feminism, best understood, is a critique *not* of the desires women feel, but of the *choices* women make *for sex* in the absence of desire.<sup>63</sup> Unwelcome sex, and not women’s desires, ought to be

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bration of masochism as “the pleasures of hierarchy” ignores the role of male supremacy in conditioning those pleasures).

<sup>62</sup> See MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 35, at 149–50.

<sup>63</sup> In brief, my argument is that it not only confounds understanding of sexual harms to conflate unwanted sex with rape—just as, analogically, it is not helpful to conflate wage labor with slavery—but that the cost goes deeper: in fact, it trivializes both Marxism and feminism to equate the non-consensual with the consensual. What Marx so stunningly revealed to the world was *not* the harms of slavery; rather, it was the harms of *fully consensual* wage-for-labor transactions. Those free transactions between free people are immensely harmful, Marx argued, when they occur within a contractual context in which one side, but not the other, is positioned to appropriate all the surplus value. Marx insisted, though, and quite pointedly, that for the exploited worker to be the source of all of that appropriated surplus value, that worker must both be, and understand himself to be, *free*—meaning not a slave. Marx did not mean this ironically. The harm Marx wanted to isolate, discuss, analyze, and describe was the harm of freely exchanged but profoundly unwanted wage labor, and *not* the harm of slavery: if the former is reduced to the latter, then the radical root of the claim is completely lost. In these free transactions between free persons, one side, but not the other, is positioned by force of necessity and economic imbalance to appropriate the surplus value generated by the worker’s labor. Likewise, what radical feminism has revealed, although with a lot of equivocation on this point, are the harms not of rape, but of *fully consensual sexual transactions*, when they occur between free individuals in a context in which one side, but not the other, is positioned in a way so as to appropriate all the surplus *pleasure*. To understand the pervasiveness and seriousness of that appropriation, it is important not only to distinguish, but to insist on the difference between consensual unwelcome sex on the one hand, and rape on the other.

*Nor* is it necessary, finally, to the coherence of either the Marxist claim regarding consensual but unwelcome labor, or the feminist claim regarding consensual but unwelcome sex, to cast profound, existential doubt on either the desires of workers to impact upon the world—to work—*or* the sexual desires of women. The “critique of desire,” in other words, is not necessary to radical feminism’s critique of sexual choice or to radical feminism’s

the focus of radical feminist critique. Here, I want to make a much narrower and more definitional point. The “critique of desire” funnel, like the “coercion funnel,” conceptually obliterates the distinctiveness, the contours, and even the logic of the claim that consensual unwanted sex causes real harm. That is a cost: these harms are substantial, and the world would be a better place if we were rid of them.

So, a major part of my ambition, in the “Harms” chapter of *Caring for Justice* and of some of my later work as well,<sup>64</sup> has been to clear out the underbrush and to bring out of definitional oblivion the harms attendant to unwelcome sex—both when it is nonconsensual, and therefore rape, but to my mind more importantly, when it is *consensual*, and therefore most assuredly not rape. Again, the real difference between Janet Halley’s view of our sexual world and mine lies in our different understandings of these harms: I think they exist and matter, she thinks they do not, and that even if they do, that they do not really matter all that much. It does not lie in differing views regarding the morality of welcome sex. On the assumption that I am right about that, let me move beyond definitions and elaborate on the nature of those harms.

How is “unwelcome sex” experienced in people’s lives, what might be the harms such sex produces, and why does it happen? Let me start with the last question first: why might a woman, or this woman, or that woman, engage in sex she does not want, does not welcome, does not desire, and does not enjoy? Maybe, of course, she engages in such sex because she was forced to, violently or by the threat of violence; if so, that makes it rape. What, though, of the unwanted sex that is not rape? Why might a woman *consent* to unwanted sex?

Let me here just catalog a few scenarios, all of which involve either consensual unwanted sex, or unwanted sex that is not unambiguously non-consensual. Maybe a woman or girl has sex she does not want, welcome, desire, or enjoy because if she does not, her boyfriend will just be in an unbearable snit, she needs to get home, and he has the car keys. Maybe she has sex she does not want, welcome, desire, or enjoy because if she does not, her husband will not leave the kids’ lunch money on the kitchen table tomorrow. Maybe she has sex she does not want or enjoy because

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critique of the role of sexuality—linchpin or otherwise—in maintaining hierarchy. It is the *choices* we make regarding sex *in the absence of desire*, and not the desires we feel, that may truly be “polluted” and that ought to be the subject of radical critique, for labor and sex both. Thus, and leaving Marx aside, I would urge us to reclaim and restate the heart of radical feminism in this way: the radical feminist insight that Catharine MacKinnon unleashed on an unsuspecting world is that the choices women make to engage in unwanted sex, when we make them, ought to be a primary target of feminist critique and understanding. When sex is unwelcome but chosen—and chosen so as to maximize the pleasure and well-being of others with no attendance to one’s own pleasures, desires, or interests—it can (please note the qualifier) be harmful. Those harms are well worth understanding. A world without them would be a better place.

<sup>64</sup> See, e.g., West, *Consensual Sex*, *supra* note 54.

she is or she feels herself and her dependents to be economically dependent on the man who does want sex, and so for economic reasons she needs to stay in his good graces. Maybe she has sex she does not want because she has been taught that her duty is to satisfy her husband's desires and God's will is that she fulfill that duty. Maybe she has sex she does not want because it is part of her understanding of what it means to be a wife, and so she just knows that she must, and regardless of her desire or its absence. Maybe she has sex she does not want because, by virtue of law, religion, custom, and community expectation, the very *idea* that the sex might not happen, if she does not want it to—the viability, that is, of the act of withholding consent—is effectively “off the table.” Maybe, for fully justified reasons, it has just never occurred to her to withhold consent on the basis of her own desires because to do so is not within her or her culture's understanding of the meanings of sex, wife, and consensuality.<sup>65</sup>

Maybe, to continue this catalogue, a girl consents to sex she does not want because her friends at school will think less of her if she does not. Maybe a woman or a girl will consent to sex she does not want, welcome, desire, or enjoy, in other words, because of that bland thing called role definition. Maybe she has sex she does not want, welcome, desire, or enjoy because her job security demands it. Maybe she does so because, if she does not, he may become physically abusive two hours later or two days later, and she does not relish the prospect of being black and blue and taking another trip to the emergency room. Maybe she does so because, rightly or wrongly and deservedly or not, she figures she cannot get a passing grade in the course otherwise. Maybe she does do so because the man who wants sex from her is a truly great man, an internationally renowned scholar, a hot lead guitarist, a world-class poet, a point guard in the NBA, an inspiring orator, or a working-class hero, and the way she has got it figured, *her* calling in life is to serve him, and a big part of that service is the sex, and—of course—regardless of her own desire. Maybe it is much simpler than that: maybe she does so because he is twice her weight and strength and she is afraid of him. Maybe it is more complicated than that: maybe she does so because he is her father or stepfather or brother or uncle or

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<sup>65</sup> In my writing on the marital rape exemption, I have argued that in a world in which the crime of rape is defined as forced sex with a woman *not one's wife*, a wife's sufferance of forced sex with her husband is analogous to getting hit by a boulder in a rock slide: it is neither consensual nor non-consensual, it is just . . . unfortunate. In these circumstances, a woman is fully justified in knowing, deep in her own body whether or not in her head, that her consent or non-consent to sex with her husband is not a cognizable event. In those circumstances sex just happens. Like the boulder hitting you in the rock slide, it is not something you either consent to or from which you withhold consent. It just happens. Such a woman would be fully justified—not irrational at all—in thinking this, if she thinks about it at all, or in “knowing” it, if she does not. See Robin L. West, *Marital Rape and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 65–66 (1990); Robin West, *Sex, Harm and Impeachment*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 129, 144 (Leonard V. Kaplan & Beverly I. Moran eds., 2001).

priest, and she is completely dependent upon not only his economic support, but also his love. Maybe she does so because she loves him. Maybe she does so because she feels sorry for him. Maybe she has this sex she does not want or desire because, and maybe she has this sex because, and maybe she does because, and then because, and because, and so on, and so on, and so on, and so on, monotonously, repetitively, and deadeningly, throughout the course of an entire adult life. Maybe it happens to her, as they say, all the fucking time.

Some of these scenarios involve unwanted sex that is induced by fears—fear of abandonment, fear of deprivation, fear of isolation, fear of future violence—some involve unwanted sex induced by a sense of duty, and some involve unwanted sex induced by a desire to conform. My point here is not to categorize or differentiate according to motivation, but rather to suggest what all these scenarios share: in all of these cases, a girl or woman has sex that she does not want or enjoy, but that is either consensual or not clearly non-consensual. None of them is unambiguously rape.

Where is the harm, though, or where are the harms, in any of this? Surely there are some good reasons to have unwanted sex, as there are good reasons to do all sorts of unpleasant and undesirable things. One can, after all, want something for reasons other than the pleasure to be had from that which is wanted; that is not an unusual state of affairs. I want my daughter to have a fun day playing soccer, so I want to take her to soccer camp even though I do not particularly want to drive out there. I would rather not do that at all, and in fact I would rather be writing this. Likewise here, one might say.<sup>66</sup> I may want some other state of affairs, and the sex I do not desire might be worth having to attain it. I might want to get pregnant. I might be feeling generous. I might want to assuage a man's ego for the best of reasons, not the worst. Aren't all of the reasons listed above just more of the same sort of thing? And if so, then isn't it the worst sort of crass paternalism—moralism, totalitarianism, even—to identify some of these reasons as bad reasons and others good?

Well, of course there are good reasons, as well as bad, to do things we do not want to do. And obviously, if we assume no harm in all of the above, then it is all a wash; reasons do not matter. We are all good calculators of our own self-interest; all better, surely, than third-party kibbitzers. Nevertheless: if there *are* harms involved in all of this self-maximizing, calculating behavior, we ought to try to understand what those harms might be, in spite of the well-recognized risks of paternalism, and for two reasons. First, if we could understand the harms involved in unwelcome but consensual sex, we might do a much better job of understanding and sorting all of those bad reasons from some of the good, and ad-

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<sup>66</sup> See Alan Wertheimer, *What is Consent? And Is It Important?*, 33 *BUFF. CRIM. L. REV.* 557, 561–62 (2000); Alan Wertheimer, *Consent and Sexual Relations*, in *THE PHILOSOPHY OF SEX* 341, 361–64 (Alan Soble ed., 4th ed. 2002).

dressing—maybe eliminating—the causes of some of the bad. Second, we might do a better job than we have done to date of understanding the harms of rape. Rape has distinctive harms unshared by unwelcome but consensual sex, and unwelcome but consensual sex has harms unshared by rape: the former is consensual, the latter is not. Nevertheless, *unwelcome sex* is the overarching category here, of which rape on the one side and consensual unwelcome sex on the other are two instances. Some of the harms of rape are shared by unwelcome consensual sex—they are both instances of the broader category of unwelcome sex. What this means is that some of rape's harms are well understood already: they are those harms shared with other crimes of violence. Others, though, are not. My intuition is simply that the harms of rape that are *not* understood—or, more frequently, just denied—are those harms that rape shares not with nonsexual violence but rather with nonviolent but unwelcome sex.<sup>67</sup> Because we do not understand or admit the existence of those harms, we do not fully understand or admit the full harms of rape.

What are those harms? The claim in the book is that at least a part of the not-well-understood part of the harm of rape, and the near-invisible and almost-never-talked-about harm of consensual but unwelcome sex, involves the *invasiveness* of both.<sup>68</sup> That is what the crime of rape shares with the non-crime of unwelcome sex—not invariably, but pervasively. The harms attendant to the unwelcome sex that is not rape, as well as the utterly un-theorized harms of the unwelcome sex that is rape, I believe, are a product of this characteristic that they share: the physical invasion and use of a woman's body toward the end of fulfilling the interests, desires, needs, and ambitions of another. When your body's internality, and access to your body's internality, is put toward the end of pleasuring others, and what you are getting from that giving over of your internal self is not pleasure, but fear, physical injury, displeasure, boredom, ennui, disgust, or nothing but pain, then (canary in the mine, here) something is very, very wrong.

My suggestion is that the result of all of this giving over of one's physical and internal self is not only the fear, the pain, the injury, the displeasure, the boredom, the ennui, and the disgust, but a massive, deep, and assaultive annihilation of self. What gets annihilated, more specifically, is the connection, central not just to liberal theory but I think also to personal integrity, creativity, productivity, and even political understanding, between anticipated pleasure, felt desire, choice, the process of choice-formation (preference, and the process of preference-formation), and ac-

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<sup>67</sup> Please note that this is a quite different claim from the claim often made by MacKinnon and others that rape shares harms with consensual sex across the board.

<sup>68</sup> WEST, *CARING FOR JUSTICE*, *supra* note 1, at 101–05, 114–17. I do not believe that invasiveness is the only harm, or even the only gendered harm, of rape or unwanted sex; I wish I had been clearer on that point. Much sexual coercion, violent and otherwise, does not involve penetration or invasion.

tion. When you engage in this sex you do not want and do not welcome and do not enjoy, you are acting, or acquiescing, with your body, not toward the “satisfaction” of your preferences, the expression of your desire, or the fulfillment of your interest. Rather, you are acting with—giving over—your body toward the end of maximizing pleasure and satisfying desire, but of someone else. In Marx’s terms, you are producing “surplus” pleasure that is then appropriated by the other.<sup>69</sup> The repercussions of such a “given over” relation of one’s own body and its purpose on this planet are profoundly privatized, and completely invisible, but quite real: that “giving over” depletes earning capacity, saps creativity, undermines one’s understanding of one’s political standing and capacities, stunts intellectuality, deadens emotionality, and compromises—badly—one’s own moral integrity. The harms of all of this unwanted, undesired, and unwelcome penetrating and invasive sex (again, something similar can be said of unwanted, undesired, and unwelcome pregnancies, although what is appropriated in the latter case is not pleasure so much as altruism), often spread over the course of an adult lifetime, are profound, and profoundly ill-understood.

At the risk of too many reiterations, let me try one more time to clarify my own position on all of this. In my view, it is, distinctively, *unwelcome* sex—not “bad” sex, not same-sex sex, not vanilla sex, not sadomasochistic sex, not cross-sex, not polygamous sex, not monogamous sex, not non-monogamous sex, not “casual” sex, not teen sex, and not immoral sex no matter how moral is defined—not, in other words, welcome, desired, wanted sex *of any description*—that harms women and that accordingly ought to be the subject of feminist critique, general understanding, and to some degree, the target of law as well. The analogy to Marx and Marxism, introduced by MacKinnon, but then, I think, misused, is in fact very helpful here. For Marx, it was distinctively unwelcome, undesirable work—including the unwelcome work procured at the point of the gun through enslavement, but mostly just unwelcome *consensual* labor—that distinctively harms workers and that he subjected to critique. Likewise, it is unwelcome sex, including but not only or even primarily rape, that harms women and that ought to be subject to critique. And, as the labor exchange

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<sup>69</sup> The relation drawn in the text between desire, pleasure, and power differs from MacKinnon’s conception of the relation of pleasure, desire, and power. MacKinnon argues in *Feminism Unmodified* and again in *Toward a Feminist Theory of the State* that *desire* in feminism is the correlate to value in Marx’s taxonomy: that while the capitalist appropriates the surplus value produced by the worker’s labor, men appropriate women’s surplus desire. I cannot make sense of that claim. It seems more logical and closer to women’s experience to suggest that *pleasure*, not desire, is the correlate for the “value” that Marx argued is produced and appropriated in labor agreements. As the capitalist appropriates the surplus value created by the worker’s labor, likewise, “surplus pleasure” may well be produced by the sexual interactions between men and women; but given current disproportionalities of power, it is then appropriated by men. See MACKINNON, FEMINISM UNMODIFIED, *supra* note 58, at 60–61; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 35, at 3–5.

is the vehicle by which the capitalist appropriates value produced by the worker, so the sexual exchange, where the sex is unwelcome, is the vehicle by which the stronger appropriates the pleasure produced by the woman. Now to be sure, and as I will discuss below, the law—our legal institutions—cannot do much of anything about most of this; our politics could do much more. Law, though, can and ought to do something about a little of it. And legal theory, both feminist and otherwise, could at least quit making the situation worse.

### III. ASSUME NO HARM

Janet Halley most likely does not agree that the sufferance of consensual unwelcome sex carries its own harms, some of which are shared by rape. Most queer theorists do not. It is fast becoming an article of faith within queer theory, following Foucault<sup>70</sup> as far as I can tell, that the harms of rape do not extend beyond the harms to body and safety that attend non-sexual physical assault.<sup>71</sup> In Halley's case, however, at least on the basis of this review essay, the skepticism appears to go further: she seems to doubt the reality of the harms to body and safety occasioned by rape as well. At least when attached to sex, harms of violence, we might say, are washed in the non-cynically disintegrating acid that accompanies the bodily transgressive highs that comes from sexual pleasure—and apparently this is true regardless of whether both are sharing that pleasure, or only the violator. Rape, Halley tells us in other writings, really is pretty much indistinguishable from garden variety marital consensual missionary (etc.) sex: both involve physical transgression, and both produce pleasure.<sup>72</sup> It does not matter if the pleasure is one-sided and the physical transgression (for example, blood spilling) likewise: pleasure, apparently, trumps harm, even harms that are both unwanted and quite violent. If this is right, this is quite a step beyond the more limited claim made by Foucault and embraced, to date, by his more cautious followers: that the harms of rape do not extend beyond the harms to life and limb, and to whatever extent the law seems to presuppose otherwise, we ought aim to de-fetishize and deregulate that law. For Halley, I think, although I am by no means sure, the harms to life and limb, as well as the more contested and certainly more subtle invasive harms of the unwanted sex itself, apparently are to get something of a pass.

All of this, though, is admittedly more than just a little speculative. Readers of Halley's work do not often encounter straightforward, empiri-

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<sup>70</sup> FOUCAULT, *supra* note 18, at 200–05.

<sup>71</sup> See Ian Halley, *Queer Theory by Men*, *supra* note 16, at 46–48; Brenda Cossman, Dan Danielson, Janet Halley, & Tracy Higgins, *Why a Feminist Law Journal? Symposium: Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 612–17 (2003).

<sup>72</sup> Halley, *Queer Theory by Men*, *supra* note 16, at 51.



cal claims about the amount, types, or intensities of sexual harms in the world. Rather, what one more often sees in Halley's writing is a hermeneutic of interpretation, not an empirical claim, regarding sexual harms. More specifically, I think, when spelt out, the hermeneutic is that identified above: when reading, talking, thinking, or witnessing sexual injury of any sort, consensual or otherwise, *assume no harm*. The hermeneutic is then typically followed by an instruction, issued with varying degrees of emphasis, that the reader would be well-advised to adopt the hermeneutic as well. So would lawmakers. That this construct guides her reading of this chapter in my book is pretty clear, I think, through the bulk of the review.<sup>73</sup> The pivotal paragraph, though, at least in this essay, when the "interpretive construct" is laid bare—when we are simply *told*, that is, that we would all be well-advised to assume no harm with respect to sexual assault—appears mid-way through the essay.<sup>74</sup> Feminists concerned about sexual harm and particularly feminists concerned about rape, Halley argues, are much like the "adults" on the playground in the following fantasized scenario. The story is told in classic Aesop's Fable mode. It begins with a make-believe story and concludes with a take-home moral:

Perhaps we can imagine the question in these terms: could feminism be like the adults on the playground? Imagine: the little girl stumbles, falls, scrapes her knee. She is silent, still, composed, waiting for the kaleidoscope of dizziness, surprise and pain to subside. Up rush the adults, ululating in sympathy, urgently concerned—has she broken her leg? Is she bleeding? How did it happen? We must not let it happen again! Poor thing. The little girl's silence breaks—for the first time afraid, she cries.

While feminism is committed to affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it. Oddly, representing women as endpoints of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women—even injured ones—as powerful actors . . . .<sup>75</sup>

Since this is by far the most instructional passage in the essay—chock full of implied shoulds and should nots—and because it holds a key to the meaning of a lot of her earlier work, which is otherwise pretty considerably communicated—I suggest that we read this passage as the moral fable

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<sup>73</sup> Again, this is at least in part what leads her to read a chapter that is ostensibly about the harms of unwanted and unwelcome sex (rape and otherwise) as covertly resting on a critique of sadomasochism. Obviously that is what a lot of this sex looks like, once we "set aside" the claim that it is harmful, injurious, unwelcome, and unwanted. Halley, *Review*, *supra* note 2, at 88–91.

<sup>74</sup> *Id.* at 83–84.

<sup>75</sup> *Id.* at 83.

it is, starting with the make-believe facts. I am going to call it, here on out, "Halley's fable." As with Aesop's, the basic story line here is simple and clear: a girl "stumbles" on the playground. We are told by the omniscient narrator that she is only slightly hurt, if that, and only for a moment. The girl is not crying, we are told; she is just scraped up, possibly bleeding—but if so, only slightly. She is quietly "collecting herself," we are told, and if left alone she will be fine. The reader knows this because the reader is told as much by an authoritative and omniscient narrator. The foolish adults on the playground, however, *au contraire*. They were not told, and they cannot figure it out for themselves—maybe because they are just foolish, or maybe because they have been over-programmed by malevolent anti-play forces to see injury where there is none. Maybe they are themselves the malevolent anti-play forces. But, for whatever reason, the foolish adults rush over to administer care. By doing so, they unleash fear, shame, a flood of tears, and then self-pity. They instill in the girl a sense of victimhood, interfere with her continued play, and put her on the road, no doubt, toward an emotionally crippled adulthood.

Which is really too bad, the reader comes to see: if only they had left her alone! If only they had left her alone she would have shrugged it off, gotten up, and re-commenced her play (as we know, and they do not—or even worse, maybe they do). Furthermore, the cost of this pointless interference is not just the lost play opportunities—although that is quite an opportunity cost, Halley makes clear.<sup>76</sup> Nor is the cost limited to the adults' needlessly expended tut-tutting exertions. The costs are greater, even, than all of that. Rather, substantial costs are borne *by the girl herself*: the adults have thwarted her development. To whatever extent she *was* harmed by the stumble—which is negligible, maybe nothing—if she had been left alone, as she should have been, she would have learned to suck it up, and sucking it up is an important life skill. Once a girl learns how to suck it up, she can grow up to be either big and strong, or more accepting and serene, but either way, she will not be a complainer. If she does not learn how to suck it up, though, poor thing, she is going to end up weak, pathetic, and probably sniveling forever. Perhaps those adults on the playground—like so many, many, misguided mothers before them—have some perverse interest in keeping her that way. The reader certainly is encouraged to suspect as much.

Next, in the fable, comes the analogy: as the child, so the rape victim, and as the foolish adults, so feminism. Let us spell it out in detail, as Halley does not. Rape victims, like this child, are only slightly hurt (if that) by rape. Feminists, though, like the adults on the playground, instill lasting and disabling harm by assuming too readily the opposite. Rape victims, like this poor child, are developmentally thwarted by feminists and state actors under their sway, all of whom are foolishly overly solici-

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<sup>76</sup> *Id.* at 83–91 (outlining the cost to men of rape reform movements).

tous of their non-injuries. Rape victims too, like this imagined child, would do just fine if they were only left alone. That woman simply *is* not hurt by the rape she has undergone—the rape, analogically, is the harmless and only slightly bloodied scrape on the knee. The real rape victim, then, is like the fantasized kid on the asphalt, about whom we were told to assume no harm.

Those are the facts. In a striking inconsistency with her earlier work,<sup>77</sup> the facts of this fable are clearly meant to resonate with the reader's "common sense," and particularly with our "commonsensical" perceptions of ourselves and of our fellow citizens as part of an overly protective, child-obsessed, and overly litigious society. The first half of the analogy, in fact, is positively soothing in its very familiarity. The rush of adults to care for, attend to, and cure (as well as compensate, recompense, and rectify) the supposed harms children suffer on playgrounds is woefully misplaced. The rush to cure—or the impulse to care—is a whole lot worse than all of those non-harmful non-injuries that children sustain in the first place. The adults should not have rushed in where angels would have feared to tread. We have all known adults just like that—they are legion!

Having put forward the facts and the analogy, the story now moves on to the moral, or rather, the morals (there are at least three). At this crucial point in the story, however—the point of explaining the moral—we get an important, indeed a pivotal, shift in voice, as is also true of Aesop's fables. As Halley moves the reader through the two paragraphs from the imagined child to the real woman, and simultaneously from story to moral, she simultaneously moves from an assumption about a made-up scenario—let us pretend there was this kid who took a tumble on a fantasized playground and was not at all harmed—to a factual claim about the decidedly real world. A rape victim, we are now urged to believe—not assume, notice, but believe—is like the made-up kid about whom we assumed a certain state of affairs. So, the real woman is like the fantasized child. This real woman, just like the fantasized child, is not harmed. The moral of the story, then, concerns what we should believe about a state of the world, not what we should assume about a hypothetical. (Again, note the parallel to Aesop: we are told to *assume* something about a fictional hare and a tortoise; we are then moralistically told to *believe* something about industrious albeit less gifted persons in the real world.) The first and most important moral of the story, then, is that the reader should believe—not just assume—that there is no serious harm attendant to rape. Again: the reader is told to assume no harm about the hypothetical kid on the playground, but to believe it about the quite real victims of rape. At this point, if I might be allowed a critical moment, this is no longer just an interpretive

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<sup>77</sup> In *Sexuality Harassment*, Halley begins with a worry that judges, in deciding cases involving same-sex sex harassment claims, will over-rely on common sense. Halley, *Sexuality Harassment*, *supra* note 16, at 183.

construct—a hermeneutic—guiding the reading of texts. It is, rather, an offensively pedantic moral: a moral about what we should believe. And, like a lot of pedantic morals, including a lot of Aesop's, this one is your basic, garden-variety, double-think, reality-twisting, mind-fucking, lamppost-lighting order.

I will look at this moral—I am going to call it moral #1—that rape victims are not harmed in some detail below. There are at least two further morals hidden in this compact little fable, though, that I think ought to be made explicit, albeit at the risk of belaboring the obvious. Let us go back for a moment to the fantasized child. The child on the playground, remember, we are told by the omniscient narrator—we are instructed to assume—stumbled. Apparently, she was not pushed. There was no perpetrator, no bad guy, and no schoolyard bully with malevolent intent in sight. It was, rather, an accident—a part of the natural Order of Things—from which it is likewise a part of the natural Order of Things that she will recover, so as to have more fun and take more stumbles in the future. That is what we are told to assume about the girl on the playground. It would be, after all, infantile, embryonic even (remember that according to Halley, it is infantile to assume a pre-injury world) to wonder how the child wound up on the asphalt, bleeding, possibly; dizzy, definitely; and collecting herself. How did she fall? Did somebody push her? Grow up! There's no pre-injury world that exists prior to kids bleeding on playgrounds! Those accidents, and the scraped knees and the dizziness they cause—they are just always already there!

What, then, are we supposed to believe about the rape victim, who is, after all, so like the child? There she too lies, maybe a little bloodied, certainly dizzy, all scraped up, and not crying. Here, though, the fable is starting to stretch at the seams of those demands of common sense—the same common sense that had made the hypothetical part of it so soothing and familiar. If a rape victim is really like the kid on the asphalt, well then, she is lying there raped—she is, after all, a “rape victim”—but there is no rapist. After all—if she is like the girl on the playground, then she too took a tumble. The rape victim stumbled into a rape? Is this an oversight? Bad fable-drafting? An accident of Halley's own? I do not think so. I think the fable is very carefully drafted. Rather, the metaphorical absence of the rapist, I think, suggests, and is intended to suggest, the fable's second moral: for the rape victim, as for the child, there is no bad guy. It was an accident. No one can or should be blamed for a stumble. For the rape victim, as for the child, it is infantile of onlookers to be curious about the pre-injury history of a post-injury world. Rapes are like stumbles; they have always already happened, and we are always already raped. There is no pre-rape infantile world in which we weren't raped. Rapes are part of the natural Order of Things. But not to worry: they are part of our play. They are harmless.

This, I think, is moral #2. Like the child, so the rape victim: it would be “infantile” (this is clearly a bad thing) to wonder who did this to either one of them. There is no reason to wonder why some of us are raped and others rape, why some of us are rape-susceptible and others rapists; some of us are on the ground and some of us are standing, some of us are maybe bleeding and some of us are not bleeding at all, some of us are on the asphalt dizzily collecting ourselves while others are standing enjoying the spectacle. There is no reason to wonder about what brought any of this to be. We always have been right where we are now: some of us already raped, some rapacious. But, not to worry, there is no need for curiosity either. Remember moral #1: no one was truly harmed. Play is both innocent and conducive to accidents. It is a playground, she stumbled, nobody pushed her, and she is always alright.

As we are in the world of analogies, it might be useful in this context, once again, to remember Marx:

The question why this free labourer confronts him in the market has no interest for the owner of money, who regards the labour market as a branch of the general market for commodities. . . . One thing, however, is clear—nature does not produce on the one side owners of money or commodities and on the other men possessing nothing but their own labour-power. This relation has no natural basis . . . . It is clearly the result of a past historical development.<sup>78</sup>

Likewise here, I would suggest, perhaps we should have just a little more curiosity than Halley would commend on this topic of the past historical development: how it came to be that in our play, some of us wind up raped, while others are seemingly innocently rapacious forces of nature.

There is one more moral. Obviously, the main target of Halley’s Fable is not the “victim” (because there is no victim), and certainly not the “rapist” (ditto), but rather feminists who are like those intervening, meddling, and foolish adults on the playground. Feminists, in Halley’s imaginings, are collectively the mother of all schizophrenogenic mothers of Freudian and neo-Freudian thought. The smothering, neurotic, and always unspeakably damaging mother—that deranged and narcissistic creature of Freud’s and Freud’s followers’ imaginings—badly stunts her children’s development in oh-so-many ways. Yet the worst thing she does, by far the worst and surely the most common thing, is to over-protect her sons and daughters (although for different reasons) against what she neurotically perceives to be the world’s dangers—dangers that exist only in her overwrought and paranoid imaginings. Now, why does she do that? Well, she does that because she wants to keep her children pathetic, weak, and ineffectual, obvi-

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<sup>78</sup> MARX, *supra* note 48, at 452–53.

ously, and she wants to do that to control them. Likewise, Halley suggests, here and elsewhere, feminists concerned with violence against women have thwarted women's healthy development by arrogantly and narcissistically labeling as harmful that which is in fact inconsequential: rough, aggravated, unwanted, non-consensual, violent sex.<sup>79</sup> Like the mother of Freud's lurid imaginings, they do so out of their own panicked, deep-seated "fear of politics": their aversion to the glories of power, and so forth. They do so in many ways but from a remarkably consistent impulse: a sickly, resentment-drenched maternal desire to infantilize the world, to render it helpless and dependent, and to do so through their treacly moralisms, or their smothering psychologisms, or whatever else works. All of that infantilizing, moralizing, resentment-driven, sick, and sickening mothering does not matter all that much, of course, so long as it remains a matter of personal family drama. But what if those deranged narcissistic mothers take hold of the powers of the state? Watch out! Then they do really serious damage. Remember, if left alone—scraped up but not crying, dizzy and "collecting herself"—the rape victim, like the child, could continue her fun play. In the worst case, if she was hurt just a little (which is unlikely), well, she could learn to suck it up. And that is important, too: strength, courage, and rectitude (meaning a functionally bullying attitude) or perhaps a quiet, tearless acquiescence (meaning an equally functional submissiveness) would be her reward. Not to be forgotten—it would be ours too. Get her in the clutches of the mother-feminist state, though, poor dear, and she is scarred for life.

So, in perfect Aesop fashion, the readers (adults, feminists, parents, new leftists, and leviathans all) who come to the essay with a question—what should we do or not do about rape reform—is quickly guided to the right answer, which is: deregulate. Do not intervene. Do not, in fact, go anywhere near her. If you want to play, then play, but otherwise, back off. If you try to "help" her, in the name of helping, you will cripple her. For the child's sake, for the girl's sake, for the rape "victim's" sake, and for the sake of our god-given right to play, let her be. And that, of course, is Moral #3. Let it be.

Let me take a slight detour, before looking at Halley's arguments for all of this. A fair question, I think, about the way that Halley has constructed her fable, is epistemological: how did the omniscient narrator get so omniscient? What do we know and how do we know it, in other words, before adding and mixing in question-begging, interpretive constructs about who is harmed and by how much? How do we—meaning the author and the compliant reader—know what we think we know, and how do we know it with such certainty?

Let us back up and start with the child, this time focusing only on this epistemological question. We—meaning, narrator, reader, and adults—see from a distance, apparently, a child on the playground who may or

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<sup>79</sup> See, e.g., Halley, *Queer Theory by Men*, *supra* note 16, at 43–47.

may not be bleeding, who is certainly scraped up, but who is not crying—a qualifier Halley clearly views as significant. The child, we might say, is having a transgressive physical experience—a dizzying, boundary-shattering mix of skin, blood, and asphalt—but no tears, no sloppy emotional anguish. That is what we all see. We are then told, by the omniscient narrator, that this child is fine, that she is “collecting herself,” that she will shake it off and resume play. Now of course, in a very familiar, particularly to law students, common sense kind of way, there really is no point in fighting hypotheticals, as Carol Gilligan’s subjects do finally learn to their ever-lasting chagrin. But let us do it anyway. Look again at what both the foolish adults and the omniscient narrator see, and then how they come to such very different positions with respect to what they think they know.

The foolish adults, remember, are mystified; they do not know whether the child is hurt or not. The narrator-reader, though, knows the girl is not hurt. Now presumably, the narrator has not, off-stage so to speak, conducted a medical exam. Rather, because of her interpretive expertise, the narrator knows what she knows: she can better interpret the facts. She is just a better diagnostician, even when reading off the same script.

Let me register my first dissent here, on what might look like a minor point. Even in that land of common sense on which Halley pretty hypocritically relies, it is not at all clear that it is smart and savvy in a tough-love-ish kind of way to assume that a child who has fallen and who is “scraped up, maybe bleeding, but not crying,” is therefore not hurt. No torn tendons, no broken bones, and no cuts that will cause tetanus? All this, because she is—what?—only scraped, maybe bleeding? Or is it because she is not crying? That is odd, even in common-sense land. On or off the playground, as any pediatrician and any babysitter who has ever dropped a baby will tell you, tears are not a reliable indicator of what does and does not require medical attention: in scary moments of uncertainty tears are generally a good sign. It is the lack of tears that is worrisome. Even beyond the tears, what exactly is it that makes the foolish adults really so foolish? Assuming the “stumble” was really that, did this child take a few such stumbles during the twenty-minute recess? Is she having trouble keeping her balance walking down the hall as well? In the real world, where some of us have those infantile pre-injury stories banging around our foolish heads, the combination of scrapes, potentially blood, dizziness, and lack of tears can be quite scary, at least in some circumstances—inexplicable falls are one such circumstance, violent rape is most assuredly another.

Accordingly, I think a holler across the asphalt to make sure the child is okay would be in order here. Is this evidence of my reflexive smother-mothering panic? I think not. The point is straightforward. Letting that child collect herself, suck it up, and resume play is perfectly good advice in common-sense land, only so long as we can safely assume that she is not harmed. It is not such good advice if she is. A stumble on the asphalt,

we might say, never hurt anybody—unless it did. Now, of course, Halley is completely explicit about this. She explicitly and pedantically tells the reader exactly how to read the story, although not in so many words: “As you read this story, dear reader, kindly assume no harm.” The child is not hurt; she is merely scraped-up, dizzy, and collecting herself. Under these conditions—no harm—the advice she imposes upon us—leave her alone—is indeed well taken. The problem is the following: we are well-advised to leave her alone only if we are well-advised to take the narrator’s expert word for it that she is not harmed. And we are well-advised to do that only if we can safely rely on the narrator’s disinterestedness, credentials, and expertise. And on that score, I do not see how or where Halley, who is the narrator, has laid the predicate.

#### IV. THE LEGITIMATION TRIAD

Let me turn now to possible arguments that might be made for the fable’s basic moral, recast as a proposal for law reform. We would be well-advised, Halley can be read as suggesting, to believe that rapists do not hurt rape victims all that badly, that we should not inquire into the pre-injury history—that would be the rape—and that feminists and others should just let the victims be. Again, the reader is told that it would be good to adopt this stance pretty much across the board, as a sort of blanket fact or baseline rule with regard to women’s supposed sexual injuries. But baselines are only as good as the arguments given to support them. Surely that is all the more true where, in the absence of pretty strong justification, the baseline being urged is one that seems to be so vividly, aggressively, and viciously legitimating. First, I will explain why this baseline rule might profitably be seen as an exercise in legitimation, and then I will take a look at some reasons that might be given for it. For the sake of symmetry, I am going to call this the “legitimation triad.”

The triad is clean, short, and sweet: the victim was not hurt, there is no culpable private-actor perpetrator, and the state should back off. We could apply this to all sorts of scenarios, not just sexual. Even the atmospherics are right: this is harmless play. We are on a *playground*. The children just want to play—just like those workers in *Lochner* just wanted to be free. The adults—those would be the people with power on the playground—are told by the omniscient narrator-advisor that they should turn their backs on the children—those would be the people with much less power—who are bleeding and in pain. Meanwhile, the person who did this—that would be the private-actor perpetrator—is recast as a benign force of nature. And why is it that the adults are told to do this? One can easily imagine the banalities: “No harm, no foul.” “Leave her alone.” “They’ll work it out on their own.” “Kids play like this all the time. No one ever gets hurt.” “Much better for them if we look aside and go away.”



I have never seen a better model of what legitimation is and how it works—anywhere. This is the prototype.

So, what are the arguments? Why *should* the feminist state, properly concerned about not over-burdening rapists, but also sensitive to the needs of would-be victims of rape and rape law everywhere, assume no harm, lose interest in history, and deregulate what looks to most people like violent behavior? By my count, Halley explicitly or implicitly suggests five different reasons. The first two, I think, are fillers. Although I will mention them, the real action is in the last three.

Halley's first argument, suggested by the title of her review, concerns the disutility of the idea of harm itself. This is the argument that purports to connect all of this to "identitarian" scholarship generally. Harms discourse, the argument goes, is just disutile from a progressive or leftist perspective. Harms discourse, she argues, like the "rights discourse" attacked by critics of decades past, is deeply conservative without saying so. The very idea of harm or injury assumes a baseline that ought to be challenged, not legitimated. It diverts us from the imperative work of politics. It is overly individualistic and blind to systemic wrongs. It gives rise to the false but comforting belief that so long as *this* harm or *that* harm for *this* injured person or *that* injured person is compensated, all else is right with the world. This strikes me as an important claim. I do not think that it is right, however, for some of the reasons previously discussed in Part One. I will briefly return to it in the last part of the following response.

I have the uneasy feeling, however, that although it takes up a good bit of room, it is the one claim in this piece that Janet Halley cannot really mean. Halley's own writing, in this review and elsewhere, is pickled in the same supposedly sour, individualistic, infantile, baseline-driven vinegar of grievance, harm, and injury. Homophobia, for example, as we have all learned from her writing on this point, is disastrously harmful.<sup>80</sup> It is very bad for those who directly suffer from it; it is even worse for others who have to suffer the homophobe. Just for starters, it leads to false legal claims being slapped on the unsuspecting innocent. So, there are two harms: first, homophobia, and second, the repercussive harms to which it leads. In this review, we learn that over-protective feminists, suffocating mothers, and foolish adults on playgrounds inflict grievous harms on the women and children they neurotically over-protect. The innocent victims of these deluded paranoids become stunted in their development. Chil-

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<sup>80</sup> See generally Janet Halley, *Symposium: Intersections: Sexuality, Cultural Tradition, and the Law*, 8 YALE J.L. & HUMAN. 93 (1996) (discussing relationships among sex, gender, and sexual orientation, as well as between sexual orientation and culture); Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993) (discussing sodomy statutes and their effect on sexual identity and cultural interpretations of sexuality, in particular on resultant restrictions on those identifying themselves as homosexual).

dren cannot become the strong, independent, competent, bullying, or sweet, placid, serene, acquiescent adults they otherwise would have become; nor can they engage in the play they so clearly crave. Likewise, battered and raped women cannot just move on and have more sex, which is presumably what they would do and would want to do in the absence of all of that intervening, injurious, harm-causing, meddling interference. The needless pediatric visits for non-existent illnesses and harmlessly scraped knees in the case of children, the entire array of Battered Women's Shelters, Houses of Ruth, rape crisis hotlines, and all of those pointless criminal trials, in the case of raped women, do real harm. The whole apparatus causes a monumental case of developmental retardation. So, Halley recognizes three harms: homophobia, false claims, and developmental retardation.

Finally, according to Halley, there are the harms felt by lots of men and lots of women everywhere—that is quite a bit of harm—pursuant to the misguided attempts of sex-phobic and sex-panicked feminists to clamp down on harmless rape. Foregone sexual pleasure is a huge opportunity cost, with (god only knows) plenty of attendant harms of its own. So we are at four harms, and counting. Whatever else might be concluded from this Bill of Particulars, one thing is clear as day: it is not the concept of harm to which Halley objects. Rather, these objections are vigorously mounted to one set of harms, and one sort of injury, identified by feminists of various stripes. Whatever might be true of the scholarship on which Halley draws, the particular interpretive construct that so over-determines *her* take on the world—*assume no harm*—only really kicks in when the subject is unwelcome sex.

The second argument one might give to support queer theory's deregulatory rape law reform movement is loosely suggested by the hypothetical: queer theorists can be read as claiming that feminists and others have simply overstated the harm of rape. Obviously, we do not need queer theory to get this argument off the ground; in fact, a fair amount of both liberal and feminist scholarship has emerged over the last decade arguing some version of just this thesis. In a nutshell: rape is bad, but not *that* bad.<sup>81</sup> Too great of a focus on rape may have misdirected our attention from worse harms, worse injuries, and greater inequities befalling women and others. As one scholar, H. E. Baber, has argued, the harm employers do to women in shit jobs is worse than the real or threatened harm of rape men do to women.<sup>82</sup> It may also be that prosecutors are unable to bring or win rape cases, in part because sentencing guidelines have raised the stakes too high. It seems to me that all of these claims are credible, and some are plausible. Yet none of them rests on the Triad of Legitimation so dear to the heart of queer theory.

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<sup>81</sup> See, e.g., H. E. Baber, *How Bad is Rape?*, 2 HYPATIA 125 (1987), reprinted in THE PHILOSOPHY OF SEX, *supra* note 66, at 303, 305–08.

<sup>82</sup> *Id.* at 311–14.

Although Halley would no doubt agree with Baber's bottom line, I cannot believe that anything that ordinary is going on here, or in queer theory generally. Go back to the fable. The adult is not advised to walk over to the child, check her out, offer a band-aid, and then address the more serious harms the child may be suffering: the lousy curriculum, the lack of funding for the music program, shoes that do not fit and that make her fall, unsafe playground equipment. Nor is the adult advised to find the perpetrator and just bawl him out versus subject him to detention for a week. Rather, there is no perpetrator—we are told that when left to their own devices, the other kids on the playground, and particularly the boys, are just fine—and the adults are advised to stay away. The idea expressed in the fable, and I think in the essay, whatever it is, is *not* the straightforward liberal or feminist claim that “rape is bad, but not that bad.” Halley has much bigger fish to fry, both philosophically and politically.

Further, the liberal-sounding claim—rape is not as bad as presupposed—would not be at all congenial to Halley's signature, although not-so-idiosyncratic, literary *method*. To actually argue for the proposition that rape is a lesser harm than is widely supposed requires that we pointedly look at some facts. That does not fit the method of Halley's writing, here or elsewhere. Remember, here the reader is instructed to assume a make-believe story in which there is no harm, no injury, no perpetrator, and no justification for intervention, and then to *analogize* from the fantasy to the real world of rape. No facts are required for this Aesop-fable-like take-home exercise. Likewise, in Halley's article about the harmlessness of sexual harassment and the grievous injuries done by sex harassment law, the reader is told to “set aside” a real plaintiff's real claims of unwelcomeness, and then to re-imagine the story with the facts remaining—all the better to see the huge harms done to sex by sexual harassment law.<sup>83</sup> There, as here, after assuming no harm in a fantasized case, the reader is instructed to analogize to the real world: what was assumed to be true in the fantasy of homophobic panic, we are just told, is true—or could be true—in real cases. Both articles, of course, reach the same moral: the only sure-fire consequence of state intervention into all of this harmless play is that like the children's play, the adults' sex will be needlessly interrupted, at considerable cost to the players. In both pieces, the argument moves by the presentation of a fantasy—alternations between dystopian and utopian possibilities—and then a slippage into instruction regarding the real world, rather than by a marshalling of facts.

Halley's third “argument” for deregulating rape is also suggested rather than explicit, although she does make it explicitly elsewhere.<sup>84</sup> One might conceivably argue that rape victims, or purported rape victims, often, if not always, want sex that *looks* like rape. Since they may well lie about it

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<sup>83</sup> Halley, *Sexuality Harassment*, *supra* note 16, at 192.

<sup>84</sup> Halley, *Queer Theory by Men*, *supra* note 16, at 39–48.

afterward (because they are sex-panicked), we ought to set a pretty high presumption against their claims of harm. The argument, to restate it metaphorically, is not simply that the child wants to play so badly that she is willing to risk falling. Rather, the argument is that she wants the stumble too, but cannot own up to her own desires. So she lies about it. She lies about the pleasure of the dizziness, the maybe-blood, the scraped knee, the boundary-smashing physical transgression of skin and asphalt. The child, remember, was dizzy, passively waiting for the pain to subside, and submissively collecting herself—hoping to play and tumble again—until the foolish adults wrongly suggested to her that she ought to be ashamed of the pleasure she took in it. So she denies the pleasure, and to prove the bona fides of the denial, she brings a false claim, alleging that what she experienced as pleasure was actually an assault—something she could not possibly have enjoyed because it was without her consent. But her denial is just that: denial. “Put it aside,” and it becomes clear that her desire for this play, including the stumbles that are such a natural part of it, are ubiquitous. The rape victim *wants* all of this, and when she later claims to the contrary, she is lying. For the most liberal and libertarian reasons, then, we should stay out.<sup>85</sup> We risk not only complicity in the purported victim’s failure of integrity, but also unduly chilling all of that edgy but consensual sex. And this would be far too high a cost.

Halley suggests something like this elsewhere in her writing,<sup>86</sup> but significantly never explicitly states it here. And the fable itself actually suggests something slightly different. Although we are told quite a bit about the child’s well-being, we are not told one way or the other whether the child enjoyed the stumble. Rather, if only by absence of clarity on the point, the suggestion seems to be that *whether or not she wanted it*, we should assume no harm. In other words, the idea seems to be that *regardless* of the child’s desire, even in the absence of desire, we should assume that the school child has had, at worst, a transgressive body-and-asphalt sort of experience: her body momentarily a part of the asphalt, a little dizziness, and then a re-immersion into those pesky, boring, physical, corporeal constraints. No lasting mental trauma, so long as the state stays out, and no physical injury. What the child *and* the raped woman experience, dizzily but willingly, is a cool astral-body-traveling physical transformation and a little bit of personal growth. Introduce the state, of course, and the girl and the rape victim—otherwise so self-sufficient, so capable of thinking for themselves, so rambunctious and so happy to play—become surprisingly malleable wimps. Keep the adults out, however, and these passive girls collect themselves and are serene and serenely accepting—*whether or not they wanted the fall or rape*. The harm of unwanted sex, including rape and the violence that accompanies it, is insignificant, untroubling,

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<sup>85</sup> See Halley, *Review*, *supra* note 2, at 83–84.

<sup>86</sup> Halley, *Queer Theory by Men*, *supra* note 16, at 196–97.

non-existent, or just of no consequence, for the sole reason that this is just the way it is going to be. This is, at heart, a celebration of power and a dismissal of harm, as well as a denial of the relevance of the desires of the weak in the name of the pleasures of the strong. If that is right—if this is the “argument”—then queer theory’s deregulatory rape reform movement, at bottom, rests on little but a fantasized “rapeophile” society: plenty of violent but harmless sex, imposed regardless of want or desire on the part of she who would be raped, and all of it then metaphorically rhapsodized.

The fourth possible argument for deregulating sexual assault concerns the eerily absent perpetrator of Halley’s fable. If a woman is raped, then presumably someone raped her. But, the argument might proceed, as there is really no harm to speak of, there is also no need for blame; and if there is no need for blame, then there is just no good reason to find or unduly burden the rapist. The harm of rape, recall, is comparable to a stumble—disorienting at worst. But what of the rapist? He is a benign, natural source of transgressive experience. Maybe more, if we seriously regard, as we should, Halley’s imagery: he is the guy that she tells us is thriving on the unregulated playground. To elaborate on this a bit, he is the guy that actually takes *action* in the world. Think Gordon Liddy with his cigarette flame on the palm of his hand; Camille Paglia’s primal masculine force; Tim Leary and his LSD; George Bush in Iraq; Colonel North in Central America. Before “leaving this sphere”—this liberal and unmonitored playground on which these unattended and free boys thrive—and again just as a note of comparison—we might remember Marx’s capitalist, how his very *physiognomy* became transformed, as he too became poised to expropriate value from the free:

On leaving this sphere . . . which furnishes the “Free-trader Vulgaris” with his views and ideas, and with the standard by which he judges a society based on capital and wages, we think we can perceive a change in the physiognomy of our *dramatis personae*. He who was previously the money owner now strides in front as capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business; the other timid, and holding back, like one who is bringing his own hide to market and has nothing to expect—but a hiding.<sup>87</sup>

The last argument for deregulation, the one Halley unequivocally endorses, regards the feminized state and perhaps its motives. Such a state, the argument goes, sees harm and injury where there is in fact nothing but pleasure, sees rape where there is in fact desired bondage, sees evidence of injury where there is in fact only a lovely red stain of transgres-

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<sup>87</sup> MARX, *supra* note 48, at 354.

sion, sees a will to harm where there is in fact just a will to power. The state regulates sexual violence unnecessarily and disingenuously. What is behind the regulatory impulse is *ressentiment*, which leads to “care” that sickens. The narcissistic mother, unleashed on the world in the form of god-help-us-all the state, snuffs out the will to power—emasculating, suffocating, thwarting, dwarfing, and “malforming” her children-subjects. Mothers just do this as a matter of course. Mothers and their impulse toward care, with the power of the state behind them, will not just sicken their children. They will sicken—apparently they have already sickened—entire peoples. Queer theory is called to the rescue.

I believe that it is these last three “arguments”—victims of rape are not really harmed, perpetrators are innocent, and the state should stay out—that collectively constitute the heart of queer theory’s deregulatory rape reform movement, and that this project is at the heart of this review essay, as it is at the heart of so much of Halley’s writing. I am not at all sure, however, that Halley actually intends what I have called the “arguments” to be read as such. Here as elsewhere in Halley’s writing, her claims do not read like arguments. Rather, they read like dystopian imaginings: this is what happens, metaphorically, should the mothering-state be unleashed. And, often by suggestion, and sometimes explicitly, but almost always in various sorts of counterfactuals, they assert a promised utopia—a brave new world—if only we can steel ourselves and resist the temptation of the mother-state’s false allure. Power in this utopia will be unbound. Not state power, god forbid, but rather all those good sorts of power: the extraordinary, liberating, breath-taking, transgressive power of ordinary people, transformed. In utopia, we will not fear this power, and hence, this power politics. Rather, we will embrace it for what it is—the life force itself. Care (power-not) will be exposed as the *ressentiment* it so clearly has been all along—perverse, narcissistic, neurotic—as will the sickness unto death that it causes.

Should this utopia come to be, I do not know what our labor markets will look like when they are likewise unbound. But it is pretty clear to me what the unbound sex will look like. First, it will be pervasive and inescapable: “compulsory sexuality” so to speak, to update somewhat Adrienne Rich’s complaint about the hetero kind.<sup>88</sup> (We will have to talk about it too. One might compare, in this regard, Foucault’s famous description of the town idiot and the speechifying required of him by the psychiatric state,<sup>89</sup> with Halley’s persistent demand that heterosexual women take to

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<sup>88</sup> Rich, *supra* note 15, at 227.

<sup>89</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 31 (1990). It is also worth comparing Halley’s fable with Foucault’s story about the little girl, sexually abused by the innocent idiot. In both, the abuse itself is hidden entirely from view; in both, it is essentially innocent, and in both, the state response, not the abuse, is that which is the target of critique.

the streets and soliloquize men's erections.<sup>90</sup>) Sexual liberation, once achieved,<sup>91</sup> must be valorized, and re-valorized, and re-valorized, lest we forget. Likewise, sexual modesty, sexual reticence, an absence of sexual desire, or a lack of sexual interest—to say nothing of political sexual resistance—will be chastised. Smote. Erased from our sexual imaginings, if not from the face of the earth.

Second, there will be no rape victims in this “rapeophilic” world of ubiquitous desire, harmless transgression, natural übermen, and a chastised state. We will have all learned the disciplined art of enjoyment, or if not that, of acquiescence. We will all know, that is, how to lie there scraped up, maybe bloodied, and “collect ourselves,” all the while with a dizzy dream-like smile on our faces. Some of us have a head start in that regard. And last, we will stay on our toes and be forever vigilant against backsliding. We shall save ourselves from ourselves: stave off, that is, a pathetic return to the bad old days, when maternalists, for the most perverse and neurotic of reasons, filled with *ressentiment*, tried to bar others—through totalitarian mind games and smothering care—from participating in all of that transgressive, border-smashing, boundary-defying, always already wanted, sexual play.

I have no idea what kind of response to make to any of this. Legitimation here as elsewhere, maybe more so than elsewhere, is a dream: it rests on utopian and dystopian imaginings, considerably communicated—in this instance, I believe, considerably communicated with seductive imagery. It is worth pointing out, though, that there is absolutely nothing new in this new-left dream. The dreamy construction of the rapist as innocent, natural, and benign, a force of nature like gravity, has been with us from pre-history, but twentieth century leftists in particular have done a plenty good job of rhapsodizing rape. Recall Norman Mailer's mid-century declaration that rape and murder are “more heroic” than masturbation. Mailer's romance with murderous heroics ended terribly.<sup>92</sup> Eldridge

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<sup>90</sup> Halley, *Review*, *supra* note 2, at 71.

<sup>91</sup> We are obviously not there yet, what with our residue of worry over Michael Jackson, Kobe Bryant, Catholic priests, and the like.

<sup>92</sup> In the early 1980s, Norman Mailer famously fought to free Jack Abbott, a prisoner, murderer, and memoirist, who had befriended Mailer through a series of literary letters dealing with prison life, later published as *In the Belly of the Beast*. A couple of weeks after Abbott was released, in large part due to Mailer's advocacy, Abbott was the honoree of a celebratory dinner, hosted by Mailer, Kozinski, and a number of other writers, in a Greenwich Village restaurant. During the dinner, Abbott quarreled with the party's waiter, an aspiring playwright. After the meal, Abbott knifed the waiter in the alley, killing him. Michiko Kakutani, Book Review, *The Strange Case of the Writer and Criminal*, N.Y. TIMES, Sept. 20, 1981, § 7, at 1.

Kakutani's report also contains a revealing discussion of not only Mailer's but of the then-literary left's infatuation with murder and murderers. Mailer expressed deep regret over his involvement in Abbott's release in several interviews (all reported on by Kakutani). Kozinski, author of *The Painted Bird*, and himself a Holocaust survivor, was never infatuated with Abbott, consistently expressing his horror and disgust at Abbott's embrace of violence. *Id.*

Cleaver infamously declared rape an anti-racist act, explaining that he raped black girls only for “practice.”<sup>93</sup> In the pages of *Suck* magazine, Germaine Greer accommodatingly declared her loyalty to poor rapists of rich girls, all of whom thereby strike a defiant blow against capitalism.<sup>94</sup> And so on right down through the decades. Likewise, the “mentalistic” understanding of harm that Halley here so actively embraces even while she decries its constituent parts—that is, her insistence that we should concern ourselves mightily with harms to the mind caused by errant and paternalistic law reform, and much less with the harms to the body caused by the knives and fists of private actors and that the state just might be able to address—likewise has a distinguished lineage. Something much like it was given eloquent expression just over a century ago in *Plessy v. Ferguson*.<sup>95</sup> Lastly, contempt for and disparagement of the work performed as well as the work product of our mothers—all those who cared for children—ebbs and flows, but it is particularly virulent in this country and has been since we defined our national soul in terms of heroic individualism. All children of the less than phenomenally privileged pay a heavy price for our collective contempt for maternalism, as do their parents, including all of those sweet fathers so new to this work we call mothering. How old is that contempt? Obviously, it does not just date from Freud.<sup>96</sup>

Nor, finally, is the legitimation triad that is at the heart of queer theory—the idea that we ought to let the private sphere alone because in that sphere one finds only a lack of harm and innocent players, so that there is just no justification for paternalistic or “totalitarian” intervention—new. It might not go back to antiquity (in antiquity, there was no need for it), but it has had a distinguished presence in our contemporary social life. The only thing truly new in this agenda—the agenda, that is, to make the world a little more accommodating to rapists, a little less friendly to mothers, and a whole lot harder for our sons and daughters who seek to resist some of this—is its identification with the new left. It has been a part of the old left all along, but it had in the recent past taken a bit of a beating.

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<sup>93</sup> ELDRIDGE CLEAVER, SOUL ON ICE 14–15 (1968).

<sup>94</sup> Germaine Greer was an editor of *Suck*, an English sexual liberationist journal, for several years in the early 1970s, during which time she gave several interviews, including the ones referenced by Dworkin. ANDREA DWORKIN, WOMAN HATING 82–84 (1974) (discussing Greer and the previous examples). For a good retrospective of Greer’s views in the 1970s and in the late 1990s regarding rape, see Rita Cochrane, *Tasting Blood Again*, INSIGHT (2000) (reviewing GERMAINE GREER, THE WHOLE WOMAN (1999)), available at [http://www.theinsight.co.uk/feature1\\_27.htm](http://www.theinsight.co.uk/feature1_27.htm).

<sup>95</sup> 163 U.S. 537 (1896).

<sup>96</sup> Go way back to Athena, founder of the Rule of Law. Athena, Aeschylus tells us, sprang full-borne from her father’s forehead, proudly declared that she had no mother, and proclaimed forthrightly that for that very reason she would always side with The Man. She chastised the Furies, freed Aeschylus from the charge of matricide, and thereby birthed the Rule of Law. See generally AESCHYLUS, EUMENIDES (Alan H. Sommerstein ed., Cambridge Univ. Press 1989) (recounting the story of Athena and the Rule of Law).



## V. THE CONCEPT OF HARM, LEGAL REFORM, RADICAL POLITICS

Let me return for just a moment to the question of harm Halley's review raises, and then I will close with some thoughts on moral reasoning and radical politics. The concept of harm, I argued in *Caring for Justice* and elsewhere, is central to law, but has disappeared from our thinking about it and particularly from our criticism of it. And law is indeed a strikingly conservative and conserving set of institutions and practices. I argued in the book that legal critics, feminist and otherwise, should elevate the concept of harm in our thinking about law. And when we do so, we should think much more than we currently do about the harms sustained by various subordinated groups, including women. All I want to add here in response to some of Halley's remarks is that harm- and law-focused inquiries with respect to gender or otherwise that come from such a focus are indeed reformist projects. They are projects about how law could do better, instrumentally, what it claims to do, and what it does do some of the time, what it does not do at all well most of the time, and often does not do at all, period.

However, while it is important to get judge-made law to do better what it already does, it is even more important, I think, to put law in its place. Law—meaning here, adjudicative law—is (lo and behold) not politics. It cannot do what politics might be able to do. It has been a tragic mistake, I think, of liberals, radicals, identitarian theorists, critical legal scholars, and progressives of all stripes involved in law, legal theory, and legalism of the past half century, to assert, and so repetitively and confidently, the contrary. The domain of adjudicative law has its own ethics. It is for the most part deeply moored in conservative values. It has some redemptive potential and therefore some play for progressive gains, but really not much. More important, it has the potential, all in the name of justice, to further aggravate the harms it manages to so successfully avoid. *Caring for Justice* was an attempt to expose the aggravation of harm done by law in the name of justice, exploit its redemptive potential, and argue that others should do this also.

But completely aside from the arguments of that book, I think this is still a very important and very much under-examined question for progressive lawyers to ask: how much can be asked of adjudicative law? Again, my answer is “not much.” Others disagree. My current retrospective on the place of Catharine MacKinnon's jurisprudence in our law and letters, for example, argues that a part of the brilliance of her labors over the last thirty years has been her quite conscious embrace of law and legalism, rather than the domain of politics, culture, or education, to achieve evolutionary changes in our understanding of both sexual injury and sexual justice.<sup>97</sup> She has been phenomenally successful in pushing law to become a

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<sup>97</sup> West, *Law's Nobility*, *supra* note 13.

vehicle for that evolutionary change. By contrast, I think, the benighted attempt over the last half century of progressive constitutional lawyers and theorists to employ the stratagems and ethics of legalism so as to refigure our fundamental politics, to achieve substantive equality, expand liberty, and the like—and to do so by urging on courts the development of progressive interpretations of their constitutional corollaries—has been a pretty striking failure, and not only because of the current Republican staffing of the courts. Obviously, the arguments put forward by progressives, radicals, and liberals in their thousands upon thousands of pages of briefs—arguments about what equality should look like, about what freedoms we all should or should not have, about democracy, about speech, about reproduction, about race, about sex, and so on and so on and so on, as well as their constitutional corollaries, from *Brown*<sup>98</sup> to *Roe*<sup>99</sup> to *Casey*<sup>100</sup> to *Lawrence*<sup>101</sup>—are vital arguments with which to engage. The problem is that these arguments should be—and are not—the bread and butter of very ordinary politics, completely traditionally understood. The repeated insistence by liberal legalists over the last half-century that these arguments are, in fact, in law's domain has not secured progressive victories and has had the perverse effect instead of impoverishing our politics.<sup>102</sup> The repeated insistence by critical legal scholars over the last thirty years that, contra liberalism, there is no difference between law and politics—and that what follows is simply that all those legal arguments in all of those endless Supreme Court opinions pontificating over the meaning of liberty and equality are in fact political arguments—has not changed this dynamic one bit. It has not only underscored the total absence of any coherent progressive instrumentalism from left understandings of the potential of law. Of greater consequence, it has also even further emasculated and eviscerated our politics, worse than liberalism could have done if it had tried, and it did not. The critical insistence on the deconstruction of the differences between law and politics has only reinforced, rather than challenged in any meaningful way, the liberal legalist conceit that law, rather than politics ordinarily understood, is the domain of radical and liberal political thought. We have no political “left” in this country, in part, because those who would otherwise be inclined to make one have instead poured their thought, their passion, and their commitments into litigation

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<sup>98</sup> *Brown v. Bd. of Education of Topeka*, 347 U.S. 483 (1954).

<sup>99</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>100</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>101</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>102</sup> I call this the legal question doctrine. If a moral question—such as, “what is equality?”—is a constitutional question, then it is a legal rather than a political question, and as it turns out, *all* of the interesting moral questions—about equality, liberty, speech, property, and so forth—are legal questions. I call this the “legal question doctrine” to contrast it with the more familiar political question doctrine. By virtue of the legal question doctrine, politics is left with nothing but horse-trading.

strategies or into the project of pointing out over and over the politics of those projects.

The result of this has been an entrenched conservatism across the board—the board, that is, of both law and politics. Progressives need to re-direct their political arguments, including the radical arguments, out of law and law reviews and into the domain of politics. We first have to get over the lazy assumption that there is no need to do so—either because law is much loftier than ordinary politics, such that ennobling political arguments *ought* to be made in judicial fora (liberalism); or because there's no difference between law and politics, so that pointing out that legal arguments are through and through political is the beginning and end of political thought (critical). There are alternatives to both, and we ought to start figuring out what they are.

Lastly, it is worth mentioning a few points about the place of care and an ethic of care in radical thought. Halley objects—dare I say viscerally—to the claim that public reasoning ought to be informed by an ethic of care, rather than exclusively by some combination of principle and interest. She clearly objects to it across the board, but finds my own interpretation of that ethic exceptionally quietist, totalitarian, mother-smothering, female and maternal supremacist, absurdly global in ambition, illogically tied to claims about reproductive harms, and unduly generous in its ascription of moral insight to those who, in her words, “give suck.”<sup>103</sup> Some of this is misdirected fury: I do not endorse an “ethic of care” as a rule or method of public decision-making. Rather, and as I tried to lay out in *Caring for Justice*, in my view an ethic of care, uncoupled from principle, runs the risk of natalism and its attendant disproportionate regards for those most closely related to or aligned with oneself: narcissism, tribalism, nationalism, racism, and fascism. An ethic of care is all about extending an affective and emotive concern to those recognizably within one's sphere of compassion. Principled political ethics are required, I believe, to extend that sphere beyond circles of inclusion that are genetically, nationally, racially, or ethnically linked. De-coupled from principle, an ethic of care fails both as an ethic of justice and as an ethic of care: it is neither just nor caring to hold in high regard only those that bear a strong resemblance to oneself. On the other hand, an ethic of principle decoupled from an ethic of care is likewise a recipe for catastrophe. In our culture it has produced among much else a liberalism that equates efficiency with human well-being, corporate life with personhood, and profit with happiness.

The remainder of Halley's Bill of Particulars, I believe, rests on a skeptical belief that the experiences of care-givers, qua care-givers, that is, those who “give suck,” have any ethical resonance, perhaps particularly for radical politics, but also simply across the board. Clearly, care-giving is neither necessary nor sufficient labor or experience to ground either

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<sup>103</sup> Halley, *Review*, *supra* note 2, at 74.

politics or ethics of any particular description, egalitarian or otherwise. On the other hand, it is a labor, often unwilling, sometimes desired and sometimes not, from which there is little or no exit, largely un-remunerative, and deeply relational: it is work that embeds the caregiver in webs of dependency on both the cared-for and on those on whom the caregiver in turn depends for support. It is also labor from which we have all benefited, and it is labor without which we will perish. Both the vulnerabilities attached to it and the insights that might be derived from it are routinely and blithely ignored in our mega-individualist culture. This is bad for the caregivers and bad for the cared-for, but it is also demonstrably bad for the culture: the essence of this labor is the focused response to the needs of those who are dependent or weak—whether because of advanced age, immaturity, sickness, or disability. We need more, not less, focused responses to the needs of those who are dependent or weak. It would behoove us to develop a better understanding of the needs, vulnerabilities, and of course the insights of those who provide it, not to mention a world in which they are better paid.

Let me end with a bold, broad, descriptive claim: the capacity for sympathy for the pain of others, such that one feels an imperative need to lessen it, is a part of, and perhaps the heart of, a human being's moral response to her world. If that is right, then it should matter to progressives and leftists alike: it may be that a moral response to others' pain is what prompts a decent, felt, political urgency—on which one might then act—for anything that is not just self-pleading. That moral, sympathetic response is not sufficient to progressive, leftist political action. But it may well be necessary.

If radicals, progressives, leftists, feminists, identitarians, and the like are to participate in any meaningful way at all in the political work needed to care for this world, we will indeed have to engage sympathetically with multiple recountings of pain described by others, listen intelligently for its coloring, learn its history and its causes, and then struggle to act politically and pragmatically so as to lessen it. We do not have to do any of that, of course. We can take a pass on caring for the world. We can, instead, talk, valorize, and celebrate power—sexual, economic, and otherwise. After the heavy lifting of exposing power's machinations, we might conclude that there is really nothing much left to do but revel in it, if power is truly everywhere, and power is all there is. Or we can always just *not care*, not for the world anyway. Our families, friends, and precious selves will keep us busy. Or we can, if so inclined, recoil at appearing foolish, like those hapless adults on the playground. "You're going to *what?* Care for the world? Ha! You fools!" But you know what? We are not, we Americans, as we now write and struggle, smothering the world with an excess of love. And we look foolish enough already, we Americans, as we uncaringly destroy it.