COMMENTARY

A POSTMODERN FEMINIST LEGAL MANIFESTO (AN UNFINISHED DRAFT)

*Mary Joe Frug**

The following Commentary is an unfinished work. Professor Frug was working on this Commentary when she was murdered on April 4, 1991. The Editors of the Harvard Law Review agreed that, under the circumstances, the preservation of Mary Joe Frug's voice outweighed strict adherence to traditional editorial policy. For this reason, neither stylistic nor organizational changes have been made, and footnotes have been expanded but not added.

To complete some of the thoughts that Professor Frug left unfinished and to continue the conversation about the relationship between feminism, postmodernism, and law reform, the Editors of the Law Review have solicited brief responses to "A Postmodern Feminist Legal Manifesto" from Professors Barbara Johnson, Ruth Colker, and Martha Minow.

I. PRELIMINARIES

I am worried about the title of this article.

Postmodernism may already be passe, for some readers. Like a shooting star or last night's popovers, its genius was the surprise of its appearance. Once that initial moment has passed, there's not much value in what's left over.

For other readers, postmodernism may refer to such an elaborate and demanding genre — within linguistics, psychoanalysis, literary theory, and philosophy — that claiming an affinity to "it" will quite properly invoke a flood of criticism regarding the omissions, misrepresentations, and mistakes that one paper will inevitably make.

The manifesto part may also be troublesome. The dictionary describes a manifesto as a statement of principles or intentions, while I have in mind a rather informal presentation; more of a discussion, say, in which the "principles" are somewhat contradictory and the "intentions" are loosely formulated goals that are qualified by an admission that they might not work. MacKinnon, of course, launched feminism into social theory orbit by drawing on Marxism to present her biting analysis.[1] Referring to one word in a Karl Marx title may

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* Professor, New England School of Law, 1981–1991.

[1] *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515 (1982) [hereinafter MacKinnon, *Agenda for Theory*]; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward*

represent an acknowledgement of her work, an unconscious, copyKat gesture; but I don't want to get carried away. I am in favor of localized disruptions. I am against totalizing theory.

Sometimes the "PM"s that label my notes remind me of female troubles — of premenstrual and postmenopausal blues. Maybe I am destined to do exactly what my title prescribes; just note the discomfort and keep going.

One "Principle"

The liberal equality doctrine is often understood as an engine of liberation with respect to sex-specific rules. This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit through critical scholarship, litigation, and legislative campaigns. Examples of these efforts include work seeking to strengthen domestic violence statutes, to enact a model anti-pornography ordinance, and to expand sexual harassment doctrine.

The postmodern position locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. To put this "principle" more bluntly, legal discourse should be recognized as a site of political struggle over sex differences.

This is not a proposal that we try to promote a benevolent and fixed meaning for sex differences. (See the "principle" below.) Rather, the argument is that continuous interpretive struggles over the meaning of sex differences can have an impact on patriarchal legal power.

Another "Principle"

In their most vulgar, bootlegged versions, both radical and cultural legal feminisms depict male and female sexual identities as anatomically determined and psychologically predictable. This is inconsistent with the semiotic character of sex differences and the impact that historical specificity has on any individual identity. In postmodern jargon, this treatment of sexual identity is inconsistent with a decentered, polymorphous, contingent understanding of the subject.

Because sex differences are semiotic — that is, constituted by a system of signs that we produce and interpret — each of us inescapably produces herself within the gender meaning system, although the meaning of gender is indeterminate or undecidable. The dilemma of

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Feminist Jurisprudence, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*].

difference, which the liberal equality guarantee seeks to avoid through neutrality, is unavoidable.

On Style

Style is important in postmodern work. The medium *is* the message, in some cases — although by no means all. When style is salient, it is characterized by irony and by wordplay that is often dazzlingly funny, smart, and irreverent. Things aren't just what they seem.

By arguing that legal rhetoric should not be dominated by masculine pronouns or by stereotypically masculine imagery, legal feminists have conceded the significance of style. But the postmodern tone sharply contrasts with the earnestness that almost universally characterizes feminist scholarship. "[T]he circumstances of women's lives [are] unbearable," Andrea Dworkin writes.[2] Legal feminists tend to agree. Hardly appropriate material for irony and play.

I do not underestimate the oppression of women as Andrea Dworkin describes it. I also appreciate what a hard time women have had communicating our situation. Reports from numerous state commissions on gender bias in the courts have concluded that one of the most significant problems of women in law is their lack of credibility. Dworkin puts this point more movingly:

> The accounts of rape, wife beating, forced childbearing, medical butchering, sex-motivated murder, forced prostitution, physical mutilation, sadistic psychological abuse, and other commonplaces of female experience that are excavated from the past or given by contemporary survivors should leave the heart seared, the mind in anguish, the conscience in upheaval. But they do not. No matter how often these stories are told, with whatever clarity or eloquence, bitterness or sorrow, they might as well have been whispered in wind or written in sand: they disappear, as if they were nothing. The tellers and the stories are ignored or ridiculed, threatened back into silence or destroyed, and the experience of female suffering is buried in cultural invisibility and contempt.[3]

Although the flip, condescending, and mocking tones that often characterize postmodernism may not capture the intensity and urgency that frequently motivate feminist legal scholarship, the postmodern style does not strike me as "politically incorrect." Indeed, the oppositional character of the style arguably coincides with the oppositional spirit of feminism. Irony, for example, is a stylistic method of acknowledging and challenging a dominant meaning, of saying some-

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[2] ANDREA DWORKIN, LETTERS FROM A WAR ZONE 65 (1989).

[3] ANDREA DWORKIN, RIGHT-WING WOMEN 20 (1983).

thing and simultaneously denying it. Figures of speech invite ideas to break out of the linear argument of a text; they challenge singular, dominant interpretations.

I confess to having considerable performance anxiety about the postmodern style myself. It may require more art, more creativity and inspiration, than I can manage. But I don't think feminist legal activists need to adopt the postmodern medium in order to exploit the postmodern message; my point about the style is simply that it doesn't require us, strategically, to dismiss postmodernism as an influence on our work.

II. Applying Postmodern "Principles": Law and the Female Body

A. Introduction

Most feminists are committed to the position that however "natural" and common sex differences may seem, the differences between women and men are not biologically compelled; they are, rather, "socially constructed." Over the past two decades this conviction has fueled many efforts to change the ways in which law produces — or socially constructs — the differences and the hierarchies between the sexes. Feminists have reasoned, for example, that when women are uneducated for "men's work," or when they are sexually harassed in the men's work they do, they are not "naturally" more suited for "women's work"; they have been constructed to be that way. Although law is by no means the only factor that influences which jobs men and women prefer, how well they perform at work, or the intensity of their wage market commitment, outlawing employment discrimination can affect to some degree what women and men are "like" as workers. What law (at least in part) constructs, law reform projects can re-construct or alter.

Regardless of how commonplace the constructed character of sex differences may be, particular differences can seem quite deeply embedded within the sexes — so much so, in fact, that the social construction thesis is undermined. When applied to differences that seem especially entrenched — differences such as masculine aggression or feminine compassion, or differences related to the erotic and reproductive aspects of women's lives, social construction seems like a clichéd, improbable, and unconvincing account of experience, an explanation for sex differences that undervalues "reality." This reaction does not necessarily provoke a return to a "natural" explanation for sex differences; but it does radically stunt the liberatory potential of

the social construction thesis. One's expectations for law reform projects are reduced; law might be able to mitigate the harsh impact of these embedded traits on women's lives, but law does not seem responsible for *constructing* them.

The subject of Part II is the role of law in the production of sex differences that seem "natural." One of my objectives is to explain and challenge the essentializing impulse that places particular sex differences outside the borders of legal responsibility. Another objective is to provide an analysis of the legal role in the production of gendered identity that will invigorate the liberatory potential of the social construction thesis.

I have chosen the relationship of law to the female body as my principal focus. I am convinced that law is more cunningly disguised but just as implicated in the production of apparently intractable sex-related traits as in those that seem more legally malleable. Since the anatomical distinctions between the sexes seem not only "natural" but fundamental to identity, proposing and describing the role of law in the production of the meaning of the female body seems like the most convincing subject with which to defend my case. In the following sections, I will argue that legal rules — like other cultural mechanisms — encode the female body with meanings. Legal discourse then explains and rationalizes these meanings by an appeal to the "natural" differences between the sexes, differences that the rules themselves help to produce. The formal norm of legal neutrality conceals the way in which legal rules participate in the construction of those meanings.

The proliferation of women's legal rights during the past two decades has liberated women from some of the restraining meanings of femininity. This liberation has been enhanced by the emergence of different feminisms over the past decade. These feminisms have made possible a stance of opposition toward a singular feminine identity; they have demonstrated that women stand in a multitude of places, depending on time and geographical location, on race, age, sexual preference, health, class status, religion, and other factors. Despite these significant changes, there remains a common residue of meaning that seems affixed, as if by nature, to the female body. Law participates in creating that meaning.

I will argue that there are at least three general claims that can be made about the relationship between legal rules and legal discourse and the meaning of the female body:

1. Legal rules permit and sometimes mandate the *terrorization* of the female body. This occurs by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity. One meaning of "female body," then, is a body that is "in terror," a body that has learned to

scurry, to cringe, and to submit. Legal discourse supports that meaning.

2. Legal rules permit and sometimes mandate the *maternalization* of the female body. This occurs with the use of provisions that reward women for singularly assuming responsibilities after childbirth and with those that penalize conduct — such as sexuality or labor market work — that conflicts with mothering. Maternalization also occurs through rules such as abortion restrictions that compel women to become mothers and by domestic relations rules that favor mothers over fathers as parents. Another meaning of "female body," then, is a body that is "for" maternity. Legal discourse supports that meaning.

3. Legal rules permit and sometimes mandate the *sexualization* of the female body. This occurs through provisions that criminalize individual sexual conduct, such as rules against commercial sex (prostitution) or same sex practices (homosexuality) and also through rules that legitimate and support institutions such as the pornography, advertising, and entertainment industries that eroticize the female body. Sexualization also occurs, paradoxically, in the application of rules such as rape and sexual harassment laws that are designed to protect women against sex-related injuries. These rules grant or deny women protection by interrogating their sexual promiscuity. The more sexually available or desiring a woman looks, the less protection these rules are likely to give her. Another meaning of "female body," then, is a body that is "for" sex with men, a body that is "desirable" and also rapable, that wants sex and wants raping. Legal discourse supports that meaning.

These groups of legal rules and discourse constitute a system that "constructs" or engenders the female body. The feminine figures the rules pose are naturalized within legal discourse by declaration — "women *are* (choose one) weak, nurturing, sexy" — and by a host of linguistic strategies that link women to particular images of the female body. By deploying these images, legal discourse rationalizes, explains, and renders authoritative the female body rule network. The impact of the rule network on women's reality in turn reacts back on the discourse, reinforcing the "truth" of these images.

Contractions of confidence in the thesis that sex differences are socially constructed have had a significant impact on women in law. Liberal jurists, for example, have been unwilling to extend the protection of the gender equality guarantee to anatomical distinctions between female and male bodies; these differences seem so basic to individual identity that law need not — or should not — be responsible for them. Feminist legal scholars have been unable to overcome this intransigence, partly because we ourselves sometimes find particular sex-related traits quite intransigent. Indeed, one way to understand the fracturing of law-related feminism into separate schools of thought over the past decade is by the sexual traits that are considered

unsusceptible to legal transformation[4] and by the criticisms these analyses have provoked within our own ranks.[5]

The fracturing of feminist criticism has occurred partly because particular sex differences seem so powerfully fixed that feminists are as unable to resist their "naturalization" as liberal jurists. But feminists also cling to particular sex-related differences because of a strategic desire to protect the feminist legal agenda from sabotage. Many feminist critics have argued that the condition of "real" women makes it too early to be post-feminist. The social construction thesis is useful to feminists insofar as it informs and supports our efforts to improve the condition of women in law. If, or when, the social construction thesis seems about to deconstruct the basic category of woman, its usefulness to feminism is problematized. How can we build a political coalition to advance the position of women in law if the subject that drives our efforts is "indeterminate," "incoherent," or "contingent?"

I think this concern is based upon a misperception of where we are in the legal struggle against sexism. I think we are in danger of being politically immobilized by a system for the production of what sex means that makes particular sex differences seem "natural." If my assessment is right, then describing the mechanics of this system is potentially enabling rather than disempowering; it may reveal opportunities for resisting the legal role in producing the radical asymmetry between the sexes.

I also think this concern is based on a misperception about the impact of deconstruction. Skeptics tend to think, I believe, that the legal deconstruction of "woman" — in one paper or in many papers, say, written over the next decade — will entail the immediate destruc-

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[4] For the radical feminist focus on male domination, see ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 14–18, 53–56 (1989); DWORKIN, *supra* note 3, at 78–87; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40–45, 171–74 (1987); MacKinnon, *Agenda for Theory*, *supra* note 1, at 530–34; and MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 1, at 643. For the cultural feminist focus on the ethic of care, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 64–105 (1982); and Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 28–37 (1988) (suggesting the incorporation of Gilligan's ethic into tort law's standard of care).

[5] For a race-conscious critique of liberal, radical, and cultural feminism for overlooking minority women concerns, see 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, 140, 152–60; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–86 (1990); and Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 120–23, 144–50 (1989). For the lesbian feminist critique of heterosexist assumptions in liberal, radical, and cultural feminisms, see AUDRE LORDE, SISTER OUTSIDER 114–23 (1984); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177, 178–82 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983). For a class-conscious feminist critique of the class bias inherent in liberal, radical, and cultural feminisms, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 192–215 (1984).

tion of "women" as identifiable subjects who are affected by law reform projects. Despite the healthy, self-serving respect I have for the influence of legal scholarship and for the role of law as a significant cultural factor (among many) that contributes to the production of femininity, I think "women" cannot be eliminated from our lexicon very quickly. The question this paper addresses is not whether sex differences exist — they do — or how to transcend them — we can't — but the character of their treatment in law.

B. Sexualization, Terrorization and Maternalization: The Case of Prostitution

Since most anti-prostitution rules are gender neutral, let me explain, before going any further, how I can argue that they have a particular impact on the meaning of the female body. Like other rules regulating sexual conduct, anti-prostitution rules sexualize male as well as female bodies; they indicate that sex — unlike, say, laughing, sneezing, or making eye contact — is legally regulated. Regardless of whether one is male or female, the pleasures and the virtue of sex are produced, at least in part, by legal rules.[6] The gendered lopsidedness of this meaning system — which I describe below — occurs, quite simply, because most sex workers are women. Thus, even though anti-prostitution rules could, in theory, generate parallel meanings for male and female bodies, in practice they just don't. At least they don't right now.

The legal definition of prostitution as the unlawful sale of sex occurs in statutes that criminalize specific commercial sex practices and in decisional law, such as contract cases that hold that agreements for the sale of sexual services are legally unenforceable. By characterizing certain sexual practices as illegal, these rules sexualize the female body. They invite a sexual interrogation of every female body: is it for or against prostitution?

This sexualization of the female body explains an experience many women have: an insistent concern that this outfit, this pose, this gesture may send the wrong signal — a fear of looking like a whore. Sexy talking, sexy walking, sexy dressing seem sexy, at least in part, because they are the telltale signs of a sex worker plying her trade. This sexualization also explains the shadow many women feel when having sex for unromantic reasons — to comfort themselves, to avoid

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[6] *Cf.* LOUIS ALTHUSSER, LENIN AND PHILOSOPHY AND OTHER ESSAYS (Ben Brewster trans., 1971) (demonstrating the role of ideology and social structure in shaping personality); MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 6–7 (Robert Hurley trans., 1978) (discussing the power-sex relationship in terms of affirmation).

a confrontation over some domestic issue, or to secure a favor — a fear of acting like a whore.[7]

This reading of the relationship between prostitution rules and the female body is aligned with but somewhat different from the radical feminist description of the relationship between prostitution and female subjectivity. Catharine MacKinnon's 1982 *Signs* piece describes the relationship this way:

> [Feminist] investigations reveal . . . [that] prostitution [is] not primarily [an] abuse[] of physical force, violence, authority, or economics. [It is an] abuse[] of sex. [It] need not and do[es] not rely for [its] coerciveness upon forms of enforcement other than the sexual . . . .
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> . . . If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it *is* its own lack, then there is no such thing as a woman as such, there are only walking embodiments of men's projected needs.[8]

MacKinnon's description of the impact of prostitution on women suggests that the sexual experience of all women may be, like sex work, the experience of having sex solely at the command of and for the pleasure of an other. This is a more extreme interpretation of the sexualized female body than mine and not one all women share.

> The feminists' point of view? Well, I would like to point out that they're missing a couple of things, because, you know, I may be dressing like the typical bimbo, whatever, but I'm in charge. You know. I'm in charge of my fantasies. I put myself in these situations with men, you know . . . . [A]ren't I in charge of my life?[9]

Although I believe Madonna's claim about herself, there are probably a number of people who don't. Anyone who looks as much like a sex worker as she does couldn't possibly be in charge of herself, they are likely to say; she is an example of exactly what MacKinnon

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[7] Even sex workers who are "in the life" feel interrogated by the sexualization question; they too struggle against acting like whores. Consider, for example, one sex worker's description of the discomfort she experienced because she sexually responded to her customer during an act of prostitution. Her orgasm in those circumstances broke down a distinction she sought to maintain between her work and the sexual pleasure she obtained from her non-work-related sexual activity. *See* Judy Edelstein, *In the Massage Parlor*, *in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 62, 62–63 (Frédérique Delacoste & Priscilla Alexander eds., 1987) [hereinafter SEX WORK]. Consider also the many accounts of sex workers who feel degraded or angry about their work; this is an experience of sexual division, a fear that, in their work as whores, they are acting like whores. *See, e.g.*, Jean Johnston, *Speaking in Tongues*, *in* SEX WORK, *supra*, at 70, 70; Sharon Kaiser, *Coming Out of Denial*, *in* SEX WORK, *supra*, at 104, 104–05; Rosie Summers, *Prostitution*, *in* SEX WORK, *supra*, at 113, 114–15.

[8] MacKinnon, *Agenda for Theory*, *supra* note 1, at 533–34.

[9] *Nightline*: Interview with Madonna (ABC television broadcast, Dec. 3, 1990).

means by a "walking embodiment[] of men's projected needs."[10] Without going further into the cottage industry of Madonna interpretation, it seems indisputable that Madonna's version of the female sexualized body is radically more autonomous and self-serving than MacKinnon's interpretation, and significantly less troubled and doubled than mine.

Because sex differences are semiotic — because the female body is produced and interpreted through a system of signs — all three of these interpretations of the sexualized female body may be accurate. The truth of any particular meaning would depend on the circumstances in which it was asserted. Thus, the sexualized female body that is produced and sustained by the legal regulation of prostitution may have multiple meanings. Moreover, the meaning of the sexualized female body for an individual woman is also affected by other feminine images that the legal regulation of prostitution produces.

Anti-prostitution rules terrorize the female body. The regulation of prostitution is accomplished not only by rules that expressly repress or prohibit commercialized sex. Prostitution regulation also occurs through a network of cultural practices that endanger sex workers' lives and make their work terrifying. These practices include the random, demeaning, and sometimes brutal character of anti-prostitution law enforcement. They also include the symbiotic relationship between the illegal drug industry and sex work, the use of prostitutes in the production of certain forms of pornography, hotel compliance with sex work, inadequate police protection for crimes against sex workers, and unregulated bias against prostitutes and their children in housing, education, the health care system, and in domestic relations law. Legal rules support and facilitate these practices.

The legal terrorization of prostitutes forces many sex workers to rely on pimps for protection and security, an arrangement which in most cases is also terrorizing. Pimps control when sex workers work, what kind of sex they do for money, and how much they make for doing it; they often use sexual seduction and physical abuse to "manage" the women who work for them. The terrorization of sex workers affects women who are not sex workers by encouraging them to do whatever they can to avoid being asked if they are "for" illegal sex. Indeed, marriage can function as one of these avoidance mechanisms, in that, conventionally, marriage signals that a woman has chosen legal sex over illegal sex.

One might argue that the terrorized female body is not that much different from the sexualized female body. Both experiences of femininity often — some might say always — entail being dominated by a man. Regardless of whether a woman is terrorized or sexualized, there are social incentives to reduce the hardships of her position,

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[10] MacKinnon, *Agenda for Theory*, *supra* note 1, at 534.

either by marrying or by aligning herself with a pimp. In both cases she typically becomes emotionally, financially, physically, and sexually dependent on and subordinate to a man.

If the terrorized and sexualized female bodies can be conflated and reduced to a dominated female body, then Madonna's claim that she's in charge, like the claims other women make that they experience sexual pleasure or autonomy in their relations with men, is suspect — perhaps, even, the product of false consciousness. But I argue that the dominated female body does not fully capture the impact of anti-prostitution rules on women. This is because anti-prostitution rules also maternalize the female body, by virtue of the interrelationship between anti-prostitution rules and legal rules that encourage women to bear and rear children. The maternalized female body triangulates the relationship between law and the meanings of the female body. It proposes a choice of roles for women.

The maternalization of the female body can be explained through the operation of the first and second postmodern "principles." That is, because we construct our identities in language and because the meaning of language is contextual and contingent, the relationship between anti-prostitution rules and the meaning of the female body is also affected by other legal rules and their relationship to the female body. The legal rules that criminalize prostitution are located in a legal system in which other legal rules legalize sex — rules, for example, that establish marriage as the legal site of sex and that link marital sex to reproduction by, for example, legitimating children born in marriage. As a result of this conjuncture, anti-prostitution rules maternalize the female body. They not only interrogate women with the question of whether they are for or against prostitution; they also raise the question of whether a woman is for illegal sex or whether she is for legal, maternalized sex.

The legal system maintains a shaky line between sex workers and other women. Anti-prostitution laws are erratically enforced; eager customers and obliging hotel services collaborate in the "crimes" prostitutes commit with relative impunity, and the legal, systemic devaluation of "women's work" sometimes makes prostitution more lucrative for women than legitimate wage labor. Anti-prostitution rules formally preserve the distinction between legal and illegal sexual activity. By preventing the line between sex workers and "mothers" from disappearing altogether, anti-prostitution rules reinforce the maternalized female body that other legal rules more directly support.

The legal discourse of anti-prostitution law explicitly deploys the image of maternalized femininity in order to contrast sex workers with women who are not sex workers. This can be observed in defamation cases involving women who are incorrectly identified or depicted as whores. In authorizing compensation for such women, courts typically appeal to maternal imagery to describe the woman who has been

wrongly described; they justify their decisions by contrasting the images of two female bodies against each other, the virgin and the whore — madonna and bimbo. The discourse of these decisions maternalizes the female body.[11] The maternalized female body is responsible for her children. Madonna's bambino puts her in charge.

The conjunction and displacement of these alternative meanings of the female body are rationalized in legal discourse, where they are presented as both "natural" but also necessary, for reasons associated with liberalism. A Massachusetts case involving a rape prosecution[12] and feminist controversy regarding the decriminalization of prostitution provide two examples.

Sometime after three o'clock in the morning on a December night in Malden Square, a police cruiser entered a parking lot where police officers had heard screams. "Seeing the headlights of an approaching car," Judge Liacos wrote for the Supreme Judicial Court, a woman "naked and bleeding around the mouth, jumped from the defendant's car and ran toward [the police cruiser] screaming and waving her arms."[13] She claimed that she had been raped, that the defendant had forced her to perform oral sex and to engage in intercourse twice. After the defendant was convicted on charges of rape and commission of an unnatural and lascivious act, he appealed. He claimed that he had wrongfully been denied the opportunity to inform the jury that the complainant had twice been charged with prostitution. He argued that the complainant's allegation of rape, which he denied, "may have been motivated by her desire to avoid further prosecution."[14]

The trial court had prohibited the defendant from mentioning the complainant's arrests to the jury because of the Massachusetts rape-shield statute,[15] a rule that prohibits the admission of reputation evidence or of specific instances of a victim's sexual conduct in a rape trial. The purpose of the rule is to encourage victims to report rapes, to eliminate victim harassment at trial, and to support the assumption that reputation evidence is "only marginally, if at all, probative of

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[11] *See, e.g.*, Veazy v. Blair, 86 Ga. App. 721, 726 (1952) (holding that a cause of action existed when the defendant had stated that "the plaintiff, a pure and chaste lady of unblemished character, was a 'public whore'"); Mullins v. Mutter, 151 S.W.2d 1047, 1048, 1051 (Ken. 1941) (upholding a large slander award when the defendant called the plaintiff a "damned whore"). In *Mullins*, the court noted that:

> In this case plaintiff is an orphaned girl, bearing — so far as the record discloses — a good reputation . . . . Up to the time complained of no breath of suspicion had been leveled against her chastity. But, so emphatically repeated charges by defendant was calculated to leave a scar upon her reputation that might follow her to her grave.

Id. at 1051.

[12] *See* Commonwealth v. Joyce, 415 N.E.2d 181 (Mass. 1981).

[13] *Id.* at 183.

[14] *Id.* at 184.

[15] *See* MASS. GEN. L. ch. 233, § 21B (1991).

consent."[16] Reasoning that a defendant's right to argue bias "may be the last refuge of an innocent defendant," the Supreme Judicial Court lifted the shield.[17]

> We emphasize that we do not depart from the long held view that prostitution is not relevant to credibility . . . . Nor do we depart from the policy of the statute in viewing prostitution or the lack of chastity as inadmissible on the issue of consent. Where, however, such facts are relevant to a showing of bias or motive to lie, the general evidentiary rule of exclusion must give way to the constitutionally based right of effective cross-examination.[18]

This interpretation of the rape-shield statute, broadly applied, denies sex workers who dare to complain of sexual violence the presumption of innocence. Because prostitution is unlawful, this ruling simultaneously terrorizes, sexualizes, and de-maternalizes sex workers. This triple whammy is accomplished by an appeal to fairness:

> [T]he defendant is entitled to present his own theory of the encounter to the jury . . . . The relevancy of testimony depends on whether it has a 'rational tendency to prove an issue in the case.' . . . Under the defendant's theory he and the complainant, previously strangers to each other, were in a car late at night parked in a vacant parking lot. Having just engaged in sexual acts, they were both naked. A police car was approaching. The defendant intended to show that the complainant, having been found in a similar situation on two prior occasions, had been arrested on each occasion and charged with prostitution. We cannot say that this evidence has no rational tendency to prove that the complainant was motivated falsely to accuse the defendant of rape by a desire to avoid further prosecution.[19]

Seems perfectly reasonable. Fair. If a guy can't explain a gal's reasons for misrepresenting a situation, that bleeding mouth might compromise *his* credibility.

It might seem obvious, at this point, that decriminalization of prostitution would be an appropriate strategy for feminist legal activists concerned about the physical security of sex workers. However, although the feminists I've read all agree that prostitution should be decriminalized, they disagree about *how* decriminalization should occur. The arguments in this dispute are another example of how legal discourse reproduces and is mired in the interpretations of the female body produced by legal rules.

Should the reform of prostitution law be restricted to the repeal of rules penalizing the sale of sex, or should other legally supported

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[16] *Joyce*, 415 N.E.2d at 186.

[17] *Id.* at 186.

[18] *Id.* at 187 (citations omitted).

[19] *Id.* (citations omitted).

structures that create, sustain and degrade sex work also be challenged? Feminists in favor of legalization — this is the postmodern position — argue that, unlike a narrowly defined decriminalization campaign, legalization might significantly improve the lives of sex workers. Legalization, for example, might extend unemployment insurance benefits to sex workers; it might allow sex workers to participate in the social security system; it might prohibit pimping; it might authorize advertising for their business.

Feminists who are against legalization — this is the radical position — envision a decriminalization project that would develop strategies for preventing women from participating in sex work, rather than strategies that would make prostitution a more comfortable line of work. Radical feminists, such as Kathleen Barry, are sympathetic to the plight of sex workers.[20] But their conviction that women are defined as women by their sexual subordination to men leads them to argue that sex workers are particularly victimized by patriarchy and that they should be extricated from their condition rather than supported in their work. These arguments against legalization are in the language of the terrorized female body.

Not all legal feminists believe that prostitutes are terrorized full time. Some feminists — I'll call this group the liberals — believe that at least some sex workers, occasionally, exercise sexual autonomy. But these feminists do not favor assimilating sex work into the wage market. They oppose legalization because they object to the kind of sexual autonomy legalization would support.[21] That is, although they support the right of women to do sex work — even at the cost of reinforcing male dominance — they resist the commodification of women's sexuality.

Sex workers themselves — who inspire the postmodern position as I develop it here — want legal support for sex that is severed from its reproduction function and from romance, affection, and long-term relationships.[22] Because "legal" sexual autonomy is conventionally extended to women only by rules that locate sexuality in marriage or

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[20] *See* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 226–37 (1979).

[21] *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921–25 (1987) (favoring limited decriminalization of prostitution, at least for the short term). *But see* Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERK. WOMEN'S L.J. 75, 107–08 (1989–1990) (arguing that "the best short-term approach to reform entails removing prostitution from the criminal realm . . . and, at the same time taking affirmative steps to destroy the conditions that create consumption and drive women to the trade").

[22] Not all sex workers seek to legalize as well as decriminalize their work, but many do. *See, e.g.*, GAIL PHETERSON, A VINDICATION OF THE RIGHTS OF WHORES 33–34 (1989); *Draft Statements from the 2nd World Whores' Congress (1986), in* SEX WORK, *supra* note 7, at 307, 307; *International Committee for Prostitutes' Rights World Charter, in* SEX WORK, *supra* note 7, at 305, 305.

by rules that allow women decisional autonomy regarding reproductive issues, arguments in support of law reforms that would legalize sex work conflict with the language of the maternalized female body. The arguments that sex workers are making to assimilate their work into the wage market appeal to a sexualized femininity that is something other than a choice between criminalized and maternalized sex or a choice between terrorized and maternalized sex. This appeal to a fresh image of the female body is based on a reorganization of the three images of femininity I described earlier; it arises within the play of these three images. Its originality suggests, to me, resistance to the dominant images.

It is significant that sex workers have "found" a different voice of feminine sexuality through the process of political organizing, through efforts to speak out against and to change the conditions of their lives. For me, the promise of postmodern legal feminism lies in the juncture of feminist politics and the genealogy of the female body in law. It is in this juncture that we can simultaneously deploy the commonalities among real women, in their historically situated, material circumstances, and at the same time challenge the conventional meanings of "woman" that sustain the subordinating conditions of women's lives.

I do not think that the sex workers' claims for legalization constitute *the* postmodern feminist legal voice. I am also unsure whether I support their position on legalization. But I believe that my analysis of the decriminalization dispute in which they are participating illustrates how postmodern legal feminism can seek and claim different voices, voices which will challenge the power of the congealed meanings of the female body that legal rules and legal discourse permit and sustain.

C. The Maternalization of the Female Body: Family and Work

There are a number of legal rules that function to compel or encourage women to bear children and to assume disproportionately larger responsibilities for rearing children than men do. Of these rules, those that regulate biological reproduction or the structure of the family are explicitly engaged in such functions; rules that regulate the wage market or wage market subsidies maternalize the female body more indirectly.

Rules that prohibit, restrict, or hinder access to abortion and rules that prohibit or inhibit the use or distribution of birth control devices prevent women from avoiding unwanted childbirth.[23] These rules have the effect of making some women become mothers against their

[23] Since teenage women are still subject to contraceptive restrictions, despite Eisenstadt v. Baird, 405 U.S. 438 (1972), these rules are not in desuetude.

will. In this way these rules directly conscript the female body in the service of maternity.

Fetal protection rules,[24] decisional law that compels women to undergo unwanted caesareans, and rules that facilitate involuntary sterilization in some circumstances require conduct of pregnant or fertile women that they themselves do not desire or might not otherwise choose. Rules such as these curtail the liberty of some women in order to regulate pregnancy and protect childbirth. In this way, these rules maternalize the female body.

Once women have given birth, legal rules relating to child custody and support disputes compel or encourage women to do more child rearing than men. Sex-specific rules only recently outlawed by the federal and state equality guarantees used to perform these functions quite directly. Pursuant to the maternal preference rule, for example, women were explicitly presumed to be better parents than men; a man could only wrest custody of his children away from their mother if he could prove she was "unfit." This rule not only allocated disproportionately more child rearing responsibilities to women in formal legal disputes; it also signalled to men and women making "private" decisions regarding parenting responsibilities that the legal system expected women to do more parenting and to do it better than men.

Two forms of child support provisions from the not-so-distant past also ensured that women were more likely than men to become primary child caretakers. Under civil and criminal child support rules, states formally imposed support obligations exclusively or primarily on fathers, and, under federal and state welfare benefit rules, widowed or single mothers (but not fathers) were entitled to governmental child support assistance. Both forms of child support provisions "freed" women to abandon or subordinate wage market work in order to care for children.

Although most sex specific provisions have been formally eliminated from custody and child support rules, the neutralized rule system has not significantly reduced the gender lopsidedness of custody and support decisions; judges still impose or approve child custody and support schemes in which women undertake more physical responsibility for child care than men. Thus, the administration of domestic relations law is implicated in helping or making women "mother" their children. The law continues to signal to women and

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[24] At least 50 cases have been brought against women for "fetal abuse" in giving birth to drug-exposed babies. *See* Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59, 64 n.40 (1990). Some states have expanded the definition of neglected children to include babies who are born addicted to certain classes of drugs. *See* FLA. STAT. ANN. § 415.503(9)(a)(2) (West Supp. 1991); MASS. GEN. L. ch. 119, § 51A (1991). Women have also been charged with vehicular homicide for the death of their fetuses. *See* State v. McCall, 458 So. 2d 875, 877 (Fla. Ct. App. 1984) (count dismissed).

men making "private" decisions about which parent should do more or less child rearing. Mothers receive more legal support for that work than do men.

Moreover, not all sex-specific provisions affecting women's parenting roles have been eliminated from domestic relations law. Procedural and substantive rules relating to the custody and support of children born to unwed parents specifically assume that unwed mothers are (or should be) the primary parents of such children. Similarly, the rules just being developed to resolve disputes over surrogate mother contracts or over the custody of children conceived with technical assistance include a presumption that biological mothers have a more significant claim (or responsibility) for custody than biological fathers.

Historically, then, but also presently, child custody and support rules and enforcement practices assign more women than men the daily responsibilities for child rearing and enforce child support duties in a way that encourages a similar allocation of child care. In this way, family law maternalizes the female body.

Legal rules that regulate the wage market compel or encourage women to bear and to rear children more indirectly than the rules described above. Nevertheless, because wage market rules undervalue the work women do in the wage market, women have much less to lose than men if they abandon, interrupt, or modify their wage market work because of child birth or child rearing. Legal rules that support women's subordinate status in the wage market thus also support (encourage or compel) women to undertake maternal responsibilities.

If employment discrimination rules actually prevented employers from treating women badly in the terms or conditions of their work, the impact of the wage market on the maternalization of the female body would be quite attenuated; it might even be eliminated. To some extent, of course, the advent of employment discrimination rules has improved women's wage work opportunities. However, the gender gap continues to exist in the wage market, partly because of gaps or omissions in the discrimination rules, partly because of the ways in which the rules have been interpreted, and partly because of the limited resources allocated to discrimination law enforcement. Consequently, the legal rules that support the wage market's undervaluation of women and the discrimination rules that don't do enough to curtail that situation support the maternalization of the female body.

Here are several examples of wage market rules that have this effect on women:

1. Although men and women are occupationally segregated into jobs that are disproportionately held by one sex or the other, and although "women's" jobs are less well compensated than "men's," legal rules validate this unequal payment system. It has been widely ar-

gued, for example, that a substantial portion of the wage disparities between sex-segregated job categories could be eliminated by requiring employers to pay wages according to the "comparable worth" of jobs. In most cases, courts have refused to hold that employment discrimination law compels employers to adjust wages in this manner.[25]

2. In most cases hazardous workplace rules that exclude pregnant or fertile women have been upheld,[26] *Johnson Controls*[27] to the contrary notwithstanding.

3. Job allocation schemes that channel disproportionately more men than women into lucrative jobs do not violate employment discrimination rules because of the narrow judicial interpretation of discrimination laws.[28]

4. An unemployment compensation scheme that denies benefits to women who leave work because of childbirth has been upheld under the narrow judicial interpretation of discrimination laws.[29]

[To be worked in, maternalization and paternalization of wage market jobs (pilot/stewardess; doctor/nurse; boss/secretary; principal/teacher)]

D. The Sexualization of the Female Body: Monogamy, Heterosexuality, Passivity

This section describes how legal rules affect the frequency, the character, and the distribution of women's sexual practices. The argument is that by directly or indirectly penalizing conduct that does not conform to a particular set of sexual behaviors, legal rules promote a model of female sexuality; this model is characterized by monogamy, heterosexuality, and passivity. This means that legal rules favor women who marry, who have sex only with their husbands, and who

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[25] *See, e.g.*, American Nurses' Ass'n v. Illinois, 783 F.2d 716, 725 (7th Cir. 1986) (holding that a state's refusal to adopt the principle of comparable worth was not actionable); American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1408 (9th Cir. 1985) (rejecting a union's claim that the state was compelled to restructure its compensation system based on the results of a comparable worth study); Christensen v. Iowa, 563 F.2d 353, 355 (8th Cir. 1977) (finding no prima facie case of sex discrimination under title VII, 42 U.S.C. § 2000e to 2000e-17 (1988), in a state university's practice of paying male physical plant workers more than female clerical workers of equivalent seniority and grade).

[26] *See, e.g.*, Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1188–91 (4th Cir. 1982).

[27] *See* 111 S. Ct. 1196, 1203 (1991).

[28] *See* EEOC v. Sears, 628 F. Supp. 1264, 1352–53 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1754–56 (1990).

[29] *See* Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 514, 522 (1987).

defer to their husbands in determining when, how often, and in what manner marital sex takes place. In contrast, legal rules discourage women from being celibate or from having sex outside marriage — with one partner, with multiple partners, or with other women; they also deter women from being more assertive than their husbands want them to be about the management of marital sex.

Although law is only one of the cultural factors that influence women's practices, if the legal rules this section describes were different, female sexuality could be different. It is hard to say whether women would have less sex than they do now, or whether they would have more; it is hard to predict how their choice of sex partners would change or how the character of their sexual experiences might be affected. Nevertheless, because the present regime of legal rules induces women to be "good girls" and imposes sanctions on "deviant" sexual conduct, it seems clear that altering the current regime would undermine the current model of female sexual behavior.

Legal rules influence female sexuality by means of three groups of rules or law enforcement practices. One group of legal rules prohibits or promotes certain forms of sex; the two other groups regulate the physical and economic conditions in which sex takes place. The remainder of this section is devoted to explaining how these rules function as a system to encourage women to conform to a monogamous, heterosexual, and passive model of female sexuality.

Legal rules promote sexual monogamy by defining marriage as a union with one other person and by punishing or indirectly penalizing sex outside of marriage. Criminal rules against bigamy prohibit marriage to more than one person at a time, while sex outside of marriage is made a criminal offense, in many states, by rules against fornication and adultery. Legal rules in most states also designate adultery as a marital "offense" that constitutes grounds for divorce. Sex outside of marriage is further discouraged by rules prohibiting prostitution and by contract rules that make agreements between unmarried individuals who live together unenforceable to the extent that they are "based on" sex. These rules encourage women and men to be monogamous by formally restricting sex to the one person to whom they are legally married.

Because the rules against adultery and fornication are only loosely enforced, the legal impact on female sexual monogamy might not amount to much if these rules were the only legal factors affecting women's sexual practices. But this is not the case. The legal rules that regulate the economic consequences of marriage, the legal rules that maintain the inferior status of women in the wage market, and the legal rules that provide women inadequate protection against physical abuse all function to reinforce the impact of the sexual monogamy rules on women. These rules create economic and safety incentives

for women to marry and to remain sexually faithful in marriage. Moreover, these rules reduce the power that married and unmarried women have in relationship to men; in this way, these rules make women more susceptible to male demands for sexual fidelity than they might be under conditions of economic equality and physical safety.

Legal rules reduce the economic power of women in relationship to men by maintaining inferior employment opportunities for women in the wage market. At the same time, legal rules make marriage a potential source of income for marital partners, by means of spousal support and property provisions that require economically dominant spouses to share what they have with their partners. In addition, alimony rules sometimes permit economically subordinate spouses to continue to receive support even after their marriages have formally ended. Government benefit rules also structure marriage as an economic enterprise, through rules that provide retirement, death, and disability benefits to the spouses of wage earners.

By structuring marriage as a significant source of financial support, legal rules make marriage a plausible substitute — or supplement — to wage market work for both sexes. However, as a result of their inferior position in the wage market — a position legal rules sustain — women are likely to be more financially dependent on marriage than men. This condition affects the responses they might otherwise have to the lax enforcement of the rules against fornication and adultery. Legal rules induce women to marry, and to stay married, for financial reasons. Even though fornication rules are not stringently enforced, wage market and marital economic benefit rules provide women financial incentives to comply with them. Moreover, married women who are economically dependent on their husbands have economic incentives to have sex only with their husbands. Despite the lax enforcement of anti-adultery rules, the wage market and marital benefit rules function to make divorce financially risky for many women; complying with anti-adultery rules enables them to avoid giving their husbands a legal reason for divorce. By inducing some women to marry and to avoid divorce for financial reasons, wage market and marital economic rules reinforce the impact on women of rules that formally restrict sex to marriage.

The legal rules that regulate social violence reduce women's power in relationship to men because they enhance the significance of the cultural convention that a woman is more likely to be verbally or physically attacked if she is alone or in the company of other women than if she is with an individual man. By ineffectively enforcing legal rules governing rape, sexual assault, and other violent crimes against the person, the social violence rule system places women in physical jeopardy. Women can sometimes mitigate the impact of these circumstances by relying on individual men for protection against violence. To the extent that these rule-enforcement practices provide women

with a safety incentive to marry and to stay married, the social violence rule system reinforces anti-fornication and anti-adultery rules that penalize nonmonogamous sexual practices.

By reducing the power of women in relationship to men, the wage market rule system and the social violence rule system provide financial and safety incentives for women to defer to their sexual partners in determining the conditions of intimacy. If their partners value sexual monogamy — an ethic, as we have seen, that legal rules help form — then women are likely to comply with their partners' demands for fidelity. Legal rules make women less inclined to resist such demands than they might be in different circumstances. Legal rules also diminish the ability of women to demand fidelity of intimate partners who are unwilling to give up sexual promiscuity.

I have argued thus far that, by inducing women to marry, by discouraging them from having affairs, and by creating economic and physical conditions that help their sexual partners to impose monogamy on them if they want to, legal rules discourage women from having sex with more than one man. The legal model of female sexual monogamy also gives some women incentives to be more sexually active than they would otherwise be. Sex workers and women who want to be celibate are examples of women whom the sexual monogamy rule system induces into sexual activity.

The legal rules that devalue "women's work" in the wage market make prostitution, like marriage, a significant economic alternative or supplement to wage market labor. Moreover, the rules against prostitution, like the rules against fornication and adultery, are not stringently enforced. Legal rules thus provide de facto protection for prostitution; they enable prostitution to function as a safety valve against the constraints of sexual monogamy. Even though anti-prostitution rules are notoriously enforced more systematically against female sex workers than against male customers, legal rules induce some women to violate the criminal rules against prostitution by making sex work more lucrative than legitimate wage labor.

Legal rules also coerce some sex workers into having more sex than they might otherwise want to by inadequately protecting them from customer abuse, which can include unwanted sex. In addition, legal rules do not protect sex workers against the demands pimps may make of them for sexual activity. Since sex workers are induced to affiliate with pimps in order to defend themselves against customers and in order to broker their way through the criminal justice system when they are caught up in it, legal rules and law enforcement practices are complicit in imposing more sex on these women than they might have if their work were not illegal and if it were physically safe.

The sexuality of women who want to practice celibacy may not be affected by the rules prohibiting bigamy, fornication, adultery, and

prostitution. However, by creating economic and safety incentives for women to marry, legal rules encourage some women to abandon celibacy in favor of marriage. Since legal rules in most states provide that refusal to have sex within marriage constitutes grounds for divorce, legal rules inhibit women who marry because of economic or safety incentives from practicing celibacy within marriage.

Legal rules also create economic and safety incentives for women to sacrifice celibacy in order to have sex with men to whom they are not married. In addition to encouraging women to turn to men for physical protection, legal rules reduce women's ability to pay their own way; the wage market treatment of women makes it hard for them to go "dutch treat." These physical and financial pressures encourage unmarried women to yield to the sexual demands of escorts or companions they have turned to — at least in part — for protection against abuse from other men.

Although men and women are both subject to the rules that directly penalize or specifically require sexual monogamy, I have argued that the legal rules establishing the economic and physical circumstances in which women and men have sex encourage women to be more sexually monogamous than men. This sex-based difference in the impact of legal rules on monogamous conduct also has an effect on the character of heterosexual relations. To put this point more bluntly, these rules not only encourage a "double standard" of sexual conduct for women and men; they also enable men to have greater control over the terms of heterosexual intimacy — they give men more power over women in sex. This is one of the ways that legal rules encourage passivity as a model of female sexual conduct.

Women are induced to choose men rather than women as sexual partners — to comply with heterosexuality as the model for female sexual conduct — by legal rules that prohibit sodomy and other sexual acts between individuals of the same sex. Although the criminal rules penalizing homosexual conduct, like the sexual monogamy rules, are not vigorously enforced, decisional law defines marriage as a heterosexual union. Women who might expect that sexual relationships with other women could

[to be completed by:

economic and security incentives that make a male partner more advantageous for non-sexual reasons than a same-sex partner for women.

rules and procedures establishing a passivity norm, which include the marital rape exemption, economic and security incentives for doing what your guy wants, and the lax enforcement of prostitution laws, which induces economically or physically dependent women to let men have their way sexually in order to avoid losing their protectors to illegal sexual competition.]

III. The Politics of Postmodern Feminism: Lessons from the Anti-pornography Campaign

A particular phase of the legal anti-pornography campaign is dead in the water. The ordinance that Catharine MacKinnon and Andrea Dworkin initially authored and then vigorously promoted in Minneapolis, Indianapolis, Cambridge, and other cities would have made pornography a form of discrimination against women. It would have permitted women to bring civil actions against those who produce, make, distribute, or sell pornography, which the ordinance generally defined as "'the graphic sexually explicit subordination of women, whether in pictures or in words.'"[30] It would have provided civil remedies for the harm that pornography causes. But the Supreme Court's summary affirmance of the Seventh Circuit's decision holding the ordinance unconstitutional has rendered continued efforts to enact this particular ordinance very problematic. The campaign to enact the MacKinnon/Dworkin ordinance may, however, offer lessons for other feminist political projects.

The ordinance campaign fascinates me. As a political event involving the community of feminist lawyers, it was a dazzling success and an appalling disaster. It politicized feminist lawyers, by engaging many of us in the practicalities of a grass roots legislative reform effort that was widely publicized and electrifyingly controversial. But it also politicized us by brutally and bitterly fracturing our community. Catharine MacKinnon, in particular, put a high price on feminist opposition to her campaign. In a chapter chillingly entitled "On Collaboration," from her book *Feminism Unmodified*, she charged, with an emotional intensity that also characterized other campaign participants, that "[w]omen who defend the pornographers are defending a source of their relatively high position among women under male supremacy, keeping all women, including them, an inferior class on the basis of sex, enforced by sexual force."[31]

"I really want you to stop your lies and misrepresentations of our position," she continued. "I want you to stop claiming that your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism."[32]

For reasons I will soon make clear, I don't particularly regret the anti-pornography ordinance defeat. But like the architects of the ordinance, I too believe in using law to oppose the oppression of

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[30] American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (quoting Indianapolis, Ind. Code § 16–3 (q) (1984)).

[31] MacKinnon, *supra* note 4, at 205.

[32] *Id.*

women. Indeed, the apparent jeopardy of *Roe v. Wade*[33] makes me especially cognizant at this moment that retaining the legalization of abortion may soon become a pressing project requiring astute political skills among feminists forced to seek legislative reform all across the United States. I hope, therefore, that closely examining the ordinance campaign, as a salient incident in the politics of legal feminism, will advance the prospects of an abortion reform effort that the Supreme Court might thrust upon us, as well as the prospects of other future feminist legal projects.

I want to make two points about the campaign. First, I intend to challenge the somewhat familiar criticisms of the campaign by suggesting that some of the campaign's weaknesses can also be understood as political strengths, strengths that might be adapted and deployed in other efforts. That is, my claim will be that the conventional failures of the campaign also constituted the campaign's successes.

Second, I will outline what I think is a new critique of the ordinance campaign. Shamelessly relying on the advantages of hindsight, I will argue that the ordinance proponents were fatally reluctant to apply the theory underlying the campaign to their own efforts. Having brilliantly identified the subordination of women by sex as a linchpin of women's oppression, the ordinance proponents relentlessly perpetuated the dichotomy of gender in the style of their rhetoric, in the content of their arguments, and in the absolutism of the ordinance's structure, which would have rigidly divided pornographic materials into two opposing categories — actionable or unactionable. My claim will be that the greatest strength of the anti-pornography ordinance campaign was also its greatest weakness. Having identified pornography as a cultural practice importantly implicated in the problem of women's condition, the ordinance advocates sought unsuccessfully to use law reform to destroy pornography. I now seek to turn this failure to some profit, by using an analysis of their campaign as an opportunity to deconstruct pornography. The interesting and perhaps troubling question that underlies my own position, however, is what effect this deconstruction would have had on the ordinance campaign.

A word of caution before I proceed. Each of us is likely to have a relatively concrete, relatively firm understanding of what we consider pornography, but we probably disagree about the components of a common conception. When I was twelve, pornography meant a few pages in my parents' copy of *From Here to Eternity*[34] and a few words like "coitus" and "fornicate" thrillingly available in my own dictionary. My personal definition now is more far ranging, but I do not know how widely shared it is.

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[33] 410 U.S. 113 (1973).

[34] JAMES JONES, FROM HERE TO ETERNITY (1951).

Two Meese Commission guys recently published a survey in the *Michigan Journal of Law Reform* that comically purports to describe the character of "adults only" pornography currently sold in the United States.[35] The survey classifies the cover photos of books, magazines, and films sold in "adults only" bookstores in four cities. Because the investigation is limited to "adults only" stores, the survey does not include material which I consider part of the pornographic genre. Examples of omitted material I would include are: formula romances; science fiction and comics that feature sexually explicit material; lesbian and gay erotica that is too pretentious for "adults only" bookstores; the dark, serious literature of sex and violence characterized by books like *The Story of O*[36] and Georges Bataille's *Story of the Eye;*[37] and portions of material found in many women's glossy magazines. I am not going to try to solve the problem of confusion that the term pornography generates in listeners by contriving a general, abstract definition that many of you would probably dislike. I simply want to assert that what constitutes pornography is usually a charged and unexplored question in any discussion involving pornography.

A. Conventional Failures Reinterpreted: The Strengths of the Ordinance Campaign

A familiar criticism of the ordinance campaign is the charge that it produced an alliance between ordinance advocates and nonfeminist conservatives. Many feminists during the campaign voiced concern that conservative support for the ordinance indicated their intention to turn the ordinance against material that is offensive only because it describes or depicts "nontraditional" sexuality. Because conservatives have considered the use of birth control devices and sexual activities such as cunnilingus "nontraditional sexual practices," ordinance opponents feared that the ordinance campaign might lead to the repression of sexual freedom rather than to the prevention of sexual oppression.

The conservative alliance might not have occurred had the ordinance advocates been clearer, narrower, and more consistent in their explanation of what constituted pornography. The advocates repeatedly attempted to reassure wary feminists that the ordinance did not need to function to impose an orthodox, traditional form of sexuality on anyone. However, the general definition of pornography as "'the graphic sexually explicit subordination of women, whether in pic-

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[35] *See* Park E. Dietz & Alan E. Sears, *Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films in Four American Cities*, 21 U. MICH. J.L. REF. 7, 10–11 (1987–1988).

[36] PAULINE RÉAGE, THE STORY OF O (Sabine d'Estrée trans., 1965).

[37] GEORGES BATAILLE, HISTOIRE DE L'OEIL (1979).

tures or in words'"[38] was broad enough to encourage the Vanilla-Sex Gestapo that they could get with the ordinance program.

I claim the conservative alliance was a virtue of the ordinance campaign because of its role in extending the ordinance debate beyond predictable feminist constituencies. In contrast to the typically narrow circle, for example, which has exhibited interest in radical legislative reforms related to the anti-family structure of the labor market, the ordinance campaign boldly and successfully engaged nonfeminist political camps. Conservative support for the ordinance undoubtedly posed troublesome management issues for the feminists supporting the ordinance. However, a broad theater of political involvement was obviously vital to the ordinance campaign, and similarly broad coalitions will also be important to the success of other feminist law reform projects.

I acknowledge that extending feminist issues beyond familiar constituencies occurred in the ordinance campaign at the cost of feminist unity. My claim is that breaching this unity is a necessary component of feminist efforts against women's oppressions.

The broad definition of pornography adopted by the ordinance advocates radically challenged a fundamental premise of post-Freudian, Lacanian theories of self, the premise that domination and subordination are an inevitable aspect of interpersonal relations. Ordinance advocates assumed that by eliminating *depictions* of sexual domination, *sexual domination* could be dealt a fatal blow. In contrast, ordinance opponents believed that domination and subordination constitute a psychological structure that does not depend on the pornography industry and that *need not* depend on gender division for its existence.

This dispute involves a profound question about the nature of the self. It is not surprising that people disagree about this issue; it is not surprising that women — indeed, that feminists — disagree about this issue. Although a powerful, broad, and coherent political community is critical to feminist law reform projects, I believe it is a mistake to fear or avoid or condemn differences among feminists as we pursue these projects. Accepting and exploring our differences, in my view, is a critical component of challenging the ideology of gender difference, which includes the assumption that there is a feminine essence that unalterably unites women, binding us together under the generic category "woman."

A second criticism that has been leveled against the ordinance campaign is that it distracted feminists from other work more important to the women's movement. Ordinance advocates argued that

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[38] American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (quoting INDIANAPOLIS, IND. CODE § 16–3(q) (1984)).

pornography triggers massive physical violence against women; they claimed that by sexualizing domination and subordination, pornography functions to consign all women to unequal social and economic status on account of their sex; and they asserted that as an eight billion dollar industry, pornography economically exploits the women who participate in its production and drains substantial resources away from other, more significant purposes. In making their criticism that the ordinance campaign was a fruitless diversion, ordinance opponents disputed all these claims.

Opponents claimed that the data causally linking pornography to violence against women was insubstantial, unconvincing, and predicated on a simplistic and unpersuasive theory of causation. They disputed the claim that regulating pornography could have much effect on the subordination of women, arguing, as I have suggested above, that this subordination is not rooted in pornography. Indeed, some feminists claimed that pornography usefully functions in certain cases to channel and subdue troubling fantasies. The opponents were skeptical that bringing down the pornography industry would make eight billion dollars available for women's causes, and they were critical of the costs of pursuing the ordinance campaign.

In contrast to the ordinance opponents, but for different reasons, I believe that concentrating so much effort, energy, expertise, and even money on the anti-pornography issue simplified and thereby facilitated feminist political organizing, much the same way single-issue campaigning often constitutes an organizational advantage in electoral politics. Political success is predictably correlated with coordinating and consolidating efforts.

I also believe the theoretical claim that the subordination of women is rooted in sex is a message that will significantly benefit the feminist movement. This claim radically challenges the traditional focus of feminist concerns. It legitimates pornography as an appropriate field for struggle, analysis, and interpretation. It challenges the traditional feminist agenda of appropriate strategies for contesting the oppression of women. Whatever skirmishes or battles we may have lost because of the anti-pornography diversion will be worth the challenge to conventional attitudes that the theoretical innovations of the movement facilitated. I attribute the exposure and discussion that occurred about this theory to the choice of pornography as the theory's practical target. This suggests to me an important political lesson for feminists. Issue choice affects our political potential, and legislative reform efforts produce political capital beyond the passage or defeat of legislation.

The last criticism of the ordinance campaign I will mention may be less familiar, but I will raise it because of how disappointed I was when the ordinance campaign came to my town in the form of model or boiler plate legislation. By preventing feminists outside the circle

of those who originally worked with MacKinnon and Dworkin from having a voice in the structure and scope of their local ordinances, the architects of the ordinance lost the organizing potential and the consciousness-raising benefits that would have inured from wider drafting participation. Moreover, broader drafting consultation or the experimentation in different cities with different ordinances, might have revealed that some of the model legislation provisions were miscalculations, mistakes that could have been corrected as the campaign moved from town to town.

Despite the criticism that using model legislation warrants, I realize that model legislation facilitates publicity and supports scholarship and efficient legal defense work, all of which strengthen local campaigns to enact feminist reform projects. Moreover, the ordinance campaign overall was remarkable for its broadly participatory character. The campaign heavily relied on indigenous, newly formed groups of concerned individuals in each of the targeted towns, and the ordinance utilized the strategy of allowing the victims of pornography to institute claims on their own behalf against pornographers. By eschewing city or state attorneys, the ordinance functioned to empower women. This strategy too could be adaptable and important in other feminist projects.

B. Destroying Pornography or Deconstructing It

I now turn to my claim that the ordinance campaign's greatest strength was also its greatest weakness, my claim that the advocates should have sought to deconstruct pornography rather than single-mindedly seeking to destroy it.

The ordinance campaign's most significant contribution to feminism was its pursuit of Catharine MacKinnon's theoretical insight that the oppression of women occurs through sexual subordination. The anti-pornography campaign allowed MacKinnon and others to dramatize what this theory means in practice, through its focus on a complex cultural phenomenon that is exclusively devoted to sex, a cultural practice consumed with depictions of what "the oppression of women through sexual subordination" means. In pornography, women get fucked.

Now, women get "fucked" in the workplace, too, where we do "women's work" for "women's wages," working for male bosses and working on male schedules. We get assigned to this inferior work track because we are identifiable by our sex. In addition, our past and present economic, social, and physical subordination makes us vulnerable to physical abuse at work, on the way there, and on the way back. We are raped at work or on route to work because of our sex, because we are cunts.

But the moment I say women get "fucked" in the workplace, the clarity of the relationship between women's oppression and sex is jeopardized. "Women's work" is a complicated construction; its origin and perpetuation depends on many factors in addition to misogyny. Pornography is a much cleaner site for demonstrating the practice of the theoretical insight; pornography is about women getting fucked.

I hasten to acknowledge here that pornography is also about violence against women and that ordinance advocates sought to attack pornography in order to prevent women who participate in its production from being harmed and in order to prevent other women from being harmed by the imitative reactions of pornography users. But the ordinance campaign was not restricted to preventing these two forms of harm.

Ordinance advocates also attacked pornography in order to oppose the sexualization of hierarchy and the objectification of women. They understood the ordinance as more than a good example of the truth of feminist theory in practice. They believed that destroying pornography would lead to the end of women's oppression on account of sex. They believed that destroying this particular depiction of women's oppression would change the experience of women's oppression in its many manifestations. I believe this was a fatal miscalculation.

If women's oppression occurs through sex, then in order to end women's oppressions in its many manifestations the way people think and talk and act about sex must be changed. The ordinance campaign was not well organized to change how people think and talk and act about sex. Rather, the ordinance advocates relentlessly utilized and exploited traditional ideas and language regarding sex in all aspects of the campaign.

Let me give just a few examples.

First, the language and rhetorical style of campaign advocacy were characterized by stereotypically masculine attributes. The language and style were militant, authoritative, and riddled with the easy obscenities typical of male talk. (I've done a little male talk myself in this section.) This style was impressively successful — the advocates were powerful campaigners; but the use of additional, less masculine rhetorical styles, which can also be persuasive and moving, would have made the ordinance campaign less gendered.

The campaign also seemed gendered because the arguments of campaign advocates were typically structured by hierarchical dichotomies. Thus, advocates reduced arguments against the ordinance to dismissive epithets: they were "anti-feminist" or "individualistic." Similarly, advocates oversimplified the character of pornography, suggestively referring only to rip and slash material in their discussions rather than acknowledging the complex character of the pornographic genre. Like the style of their rhetoric, the content of their arguments was stirring; it was arousing. But like the ideology of gender, which rigidly

divides the world into two sexes, the campaign argument was premised on an assumption that its listeners were divisible into only two camps — those who were pro-woman, and, therefore, pro-ordinance, and those who weren't.

I believe a less dichotomized approach to the problem of the oppression of women by sex would have been more likely to change the way we think and act about sex. By falsely simplifying the content of the pornography genre, the advocates overlooked the way in which some works within the genre already thematically challenge the subordination of women by sex. Not all pornography is simply about women being fucked. There are some pornographic works in which women fuck, for example; some works in which the objectification of the ejaculating penis is not repeatedly depicted and valorized; and many works in which the subjectivity of a female character is a dominant and successful thematic concern. These works do not depict what the ordinance advocates suggested pornography "is."

The ordinance advocates falsely simplified user responses to pornography, assuming in most of their arguments that pornography users mechanistically identify with same-sex characters and mechanistically seek to reproduce pornography scenes in their own lives. This singular reaction does not characterize reader responses to non-pornographic literature or viewer responses to non-pornographic films. Although many individuals may use pornography for sex instruction, it also seems likely that others use pornography as an implement of fantasy, seeking through their reading or viewing to escape lives characterized by chastity, by routinized sex, or by genderized sex. They may also use pornography to transform their lives by a more complicated reaction than simple imitation.

Users would not be interested in or sexually aroused by many forms of pornography if they reacted only by identifying with same-sex characters. Works like sexually explicit formula romances, for example, in which a woman is the principal sexual subject, would most likely be sexually arousing to a male user only if he identified with the female heroine, thereby relinquishing his sex-stereotyped desires to fuck and fantasizing himself instead as fuckee. Similarly, the appeal of lesbian and gay pornography seems to depend on more than mechanistic same-sex identification, in that users must select differences other than biological sex to identify with particular characters.

I hope I am not misunderstood here. I do not want to be understood as a pornography apologist, for I believe that the proliferation and character of the pornography genre is one of the most complicated cultural events of our time, an event whose meanings are still quite indeterminate.

I also do not want to be understood as anti-feminist. The polarization of the feminist legal community during the ordinance campaign was terrifying to me; I understand the instinct to condemn the op-

position that caused such division among friends and colleagues. However, I believe the divisions the campaign produced among feminists constituted an important challenge to the polarization of the world by gender. The closing lesson I want to draw from the anti-pornography campaign about feminist organization is the observation that exploring, pursuing, and accepting differences among women and differences among sexual practices is necessary to challenge the oppression of women by sex. Only when sex means more than male or female, only when the word "woman" cannot be coherently understood, will oppression by sex be fatally undermined.