INTRODUCTION

I do not recommend reading *Manliness*. I could stop there, and I wouldn't feel as if I’d done the book a disservice. But to make sure readers don’t waste their time and money, I’ll provide an overview that deals with some of Harvey Mansfield’s apparent concerns in Part I of this review. In Parts II and III, I raise and provide tentative answers to questions far more important than Mansfield’s muddled and passionless plea for the status quo.

Contrary to what Mansfield sometimes implies, but never really commits to, feminism has been good, not bad, for society. Feminist politics has worked and continues to work a mostly wonderful revolution in the way we live our lives and choose our aspirations. But most feminist theories that reject gender essentialism have been fundamentally problematized—feminist theory is

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1. I use the term gender essentialism to mean the belief that gender has essential aspects that are inevitable and cannot be successfully defied.
troubled. Mansfield appears to posit this trouble as an inevitable slide toward nihilism, but he is off the mark.

In Part II, I will examine the real problem with many feminist theories that reject gender essentialism: the fact that, once the time comes to move on to normative prescriptions, the theories either fall short or reject that project altogether. Rejecting gender essentialism leads to the extremely difficult question of how people with socially constructed identities are to change their social construction. I will first examine Simone de Beauvoir’s call to do the impossible—transcend gender. I will then examine Catharine MacKinnon’s much less naïve efforts to “explode” the obstinate system of gender subordination. Though MacKinnon characterized her politics as a grassroots awakening of those most injured by the system, her project felt instead to many women and queers like a top-down construction that rejected their desires and wishes. This victim-based politics grappled more directly with the problem of escaping what constructs one’s identity, but to many it was not a convincing means of exploding gender. Still, this politics seemed arrogant, as if it were sitting above us in order to raise our consciousness. Finally in this Part, I will look at postmodern feminism. Postmodern theorists including Judith Butler call for “gender trouble,” not gender transcendence or gender explosion. They embrace the trouble, in an often elegant project that theoretically quiets the trouble by co-opting it. But for what purpose is the trouble being co-opted? Postmodern theory has yet to give us implications for politics or law. As Steven Seidman has said, queer theory and postmodernism seem to have started out “against identity politics” but ended up promoting an empty, and potentially irrelevant, “politics against identity.”

In Part III, I argue that there are real political implications that we can draw from the rejection of identity politics and essentialism, including gender essentialism. While anti-essentialism doesn’t tell us how to live our lives, it can tell us what kinds of legal rights to protect and construct, in order to ensure that there is room to rally against the very real suffering and injustice that social norms and identities have so often caused.

I. OVERVIEW

Mansfield’s book is muddied, and it’s hard to connect much of the book with its apparent thesis: that we live in a “gender-neutral society,” or one that aspires to be so, which attempts to eradicate manliness, the virtue that poses a challenge to that gender-neutral aspiration. According to Mansfield, manliness

2. See, e.g., JUDITH BUTLER, GENDER TROUBLE 44, 95-96 (2d ed. 1999).
is a natural feature of maleness which cannot be defied, and which we must instead employ and value. How do we do this? By treating the sexes as equal under the law, in what Mansfield calls the public realm, but expecting them and encouraging them to be unequal in the private realm, where men should be manly and women should be womanly, in ideally balanced yin/yang-like heterosexual marriages. Men will do most of the wage labor, women will do most of the domestic labor, and each will respect the other’s contributions to the family and society. However, men will, naturally, be higher in status and power than women. Part of their manly role will be to look down on what women do as beneath them. But they will have a respect for women’s choice and sacrifice in taking on these domestic roles, and women will have certain kinds of indirect power over men, as well as a certain kind of feminine dignity that comes from making a pleasant home.

One could question whether this prescription differs from the ideal pictured by the mainstream of American society. Perhaps more importantly, one could ask how many Americans can afford this lifestyle, even if they want it? Many men and women have no choice but to engage in full-time wage labor whenever they can get it. I suspect, though, that Mansfield is concerned with a certain upper-middle class, heterosexual subset of American society, exemplified by his academic peers. Many members of this subculture likely do not accept gender inequality, and certainly not gender subordination, whether under the law or outside it. I suspect most of these persons take a hands-off approach, as a legal matter, to the way others choose to arrange their personal lives—few of them would advocate mandating that all women work as a matter of law. But many of them will probably not be friends with people who believe men should dominate women in the home. Some of these persons have the financial means to divide labor within their families the way Mansfield proposes, but choose not to. Mansfield seems to be focusing his sights on a class of Americans quite similar to those Betty Friedan focused on in The Feminine Mystique. Friedan succeeded in changing the social norms

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5. Id. at 229.
6. Id. at 241.
7. Id. at 198, 242.
8. Id. at 241-42; see also id. at 79 ("That marriage mutes but does not remove sex differences suggests that men and women learn from each other . . . . Isn’t it possible that a married couple might be in love? And when you’re in love, you want in your beloved some things you lack but appreciate . . . . Or at least, if you cannot change yourself, you can be glad to have a spouse to do what you won’t do.").
9. Id. at 7-8, 13, 21, 27, 32, 215.
10. Id. at 143.
11. Id. at 142-43.
12. For instance, members of the faculty of Harvard University, a private school, were deeply opposed to former President Larry Summers’s comments that treated gender inequality in the science departments at Harvard as a potentially natural state of affairs that, implicitly, need not be altered. See Jay Tolson et al., Hard Lessons, U.S. NEWS & WORLD REP., Mar. 7, 2005, at 30.
13. See generally BETTY FRIEDAN, THE FEMININE MYSTIQUE (5th prtg. 2001). As bell hooks notes,
regarding gender for many of these people; Mansfield wants to change them back. And like Friedan, Mansfield has masked the fact that his book has a narrow scope and relevance.

Of course, even a book with limited relevance to many socioeconomic classes can be worthwhile.\textsuperscript{14} Unfortunately, however, large sections of the book appear logically unconnected to the stated purpose and thesis. Many sections consist of dull, tiresome assertions of what counts as manly and what doesn’t.\textsuperscript{15} Manliness is essentially an archetype, but the pages Mansfield spends trying to describe the archetype are repetitive and supercilious. Other sections of the book attempt to convince us that feminist writers are not great thinkers, while classical philosophers are great thinkers and more worth reading.\textsuperscript{16}

What does all this have to do with gender roles in our society and the posited loss of well-employed manliness? It’s just not clear. Mansfield devotes an entire chapter to scientific evidence of inherent gender differences on which he himself disclaims reliance because he prefers the lessons of art and literature to those of science.\textsuperscript{17} I will attempt to provide a brief overview of all this, but one must keep in mind that most of the book actually doesn’t serve its stated purposes.

The portion of this book in which Mansfield displays some real passion consists in undermining those feminist theorists of whom he is aware (largely Simone de Beauvoir),\textsuperscript{18} while rehabilitating and apologizing for classic thinkers like Aristotle and Plato.\textsuperscript{19} There is also some measured praise for the fathers of American liberalism, like Hobbes and Mill, as well as a few early feminists like Elizabeth Cady Stanton.\textsuperscript{20} But all this has nothing to do with criticizing and reforming our society’s approach to gender—the purported goal of the book—for if it did, Mansfield wouldn’t limit himself to a critique of Beauvoir and a few radical feminists who had little social or legal impact in America.

\begin{quote}
She did not speak of the needs of women without men, without children, without homes. She ignored the existence of all non-white women and poor white women. She did not tell readers whether it was more fulfilling to be a maid, a babysitter, a factory worker, a clerk, or a prostitute, than to be a leisure class housewife.

\end{quote}

\textsuperscript{14.} See \textit{Hooks}, \textit{supra} note 13, at 2 ("Specific problems and dilemmas of leisure-class white housewives were real concerns that merited consideration and change, but they were not the pressing political concerns of masses of women."); see also Evelyn Reed, \textit{A Study of the Feminine Mystique}, 25 INT'L SOCIALIST REV. 24, 24 (1964) (reviewing \textit{Betty Friedan, The Feminine Mystique} (1963)) ("Betty Friedan’s findings have a wider relevance than the well-to-do housewives she has investigated. These set the pattern of behavior and aspiration for working-class housewives, who mistakenly believe that because middle-class women have all the advantages, they also have all the answers.").

\textsuperscript{15.} \textit{Mansfield, supra} note 4, at 50-81.
\textsuperscript{16.} \textit{Id.} at 122-62, 190-228.
\textsuperscript{17.} \textit{Id.} at 51.
\textsuperscript{18.} \textit{Id.} at 131.
\textsuperscript{19.} \textit{Id.} at 204-21.
\textsuperscript{20.} \textit{Id.} at 124-26, 163-89.
Those feminists who had a major impact on our social and legal gender norms include liberal feminist activists like Justice Ruth Bader Ginsburg, as well as radical feminists like Catharine MacKinnon and Andrea Dworkin (whose names appear nowhere in the book outside of the bibliography). Cultural or “difference” feminism, too, has had a great deal of purchase in mainstream America, but neither Robin West nor Christine Littleton nor the ideas behind cultural feminism are presented or disputed. Betty Friedan is of course too common a household name for Mansfield to pretend she does not exist, so his means of undermining her is to argue that she, like Beauvoir, was influenced by communists and “flirts with nihilism.” Her liberal feminism is described as a kind of ruse or grudging compromise, covering up her radical existentialism. She was really no different from Beauvoir, he seems to think, except that she focused less on sex and more on career.

Mansfield suggests that by denying that humans have essences which are controlled by nature, Beauvoir and other existentialists leave humans with no ethical or moral guide; all that guides is the will to power. Thus, he calls existentialists nihilists. Mansfield writes a broad intellectual history that seeks to tenuously connect American feminism to Beauvoir, Beauvoir to Nietzsche, and Nietzsche to Hitler. His critique of Beauvoir is, in my view, deeply flawed, though there are certainly legitimate critiques of Beauvoir’s work, one of which I will explore in Part II of this review.

More importantly, however, the critique reveals nothing about what’s wrong with our American “gender-neutral society.” Of course, the “gender-neutral society” that Mansfield argues is problematic is not in fact existentialist, and certainly not nihilist. People in the “gender-neutral society” may not think that sex should determine how you live your life, but they do hold all sorts of views on what constitutes a moral and ethical life. So how does Mansfield draw a connection between the “gender-neutral” society and nihilism?

23. Indeed, Mansfield seems to be a cultural feminist without realizing it. Like cultural feminists, he believes that men and women contribute different, but valuable, things to society, and that both ways of speaking, reasoning, and living deserve some form of respect. But crucially, unlike most cultural feminists Mansfield does not promote respect for women’s unique contributions in the form of financial compensation or leadership roles.
24. MANSFIELD, supra note 4, at 150-51, 153.
25. Id. at 152-54.
26. Id. at 118 (“Although Nietzsche himself would never have been a Nazi, his influence helped create what has been called ‘German nihilism’ . . . ”); see also id. at 122. (“What interested these women in Nietzsche was the nihilism he proclaimed as fact—God is dead—and the possibility of creating a new order in its place. Nihilism, or the disappearance of nature, represented opportunity . . . .”); id. at 190 (“The only true humanity, according to Beauvoir, so far exclusively male, is to transcend the given or the natural or the ‘immanent’ in a manner I have called nihilist because it accepts no guide but will to power. In the feminist society there are no social roles.”).
To do so, Mansfield has to pretend there is no such thing as a liberal feminist—someone who simply wants to extend the liberal American values of equality and liberty to women. He pretends that modern American feminism, including that which revolutionized our society and made some of it gender-neutral, is inextricably allied with existentialism. But of course, whoever her intellectual influences have been, Friedan is a liberal feminist, as is now-Justice Ruth Bader Ginsburg, who, along with others at the American Civil Liberties Union Women’s Rights Project, used impact litigation and legislative change to ensure the equality of men and women before the law and in the workplace. These two names are recognized by many Americans, and they are feminist giants in terms of their influence on our social and legal norms, respectively. The influence they had was a liberal feminist influence. But liberal feminism is something Mansfield has no real issues with. Indeed, his proposal for dealing with gender roles is classic American legal liberalism, with its division of the public and private spheres, its prohibition on discrimination in the public sphere, and its license to discriminate in the private sphere. With respect to law, he implores us to preserve the status quo.

What Mansfield really wants to do is to promote discrimination in the private sphere. To do so, he must suggest that equality is somehow normatively inappropriate to that sphere. Thus, he tries his best to depict modern American feminism, which is associated with equality, as anti-child and anti-family.

27. Id. at 163 (“The revolution that made the gender-neutral society was not led by liberals but by women of the left, inspired as I have argued, by a womanly nihilism. Their heroine was Simone de Beauvoir, and behind her, Marx and Nietzsche.”).

28. Ginsburg founded the ACLU Women’s Rights Project (WRP) in 1972. She successfully argued *Frontiero v. Richardson*, 411 U.S. 677 (1973), before the Supreme Court, establishing heightened scrutiny for gender discrimination by the government. In that case and a series of further cases, she used both male and female plaintiffs to demonstrate that public sex discrimination and governmental assumptions about the economic roles of men and women harmed both “men and women—indeed, entire families.... While some would have focused solely on the injustice such rules work on women, Ginsburg rejected differential treatment based on gender as inherently harmful to all involved.” Sandra Pullman, Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff, THE AMERICAN CIVIL LIBERTIES UNION (Mar. 2006), http://www.aclu.org/womensrights/gen/24412pub20060307.html.

Ginsburg was also incredibly pro-family. Brenda Feigen explains, “Both of us [Feigen and Ginsburg] agreed that we didn’t want to deprive the fathers of our children of the experience of being fathers—or the children of having fathers involved in their daily lives.” Id. The WRP fought to end discrimination against pregnant women, losing in the courts but successfully obtaining passage of the Pregnancy Discrimination Act. “During these years, WRP set an example of accommodating working mothers at the office. To balance the competing demands of family and career, women brought their newborn children to work with them .... College students were hired to look after the infants, and the lawyers would breastfeed during the day.” Id.

29. MANSFIELD, supra note 4, at 188 (“In sum, Mill provides a reasonable case for women’s equality that ought to satisfy reasonable women. It is mostly about careers and occupations, and though it makes sensible concessions to the doubts of sensible men, it opens all doors to women and allows them to prove their merit wherever they can. It is not about sexual equality, and, like the case made by Wollstonecraft and Stanton, it does not attack motherhood and the family.”).

30. Mansfield describes the “something more” than husband and children that Friedan wanted women to have as “something other than ‘my husband and my children and my home.'” Id. at 153.
However, this old anti-feminist tactic rings false to those who know what the American feminist movement has given to women with families.

Mansfield describes Friedan as a “moderate feminist,” who is distinguished from a “radical feminist” by “not wanting to abolish the family,” while providing no thought about “how women might combine job and family.” Yet much of The Feminine Mystique is about exactly this problem, with proposed solutions ranging from the class-specific “hire a housekeeper” to the use of modern devices for housework to a rather non-class-centric government subsidy program designed to help women resume their education through funding for household help and reformation of higher education.

Liberal feminism sought to make women equal to men by giving them the opportunity to do what men did—primarily, engage in wage labor and get paid the same for it. In doing so, feminism clearly had to ease the socially produced domestic obligations that would have left women with no time to engage in wage labor. But in describing this move as anti-child, Mansfield neglects to mention, or is perhaps ignorant of, feminist efforts to balance child-rearing with equality. For instance, the Women’s Strike for Equality March organized by Friedan in 1970 had three core demands, one of which was free childcare. This is a demand aimed at the need for women to have jobs and children. He is also either ignorant of or neglects decades of modern American feminist demands for work flexibility. These demands are aimed at facilitating engagement in the non-wage provision of childcare by both women and men. What could be more pro-child and pro-family? These demands have seen modest success in the Family Medical Leave Act, and continue in the work-life balance movement. Finally, Mansfield appears especially ignorant of the liberal feminism that now-Justice Ginsburg employed to reform our law in radical ways. The following quote sums up Mansfield’s ignorance and neglect well:

The radical feminism I have discussed is not [the feminism] most women believe or practice, but it is the only feminism there is. Another, better feminism might begin from the idea that women, as many of them say, “want it all.” They want a career and they want to be women too. They don’t want to be defined, and they do. The

31. Id. at 152-53.
32. For discussion of labor saving devices, see FRIEDAN, supra note 13, at 301-07, 311-12, 341-43. For discussion of hiring help, see id. at 271, 272, 304, 357, 478. For discussion of the national program, see id. at 502-03.
34. 29 U.S.C §§ 2601-2654 (2000).
35. This movement’s legal arm is exemplified by the WorkLife Law Center at University of California Hastings College of the Law, whose webpage is available at http://www.uchastings.edu/?pid=3624 (last visited Apr. 16, 2007).
36. See supra note 28.
challenge to a new feminism is to make sense of those two desires and unite them.\textsuperscript{37}

Another section in the book where we see some passion is Mansfield's critique of science as inadequate to the task of understanding qualities like manliness and womanliness.\textsuperscript{38} This section of the book actually has some sentences in it that are not incorrect. Mansfield is right that if we are concerned with exploring a quality such as personality, especially archetypal personality, the value of science may be limited by its compulsion to dissect that quality. We can learn a great deal from art and literature about what human qualities and virtues are worthy of our aspirations and idealism.

But Mansfield's analyses of cultural depictions of the manliness ideal fall flat. Mansfield draws on works such as Ernest Hemingway's \textit{The Old Man and the Sea}\textsuperscript{39} and Henry James's \textit{The Bostonians},\textsuperscript{40} as well as popular icons such as John Wayne.\textsuperscript{41} Unfortunately, his readings of these texts and icons are tortuous, not very compelling or illuminating, and, ultimately, too boring to justify the time he spends on them. Though his reading of Hemingway is not bad, nothing in his reading of \textit{The Bostonians}, for instance, convinced me that the subordination of women Mansfield argues it valorizes is something anyone should aspire to. Most importantly, his analyses don't give the reader the feeling that the works examined speak any deep truth, even though the purpose of drawing on these works is to get to a deeper truth than science can. In any case, it's clear that for Mansfield the concept of manliness is an archetype, an ideal provided content in no small part by human culture and genius.

But feminism's critique of essentialized gender and gender roles acknowledges and even makes a point of the fact that gendered roles, archetypes, and virtues are pervasive in our literature and culture. Feminism argues that they are nevertheless untrue and unjust. For cultural or difference feminists, the literature and culture might be said to unjustly (and untruly) give too little value to female archetypes. For liberal feminists, literature and culture might be said to unjustly (and untruly) associate these virtues with biological sex. For radical feminists like Catharine MacKinnon, literature and culture might be said to unjustly (and untruly) make virtues of things that are not virtues at all, like the exertion of power and violence over others. Thus, pointing out appearances of the archetype of manliness in literature and culture does not adequately respond to the feminist concern that the way we have been

\textsuperscript{37} MANSFIELD, supra note 4, at 240-41 (emphasis added). For Mansfield, the term "radical feminism" is most essentially represented by Beauvoir, not by MacKinnon or Adrienne Rich or other such radical feminists. For Mansfield, radical feminism appears to mean pro-sex existentialist/Marxist feminism, which includes Beauvoir, Shulamith Firestone, and perhaps some postmodernist feminists.

\textsuperscript{38} Id. at 37-38.

\textsuperscript{39} Id. at 51-55.

\textsuperscript{40} Id. at 127-31.

\textsuperscript{41} Id. at 17.
doing things and arranging things is deeply unjust and needs to change, even
though these practices are deeply ingrained.

Mansfield moves from his discussion of manly and womanly
characteristics to a critique of existentialism. This critique is targeted at setting
up his claim that we need some social roles rooted in our nature, some guide
from nature, or we risk falling into an evil nihilism whose only guiding
principle is the will to power. By nature, Mansfield does not mean
biologically determined traits. For Mansfield, man’s nature (manly) and
woman’s nature (womanly) are part natural animal, part modified and
controlled animal. Nature is something that works in cooperation and in
conflict with nurture, says Mansfield, and cannot be separated from it. Nature,
it seems, includes human construction and the exercise of human will.

By defining nature in this way, Mansfield makes more plausible his claim
that manliness and womanliness, which he has described as something like
archetypal personalities, are “natural.” As Mansfield defines it, “natural”
includes human construction, so the claim that an ideal like manliness, drawn
from literature and film, is “naturally” male is not so preposterous.

But how does the claim that manliness is “naturally” male, in this sense of
natural, provide support for the thesis that we should impose social norms
requiring males to act manly and females to act womanly? It doesn’t, and this is
just one of numerous problems in Mansfield’s book. When manliness is defined
as a combination of human will and art with animal instincts, we imagine it,
including its connection to being male, differently. Ideals and archetypes are
hard to change, but they do change. Thus, “natural” ideals, as Mansfield
describes them, are clearly contestable and modifiable.

While Mansfield emphasizes at points that human nature as he is using the
term includes human construction, he then slips into the more common usage
of nature as a deterministic force. If it’s natural for men to be manly, then they
should be expected to be manly because we can’t defy nature.

Of course we can defy nature if nature is human construction and
transformation of animal instinct, but we can’t transcend nature simply because
it is human construction. Human constructions are just as real as animal
instincts and probably more often represent relevant constraints on our social

42. Id. at 190.
43. “[W]hat is needed is . . . a nature that leaves humans free to choose and a nurture that can cite a
reason for the choice made . . . . Hence nature must be seen as the guide for nurture.” Id. at 202; see also
id. at 213 (“Nature is pliable as well as inescapable.”).
44. Id. at 215-16 (“Insofar as nature is merely spontaneous, men transcend nature, . . . . but in doing
so they use nature as a guide, . . . . and they impose their interpretation on nature as well as on their
society. Nature allows itself to be understood as a whole in partisan interpretations, variously, and by
regimes.”).
45. E.g., id. at 228 (“[R]epressing the difference won’t work because manliness is in our nature and
cannot be repressed.”).
lives. We can, however, modify nature, disrupt it, and defy it if it is human construction. (And even if it's not, given the right technology.) On the other hand, if nature really is something that cannot be disrupted, remade, and reformed (however difficult and unpredictable the process), then the claim that the archetype of manliness described by Mansfield and depicted in literature and culture is “natural” seems preposterous.

In any case, Mansfield positions manliness as an embattled virtue, one that our “gender-neutral society” has been seeking to eradicate but which cannot be eradicated. In this view, manliness continues to rear its irritating head and pose problems for the gender neutral society because it is natural for men to be manly. Few women are very manly, according to Mansfield, though some can be,\(^{46}\) and though it appears, given his idea of manliness, that very few men have ever been truly manly, either.\(^{47}\)

Why would manliness pose a problem for the gender-neutral society? Couldn’t the qualities of manliness simply be accessible to both males and females? The answer is not what you might think. Mansfield does not mean that men exhibit more manliness than women do, and that this poses a constant experiential challenge to our belief in the lack of significant differences between men and women. For Mansfield, the key manner in which manliness threatens gender neutrality is that manliness includes misogyny.\(^{48}\) Subordination of women is an unavoidable part of manliness for Mansfield, one that men can’t shake, because they can’t defy their nature. For Mansfield, it is manly to look down on women’s work precisely because it is work done by women. It is manly to look down on and seek to dominate women.\(^{49}\)

How exactly does this misogyny evidence itself even in the gender-neutral society, according to Mansfield? I would have thought the prevalence of rape and domestic violence were the most telling evidence that men, even in the “gender-neutral society,” still think of women as lesser beings.\(^{50}\) But apparently, the real problem for the gender-neutral society is men’s evasion of

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46. Margaret Thatcher is repeatedly mentioned as an exemplar of manliness. \textit{Id.} at 11, 12, 69, 80, 152.

47. Some of the primary attributes of manliness according to Mansfield are confidence, ability to command, independence, in control in risky situations, aloofness, assertiveness, assumption of authority, stubbornness, and willingness to justify one’s causes and actions in politics. \textit{Id.} at 16-17, 71. “John Wayne is still every American’s idea of manliness. That tells you something about the standing of manliness because John Wayne is not of our generation; in fact, he’s dead.” \textit{Id.} at 17.


49. \textit{Id.} at 7-8, 13, 21.

50. These, like gay, lesbian, and bisexual existence, are topics that Mansfield mystifyingly leaves untreated in his plea for more stringent gender roles. The mentions of rape are few—mostly offhand remarks, having nothing to do with male power, about the reason men don’t understand “no.” (They are apparently confused about whether a woman is being modest.) \textit{Id.} at 155. One of the few mentions of queer existence comes when Mansfield refers to “the gays and lesbians” as imitators of heterosexual marriage, whose unions require “compensat[ion] for the missing qualities of the other sex,” and therefore lack the ideal gender balance of heterosexual marriage. \textit{Id.} at 242.
their equal share of housework. Laziness is an odd way for woman-deriding, physically superior, direct, assertive manliness to present itself, but this is what Mansfield posits. He argues that men don’t like to do housework because they look down on it as women’s work. This feeling of superiority is accommodated because, as an element of manliness, it is only natural. Perhaps mentioning rape and domestic violence would have made far too clear that not all that is “naturally” male, in the sense of culturally idealized and associated with males, should be accommodated and encouraged.

As if recognizing that all of this is really not convincing, Mansfield stops well short of what would seem to be the implications of his view that the “natural” traits of womanliness and manliness should guide us. Mansfield says that we cannot return to the formal legal inequality of a prior day, and have to instead settle for public equality and private inequality, as a means of “employing” manliness, now unemployed. By this he seems not to mean that married women should not be allowed to form contracts, or that men should be allowed to rape and beat their wives, simply because this all occurs in “private.” (Although he doesn’t necessarily not mean that, either.) “Public” to Mansfield appears to include any treatment of sex as a formal matter before the law. And before the law, he grudgingly concedes, women must now be equal to men, period. What Mansfield really seems to mean is that we should raise boys and girls in gendered ways, but leave a few headstrong exceptions free as a formal legal matter to deviate from those gender roles if they insist.

It is not explained how gender roles serve as any kind of sensible guide for boys, girls, men, and women, when law promotes a gender-neutral set of norms. How are men to treat women as equals at work if “nature” dictates that they treat them as subordinates at home? How are we to pander to the supposedly “natural” need of men to “feel important,” while insisting that they not rape and beat those who make them feel unimportant, including their wives? Mansfield claims in earlier chapters of his book that he wants to resist scientific dissection of the manliness archetype. He rejects the possibility of throwing out isolated pieces of manliness, like the gender hierarchy and sex roles it embraces. But in the final chapters of his book, Mansfield picks and chooses with impunity. What is going on?

51. Id. at 7-8, 13, 21, 32-33.
52. Id. at 229, 237, 241.
53. Id. at 241.
54. See id. at 243 (“Our public education tries to get boys to play with dolls, and girls to play with ... no, for some reason not guns. A better education would make children and grown-ups more aware of themselves, and it would be franker and less manipulative than what we attempt now.”). He also includes some strange comments that I can only call “awkward dating advice” at the start of his concluding chapter. Id. at 229 (“I could tell young women not to disparage motherhood in the hearing of a man they want to attract ... I could tell young men that women want to be taken seriously almost as much as they want to be loved.”).
55. Id. at 21.
Perhaps Mansfield knows he doesn’t have what it takes to convince anyone in the political realm, so instead he hopes to slowly erode our norms of gender equality in private, until eventually political support for formal legal oppression of women gathers force. In this attempt to indirectly accomplish what he cannot accomplish through honest argument, his book is exceedingly “womanly,” in a rather negative sense of the term.

In sum, *Manliness* is a very boring book. Those rare points that are correct are neither original nor particularly well-put, and require slogging through numerous tiresome and unconvincing assertions. Throughout, the book obfuscates its position to no seeming purpose, and ends on a most un-“manly” note. Feminism could use a better rejoinder than this.

II. TROUBLE FOR FEMINISM

While Mansfield misses them, there are real problems and inadequacies in feminist theory. In this part, I provide what I think is a fairer problematization of feminist theories, especially postmodern feminism, that maintain that gender is largely socially constructed and therefore not essential.

A. Optimistically Transcending Gender

Simone de Beauvoir was an existentialist. The notion that objects and things are indifferent to the human and the significance the human places upon them is crucial to this way of thinking. This is a picture of human experience as a difficult and painful confrontation with the fact that one has freedom to act and engage with the world. Another concept fundamental to Beauvoir’s way of thinking is that existence precedes essence; man is not a natural species, but rather a historical idea. As she famously put it, “One is not born, but rather becomes, a woman;” biological differences are irrelevant outside of the social relevance given to them. This is a rejection of the body’s importance outside of a social context. One cannot be conscious of oneself except as a social being.

Beauvoir also accepts the psychoanalytic idea that one defines oneself through exclusion and negation of the Other. In other words, one thinks of oneself as individual by distinguishing the Other. Beauvoir fits the oppression of women into this picture by positing that they are the ultimate Other. Normally, one must distinguish oneself from the Other in order to recognize

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57. *Id.* at 53 (“Humanity is not an animal species, it is a historical reality.”).
58. *Id.* at 267.
59. *Id.* at 36-37 (“[W]e must view the facts of biology in the light of ontological, economic, social, and psychological context . . . . [T]here is no true living reality except as manifested by the conscious individual through activities and in the bosom of a society.”).
one’s own liberty. One then seeks to dominate and subjugate the Other. But when the other person is revealed to be a consciousness, one must recognize that this other person also has liberty.\textsuperscript{60} Women are the ultimate Other that is used to resolve this problem; women are given the status of an Other that is not cold and indifferent like objects, but is still not really another person. Woman is “a conscious being” yet “it seems possible to possess her in the flesh.”\textsuperscript{61}

So what happens when even women, the ultimate Other, assert themselves and try to establish their sovereignty? Beauvoir says that they seek to dominate men as a form of self-defense, and men resist this.\textsuperscript{62} Beauvoir describes a complex power relation between men and women. The object seeks to use its submission as power over the subject.\textsuperscript{63} Both sexes then become victims of each other and themselves.\textsuperscript{64} But Beauvoir promotes another option: women simply asserting their own equality and existent nature, without seeking to dominate men. Beauvoir acknowledges certain pleasures in the power dynamic between man and his Other, but she says the pleasures can be sacrificed because they come at the cost of “blood or misery.”\textsuperscript{65} Her utopian vision of sexual relations between men and women is far from perfect, and is homophobic,\textsuperscript{66} but this sounds anything but nihilist.

Rather, Beauvoir argues that when we abandon the idea that there is a natural law that constrains our freedom and tells us what to do, we must then confront our terrifying freedom and figure out what to do on our own. This does not inexorably lead to guidance by the will to power, and did not for Beauvoir, but she did choose an overly simplistic and ultimately dissatisfying answer for what we should do: Women should assert their liberty, and men should respond to that assertion by recognizing the liberty of women. Men themselves would be liberated in this recognition of women’s liberty, she argues—liberated from the task of continual subordination and repression of women’s assertions of liberty.\textsuperscript{67} She expresses a faith that “liberty can break the circle.”\textsuperscript{68}

\textsuperscript{60} Id. at 139-140, 141.
\textsuperscript{61} Id. at 141.
\textsuperscript{62} Id. at 717.
\textsuperscript{63} Id. at 718.
\textsuperscript{64} Id. at 718-19.
\textsuperscript{65} Id. at 729-30.
\textsuperscript{66} Beauvoir’s main discussion of lesbianism is tolerant. It analyzes lesbianism as a reaction to women’s subordination, but concludes that it is “[l]ike all human behavior,” and simply “one way, among others, in which woman solves the problems posed by her condition in general, her erotic situation in particular.” Id. at 424. Yet in describing how women could be free if boys and girls were raised as equals, in coeducational settings, Beauvoir notes that other systems create “repressions, obsessions, [and] neuroses.” She argues that “[t]he excessive sentimentality, homosexual fervors, and platonic crushes of adolescent girls, ..., are much more injurious than a little childish sex play.” Id. at 726-27.
\textsuperscript{67} Id. at 720.
\textsuperscript{68} Id. at 728.
Of course, even if gender is socially constructed, that doesn’t necessarily make it easy to “transcend.” In this, Mansfield is right to critique Beauvoir, but not very original. Postmodern thinkers, while abandoning the notion of natural law and essences, give focus to the fact that we are still constrained by social constructions. Social constructions aren’t essential, but they are very real. You can’t transcend what has made you, whether or not it involves human construction. And in seeking to transcend gender, you inevitably define yourself with reference to gender, in reaction to it. Thus, the response of many postmodernists has been to valorize strategies that disrupt identity, rather than seeking to transcend it.

Even the postmodern strategy, however, begs the question of what that disruption is in the service of, as I discuss in Section II.C. Society, especially one that wants freedom, needs constraints and ethics. Being an animal isn’t being free in the human sense. An overly simplistic notion of transcendent liberty fails to suggest what those constraints should be, or how people should discover them. It fails to define the self. In my reading, Beauvoir does not promote a freedom in which there is no morality or ethics other than one’s own desire for power. Far from it. But she does fail to say what goes in place of natural law, or to give a realistic prescription of how to disrupt gender essentialism.

B. Radical Feminists

Radical feminists like MacKinnon, whom Mansfield mentions only in the bibliography, do in fact provide a prescription for change. MacKinnon, like Beauvoir, sees gender as socially constructed. The definitions of man and woman are precise: a subject—man—who fucks, and an object—woman—who gets fucked. To be subordinated is to be a woman by definition.

But MacKinnon takes a less naïve approach than does Beauvoir, seeing any “transcendence” of gender as incredibly difficult to accomplish. In this view, women cannot simply be liberated by saying so, to enjoy sexuality on equal and free terms. In fact, MacKinnon argues that sexuality would look so different in a world without gender subordination that we can’t even conceive of it.
But she does not seem to argue that there is no reality, no truth, or no nature to guide us. Rather, she argues that because we have been so corrupted by the social construction of gender, we can’t even see it right now. The first goal, then, is to get past gender subordination. How do we explode the false system of gender subordination and power relations in order to move on to constructing good lives? Through consciousness-raising of women, as well as through specific causes of action that give women the power to speak the harm that has been done to them by gender subordination and recover for it. Mansfield seems to think that consciousness-raising means ridding our vocabulary of gendered words and the like, but it also has meant women coming together in groups to speak about the harm and injury of rape—an issue Mansfield largely ignores—issues they had been so long forbidden to discuss.

Rather than trusting the state’s criminal law, or any top-down state action, to undo women’s subordination, MacKinnon chose civil lawsuits, which by their nature are more grassroots because they are attached to and directed by victims’ claims of injury. Her approach avoids the need for top-down reform, which is inevitably poisoned by the system of gender subordination itself. Moreover, avoiding a top-down prescription avoids the need to find a justification for that prescription in any essential law or nature. The anti-pornography ordinance MacKinnon drafted with Andrea Dworkin, for instance, did not outlaw pornography directly as an immoral or unnatural practice. Rather, it gave individual women civil rights claims that would give them the power to speak the harm that pornography did to them and to recover. Pornographers would have to pay because they injured actual women who complained, not because they defied natural law or some other moral system.

Why should we listen to those women’s claims of injury? For MacKinnon, it is because women have special access to the system of gender subordination we hope to explode, precisely because they are victim subjects who have been constructed by it. But of course, men, too, have been constructed by a system

75. Id. at 536-37.
76. MacKinnon and Andrea Dworkin drafted an antipornography ordinance for the City of Minneapolis. CATHARINE A. MACKINNON, Francis Biddle’s Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED (1987), reprinted in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 59 (D. Kelly Weisberg ed., 1996). MacKinnon was also on the brief for the plaintiff in Meritor Savings Bank FSB v. Vinson, which held that both quid pro quo and hostile work environment forms of sexual harassment violate Title VII. 477 U.S. 57 (1986).
77. E.g., MANSFIELD, supra note 4, at 123, 212.
78. Andrea Dworkin, Against the Male Flood: Censorship, Pornography, and Equality, 8 HARV. WOMEN’S L.J. 1, 22-23 (1985) (“The civil rights law does not force the pornography back underground. There is no prior restraint or police power to make arrests . . . . The civil rights law is women’s speech. It defines an injury to us from our point of view.”).
79. “We define pornography as . . . a violation of women’s civil rights . . . . [The] point [of the ordinance] is to hold those who profit from and benefit from that injury accountable to those who are injured. It means that women’s injury—our damage, our pain, our enforced inferiority—should outweigh their pleasure and their profits . . . .” MACKINNON, supra note 76, at 59.
80. MacKinnon, supra note 74, at 536-37.
of gender subordination. And special access or no, not all women think the same way.

As a result, MacKinnon’s project against pornography was deeply unsatisfying even to many whose interest was not in the subordination of women. Her project against sexual harassment has come under sincere attack from queer theory as well. Despite the facial appeal of civil actions as a kind of grassroots reform mechanism, they do in fact permit some women to speak for others in the form of class actions, injunctive remedies, and industry-crippling monetary damages. If one woman can obtain an injunction or monetary damages against the production of pornographic material, or against telling crude and degrading jokes at work, she can prevent all women and men from accessing that material, profiting from it, or being a part of it.

What one woman views as degradation and harm, another views as sexually pleasing. And if we have all been constructed by gender subordination, then why listen to some women over others? MacKinnon’s answer to this diversity of perception among women was false consciousness, which needed raising. The idea that we all have false consciousnesses might not have been so difficult to accept. But of course, with consciousness-raising, the implication is that someone is doing the raising. This does not feel like a revolution of the people, who are women. This still feels like top-down reform, and so the question looms: From where does one get these prescriptions for social and legal reforms, and what makes them right?

C. Embracing Trouble

Postmodern feminists have learned a great deal from the pitfalls of Beauvoir and MacKinnon’s approaches, and have taken extremely seriously the viewpoint that all our desires and wishes are constructed and coerced by various loci of power. In their view, there is no such thing as “free” action outside the context of coercion. “Freedom” is just as naïve a term as “transcendence.”

Rather than seeking to transcend or explode the social construction of gender (and other social constructions), postmodern feminists promote the
disruption of identity. In this regard, they share an affinity with Mansfield, though one gets the sense he would not like to admit it. Mansfield asserts, citing to Aristotle, that manliness is "both within nature and asserted against nature . . . . Assertiveness is what makes manliness 'transcendent,' to use Beauvoir's word in a more adequate way than she . . . ." He finds this manly transcendence virtuous.

Though postmodern theory has rejected the simplistic idea that cultural constructs can be transcended (in the sense of ignored and escaped), like Beauvoir, postmodern theory does not provide any morality or ethics that these disruptive assertions serve. Nor does Mansfield do this for manliness. For Mansfield, manliness can be in the service of all kinds of potential moralities. It is "neutral between good and evil." He does, in fact, propose a specific guide for human life: men should act manly and women should act womanly. But manliness itself, the rehabilitation of which the book purports to take as its purpose, does not necessarily serve gender roles. After all, as Mansfield repeatedly affirms, the modern feminist movement was itself manly, and, in his view, helped abolish gender roles. There is no good connection between the rehabilitation of manliness and the rehabilitation of a dual gender system, loosely tied to biological sex.

As Seidman has explained in an illuminating history of queer theory's development, "to the extent . . . that poststructural critique . . . [has become] a politics of the disruptive gesture, it lacks coherence. Underlying this politics of subversion is a vague notion that this will encourage new, affirmative forms of personal and social life, although poststructuralists are reluctant to name their social vision." Seidman sees this as an "implicit[ly]" "anarchistic championing of 'pure' freedom from all constraints and limits"—not too dissimilar from the "nihilism" to which Mansfield claims eradicating gender roles leads.

But to draw this implication so quickly is not quite fair. Firm opposition to a rigid role or identity may not necessarily equate to extreme forms of individualistic libertarianism and anarchism, or even nihilism. Postmodern theorists are not inspired by Nietzsche and Foucault alone. They are also

85. See BUTLER, supra note 2, at 174-80.
86. MANSFIELD, supra note 4, at 216.
87. Id. at x, xii.
88. Id. at 244.
89. Id. at ix-x.
90. Without much explanation at all, Mansfield submits to eradication of gender roles under the law, in what he deems the public sphere, but insists on dual, complementary gender roles in the private sphere. This is why I call his dual gender system "loosely" tied to biological sex.
91. Seidman, supra note 3, at 135.
92. Id. at 132.
93. Id. at 133.
inspired to end injustice against women, people of color, and queers. A better reading perhaps is that the postmodernists and queer theorists are in favor of ethics and morals, but have the humility to realize that an appropriate ethics and morality is contingent on the society we currently inhabit. We simply should not assume that any particular ethics or morality is fixed by natural law for all time. So they limit themselves to exposing the fact that these social roles, moralities, and ethical rules are ones we choose, that we bear responsibility for, and that are therefore always subject to contest.

For example, Judith Butler clearly acknowledges that there is a “political necessity to use some sign now.” Some identity, some role, is necessary. It’s necessary for justice. She simply asks for avowal of the “the sign’s strategic provisionality” in order that “future significations of the sign not be foreclosed.” It doesn’t seem that Butler is implying that identity is the root of evil, but rather that the naturalization of identity is.

Of course, she’s still not telling us which identities, roles, norms, and ethical rules are the right ones for now; that doesn’t seem to be part of her project. So there is a looming question: What’s the point? Here is the trouble for postmodern feminism: Simply embracing the idea of trouble doesn’t satisfy. The problem with feminism is that we don’t yet have a system for determining the concrete political implications of postmodern theory, not that postmodern and feminist theorists are unwittingly advocating anarchy.

III. POLITICAL IMPLICATIONS

So can we have guiding principles for how to live a basically human life without resort to “nature”? Mansfield asserts that we cannot, but there have in fact been good efforts to do just this. Martha Nussbaum, for instance, promotes the protection of “capabilities,” leaving space for people to do what they will with those capabilities, and provides room for variation in what constitutes a truly human life. But even this still feels somewhat like universalism.

I believe that we can construct rights while acknowledging their contingency. We can create legal constructions that protect room for reconstruction of social and legal norms themselves. Speech is an obvious such

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94. In her Preface to the 1999 edition of Gender Trouble, Butler explains, “I grew up understanding something of the violence of gender norms . . . . The writing of this denaturalization was not done simply out of a desire to play with language or prescribe theatrical antics in the place of ‘real’ politics . . . . It was done from a desire to live, to make life possible . . . .” BUTLER, supra note 2, at xx.

95. Katharine Bartlett, Feminist Legal Methods, 103 HARV. L.R. 829, 880 (1990) (“Positionality is a stance from which a number of apparently inconsistent feminist ‘truths’ make sense. The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency.”).


right, which is thought to protect our ability to reason about and change what we think matters. But other rights can also protect agency in the construction of identity, the self, and norms of what it means to be human. These are rights such as the right to control one's own body, freedom of dress, and rights to education, and workplace liberties.

We cannot eradicate social norms and roles, and we shouldn't want to. But demands for justice and claims of equality by numerous classes of subordinated persons, including women, should teach us that we need a society that preserves space for contesting those norms and roles—for troubling them. Without that space, we become a static, oppressive society, resistant to change, guided by orthodoxy. Yes, we need identities, but identities should be things we take part in reforming and reconstructing, not rigid stereotypes that limit our possibilities.

Instead of stopping with the promotion of "troubling" those identities, legal scholars are situated to go further. We should do something about the fact that most people don't have the legal right to be troublemakers in the first place. Dressing in drag might trouble gender identity, but the usefulness of that prescription is limited for someone who will lose her job, be kicked out of school, or be sent to jail for doing so. That is why I have, previously, provided a normative argument for recognizing a freedom of dress.

In other words, despite its refusal to embrace a permanent, universal guide for living a good life, postmodern theory can still have a point—at least for law. The point is that we should protect, via legal constructs such as rights, the capacity to experiment with, challenge, and trouble social norms and roles. These rights do not have to be constants in order to be important. For example, freedom of dress is, today, in capitalist America especially, a crucial freedom for the formation and re-formation of identity. But it may not be in some cultures, and it may not be forever.

In other words, Butler promotes gender trouble, rather than freedom from gender. But there is a further project of recognizing why gender trouble is normatively good; what is it in the service of, if not eradicating gender? My guess as to why the concept of gender trouble has appealed to so many is that we recognize contestation of our received wisdom and social roles as normatively good. Being able to participate in our own self-definition is a large part of what it means to be human, and gender trouble is an example of such active participation. But once we recognize the value of contest and participation, we should act in concrete ways to protect the freedom to engage

99. See id.
100. See id. at 40-44.
in it. While freedom from gender may be a false hope, freedom to be a gender troublemaker need not be.
Review: *The Devil Wears Prada* and *Working Girl*: Sympathy for the Devil

Judith P. Miller†

Miranda Priestly (Meryl Streep), the eponymous “Devil” in the roman à clef, *The Devil Wears Prada*, is “the most powerful woman in publishing.” Yet, as the movie makes plain, it is the work of the women behind the woman that makes her success possible. Assistants Andy Sachs (Anne Hathaway) and Emily (Emily Blunt) are professional wives, picking up—and in some cases picking up after—Miranda’s dry-cleaning, dog, children, breakfast, coat, coffee, and (signature Hermés) scarves. Andy arranges parent-teacher conferences and calls caterers—all at a moment’s notice, at any time of day or night, and with little in the way of thanks or encouragement. Focusing on Andy, the movie seems a conventional coming-of-age story: naïve Midwestern young woman graduates from college, moves to New York, loses her moral compass under the seductive influence of a worldly new job, then comes to her senses in time to reclaim her true self (a journalist) at the end of the movie. Under this reading, Miranda is little more than yet another iteration of the dragon-lady boss, a cinematic stock character echoing, most notably, Katharine Parker (Sigourney Weaver) of *Working Girl*, but with roots deep in the history of cinema. Yet although Andy may well come of age, Miranda is no stock type, twisted by the cost of her success in a man’s world. Indeed, it is precisely her contrast with cinema’s Katharine Parkers, who epitomize femininity perverted by the workplace, that makes the film so remarkable. While both films betray a popular culture’s ambivalence toward women’s success in the

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3. See, e.g., ALL ABOUT EVE (Twentieth Century Fox 1950) (depicting Margo Channing’s (Bette Davis) relationship with an ambitious young star who wants to replace Channing).

4. Cf. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR ON AMERICAN WOMEN at xx-xxiii, 1-226 (Anchor Books 1992) (1991) (arguing that media portrayals of feminism as responsible for women’s problems should be understood as attempts to re-entrench those values threatened by the women’s movement’s successes).

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workplace, the movies’ strikingly different frameworks for their protagonists’ travails illustrate a genuine transformation: Where *Working Girl* obsesses over a token woman’s feminine failures, *The Devil Wears Prada* revalues women’s work by treating women’s participation in the workplace as unremarkable.

As Rosabeth Moss Kanter explains in her ground-breaking *Men and Women of the Corporation*, firms’ constructions of the workplace—particularly the structure of incentives, disincentives, and opportunities—in turn construct work as gendered. That is, as opportunities to enter the workplace open in a sex-segregated fashion, and the workplace itself reproduces sex segregation, those inhabiting different subdivisions of the workplace then strive for success in their segmented job sectors. These varying job tracks cause employees to emphasize and develop precisely those skills leading to success in their area but, due to the nature of the job structures, not the workplace as a whole. Because workers classify other workers by sex rather than position in the workplace, this self-entrenching sex-segregation reproduces and even strengthens itself into “women’s” and “men’s” jobs where job characteristics are subsumed into naturalized sexes. Breaking out of these pink-collar ghettos does not, all on its own, end the effects of this segregation. To the contrary, the faux-integration of small numbers of women can leave them “tokens” in an overwhelmingly male workplace. Kanter observes that, in such workplaces, women frequently ease the difficulties they encounter by adopting (or being treated as) a “type”: conventionally, “mother,” “seductress,” “pet,” and “iron maiden.”

Kanter’s explanation easily encompasses Katharine Parker: The only managerial woman we see in the world of finance she inhabits, Katharine, like Miranda Priestly, is brought to viewers’ attention through her increasingly exploitative treatment of her secretary/personal assistant, Tess McGill (Melanie Griffith). The movie’s viewers are led to believe that Katharine claws her way to middle management through her feminine wiles, a true “woman of the corporation.” Responding to colleagues’ and superiors’ sexual come-ons, she parries their remarks with her own flirtatious responses, acting at once the token making the best of a sexualized situation beyond her control and the seductress using her sexuality for career advancement. As she summarizes to Tess, “Today’s junior prick is tomorrow’s senior partner.” Indeed, Tess believes Katharine takes her and her ambitions seriously because, as Tess explains to her boyfriend, “Katharine is a woman. There’s none of that chasing around the desk crap. And it’s like, she wants to be my mentor, which is exactly what I needed!”

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6. Id. at 233-36.
8. Id.
For Katharine, it is this inviting—this feminine—persona which gives her a leg up in an otherwise uninviting workplace. Katharine succeeds precisely because of her success in turning her weapon of the weak\(^9\)—namely, her femininity—against her environment, taking advantage of Tess by softening her domineering requests with girlish flirtation. She opens her deepest betrayal by, first, coquettishly revealing to Tess her plans to marry her long-time boyfriend and colleague, Jack Trainer (Harrison Ford). Only then, after invoking this intimacy, does Katharine explain to Tess that the business deal Tess suggested to Katharine—a business deal which could launch Tess out of her dead-end secretarial pool and into a management position—won’t work. As Tess discovers later, Katharine has actually decided to carry out the deal herself, stealing Tess’s idea and its concomitant opportunity for career advancement.

This exploitation through feminine intimacy is Katharine’s modus operandi. One can only imagine the hostility Katharine would have encountered from a world of Jack Trainers had she been less of a “seductress.” As Jack puts it, on meeting Tess, “You’re the first woman I’ve seen [at a business function] . . . that dresses like a woman, not like a woman thinks a man would dress if he was a woman.”\(^1\) That is, even Jack—the boyfriend of the only publicly successful woman in the movie (and the unwitting accomplice to Tess’s business machinations)—sees women in business as women vis-à-vis their femininity, and Katharine is no fool to try to turn that sex-stereotyping to her advantage. The real-world figure of Ann Hopkins—told, after she was denied promotion, that she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”\(^11\) if she wanted a promotion—provides all the cautionary warnings the Katharine Parkers of the world need. Parker is thus not just one “bad apple.” She represents, rather, the cumulative consequences of rational responses to a sex-segregated workplace where Kanter-like gender roles “help” ambitious women navigate toward successful careers.

While Miranda Priestly certainly does not hesitate to use her subordinates for her own purposes, she does not rely on intimacy to extract their labor. Rather, she offers a bargain: one year of servitude in the form of standard wifework in exchange for a future of the subordinate’s choosing. Like Katharine Parker, Miranda asks Andy to perform a series of humiliating errands, but, unlike Parker, she never demands Andy do them out of love. The cultural anxiety the genre reflects thus shifts from women in the workplace to the workplace itself.

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10. Working Girl, supra note 2.

Andy would disagree with this assessment. In Miranda’s defense, Andy exclaims, “If [Miranda] were a man, the only thing people would talk about is how good she is at her job!” Yet, particularly in contrast to Katharine Parker, Miranda’s womanhood does not seem particularly relevant to her workplace-shaped behavior. For instance, while Miranda’s husband seeks divorce in response to her work-induced absences, we learn that he too works a high-powered job in politics but does manage to make time for his family. And, indeed, the phenomenon of the executive spouse is a real one. As Kanter discusses, men also rely on the labor of their unpaid spouses to bolster their careers. So, too, while Miranda betrays an employee for her own advantage, recommending that her rival move to a lucrative and exciting job in a new company although her own employee had already been promised it, the betrayal in no way relied on intimacy to function. Miranda is willing to step on someone to get ahead—something she believes the workplace demands—but power politics are not excluded from the bargains she seals. Indeed, there is something refreshingly upfront about the way in which Miranda presents Andy with the “opportunity” to betray Emily, the senior assistant. When Miranda informs Andy that she has chosen Andy, not Emily, to go to the Paris fashion shows (the movie’s golden apple), Miranda makes Andy herself inform Emily of the change. Miranda’s methods for getting ahead—the tools she tries to impart to Andy—are nasty, but they are not especially distinct from a conventional account of the backstabbing world of corporate politics.

Miranda’s only gendered variation on this corporate world is not feminine but, rather, borderline feminist, as we see from her implicit bargain with Andy: one year of professional wifework in exchange for entrée into the world of magazine journalism. And indeed, even after Andy walks off her job in a huff, Miranda provides a winning recommendation: as recounted by Andy’s interviewer, “Of all the assistants she has ever had, you were by far her biggest disappointment. And, if I don’t hire you, I’m an idiot.” Miranda, who, as we learned earlier in the movie, has come to “see a great deal of [her]self in [Andy],” is indeed personally disappointed by Andy. Yet she still recommends Andy for future work in terms no editor could afford to ignore (given Miranda’s power in the publishing world). Indeed, personal assistance to Miranda, in spite of its utter detachment from actual journalism experience, remains widely understood to qualify one for any journalism job.

12. PRADA, supra note 1.
13. KANTER, supra note 5, at 104-26 (describing the role of corporate wives in their husbands’ careers). Of course, as many have noted, the relative social roles within an intimate relationship too are gendered from within and without the relationship. See, e.g., RHONA MAHONEY, KIDDING OURSELVES (1995) (outlining actions within relationships modeled on bargaining as a way of changing the relative social roles of men and women in relationships).
14. PRADA, supra note 1.
15. Id.
The Devil Wears Prada cleverly subverts the genre Working Girl typifies by doing far more than merely meeting the low bar of evaluating a successful woman without focusing on her gender. The film instead transforms the genre of punishing uppity women for violating gender norms into a celebration of ambition in women and a recognition of the real behind-the-scenes labor—women's work—which enables the contemporary workplace. The movie doesn't wear its feminist credentials on its sleeve but sneaks them in sub rosa, subversion by iteration.
INTRODUCTION

Janet Halley's new book, *Split Decisions: How and Why to Take a Break from Feminism*, challenges us to learn to imagine, to theorize, to organize outside of feminism, not to renounce or abandon it.¹ Such an effort will be fruitful, according to Halley, on account of the power feminism now wields in the constitution of life in the United States. For Halley, if feminism, and in

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particular feminist theory, has come to help shape how we understand experience, process information, evaluate circumstance, assign meaning, design institutions, order society, economy, community, and intimacy, manage emotion, and dream utopia, then it would be good on occasion to look critically at the entire enterprise, to subject feminist assumptions, conceptions, and aspirations to rigorous critique, to see what is there when feminism is not.\(^2\)

Halley's core argument is correct: the ideas and ideals upon and towards which any feminist project—indeed, any project—proceeds must always be subject to reconsideration, revision, and, perhaps, rejection.\(^3\) As a scholar concerned with the distribution and operation of power in society, I agree with Halley that all sources and exercises of power must be interrogated, even if ultimately approved of. Yet I cannot agree with the way Halley states her point, for it is not necessary to take a break from feminism, as Halley urges, to be critical of or to work beyond feminist projects, as Halley desires.\(^4\) To be sure, not only do feminist methodologies elide the substantive commitments of which Halley is critical, they also demand and invite self-criticism. More fundamentally, the construction of Halley’s point mistakenly presumes the existence of a readily, and easily, identifiable body of substantive thought called “feminism” from which to take a break. Rather, like others before me, I suggest the term “feminist,” particularly when applied to legal theory, is best understood as a methodological description.

In the context of Split Decisions, the inquiry into what feminism is raises the question of what queer legal theory is, for Halley argues for a project that takes a break from the former in favor of, it appears, the latter. Because “queer” reflects a positionality vis-à-vis the normative, we cannot know what queer

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2. See, e.g., id. at 8 (“If I’m right that feminism as it is practiced in the United States today is dedicated to thinking in terms of male and female (masculine and feminine, etc.), noticing instances of male power and female subordination, and working on behalf of subordinated female interests, we can convert these aspirational and prescriptive commitments to hypotheses, and then take a break from them and try to see other arrangements of m and f and other kinds of power.”); see also Ian Halley, Queer Theory by Men, 11 DUKE J. GENDER L. & POL’Y 7 (2004) (the author also publishes as Janet Halley) [hereinafter Halley, Queer Theory by Men I]; Janet Halley, Queer Theory by Men, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY (Martha Albertson Fineman, Jack E. Jackson, & Adam P. Romero eds., forthcoming 2007) (manuscript at 1, on file with author) [hereinafter Halley, Queer Theory by Men II].

3. Cf. ANNA MARIE SMITH, LACLAU AND MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY 182 (1998) (“A space for permanent democratic dissent must therefore be built into the radical democratic pluralist imaginary, for it is through contestation and struggle that exclusions can be brought to light and new democratic institutions can be imagined and established.”).

4. Halley seems to want to both work outside of feminism as well as to critique feminism. However, there is a subtle, but important, difference to note: being without feminism or working outside of it suggests an absence of feminism, whereas, on the other hand, critiquing feminism or being against it requires feminism to remain very much present. Certainly Halley can argue for both types of projects since they are not mutually exclusive. However, one wonders if Halley truly seeks a complete suspension of feminism, since, as Part II argues, Halley advocates for arguably feminist methods without predetermined substantive commitments. If that is true, what becomes clear—and what is confirmed by the focus of Split Decisions—is that Halley seeks a specific substantive, rather than a methodological, hiatus from feminism.
theory is in any definitional or substantively finite sense. Rather, I argue "queer," as in "queer legal theory"—similar to the "feminist" of "feminist legal theory"—represents a methodological description. If, then, "feminist" and "queer" represent methodological descriptions, specific projects may be feminist and queer, feminist but not queer, or queer but not feminist, as existing scholarship makes plain enough. However, I do not mean to suggest—as the immediately prior categorization might—that feminism and queer theory are distinct arenas of thought. To the contrary, I argue that Halley's unspecific differentiation of feminist thought from queer thought problematically attempts to disentangle what cannot, and perhaps ought not, be so smoothly distinguished.

Part I of this essay summarizes Halley's arguments. I explore some of Halley's valuable insights and register some important criticisms of her arguments. Part II discusses feminist methodologies and argues the critique Halley seeks is possible without taking a break from feminism. I illustrate this point using Vicki Schultz's recent work on sexual harassment. Part III takes up Halley's declaration that Duncan Kennedy's 1992 article "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination"5 is "the only sophisticated legal analysis of American sexual regulation that [she is] tempted to call queer."6 More specifically, Part III considers two questions: What is queer legal theory? And, is a queer domain necessarily split from feminism truly queer and truly possible? By way of a conclusion, I argue that Halley should leave the take-a-break-from-feminism rhetoric behind. It is distracting from, and unnecessary to, the important points Halley makes, which I emphasize in Part I but do not repeat in the Conclusion. Those are: (1) everything feminist and everything spawned from something feminist should be subject to sustained critique; (2) the power feminism engenders and wields must be checked; (3) the inevitable "costs" that result from feminist projects must be taken into account even though they may not outweigh the benefits; (4) a single theory of sexuality and of power is unattainable and undesirable; and (5) there is value in theoretical, and political, uncertainty, inconsistency, and incommensurability.

I. HALLEY'S ARGUMENTS

Split Decisions is concerned for the tough negotiations a person with Left political commitments makes when the issues one cares about are inconsistent, if not in direct tension. In a non-Halley example, consider access to abortion services: someone who supports the right to choose to abort as well as first amendment speech rights may find those interests irreconcilable when deciding

6. HALLEY, supra note 1, at 151.
whether to permit aggressive protest of abortion providers.\(^7\) It is in the
navigation of these complex negotiations—or “split decisions” as Halley calls
them\(^8\)—that Halley urges us to learn to suspend—not to repudiate or quit—our
“feminist” commitments, if need be, in order to make room for others.\(^9\) In
particular, Halley seeks to make politically and culturally viable interests
respecting sexuality that are, in Halley’s view, diminished, devalued, or
otherwise hurt by certain feminist approaches to, and understandings of,
sexuality.\(^10\)

Thus, while Halley takes direct aim at “feminism,” her general point is
broader in that she reminds us to be critical of all of our assumptions,
conceptions, and aspirations:\(^11\)

Perhaps [Halley’s] ultimate point is that we can’t make decisions about
what to do with legal power in its many forms responsibly without
taking into account as many interests, constituencies, and uncertainties
as we can acknowledge. To wield power responsibly, we need to fess
up to the fact that, in deciding to advocate, negotiate, legislate,
adjudicate, or administer one way or another, we spread both benefits
and harms across social and ideological life.\(^12\)

For example, if an employer accommodates a pregnant worker, it may shift
accommodation costs “possibly to places where they will hurt women; possibly
to places where they will hurt men, maybe only blacks will shoulder them, or
third-world workers; maybe they will go to places where no current
subordination theory can find them.”\(^13\)

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7. *Cf.* Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,
290 F.3d 1058 (9th Cir. 2002) (en banc) (construing the Freedom of Access to Clinics Entrances Act
(FACE), 18 U.S.C. § 248, which creates a right of action against whoever by “threat of force . . .
intentionally . . . intimidates . . . any person because that person is or has been . . . providing
reproductive health services,” so as to comport with the First Amendment).

8. See HALLEY, supra note 1, at 4 (“This book argues that, at least when it comes to sexuality, the
responsible way to engage in a politics that depends on theory and produces it . . . is to decide in the
splits between theories and between the interests they make visible, produce, and narrate.”).

9. Halley repeats throughout the book that she is not looking to “kill [feminism], supersede it,
abandon it; immune, immolate, or bury it”; rather, she “merely [wants to] spend some time outside it
exploring theories of sexuality, inhabiting realities, and imagining political goals that do not fall within
its terms.” Id. at 10.

10. See, e.g., id. at 65 (“I have not found anyone determined to produce a theory or politics of
women’s heterosexual desire for masculinity in men. It’s just missing. Inside feminism I’ve found
affirmations of female femininity, female masculinity, and male femininity . . . but not affirmations of
male masculinity. That, too, is just missing.”); see also id. at 171 (noting with approval Duncan
Kennedy’s recognition that some men eroticize women’s subordination); Janet Halley, *Sexuality
Harassment, in Directions in Sexual Harassment Law* 182 (Catharine A. MacKinnon & Reva B.
Siegel eds., 2004) (arguing certain feminist “victories” in sexual harassment law translate to queer
“losses”).

11. See, e.g., HALLEY, supra note 1, at 282 (“Would it possibly be a good idea for feminists, and
for people involved in related justice-seeking intellectual/activist enterprises, to learn to suspend
feminism—indeed, to suspend antiracism, queer theory, trans theory, any theory—to interrupt it, to
sustain its displacement by inconsistent hypotheses of power, hierarchy, and progressive struggle? I
argue . . . that it may well be.”)

12. Id. at 9.

13. Id. at 287.
Halley has three particular problems with feminism. First, feminism "is persistently a subordination theory set by default to seek the social welfare of women, femininity, and/or female or feminine gender by undoing some part or all of their subordination to men, masculinity, and/or male or masculine gender."\(^\text{14}\) Feminism, for Halley, thus involves, at a minimum, "a distinction between something m and something f; a commitment to be a theory about, and a practice about, the subordination of f to m; and a commitment to work against that subordination on behalf of f."\(^\text{15}\) Second, Halley is troubled by feminism's "deeply held but entirely dispensable view that [it] is an indispensable element, if not the overarching structure, of any adequate theory of sexuality, gender, m/f, and associated matters."\(^\text{16}\) Halley's third problem involves

a series of interconnected assumptions all feminists share with almost all left-of-center theorists of sexuality in the tradition [she] stud[ies]... that one theory is better than many; that integrating alternative theories together is the main goal of our work; that reality must come fully into line with, be engulfed by, theory; that theory will tell us all the crucial things we need to know about moral value and emancipation.\(^\text{17}\)

Halley's conception of feminism is narrow.\(^\text{18}\) Efforts that do not fit her formulation of feminism, by Halley's account (and in the service of her project) part ways with feminism. Many of the projects Halley attempts to characterize as diverging or fully breaking from feminism, however, are self-identified as and arguably are feminist efforts.\(^\text{19}\) True, feminism, for many, is a political project concerned with power and, in particular, the operation and distribution of power with respect to, but not exclusively, gender.\(^\text{20}\) And true, many feminists accordingly examine the significance of gender by revealing and criticizing the values, judgments, and assumptions around and through which gender-based and gender-relevant inequalities are constructed, accomplished,

\begin{itemize}
\item \(^\text{14}\) Id. at 4.
\item \(^\text{15}\) Id. at 4-5; see also id. at 16-22. In turn, Halley adapts the following shorthand for a "feminist" project: "m/f, m>f, and carrying a brief for f." Id. at 5.
\item \(^\text{16}\) Id. at 5.
\item \(^\text{17}\) Id.
\item Somewhat strangely, even as Halley recognizes the diversity of feminist views, such as with respect to sexuality, she insists on defining feminism solely in connection to only certain strands of feminist thought.
\item \(^\text{19}\) For example, Halley describes JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2d ed. 1999) as diverging from feminism on account of its critique of the very idea of "woman." See HALLEY, supra note 1, at 137, 210. However, Butler's work is—to Butler and others—feminist.
\item \(^\text{20}\) E.g., Martha Albertson Fineman, Feminist Legal Theory, 13 AM. U.J. GENDER SOC. POL’Y & L. 13, 13 (2005); id. at 19 ("How can the major feminist insight—that women live gendered lives, lives shaped by experiences within a society whose institutions and ideologies are founded upon and incorporate gendered assumptions—be reconciled with the equality paradigm as it is played out in law as sameness or equality of treatment? By and large, there is no reconciliation."))
\end{itemize}
and maintained. Nonetheless, there is little wholesale agreement about what exactly constitutes feminism.22 On the other hand, and contrary to Halley’s

21. For example, the concept of intersectionality is based on the observation that gender, race, class, and other aspects of experience can interact to form hybrid forms of inequality and of identity. See Kimberlé Crenshaw, Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402 (Toni Morrison ed., 1992) (arguing sexism “intersects” with racism such that the wrongs suffered by women of color are often different in content and form than those that affect men of color and white women) [hereinafter Crenshaw, Whose Story is it Anyway?]; see also Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 391, 422, on file with author) (arguing civil rights proponents—specifically leading military-equality activists in the LGBT community—must acknowledge and give content to the complexity of identity). This recognition complicates and challenges dominant understandings of the operation of power and inequality in society. Law and dominant politics often fail to appreciate the complexities of discrimination. A Latina, for example, may not only face racism and sexism, but also racialized sexism and gendered racism—her experience may be considerably different than those of Latinos, white women, and even black women. Cf. Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, Demarginalizing the Intersection of Race and Sex]; Harris, supra note 26. Scholars concerned for intersectionality are also cautious with analogies—such as homophobia is like racism as exclusion of same-sex couples from marriage is like laws against miscegenation—because, despite being often powerful and effective, analogies tend to obscure the experiences of people who face discrimination along multiple axes of power by emphasizing the parallel rather than the intersectional aspects of identity, discrimination, and inequality. E.g., Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, Mapping the Margins].

22. See generally FEMINISM AND PHILOSOPHY: ESSENTIAL READINGS IN THEORY, REINTERPRETATION, AND APPLICATION (Nancy Tuana & Rosemarie Tong eds., 1995) (collecting a wide range of feminist texts including “liberal feminist,” “Marxist feminist,” “radical feminist,” “psychoanalytic feminist,” “socialist feminist,” “anarcha feminist and ecological feminist,” and “phenomenological feminist” perspectives as well as “perspectives on the intersections of race, class, and gender”). Differences in conceptions of feminism can be subtle as well as striking. For example, compare the following: NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 1, 15-16 (2006) ("[F]eminism stands for the idea that women and men should have equal economic, political, and social rights. Surely this is true, but there are many aspects to the story. . . . All feminist theories share two things—the first an observation, the second an aspiration. First, feminists recognize that the world has been shaped by men, particularly white men, who for this reason possess larger shares of power and privilege. . . . Second, all feminists believe that women and men should have political, social, and economic equality, they disagree about its meaning and on how to achieve it."); Fineman, supra note 20, at 13 ("Feminism is not anchored by any one discipline. It presents a theory of gender and challenges the assertions and assumptions of gender-neutrality and objectivity in received disciplinary knowledge. As a group, feminists are concerned with the implications of historic and contemporary exploitation of women within society, seeking the empowerment of women and the transformation of institutions dominated by men."); Mary Joe Frug, Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law, 140 U. PA. L. REV. 1029, 1033 (1992) (defining feminist theory as “work that seeks to account for the condition of women as well as to illustrate it or oppose it”); Linda Gordon, The Struggle for Reproductive Freedom: Three Stages of Feminism, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 107 n.1 (Zillah R. Eisenstein ed., 1979) ("[Feminism is an analysis of women’s subordination for the purpose of figuring out how to change it."); Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV. C.R.-C.L. L. REV. 1, 11 (1985) ("Feminism is the first theory, the first practice, the first movement, to take seriously the situation of all women from the point of view of all women, both on our situation and on social life as a whole. The discovery has therefore been made that the implicit social content of humanism, as well as the standpoint from which legal method has been designed and injuries have been defined, has not been women’s standpoint. Defining feminism in a way that connects epistemology with power as the politics of women’s point of view, this discovery can be summed up by
suggestion, there is quite broad agreement that sexual-subordination feminism does not singularly constitute feminism. The point, as Martha Fineman clarifies, is that “when we speak of feminism, it is necessary to clearly state that there are many differences within feminism—difference in approach, emphasis, and objectives—that make sweeping generalizations difficult.”

Though Halley chides feminism for attempting to produce one all-encompassing theory of sexuality, feminism does not actually purport to do this. Rather, as the focus of Split Decisions makes clear, Halley’s real problem is with two strands of “sexual-subordination feminism,” not feminism in toto. Specifically, Halley targets the structuralist accounts of sexuality that attend both “power feminism” à la Catherine MacKinnon and “cultural feminism” à la Robin West. Halley detests the anti-sex culture connected to the former and the moralism that pervades the latter. Yet, that power feminism and cultural feminism may each attempt a total theory of sexuality and that they can compete to describe and explain the same set of circumstances, suggests a disconnect, if not incompatibility, that further reflects my point that feminism does not venture to present one theory of sexuality. Moreover, Halley’s criticism of MacKinnon and West reflects what other feminists have long argued is wrong with those feminist endeavors: their questions beg their answers, their theories are totalizing to a fault. Katherine Bartlett, for

looking at the world from this point of view, a whole shadow world of previously invisible silent abuse has been discerned.”); and Catharine A. MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 SIGNS 515, 531-33 (1982) (“Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.”) [hereinafter MacKinnon, Feminism, Marxism, Method and the State].

The difficulty, if not inability, of determining a substantive definition of feminism is further highlighted by divergences in feminist views. See, e.g., Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304 (1995) (examining tensions and differences in feminist thought about women’s agency and women’s oppression and victimization).


24. Halley refers to power feminism and cultural feminism as two important kinds of sexual-subordination feminism. See HALLEY, supra note 1, at 41.


26. See, e.g., Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 873-74 (1990) (chiding MacKinnon and West, among others, for their totalizing views); Judith Butler, Against Proper Objects, in FEMINISM MEETS QUEER THEORY 1, 9-10 (Elizabeth Weed & Naomi Schor eds., 1997) (“Such a rigid determinism [as MacKinnon’s] assimilates any account of sexuality to rigid positions of domination and subordination and assimilates these positions to the social gender of man and woman. But that deterministic account has come under continuous criticism from feminists not only for an untenable account of female sexuality as coerced subordination, but for the totalizing view of heterosexuality as well—one in which all the power relations are reduced to relations of domination—and for the failure to distinguish the presence of coerced domination from pleasurable and wanted dynamics of power.”); Drucilla Cornell, Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State, 100 YALE L.J. 2247, 2264 (1991) (“MacKinnon fails to understand the critical lesson of deconstruction . . . that no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meaning can never be fully protected from slippage and reinterpretation.”);
example, notes that "MacKinnon’s theory is not something to be proved; rather, it presupposes what it claims to prove, and is structured so that no set of facts, logically, could ever disprove it."

Halley’s narrow views of feminism to the side, for anyone interested in the distribution and operation of power in society, Halley’s point about scrutinizing the power that feminism creates and wields is well-taken. With respect to law, the impact of feminism over the past half-century has been relatively profound: the effects of feminist insights and concerns are apparent in form, process, and goals; evident in legal scholarship, decisional law, legislation, and administration. Sexual harassment law, as discussed later in Part II.B, is a prime example.

Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990) ("The result of [MacKinnon’s and West’s] tendency toward gender essentialism... is not only that some voices are silenced in order to privilege others... but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of ‘We the People’—among them, the voices of black women."). But see Catharine A. MacKinnon, Points Against Postmodernism, 75 Chi.-Kent L. Rev. 687, 695 (2000) ("Feminism has... never, to my knowledge, had what is called a ‘monocular’ narrative, at least I haven’t. It is also worth repeating that sexual politics, in feminism, is not an overarching preexisting general theory that is appealed to in order to understand or explain, but a constantly provisional analysis in the process of being made by the social realities that produce[d] it.").


Even scholars known for their non/un/anti-feminist positions, still pay heed to the influence of feminist critique. E.g., Richard A. Posner, Legal Scholarship Today, 115 Harv. L. Rev. 1314, 1317 (2000) ("Already there are signs that [interdisciplinary scholarship] is changing the internal perspective of the academic legal profession by infiltrating doctrinal scholarship and changing the professoriat’s understanding of what constitutes good doctrinal scholarship and good teaching of core law courses: scholarship and teaching that incorporates, to a degree anyway, and with considerable simplification, the most influential of the interdisciplinary approaches, such as economic analysis of law and feminist jurisprudence.").

E.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (holding not violative of the First Amendment an application of Minnesota’s antidiscrimination public accommodation law, which forbid discrimination on the basis of sex, to compel the Jaycees to accept women as regular members because “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms”).


For example, the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry established in 1994 the Office of Women’s Health "to promote and improve the health, safety, and quality of life for women." Centers for Disease Control and Prevention, CDC/ATSDR Office of Women’s Health, About Us, http://www.cdc.gov/women/about.htm (last visited Mar. 5, 2007). Though it is not readily apparent what the precise impetus was for the creation of the Office of Women’s Health, it is, I think, safe to assume feminist influence given that feminists had long pressed for attention to health concerns particular to women. It might also be noted that a comparable “Office of Men’s Health” does not exist, though the CDC does devote webspace to men’s health concerns. Compare id. with Centers for Disease Control and Prevention, Men’s Health, http://www.cdc.gov/men (last visited Mar. 5, 2007).

See infra Part II.B (discussing Vicki Schultz’s work on sex harassment law).
Halley's argument goes further than merely checking the "formal" influence feminism engenders and exerts. Feminist theory, for many of us, fundamentally affects how we understand life, society, intimacy, and ourselves. Feminist ideas not only describe and critique, they also shape reality, perspectives on history, and aspirations for the future. That is, subject formation—who we are and what we know—is influenced by feminism. Halley therefore makes an interesting point about trying to see what is there when feminism is not. Though I am skeptical about how to implement Halley's point as a practical matter, it might still be worth considering what, if anything, is missed in our feminist commitments and commitment to feminism. What, if anything, are we blinded, desensitized, or made unmindful by and to? Indeed, "presupposing that [feminist] theory fully describes the world—refusing to Take a Break to see whether something else might be going on as well or instead—commits feminism to being unable to see around corners of its own construction." Though Halley may overstate the situation, it is a useful reminder, particularly as feminist ideas and concerns become, over time, further institutionalized, assimilated, entrenched, and co-opted. For there may be cause for great concern when mainstream and conservative hands redirect feminist ideas away from their original objectives, dilute those ideas to effective irrelevance, or deploy them against their authors. And certainly we must be attentive to abuses of power committed by feminists or in the name of feminism.

Halley's arguments against the normative demand to harmonize and reconcile theories of sexuality and of power are also noteworthy. I support Halley's effort to

[s]ustain[] competing theories for describing the same social arrangements [in order to] expand our sense of the stakes at stake when we make our choices about what to see as a social good and a social


34. Halley seeks both to suspend as well as to critique feminism. There is an important difference, however, between those efforts: feminism's suspension suggests an absence of feminism, while critiquing feminism requires feminism to remain very much present. See supra note 4.

35. While certainly we can do things to try to get outside of feminism—such as engage with non-feminist texts and ask non-feminists to examine our work—my skepticism goes to implementing Halley's suggestion that we totally turn off feminist influence in our understandings of the workings of the world. See JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION (1997) (considering ways in which psychic life is a product and producer of the social distribution and operation of power).

36. See, e.g., Brenda Cossman, Sex, Gender, and Feminism After, 12 COLUM. J. GENDER & L. 617, 618 (2003) ("Janet's methodology is a productive one. It has allowed her to produce counter narratives of the operation of power on the terrain of sexuality, narratives that were obscured from within feminism's male/female binary.").

37. HALLEY, supra note 1, at 321.
bad, how to understand their distribution, what to think of as normatively bad, and what to aspire to.\textsuperscript{38}

Halley continues:

I hope to elicit your desire to think that no one theory, no one political engagement, is nearly as valuable as the invitation to critique that is issued by the simultaneous incommensurate presence of many theories (past, present, and still to be made). We decide immense questions of social distribution and social welfare—substantive, strategic, and tactical—when we commit to one of these theories over another. I am promoting a left-of-center political consciousness that makes such commitment perpetually contingent on redcision at the level of theory. I am urging us to indulge—precisely because we love justice but don’t know what it is—in the hedonics of critique.\textsuperscript{39}

Because we never know what exactly the future holds and because we are perpetually on truths’ tail, it would prove impossible to devise a complete or perfect theory of sexuality or of power. We can, I suspect, always think up situations and circumstances that in one way or another challenge, disjoint, undermine, reverse, or operate without reference to any purportedly perfect theory. Moreover, to compose a complete or perfect theory is objectionable if we are interested to discover and achieve greater practices of freedom and democracy in addition to incidences of well-being and self-determination.\textsuperscript{40}

Sexual desire, for example, is simply too variable and too unpredictable.\textsuperscript{41}

Manifold perspectives and competing, and complementary, ideas—all always provisional and subject to disproof—yield knowledge, innovation, and criticism.

Though Halley is certainly on to something, her insights, as the next Part explains, echo what many feminists have long maintained with respect to methodology.

\section*{II. FEMINIST METHODS}

In this Part, I explain why, and then how, Halley’s critique is possible without taking a break from feminism. First, I discuss feminist methodology to show that Halley’s arguments reflect, and do not contradict, the methods many

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 8.
\item \textit{Id.} at 9.
\item \textit{Cf.} \textit{SMITH}, supra note 3, at 182 (“We can only begin to imagine subjects who have yet to be invented, let alone their rights and responsibilities in communities that will only faintly resemble our own…. We have no reason to assume that we are peculiarly endowed with an ability to make all contemporary and future antagonisms transparent.”).
\item See, e.g., Allegra Long, \textit{Soap and Water}, in \textbf{THE BEST AMERICAN EROTICA 1997}, at 227, 229 (Susie Bright ed., 1997) (“You’d think that, at least, would be a turnoff, but nothing is predictable about sexual arousal.”).
\end{enumerate}
\end{footnotesize}
Feminists engage. Second, I review Vicki Schultz’s scholarship on workplace sex harassment to illustrate the broader point.

A. Feminist Methodology, or, Is Halley Saying Anything New?

For Halley, reality, not theory, drives the train because theory sometimes—quite possibly always—fails to adequately, let alone perfectly, describe, explore, and explain what is really going on: “My desire,” Halley tells us, “is a posture, an attitude, a practice, of being in the problem, not being in the theory.”42 Thus, while theory is “the effort to form hypotheses about what is happening in the world and about the various social goods and bads that are being distributed among people,”43 the task of theorists is not to understand reality in a way that comports with our theories, rather it is to theorize in relation to our changing realities.

Though this point is a welcome reminder, it is just that. Feminists have long pressed and practiced methodologically that which Halley hopes to elicit. Notwithstanding some feminist projects,44 many feminists acknowledge and embrace the idea that no one theory could ever provide the exact, the perfect, explanation; these feminists eschew totalizing “grand theory” and instead opt for “middle-range theory” grounded in everyday experience.45 Thus feminist methodology tends to involve making theory more concrete, by, for example, emphasizing lived experience, context, situation, and specifics, not abstractions.46 Angela Harris, for example, notes that feminist methodology, in which ideas are tentative, relational, and unstable, helps to avoid dangerous essentialisms.47 Feminist methods tend to complicate rather than to simplify or to generalize. Feminist methods are typically critical, at times purely descriptive, but almost always insist upon constant curiosity, if not downright suspicion, even of those things understood to be feminist. Indeed, as previously noted, many of the political and theoretical divergences considered in Split Decisions are identifiably and arguably feminist, or at least the product

42. HALLEY, supra note 1, at 7.
43. Id. at 6-7.
44. E.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); see Bartlett, supra note 27, at 46-53 (arguing MacKinnon’s method and substantive theory merge); Butler, supra note 26, at 9-10 (criticizing MacKinnon’s totalizing claims); Cornell, supra note 26, at 2264 (same); Harris, supra note 26, at 585 (same). But see MacKinnon, supra note 26, at 695-97 (responding partially to these claims).
46. E.g., PHELAN, supra note 45 (examining the notion of specificity and arguing its importance to lesbian identity politics); see Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 637-38 (1990).
47. See Harris, supra note 26, at 586.
of feminist methods grilling feminist theories. Some feminists' critical stances are achieved by taking the point of view of women—"asking the woman question"—in order to challenge male-dominated processes and institutions. Feminist methods can accordingly involve bringing women's experiences to the foreground. The employment of such methods recognizes the validity and importance of women's experiences and grounds feminist theory and research. Yet, other feminists take aim at the very idea that gender ought to be a salient concept for social organization and goods distribution, questioning, for example, the reification of gender that can occur through a monolithic focus on the subject of "woman."

As Martha Fineman notes in At the Boundaries of Law—the very first volume of feminist legal theory—feminist theory is evolutionary in nature: "Feminist methodology at its best represents a contribution to a series of ongoing debates and discussions which take as a given that ‘truth’ changes over time as circumstances change and that gains and losses, along with wisdom recorded, are not immutable but part of an evolving story." In this regard, as Katherine Bartlett argues, feminist method is feminist theory.

To be engaged, with others, in a critical, transformative process of seeking further partial knowledges from one's admittedly limited habitat [is a central goal of feminism]. This goal is the grounding of feminism, a grounding that combines the search for further

48. See, e.g., supra note 19 and accompanying text.
49. Bartlett, supra note 26, at 837 ("[A]sking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.").
50. E.g., Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 2-3 (1988) (arguing that modern legal theory is masculine and that the legal concept of “human being” contrasts with the construct of “woman” in modern feminist theory).
51. E.g., Mari J. Matsuda, Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice, 16 N.M. L. REV. 613, 618 (1986) ("Who makes breakfast, who gets a paycheck, who gets whistled at in the street—all the experiences of daily life are a part of the distribution of wealth and power in society.").
52. See Christine A. Littleton, Feminist Jurisprudence: The Difference Method Makes, 41 STAN. L. REV. 751, 764 (1989) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)) ("Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us.").
54. E.g., BUTLER, supra note 19.
55. Fineman, supra note 45, at xv; see also Bartlett, supra note 26, at 887-88; Fineman, supra note 20, at 23.
56. Bartlett, supra note 26, at 887. Bartlett argues for a method of “positionality” that recognizes the contingency of “truth” but allows the feminist reformer to embrace a truth long enough to explore experience and advance reform. See id. at 880-87. Bartlett’s positionality sounds in what has been described as “feminist standpoint epistemologies.” See, e.g., Sandra Harding, Rethinking Standpoint Epistemology: What is “Strong Objectivity?,” in FEMINIST EPISTEMOLOGIES 49 (Linda Alcoff & Elizabeth Potter eds., 1993) (discussing and defending feminist standpoint epistemologies).
understandings and sustained criticism toward those understandings. Feminist doing is, in this sense, feminist knowing. And vice versa.57

Back ing up a moment, it should be noted that “[f]eminist method signifies the manner in which feminist scholars attempt to answer the epistemological question ‘how do we know what we know?’”58 There is not a set list of “feminist methods,” and what may not appear to be “method” often is; indeed, feminist methodology can be found in narrative and storytelling, art, music, literature, poetry, and psychological discourses, for example. Levit and Verchick identify “the fundamentals of feminist methods [to] generally include (1) unmasking patriarchy, (2) contextual reasoning, and (3)
consciousness-raising." Though Levit and Verchick may be descriptively accurate, we ought to hesitate on "unmasking patriarchy," for it would seem to presuppose the subordination of women to men, or females to males, as Halley contends is definitional to feminism. Thus, without denying that many feminist projects are expressly concerned with patriarchal and, more generally, gendered inequalities and subordination, we might recast "unmasking patriarchy" as "asking the gender question." Cast as a question, the method is released from any substantive and prescriptive commitments attendant to a characterization in terms of patriarchy. For example, "asking the gender question" does not entail the outcome-oriented positions of "ending women's subordination" or "increasing women's power" that would tend to attend "unmasking patriarchy" as method. If, however, invoking gender necessarily requires acknowledging that the very concept of gender is predicated on gendered inequality, "asking the gender question" may too operate substantively. Yet, I do not understand gender in such a manner. Gender is not the property of any one theory, let alone subordination theory specifically. That is, the concept of gender is not properly studied through any one framework or discipline or with any particular vision in mind. So conceived, "asking the gender question" does not necessarily presuppose any substantive agenda. Indeed, "asking the gender question" could end up advocating that women give up power to men in some realms, such as caretaking. It should also be noted that "asking the gender question," unlike "asking the woman question," does not reify the totalizing category of "woman"—dutifully scrutinized by critical race, trans, postmodern, and poststructuralist theorists, among others.

With respect to feminist legal theory, many feminists understand law as a manifestation and a process of power in society: law has developed over time

65. LEVIT & VERCHICK, supra note 22, at 45 (citing Bartlett, supra note 26, at 836-37).
66. I hesitate as well at offering even a tentative list of methods because doing so may serve to corral and contain. See Gary Lawson, Feminist Legal Theories, 18 HARV. J.L. & PUB. POL'Y 325, 325 (1995) (discussing the dangers of defining certain ideas or sets of ideas as "feminist legal theory").
67. This is certainly not to say that unmasking patriarchy is not something feminists do. Nor am I suggesting that "asking the gender question" is the most appropriate or best method to always engage. See, e.g., Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79, 112 (1989) (arguing that adopting gender as the category of analysis in specific instances may obscure women's position).
68. See Bartlett, supra note 27, at 39-40 ("Feminist method looks for gender bias, based on the hypothesis that gender bias exists.")
69. Moreover, as Butler states:
Where and when a feminist analysis accepts the cultural presumption that sexuality is a function of relations between women and men, feminism actively recapitulates heterosexist hegemony. But when and where feminism refuses to derive gender from sex or from sexuality, feminism appears to be part of the very critical practice that contests the heterosexual matrix, pursuing the specific social organization of each of these relations as well as their capacity for social transformation.

Butler, supra note 26, at 12 (emphasis omitted).
70. See supra note 49 and accompanying text.
to reflect dominant ideologies and historical arrangements, but also is an important source of power and site of democratic contestation. From this perspective, "the task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the existing totalizing nature of grand legal theory." Thus the term "feminist," when used to modify "legal scholarship," emerges as a methodological description. Indeed, "rather than develop any substantive theory of sex inequality or how to remedy it, feminist legal methodology focuses on the tools of how to practice feminist legal thinking and the ways of documenting the experiences of gender." Feminist legal work tends not only to thoroughly evaluate outcomes but also to reveal and to scrutinize preceding and underlying processes, standards, rules, values, and ideas. Feminist legal theory often challenges assumptions and ideologies that drive and justify biased values, standards, norms, structures, and aspirations amid which we live and against which results are measured and appraised. In this regard, many feminist legal theorists—often critical of, if not expressly oppositional to, the status quo—offer and advocate alternatives to existing orders. At their cores, many feminists are radically nonassimilationist on the understanding that mere inclusion into or accommodation by dominant culture typically present measly challenges to entrenched—widely and wildly pervasive—ideologies that stimulate and

72. Fineman, supra note 45, at xiii.
73. Bartlett, supra note 27, at 34.
74. LEVIT & VERCHICK, supra note 22, at 45.
75. See, e.g., MacKinnon, Feminism, Marxism, Method and the State, supra note 22, at 539-40.
77. E.g., Lani Guinier, Of Gentlemen and Role Models, in CRITICAL RACE FEMINISM: A READER 106 (Adrien Katherine Wing ed., 2d ed. 2003) (discussing alienation and isolation begotten by “gentlemen orthodoxies” in law school) [hereinafter CRITICAL RACE FEMINISM]; Kathleen Neal Cleaver, Racism, Civil Rights, and Feminism, in CRITICAL RACE FEMINISM, supra, at 48 (challenging racism and the lack of an adequate race critique among feminist activists); see Fineman, supra note 45, at xiii (“Feminist legal theory can demonstrate that what is is not neutral. What is is as ‘biased’ as that which challenges it, and what is is certainly no more ‘correct’ than that which challenges it, and there can be no refuge in the status quo.”).
78. E.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (offering not only a searing critique of the current concentration on the sexual connection between a husband and wife as the core organizing relationship of family law, but also an alternative vision to aspire towards that elevates the caretaker-dependent relationship to the center of society’s concern for family); The Berkeley-Oakland Women’s Union Statement, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM, supra note 22, at 355 (outlining a socialist feminist mobilization and vision); The Combahee River Collective, A Black Feminist Statement, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM, supra note 22, at 362 (outlining a black feminist mobilization and vision).
sustain gendered inequalities, privileges, and disadvantages. These feminists are also skeptical about the chances that legal reform will be at the forefront of social change.

B. Halley’s Project Is Possible Without Taking a Break from Feminism: An Example

Vicki Schultz’s recent work on employment discrimination in the form of hostile environment sex harassment illustrates that Halley’s critical stance, and the critique of feminist projects she seeks, can be achieved without taking a break from feminism. In two complementary articles, Schultz presents a feminist critique of a feminist initiative—sexual harassment law—that, in her view, has developed problematically such that it narrows antidiscrimination efforts, buttresses employers’ authority over employees and workplaces, and contributes to an anti-sex, anti-intimacy culture. For Schultz, sex harassment law, and sex discrimination law in general, need not generate these untoward byproducts in order to deter discrimination, promote gender equality, and improve possibilities for self-realization.

In “Reconceptualizing Sexual Harassment,” Schultz demonstrates that judicial conceptions of sex harassment in the form of hostile work environment were largely framed in sexual (as in sexuality) terms. To be actionable under, let alone violative of, Title VII, many judges all but required allegedly harassing conduct to be of a sexual nature. Furthermore, while judges tended to presume sexual conduct was per se discriminatory because of sex, non-sexual allegations, if they were even counted, were not granted the same presumption. The focus on and privileging of sexual conduct, Schultz argues, is unwarranted and unwise: unwarranted because Title VII’s proscription of sex
discrimination ("because of sex") says nothing about sexuality, unwise because it reflects a very cramped view of sex harassment. For example, in narrowly looking for sexual conduct, judges discredited or disregarded non-sexual hostile work environment claims involving, say, putting rats in a woman's locker, dangling her high above the floor in a stairwell, or a deliberate campaign by men to sabotage the work product of the few women in their department. Though not obviously sexual in content or form, such harassing conduct is nonetheless likely to occur "because of sex" and therefore, Schultz argues, ought to be prohibited under Title VII to the same extent as expressly sexual conduct.

In The Sanitized Workplace, Schultz demonstrates that, in addition to being underinclusive, the sexual model of sex harassment is also overbroad because it encourages companies to go overboard in regulating and disciplining sexual expression that neither meets the legal definition of sex harassment nor jeopardizes gender equality in the workplace. In this regard, Schultz draws our attention to the ways sexual harassment law, particularly as implemented by management, aligns corporate power behind a historically punitive stance toward sexuality, while at the same time averting legal, organizational, and activist attention away from broader patterns of sex-segregation, in which, significantly, harassment and discrimination both boom and are meted out.

Schultz's critique also emphasizes the ways in which the focus on sexuality can be uniquely detrimental to sexual and racial minorities. For example:

84. Title VII provides that it is illegal for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .


85. See Schultz, Reconceptualizing Sexual Harassment, supra note 81, at 1738-55.

86. See id. at 1706-10 (detailing King v. Bd. of Regents of the Univ. of Wisconsin Sys., 898 F.2d 533 (7th Cir. 1990)); id. at 1717-20 (citing cases ruling against plaintiffs because their harassment claims did not involve readily recognizable sexual advances or sexually motivated conduct); Schultz, Understanding Sexual Harassment Law in Action, supra note 81, at 11-18.

87. See Schultz, Reconceptualizing Sexual Harassment, supra note 81, at 1689. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal citations, quotation marks, and punctuation omitted); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1988) (establishing that a violation of Title VII may be shown by proving discrimination based on sex created by a hostile or abusive work environment).

88. See Schultz, The Sanitized Workplace I, supra note 81, at 2087-136; see also Schultz, Reconceptualizing Sexual Harassment, supra note 81, at 1789-96.

89. See Schultz, The Sanitized Workplace I, supra note 81, at 2136-58; see also Schultz, Understanding Sexual Harassment Law in Action, supra note 81, at 18-42.

90. See Schultz, The Sanitized Workplace I, supra note 81, at 2158-63; see also Halley, supra note 10 (arguing the current sexual-harassment regime facilitates "sexuality harassment" in which sexual minorities are accused of sexual harassment by homophobes). For example, whereas a straight man might not care much if his avowedly straight co-worker slaps his butt, he might care a lot, and view it as
The fixation on sexual advances has led to a two-tiered system of justice in which people perceived to be homosexuals are frequently penalized as sexual harassers, but rarely, if ever, protected as harasses. Within organizations, the drive to suppress sexuality has also created disproportionate problems for homosexuals and other sexual minorities, whose sexual expression—and even mere presence—may be perceived as offensive or threatening in a world governed by the ethic of asexuality.\textsuperscript{91}

Schultz also worries that the campaign to exterminate sexuality in the workplace—enhanced and legitimated by sexual harassment law—undermines other human interests:

In the name of productivity and order, [the logic of sanitization] grants employers the power to control not only sexuality, but all the other emotional drives and dramas of human life: reproduction and care, birth and death, accident and aging, disease and disability, friendship and solidarity, and even love and romantic partnership.\textsuperscript{92}

In place of the sexual model, Schultz articulates a vision\textsuperscript{93} of sex harassment law that equalizes the risk of legal liability for sexual and non-sexual harassment and focuses on whether the alleged harassment undermined a plaintiff's competence.\textsuperscript{94} Schultz also advocates tying the risk of legal liability to the level of segregation and inequality in the relevant job setting, such that employers with highly sex-segregated workplaces would face a greater risk of liability than employers that achieve full integration.\textsuperscript{95} By

\textsuperscript{91} Schultz, \textit{The Sanitized Workplace I}, supra note 81, at 2159-63 (discussing Patti A. Giuffre & Christine L. Williams, \textit{Boundary Lines: Labeling Sexual Harassment in Restaurants}, \textit{8 Gender & Soc'y} 378, 380-87 (1994)).

\textsuperscript{92} Schultz, \textit{The Sanitized Workplace I}, supra note 81, at 2171. Though the above quotation does not expressly say so, Schultz is well aware that homosexuals and other sexual minorities may be perceived as offensive or threatening not only because of an ethic of asexuality, but also, and perhaps more so, because of an ethic of heteronormativity and compulsory heterosexuality. See id. at 2170-72.

\textsuperscript{93} Contrary to some readings of Schultz, e.g., Tucker Culbertson & Jack Jackson, \textit{Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique, in \textit{Strange Bedfellows}: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 325, 342-54, on file with author), Schultz's prescriptive vision is not limited to a juridical intervention. Rather, Schultz's legal restructuring is situated within a broader, multi-dimensional political movement aimed at dismantling the many facets of gendered discrimination and inequality. See Schultz, \textit{The Sanitized Workplace I}, supra note 81, at 2163-93.

\textsuperscript{94} See Schultz, \textit{Reconceptualizing Sexual Harassment}, supra note 81, at 1755-96. For a critique of Schultz's competence-focused scheme, see Kathryn Abrams, \textit{The New Jurisprudence of Sexual Harassment}, \textit{83 Cornell L. Rev.} 1169, 1215-17 (agreeing generally with Schultz's critique of the sexual model of sex harassment but arguing that Schultz's focus on competence runs the risk of "replacing one unitary theory of sexual harassment with another... [and] encouraging courts to turn away from the regulation of sexualized harassment rather than pluralizing their analysis of the various motives and modes of sexual harassment").

\textsuperscript{95} Specifically, under Schultz's scheme, if the job setting remains significantly sex-segregated or otherwise unequal, the employer would face a more stringent set of rules that would make it easier than it is now for plaintiffs to prove harassment occurred because of sex. But if an employer succeeds in
apportioning risk of liability with respect to relevant job segregation, Schultz aims to stimulate integration. This would benefit women far more than the current scheme because sex discrimination generally, and harassment particularly, flourish in highly segregated workplaces and tend to die out in fully-integrated settings where women have the power in numbers to denounce harassing conduct, destruct stereotypes, and help establish an agreeable local workplace culture that may or may not involve a degree of sexual current.⁹⁶

Some critics have mistakenly lodged complaints about what they perceive as anti-feminist arguments in Schultz’s scholarship, particularly in light of Schultz’s indictment of the sexual model of harassment, which was invented by some early feminist scholars and activists.⁹⁷ Robin West, for example, accuses Schultz of disbelieving complainants and trivializing their complaints.⁹⁸ Though West misreads Schultz on this issue,⁹⁹ Schultz does—without a doubt—sharply criticize the sexual model of sex harassment as well as its intellectual foundation. Schultz disagrees with theorists, such as MacKinnon, whose “reductionist view . . . isolate[s] sexuality from other social relations and treat[s] it as the primary mechanism of women’s inequality”—the view from which the sexual model was hatched and is justified.¹⁰⁰ Assumedly, Halley approves of, if not applauds, this dimension of Schultz’s critique.¹⁰¹ Schultz, like Halley, expressly criticizes totalizing feminist theories of sexuality, as well as the view that sexuality alone generates gender inequality. Indeed, Schultz proceeds on the assumption that non-sexual harms ought to be treated as potentially injurious as sexual harms. In addition, Schultz, again like Halley, insists upon an antiessentialist and contextual understanding of sexuality,¹⁰² as well as adopts a relatively sex-positive outlook. For example, Schultz’s vision of work and workplaces leaves room for the possibility of non-discriminatory sexualized work environments and sexualized relations between co-workers. Though there are numerous aspects of Schultz’s scholarship that arguably make it just the sort of thing Halley is looking for, I will mention one more. Perhaps Schultz’s most remarkable insight is the identification and criticism of a form of sexuality regulation that heretofore has gone unnoticed. Schultz

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⁹⁶ Id. at 2172-84.
⁹⁷ E.g., Robin L. West, Law’s Nobility, 17 YALE J.L. & FEMINISM 385 (2005) (critiquing Schultz (and Halley) and defending, but modifying, MacKinnon).
⁹⁸ See id. at 428.
⁹⁹ See Schultz, Understanding Sexual Harassment Law in Action, supra note 81, at 41-42 (responding to West’s claims).
¹⁰⁰ Id. at 9.
¹⁰¹ See Halley, supra note 10, at 198 (discussing Schultz’s scholarship with approval).
demonstrates that workplace sexuality has become, in part because of sexual harassment law, a site of serious forms of discipline and regulation, including self-discipline and self-regulation, the observation of which, in the spirit of Foucault, tends to attract the intellectual attention of, and to alarm, theorists such as Halley.

Make no mistake: Schultz’s work is feminist, substantively, prescriptively, and methodologically. Schultz’s criticism of the sexual model and its feminist roots does not, and cannot, make Schultz un- or anti-feminist. To the contrary, Schultz is particularly concerned for the rights and well-being of women and sexual and racial minorities as well as about the operation of gender, sexuality, class, and race. Furthermore, Schultz’s work, like that which Halley hopes to elicit, is driven by reams of empirical evidence and concrete examples; her observations and theories are the result of meticulous and extensive reviews of decisional law, workplace policies, sociological data, and other contextualized evidence.

Ultimately, Schultz’s feminist critique of a feminist initiative makes clear that Halley’s critical project is possible without taking a break from feminism. Indeed, as this Part on the whole suggests, Halley effectively advocates feminist methods, even as she ostensibly seeks their suspension. In other words, while Halley advocates that we take a break from feminism, Halley means for us to take a break from certain substantive feminist ideas and commitments, not from feminist methods, which do not carry the substantive baggage Halley proposes we both criticize and work beyond.

III. QUEER AND FEMINIST DIVISIONS AND DOMAINS

*Split Decisions* appears to argue for a queer domain that is both critical of and beyond feminism. In the context of *Split Decisions*, then, inquiry into what constitutes feminist thought begs the question: what is queer (legal) theory? I argue, in Section A below, “queer,” in “queer legal theory”—like “feminist,” in “feminist legal theory”—is best understood as a methodological description; therefore, we cannot know what queer legal theory is in any definite sense. Halley’s work begs a further question: Is an unspecific queer project that splits from feminism truly queer and truly possible? The answer,


104. Halley views herself as “a sex-positive postmodernist, only rarely and intermittently feminist, a skeptic about identity politics, with a strong attraction to ‘queer’ revelations of the strangeness and unknowability of social and sexual life, and a deep distrust of slave-moralistic pretensions to identity-political ‘powerlessness.’” HALLEY, supra note 1, at 15.

105. To be beyond feminism is different than to be against feminism. In the former, feminism is apparently absent, while in the latter feminism remains very much present. See supra note 4.
presented in Section B, is no. Specific queer projects can break from feminism, but a general or foundational differentiation between queer theory and feminism is neither possible nor desirable.

A. What Is Queer Legal Theory?

The concept of “queer legal theory” is something of a paradox given the tension between “queer” and “legal.” “Queer,” in its contemporary reclaimed form,\(^\text{106}\) tends to be associated with prideful opposition to, and transgression of, dominant norms, especially those related to sexuality, gender, intimacy, and kinship.\(^\text{107}\) In support of these politics, much “queer theory” scrutinizes and deconstructs dominant discourses (literary, scientific, political, etc.), subjecting to withering critique the ideologies, ideas, and ideals that influence, enhance, drive, and justify those discourses.\(^\text{108}\) A queer theoretical move might involve highlighting, but also furthering, the incoherence of sexed and gendered constructions, such as the “body” or the polarization and compartmentalization of men from women, male from female, masculinity from femininity, or heterosexual from homosexual.\(^\text{109}\) Queer politics and queer theory are usually


\(^{107}\) See DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995) (“As the very work implies, “queer” does not name some natural kind or refer to some determinate object; it acquires its meaning from its oppositional relational to the norm. Queer is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers. It is an identity without an essence. ‘Queer,’ then, demarcates not a positivity but a positionality vis-à-vis the normative—a positionality that is not restricted to lesbians and gay men but is in fact available to anyone who is or who feels marginalized . . . .”); PHELAN, supra note 45, at 151-54 (discussing queer politics); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 33-40 (1999) (discussing queer ethics and criticizing the sense that dignity and sex are in tension); Michael Warner, Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY, at vii, xxv-xxviii (Michael Warner ed., 1993) (discussing queer politics) [hereinafter FEAR OF A QUEER PLANET].

\(^{108}\) E.g., JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (1993) (scrutinizing, among other texts, writings by Jacques Lacan, Willa Cather, and Nella Larsen, and Jennie Livingston’s film Paris is Burning to critically analyze the social construct and status of sex) [hereinafter BUTLER, BODIES THAT MATTER]; JUDITH BUTLER, Quandaries of the Incest Taboo, in UNDOING GENDER 152 (2004) (arguing for a rethinking of dominant psychoanalytic approaches to incest and kinship); Eve Kosofsky Sedgwick, How to Bring Your Kids Up Gay, in FEAR OF A QUEER PLANET, supra note 107, at 69, 79 (“What the books I have been discussing, and the institutions to which they are attached, demonstrate is that the wish for the dignified treatment of already gay people is necessarily destined to turn into wither trivializing apologetics or, much worse, a silkily camouflaged complicity in oppression—in the absence of a strong, explicit, erotically invested affirmation of some people’s felt desire or need that there be gay people in the immediate world.”).

\(^{109}\) E.g., BUTLER, BODIES THAT MATTER, supra note 108, at 27, 30 (problematizing the concept of “body”); WILCHINS, supra note 53, at 141-57 (same); see also Joan Nestle, Genders on My Mind, Introduction to GENDERVERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 3, 9 (Joan Nestle et al. eds., 2002) (noting writers such as Judith Halberstam and Jay Prosser, among others, are creating “new gender histories: histories that will include the lives of men who spent many years living as lesbian feminists; women who started their biological lives as men and now live as lesbians; histories that will
suspicious of identity politics, which tend to categorize and simplify human organization and our engagements with power. In this regard, queer politics and queer theory often seek a volatility or precariousness of sorts. Certainly other political movements and theoretical projects, including critical race and feminist theory, have deployed similar strategies; yet queer theory provided, and provides, a fresh articulation in a particular historical moment, coinciding with and supporting the empowerment and safety of those who do not conform to dominant—such as hetero-patriarchal—conceptions of natural or proper sexual desire, gender performance, and anatomical form.

Meanwhile, law and the rule of law, especially as formal matters, articulate dominant societal values, even if sloppily and inconsistently. Law tends to approximate, implement, and reinforce dominant societal norms, rules, ideologies, and aspirations. How “law,” then, could ever be “queer” is something of a mystery. Consider the queer “dilemma” over the criminalization, decriminalization, and legalization of sodomy. On the one hand, we can expect queer concerns about the imposition of prudish sensibilities, the disrespect—and potential punishment—of personal choices, include the voices of people who live as both sexes when the medical world allows them; and histories of mourning for the gendered selves not allowed to survive.


111. With respect to any poststructuralism that may underpin queer suspicion of identity politics, some caution is in order: “[The] very refusal to anchor experience in identifications ends up, ironically, denying differences by either submerging them in an undifferentiated oppositional mass or by blocking the development of individual and social differences through the disciplining compulsory imperative to remain undifferentiated.” Steven Siedman, Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes, in FEAR OF A QUEER PLANET, supra note 107, at 105, 133.

112. E.g., Wilchins, supra note 53, at 86; Paisley Currah, The Transgender Rights Imaginary, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 427, 446-47, on file with author) (arguing for “ensuring the many, often conflicting, narratives of transgender identity that now appear in social and legal arenas continue to circulate and even proliferate”); Stephen Whittle, Foreword to THE TRANSGENDER STUDIES READER, supra note 110, at xi, xiv (“In trans theory there is an inherent recognition that the trans position is problematic.”).

113. See PAUL KAHN, THE CULTURAL STUDY OF LAW 8 (1999) (“Law that appears to make no contact with popular will, either past or present, is as problematic as law without reason. The ambition of law’s rule in a democratic polity is to reach a coincidence of will—popular consent—and reason. Because this ambition is never fully or finally achieved, at every moment law stands in need of reform.”); see also id. at 1 (stating the rule of law is a culture that has “its founding myths, its necessary beliefs, and its reason that are internal to its own norms”).

114. See HALLEY, supra note 1, at 173-74 (noting that law is not a monolithic “consolidated entity imposing its norms unilaterally on a social world made up simply of obedient and disobedient subjects”).

115. For an excellent critique of lurking conservative ideologies in queer approaches to intimacy, see Martha T. McCluskey, How Queer Theory Makes Liberalism Sexy: Right-Wing Economic Politics and the Queer Challenge to Feminism, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 182, on file with author).
and the lack of privacy that accompany illegal sodomy. Yet at the same time, there is likely to be queer sensitivity to the fact that decriminalization and legalization—and linked regulation—of sodomy may unleash thoroughly undesirable consequences. A queer theorist may worry that decriminalizing and, especially, legalizing sodomy could function to discipline sodomites and others into existences significantly less free than those previously experienced. A queer theorist might be concerned, for instance, that along with decriminalization, the sense of oneself as a sexual outlaw, as committing a naughty endeavor, as involved in something wonderfully illicit or deliciously scandalous, as transgressing purported community tenets—and the lush imaginative life that feeds on such feelings and locations—would abate, if not dissipate completely. For it may be sad indeed if in obtaining the right to sodomy, that which was queer sunk into the banality of normalcy, even if over the long term without immediate detection.

Of course, queer legal theory may not necessarily (though perhaps it could, even if awkwardly) be interested in queering law. More than a decade ago, Frank Valdés called for the initiation of "Queer [sic] legal scholarship as a theoretical and political enterprise devoted to the education and reformation of legal discourse, culture, and doctrine regarding matters of (special) concern to sexual minorities." Valdés continued: "Queer legal theory . . . is the name employed . . . to signify a self-conscious, self-defined, and self-sustaining body of liberational legal scholarship that voices and pursues the interests of sexual minorities as its particular contribution toward the end of sex/gender subordination." Valdés later argued that "Queer cultural activism and interdisciplinary theorizing . . . can provide the point of departure for articulating and practicing Queer legal theory as a form of multidimensionalized antisubordination praxis in sexual orientation sociolegal contexts." With regard to queer legal methods, Valdés outlined eight non-exhaustive methods for queer legal theorists to employ: 1) fighting conflationary stereotypes; 2) bridging social science knowledge and legal knowledge; 3) using narratives; 4) developing constructionalist sensibilities; 5) conceptualizing "sexual orientation;" 6) defending desire as such; 7)
transcending "privacy;" and 8) promoting positionality, relationality, and (inter)connectivity.121

While Valdés seems particularly concerned with a specific queer legal project that takes up the interests of sexual minorities and the issue of sexual orientation,122 I hesitate to define queer legal theory in such a manner. Queer, as noted above, positions itself in opposition to, or at least at odds with, that which is normal, dominant, or hegemonic, but there is nothing to which "queer" necessarily refers.123 Accordingly, we cannot definitively know what the project of queer legal theory is, even as the bulk of queer legal theories are critical of the place and role of sexuality within law and legal institutions. Queer theory, by design and intention, resists being pinned down and delineated. The second you (think you) get your finger on it, a queer theoretical move registers an exception or shifts away to posture contrary to what you think you just identified. For example, it has been suggested to me that queer theory, as a definitional and categorical matter, deals with sexuality and, specifically, sexual desire. Yet while that may be an accurate accounting of many queer theoretical texts, to define the entire queer project in such a manner discounts and works to exclude consideration of, among other things, asexuality. Indeed, many asexuals do not view the world, their relationships, or themselves in, or even in relation to, sexual terms, let alone those of sexual desire. If, then, an asexual is queer to a definition about sexuality and sexual desire, that definition does not capture all that is queer and therefore fails.

Notwithstanding Valdés's effort—a project I wholeheartedly support—the term "queer" (as it is used in the general concept of "queer legal theory") is best understood as a methodological description, rather than, as Valdés seems to suggest, in a more explicitly substantive and prescriptive sense. Borrowing

121. See Valdés, supra note 106, at 364-72. "Fighting Conflationary Stereotypes" involves eradicating "social and sexual gender stereotypes that facilitate the manufacture and use of socio-sexual identity to devalue and subordinate sexual minorities and women." Id. at 365. "Bridging Social Science Knowledge & Legal Knowledge" involves "import[ing] and employ[ing] the knowledge assembled by the social sciences . . . regarding sexual orientation and sexual minorities." Id. "Using Narratives" means "air[ing] in legal venues the stories of sexual minority lives caught in the legal system for one reason or another." Id. at 366. "Developing Constructionist Sensibilities" involves avoiding the dangers of essentialism in order to recognize queer diversity even as queer commonalities are pursued. Id. at 366-67. "Conceptualizing 'Sexual Orientation'" involves "join[ing] in the unfinished task of conceptualizing 'sexual orientation' as a functional legal and social construct." Id. at 367. "Defending Desire As Such" involves clarifying that "sexual and affectional intimacy, driven by erotic desires, is integral to humanity" while recognizing that the concept of desire is problematic, particularly as legally significant experience. Id. at 368. "Transcending 'Privacy'" means "promoting the realization that sexuality is not just about 'privacy' but about the ability to function in various social, economic, and political settings on equal terms." Id. at 370. Finally, "Promoting Positionality, Relationality & (Inter)Connectivity" involves building "social and legal empowerment and reconstruction out of intersectionality, multiplicity, and coalition." Id. at 371.

122. But cf. Valdés, supra note 118, at 1296-97 ("[I]t is urgent, and both substantively and strategically imperative, for critical legal scholars who choose to write from a lesbian, gay, or bisexual subject position to interrogate the racialized and ethnicized dynamics of sexual orientation identities and issues as part of an evolving anti-subordination discourse.").

123. See HALPERIN, supra note 107, at 62.
from David Halperin, queer method refers "not [to] a positivity but [to] a positionality vis-à-vis the normative ...." Thus the method of queer legal theory involves an oppositional or non-normative inquiry into law and legal things. To the extent, then, some of the queer legal methods articulated by Valdés read or act as substance, I resist them too. While specific queer projects certainly can and should do as Valdés suggests, queer legal methods ought not be defined in connection with substantive agendas and commitments. This is an important point, for, as Judith Butler writes in different context:

It [is] necessary to affirm the contingency of the term ["queer"]: to let it be vanquished by those who are excluded by the term but who justifiably expect representation by it, to let it take on meanings that cannot now be anticipated by a younger generation whose political vocabulary may well carry a very different set of investments. ... That it can become such a discursive site whose uses are not fully constrained in advance ought to be safeguarded not only for the purposes of continuing to democratize queer politics, but also to expose, affirm, and rework the specific historicity of the term.125

Halley appears to agree with me about what makes legal scholarship queer.126 Halley identifies Duncan Kennedy's 1992 article "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination"127 as "the only"128 sophisticated legal analysis of American sexual regulation that [she is] tempted to call queer."129 And I do not think Halley wrote that lightly,130 nor should she.131 According to Halley, Kennedy's article is “distinctly queer in its

124. Id. (emphasis removed).
125. BUTLER, BODIES THAT MATTER, supra note 108, at 230; see also PHELAN, supra note 45, at 154 ("The hegemonic inscription of the queer as the sexual minority will then amount to an exclusionary colonization of those who refuse their membership.")
126. It should be noted that Split Decisions does not include the definition of queer theory Halley attempted to deduce as Ian Halley in "Queer Theory by Men." Compare Halley, Queer Theory by Men I, supra note 2, at 50-55 (offering a definition of "queer theory"), with HALLEY, supra note 1 (offering no such definition), and Halley, Queer Theory by Men II, supra note 2 (same).
127. KENNEDY, supra note 5.
128. As discussed infra pp. 252-55, I do not agree with Halley that Kennedy's article is the only sophisticated queer legal analysis of sexual regulation in the United States.
129. HALLEY, supra note 1, at 151.
130. In noting that Kennedy's article is the only sophisticated legal analysis of American sexual regulation that she is tempted to call queer, Halley quipped a "sorry, folks!" which suggests she knew the sentence would cause a stir. See id.
analysis of sexuality, power, and knowledge” because it considers sexual abuse and sexual desire, not from the position of women (as some feminists do) but from the perspective of a “straight white male middle-class radical... [who does not] think of [himself] as a feminist.” It is these moves—to consider an issue theretofore the domain of feminists from the perspective of a straight white male middle-class radical who does not consider himself a feminist and to “take into account the erotic interests of a person so situated”—that makes Kennedy’s article queer for Halley.

If I am correct that “queer,” as applied to “legal theory,” is best understood as a methodological description, then queer legal theory and feminist legal theory, in many instances, will very rightly collapse. To be sure, many stellar pieces of feminist legal scholarship are also queer texts. Martha Fineman’s work on the primacy of the sexual connection to dominant and legal conceptions of family is one noteworthy example. Fineman theorizes the powerful concept of the “sexual family” in order to emphasize that, despite vast transformations in family form and function over the past half-century, “our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and woman.”

For Fineman, the sexual family—despite aspirations of egalitarian gender roles—remains one of society’s most gendered institutions and is thus an engine for the realization and perpetuation of patriarchy. Though not emphasized by Fineman, her


132. HALLEY, supra note 1, at 171 (quoting KENNEDY, supra note 5, at 126, 129).
133. HALLEY, supra note 1, at 171.
134. See also id. (viewing Kennedy’s article “as queer... because of its embrace of male heterosexual erotic interests”).

135. Anna Marie Smith’s recent work on sexual regulation in welfare policy is an example of excellent scholarship that is feminist and queer. See ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION (forthcoming 2007) (arguing one of welfare reform’s primary disciplinary and regulatory targets is sexuality and, in particular, the sexuality of poor single mothers); Anna Marie Smith, From Paupersfare to Marriage Promotion: Sexual Regulation and Welfare Reform, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (examining sexual regulation dimensions of child support and marriage promotion policy) (manuscript at 544, on file with author); Anna Marie Smith, The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview, 8 Mich. J. Gender & L. 121 (2002) (demonstrating that welfare policy at the state level is a prominent site of sexual regulation).

136. FINEMAN, supra note 78, at 143.
137. The state, Fineman demonstrates, plays a leading role in fostering the sexual family’s premier, vital status. See id. at 145-49. The aim of family law, policy, and subsidy is assumed to be the accommodation, protection, and privileging of this singular family form; the sexual family is considered
scholarship shows the sexual family is also key to the operation and continuation of heteronormativity and homophobia as well as compulsory monogamy. In this regard, Fineman’s work is both feminist and of concern to sexual and gender minorities. Fineman’s scholarship is also queer for several different reasons, including that her critique presents a formidable challenge to not only dominant conceptions of family, but also many feminist and gay and lesbian projects that take for granted the primacy of the sexual connection, even as they recommend it behave (e.g., egalitarian gender roles) and/or look

crucial to the formation and execution of social policy and society itself. See id. There are, for instance, entire bodies of legal doctrines and rules that benefit traditional families, conferring special treatment on them or protecting the interactions of their members. Civil marriage is a source of respect, legitimacy, and subsidization on an array of levels. Federally, more than a thousand benefits are linked to marital status. In 1997, the Government Accounting Office reported that federal law provided at least 1,049 benefits appurtenant to marriage. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO/OGC-97-16, at 1-2 (1997), available at http://www.gao.gov/archive/1997/og97016.pdf. That figure was increased to 1,138 in 2004. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO-04-353R, at 1 (2004), available at http://www.gao.gov/new.items/d04353r.pdf. Among those are tax benefits, access to a spouse’s healthcare benefits, automatic immigration status for a non-U.S. citizen spouse, the right to take up to twelve weeks unpaid leave from work to care for an ill spouse or parent of a spouse, as well as spousal access to Social Security, military, and veteran benefits. See id. At the state level, the package of rights and benefits attached to marriage is similarly expansive, albeit state-specific, affecting such things as tax benefits, inheritance preference at intestate, standing to sue for wrongful death, exceptions from aiding-and-abetting liability, evidentiary privileges, transferability of real estate and other valuable licenses, and the right to make decisions on a partner’s behalf in medical emergencies. See, e.g., Brief of Plaintiffs-Appellees at 3-9, Conaway v. Deane & Polyack, No. 44 (Md. Oct. 19, 2006) (noting plaintiffs, same-sex couples, and their children are denied hundreds of important statutory, regulatory, common law, and other legal protections that are afforded to married couples and their children under Maryland law) (citing EQUALITY MARYLAND, MARRIAGE INEQUALITY IN THE STATE OF MARYLAND (2006), available at http://www.equalitymaryland.org/marriage/marriage_inequality_in_maryland.pdf (last visited Mar. 12, 2007)), available at http://www.aclu.org/images/asset_upload_file156_27154.pdf (last visited Mar. 12, 2007).

The state is not, of course, the only institution and the law is not the only discipline that views the sexual family as natural and ideal. FINEMAN, supra note 78, at 150-55. The large majority of cultural, academic, medical, and media discourses position the sexual affiliation between a man and woman as the natural, ideal familial nucleus, and a good number of these discourses draw on an even more specific family image—that which is middle class, suburban, white, and married with children. Even what appear to be satire or parody of the traditional family—television’s incredibly dysfunctional household à la Roseanne comes to mind—are typically premised on the traditional family as preface, body, and conclusion.

138. For an examination of the role of the sexual family in heteronormative and homophobic ideologies and cultural and legal biases, see Adam P. Romero, The Rule of Family, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 624, on file with author).

139. Fineman’s work did to some degree focus on monogamy in that she critiqued the ways in which dominant images of proper family behavior make men’s presence definitional. See, e.g., FINEMAN, supra note 78, at 147-48 (arguing single mothers are viewed by the law and by society as irregular and incomplete because “[they] represent the rejection of the primacy of the sexual connection as the core organizing familial relationship”). For an examination of compulsory monogamy, see Elizabeth F. Emens, Compulsory Monogamy and Polyamorous Existence, in STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY, supra note 2 (manuscript at 493, on file with author).

140. For instance, the same-sex marriage movement offers, perhaps because of strategic necessity, as its emblematic and only family that which has at its core a same-sex relationship.
Fineman’s ambition for family and family law is also both feminist and queer. Fineman would cast aside the current concentration on marriage and, more generally, the sexual connection as the core familial relationship. Instead, Fineman would completely reorient society’s concern for the family so as to revolve around the caretaker-dependent relationship, regardless of who is the caretaker and who is the dependent. Fineman’s vision is queer in a particularly interesting way because it does not involve, let alone require—as queer projects often do—an affirmation of sexuality; indeed, Fineman urges an utter refiguring of our understanding of intimacy—drained of sexuality and focused on care and dependency.

That many texts are both feminist and queer does not mean that every queer text must be feminist or that every feminist text must be queer. To the contrary, a particular text can be all kinds of things. Indeed, as Halley argues, Kennedy’s article “Sexy Dressing” is an example of queer scholarship that is not feminist. A second example of this type is Rick Rambuss’s essay “Indicatively Male,” which deliberately imagines male-only spaces and explains that gay men, in some instances, may have important interests not valued or devalued in feminist literature. With respect to feminist but not queer scholarship, it might be argued that all feminist legal texts once were, in a sense, queer—for example, if one believed all law was inherently male or masculine. However, as noted above, feminist influence has, over the past half-century, deeply impacted various legal fields, the fact of which negates the notion that today feminist legal texts are always already queer. That is, feminist texts may be queer, but they are not as such necessarily.

In sum, legal theory that is queer is legal scholarship that is oppositional or at odds with that which is normal or dominant. The term “queer,” then, refers to relational scholarship that postures itself somehow against, or at variance with, the normative. Though much queer legal scholarship concerns itself with sexual and gendered minorities, the general term “queer,” as I have suggested, is not prefigured to refer to any issue or set of issues in particular. Furthermore, it is

141. *E.g.*, WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) (arguing extending marriage rights to same-sex couples will benefit the institution of marriage, because gays and lesbians will create more equal relationships, as well as benefit gays and lesbians, who will be encouraged to build enduring relationships); Carlos A. Ball, *Not Your Father’s Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective*, in *STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY*, supra note 2 (manuscript at 451, on file with author) (arguing, on a feminist and relational conception of autonomy, the state is obliged to recognize and support gay and lesbian relationships and families).

142. See FINEMAN, supra note 78, at 226-36.

143. See Richard Rambuss, *Indicatively Male: Stanley Kubrick’s War Films and Male Military Cultures*, in *STRANGE BEDFELLOWS?: AN UNCOMFORTABLE CONVERSATION IN FEMINIST AND QUEER LEGAL THEORY*, supra note 2 (manuscript at 292, 318, on file with author) (“As for feminism, it never developed much of a lexicon (apart from terms of censure) for describing and analyzing what may be perceived and experienced as ‘indicatively male.’”).
important to recognize, that what may be queer in relation to certain things, may not be queer in relation to others. That which is normative or dominant is of course a matter of context and perspective. For example, while feminist work on sexual abuse and desire may be queer in relation to what was once the status quo, this work is the norm to which Kennedy’s article is queer. The slipperiness—as well as the positionality and relationality—of the idea of “queer” thus emerges, and is affirmed.

B. Is a Queer Break from Feminism Possible?

Though Halley and I appear to be in agreement with respect to what the “queer” in “queer legal theory” suggests—a methodological description—we part ways as to whether a general—that is, unspecific—queer project is a coherent alternative to feminism. While Halley seems to advocate a general or foundational queer break from feminism, queer theory and feminism cannot, and should not, generally or foundationalally be disentangled. 144

Halley’s call evokes concerns raised in Judith Butler’s essay “Against Proper Objects,” which argues against a generalized disaggregation of lesbian/gay/queer work from feminism. 145 Specifically, Butler critiques the claim that “[l]esbian/gay studies does for sex and sexuality approximately what women’s studies does for gender,” 146 which in effect differentiates a discrete lesbian/gay/queer project beyond the scope and authority of women’s studies and feminism. 147 Butler argues against the assignment of sex and sexuality to the domain of lesbian/gay and queer studies, on the one hand, and the assignment of gender to women’s studies and feminism, on the other. 148 Not only would such “proper objects” of study obfuscate the range of difference and degree of complexity attendant to human organization, operations, and engagements with power, 149 such consignments would function to dislocate

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144. See Culbertson & Jackson, supra note 93 (manuscript at 327-33, on file with author). Though I do not join Culbertson and Jackson’s general read of Halley and Schultz—in fact I believe their assessment of these scholars is partly mistaken—I am indebted to their essay for its explication of similar arguments as those presented in this section.

145. Butler’s essay slips at times between gay and lesbian studies and queer theory (perhaps as result of the analogy—sex and sexuality is to gay and lesbian studies, as gender is to women’s studies—she critiques). Accordingly, I use those concepts somewhat interchangeably in this paragraph, though they are not nearly ever so.

146. See Butler, supra note 26; see also Biddy Martin, Sexuality Without Genders and Other Queer Utopias, 24 DIACRITICS 104 (1993).

147. Butler, supra note 26, at 4 (quoting Henry Abelove, Michèle Aina Barale & David Halperin, Introduction to THE LESBIAN AND GAY STUDIES READER, at xv (Henry Abelove et al. eds., 1993)).

148. See Butler, supra note 26, at 4, 7.

149. See id. at 4-9.

150. See, e.g., David Valentine, “I Went to Bed With My Own Kind”: The Erasure of Desire in the Name of Identity, in THE TRANSGENDER STUDIES READER, supra note 110, at 407, 417 (“Looking at what people say about what they desire, who they desire, and how they act upon those desires can highlight for us the political nature of desire and the ways such yearnings are shaped by the identity categories through which they are forced to speak if they wish to get a hearing. Such a focus can enable
feminist theory from queer theory in an unproductive, if not counterproductive, manner—unproductive, for example, because of course queers have a whole lot to say about gender, as do feminists about sexuality; counterproductive, for example, because disaffiliating queer theory from feminism might license and reconstitute heteronormativity and heterosexism in feminism, on the one hand, and, misogyny and sexism in queer theory, on the other. Rather, Butler argues for antiessentialist, usually deconstructive, understandings of gender and sexuality, drawing particular attention to the erasure in the proposed paradigm of other discourses on identity and power, such as those involving class, race, and nation. Butler’s critique thus resonates with the insights of critical race theorists, among others.

Again, it is not my argument that every queer text must be feminist or that every feminist text must be queer. Rather, while specific queer projects can break from feminism—conduct themselves outside of feminism, for example—Halley seems to be mobilizing an unspecific, general, and foundational queer domain that functions both beyond and against feminism. As a methodology, then, Halley’s call to take a break from feminism is problematic like the claim criticized by Butler. It risks reproducing the troubling assignment of “proper” objects of study (gender here, sexuality there); obscures significant currents of feminist and queer thought; and falsely assumes possible an identifiable yet general distinction between feminist theory and queer theory. Moreover, Halley’s formulation—in committing the projects to distinct spheres—is fiercely undercut by the slipperiness of the concept of queer. Queer—as a general, unspecific, and definitional matter—is too slick, too itinerant, too relational to simply take a break from feminism. (And feminist thought is too unstable, too contextual, and too evolutionary to be simply taken a break from.) For example, it might be said that certain feminist conceptions of sexuality are queer vis-à-vis those forms and flavors of sexuality that Halley hopes to

us to look more closely at the seemingly neutral categories of ‘gender’ and ‘sexuality,’ and complicate the relationship between them. And, most usefully, it requires us to not simply assume that desire is self evidently explained by the categories ‘gender’ and ‘sexuality’ in using them to talk about the complexity of erotic lives.”)

152. Id. at 23. For example, Butler notes that

[1] If sexuality is conceived as liberated from gender, then the sexuality that is “liberated” from feminism will be one which suspends the reference to masculine and feminine, reinforcing the refusal to mark that difference, which is the conventional way in which the masculine has achieved the status of the “sex” which is one. Such a “liberation” dovetails with mainstream conservatism and with male dominance in its many and various forms . . . .

Id.

153. See id.
154. Id. at 24.
155. E.g., Evelyn Hammonds, Black (W)holes and the Geometry of Black Female Sexuality, in FEMINISM MEETS QUEER THEORY, supra note 26, at 136; Carbado, supra note 21; Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 21; Crenshaw, Mapping the Margins, supra note 21; Crenshaw, Whose Story is it Anyway?, supra note 21; Harris, supra note 26; Valdés, supra note 110; Valdés, supra note 106; Valdés, supra note 118.
resuscitate, advance, imagine, and experience. In other words, if Halley’s queer domain is conceived, for the sake of argument, to be a BDSM\textsuperscript{156} den, it is the MacKinnonites, not necessarily the Bersani’s,\textsuperscript{157} who are queer in relation to the BDSM erotics achieved, enjoyed, and, most significantly, dominant in that environment. Yet, to be sure, BDSM erotics are queer with respect to notions of sane sexuality that prevail, at least rhetorically, in mainstream channels.

The complexity and contingency of societal and personal operation and organization as well as the distribution and use of power in its many forms suggests that rather than articulating a queer domain that is necessarily beyond or against feminism, we ought to generate always sensitive, contextualized, and incomplete accounts of difference, of gender, of sexuality, of power. Because I see this vision as Halley’s actually desire, I urge her to abandon the unspecific call to take a break from feminism.

\textbf{CONCLUSION}

That Janet Halley’s recent scholarship,\textsuperscript{158} culminating in \textit{Split Decisions}, has rubbed quite a few people the wrong way, is largely the result of Halley’s unabashedly blunt call to take a break from feminism.\textsuperscript{159} This frankness, though effectively provocative, is distracting from—and unnecessary to—the important arguments I believe Halley to actually be making about power, politics, theory, sexuality, and gender.\textsuperscript{160} What is more, Halley’s apparent queer break from feminism suffers from several fatal flaws. First, the definition of feminism that Halley offers is incredibly narrow: all feminism is collapsed into dominance feminism and cultural feminism, and then Catherine MacKinnon is allowed to dictate the former and Robin West the latter. Second, because the methodologies long engaged by many feminists do not necessarily entail the substantive commitments of which Halley is critical, the critique Halley seeks

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\textsuperscript{156} “BDSM” includes bondage and discipline, sadism and masochism, and domination and submission. \textit{See generally SADOMASOCHISM: POWERFUL PLEASURES} (Peggy J. Kleinplatz & Charles Moser eds., 2006).

\textsuperscript{157} For Halley, Leo Bersani’s essay “Is the Rectum a Grave?” is canonical queer theory. \textit{See HALLEY, supra note 1, at 150, 151-67} (discussing Leo Bersani, \textit{Is the Rectum a Grace?}, in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 197 (Douglas Crimp ed., 1988)).

\textsuperscript{158} \textit{E.g.}, Halley, \textit{Queer Theory by Men I, supra note 2}; Halley, \textit{supra} note 10.

\textsuperscript{159} For example, at a recent Feminism and Legal Theory Project workshop on relations and tensions among feminist and queer legal theories, several presenters and audience members railed repeatedly against Halley’s suggestion about taking a break from feminism. \textit{See DVD: An Uncomfortable Conversation: Feminist and Queer Legal Theory—Convergences and Departures} (Feminism and Legal Theory Project 2005) (on file with the Emory University School of Law Library).

\textsuperscript{160} Specifically, Halley’s important insights include: (1) everything “feminist” and everything spawned from something “feminist” should be subject to sustained critique; (2) the power feminism engenders and wields must be checked; (3) the inevitable “costs” that result from feminist projects must be taken into account even though they may not outweigh the benefits; (4) a single theory of sexuality is unattainable and undesirable; and (5) there is value in theoretical, and political, uncertainty, inconsistency, and incommensurability. \textit{See supra Part I and Introduction}. 
is possible without taking a break from feminism. Indeed, feminist methods invite and instantiate the rigor and critique Halley advocates. Third, the idea of a general queer domain, beyond but also critical of feminism, not only fails to account for a great deal of feminist and queer thought, it also incorrectly assumes there is a fixed, stable body of thought called feminism from which to take a break. In reality, feminism is too unsettled for the possibility of its general suspension to be realizable. And because the concept of queer is relational, a premeditated queer domain that is always already outside of or opposed to that which is feminist is problematic as a general, foundational, or unspecific matter. However, as I have stressed, specific texts can and do countenance a variety of characteristics, such as being feminist and queer, and queer yet not feminist. In making these points, I argued that the terms “feminist” and “queer,” when used to modify “legal scholarship” and “legal theory,” represent methodological descriptions that do not carry substantive commitments. Some feminist methods include “asking the gender question,” consciousness-raising, and contextualized reasoning. Queer methodology reflects a contrary positionality vis-à-vis the normative or dominant. If “feminist” and “queer” are best understood as descriptions of method, then we cannot know definitively what feminist legal theory and queer legal theory, as such, substantively are or do.

While writing this essay, I have struggled over whether the focus on method is, in a sense, politically disempowering or strategically misplaced. Is it, for instance, dilutive of feminist and queer political mobilizations to suggest that we cannot conclusively define and delineate feminism or queer theory? Even if it is to particular political and theoretical interests, the focus on method serves an important safeguarding and democratizing role. Leaving discussion and debate over feminist and queer assumptions, conceptions, ambitions, and aspirations perpetually unlocked and unfinished, the focus on method makes for and produces a more dynamic, mobile, transformative, responsive, informed, complex, and humble feminist and queer politics. In a wonderful, and wonderfully honest, line of Split Decisions, Halley affirms that, with respect to what she is trying to say and do, “it’s impossible to get this right.” Indeed, all ideas, all ideals, this essay are necessarily imperfect. Life is too multifaceted, too vibrant, too local for our means of communication—and possibly even conceptualization—to ever perfectly capture what is really going on and what really should be, perhaps especially on the frontier. There is, for better or worse, always an exception.

161. See supra note 4 and accompanying text.
162. HALLEY, supra note 1, at 15.
Splitting the Difference: A Reaction to Janet Halley’s *Split Decisions: How and Why to Take a Break from Feminism*

Pamela D. Bridgewater†

INTRODUCTION

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† Professor of Law, American University. I would like to thank my colleagues Fernanda Nicola and Jennifer Chuang. Also, thank you to the members of the Metro D.C. Feminist Legal Theory Reading Group and our gracious host, Jana Singer. Lama Abu-Odeh, Michele Alexandre, and Adam Romero shared their invaluable insight on the text and the review. The staff members of the Yale Journal of Law and Feminism, especially Sara Jeruss, are amazing. My research assistant Jeff Patterson gets a gold star and my deep appreciation for getting me the lyrics of Nas’s “Hip Hop is Dead” (in the “clean” and “dirty” versions) on a moment’s notice. Martha Fineman, JoAnn Wypijewski, Dennis Williams, and Kweku Toure (fine feminists all) do more than they know to make what I do possible. Thank you T.P. for “trickerations.”

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Every woman writing in these years has had to swim in that feminist wave. No matter what she thinks of it, even if she bravely swims against it, she has been supported by it—the buoyancy, the noise, the saltiness.¹

INTRODUCTION

Adam Romero has made my task so much easier with his thoughtful comments on Janet Halley’s *Split Decisions: How and Why to Take a Break from Feminism.*² His review allows me to offer more of a reaction than a review. When taken together, our pieces should encourage readers to engage *Split Decisions* with equal parts affection and salt. For me, both ingredients are necessary to recognize that Halley’s observations—that life, law, theory, and politics are complex, and that we should embrace the complexity, revel in it, look forward to it, pursue it, and savor it—warrant affection because they arise from an appreciation of the growth and progress that can (and often do) result from working through complexities. Much like Adam’s “what’s new about this?” my saltiness comes from having a “but we knew this already, right?” reaction frequently during the course of reading *Split Decisions.*

My reaction begins with a brief description of the project Halley envisions for her intervention. I then assess the two aspects of Halley’s genealogy of feminism, feminist theory, and feminist legal theory that elicited the most visceral reaction for me: her taking a break tests, and the gaps in her assessment of how her intervention differs from feminism’s approach to complexities. In Part II, I address what is for me the primary source of frustration with Halley’s effort—the failure to acknowledge the body of resistance projects into which *Split Decisions* fits. Whether or not she agrees with the prior interventions, Halley’s project suffers from her lack of recognition that she is joining an ongoing conversation. Finally, I encourage Halley to continue to offer her important and novel contribution with vulnerability and bravery, especially should she decide to expand her innovative critique of expressions of power and powerlessness among mainstream and outsider feminists.

In *Split Decisions,* Halley sets forth the how and why of her proposed intervention: taking a break from feminism. Although her fundamental critiques are applicable and useful when considering nearly every other theoretical and political social change movement, Halley takes on feminism exclusively and challenges its impulse to smooth away, harmonize, reconcile, or subsume conflicts (or splits) and mask (or deny) its unchecked power.

I have overwhelming affection for Halley’s project, which is clearly born of careful observation and thoughtfulness. There are times, however, when I am

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¹. GRACE PALEY, Two Ears, Three Lucks, in THE COLLECTED STORIES ix, xi (1994).
². JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).
underwhelmed by the why. For example, she does not fully explain why the characteristics she challenges are particularly dangerous in the hands of feminists. Finally, because of Halley’s failure to consider preexisting challenges or attempts to resist and reform feminism, I find the how deeply flawed.

Now is the perfect time for a musical interlude:

*Everybody sound the same, commercialize the game...*

*From “Beat Street” to commercials on Mickey D’s*¹³

This riff is taken from *Hip Hop is Dead*, the title song from the album dropped by Nas (a.k.a. Nasir Jones) last fall.⁴ In it, Nas critiques what he sees as the ills plaguing the genre today.⁵ Not surprisingly, Nas is a hip hop artist and the cut itself is hip hop. He uses hip hop to critique (perhaps even trash) hip hop. Despite this provocation, hip hop lovers and haters alike rushed to buy this cut. Even Nas’s main rival, 50 Cent, has sought to cash in on the windfall by using *Hip Hop is Dead* as an intro to his new album. *Hip Hop is Dead* was wildly popular. It broke many records and simultaneously occupied top spots on three different Billboard charts.⁶

Yes, *Hip Hop is Dead* bangs and Nas rarely disappoints, but my sense is that the title has played a significant role in boosting his sales and attention. I attribute the high volume sales of this hip hop commentary on hip hop to the fact that people wanted to know whether hip hop was, in fact, dead (despite their recent purchase evidencing the contrary), or whether hip hop was just dead for Nas because he was getting out of the game, à la Jay-Z. Regardless of the precise reasons, *Hip Hop Is Dead* created buzz. What inquisitive minds (mine included) found out was that Nas is not describing or calling for the end of hip hop. He is offering a threat of sorts. A premonition, perhaps. To be sure, he wants to make hip hop better and saw critique from the inside as a viable way to urge producers and consumers to work to bring about that progress.

Halley, probably unknowingly, takes a page from Nas’s playbook in *Split Decisions*. She provides a provocative title that is irresistible to lovers and haters of feminism alike. Like Nas, Halley created buzz around the opportunity to find out what a leading scholar on feminism has to say about the past, present, and future of feminism—even if she is suggesting that we need to take a break from it. Unlike Nas, Halley even owns up to the irony (although near the end of the book) and challenges of writing about taking a break from

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¹. NAS, *HIP HOP IS DEAD* (Def Jam Recordings 2006).
². Id.
³. Id.
⁴. The charts were the Billboard Hot 100, Top R&B/Hip Hop Songs, and Hot Rap Tracks. See Billboard Artist Chart History, Nas, http://www.billboard.com (search “Music Search” by Artist for “Nas”; click on “Nas”; then click “Artist Chart History”) (last visited Apr. 12, 2007).
feminism by writing about taking a break from feminism. Halley also gives readers much more than the title suggests in that her list of targets indicates that we need a break not only from feminism but from feminist theory and feminist legal theory as well.

Halley is smart, sassy, and self-confident. Her prose is stylish and at times mirrors Nas’s expertly executed syncopation—lulling listeners into head nodding agreement (even if we don’t agree). Halley deserves commendation for her willingness and ability to be vulnerable, honest, and transparent. Such openness and candor either goes unnoticed or is mocked. By bringing herself to the text, she establishes herself as a much needed voice in legal scholarship. And for the sake of solidarity, positive reinforcement, and goodwill, I will follow her lead and disclose the following: I, a card-carrying, toaster-earning lesbian, have also wished that I could click my heels and become a gay man. Really. My wish is something about which my ex-“wife” and my current “husband” have celebrated and commiserated. This disclosure serves another purpose: It allows me to offer myself as living, though unremarkable, proof of the complexities of sexuality and evidence of the ongoing contemplation of how and whether feminism might assist us in navigating the wonderfully complicated matters of sex and identity performance.

I. HALLEY’S INTERVENTION: ARGUMENT, THEORY, GENEALOGY, AND TESTS

A. Argument

Halley’s argument is clear: Feminism is everywhere and it is powerful. She believes that this powerful feminism does not realize (or denies) its power and, as such, misses the ways in which feminist power hurts men, women, and the left. Interestingly, Halley does not establish why feminism is any different from other counter-majoritarian theoretical or political movements that also face the complexities of law, life, and theory. By presenting the feminism problem in isolation, Halley creates a blank slate for herself and her project. Certainly I can appreciate the value in presenting a new problem and the solution all in one project. The problem, however, is not new and presenting it as such unnecessarily impedes the reader’s ability to locate Halley’s project and assess the voracity of Halley’s argument in relation to other projects with similar aims.

In addition to Halley’s narrow representation of the field of others who share her identification of the problem and aspects of her argument, she does not sufficiently establish that there is anyone who disagrees with her on the

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7. HALLEY, supra note 2, at 310.
8. Id. at 13.

inability of any one theory to address complexities. In the ten pages and one footnote devoted to her argument, Halley does not substantiate her claim by identifying one theorist or group who fails to recognize and appreciate the "splits." For example, when she mentions the "range of political and theoretical incursions, all decidedly left of center and all simultaneously adding to and competing with feminism,"9 she does not describe the incursions (on whom or what), nor does she offer specifics as to how they have been competing with feminism. Of course, there have been miserable failures in dealing with the splits. There have also been successes. Halley either trusts her readers to trust her or she has profoundly miscalculated the importance of solid examples of the failures that center her argument and justify her intervention.

B. Theory

With such a provocative title and unambiguous argument, it is clear that Halley intends to seize the mic and offer a theory on the state and fate of feminism in support of her argument that we need to take a break from feminism.10 According to Halley, when faced with issues related to sexual politics, all current constructions of "left-of-center" U.S. feminism further a male versus female anti-subordination project on behalf of women.11 There are three essential components to her theory: the central subjects (men and women), the central premise (men subordinate women) and the central argument (the subordination of women by men should be eradicated). In other words (or symbols), a feminism is not a feminism unless it includes "m/f, m>f and carrying the brief for f."12 Halley contends that, in addition to being ill-equipped to speak to the complexities of life and theory, this rigid formulation always fails to deal with its own impulse to reinstate itself and therefore is unable to check its own power.

Halley also charges that feminism lacks the ability to see the nuances that might be present in any situation related to sex1 (biological sex), gender (everything else that distinguishes men from women), sex2 (the erotic), sexual orientation (the subject of our erotic sex taken at any particular moment, to the extent it can be ascertained), or sexuality ("some arrangement of most of foregoing terms").13 Halley admits to engaging in "definitional violence" in reducing these concepts to their bare essentials.14 In a final note on the

9. HALLEY, supra note 2, at 11.
10. Id. at 20, 25-26.
11. She describes this in shorthand used throughout the book as "m/f, m>f and carrying the brief for f." HALLEY, supra note 2, at 17-18.
12. Id.
13. Id. at 24.
14. Id. at 309.
“taxonomic location” of her project, Halley explicitly and joyfully informs us that she plans to talk about sex. I, for one, am glad.

C. Genealogy

Part II of Split Decisions constitutes Halley’s genealogical laboratory. In it she cuts, constructs, braids, and unbraids her story of feminism. Halley not only tells the theoretical story she knows, she tells the story in a way that best facilitates her analysis and premise. This is not surprising. In fact this is what lawyers are expected to do. We craft good stories in a way that favors a particular client or case theory. I welcomed Halley’s construction and selections in mapping “the single protracted debate among feminist, gay-positive, postmodernizing, and ‘queer’ theories of sexualities.” However, Halley continues to underestimate the utility of placing her theory in the context of a larger story of feminism fatigue. As I discuss in greater detail later, she uses the Combahee River Collective’s 1977 statement as the sole example of her convergence theory, while neglecting to point out that the Collective was born out of splits that could not be smoothed over or reconciled with m/f, m>f, and carrying the brief for f. This genealogical misstep is replayed throughout Split Decisions. Halley does this to the detriment of her argument in that even if she ultimately disagrees with their conclusions, she could have built from the momentum of previous expressions of frustration with feminism in order to help the reader more easily accept that which she recognizes will be difficult to swallow.

D. Tests

In two rereadings of cases suffering from the impulses toward feminist resolutions, Halley tests her theory of taking a break or even putting feminism down in order to figure out alternative ways of dealing with the complexities of sex, gender, and sexuality. First, she rereads Oncale v. Sundowner, a case alleging same-sex sexual harassment. In her rereading, Halley rightly shows that sexual transactions can have many possible interpretations, and that

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15. Id. at 22.
16. Id. at 22-23 (“This book—it’s about sex.”).
17. This is one of my favorite descriptions for deconstructive, post-structuralist theoretical projects. See Margaret Montoya, Mascaras, Trenzas, y Grenas: Unmasking the Self While Un/Brading Latina Stories and Legal Discourse, 17 HARV. WOMEN’S L.J. 185 (1994) (describing the “masks, braids and uncombed messy hair” of learning to speak stories of marginalization and subordination and power within traditional legal discourse).
18. HALLEY, supra note 2, at 38.
19. Id. at 82-91 (citing THE COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT: BLACK FEMINIST ORGANIZING IN THE SEVENTIES AND EIGHTIES (1986)).
feminism is but one. Further, Halley queries the reading of the facts of *Oncale* by imagining the power of the bottom, i.e., the possibility that there may be more sophisticated negotiations between the "victim" and the "perpetrators." She challenges what she sees as feminism's myopia in dealing with sexual conflicts even when there is no woman involved—the feminized actor is always the victimized party in order to invoke feminism’s protective shield. Halley’s critique here is solid and raises an important challenge to feminism’s power to define sexual transactions in a way that fits within a preset “script” of human sexual behavior when harm is alleged.

On the other hand, Halley’s “queering” of *Twyman v. Twyman* does not reflect a radical departure from feminism. In fact, Halley’s rereading of *Twyman* utilizes all forms of her feminist formula: m/f, m>f and carrying the brief for f. First, by examining the sexual transactions and power negotiations within the context of a divorce between a man and a woman, Halley joins the legions of feminists who have addressed the distribution of power within the institution of marriage. I wonder why she chose not to look to dissolution or custody cases between f/f or m/m to highlight the limitations of feminism in dealing with the complexities of sex and sexuality. There are several recent custody cases where lesbian partners appealed to dominance and cultural feminism to gain the upper hand. Their appeals to feminism essentially cancel each other out and the courts are left to return to or reconstruct their traditional notions of motherhood, nurturing, and the role of women in the family. In an era where challenges to m/f marriage abound, Halley’s choice of *Twyman* becomes an indirect endorsement of m/f as the appropriate traditional context for examining the power dynamics of marriage. What is missing is Halley’s insight on the possibility of queering marriage to actually solidify and reify itself as feminism has.

Halley misses another opportunity to actually challenge the feminist formula by merely flipping the power dynamic in *Twyman*. Halley offers the possibility that Mrs. Twyman exercised more power in negotiating the sexual transactions that took place within the marriage, or f>m. Again, women’s power in marriage is a traditionally feminist proposition developed to challenge the status quo ante, or what I call “prefeminism.” As such, I found it difficult to distinguish Halley’s flip from the feminist impulse she denounces. I could certainly imagine how self-congratulatory feminists would count Halley’s rereading of Mrs. Twyman in their win column. In order to more fully and radically explore the possibilities that would flow from her theory, Halley...

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21. *Id.* at 284-85 (citing *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993)).
23. “Queer... is an anti-identity identity... Rather than sort out the real lesbians... or the real homosexuals from those that do not really qualify, queer is a status that is difficult to challenge.” Laurie Shrage, *Passing Beyond the Other Race or Sex, in RACE/SEX: THEIR SAMENESS, DIFFERENCE, AND INTERPLAY* 183, 185 (Naomi Zack ed., 1997).
would have to truly take a break from feminism. For example, she could reread Mrs. Twyman's actions as informal consent to a nonmonogamous arrangement with her husband and his mistress where certain sexual, economic, and emotional duties or acts were allocated to various partners. Mrs. Twyman would have had her expectations disappointed when her husband sought to reallocate duties (s/m sex) to her. This rereading could have distributed power and agency to Mrs. Twyman without requiring Mr. Twyman's submission.

Finally, Halley's rereading of Twyman carries the brief for females in much the same way feminism has. Although Halley's flip of power to Mrs. Twyman may at first glance seem an empowering gesture, it can also be read as another example of questioning the credibility of the women who make allegations of sexual violence against men, especially their husbands. Halley's empowerment of Mrs. Twyman depends on not accepting her testimony, which risks reifying the status quo ante position of "she asked for it, she liked it, or it was her duty." To her credit, Halley acknowledges the potential for such misuses of her theory, but she does not address whether her theory can overcome them. Halley does acknowledge that queer theory is not "the answer" to the shortcomings of feminism, yet she does not discuss the impact of queer theory's flaws or give illustrations of how queer theory would fail to yield a different result from feminism—presently or eventually. Halley does not subject her rereading to the same depth of critique as she does feminist theory, nor does she employ a more challenging query of the role that the gender and sexual expressions of the parties (including the possibility of queer motivations for their sexual practices) plays within the institution of marriage or their appeal to courts. Halley's queer rereading, without more, runs the risk of being dismissed as merely critical feminist theory in rainbow flag drag.

II. "SPLIT AT THE ROOT?"24

In much of Split Decisions Halley swims against what she sees as an uncritical unyielding feminism on autopilot that increasingly fails to check its exertions of power and claims to powerlessness. She seeks to flip the power assumptions that drive the automated deployments of feminist power and illustrate how feminism is ill-equipped to deal with the real life possibilities that may and do exist beyond the feminist theoretical and political gaze. Yet, there are moments in Split Decisions when, while appearing to head directly for the murky choppy deep dangerous critical rip tide, Halley swims in tandem

24. This subtitle has special meaning to me and serves multiple functions. First, it is the title of an article written by Margaret Baldwin. Margaret A. Baldwin, Split at the Root: Prostitution and Feminist Discourses of Law Reform, 5 YALE J.L. & FEMINISM 47 (1992) (addressing several of the questions Halley represents as nonexistent). While in law school, Baldwin was a research assistant to Catharine MacKinnon. During my law school years, I was a research assistant for Baldwin while she wrote this article.
with the feminism she critiques. Moreover, Halley makes no ado, although much is due, of the moments in *Split Decisions* when she is actually following in their wake. I address a few of those moments here.

In Section A, I question whether Halley sufficiently makes the case for taking a break based on her presentation of complexities, both real and illusory. In Section B, I point out theoretical disconnects in *Split Decisions'* premise that hinder the overall voracity of Halley’s taking a break intervention. Finally, in Section C, I address one of the most important factors informing my reaction to *Split Decisions*: Halley’s failure to align with those scholars who, for better or worse, have long critiqued feminism and have sought with wildly varying degrees of success to achieve results similar to those pursued by Halley in *Split Decisions*. Since these aspects of *Split Decisions* represent moments when Halley’s analysis and execution of her theory actually split from her articulated objective, I divide my discussion here into three subheadings: Conceptual Splits, Theoretical Splits, and Methodological Splits.

**A. Conceptual Splits**

The central thrust of Halley’s intervention is triggered by her observation that feminism is unable to appropriately respond to the complexities of life, law, theory, and sexuality. She correctly recognizes that the complexities of each present opportunities to understand more and strategize more efficiently and should, therefore, be embraced. Avoiding them, she continues, leads to unchecked power and paralysis and a host of other ills that plague feminism, feminist theory, and feminist legal theory. Halley warns that continued efforts to smooth away the complexities ultimately harm the left’s social justice project.

1. **Illusory Complexities**

Despite their potential to bolster Halley’s challenge that we demand more from our movements and theories, Halley doesn’t offer examples that would facilitate our doing so. I suspect that one reason Halley may have decided not to mention the hyper-complex issues that face all but the most rigid of feminists (i.e., the rest of us) is that doing so would have impacted her convergence critique dramatically. Specifically, dealing with such splits would have required accepting the possibility that aspects of convergentists’ claim may have some utility. This acceptance and its implications for real splits is far too important to be so broadly dismissed, as it is in Halley’s analysis.

Halley’s observations and warnings are hard to refute, but as Adam Romero aptly points out in his review, she does not clearly establish that they are needed by all feminists. As such, the feminist reader has little, if any,
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disinclination to the impulse to see herself as beyond the scope of Halley's critique. It is all too easy to believe that one is not a member of Halley's intended audience and thus exempt from the critique. For example, my reaction was, "Who hasn't recognized the limitations of feminism, feminist theory, and feminist legal theory?" This was more than rhetorical for me. I really wanted to know who had failed to recognize these limitations according to Halley. Halley's analysis would have been better served had she made it clear that she was speaking directly to mainstream feminists who adhere exclusively to the most vanilla articulation of feminism or had she dealt with the complexities that face more radical feminists, outsider feminists, or those who identify as members of the radical queer crit nation.25

By allowing so many of her readers to legitimately disassociate themselves from her critique, Halley also misses the opportunity to illustrate more meaningful (read complex) examples of the disutility of feminism than prostitution, pornography, and street harassment. Halley could have drawn more of her comrades into her critique had she simultaneously and persuasively addressed the limitations of feminist theory and queer theory in dealing with the complex splits occurring within the feminist and LGBT communities.

Another fruitful site of complex splits is intraqueer relations, as evidenced by the fact that in Washington, D.C., a popular trans prostitute coalition has no alliances in the pro-sex feminist or mainstream LGBT communities.26 Feminism's limitations play out prominently in the issues related to sexual relations and transactions within the institutional context.

Other complexities that illustrate the limitation to feminism include misogyny and homoeroticism in hip hop,27 men who sell sex to and for women and women who sell sex to and for women,28 the titillating blogs on fundamentalist Christian websites discussing matters ranging from vibrators versus dildos with strap-ons to role playing,29 voluntary intersexuality,30

25. I use the term in its more general sense to refer to the collective of outcasts and sexual minorities even among mainstream lesbians, gays, and transpeople. Similar to Frank Valdés's use of OUTCrèt, my use of the term connotes a radical departure (if not rejection of the norm) while also giving a shout out to ACT UP, the radical group whose members founded Queer Nation as a direct action activist group in the early 1990s.

26. My colleague who works for a trans sex workers' advocacy project, Helping Individual Prostitutes Survive (HIPS), had no connections with the Human Rights Campaign although her office was less than a ten-minute walk from HRC's headquarters.

27. See, e.g., Eisa Davis, Sexism and the Art of Feminist Hip-Hop Maintenance, in TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM 127, 127-28, 131 (Rebecca Walker ed., 1995) (relating her "split" when faced with the choice between buying "Doggystyle," with lyrics such as "G's up hoes down," by Snoop Dog or "Black Reign," by Queen Latifah).


30. I used this term to mean intersexuals who decide not to choose between one sex or the other or who choose to reverse surgical attempts to have their genitalia match their gender assignment at birth.
sexuality expression in the context of involuntary institutionalization, sexual expression by and with minors, the "woman born woman" policy at the Michigan Womyn's Music Festival, male and female circumcision, and the concept of "down low," including its racist, heteronormative, monogamy-promoting, and homophobic underpinnings. Finally, I have not found a theory—feminist, queer, or otherwise—to help me wrap my head or heart around barebacking as fetish.

2. Male-Affirming Feminists

Another conceptual problem with the basic premise of Split Decisions is Halley's objection to the ways in which feminism fails to affirm or own up to its relationship to maleness or masculinity. While it is true that feminism's relationship with men, maleness, and masculinity is fraught with complexities, Halley's view that feminists' relationships with men occur simultaneously with their closeted view that masculinity is the epicenter of power used in large part to subordinate women is problematic. This objection becomes a theme that animates her critique of governance and liberal feminism as well as laws, theories, and politics that position women as perpetual victims and male dominance and power as categorically injurious to women. Halley, however, does not take on two important exceptions to her theory: the fact that white feminists' equality theory is overtly male-affirming and that black feminism has a political, theoretical, and historical connection to black maleness.

For years, feminists have struggled against the perception that they are anti-male. Their struggle is most clearly seen in the extraordinary efforts many feminists employ to rebut notions that the label is a synonym for lesbian. For example, I have personally endured countless hours of tedious convergence conversations justifying the presence of lesbians in the abortion rights movement. The straight feminists in the room show no desire to risk the privileges that flow from their intimacy with men. They fiercely protect it from the threat of excommunication associated with lesbianism.

33. "Woman born woman" refers to the "no trans" admissions policy at the festival.
35. Despite the more appropriate term of closeted bisexual, black men who have sex and/or relationships with men and women are referred to as "down low brothers." At least initially, they did not use this term to refer to themselves. I am not sure why black men warrant their own term.
37. Barebacking is unprotected anal sex.
38. Halley, supra note 2, at 65.
With equal fierceness, white feminists pursue equality with white men. In fact, equality theory is a central organizing theme in liberal feminism. Equality-based claims declare “I want equal access to educational and employment opportunities. Laws and policies must impact and protect us equally. I want to be equal!” Equal to whom? The answer reveals the inherent male centeredness of feminism. Setting the male experience as the benchmark affirms masculinity but Halley ignores this aspect of feminism, choosing rather to accuse feminists of hiding their apparent love of their men, their sons, and their fathers. To Halley, they do this because feminism, as presently constructed, cannot coexist with men, which means it is time to take a break.

Halley’s critique misses another important exception to her description of feminisms’ anti-male posture—black feminists’ love for their men is an important aspect of their feminism. Their work represents the strong trend in the black community, almost exclusively, to focus on the plight of black males. Far beyond affirming the masculinity of black males, black feminists have long defended black maleness and incorporated it into their concept of the feminist mission. Further, black feminists have long employed more nuanced analyses in their defense of black maleness than Halley’s description of their approach to splits acknowledges. For example, many black feminists diverged from Halley’s script when basketball superstar Kobe Bryant was accused of raping a white woman in a hotel room, or during the murder trial of former football star O.J. Simpson. In both instances, black feminists were able to take a break from feminism in order to assess the implications of power, wealth, and masculinity as well as gender, and resisted a prescriptive deployment of claims of racism and sexism.40

To be sure, it is not Halley’s job to work through all possible corollaries and parallels to her project. Nor must she engage all of the possible challenges to how she has conceived of key elements of her project or the possible ways in which her theory might result in changes antithetical to her leftist leanings. However, Halley’s decision to spend so little time “flipping” her own theory is puzzling (or suspicious), especially given that the major thrusts of mainstream feminist theory and black feminism present stark counters to fundamental concepts in her analysis.

B. Structural Splits

Halley is right to locate Catharine MacKinnon’s work at the genealogical center of late twentieth century mainstream feminist legal theory. MacKinnon’s work, early and late, is the reference point that Halley uses to ground her

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39. Consider the work of noted feminists Audre Lorde, Angela Y. Davis, and Pearle Cleage.
40. In her comments about the O.J. case, D.C. Delegate Eleanor Holmes Norton (a feminist) discussed the spectacle as an assault on black male sexuality.
critique of feminism, feminist theory, and feminist legal theory. It would not be hyperbolic to suggest that without MacKinnon, we would not have much of today’s mainstream feminist legal theory. Nor would we have *Split Decisions*. Halley’s premise depends upon the power and influence of MacKinnon. What at first glance appears to be Halley merely establishing MacKinnon at the center of the feminist legal theoretical foundation is soon revealed to be Halley’s basis for identifying feminism as everywhere and feminism as ever powerful.

Her formula for feminism could be expressed as: (1) MacKinnon is feminism, (2) feminism is everywhere, and (3) feminism is solely a modality of the left. For example, in her painstakingly detailed and exhaustive critique of MacKinnon’s oeuvre, Halley describes MacKinnon’s brief in *Oncale v. Sundowner Offshore Services* as advocating an “utterly remarkable” formulation that endorses a “rigid, monolithic association of male bodies with male gender and superordination, and of female bodies with female gender and subordination.” She further attacks structuralism in her analysis of the binary subordination model (m/f, m>f, carrying the brief for f) that permeates feminism. While each proposition is intriguing and worthy of scholarly attention, Halley proceeds as if these are foregone and uncontested conclusions. By not acknowledging the myriad instances where U.S. feminism is fiercely resisted (recall the Beijing Women’s conference?), Halley’s critique mirrors the paranoid structuralism she sees in feminism.

I do not object to Halley’s recognition that feminism is powerful and that it has permeated many spaces previously closed to feminist influence. Halley is also right to note that much of that power is unchecked and is exercised in many ways without acknowledgment. Halley, however, makes feminism appear much more powerful than I suspect it is. I am not convinced that feminism is as omnipotent and omnipresent as Halley suggests. In her rereading of *Twyman*, for example, Halley sees feminism as the culprit and engages in little, if any, critique of the power of the institution of marriage, the parameters of legal tribunals, or the power of the judges. Had Halley given us a sense of how, if at all, *Twyman* would have played out prior to feminism’s “take over,” her critique would have been more persuasive. Halley’s feminism is given far too much responsibility for creating the *Twyman* experience, when it could just as easily be understood as the result of an overly paternalistic court that was not in the least influenced by feminism. The richer analytical alternative would have been to help the reader assess the “pre-feminism” possible outcomes and judge for themselves the utility of feminism versus taking a break.

Implicit in Halley’s analysis is the notion that all things woman equal feminism and that all things queer equal the left, yet it does not accurately reflect the current construction of feminism, queer sexuality/identity, or the left. Consider Halley’s point that feminist power is at work in the impact of NGOs in Rwanda and Yugoslavia. Halley offers as support for this contention a quote indicating the importance of having women judges, lawyers, investigators, and translators, especially those with expertise in gender crimes, involved in the prosecution of the crimes. Halley’s use of this quote shows that she too is bound by a rigid construction of feminism that presumes women who are experts in gender crimes are per se feminist. Would she make the same assumption about men who become experts in gender crimes? Or a white person who becomes an expert in racial issues? Or straight men who become experts in sexual orientation?

Halley continues her hyper-structural critique of structuralism (women = feminism) when she equates the term “women of color” with “feminists of color.” For example, in describing a major split within feminism, Halley lists, “women of color against white feminists.”

Finally, Halley appears to be carrying a brief for feminism in the same way she says that feminism carries a brief for women. This very subtle shift appears in Halley’s discussion of one of the benefits of taking a break: a realistic view of the power of feminism. She sees the failure to fully appreciate the power of feminism as bad faith and thinks that suspending this bad faith, i.e., taking a break, might enable feminism to “participate in a much more expansive political engagement.”

So, this is Halley’s Nas moment. She actually wants feminism to succeed. While Halley discloses that she changed her mind several times during the course of writing Split Decisions, this particular flip (making feminism better) is too important not to be addressed directly.

*If hip hop should die, we die together*

*Bodies in the morgue, [we] lie together....*

Another manifestation of Halley’s structuralist alter ego is her desire to further the goals of the left. First, Halley seems to accept without proof that

43. HALLEY, supra note 2, at 57.
44. Id. at 365 n.3.
46. See, e.g., Devon Carbado, Men, Feminism and Male Heterosexual Privilege, in CRITICAL RACE THEORY: THE CUTTING EDGE 525 (Richard Delgado & Jean Stefancic eds., 2000); see also BLACK MEN ON RACE, GENDER AND SEXUALITY: A CRITICAL READER (Devon W. Carbado ed., 1999).
47. HALLEY, supra note 2, at 188.
48. Id. at 344.
49. Id.
50. NAS, supra note 3.
the left exists today in a meaningful way and she leaves unexamined the implications the power of the left have on feminism. If she assumes that her attack on feminism is an attack on the left, she is reifying her structuralism ties by seeing the two as bound. Even if Halley assumes that her critique of feminism is a critique of the left, she would also need to acknowledge the reality that at times feminism and the left have mutually exclusive goals. Either way, would Halley be willing to consider taking a break from the left? I doubt it. It does not occur to her that her problems with feminism might be the byproducts of problems of the left. Without acknowledgment or analysis, Halley seems to have an impulse towards the left similar to the impulse she finds so distasteful in feminism, even though the left’s power, structure, rigidity, and denial of the blood on its hands is legendary.

Halley’s premise is that by improving sexuality theories and politics, we get closer to achieving leftist objectives. This position seems to suggest that sexuality incursions, queer interventions, and taking a break are connected to leftist politics. Not only does right-wing poster man Paul Wolfowitiz’s description of his current girlfriend as his “domestic partner” (a term created by sexual minorities) challenge Halley’s presumption that matters related to sexual others necessarily further objectives of the left, but far more ordinary complexities also preclude Halley from sustaining queer sex as sole province of the left. One has only to look to pro-choice right-wing conservatives like Rudy Guiliani, feminist anti-choice conservatives, Log Cabin Republicans, and right-wing, fundamentalist religious conservatives and their wives who engage in online discussions of their sex play with butt plugs and dildos.52

Halley leaves the readers (regardless of their political affiliation) to their own devices when considering the utility of taking a break. This cannot be avoided. When she fails to critique the left or even acknowledge counterleftist complexities within feminist/queer identities/performances, it seems as though they do not matter. It also shows that, rather than acknowledge, address, or risk the sex splits within her own political orientation (or the political splits within her sexual orientation), Halley abandons her own advice and seems to embrace rigid formulations, construction, and claims to power.

C. Methodological Splits

While there are exhilarating aspects of Halley’s project, she often fails to acknowledge the kinship between her critique of feminism and the scores of similarly postured critics who have resisted feminism and its power for decades. When these resistance theorists appear in Halley’s analyses, they are

51. HALLEY, supra note 2, at 3; see, e.g., Eli Zaretsky, Psychoanalysis, Marxism and Post-Structuralism, in SOCIAL THEORY AND POLITICS OF IDENTITY 206 (Craig Calhoun ed., 1994).
52. Wypijewski, supra note 29, at 22.
described as hybrid, convergentist, or divergentist, or simply as feminism’s “others.” Halley offers simplistic interpretations and relies on anecdotal theoretical snap shots, without adjusting the speed or length of her stroke to deal with the nuances and multiple possible interpretations of the snap shots.

There are moments when she works against her objective of establishing a need for alternate theories and setting forth a novel theory on the limitations of feminism, feminist theory, and feminist legal theory. Halley does not question her reading of the intent of the convergentists nor other implications of their “demands.” Rather than establish the basis for her insight into convergentists’ intent or the contours and diversity of their demands she describes them as she experiences them—a scary, demanding, monolithic blob causing “paralysis” and “imposing tragic costs” with their “finely honed knives of self- and mutual blame lying on the table.”

Halley only for the briefest of moments acknowledges that these prescriptive deployments also represent important splits. She overlooks altogether that they are possibly (and often are) motivated by a desire to take a break from feminism or, perhaps, create something new in its place. She chooses rather to point out that convergence demands have been elevated to the status of moralist mandates. Regrettably, she does not identify who is responsible for this elevation—those outside or inside mainstream feminism. The difference is substantial because the prescriptive deployments of feminists outside mainstream feminism have enabled mainstream feminists’ uncritical use of split-motivated buzz words such as “of color,” “margins,” and “intersectionality” as “get out of analysis free” cards. Surprisingly, Halley reserves her disdain solely for the “race, class . . mantram” rather than applying it to mainstream feminism’s use of the mantra and buzz words to ostensibly overcome many deadlocks and paralyses and, in turn, become more powerful to its constituency.

Curiously, Halley makes no attempt to distinguish between her critique of feminism and convergentists’ propensity to accuse mainstream feminists of “reiterating or even performing dominance.” By not acknowledging (much less incorporating) this important theoretical twist or its utility to convergentists and their “targets,” Halley misses an opportunity to offer the reader a new critical dimension to the outsider critique of mainstream feminism while simultaneously supporting her own premise.

Halley’s decision not to acknowledge that her intervention exists within a larger context of others who resist feminism is “highly puzzling if not downright inexplicable.” Halley requires too much from her readers by proceeding as if she has no knowledge of the preexisting projects addressing

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53. Halley, supra note 2, at 192.
54. Halley, supra note 2, at 65 (discussing the “pervasive lack of interest in women’s erotic yearning for men and a foreclosure of theoretic space for erotic yearning for men’s erotic yearning for them”).
the limits and dangers of feminism and its unchecked power. Notwithstanding the relative success of the projects, Halley’s blind spots require her readers to suspend their knowledge of the uncited works in order to stay focused on her analysis. The strange thing is that despite the frustration created by being so distracted by the ghosts in the margins, Halley’s prose and ultimately the concept behind this project is exhilarating and provocative, although I suspect not in the ways Halley intended.

Halley’s methodological misstep of not placing her intervention within the context of a rich body of work resisting feminism that predates Split Decisions has profound implications for the voracity of her intervention. Halley briefly acknowledges that the limitations of feminism have been an important topic for hybrid, divergent, and post-colonial feminist critical theorists. Indeed, their critiques document feminism’s limitations. She forces the reader to continuously consider the reasons behind the omission. Rather than engaging in syncopated head nodding (or shaking), the reader is asking, “Does she know about X’s work on this very point? She must. Then why doesn’t she address it?” Even if Halley decided to dismiss X’s work as bunk, bogus, or ultimately unhelpful, her silence as to the existence and relevance of X’s work is distracting, if not deafening.

While there are far too many examples to address in this reaction piece, Halley’s treatment of the Combahee River Collective Statement is representative. While Halley recognizes that the statement is important to the discourse on black feminism, Halley presents it as a flat document without history, context, or contours. In so doing, Halley misses an opportunity to illustrate the virtue of a sexuality based split of the very type she endorses throughout the text. Far from being a group of “unnamed black feminists,” the Collective was a group of well-known black lesbian feminists who, based on their resistance to rigid formulations of feminism, split from a larger group of black feminists over issues of class and homophobia. What could be the reasons for this? Did Halley abandon her commitment to depth? Or does the negation of this important historical split disprove her convergence theory or the justification for her intervention? Engaging the Combahee Collective’s statement without acknowledging that the organization and its statement arose from a black feminist versus black lesbian split further undermines the faith Halley’s readers must have if they are to accept (or seriously contemplate) her intervention.

The central aim of my critique here is not to deploy a moral mandate that any genealogy of feminism must include comprehensive histories of radical, black feminists or those who have engaged in fierce resistance to feminism. I

55. See id. at 84.
56. Id. at 82.
do, however, maintain that such a substantial omission is problematic. Even more problematic is the fact that by limiting her analysis of the implications of resistance projects that inform her own work (whether accepted or not), Halley misses golden opportunities to attain the head nodding agreement upon which the persuasiveness, indeed the ultimate success, of her intervention depends.

III. GO WEST, YOUNG MAN!

Halley seeks to impact discourse and explore new frontiers in theory and political possibilities in Split Decisions yet fails to acknowledge innovations such as OUTCritic theory and politics. Nonetheless, Halley takes a large, adventurous step in the development of describing feminism, feminist theory, and feminist legal theory. These are valuable insights and contributions. She continues to build upon her willingness to be vulnerable when she shares those moments of paralysis that result from strategic deployment of moral mandates and appeals to unlimited powerlessness. Halley is on to something when she describes how she experiences the sharpening of knives waiting for a misstep. Halley checks the power of race critiques, indeed any outsider critique, in a novel way—marginalizing the mainstream. Unfortunately, Halley does not take this issue on directly.

Halley’s intervention in this forbidden realm of intrafeminist race and power critique would be groundbreaking—and terrifying. Fortunately, there are role models that may prove useful to Halley if she takes up this challenge: Martha Fineman and Shane Phelan. They both have taken on many of the splits Halley alludes to in Split Decisions in a non-convergentist (read “intersectionality”) way. They have stepped boldly into the fray of sexuality and race and improved the discourse as a result. Martha Fineman has been an important figure in Western feminism for many years—in theory and practice, she joyfully and bravely embraces the split that causes Halley so much consternation: race. Fineman instituted a forum explicitly designed to revel in the splits of race and sexuality, among other splits. Fineman’s Uncomfortable Conversations series is one of the few places where splits, including those created by race differences, are treated as conversation starters rather than silencers.

58. This term is used to describe race, fem, queer, lat, and other crits that attempt to “expose and dismantle entrenched rules, structures and conditions that breed injustice.” Francisco Valdés, Outsider Scholars, Critical Race Theory, and OUTCriter Perspectivity: Postsubordination Vision as Jurisprudential Method, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 403 (Francisco Valdés et al. eds., 2002). The term, although not the concept, was coined by queer race theorist and co-founder of LATCRIT, Inc., Francisco Valdés.


60. The workshop is now housed at Emory Law School.
Shane Phelan is another white feminist theorist who seems to joyfully embrace the complexities of power, race, sexuality, and feminism. In her book, *Getting Specific: Postmodern Lesbian Politics*, Phelan locates “[m]any of the best discussions of the problems of diversity and overlapping networks of domination” within feminist theory.\(^6\) The novelty of Halley’s suggestions in *Split Decisions* should be assessed in light of Phelan’s conclusion that “lesbian feminist theorists had been mistaken in their construction of too-monolithic, often essentialist ‘lesbian.’”\(^6\) Phelan goes on to say that white women need to inquire into their own histories, asking themselves about their own racism, classism, sexism, and heterosexism, “rather than engaging in amateur anthropology toward people of color.”\(^6\) More than advocating intersectionality, Phelan calls for self-critique.

What Halley brings to the table is her willingness to flip Phelan’s challenge and critique the “amateur anthropology” of feminists of color. Whatever her spin (or flip), Halley would continue to show willingness to be simultaneously vulnerable and brave by “calling out” hybrid feminists (black feminists, feminists of color, post-colonial feminists) on her experience with the fear and loathing that takes place around those tables where feminists, queers, lefties, lesbians, intellectuals, and activists gather to sort out theory and try to “get in the problem.” If Halley could, that would be novel and useful.

Halley is well-suited to embark on this territory because she has already started down the road. And because *Split Decisions* establishes her as brave (she continues to go into those rooms in spite of the sharpened knives), queer, and cool.

Yes, I think she’s cool and I think she is right to critique the critique of women of color who challenge white feminists without also challenging their (ok, our) appeals to powerlessness and exertions of power.

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62. Id. at ix.
63. Id. at xv.