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Sexuality Harassment

The Supreme Court has held that same-sex harassment may be sex discrimination within the ambit of Title VII. Its opinion in *Oncale v. Sundowner Offshore Services, Inc.*[1] tells us that same-sex harassing conduct that meets other criteria in the doctrinal scheme is conclusively sex discrimination when it is motivated by erotic attraction. Thus the Court indicates that same-sex erotic overtures at work can be sex discrimination, and invites lower courts to test for erotic content by inquiring into the sexual orientation of the individual defendant. Where the defendant in a same-sex sex harassment case is not homosexual, the Court says that the "social context" will indicate whether harassing conduct is sex-based and thus sex discriminatory. The purportedly clarifying example is the (presumptively heterosexual) coach of a professional football team. This person is not engaging in actionable harassment when he "smacks" a player on the butt out on the field (the Court seems not to notice its own salacious double entendre), but he may come within the reach of Title VII if he commits the same act upon a secretary (male or female) back in the office. Apparently, we know that the former leaves men on the football team *in statu quo ante* as men and as employees, while the latter, if deemed objectively severe, could make the office a hostile environment for members of the secretary's sex. If this strikes you as a bit mysterious, do not be concerned. Justice Scalia ends the opinion with a reassurance that courts and juries will use *common sense* to distinguish "simple teasing and roughhousing among members of the same sex" from actionable sex discrimination.

Common sense is precisely what I am afraid judges and juries *will* use.

After all, homophobia and homosexual panic are common sense. To be sure, a gay-friendly analysis has to welcome the Court's decision that same-sex sex harassment is actionable sex discrimination: without it, federal antidiscrimination law would have explicitly declared open season on gay men and lesbians, leaving us unprotected from sexual interference that can threaten our very ability to work and learn. But with it, federal antidiscrimination law may *implicitly* declare open season on gay men and lesbians, leaving us unprotected from lawsuits that threaten our very ability to work and learn.

Moreover, the new legitimacy of same-sex cases presents us with a miner's canary, capable of revealing aspects of sex harassment enforcement that seem quite innocuous until you imagine how they would work when driven by the energies of homophobia. When the canary dies, it's time to ask whether the space is good for anyone.

Feminist, Pro-Gay, and Queer Readings of Same-Sex Sexual Harassment

Women's subordination feminism posits that women are subordinated to men. Some women's subordination feminisms claim that this is a structural feature of human life (MacKinnon; cultural feminism in its "patriarchy" mode); others think that subordination is more episodic (historicist Marxist feminism; cultural feminism in its "social meanings" mode). Some object to women's subordination as an unjust effect of power (MacKinnon); others detect in it an error in values (cultural feminism). And whereas some locate the primary or paradigm site of women's subordination in the market/family complex (Marxist and socialist feminisms), others locate it in reproduction and women's experience of care (cultural feminism), while still others locate it in sexuality (MacKinnon; cultural feminism focused on sexuality rather than maternity). I call the last of these *sexual subordination feminism*.

One basic thing that went wrong in the left project of remedying women's subordination at work is that sexual subordination feminism — MacKinnon's feminism in an alliance with cultural feminism — came to subtend the legal and regulatory project and to locate its contours, all at the expense of socialist feminism. I argue that it is time for a return to a socialist feminist understanding of this piece of left legalism. This is in part because socialist feminism provides the more germane insights into women's working lives. Because this project is already well articulated in a pathbreaking article by

Vicki Schultz, I will not concentrate on it here.[2] Instead I want to concentrate on another reason for such a shift, one emerging from gay identity and queer interests and thinking. By a gay identity project, I mean one that supposes that there are and should be gay men and lesbians, that they are subordinated unjustly, and that justice projects should focus on their equality. By a queer project, I mean one that emphasizes the fictional status of sex, gender, and sexual orientation identity, and that affirms rather than abhors sexuality, "dark side" and all. From the perspective of these projects, we can notice that sexual subordination feminism makes policy choices that put gay and queer constituencies in the line of regulatory fire, and that it depends on feminist models of gender and sexuality from which pro-gay and queer thought diverge.

Confronting this, moreover, requires us to be able to notice as well that gay and queer thought and aims diverge. Each seeks the welfare of a different kind of sexual subject. A gay-identity approach posits that some people are homosexual and that the stigma attached to this kind of person should be removed. By contrast, a queer approach regards the homosexual/heterosexual distinction with skepticism and even resentment, arguing that it is historically contingent and is itself oppressive. This divergence, as that between gay identity and queer projects on one hand and sexual-subordination feminism on the other, is of course only crudely indicated by this sketch. I hope some of the nuances will emerge in the following analysis of real interpretive and policy choices they are all are faced with in sex harassment law.

In the following pages I spell out the terms of MacKinnon's theory, the differences between it and cultural feminism, and the differences between them and gay identity and queer thinking, and deploy all of them to produce divergent readings of *Oncale*. My goal is to make clear the inadequacy of sexual subordination feminism to assess certain effects and defects of its own law reform project, to suggest an overall need to alter the left attitude toward sexual harassment law. Sexual harassment law has become, I argue, sexuality harassment, and it is time to build left resistance to it.

SEXUAL SUBORDINATION FEMINISM

The Structural Male/Female Model. In the book that did more than anything else to provide the theoretic basis for sex harassment law, *Sexual Harassment of Working Women,* published in 1979, Catharine A. MacKinnon set out a theory of sex, gender, sexuality, and power that explains

why male/female sexual overtures at work are sex discrimination. Here's MacKinnon's male/female model: "Analysis of sexuality must not be severed and abstracted from analysis of gender. What the current interpretations of rape [as an exercise of power, not of sexuality] fail to grasp . . . is the argument most conducive to conceiving sexual harassment as sex discrimination: a crime of sex *is* a crime of power. Sexual harassment (and rape) have everything to do with sexuality. Gender *is* a power division and sexuality is one sphere of its expression. One thing wrong with sexual harassment (and with rape) is that it eroticizes women's subordination. It acts out and deepens the powerlessness of women as a gender, *as women.*"[3] This paragraph uses a number of ambiguous terms, but it gives them very stable, intelligible meanings. Sex appears here both as the difference between men and women (I call this sex1, to indicate bodily dimorphism, the purportedly stable difference between male and female bodies) and as erotic appeal, genital eroticism, and everything that makes "fucking" a central focus of attention (I call this sex2). Sexuality is the structural rather than interpersonal dimension of sex2 (it appears that MacKinnon was not thinking here about sexual orientation at all).

The crucial term, however, is gender. Rape and sex harassment are homologous crimes of sex1 because they use sex2 to generate gender. Gender renders men as men (that is, superordinate) and women as women (that is, subordinate). Women *as women* are powerless. Their *gender* is this subordination.

In the important theoretical article that MacKinnon published in the feminist journal *Signs* in 1982 but had written well before the publication of *Sexual Harassment of Working Women*[4] she restated this point and elaborated it: "Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. 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."[5] As MacKinnon suggested in 1979 and as she explicitly states here, gender renders sex hierarchy as what men and women *are;* it produces rather than reflects sex1. This is one of the most radical elements of MacKinnon's theory of sex2. The reality of sex1, and the consciousness in which that reality seems real, natural, and inevitable, are *effects* of power. As MacKinnon put it in her subsequent 1983 *Signs* article, sex hierarchy is ontologically and epistemologically "nearly perfect":[6] by producing both

its own reality and our every mode of apprehending that reality (with the sole exception of feminist method as MacKinnon defines it), it almost completely occupies the horizon of possibility.

I call this the male/female model. It is a neat, tight system; indeed, for all its constructedness and contingency, it is total, structural, complete.[7] Purportedly operating on the ground of sex1 but actually producing it, men use sex2 to make themselves superordinate, and that is their gender; and to make women subordinate, and that is our gender. They win, we lose.

Of course, this is not inevitable; rather, it is a historical catastrophe. Almost luckily, rape and sex harassment are especially concentrated forms of sex2. Just like myriad other rituals of heterosexual interaction, but with particular force and clarity, rape and sex harassment give men and women gender (that is, makes them men and women), which, for MacKinnon, means their relative place in a male/female hierarchy. And here is where MacKinnon places her Archimedes' lever. According to MacKinnon's theory of legal remediation, the law of rape and of sex harassment, when they provide a remedy for the injury of sex2 *based on a woman's claim to women's point of view,* provide ways of exposing this terrible mistake, interrupting the ontological and epistemological seamlessness of sex2, and enlisting the energies of the state in the project of justice.

Now, the claim of any one woman to "women's point of view" is necessarily problematic. Not only do women disagree, but their epistemic powers are, MacKinnon insists, fundamentally constructed by the eroticization of male dominance. In 1982 MacKinnon urged feminism to address, not resolve, this problematic, by dedicating itself not to the assertion of women's point of view but to the search for it.[8] In 1982, the essence of feminism to MacKinnon was not the male/female model but a methodological commitment to consciousness raising. But by 1983 she began to claim that CR had revealed women's point of view, and revealed it to be nothing other than the social truth of the male/female model. By 2000 she could make the following claim:

> Gender . . . was what was *found there, by women, in women's lives.* Piece by bloody piece, in *articulating direct experiences*, in resisting the disclosed particulars, in trying to make women's status be different than it was, a theory of the status of women was forged, and with it a theory of the method that could be adequate to it: *how we had to know in order to know this.*

> . . . *In and from the experience of woman after woman* emerged a systematic, systemic, organized, structured, newly coherent picture of the relations between women and men that discernibly extended from intimacy throughout the social order and the state. Our minds *could know it was real* because our bodies, collectively, lived through it. . . .
>
> My own work provides just one illustration of how this philosophical approach of theory from-the-ground-up has been productive in practice. . . .
>
> Feminism made a bold claim in Western philosophy: *women can access our own reality because we live it;* slightly more broadly, that living a subordinated status can give one access to its reality. . . . We . . . claimed *the reality of women's experience as a ground to stand on and move from,* as a basis for conscious political action. . . . Women turned the realities of powerlessness into a form of power: credibility. And reality supported us. *What we said was credible because it was real.*[9]

Between 1982 and 2000, then, MacKinnon made a transition from critique to Enlightenment knowing, one that helps to explain how, originally the radical feminist par excellence, she has been able to make an almost complete reconciliation with liberal feminism.

A second change was also necessary. In 1983 MacKinnon offered the bold proposal that the state, its law, and the rule of law are male. She "propose[d] that the state is male in the feminist sense" not only because it pursued and protected men's interests in sexual control over women by adopting particular rules (which presumably could be rewritten), but because "formally, the state is male in that objectivity is its norm." The very "rule form . . . institutionalizes the objective stance as jurisprudence," which, in liberalism, is "the law of law."[10] Asking the law, rather than women, to speak the meaning of sexuality from women's point of view would be a hopelessly contradictory undertaking. And so rewriting the rules of rape adjudication to make women's subjective experience decisive would merely reinscribe the terms of male dominance into the feminist project: "Even though the rape law oscillates between subjective tests and more objective standards invoking social reasonableness, it uniformly presumes a single underlying reality, not a reality split by divergent meanings, such as those inequality produces. . . . One-sidedly erasing women's violation or dissolving the presumptions into the subjectivity *of either side* are alternatives dictated by the terms of the object/subject split respectively.

These are alternatives that will only retrace that split until its terms are confronted as gendered to the ground."[11] This at least suggests what the *Signs* articles repeatedly affirm: that women's subjective experience, no less than men's, is part of the epistemological dilemma posed by male dominance. To move "toward a feminist jurisprudence," for the MacKinnon of 1983, was to engage in critique by exposing that dilemma in all its stringency, as an opening for a feminist consciousness currently unattainable in its terms. And so, just after affirming, in the passage quoted above, that "what is wrong with rape is that it is an act of the subordination of women to men," MacKinnon turned from law and rape to the system of meaning in which they are embedded: "the issue is not so much what rape 'is' as the way its social conception is shaped to interpret particular encounters."[12] It seems quite fitting, then, that the second *Signs* article ends in the mode of critique. Its last section warns that "making and enforcing certain acts as illegal reinforces a structure of subordination," catalogues the dilemmas posed for her feminist project by liberal and left jurisprudence, insists in its last line that "justice" would require something quite "new"—and avoids any effort to reconcile the idea of a charge of rape or cause of action for sex harassment by a particular woman with the problematic relationship that may obtain between her understanding and "women's point of view."[13]

But by 1989 MacKinnon was able to say that there can be "feminist law": "Abstract rights authoritize [*sic*] the male experience of the world. Substantive rights for women would not. Their authority would be the currently unthinkable: nondominant authority, the authority of excluded truth, the voice of silence."[14] An individual woman who suffers sex harassment at work thereby exemplifies, in her sexual injury, women's gender. As long as her legal cause of action for sex harassment performs the perspective produced by *women's point of view,* it will allow her to interrupt the ontological seamlessness joining male superordination with the law, enabling her to make not only her injury but the injury of all women visible, audible, and interruptable.

The idea that the legal claim of one woman flawlessly reveals the injury that male superordination and female subordination inflict on all women seems quite foreign to the radicalism and the critical stance of MacKinnon's *Signs* articles, but nevertheless pervades her practice of legal remediation. The MacKinnon/Dworkin antipornography ordinance would have allowed an individual woman, acting "as a woman acting against the subordination of women," to obtain an injunction against "trafficking" in

"pornography." Though MacKinnon and others frequently defended the ordinance on the grounds that an individual woman would have to "prove injury,"[15] that is precisely what women complainants seeking to enjoin "trafficking" in pornography were *not* required to do. Instead, it would have allowed one woman to act for all women, without any showing of actual harm to herself or anyone else, by enjoining the production, sale, exhibition, and distribution of a wide array of "pornography," even against defendants who thought in good faith that the materials were not subordinating to women.[16] Nor was MacKinnon's aim providing recompense to injured individuals or securing a locale in which those seeking to avoid pornography could do so; at least in the Minneapolis phase of their activism, MacKinnon and Dworkin urged the municipal Zoning and Planning Commission to reject a zoning approach and to adopt the private right of action not because the latter would recognize harm to individual women but because any pornography anywhere is sex discrimination. As MacKinnon told the Commission, "I do not admit that pornography has to exist."[17] Similarly, MacKinnon would remove any requirement that an individual woman prove that her employer fired her with actual illegal intent; "statistical proofs of disparity would be conclusive" because harm to an individual woman is the 100 percent pure distillate of the harm suffered by all women.[18] Clearly, the private lawsuit is an opportunity to remedy the injury sex2 imposes on all women. Of course, if some women think pornography helps them, or if a woman has been fired not because she is a woman but because she has committed a series of safety infractions on the shop floor, giving her claim this priority will hurt, not liberate, (some) women.

The Moralistic Male/Female Model. For two reasons I am going to sketch cultural feminism rather than exemplify it in one of its exponents' work. First, it has so many exponents in feminist legal theory that selecting one would seem arbitrary. Second, although it has generated many different "takes" on same-sex harassment, all of them bear such a strong family resemblance that a general rather than particular description should suffice for my purposes here.

Cultural feminism holds that women have a distinct consciousness and/or culture. In some versions, this distinctiveness derives from their biological situation; in others, it emerges from their historical oppression by men. Some versions emphasize women's reproductive experience; others focus

on their situation in sexuality. What makes a feminism *cultural* feminist is not its position on the essentialist/social constructivist divide, but its dedication to the propositions that women's feminine attributes amount to a consciousness or culture, that their consciousness or culture is improperly devalued, and that the reform goal is to revalue it upwards, until it has cultural status equal to or perhaps superior to the culture of men and maleness.

How does cultural feminism differ from and repeat the male/female model as MacKinnon deploys it? It's not a structural theory. Male domination is not perfect; women escape dominance much or some of the time, have agency, are authentic, and so on. Indeed, women have more of every kind of virtue than men, including the epistemological and ontological ones of knowledge and existence. And while MacKinnon's theory attributes sex inequality to *power*—male domination, for her, is "not a moral issue"[19]—cultural feminism is intensely moralistic. Women's subordination is a moral error, and it has produced women's moral superiority to men.

These two differences produce very different takes on sex2 and on law. Sex2 first. Whereas MacKinnon's theory makes it impossible to know the difference between normal heterosexual intercourse and rape, cultural feminism (when it is about sexuality, not maternity) knows a lot about what good sex2 between men and women looks like. It has the virtues that have been, at least since the late nineteenth century in the West, associated with women. Good sex is intersubjective, caring, respectful, alert to human dignity, human values, human sensibilities, human sensitivities. Good sex involves taking one's pleasure in the pleasure of the other, or at least only on the condition of the pleasure of the other. Good sex is expressive; it respects, reflects, and/or constitutes personhood. In the name of these ideals, good sex, to be good, must depress masculinity in either partner and promote femininity in both.

And the differences between the male/female model and cultural feminism produce a very different relation to liberal feminism and a different approach to legal reform. Unlike MacKinnon's theory, cultural feminism has a firm grasp on the categorical imperative in sex2. It can speak to liberalism about human dignity in a way MacKinnon cannot. There are people on the planet—women—who are doing life right; we can all model ourselves on them. This is why cultural feminism (though it has its apocalyptic moments) basically has a sunny disposition. If we could let women

run things, or convert men to femininity, things would be better. Women's oppression is episodic; there is almost always light at the end of the tunnel. Cultural feminism thus fits into liberal feminism without all the angst that attends MacKinnon's relation to it. It has permeated feminist *legal* theory, I think, because it is good at designing incremental reforms and maintaining faith in them, and because liberal feminism is hospitable about half of the time to its search for special treatment.

For all that, though, cultural feminism shares a lot with the male/female model. When it is about sexuality, not maternity, it is a sexual dominance theory. That is, it holds that sexuality is central to women's subordination and that women's subordination is the central fact in sexuality; that masculinity is dominance and objectification; that femininity is its opposite; that masculinity belongs to men and femininity to women; that this formula states the relevant alternatives so exclusively that, if a man is sexually subordinated, he must be understood to be feminized;[20] and that whenever in sexuality we find dominance it is masculine and morally erroneous.

And the moralism of cultural feminism makes it just as radical as MacKinnon's early theory, though in a very different way. MacKinnon would like to get them by the balls because she doesn't believe their minds and hearts *can* follow; whereas cultural feminism has detailed plans for their hearts and minds. It is a fighting faith seeking the moral conversion of a little less than half the human race. The emphasis on values in cultural feminism has led it to have reform aspirations that are at once minute and diffuse; it knows things like "Lesbians should not wear strap-ons" and "People having sex should be required to ask permission for every new intimate touch," and "A husband who introduces his penis into the vagina of his sleeping wife has raped her and should be prosecuted." It can't stand to listen to Randy Newman's "You Can Leave Your Hat On." It thinks that a man who would joke to a female subordinate at work about pubic hairs appearing on his Coke can has shown himself unfit for high office. It's easily offended; it is schoolmarmish, judgmental, self-righteous. And here it begins to look not like a species of liberal feminism but like an alien infiltrator in it: we have seen it seeking to clear the airwaves of all endorsements of values it thinks are bad; we have seen it thinking that *referring* to a value is *endorsing* it.[21] It can insist that people not only do the right thing, but do it with the right spirit. In short, cultural feminist moralism can trend toward totalitarian regulatory projects. Opposing it makes one sound like a libertarian.

READINGS OF *ONCALE*

By the Structural Male/Female Model. Almost twenty years after publishing *Sexual Harassment of Working Women,* MacKinnon wrote a brief in the *Oncale* case for a group of amici committed to stopping violence by and against men.[22] It shows concisely how MacKinnon's male/female model works when it incorporates three new elements of sex harassment: men's subordination *of a man, male/male* sex2, and thus *sexuality* reconstrued as the social dimension not of male/female sex2 but of sex2 more generally.

The facts alleged by Joseph Oncale are disturbing. Working on an oil rig in an all-male workforce, he was repeatedly threatened and assaulted by his supervisor and two coworkers. They threatened to rape him; twice they held him down while placing their penises up against his body; once they grabbed him in the shower and did something (one cannot be sure quite what) with a piece of soap. His complaints were ignored, and he quit under protest.

In the male/female model as the MacKinnon brief elaborates it, Oncale suffered sex discrimination because he was injured *as a man.* He and other male victims of male sexual aggression are "victimized through their masculinity, violated in their minds and bodies as individual members of their gender" (7). This happens because they are given not only the *worse* gender, but the *wrong* one: "They are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors. . . . For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak. This cannot be done to a woman. What he loses, he loses through gender, as a man" (10). What is utterly remarkable about this formulation is the endorsement it offers to a rigid, monolithic association of male bodies with male gender with superordination, and of female bodies with female gender and subordination. This endorsement is even normative to the extent that it maintains MacKinnon's project of articulating "the authority of excluded truth, the voice of silence." Adopting the perspective of male victims of male sexual violence requires us to recognize that they are persecuted by other men because they fail to represent dominant masculinity seamlessly. Here the brief seems to detach sex1 from gender, to recognize a political project of loosening the stringencies of masculinty. But the brief's articulation of the wrong suffered by Oncale also requires us to acknowledge that his primary, definitional injury is the loss of masculine superordination. How can this be a compensable loss in a feminist theory of injury?

The answer lies in the structural character — the totalism, if you will — of the male/female model. Like MacKinnon's articles and books analyzed in the prior section, the MacKinnon brief formulates the male/female model not as natural — it is, au contraire, a historical contingency which the law can resist (11) — but as total. This is unequivocally clear for women: a woman has no masculinity to lose. Men, however, can endure gender downward mobility. Though the brief is careful to flag the socially constructed quality of male gender, it is equally insistent that a man who loses masculinity is necessarily feminized: *there is nowhere else for him to go.* Thus men who lose their masculinity do so in "their gender, as gender is socially defined" (7), but there is nothing socially negotiable about their fate "as men": because of the harassment they "*are* feminized." Similarly, the brief posits that the attacks on Oncale "violat[ed] (what is conventionally considered) his manhood" (25). This would be a nice recognition of the social negotiability of that outcome except for the parentheses, which give us the option of reading the violation as real: the attacks "violat[ed] . . . his manhood." Whether it's conventional or not, his manhood is all Joseph Oncale has got that is properly his. Take it away, and he is wronged.

The MacKinnon brief again reveals the structural ambitions, the totalism, of the male/female model when it insists that homoeroticism and homosexuality have no independence of its terms. The latter are *subsumed* into the former. The MacKinnon brief achieves this by arguing that the question of homosexuality is both irrelevant to the question of sex discrimination and fundamentally the same as it. It is irrelevant because a homosexual harassing a person of his or her own sex is acting *just like* a heterosexual harassing a member of what the brief calls "the opposite sex" (1, 24), and because victims of sex harassment are victims whether they are straight or gay (25). Harassment is harassment no matter who does it to whom; it always reproduces the paradigm of male/female harassment, and thus we need not take into account anything distinctive about the same-sex-ness of the parties. But at the same time homosexuality is really fundamentally male/female gender all over again: the sex of one's sexual object choice is a "powerful constituent" of one's gender, and antigay discrimination fundamentally disadvantages people for deviating from gender expectations (26–27). As MacKinnon wrote on her own behalf in 1989, "Since sexuality largely defines gender, discrimination based on sexuality *is* discrimination based on gender."

The MacKinnon brief thus maintains the ontological supremacy of the

male/female model by simultaneously evacuating sexual orientation of any distinct components and flooding it with gender understood as male superordination and female subordination. This is, I think, a big mistake.

Why? Two points. First, this formulation causes the brief to argue that the homosexual orientation of the "perpetrator" (not the "defendant") may be relevant because it would make a male-male harassment case homologous to a male-female case. This would be a good thing for the plaintiff, the brief acknowledges, because the court would then be in a position to say that the defendant would not have selected a woman as his target (24). This is a quick and easy route to a legal finding of sex discrimination, one that the Supreme Court explicitly opened up in its decision in *Oncale*. Gay rights organizations have fought to close this route off ever since circuit courts first opened it, however, because it is also a quick and easy route to homophobia, via the inference that because the defendant is homosexual, he probably has done this bad sexual thing. In a male-male case the inference is even richer, borrowing as it does from the male/female model: because the defendant is a *male* homosexual, he is a sexual dominator.

To be sure, the brief counsels that courts may be institutionally unable to make findings of parties' sexual orientations, and it also indicates that courts allowing evidence of the parties' sexual orientations must prevent "homophobic attacks" (24). But it entirely misses the commonsense status of the virulent inference from defendant's homosexuality to his character as a sexual wrongdoer. Indeed, the brief virtually invites the Supreme Court to indulge in them by dropping an entirely unnecessary footnote quoting from Joseph Oncale's deposition testimony: "I feel that they made homosexual advances toward me," Oncale opined, according to the brief. "I feel they are homosexuals" (23 n.7).

And so second: neither lower-court opinion in *Oncale,* and none of the briefs submitted to the Supreme Court, brought this detail in the record to the Justices' attention. And the Justices did not ask for it: the questions they certified for their review made no mention of homosexuality. *Oncale* made its way up the appellate ladder as an "Animal House" case: the plaintiff's allegations of cruel, repeated, and unwelcome sexual assaults were persistently read as male-male homosocial highjinks gone awry—in Justice Scalia's terms, "simple teasing or roughhousing among members of the same sex" that is aberrational only in that it has become "objectively severe." Alternatively, of course, Oncale's deposition testimony could support a reading of the scene as homosexual predation. It is difficult to escape

the conclusion that the MacKinnon brief aimed to induce the Court to adopt just such a reading.

By the Moralistic Male/Female Model. Cultural feminism sees the facts alleged by Oncale to constitute a classic moral struggle between a virtuous feminine or at least not masculine (and in either case, a feminized) Oncale and his morally defective, testosterone-poisoned coworkers. Oncale on this reading is a surrogate woman: the harassment he suffered would have been targeted at a woman had she been there, and serves to masculinize oil rig work, to warn women that the oil rig is a province for male privilege. The masculinity of the rig, consolidated by Oncale's ejection, not only limits women's employment opportunities, but also confirms that sexuality is a, if not the, crucial vehicle for women's subordination.

Cultural feminism wants Oncale to be able to sue for sex discrimination to vindicate his feminine/feminized persona. It wants to borrow the authority of a federal court to make an official statement about gender virtue and gender vice. It also wants to feminize or, faut de mieux, degender the oil rig. That too would send a good moral message; it would push male-dominant values out of this form of public life, and it would clear the way for women to work there and to bring femininity with them. And it wants to desexualize the workplace, either because it shares MacKinnon's structuralism, and so thinks that sex always carries male dominance and female subordination, or because it thinks morally good sex—intersubjective, caring, respectful, alert to human dignity, human values, human sensibilities, human sensitivities—just can't happen between people as lightly connected as coworkers (only domestic monogamy is up to the challenge).

Finally, cultural feminism shares MacKinnon's suspicion of male/male eroticism: unless redeemed by the femininity of one partner, or a thoroughgoing display of categorical imperative respect, etc., what men do with men strikes cultural feminism as morally risky. It would suspect Oncale was right that his assailants were homosexuals, and would regard their sexual aggression as a textbook case of morally defective masculine eroticism.

By Gay Identity and Queer Understandings of Sexuality. There are two other ways to imagine the case—neither of them antigay—and none of the facts published in the various court decisions in the case preclude either one. I want to be very clear about what I am about to do. I am not saying anything about the human being Joseph Oncale, or making any truth

claims about what actually happened on the oil rig. Instead, I want to show how his factual allegations can be read. I am going to put his allegation of unwantedness aside, as a mere allegation, and then connect the remaining dots. And because that heuristic produces the equivalent of a court's knowledge of a same-sex harassment case of this type up to and beyond summary judgment, the patterns I draw will become predictions about two alarming classes of cases that will make it to trial under *Oncale*.

In the first of these alternative readings, we can posit, at least for purposes of contemplating what sex harassment law after *Oncale* might authorize, that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in Oncale's complaint (or that he engaged in some of that conduct and fantasized the rest; or even that he fantasized all of it), and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.

That is to say, *Oncale* might have been a homosexual panic case. It would be easy enough to generate this reading of the case out of entirely gay identity presuppositions; in that event, Oncale is actually a gay or bisexual man, but a shame-ridden one, who reacted to his own (identity-appropriate) sexual behavior and/or desires and fantasies with remorse and a lawyer. Oncale's many television appearances in which he (I am told) affirmed his horrified heterosexuality would merely be taken, on this reading, as a closet drama, a project in deep bad faith; my insistence on the possibility of this other reading of the case would be, then, a gesture in the direction of an outing (though note that my reading is of the record, not the human being). On this, first rereading of the case, we would have to understand Oncale as the aggressor, the other men on the oil rig as the victims, and the lawsuit (not any sexual encounter on the oil rig) as the wrong.

But a more thoroughgoing queer approach would make the case outright undecidable. Recall that I posited that a queer approach would detach male bodies from masculinity and superordination, and female bodies from feminity and subordination; it wants to undermine, historicize, celebrate every current supercession of, and generally "get beyond" discrete homo- and heterosexual identities; and it wants to notice that sexual super- *and* subordination can *both* be complex objects of desire, whether they are inflected by any particular configuration of bodies, genders, or homo/hetero identifications, or go bare of all of that.

Once you try, it's perfectly easy to read the facts in *Oncale* in a number of ways that perform many of these detachments. We can imagine that the

oil rig has a culture with rules, and that these rules draw not on the male/female model or a gay identity script, but on the ways in which masculine and feminine performances and gay-identified and gay-disidentified performances can diverge and converge to make the power relationships in sex expressly problematic. The rules allow Oncale to indicate a willingness to be mastered, indeed to demand that he is sexually accessible only on the stipulation that those approaching him take on the task of mastery; they submit by taking control; and something happens with a piece of soap. There's not enough in the record to say much more about how it could have been, but (assuming we are going to take Oncale's allegations about unwelcomeness as merely that: allegations) nothing I've said so far is ruled out by the record. From this starting point, the possibilities, in terms of masculinity and femininity and in terms of gay and straight, are probably endless. Mix, match, and omit as you will:[23]

1. Oncale performs a feminine man to signal his willingness to be mastered; it's the *discrepancy* between his male body and his gender that gets things going; the other guys comply with a big display of masculinity; and it's the *discrepancy* between their mere bodily selves and the grand controlling personae they assume that keeps things going; so "man fucks woman" but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.
2. Oncale performs a perfectly masculine man but only one kind of masculine man; it's the discrepancy between his masculinity and that performed by the other men involved that gets things going. Femininity is not important in this version—it's just absent; the men are differentiating themselves within some diacritics in masculinity. The terms of differentiation could sound in sentiment, age, refinement, race, moodiness, or simply (this is important; convergence is not mandated) masculinity itself. So, "it's a guy thing" that creates the space for a dominance/submission sexual interaction. So, "man fucks man": maleness and masculinity are important products of the interaction, but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.
3. The other men perform a kind of femininity associated with power; for example, they become bitchy. There is no necessary gender correlate for Oncale. He could be the heterosexual partner of the bitch and thus masculinized, but that doesn't tell us whether he's henpecked or intensely

phallic. He could be their lesbian partner, but that doesn't tell us whether she's butch or femme. Or he could merely play the bottom to the power on display: no gender at all. So "man or woman fucks man or woman," or perhaps "man or woman fucks," always with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

4. Possibly more than one of these is happening at the same time, or rather, perhaps they shift in and out of focus as the scene unfolds. Or it could be that the sheer bodily homosexuality of the scene is so dominantly *what it is about* that any effort to attribute to it legible gender signification is simply doomed to defeat. In either case we would have a power/submission relay, but with a twist that undoes the capacity of the male/female model to underwrite Oncale as a victim.

None of the above involves homosexual panic. Indeed, a person could pass through most of the scenes I've described without a sexual orientation identity; you could even do some of them "as" heterosexual. More likely, homosexual and heterosexual desire would—each—be, at every moment, complexly achieved, defeated, and deferred. To that extent the object of desire for any of the players would be some *relationship* to sexual orientation. Similarly, where gender is of any moment, it reads not as a property or determinant of the bodily self but as a performative language, as a means of transmitting desire. Certainly we can say that, when gender matters at all, the object of desire is not a gendered object, but a *relationship* to a gender or perhaps to gender more generally.

But I've made the assumption that the lead theme in the scene is power and submission. And here's the rub. The mix-and-match volatilities of gender and sexual orientation work to make the question of who is submitting to whom extremely difficult to answer. Indeed, the chief theme would have to be that the desire of the parties to any of these scenes has as its object a *mise-en-probleme* of desire itself. To the extent that the decision in *Oncale* allows one participant in scenes like these to have a panic about it afterward and sue, it sets courts and juries administering Title VII a deeply problematic function.

Let me reapproach that last point from the perspective of the male/female model. The rereadability of the facts in *Oncale,* rather than confirming the male/female model, shows what's wrong with it. It is just too complete and too settled. Men are over there with masculinity and superordination; women are over here with femininity and subordination. Sex and

sexuality are never good; they are always tools by which women are assigned subordination and men either assign or suffer it. Sexual orientation both matters and doesn't matter precisely and only to the extent that it confirms this mapping. Everything is accounted for; there is nothing left over. The model produces great certainty: Oncale transparently represents all men injured by this totalized gender system because the system frames all options for understanding his injury. But if the model doesn't apply, if homosexual panic or more complex "problematicness" panic is what the "case is about," that certainty will evaporate.

The resulting uncertainty intensifies, moreover, as we move from the homosexual panic hypothesis to the problematicness panic hypothesis. Things are bad enough under the former. Surely, on that reading of the facts, Joseph Oncale's hesitant sense that his attackers "are homosexuals" is volatile in a way that disables the male/female model. Does his "feeling" about his attackers tell us that they are homosexuals or that he might be? That they attacked him on the oil rig or that he attacked them by invoking the remarkable powers of the federal court to restore his social position as heterosexual? If we could know the answer to these questions, at least we'd know how to judge the case: we know we're against assault, and we know we're against homosexual panic. But how, in an actual case, *would* we know? Surely we would not want Justice Scalia's "common sense" to be our guide: as I've posited, homosexual panic *is* common sense.

Still less do I relish the idea of Sundowner Offshore Services deciding whether to put Pat Califia on the stand in an effort to persuade juries out of their commonsense intuition that no one could want to be mastered sexually, or could take control by demanding to be mastered. But the problem in the problematicness panic rereading of the *Oncale* facts runs much deeper than that. On that reading, it was precisely the loss of certainty about wantedness that the players were seeking. That *was* their desire. It's a risky desire: acting on it places one in the way of having some unwanted sex. Things can go wrong; we need to keep one eye on the cause of action for assault. But more profoundly, if things go right, the wantedness of the sex that happens will be *undecidable.*

On the way to confronting that, there are four more conventional reasons not to want this case ever to be tried as a sex harassment claim. First, this Oncale contradicts his own past decision when he claims access now to a less problematic set of norms about wantedness. We can and should estop him from claiming now that then he didn't want to put wantedness *en*

abysme. Second, if we don't estop him, we set up a one-way cultural ratchet: Title VII (and the background norms we will have further confirmed when we decide to use it in this way) will always turn the normative screw in the direction of less problematic sex. The male/female model is not a transparent translation of suppressed consciousness into the law; it's a trumping move. Third, to the extent that that changes the culture of the oil rig and the culture generally, that would be a huge loss. I may not be able to convince you of it, but I think the problematic of wantedness isn't just tolerable; it's beautiful. It's brave. It's complicated and fleeting and elaborate and human.

Fourth, suppressing performances that make the problematic of wantedness explicit would not make it go away; the regulatory project would only make the problematic of wantedness more covert; indeed, regulation might intensify by narrowing the vocabularies that subversion has to mobilize. After all, it's not just the perverts who engage in scenes like those I've just affirmed as good who seek incoherent experiences in sex: I think most of us experience sex (when it's not routinized) as an alarming mix of desire and fear, delight and disgust, power and surrender, surrender and power, attachment and alienation, ecstasy in the root sense of the word and enmired embodiedness. Essential elements of the third Oncale scenario are enacted, I imagine, in many more sexual relationships than you would guess just by looking around the boardroom or seminar room, and the edgy experience of unwantedness in sex is probably cherished by more people than are willing to say so. Suppressing performances like my third Oncale scenario might make sex on Sunday afternoon, with your spouse, in the sacred precincts of the marital bedroom, more banal or more weird—it's hard to tell which, in a domain of experience so routinely enriched by prohibition. The queer project carries a brief for the weirdness of sex wherever it appears; it is (or should be) agnostic about where, when, and among or between whom the intensities of sex are possible. But (and this is probably the queerest reason to protect the problematic of unwantedness from regulation as sex harassment) it would resist the redistribution of sexual intensities achieved under color of women's equality or moral virtue.

Some Doctrinal and Political Consequences

Homosexual panic—the experience of terror that some people feel when they think that someone of their own sex finds them sexually attractive—

can be extremely dysphoric. Some people might even say that having a homosexual panic experience at work was unwelcome and sufficiently severe to alter the conditions of their employment and create an abusive working environment. Under *Oncale,* they can sue for that. And because juries might well think that a single same-sex erotic overture was more obviously unwanted, and more "severe," than a single cross-sex one, these suits could place gay men and lesbians in the workplace (especially the "known" ones) under tighter surveillance than their obviously heterosexual counterparts.

Both gay identity and queer thinking are thus in tension with feminist projects of maintaining a copious definition of a "hostile work environment" here. From a gay identity perspective, *Oncale* should be read as a direct, disproportionate threat to the constituent group. And there is more to it than that if we move in a queer direction. The idea there is to regard homosexual panic with the utmost suspicion. It's not just that the experience appears from this perspective to be silly; it's deemed to be *in bad faith*. The idea is that no one would *panic* over the possibility of a homosexual engagement unless he or she both didn't *and did* want it. Homosexual panic, when it produces an attack on a gay man or lesbian, is thought to be a way of punishing someone else for desires that are properly one's own. A queer approach would question whether the homosexual panic plaintiff is making credible assertions about what the supposed perpetrator did to initiate his or her dysphoria, and whether the plaintiff's reaction is objectively reasonable. It would want the doctrinal machinery applied at these points to be skeptical, resistant to the plaintiff.

And so a gay-friendly or queer approach would be unhappy about achievements that feminists have sought and gained to make these bits of the doctrinal machinery more plaintiff-friendly. For instance, they would be worried about a recent change in the Rules of Evidence, sought and hailed by feminists, barring admission of evidence of plaintiff's sexual history in civil cases involving "sexual assault" or attempted sexual assault. (Sexual assault includes any unwanted sexual touching, so a lot of sex harassment cases are governed by this new rule.) The new rule could make it difficult to undermine the credibility of a homosexual panic complainant. And a queer approach would worry about reforms sought and, when achieved, hailed by most feminists, that tailor the reasonableness inquiry to match the "perspective" or "social knowledge" attributed to the plaintiff's demography. Both gay identity and queer projects would worry, for exam-

ple, about the Ninth Circuit's holding that the socially sensitive judgments in cases involving women's complaints about the behavior of men be subjected to a "reasonable *woman*" test. What's next? Are we going to refer these elements in male/male cases to the "reasonable (thus presumably the heterosexual) man"? I hope not. Feminism focused on sexuality as the central mechanism of women's subordination and gay-affirmative thought show trajectories across these bits of doctrinal turf that are veering into collision.

And there is even more to the problem than that. Unlike a gay identity approach, a queer approach tends to minimize rather than maximize the differences between same-sex eroticism and cross-sex eroticism. There are many reasons for this, but I suggest that the chief one is a sense that gender and power circulate far more complexly and with far more contingency than is thought in feminisms focused on woman's sexual subordination. The phenomenon of lesbians wearing dildos (big news fifteen years ago) leads to heterosexual women wearing dildos (not news yet, but it's happening). What's the difference, asks queer theory? Or take a footnote from Jessica Benjamin's book, *The Bonds of Love*. There she tells us, "A woman who had once been involved in a sadomasochistic relationship complained of her partner that "he was bumbling, he never hurt me where or how *I wanted* to be hurt.' Indeed," Benjamin continues, "a good sadist is hard to find: he has to intuit his victim's hidden desires, protect *the illusion* of oneness and mastery that stem from *his knowing what she wants*."[24] Feminism focused on the badness of women's sexual pain at the hands of men and committed to the idea that women's sexual subordination is the core reason for women's social subordination has trouble liking a sentence like that. But gay and queer thinking have no problem with it; indeed, they exult over how it rearranges conventional associations of the feminine with subordination and the masculine with power.

This tendency in queer thinking creates a deep tension between it and what may be *the* central goal of women's-sexual-subordination-feminist law reform in the area of sexuality. If the queer project reacts with so much skepticism to claims of same-sex sexual injury, and if the reason for that lies not only in its understanding of the historical fate of same-sex love but in its understanding of the complexities and ambivalences of eroticism, then the queer project undermines our reasons for believing women who assert that they are sexually injured by men. If same-sex sexual injury can be phantasmatic and based as much on desire as its opposite, why not also its cross-

sex counterpart? Indeed, *feminist* queer thinking might even say that we insult women by attributing to them such milquetoast psyches that they must be assumed incapable of fomenting powerful phantasmatic cathexes on abjection. And so we have queer and *feminist* queer projects of asking whether, when a woman claims that a male coworker or supervisor or teacher injures her by desiring her sexually, we should believe her, or think her claim of injury is reasonable. And here we are near the heart of the women's-sexual-subordination-feminist sexual regulatory project, which has been to change things so that women are believed when they claim sexual injury.

Near the heart. *At* the heart is the claim that the sexual—male/female or masculine/feminine sex2 and, in more structural versions, sexuality tout court—is subordinating for women. The astonishing cultural success of this defining idea of sexual subordination feminism can be traced in the intuition of women we know, and perhaps the women we are, that we are more injured when a male supervisor asks to sleep with us than when he forgets to sign us up for a reskilling conference or power lunch. And in the assumption that we are more injured when he asks than he is when we say no (or, for that matter, yes).

As we have seen, the idea that his overture is *sex discrimination* depends on an assumption that it is heterosexual: he would not have issued the same invitation to a man, say Catharine MacKinnon and Justice Scalia. And as we have seen, gay identity thinking seeks to cut that link in its concern that the logic in same-sex cases will be anything but benign for known or suspected gay and lesbian "perpetrators" and for homosexuality generally. More to the point, perhaps, queer thinking questions the very idea that there *are* homosexuals and heterosexuals, and objects to this element in sex harassment law because it promises to authorize and produce the narrowly conceived erotic personhoods it supposedly merely proves.

That is to say, gay identity and queer thinking *disagree* with sexual subordination feminism over the idea that sex2 and sexuality are consistently structured as top-down male/female power, and thus *disagree* with the idea that eroticism at work is presumptively sex discrimination that subordinates women. To be sure, they are or should be ready to recognize that sexuality can be deployed in cruel ways, and that erotic conduct can be prosthetic to a sex discrimination project that harms women. But I think their current political goals must be to dethrone feminism as the sole authoritative source for left understandings of the sexual normativity, and to

look to socialist feminism for left understandings of sex discrimination. At the very least, gay identity and queer thinking would sever the doctrinal link making sexual harassment a first-order species of sex discrimination, sending the former out of the discrimination paradigm and reducing allegations of sexual cruelties at work to the status of mere evidence, no different in legal value from evidence that someone threw a stapler across the room.

To say so is to violate a left-multicultural norm favoring left/liberal feminist/socialist/gay/sex-positive/queer convergence — intersectionality, coalition formation, conflation, what you will. Left social theory has been conducted on an assumption that a really successful analysis would show that feminism, socialism, gay affirmativity, sex positivity, and queer thought would discover that, in theory and in the real world, their findings and aspirations converge. The waters have been muddied by a general left/liberal desire always to reconcile its various ideas, commitments, constituencies, and projects, and the resulting confusion has protected sexual subordination feminism from critique and smoothed the way for its regulatory successes — many of which must seem like costs, not benefits, once a splitting becomes articulate. It seems timely to urge feminists to learn to suspend feminism, to interrupt it, to sustain its displacement by inconsistent hypotheses about power, hierarchy, and progressive struggle.

That is not to say that sexual subordination feminism might not ultimately be the best choice for a vocabulary in which to conduct a sex discrimination regime. Certainly it seemed necessary when women first entered the workforce in the United States. Whatever the benefits of sex harassment regulation when it was introduced, and even now, I argue here, not that it is instrinsically mistaken but that it has costs that have not been counted and that, if you take a socialist feminist, sex-positive feminist, progay, or queer approach to life, you think some of those costs now outweigh many of the corresponding benefits. Revealing and balancing those costs and those benefits — and doing so under the weight of the uncertainty brought to the table by the possibility of problematicness panic and all that it suggests about the dark side of power and knowledge in sexual interaction — would return sex harassment to political contestation understood as an indeterminate, decisionistic enterprise:

> One might say that a decision is "political" when and to the extent that it is made under conditions of ambiguity and with knowledge of consequences. A political decision is one which the decision maker had room to make, within or against the terms of his role and expertise [and, I would add, favorite social theory], in various ways, and which was understood to have consequences — making some things more likely, some less, some people better off, some [worse], and so forth. The point is not *which* interests are advanced and which retarded, nor the ideological associations we can associate with the decision once the determinacy of the experts' identity and vocabulary run out, but the human experience of deciding knowing there will *be* consequences, and that one *can* decide in various ways.[25]

Even more pleasurable than loosening the feminist grip on sex harassment, and even more surprising than seeing how sex harassment law has become a mechanism for sexuality harassment, is the pleasurable surprise that politics could happen in a contestatory engagement of various feminisms with their gay identity and queer critiques.

Notes

1. 118 S. Ct. 998 (1998).

2. Vicki Schultz, "Reconceptualizing Sexual Harassment," *Yale Law Journal* 107 (1998): 1683.

3. Catharine A. MacKinnon. *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1986), 220–21.

4. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), xiv.

5. Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory," *Signs* 7.3 (1982): 515, 533; hereafter, "An Agenda for Theory."

6. Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence," *Signs* 8.4 (1983): 635, 638; hereafter, "Toward Feminist Jurisprudence."

7. Male dominance, MacKinnon concluded, is "total on the one side and a delusion on the other" ("Agenda for Theory," 542). The inequality of women is structural: "The inequality approach . . . sees women's situation as a structural problem of enforced interiority that needs to be radically altered" (MacKinnon, *Sexual Harassment of Working Women*, 4–5).

8. MacKinnon, "Toward Feminist Jurisprudence," 637–38 n. 5.

9. Catharine A. MacKinnon, "Points against Postmodernism," *Chicago-Kent Law Review* 75 (2000): 687, 688–89, 691, 692–93; emphasis added.

10. MacKinnon, "Toward Feminist Jurisprudence," 644–45.

11. Ibid., 652, 654–55; emphasis added.

12. Ibid., 652.

13. Ibid., 655–58.

14. MacKinnon, *Toward,* 248–49.

15. For example: "In 1982, Andrea Dworkin and I advanced our equality approach to pornography through our ordinance allowing civil suits for sex discrimination *by those who can prove harm through pornography.*" Catharine A. MacKinnon and Ronald Dworkin, "Pornography: An Exchange," *New York Review of Books* 3 Mar. 1994, 47–48; rpt. in Drucilla Cornell, *Feminism and Pornography* (Oxford: Oxford University Press, 2000), 121.

16. I rely on the ordinance as reprinted in *American Booksellers Ass'n v. Hudnut,* 598 F.2d 323 (7th Cir. 1985), *aff'g on other grounds* 598 F. Supp. 1316 (S.D.Ind. 1984), *aff'd* 106 S.Ct. 1172 (1986) (mem.) and in Andrea Dworkin and Catharine A. MacKinnon, eds., *Harm's Way: The Pornography Civil Rights Hearing* (Cambridge, MA: Harvard University Press, 1997), 438–57. See also Catharine A. MacKinnon, "Pornography, Civil Rights, and Speech," *Harvard Civil Rights–Civil Liberties Law Review* 20 (1985): 1, 60 ("The hearings establish the harm. The definition sets the standard"); and Catharine A. MacKinnon, "The Roar on the Other Side of Silence," in *In Harm's Way,* 3–24, for a general defense of the assertion that the hearings were conclusive on this point.

17. Quoted in Paul Brest and Ann Vandenberg, "Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis," *Stanford Law Review* 39 (1987): 607, 613.

18. MacKinnon, *Toward,* 248.

19. Thus pornography poses a question not of morality but of power. See Catharine A. MacKinnon, "Not a Moral Issue," *Yale Law and Policy Review* 2 (1984): 321; see also MacKinnon, "Toward Feminist Jurisprudence," 654 n. 41 ("In feminist analysis, a rape is not an isolated or individual or moral transgression but a terrorist act within a systematic context of group subjection, like lynching").

20. Though there is a subdifference here: MacKinnon sees the feminization of a man as an injury, while cultural feminism sees it as an instance of moral uplift.

21. For a rich description and canny critique of this move, see Amy Adler, "What's Left? Hate Speech, Pornography, and the Problem for Artistic Expression," *California Law Review* 84 (1996): 1499.

22. Brief of National Organization on Male Victimization, Inc., et al. In *Oncale,* No. 96-568 (U.S.S.C.) (11 Aug. 1997); rpt. at *U.C.L.A. Women's Law Journal* 8 (1997): 9.

23. A memorial moment for David Charny, who opened this avenue for me.

24. Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon, 1998), 64.

25. David Kennedy, *Global Governance and the Politics of the Professions,* draft of 26 Sept. 2001, p. 16.

LAUREN BERLANT

The Subject of True Feeling: Pain, Privacy, and Politics

Liberty finds no refuge in a jurisprudence of doubt. — *Planned Parenthood of S eastern Pennsylvania v. Casey,* 112 S.Ct. 2791 (1992)

Pain

Ravaged wages and ravaged bodies saturate the global marketpla which the United States seeks desperately to compete "competitivel the euphemism goes, signifying a race that will be won by the na whose labor conditions are most optimal for profit.[1] In the United S the media of the political public sphere regularly register new scand the proliferating sweatshop networks "at home" and "abroad," whic to be a good thing, because it produces *feeling* and with it somethi least akin to *consciousness* that can lead to *action*.[2] Yet, even as the i of the traumatized worker proliferates, even as evidence of exploitat found under every rock or commodity, it competes with a normative pian image of the U.S. citizen who remains unmarked, framed, and tected by the private trajectory of his life project, which is sanctified a juncture where the unconscious meets history: the American Drean that story one's identity is not born of suffering, mental, physical, o nomic. If the U.S. worker is lucky enough to live at an economic mo that sustains the Dream, he gets to appear at his *least* national when working and at his most national at leisure, with his family or in semip worlds of other men producing surplus manliness (e.g., via sports). I American dreamscape his identity is private property, a zone in v