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## The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory

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# THE DIFFERENCE IN WOMEN'S HEDONIC LIVES: A PHENOMENOLOGICAL CRITIQUE OF FEMINIST LEGAL THEORY

*Robin L. West\**

## INTRODUCTION

Women's subjective, hedonic lives are different from men's. The quality of our suffering is different from that of men's, as is the nature of our joy. Furthermore, and of more direct concern to feminist lawyers, the quantity of pain and pleasure enjoyed or suffered by the two genders is different: women suffer more than men. The two points are related. One reason that women suffer more than men is that women often find painful the same objective event or condition that men find pleasurable. The introduction of oxymorons in our vocabulary, wrought by feminist victories, evidences this difference in women's and men's hedonic lives. The phrases "date-rape," for example and "sexual harassment," capture these different subjective experiences of shared social realities: For the man, the office pass was sex (and pleasurable), for the woman, it was harassment (and painful); for the man the evening was a date—perhaps not pleasant, but certainly not frightening—for the woman, it was a rape and very scary indeed. Similarly, a man may experience as at worst offensive, and at best stimulating, that which a woman finds debilitating, dehumanizing or even life-threatening. Pornographic depictions of women which facilitate by legitimating the violent brutalization of our bodies are obvious examples. Finally, many men are simply oblivious—they do not experience *at all*—external conditions which for women are painful, frightening, stunting, torturous and pervasive—including domestic violence in the home, sexual assault on the street, and sexual harassment in the workplace and school.

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Feminists generally agree—it should go without saying—that women suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture. Just as women's work is not recognized or compensated by the market culture,<sup>1</sup> women's injuries are often not recognized or compensated as *injuries* by the legal culture. The dismissal of women's gender-specific suffering comes in various forms, but the outcome is always the same: women's suffering for one reason or another is outside the scope of legal redress. Thus, women's distinctive, gender-specific injuries are now or have in the recent past been variously dismissed as trivial (sexual harassment on the street); consensual (sexual harassment on the job); humorous (non-violent marital rape); participatory, subconsciously wanted, or self-induced (father/daughter incest); natural or biological, and therefore inevitable (childbirth); sporadic, and conceptually continuous with gender-neutral pain (rape, viewed as a crime of violence); deserved or private (domestic violence); non-existent (pornography); incomprehensible (unpleasant and unwanted consensual sex) or legally predetermined (marital rape, in states with the marital exemption).<sup>2</sup>

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1. See generally Benston, *The Political Economy of Women's Liberation*, reprinted in *From Feminism to Liberation*, E. Altbach ed. 199-210 (1971); J. Gardiner, *Women's Domestic Labor*, 89 *New Left Review* 47 (1975) and J. Landes, *Wages for Housework: Subsidizing Capitalism*, 2 *Quest: A Feminist Quarterly* 17 (1975).

2. The trivialization of the harm women sustain by sexual abuse on the street is reflected in the lack of writing on the topic.

It is now law, of course, that consent is not a defense to a discrimination action for sexual harassment. As every woman who has ever complained of harassment knows, however, the presumption that the harassment was in fact consensual is as difficult to dislodge, as is the belief that by virtue of that consent, it is permissible. See generally C. Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979). See also B. Dziech and L. Weiner, *The Lecherous Professor* (1985), for a description of sexual harassment in schools, and the various ways in which universities and male professors characterize the harm as non-harm.

The dismissal of the harm women sustain through unwanted marital sex as comical, is clearly reflected in our pop culture: think of the number of stand-up routines that explore the ridiculousness of the frigid or unwilling wife. Domestic violence as well is apparently regarded by many "decent folks" as humorous. *Time* reports: "As a society," says Sociologist Gelles of private violence, 'we laugh at this behavior'. . . . But indeed, such behavior is not so completely unthinkable that decent folks do not chuckle when Jackie Gleason's Ralph Kramden angrily threatens to sock his ever-loving wife." *Time*, (Sept. 5, 1983).

Freud, of course, has done more than any other individual to popularize the notion that incest is desired by the child rather than the parent. His reasons for insisting that this is so are the subject of popular debate. See J. Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (1984) and J. Malcolm, *In The Freud Archives* (1984), and A. Miller, *Thou Shalt Not Be Aware: Society's Betrayal Of The Child* (1986). For a summary of more recent "experts" who have praised incest as desirable, liberating, consensual, and beneficial for all, and an account of the more subtle ways in which we all condone and encourage the sexual use of children, particularly girls, see E. Bass, *In the Truth Itself There is Healing*, included as introduction to

It is not so clear, though, *why* women's suffering is so pervasively dismissed or trivialized by legal culture, or more importantly what to do about it. As I will argue in a moment, feminist legal theorists do not typically frame the problem in the way I have just posed it. Nevertheless, it is not hard to construct two characteristic feminist explanations of the phenomenon, and the strategies they entail. The "liberal-legal feminist" would characterize the legal culture's discriminatory treatment of women's suffering as the reflection of a "perceptual error" committed by that culture. Women are in fact *the same as*—and therefore *equal to*—men, in the only sense which should matter to liberal legal theory. Women, like men, are autonomous individuals who, if free to do so, will choose among proffered alternatives so as to fashion their own "good life," and thereby create social value. However, the legal culture fails to see or acknowledge this central sameness—and hence equality—of women and men. Because we are not *perceived* as identical to men in this way, we are not treated as such. Our choices are differentially restricted, and as a result we disproportionately suffer. The liberal feminist's strategy is directly implied by her diagnosis: what we must do is prove that we are what we are—individualists and egoists, as are men—and then fight for the equal rights and respect that sameness demands. Equal respect will in turn ensure, through the logic of formal justice and the Equal Protection Clause of the Fourteenth Amendment, that our suffering will be alleviated by law—just as is men's suffering—through a liberating expansion of our opportunities for choice.<sup>3</sup>

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Bass and L. Thornton, *I Never Told Anyone*, Writings by Women Survivors of Child Sexual Abuse (1983). See generally F. Rush, *The Best Kept Secret* (1980).

On the presumed inevitability of the pain of childbirth, see S. Firestone, *The Dialectic Of Sex: The Case For Feminist Revolution* (1972).

The privatization of domestic violence is eloquently expressed as well as documented in Prizzin's classic treatment, *Scream Quietly Or The Neighbors Will Hear* (1980).

The explosion of derisive, dismissive and derogatory treatments of the recent Meese Commission report on pornography makes clear that the literate and concerned public still does not understand, and perhaps does not want to understand, that pornography causes physical injury. For just one example of hundreds, see C. Vance, *The Meese Commission on the Road*, *The Nation* (August 2, 1986).

Finally, the invisibility and incomprehensibility of marital rape is dramatically reflected in Time's 1983 report, *Child Abuse, Wife Beating and Rape*. The *only* mention of marital rape occurs in the following passage:

*[m]ost cases of private violence are closer calls. What to do about a man who rapes his wife? What about the fight between spouses that are not pat, villain-and-victim episodes? . . . One problem is that reasonable, well-intentioned people disagree (emphasis mine).*

On marital rape generally, see D. Russell, *Rape In Marriage* (1982).

3. Because of her interest in the recent equal treatment/special treatment debate, Wendy Williams has emerged as the spokesperson for classical, liberal-legal feminism. See, e.g., Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1985); and Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rights L. Rptr.

The radical legal feminist's explanation of this phenomenon is also not hard to construct. The blanket dismissal of women's suffering by the male legal culture is not a reflection of a misperception. Indeed the larger culture's perception is accurate: women are *not* as autonomous or individualistic as men. The liberal is wrong to insist that women and men are equal in this way. The reason the legal culture tends to dismiss women's gender-specific sufferings is that women don't matter. Those in power ignore women's suffering because they don't care about the suffering of the disempowered. Hierarchical power imbalances do that to people—they make the disempowered less than human, and they make the empowered ruthless. The radical feminist's strategy follows directly from her diagnosis: what we must do is dismantle the hierarchy. The Equal Protection Clause—at least if we can interpret it (and use it) as an “Equality Promotion Clause” — might help.<sup>4</sup>

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175 (1982). I do not, however, mean to imply that liberal-legal feminism aligns itself uniformly with the “equal treatment” prong of the pregnancy/workplace debate. On the contrary: because of their insistence upon the substantial similarity of men and women and their emphasis on the importance of expanding opportunities for women's choice so that they equal men's, I also regard those feminists who regard the pregnancy difference as the *only* difference between men and women, as liberal-legalists. Thus, at least some, if not most, of the “special treatment” advocates are “liberal” and liberal-legalist in their overriding political and jurisprudential orientation. See Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Jurisprudence, 56 Ind. L.J. 375 (1981).

The pornography debate has also triggered a rebirth of liberal-legal feminism, or at least, a feminism which draws on, rather than distinguishes itself from, traditional liberal-legal commitments to individualism, freedom and autonomy. See, e.g., V. Burstyn (Ed.) *Women Against Censorship* (1985); Rubin, *Sexual Politics, the New Right and the Sexual Fringe*, 2 Leaping Lesbian (Feb. 1978); A. Snitow, C. Stansell and S. Thompson (Eds.) *Powers of Desire: The Politics of Sexuality* (1983) and C. Vance (Ed.) *Pleasure And Danger: Exploring Female Sexuality* (1985).

For further elaborations of liberal-legal feminism beyond the contours of both the special treatment versus equal treatment debate and the “porn wars,” see D. Kirp, M. Yudof & M. Franks, *Gender Justice* (1986); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. Law Rev. 581 (1977); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913 (1983); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 Ore. L. Rev. 265 (1984) and Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986) (part critique, partial endorsement of liberal-legal insistence on similarity and opportunities for choice.)

4. See, e.g., Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *Politics Of Law* 117 (D. Kairys ed. 1982); MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 Signs 515 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 Signs 304 (1986); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986) (partial critique, partial endorsement, of radical legal feminist focus on gender hierarchy); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373 (1986), and Ruth Colker's contribution to this journal, *Anti-Subordination Above All Else*. For an early articulation of some of the principles now basic to radical legalist analysis, see Fiss, *Groups and the Equal Protection Clause*, 5 Phil. And Public Affairs 107 (1976).

The recent explosion of feminist writings on the multitude of problems generated by women's "difference"<sup>5</sup> prompts me to suggest a third explanation of this blanket dismissal by the legal culture of women's pain, and thus a third strategy. The blanket dismissal of women's gender-specific suffering by the legal culture may be (partly) a reflection of the extent to which the pain women feel is *not understood*, and *that* it is not understood may be because it is itself different, and not just a product of our difference. Thus, it may be that women suffer more because we suffer differently. The pain we feel is *itself* different (as are our pleasures). (Is there anything quite like the pain of childbirth?) If this is right, then the legal culture has committed a perceptual error, but the error is not, as the liberal feminist believes, in perceiving us as different where we in fact are the same. The perceptual error is in failing to understand the *difference*—not the sameness—of our subjective, hedonic lives. If the pain women feel is in fact discontinuous from—different than—what is experienced by men, then it is not really surprising that the injuries we sustain are trivialized or dismissed by the larger male culture. It is hard to empathize with the pain of another, when the nature of that pain is not understood. If the pain women feel is different—not shared by men—then it is not surprising that men cannot readily empathize with women who suffer, much less share in the effort to resist the source of their injuries. The strategic inference I draw is this: if we want to enlist the aid of the larger legal culture, the feel of our gender-specific pain must be described before we can ever hope to communicate its magnitude.

Focus on the "difference" of our hedonic lives also suggests a different way to address the related problem of "false consciousness." As feminists know all too well, it is not just the legal culture which trivializes women's suffering, women do so also. Again, if we focus on the distinctiveness of our pain, this becomes less surprising. An injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality. Consequently, the victim as well as the perpetrator will transform the pain into *something else*, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure. A victim's response to an injury which is perceived by the victim as deservedly punitive, consensual, natural, subconsciously desired, legally inevitable, or trivial will be very different from a response to an injury which is perceived as simply *painful*. We change our behavior in response to the threat of what we perceive as punish-

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5. See, e.g., *The Future of Difference*, H. Eisenstein and A. Jardine, eds. (1984). The classic works are C. Gilligan, *In a Different Voice* (1980) and N. Chodorow, *The Reproduction of Mothering* (1979). In the legal context, see, e.g., Scales, *Towards a Feminist Jurisprudence*, 56 *Indiana L.J.* 375 (1981); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *Yale L.J.* 913 (1983); Law, *Rethinking Sex and the Constitution*, 132 *Pennsylvania L. Rev.* 955 (1984) and, of course, the rest of the submissions to this journal.

ment; we diminish ourselves in response to injuries we perceive as trivial; we reconstruct our pasts in response to injuries we perceive as subconsciously desired; we negate our inner selves in response to injuries we perceive as consensual and we constrain our potentiality in response to injuries we perceive as inevitable. We respond to pain, on the other hand, by resisting the source of the pain. The strategic inference should be clear: we must give voice to the hurting self, even when that hurting self sounds like a child rather than an adult; even when that hurting self voices "trivial" complaints; even when the hurting self is ambivalent toward the harm and even when (especially when) the hurting self is talking a language not heard in public discourse. Only by so doing will we *ourselves* become aware of the meaning of the suffering in our lives, and its contingency in our history. Only when we understand the contingency of that pain, will we be free to address it and change the conditions which cause it through legal tools.

If my argument is correct, then it would seem that feminist legal theorists should be hard at work providing rich descriptions of women's subjective, hedonic lives, particularly the pain in those lives, and more particularly the pain in our lives which is different. And yet *we aren't*, by which I mean, feminist *legal theorists* aren't. Feminists, by contrast, *are*, as are feminist lawyers. But feminist legal theorists, I believe, are dangerously neglecting the phenomenological, subjective, and hedonic distinctiveness of women's lives, and the relevance of this aspect of our difference to legal criticism. I can think of four possible reasons for this neglect. The first three are problems which plague discussion of all aspects of our difference. The fourth reason is philosophical, and is the subject of this essay.

The first reason is linguistic. It is *hard* to talk about our pain and pleasure, and it is hard to talk about our pain and pleasure because they are different. Our language is inadequate to the task. As women become more powerful, this linguistic barrier is eased: we now possess, for example, the legal and social labels that at least identify some of our experiences as injurious, such as "sexual harassment" and "date-rape." But we still lack the descriptive vocabulary necessary to convey the quality of the pain we sustain by virtue of these experiences. The second reason is psychological. Before we can convince others of the seriousness of the injuries we sustain, we must first convince ourselves, and so long as others are unconvinced, to some extent, we will be as well. This is a circle that must be broken, not inhabited. The third and underlying problem is political. The inadequacy of language and the problem of "false consciousness" are but reflections of what is surely the core obstacle to the development of feminist discourse on the nature of gender-specific pain, which is an unwilling and resisting audience. When we struggle to find the words to describe the pain (or pleasure) in our lives, and the effort is rewarded with dismissal and trivialization, the fully human response is to silence ourselves.

However, at least one reason—and perhaps the main reason—that feminist legal theorists have neglected the hedonic dimension of our difference—and the subject of this article—is not the difference problem, but the emerging logic of feminist legal theory itself. By virtue of the models of legal criticism that feminist legal theorists have embraced, we've literally defined the subjective, hedonic aspect of our differences out of existence. Unlike feminist political theorists, feminist legal theorists have followed largely derivative normative strategies.<sup>6</sup> That is, feminist legal theorists have adopted *non-feminist* normative models of legal criticism, and then applied those models to women's problems. I have no objection to this strategy: there is no reason that feminist legal theorists should aim for relentless originality. I do object, though, to the *particular* models feminist legal theorists have adopted. The two major normative models of legal criticism which feminist legal theorists have thus far embraced—liberal legalism and radical legalism—*themselves* deny the normative significance of the subjective pleasure and suffering of our lives. Because of the normative models employed by modern legal feminists, the internal, phenomenological reality of women's hedonic lives—and its difference from men's—has become virtually irrelevant to feminist legal theory.

Thus, I will argue that *liberal-legal* feminist theorists—true to their liberalism—want women to have more choices, and that *radical-legal* feminist theorists—true to their radicalism—want women to have more power. Both models direct our critical attention *outward*—liberalism to the number of choices we have, radicalism to the amount of power. Neither model of legal criticism, and therefore, derivatively, of feminist legal criticism, posits subjective happiness as the direct goal of legal reform, or subjective suffering as the direct evil to be eradicated. Neither model directs our critical attention *inward*. Consequently, and unsurprisingly, neither liberal nor radical feminist legal critics have committed themselves to the task of determining the measure of women's happiness or suffering.

Which is not to say that liberal and radical feminist legal theorists are unconcerned about women's subjective well-being. Rather, each group dismisses the normative significance of women's pain and suffering because of the essentially strategic choices made by the underlying (nonfeminist) politics embraced by that group, and the depictions of human nature those choices entail. That is, radicals, liberals and

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6. See generally A. Jagger, *Feminist Politics and Human Nature* (1983) for a discussion of the relation between liberal feminism and liberalism, radical feminism and radicalism, socialist feminism and socialism, and marxist feminism and marxism.

Feminists who write from a "difference" perspective, and who are generally critical of an "equality" approach to women's liberation both legal and otherwise, tend to note that the equality discourse employed by both liberal and radical feminist legal theory is "borrowed." See, e.g., Note (Prof. Christine Littleton), *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487 (1981); and Finley, *supra* n. 4.



feminists all have great concern for people's subjective happiness. But neither radical nor liberal legalism—nor their feminist derivatives—aim for happiness or well-being *directly*. Instead, they both assert a definition of the human being which in turn assumes a correlation between some condition of the objective world and a subjective state of well-being and then aim to maximize that objective, external *condition*. Thus, definitionally, liberal legalism assumes that, if free to do so, people will choose what will make them happy, and that therefore there exists a correlation between the objective act of consent and a subjective gain in happiness. On this assumption, liberal legalists seek to maximize not our subjective happiness, but our objective opportunities for choice.<sup>7</sup> Radical legalism assumes that there exists a correlation between people's objective equality and subjective happiness, or well-being. On this assumption, radicals seek to maximize not our subjective happiness, but our objective equality.<sup>8</sup> In each case, the correlation between objective, external condition and subjective, internal, hedonic state is a function of the definition of the "human" to which each tradition is committed. Both models share a refusal to inquire into whether their assumed correlation between objective condition and subjective well-being is true or false of contingent, embodied human beings. Therefore, both models methodologically preclude, on their own terms, feminist inquiry into whether the account of the human being that the model assumes is a true account of *women*. And finally, they both direct the feminists that embrace them away from an investigation of the differences of women's internal, hedonic lives.

The cost *to women* of feminist legal theorists' endorsement of the anti-phenomenological methodology<sup>9</sup> and anti-hedonic norms<sup>10</sup> of

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7. The commitment to personal choice reappears in different forms all over the political spectrum that falls under liberal legalism's umbrella. See as an example from the liberal left, Dworkin, *Liberalism*, republished in R. Dworkin, *A Matter of Principle* 181 (1985) and for an example from the right, see R. Posner, *The Economics of Justice* (1982). See also generally West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 *Pittsburgh L. Rev.* 673 (1985), West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *Harv. L. Rev.* 384 (1985) and West, *Submission Choice and Ethics: A Rejoinder to Judge Posner*, 99 *Harv. L. Rev.* 1449 (1986).

8. Whatever else they may be, and whatever inconsistencies divide them, radical legalists are anti-hierarchical, seemingly regardless of the hierarchy in question. The best statement, I believe, of this commitment is found in Roberto Unger's much maligned but well-reasoned exposition of the Critical Legal Studies movement, Unger, *Critical Legal Studies*, 96 *Harv. L. Rev.* 563 (1982).

9. I will happily abandon this awkward phrase, if there is a better one. I mean simply that liberal and radical theory refuse to test their assumptions regarding our nature against the evidence of our phenomenal perceptions. I am not claiming that desires, motivations, or experience of pleasure and pain are not socially constructed, or that perceptions of them are in some way pure. But it does not follow that hedonic lives *don't exist*, or, just as bad, that they cannot be falsely characterized, or that they are infinitely malleable.

the models they endorse is very high. It renders liberal and radical feminist legal theorists peculiarly uncritical—as *feminists*—of the visions of the human and thus of the normative assumptions of the models for legal criticism which they have respectively embraced. The anti-phenomenological methodology of radicalism and liberalism rule out the only inquiry which could conceivably determine the value *to women* of the model itself, and that is whether the description of the human which each model embraces is true of women. Thus, liberal feminists fail to ask—*by virtue of the intrinsic commitments of liberalism*—whether the liberal conception of the phenomenology of choice is true of *women's* experience. As a result liberal feminist legal theorists cannot even ask the question which as feminists they should start with, and that is whether the liberalism they embrace will be of any value *to women*. Radical feminists fail to ask—*by virtue of the intrinsic commitments of radicalism*—whether the radical commitment to the ideal of equality resonates with *women's* felt desires. As a result, radical feminist legal theorists cannot even ask the question which as feminists they should start with, and that is whether the radical ideal of equality is desirable *for women*. It is only by focusing directly on what both models definitionally exclude—our phenomenological, hedonic experience—that we will be able to ask these questions. And it is only by asking these questions that we will determine the limits of liberal and radical models of legal criticism and reform, and it is only by understanding those limits that we will understand where a truly feminist model of legal criticism must begin.

Part One of this article provides a phenomenological and hedonic critique of the conception of the human—and thus the female—that underlies liberal legal feminism. Part Two presents a phenomenological critique of the conception of the human—and thus the female—which underlies radical feminist legal criticism. Again, I will argue that in both cases the theory does not pay enough attention to feminism: liberal feminist legal theory owes more to liberalism than to feminism and radical feminist legal theory owes more to radicalism than it does to feminism. Both models accept a depiction of human nature which is simply untrue of women. Thus, both accept, uncritically, a claimed correlation between objective condition

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10. Although feminist legalists have apparently embraced the mainstream twentieth century resistance to ethical hedonism, the ethical theory that asserts pleasure as the good toward which we ought aim, and pain as the evil we should eradicate, some feminists, notably Marilyn French, are leaning toward an explicit endorsement of hedonism. See M. French, *Beyond Power* (1985). The “female voice” that Gilligan describes in *In A Different Voice* *supra* n.5 also bears strong resemblance to the classical hedonist’s voice, undoubtedly muted in this century, but very loud, and very male, in the writings of the classical ethical hedonists. See C. Gilligan, *In a Different Voice*, *supra* n.5. A small but growing number of feminists have noted the hostility of the deontological tradition to feminist concerns, and have for that reason endorsed hedonism, its traditional contender. See, e.g., R. Lake, *The Metaethical Framework of Anti-Abortion Rhetoric*, 11 *Signs* (Summer 1985).

and subjective reality, which, I will argue, is untrue to women. As a result, both groups fail to address the distinctive quality of women's subjective, hedonic lives, and the theories they have generated therefore have the potential to backfire—badly—against women's true interests.

In the concluding section I will suggest an alternative normative model for feminist legal criticism which aims neither for choice nor equality, but directly for women's happiness, and a feminist legal theory which has as its critical focus the felt experience of women's subjective, hedonic lives. My substantive claim is that women's happiness or pleasure—as opposed to women's freedom or equality—should be the ideal toward which feminist legal criticism and reform should be pressed, and that women's misery, suffering and pain—as opposed to women's oppression or subordination—is the evil we should resist. I will argue that feminist legal theorists, in short, have paid too much attention to the ideals of equality and autonomy and not enough attention to the hedonistic ideals of happiness and pleasure, and that correlatively we have paid too much attention to the evils of subordination and oppression, and not enough attention to the hedonistic evils of suffering and pain. My methodological assumption is that the key to moral decision-making lies in our capacity to empathize with the pain of others, and thereby resist the source of it, and not in our capacity for abstraction, generalization, or reason. My strategic claim is directly entailed: the major obstacle to achieving the empathic understanding which is the key to significant moral commitment, including the commitment of the legal system to address the causes of women's suffering, is the striking difference between women's and men's internal lives, and more specifically, the different quality of our joys and sorrows. This obstacle can only be overcome through rich description of our internal hedonic lives.

Much of my argument will proceed by way of narrative and anecdote, for two reasons. First, it is, I believe, the only way to express the different quality of women's hedonic lives. But second, narrative is emerging as a feminist method of moral argument, both in practice and theory. The divergence maps another aspect of our difference: women just do rely on narrative, anecdote and story more than do men for purposes of making moral arguments.<sup>11</sup> Women in legal academia can and typically have bridged the gulf that consequently separates us from male discourse by assimilating. However, particularly as our numbers increase, we should begin to respond to the gap by bringing women's speech, voice and method into the dialogue. I think—I'm sure—that we should do both. But since thus far we've done only the former, I urge some dialectic affirmative action. We must begin to make good on our promise to change the discourse

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11. See C. Gilligan, *supra* n.5.

with our presence, instead of simply changing ourselves to fit the discourse.

### I. LIBERAL FEMINISM: CONSENT, AUTONOMY AND THE GIVING SELF

Perhaps the most widely held normative commitment of mainstream liberal legal theorists is that individuals should be free to choose their own style of life, and to exercise that freedom of choice in as many spheres as possible—economic, political and personal.<sup>12</sup> The conception of the human and the relation between the individual and the state which implicitly motivates this commitment is relatively straightforward. According to the liberal vision, value is produced in our social world through satiation of the subjective desires and preferences of the individual. That satiation is in turn manifested and facilitated through the individual's voluntary choices. The individual's choice will reflect that individual's judgment of what will best satisfy that individual's own desires. It follows that whatever is freely consented to by an individual is what is good for that individual, and, if free of adverse effects on others, is good for society. The way to maximize value in the social world is therefore to maximize the opportunities for the exercise of choice through voluntary transactions between individuals. A law which either facilitates or mimics consensual transactions between freely choosing individuals is a good law on this model, while a law which frustrates such transactions is a bad law. Individual freedom is the ideal toward which law and legal reform ought press, and coercion or restraint on freedom is the evil.<sup>13</sup>

The contribution of feminist liberal legalism has been to extend the umbrella of this normative vision to women as well as men.<sup>14</sup> The liberal legal feminist insists that the depiction of the human embraced by liberal legalism—which I will sometimes refer to as the “liberal self”—is also true of women, and that therefore the relationship of the state to the individual must be the same for both women and men. What it means for women to be equal to men in the liberal feminist

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12. See, e.g., Dworkin, *Liberalism*, *supra* n.7; Posner, *supra* n.7, and B. Ackerman, *Social Justice in the Liberal State* (1978).

13. The legal economists' articulation of this thesis is often clearer than mainstream legal liberal articulation. Posner's is perhaps the clearest. See R. Posner, *supra*, n.7; Posner, *An Economic Theory of Criminal Law*, 85 *Colum. L. Rev.* 1193, 1197-99 (1985); Posner & Landes, *The Economics of the Baby Shortage*, 7 *J. Legal Stud.* 323 (1978) and Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *Harv. L. Rev.* 1431 (1986).

14. For an excellent discussion of liberal feminism, see A. Jagger, *Feminist Politics and Human Nature*, 27-49 (1983). By “feminist liberal legalism,” I have in mind a characteristic way of thinking about the relation of women to legal theory, not a particular individual. In fact, to my knowledge, no liberal feminist thinker conversant with legal theory has spelled out sympathetically what the tenets of feminist liberal legalism would be. In spite of this gap, though, feminist liberal legalism as I have characterized it in the text, dominates the way most legalists—feminists, non-feminists and even perhaps some anti-feminists—think about women and law.

vision is basically that women and men are the same in the only sense that matters to the liberal legalist: women as well as men create value by satiating their subjective desires through consensual choices. Because women and men are equal in this way—because they share the same definitive human attribute—women should be equally free to choose their own life plans, and women should be equally entitled to the respect from the state that that freedom requires.

The liberal feminist legal strategy for dealing with women's suffering is directly entailed by her liberalism. Women, like men, consent to that which will minimize their own suffering and maximize their own felt happiness. Therefore, the way to deal with women's suffering is to increase women's sphere of consensual freedom. What we should do with law, then, is insure that women's sphere of consensual freedom is as large as possible, or at least as large as men's. Thus, the liberal feminist's central jurisprudential commitment tracks the liberal's: a law is a good law if it increases the freedom of women to enter into consensual transactions or if it equalizes that freedom with that enjoyed by men. A law is a bad law if it decreases that freedom.<sup>15</sup>

Liberal feminist legal theory carries with it the same problems which now plague liberal legalism, but multiplied. Modern liberal legal feminists, like modern liberals generally, have failed to examine the essentially descriptive claims about the human being that underlie their normative model. The liberal claim that human beings consent to transactions in order to maximize their welfare may be false. If it is, then the liberal claim that social value is created through facilitating choice will be false as well.<sup>16</sup> But furthermore, *women* may be "different" in precisely the way which would render the empirical assumptions regarding human motivation which underlie the liberal's commitment to the ethics of consent *more false for women than for men*. Thus, it may be that women generally *don't* consent to changes *so as to* increase our own pleasure or satisfy our own desires. It may be that women consent to changes *so as to* increase the pleasure or satisfy the desires of *others*. The descriptive account of the phenomenology of choice that underlies the liberal's conceptual defense of the moral primacy of consent may be wildly at odds with the way women phenomenologically experience the act of consent. If it is—if women "consent" to transactions not to increase our own welfare, but to increase the welfare of others—if women are "different" in this psychological way—then the liberal's ethic of consent, with its presumption of an essentially selfish human (male) actor and an essentially selfish consensual act, when even-handedly applied to both genders, will have disastrous implications for women. For if women consent to

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15. Thus, the liberal feminist tendency to cast arguments in terms of women's freedom. The "pro-choice" rhetoric of the liberal abortion campaign is the best example.

16. For two critiques of mainstream liberal legalism on this score, see West, *supra* n.7; and Kelman, *Choice and Utility*, 1979 Wis. L. Rev. 769.

changes so as to increase the happiness of others rather than to increase our own happiness, then the ethic of consent, applied even-handedly, may indeed increase the amount of happiness in the world, but women will not be the beneficiaries.

And indeed, the liberal ethic of consent does, oftentimes, have less than happy consequences for women. The magnitude of the disservice should be obvious to anyone who can resist the staggeringly seductive liberal urge to imply an increase in subjective happiness from the objective act of consent. The rather inescapable fact is that much of the misery women endure is fully "consensual." That is, much of women's suffering is a product of a state of being which was *itself* brought into being through a transaction to which women unquestionably tendered consent. A woman's experience of marital sexuality, for example, may range from boring to irritating to invasive to intensely painful. Similarly, a female employee may experience the sexual advances of an employer as degrading. But the fact is that neither the wife nor the employee was brought to the altar in shackles or place of employment in chains.<sup>17</sup> Put affirmatively, the conditions which create our misery—unwanted pregnancies, violent and abusive marriages, sexual harassment on the job—are often traceable to acts of consent. Women—somewhat uniquely—consent to their misery. An ethical standard which ties value to the act of consent by presumptively assuming that people consent to their circumstances so as to bring about their own happiness—and by so doing thereby create value—leaves these miserable consensual relationships beyond criticism.

The liberal legal feminist, to the extent she is a liberal legalist, is—must be—deaf to the above claim. For the liberal legal feminist, women and men are *the same* on the only dimension that should be of concern to law: women and men both create value through their individual and presumptively selfish choices. This is the empirical equality—meaning identity or sameness—behind the liberal legal feminist's normative commitment to equal freedom and equal respect. Reflecting a not-necessarily-admirable respect for the virtue of consistency, liberal feminists must and do simply deny the extent to which women consent to their sufferance of misery. For the liberal and for the liberal feminist as well, it just *can't be*.

#### A. *A Phenomenological Critique of Liberal Feminism*

I want to suggest in this section that many women, much of the time, consent to transactions, changes, or situations in the world so as

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17. I do not mean to deny—indeed I mean to highlight—the extent to which the choices we make occur within a context of compulsory heterosexuality. But that does not negate the fact that *within that context* these choices are relatively unfettered. If we are going to address the causes of our misery, then, we must attack the *context*, not the choices themselves, for signs of bondage.

to satisfy not their own desires or to maximize their own pleasure, as liberal legalism and liberal legal feminism both presume, but to maximize the pleasure and satiate the desires of others, and that they do so by virtue of conditions which only women experience. I will sometimes call the cluster of "other-regarding," other-pleasing motivations that rule these women's actions the "giving self," so as to distinguish it from the "liberal self": the cluster of self-regarding "rational" motivations presumed by liberal legalism. Thus my descriptive claim is that many women much of the time are giving selves rather than liberal selves. If we take the liberal's description of the motivational core of the human being as accurate and central, then this motivational difference between most men and many women implies that women who define themselves as "giving selves" are not human.

I believe that women become giving rather than liberal selves for a range of reasons—including our (biological) pregnability and our (social) training for our role as primary caretakers<sup>18</sup>—but in this section, I will focus on only one causal hypothesis, which (I think) has great explanatory force. The causal hypothesis is this: women's lives are dangerous, and it is the acquisitive and potentially violent nature of male sexuality which is the cause of the danger. A fully justified fear of acquisitive and violent male sexuality consequently permeates many women's—perhaps all women's—sexual and emotional self-definition. Women respond to this fear by *re-constituting* themselves in a way that controls the danger and suppresses the fear. Thus: women define themselves as "giving selves" so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken.

The danger, and hence the fear, that women live with is very hard for others (men) to acknowledge or understand for two reasons. First, both the objective danger and the subjective fear are "different." The danger and the endangered fear are pervasive rather than sporadic conditions of our lives. There is a world of difference between the threat of sporadic violence (with which men are imminently familiar, from barroom brawls to wars), and hence sporadic fear, and a threat of *pervasive* violence, and hence *definitional* fear. One responds to sporadic fear and the threat of sporadic violence by changing one's behavior. One moves to a safer neighborhood, one fights back, one runs away, one cowers, or whatever, but one knows that the barroom brawl, the mugging, or the war will be over, and that when it is over, the state of normalcy—safety—will return. By contrast, one responds to pervasive fear and pervasive threat not by changing one's behavior, but by *re-defining oneself*. Women cannot eliminate the danger our sexuality poses by moving to a safer neighborhood, any more than blacks can respond to the danger their color poses by moving to a safer race.

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18. See N. Chodorow, *supra* n.5, and D. Dinnerstein, *The Mermaid And The Minotaur: Sexual Arrangements And Human Malaise* (1977).

Nor will the danger cease when the war ends. We respond to the pervasive threat of violent and acquisitive male sexuality instead by changing ourselves, rather than responding to the conditions which cause it.

The danger, the violence, and the fear with which women live and which informs our self-definition are invisible, which is the second reason they are misunderstood. They are not a part of men's world, externally or internally. They are obviously not a part of their internal world: men, unlike women, do not experience the fear of violent sexuality as a part of their self-definition. They will not, because they cannot, understand the kind of defining fear with which women live by reference to shared experience. Furthermore, women's definitional fear is not a part of their external world: the danger and the threat that causes it are largely—to them—invisible. Left and liberal men do not see women shake with fear. They do not see women getting harassed on the street; when men accompany women, as all women know, harassment stops. For the same reason, they do not see women sexually harassed at work. They do not see women battered in the home. They do not see women being raped, by strangers, dates or husbands. They do not see women violated, abused and afraid. To these men, violence against women, the pain women feel as a result of it, and the fear of its recurrence, are invisible. It is not surprising that the claim that women's lives are ruled by fear is heard by these men as wildly implausible. They see no evidence in their own lives to support it. This simple fact, more than anything else, I believe, commits women and men to live in two separate realities.

This invisibility and the ignorance it produces is almost as damaging as the fear itself. It has several manifestations, every one of which now constitutes a serious stumbling block for feminist progress. One manifestation, for example, is the male reaction to the increasing *visibility* of the problem. As anyone who reads *Newsweek* knows, the amount of violence in women's lives is not just higher, but *much* higher, than has until very recently generally been thought. Surely it's fair to say that the percentage of women who have been violently (and privately) abused at some point in their lives is higher than most men and therefore higher than most of "us" used to believe. The probable incidence of sexual abuse of young girls is not ".02 percent," as it was comfortably thought until very recently, it is far higher.<sup>19</sup> The probable incidence of wife abuse is not .1 percent, (did anyone ever really think that?) it is far higher.<sup>20</sup> Here's a "sex difference" I've noticed: When women see these newly reported high percentages, they are

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19. In Russell, *The Secret Trauma: Incest In The Lives Of Girls And Women* 394 (1986) the author puts the level of incest at 16 percent. In Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 *Child Abuse & Neglect* 137 (1983) she puts the amount of child sexual abuse, familial and extrafamilial, at 38 percent.

20. The amount of "private violence" in any society is *by definition* not known. *Time* magazine put the point this way:



outraged at the violence, and when men see the same numbers they are outraged at what they perceive as “unethical” and wild inflation of statistics. I find this sex difference profoundly disturbing.

[What is the logic revealed by the skeptical insistence that “although I haven’t done the research myself, these numbers ‘just can’t’ be right?” Why can’t they be? To provide a comparative perspective: I haven’t done the research either, and my own reaction, (equally “ignorant”) when I look at those same high numbers, is that they are deflated, not inflated. My “guess” is that the actual incidence of, say, child/wife abuse is higher than the highest estimates I’ve yet seen. Why is my reaction so *different*? I attribute it to this: my reality—both internal and external—includes that violence, the pain it causes, and the fear it engenders. Not only have I lived it (and they haven’t), but I talk to women (and they don’t), and women talk to me (and not them). Like all women I know, I hear narratives of violence which are not heard by any man with the sometimes exception of male therapists. My male colleagues think my neighborhood is safe; they weren’t told (I was) the details of a recent rape. I *hear* about the date rapes of students (more often, these days, attempted date rapes); my male colleagues do not. The story is always prefaced by, “Don’t tell anyone.” I *hear* (men don’t) about marital violence. It is always prefaced by: “Don’t tell anyone; he’d kill me” (which might be true) or “don’t tell anyone, he’d lose his job” (which is hardly ever true) or “don’t tell anyone, I’d be ashamed” (which is always true). I *hear* women’s memories of early sexual abuse. “Don’t tell anyone.” I draw this simple inference: Women and men have wildly different “ignorant” intuitions about the amount of danger, violence and fear in wo-

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[W]hen statisticians turn to private violence, the numbers become iffy, approximate in the extreme. Are there 650,000 cases of child abuse annually, or a million? Or 6 million? Bona fide experts, extrapolating and just guessing, variously cite all those figures and others. It is said that every year two million women are beaten by their husbands, and it is also said that nearly six million are. Pick your figure. A Justice Department survey counted 178,000 rapes during 1981, but for every woman who reported a rape to the police, perhaps nine or maybe 25 did not. It is beyond dispute, however, that extraordinary numbers of women and children are being brutalized by those closest to them. *Time*, p. 19 (Sept. 5, 1983).

The editors of *Sisterhood Is Global* elaborate:

Approximately 2 million to 6 million women each year are beaten by the men they live with or are married to; 50-70% of wives experience battery during their marriages; 2000-4000 women are beaten to death by husbands each year; in 1979 40% of all women who were killed were murdered by their partners . . . 25% of women’s suicide attempts follow a history of battery; wife battery injures more U.S. women than auto accidents, rape or muggings; every 18 seconds a woman is beaten by her husband severely enough to require hospitalization. Police spend 1/3 to 1/2 of their time responding to domestic violence calls; 97% of spouse abuse is directed against wives. Battery is a cross-class, cross-race problem.

R. Morgan, (ed.) *Sisterhood Is Global* 704 (1984).

men's lives because women live it and men don't and women *tell* other women and not men. The strategic implication is this: Women should start telling their stories, out loud, in public, in whatever voice, dialect or register fits the occasion.]

How does a pervasive and largely invisible danger, and an equally pervasive and invisible fear, affect women's lives? Women cannot, and do not live in a state of constant fear of male sexual violence any more than workers can live in a state of constant fear of material deprivation. One way (there are others) that women control the danger—and thus suppress the fear—is by redefining themselves as “giving selves.” Most simply, a woman will define herself as a “giving self” so that she will not be violated. She defines herself as a being who “gives” sex, so that she will not become a being *from whom sex is taken*. In a deep sense (too deep: she tends to forget it), this transformation is consensual: she “consents” to being a “giving self”—the dependent party in a comparatively protective relationship—for self-regarding liberal reasons; she consents in order to control the danger both inside and outside of the relationship, and in order to suppress the fear that danger engenders. Once redefined, however, and once within those institutions that support the definition, she becomes a person who gives her consent *so as to ensure the other's happiness* (not her own), so as to satiate the *other's* desires (not her own), so as to promote the *other's* well-being (not her own), and ultimately so as *to obey the other's commands*. In other words, she embraces a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism. The motivation of her consensual acts is the satisfaction of another's desires. She consents to serve the needs and satiate the desires of others.

I have no interest in arguing that all women are giving selves all of the time. I want to suggest in the next few subsections that enough women have lived with enough fear and danger in their lives as to justify the inference that significant numbers of women have defined themselves in a way that undercuts the commitment to the ethical primacy of consent which underlies liberal feminist legal theory. In the following sections I will describe some of the life environments that render such a self-definition plausible. I will discuss only those environments in which I have lived. Thus, the descriptions that follow are exemplary of the types of fear which have at some point in my life determined my self-definition. Toward that end, I will discuss the effect of domestic violence, promiscuous and threatening heterosexuality, and the fear of rape and street hassling on a woman's self-definition. The list is obviously not exhaustive; it excludes, because I have not myself lived through it and do not fully understand it, how

stranger-rape itself<sup>21</sup> (instead of the fear of it) and incest affects a woman's self-perception.<sup>22</sup>

### 1. Abusive Domestic Relationships: Fear and Consent

Del Martin begins her book *Battered Wives*<sup>23</sup> with the following *Letter from a Battered Wife*:

I am in my thirties and so is my husband. I have a high school diploma and am presently attending a local college, trying to obtain the additional education I need. My husband is a college graduate and a professional in his field. We are both attractive and . . . respected and well-liked. We have four children and live in a middle-class home with all the comforts we could possibly want.

I have everything except life without fear.

For most of my married life I have been periodically beaten by my husband. What do I mean by "beaten"? I mean that parts of my body have been hit violently and repeatedly, and that painful bruises, swelling, bleeding wounds, unconsciousness [sic], and combinations of these things have resulted.

I have had glasses thrown at me. I have been kicked in the abdomen when I was visibly pregnant. I have been kicked off the bed and hit while lying on the floor—again, while I was pregnant. I have been whipped, kicked and thrown, picked up again and thrown down again. I have been punched and kicked in the head, chest, face and abdomen more times than I can count.

Few people have ever seen my black and blue face or swollen lips because I have always stayed indoors afterwards, feeling ashamed. I was never able to drive following one of these beatings, so I could not get myself to a hospital for care. I could never have left my young children alone, even if I could have driven a car.

Being beaten is a terrible thing; it is most terrible of all if you are not equipped to fight back. I recall an occasion when I tried to defend myself and actually tore my husband's shirt. Later, he showed it to a relative as proof that I had done something wrong. The fact that at that moment I had several raised spots on my head hidden by my hair, a swollen lip that was bleeding, and a severely damaged cheek with a blood clot that caused a permanent dimple didn't matter to him. What mattered was that I tore his shirt! That I tore it in self-defense didn't mean anything to him.

*My situation is so untenable I would guess that anyone who has not experienced one like it would find it incomprehensible. I find it difficult to believe myself.*<sup>24</sup>

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21. The best description to my knowledge is in Henderson, *The Wrongs of Victims' Rights* 37 Stanford L. Review 953-66 (1985).

22. For powerful descriptions, see E. Bass & L. Thornton (Eds.) *supra* n.2.

23. D. Martin, *Battered Wives* (1984).

24. *Id.* at 2-3.

How do women respond to the total fear that accompanies the daily violence that characterizes an abusive domestic relationship? What does such fear *teach* you? A woman cannot live in a state of terror *every day* and what a battered woman learns in an abusive marriage is how to define herself in such a way that she can on occasion suppress the fear. Thus, what a violent intimate relationship taught me was to live *for the other*. I was—as these things go—relatively lucky, by which I mean the abuse I sustained was not nearly so extreme as that suffered by the woman quoted above. But I did learn in this relatively lucky environment of fists, slaps, bruises, threats, glares and terror the lesson of daily fear. Daily fear taught me to define myself as an object, the purpose of which was to buffer—and silence—another's violence. My purpose—my *only* reason for acting and my *only* motivation—was to serve *that* need of another. Fear taught me to view as literally incongruous the mere suggestion that I should expect to reap pleasure for myself from anything at all; surely not from sex, but nor from more ordinary sources, such as food, flowers, music, friendship or scenery. The notion that I would act—or *consent*—so as to further my own welfare or to create pleasure for myself was both inconceivable and unconceived: until circumstances and self-preservatory desperation inspired my exit, it never crossed my mind. Pleasures were for others. Sensuality was for others. “Personal welfare” was for others. Subjectivity was for others. I did not have, much less act on, preferences. I learned to view this as both natural and as naturally *inarticulable*, meaning I learned not just to lie, but to be a lie, to embody lying, to have no entitlement to either truth or language. I learned to be *for another's violence* and to view it as my reason for being, and I learned not to think about it much.

[Should I talk about this? Is it shameful? Could he still hurt me? Will people think I must have been crazy? Will they think I must have enjoyed it? Will they think I'm damaged? Will it undermine my credibility? Can I answer questions about it? Can I trust my voice? Will I become an untouchable? Was my situation too exceptional? (No, my situation was not exceptional. It was terrifying, and is common.) Does it make my perceptions idiosyncratic? (They're not.) Does my experience *of* it make my argument *about* it invalid? (That's the gamble.)]

I am certain that the lesson I learned from domestic violence was *the* lesson to be learned. This same lesson is reiterated in virtually any woman's account of an abusive intimate relationship. Thus, *the near-universal response to the pervasive fear with which a battered woman lives is to redefine herself as a giving rather than a liberal self*. The battered woman is a “giving self” and *for another* within an abusive marriage to precisely the extent to which it is too frightening and too dangerous to even contemplate being *for oneself*. As a giving self, she consents to everything, absolutely, and at all levels of being, and she does so for the subjectivity of the other, and the survival of herself. The other must

live, and that is *why you are*. If you are going to be *at all*, you are going to be *for him*. And you are going to be, so you are going to be for him.

One woman explains:

FEAR (a) My husband was physically violent three times . . . . [H]e and I [sat] in a crowded restaurant where we were both well-known, me listening to him demolishing my character, that of my parents and friends, and when I resisted and insisted on leaving, he threatened to kill me. And I believed him, I sat there, I smiled, . . . and I was terrified.

(b) Fear of my sanity—*I felt myself fragmenting—much like in descriptions of schizophrenia. Bits of me seemed to be breaking off and floating away, and it was always more of a problem to catch them and get them back, like catching soap bubbles.*

CONFUSION Why had he married me? What did he want? . . . Who had he married? *It wasn't me*. Who had I married? Was it him?

ISOLATION—IDENTITY LOSS—LOSS OF CONFIDENCE—MISERY All these go together. They merge and feed one upon the other . . . I cried, I stormed, *I took on his description of me*, I wilted under the pressure of how to correct these so obviously irritating characteristics. But, was he, himself at fault. *No, for I tried to be understanding.*

*It's a long time after now—ten years . . . . With an understanding of feminism came a way of absolving myself of failure, of eccentricity, of non-conformity. Yet, I remain bruised—I keep my guard up, because . . . I'm afraid at times that the next punch will splinter me forever.*<sup>25</sup>

The re-definition of self as “giving” in an abusive marriage is the literal death of a woman’s liberal subjectivity. She learns to *consent* for the satiation of the other’s desires. That becomes the *meaning* of “consent.” This does not make her an altruistic person; this makes her a negative. She will even remember herself as such:

I don't find it difficult to come to certain theoretical conclusions based on my experiences—but *I still feel as if I'm standing apart and outside the experience*—no amount of theorizing or analyzing can describe the complexities of emotional feelings I experienced during my marriage. *When I analyze or theorize it's almost as if I am talking and thinking about another person—not myself . . . . I can't remember anything except six months of negative feelings . . . . I was afraid I would go mad.*<sup>26</sup>

She teaches herself that this negative mode of being is inevitable:

When I was eight, my father remarried. My new mother . . . shielded me from some of my father's most brutal outbursts. . . .

25. D. Rhodes, S. McNeill (Eds.) *Women Against Violence Against Women* 232-34 (1985) (hereinafter, WAWAW).

26. *Id.* at 232.

[One day I asked her why she put up with my father's violence.]  
 'Claudia, that's the way men are. *You just have to take it.*'<sup>27</sup>

And finally, she teaches herself that the apparently human face she shows the world is a fraud; you are not truly human, you are other. A giving self, being *for another*, has no entitlement to truth. You have relinquished the self-validating, self-creating, and self-verifying connection between word and experience. You learn, in other words, to lie to yourself and to others. You become the lie:

Well-educated, well-to-do people don't discuss such things. I became a super cover-up artist. Shielding five children from the fact that their father took swipes at their mother was easy compared to the elaborate excuses designed for friends. [When a friend told me of her abuse by her husband, *I was appalled, and felt pity and disgust.*] I couldn't allow myself the solace of confiding to her that I was a fellow sufferer. Perhaps pride stood in my way. My reaction to her disclosure merely reinforced my vow never to discuss my own situation with anyone.<sup>28</sup>

"Very few people understand this kind of fear," says Erin Pizzey, in *Scream Quietly or the Neighbors Will Hear*.<sup>29</sup> This is not right—a lot of women understand this kind of fear. But with the exception of Vietnam veterans, no white, heterosexual man I have ever known knows how it feels to be afraid *all of the time*. Most women as well lack this knowledge. But many women—and there are many battered women—know what it means to define oneself in such a way as to make it possible to live with the truth that tomorrow you may die. If the day-to-day decision to stay in such a marriage is "consensual," the price is unconscionable: for the gain of controlling fear, you give up your subjective life.

## 2. Promiscuous Heterosexuality: Fear and Consent

Many more women, however, know the fear and the threat of violence implicit in promiscuous heterosexuality. A "date" with a man who is utterly—aggressively—uninterested in your subjective well-being, and at the same time, utterly consumed by his expectation and his felt compulsion to *have you* is a frightening encounter. During my adolescence and post-adolescence I divided the world of boys and men into two distinct groups; those who did and those who did not possess "the attitude." Those with the attitude were strong, stupid, uninterested in me, sexually acquisitive, and potentially violent. They had empty stares and over-developed biceps. They openly and proudly displayed both their expectation of absolute entitlement to my sexuality and their utter lack of interest in my subjective self. The sense of failure and the feeling of betrayal and rage which they would

27. Quoted from D. Martin, *Battered Wives* 79 (1981).

28. *Id.* at 79-80.

29. Quoted in D. Martin, *Battered Wives* 78 (1981).

unquestionably feel and probably act on, were we not to have sex, was potent. They were very frightening although rarely "violent" and we always had sex.

[Should I talk about this? Does adolescent and post-adolescent promiscuity make me exceptional, and therefore—again—marginal? (You've got to be kidding.) A better question: Is it worth it? I wonder if it is possible to explain—at all—to men who remember their *own* sexual adolescence and initiation as one of continual rejections from women, that other men—the ones who scored—*got it* more often than not by overt intimidation. That they accomplished this great triumph by refusing to even see the girl's subjectivity, much less give a damn for her welfare, by making their profound lack of concern manifest, and then by exploiting her resulting (fully justified) perception of his dangerousness. That noncriminal locker-room teenage boys are exploitative and frightening; that promiscuous heterosexuality, both adolescent and post-adolescent—our oft-times cultural prototype of innocent and mutual pleasure—is often fraught with fear and the threat of violence. Is it possible to make nondangerous men even entertain the possibility that they were/are the beneficiaries of the violence threatened and acted upon by their more sexually "successful" teenage peers?]

The fear of violence in promiscuous heterosexuality, when it is there, is always disguised and always confused. One woman explains:

[I]t is considered quite O.K. and normal for a man to try to persuade a woman to have sexual intercourse. He asks her to dance, she accepts. (She wants to, she doesn't want to but she's afraid of hurting his feelings, *she's afraid of making him angry*, she wants a man to dance with.) He asks her out, she accepts. (She wants to, or she doesn't want to, but all her friends have got blokes, *she's afraid of making him angry*, he might feel hurt, she cannot go out if she's on her own.) He kisses her. He puts his hand on her leg, her breast, her cunt. He wants to see how far he can go. She lets him. (She wants to, or she doesn't want to but he's taken her out after all, and spent money on her, she needs a lift home, she doesn't want to seem a prude, *he might be angry*.) He asks her to sleep with him. She accepts. (She wants to, or she doesn't want to but she thinks she might as well, she can't back off now, it might be O.K., she's flattered that he wants her, *he might be angry*.)

Or she refuses. He tries to persuade her. He tells her he loves her. He says she doesn't love him. He calls her a prude, immature, frigid. He says he needs sex. . . . Each time she finally tells him to stop, breaks away, he gets angry, he rages, he sulks, he tells her how bad it is for men to be left 'excited.' (Prick-teaser!) He teaches her to suck him off. He works toward his goal, which is her vagina. He means to have, to possess this woman.

This isn't rape, this is normal everyday stuff. The magazines call it young love. . . .<sup>30</sup>

And another describes her own memories:

I want to talk particularly about the violence I have experienced from men . . . When I was in my early teens I naively believed myself to be the inheritor of enlightened and liberating attitudes to sex. We had the pill and as far as I could see the double standard was diminishing, making it easier for women to be sexually active and assertive. Unlike my mother who was told never to say yes it was unpopular amongst girls I knew then to ever say no. We were controlled by men's demands. . . . Throughout my teens I variously had sex with men in the backs of cars, at the fairground, under the pier and in lavatories a few times. Violence was implicit in many of these sexual encounters. I remember my arms being locked above my head so I could not move; I remember being bruised and bitten and scratched. I remember moments of rising panic when I thought the man was actually going to hurt me badly.<sup>31</sup>

One way (there are others) that a young girl can respond to the "rising panic" she feels on a date is by defining herself as "giving." A straightforward, sensible, protective reaction to someone who is indifferent to your subjectivity, and at the same time must have you as an object, is to hide your subjective self and objectify and then give your sexual self for his pleasure and your safety. The subjective experience of a date rape for a giving self is the experience of giving what must inevitably—definitionally—be given. The empty stares and the overdeveloped biceps are not as threatening—the sex which is the culmination of the date will not feel like a rape—if the girl has defined herself in such a way that sex just *is* "that which is given to the other." To withhold consent (and thus invite a rape) once she redefines herself as giving is not just unliberated or prudish; it is definitionally excluded. It will be followed by guilt and confusion. It will feel intolerably unnatural, like doing something perverted and in violation of one's reason for being. To be is to be sexually giving.

The woman quoted above accounts for her *consensual* participation in these multiple and violent sexual encounters:

Frequently I was either uncomfortable or in actual pain but *I did not know how to protest or refuse*. I had non-voluntary sex quite a few times particularly when I was drunk and the men were reckless as to whether or not I had willed it in the first place. Quite often I suffered from thrush and cystitis, *but I would never tell men to stop because I was in pain*. During that time I often felt sick with guilt and with confusion but I still confused my constant sexual availability with liberation and freedom of choice. A couple of times I allowed men

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30. WAVAW, *supra* n.26, at 27-28.

31. *Id.* at 228.



to bugger me and one of these times I bled so much I thought I had hemorrhaged.<sup>32</sup>

There is a fine line between the feeling of being threatened by an implied threat of force and the feeling of the sheer inevitability of sex. Nevertheless, they are, for the self-regarding woman, distinctively different experiences: the first is frightening and the second is deadening. By contrast, for a woman or girl who has defined herself as "giving" and her sexuality as "that which is to be given," there is no line. She will never experience the anxious, ambiguous fear of rape by a "date." But *nor* will she experience consensual sex as pleasurable, or if she does, it will be only incidentally so. She consents to sex for his, not for her pleasure. The sex which is the culmination of these dates will be consensual, but it will also be uncomfortable, unpleasant, painful or dangerous. It will invite venereal disease (genital sex); bleeding and hemorrhaging (anal sex); gagging and nausea (deep oral sex); bruises, lacerations and welts (somasochistic sex); and unwanted pregnancy. The giving self will not experience this pain as a reason to withhold consent, for she is not, by self-definition, a being who consents to sexual encounters for her own pleasure or withholds consent if she foresees pain. She unquestionably consents, but not to satiate her own desires. She consents to satiate the desires and feed the pleasure of the other.

### 3. The Rape Threat: Fear and Consent

*Almost all* women, including those who have never experienced unwanted sex or battery, have experienced the fear of rape. The working paper on rape from the WAVAW conference elaborates:

The fear of rape is always with us. It affects our lives in countless ways—not only in that we are afraid to walk the streets late at night, but in all our dealings with men, however superficial these might be. . . .

This makes us self-conscious about our bodies, the way we sit and stand and walk—when was the last time you saw a woman sit sprawled across a bus seat the way men do all the time? We keep our knees together, our legs crossed, our faces neutral. Somewhere in our minds we are always aware that any man—every man—can, if he wants to, use the weapon of rape against us.

And men know it too. The man who mutters obscenities at us in the street knows it, the local greengrocer who insists on calling us love . . . knows it, the wolf-whistling building workers know it, the man reading page three on the tube and grinning at us knows it. *At one point on Reclaim the Night in Soho, we were confronted by a large group of men shouting "We're on the rapist's side—we're with the rapist." They didn't really need to tell us. We already knew.*<sup>33</sup>

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32. *Id.*

33. *Id.* at 25.

One way that (some) women respond to the pervasive, silent, unspoken and invisible fear of rape in their lives is by giving their (sexual) selves to a consensual, protective, and monogamous relationship. This is widely denied—but it may be widely denied because it is so widely presumed. It is, after all, precisely what we are supposed to do. One woman describes her embrace of this option thusly:

The brutality and coldness of (promiscuous heterosexual) experiences were largely instrumental in persuading me to have steady and secure relationships with men. I did not feel safe with lots of different ones. The threat of men's violence drove me into couple relationships. I feel ambivalent about these men. They were not unmitigated bastards and they did afford me protection. My mother would often mutter ominously about the world not being a safe place for women and my experiences could only confirm this. Being alone I felt, at times, besieged and up for grabs. Being with one man sheltered unwelcome attention from men in the streets, at parties, etc.<sup>34</sup>

Women who give themselves to a monogamous relationship in order to avoid the danger of rape from others, often end up giving themselves *within* the monogamous relationship so as to avoid the danger of rape by their partner. These women—and it is anyone's guess how many there are—acutely feel the loss of identity that such a "giving" entails. "L" begins her story:

I got married in 1970, I was 19 and so was he. I found marriage a great strain at first adjusting myself to fit in with his personality, character, needs and wishes. Somehow I seemed to know this is what I had to do. . . . [*M*]ainly I was losing my name and 'gaining' his. I didn't at that time realize I had a choice.<sup>35</sup>

Such women are in a constant state of duress, but they will only occasionally—and only dimly—experience it as such. A woman who learns to give herself in monogamy so as to obviate the fear and danger of marital rape will not experience the sex *itself* as frightening: the sex is what she gives to avoid the danger of rape. Such a woman controls danger and fear, but in exchange she gives—she alienates—her power to seek her own subjective pleasure through her own volition: the duressed gift of one's sexual self severs the connection between pleasure and volition. By giving yourself and your sexuality in order to insure your safety from danger, you lose the power to bring about your own pleasure. L continues:

In the main I was enthusiastic about sex, the physical pain seemed to stop, or perhaps I got used to it. Even then, though, I remember not always wanting to do it when he did, maybe I was tired, or just not in the mood but I wouldn't say no because he might be hurt or upset. I didn't at the time feel particularly resentful about this . . . .

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34. *Id.* at 228-29.

35. *Id.* at 234.

It was only after my first child was born . . . that sex began to be a problem . . . . I began to resent the sexual demands my husband made . . . . As well as this I was working full-time so I felt generally harassed. But I had been advised . . . not to neglect my husband. So I didn't. I sexually serviced him, and it began to feel just like that. If I said no, as I sometimes did, there would be either a row, well into the night, or silence which might last for days. Either way my tension and strain increased so I learned to be available, even if I didn't want to. It was quicker in the long run, so I could get some sleep.

I remember feeling all kinds of hostile feelings against him when he invaded my body, . . . But I couldn't really articulate it, I felt trapped . . . I was like some kind of automaton. . . . On and on it went with me totally drained of energy, but still I was expected to 'have sex.' In fact I did, without enthusiasm, just as another chore, like doing the ironing or bathing the kids. . . .

I didn't like most of the things he did to me, but I felt a little that I was supposed to. I faked liking what he did, including buggery which I found painful, but still he kept doing it.<sup>36</sup>

Finally, and paradoxically, she gives away her own safety when she gives herself for safety. Protection from someone who is himself a source of danger is whimsical. The point at which the monogamous woman begins to feel that the sex in such a relationship is coercive, is precisely the point at which she has begun to re-define herself as self-regarding. When the woman begins to define herself as self-regarding rather than giving, the sex begins to look and feel more like rape—to feel scary—instead of feeling boring and unpleasant and deadening. L describes this transformation—from “bad sex” to rape—thus:

I could catalogue all the separate incidences of rape—that is, doing it against my will—but its [sic] too painful for me to recall it. In fact my experience is fairly commonplace. No major brutal acts, just a generalized abuse of my integrity. . . .

It's well over a year since I left, and I think I'm beginning to recover. It's hard whilst it's happening to you to realize that you are being exploited, fucked-over and constantly raped. Because the effect of it all is to reduce your ability to fight back, or even to see what its [sic] about. My confidence was constantly undermined and eroded. . . . It's all those years of rape—perhaps subtle rather than brutal, but rape nevertheless. I was lucky I got out after ten years of marriage. Its [sic] only now that I can see what effect it had on me. *It was rape and I couldn't name it. Had I known I'm sure I would have got out sooner. Rape in marriage is an issue, naming it is the first step in a campaign which could stop the misery of millions of women's lives.*<sup>37</sup>

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36. *Id.* at 235-36.

37. *Id.* at 236.

#### 4. Street Hassling: Fear and Consent

Finally, for exceptionally privileged and protected young women and girls who do not learn elsewhere the threat under which they live, street hassling gets the message across. It is a potent daily reminder of the quality of the state-of-nature outside the protective institutions in which they will be expected to encase their lives. Street hassling is not trivial. Sexual assaults and batteries on the street are threatening ("Come sit on my face, bitch. Hey bitch, I said come sit on my face! HEY BITCH, I MEAN YOU . . . ."), constant (most white men have experienced only a few street assaults by strangers. Many women—perhaps most women who live in urban areas—have experienced hundreds), criminal (they are assaults, and when accompanied by touchings, they are batteries), frightening (look down, cut across the street, shrink into your coat, let your mind go blank, don't look up), unacknowledged (look down, hope it stops, hope no one else hears, hope no one else sees), disorienting and self-alienating (smile so he might stop . . . learn to smile—to show pleasure—when you are frightened), uncompensated (of course), and unpunished (ditto). Street hassling is also the earliest—and therefore the defining—lesson in the source of a girl's disempowerment. If they haven't learned it anywhere else, street hassling teaches girls that their sexuality implies their vulnerability. It is damaging to be pointed at, jeered at, and laughed at for one's sexuality, and it is infantilizing to know you have to take it. The woman on the street is under the thumb of the abusive man in exactly the way that children are under the thumb of abusive parents. She is an object of his pleasure, his contempt and his disposal. The subjective experience reflects the treatment. It feels frightening and infantilizing. It always made me feel—still makes me feel—like a helpless and guilty child. I know that I am in the hands of a superior power which will not be even seen, much less checked, by those from whom I might expect protection—the state, sympathetic men. When I refuse to let danger inhibit my movement (which is often), I pay a high price. On "public" streets, and on "public" transportation, I can expect to be touched, jeered at, yelled at, sexually ridiculed and exposed. This does not make me feel (primarily) "angry," "wronged" or even "assaulted." It makes me feel sexually ridiculous, exposed, dirty, vulgar, vulnerable and afraid.

One way that (some) women and girls respond to the jolt of fear—the "rising panic"—that street hassling engenders is by defining themselves as "giving;" by hiding—suppressing—their subjective selves and then giving away for visual consumption their sexual appearance. She gives up her sexual appearance for visual consumption, in exchange for the safety of her subjectivity. *Thought* stops. *Feeling* stops. She must—and does—stop thinking and feeling when she is on the street, because it is the thinking, feeling, *subjective* person who is most denied and hence most threatened by harassment. The subjective, thinking, feeling being must hide. What she becomes on the street is

visually consumed, given-away sex. To become less fearful (and thereby relatively freer in movement) she separates her sexual appearance from her subjective self, hides the latter and gives the former away. She gives it away for his pleasure and for her safety.

This quasi-consensual bargain feels horrible. Your body, objectified and separated from your subjective being, becomes dead weight. You hide the subjective identity you value, and you de-value what you can't hide and must give—your objective sexuality. As you do so, you learn self-deception and self-belittlement—you learn to smile when you are in pain. And finally, you learn to hate that which forces this violent rupture of subjective self and objective sexuality, and it is your sexuality which forces it.

[Should I talk about this? Domestic violence is too exceptional; street hassling is—too ordinary? Too frequent? Too trivial? Am I over sensitive? (No. It is *because* of their frequency, their constancy, and their banality that the sexual threats expressed on the street are so effective, and so foundational. They shrink us, rather than enrage us.) Again a harder question: Is this worth it? Most men I've discussed this with have said something like the following: "Yes, I agree it's horrible. But men go through it too. I was bullied on the schoolyard as a kid and felt just that way." To point out the obvious: the defining condition of *your* childhood—vulnerability because of size and strength disparities—is the defining condition of *my* adulthood. You grew *out* of vulnerability as you became a man, I grew *into* vulnerability as I became a woman. For women, the acquisition of adult sexuality ushers in, not out, those paralyzing fears that you identify with childhood. If you really understand this, because you remember getting bullied on the schoolyard, then it should not be such a mystery to you why so many of the women you know act like children.]

We all—men and women—live under a terrifying threat of material deprivation. We spend a great deal of energy warding off that danger and suppressing that fear. We pay our employer to protect us from that threat with our surplus labor value, and we spend considerable time and energy legitimating the employer's authority and "right" to do so. Similarly, we all live with the threat of criminal violence, pay the state to protect us from the threat, and expend energy legitimating its authoritative right to do so as well. Both employer and state become authorities whose legitimacy we regularly affirm. With every such act of affirmation, of legitimization, we become less like the self-regarding character presupposed by liberalism. And, by virtue in part of our continuing affirmation of these authorities, the authorities become increasingly dangerous themselves.

Women, though, and only women, live with a third danger: women and only women must somehow ward off the threat of acquisitive and violent male sexuality. It should not be so hard to understand (*why* is it so hard to understand?) that women develop protective strategies for coping with this additional threat. The means with which we

do so—primarily by learning to give ourselves to consensual, protective relationships, within which we then define ourselves as “giving”—are not the product of false consciousness or brain-washing. But nor are they value-creating voluntary and mutual relationships worthy of celebration. They are no less and no more than the product of our victimization: they are coherent, understandable responses to very real danger. Until we create a better world, they are also all we have.

### B. *The Giving Self and Liberal Feminism*

A liberal feminist theory of law which presumptively values consensual transactions on the assumption that the giving of consent is motivationally self-regarding, without addressing the fear that molds women's self-definition, runs the risk of missing altogether the real causes of women's misery. I will explore only one example.

Sexual harassment of women students by male professors is now recognized as a discriminatory injury and an actionable harm. And, although it constitutes a triumph of radical—not liberal—feminism,<sup>38</sup> the prohibition of coercive, academic sexual harassment is nevertheless fully consistent with liberal and liberal feminist premises. The sex-for-a-grade that follows sexual harassment by a teacher of a student is characterized by liberals and liberal feminists as “coercive” because it is for a grade. Thus, whatever other reason might exist for prohibiting sex-for-grade transactions (and there are others), prohibition of these sexual transfers is fully consistent with liberal premises: the sex is a compensable assault because it is non-consensual.

This liberal feminist reconstruction of what was originally a more radical insight, I believe, rather significantly misses the mark. The greater damage done on college campuses, to women, by men, and through sex, is precisely what the liberal conception of academic sexual harassment definitionally excludes. Women who are faced with the choice of sleeping with the teacher to get the A they academically earned, or settling instead for a C, have undoubtedly been injured. But with all due respect for the harm done to those students, there is a deeper tragedy, a more profound loss, and a greater harm done daily in campus bedrooms, and these relatively astute women who “know what they should have gotten” are decidedly not the victims. The

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38. For a general sense of the difference between liberal and radical conceptions of the harm in sexual harassment, contrast the radical treatment of the topic in C. Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) with the liberal treatment in B. Dziech and L. Weiner, *The Lecherous Professor* (1984). Both books reflect their authors' passionate conviction that harassment, either in school or at work, is terribly wrong. But there is a vivid difference in the characterization of that wrong. Dziech and Weiner conceive of their mission, I think, as an attempt to uncover a festering but exceptional wound: a few bad apples—the “lecherous professors”—sexually molest a not-so-few number of female students. MacKinnon, by contrast, reveals sexual harassment in the workplace to be continuous with sexuality outside of the workplace. Sex *in* the workplace, because it is at work, poses a different injury than that outside of work.

greater misery, I believe, is a product of the fully consensual and highly regarded romantic attachments of female graduate students and assistant professors, or undergraduates and research assistants. It is a mistake to infer, as the liberal feminist is inclined to do, from the wrongness of coercive, for-grade campus sex that consensual sex between male teachers and female students is therefore *good*. We cannot and should not so infer.

Smart male students view themselves as all sorts of things, including young intellectuals. A good male student will often attach himself to a brilliant professor, and will aspire to *be like* him. A smart female student who defines herself as "giving" *might* attach herself in this way to a brilliant professor and aspire to be like him. But it's not very likely. Unlike the male student, she is far more likely to be attracted to the brilliant professor, and aspire not to be *like* him, but to give herself *to* him. In her own way the "giving" female student will seek the recognition and praise which all students crave, by offering her sexuality. She may be intellectually gifted and she may perceive herself as such. But to the extent that the female student who is a "giving self" tries to define herself as an intellectual, she does so at the cost of internal war. For the definition of "self" as a sexually giving self rather than an academically demanding self is always there, always in competition, always available. For the female student, the intellectual self must fight the giving self, both in external and internal reality. The women who lose this battle have lost far more than the women who lost the A to which they were entitled, and so has the world.

All good students, male and female, love their professor's displays of intellectual brilliance; this is part of the joy of being a student. For the giving woman, however, that love is dangerous and ambiguous. Like male students, she craves recognition by her teachers. Her intellectual self craves recognition for intellectual work done. Her "giving self" though, craves the recognition that can only come through the teacher's acceptance of her gift of self. Consequently, male professors have a power which I suspect they often do not know they have, and when they do, they don't understand it. The male professor, as authority, is in a position to validate one or the other of the woman's conflicting self-definitions. If he reinforces the intellectual self, the woman's self-definition as intellectual is encouraged. If he reinforces the giving self, by accepting the woman's offered sexuality, the woman's internal war is over. The woman receives an authoritative pronouncement to the effect that her contribution to art, history, music or whatever will be in a form that she has always suspected and even hoped for—that it will be, at root, sexual. Her contribution will not be in the delivery of ideas—which after all will most likely not be the work of genius—but will be instead through her giving of herself to one whose intellectual contribution, unlike her own, may be. She is a jewel whose intellectual talents will be used to make all the more perfect her rare gift. The female student who loves intellect, and who is

aware of herself as a sexual being, will not only consent to these romantic entanglements. She will crave them—fiercely, continuously, and with heart, mind and soul.

The pleasure to be had in such a relationship bears a disconcerting similarity to that of a cocaine high. Furthermore, both are damaging and addictive, although only cocaine is recognized as such. The woman feels pleasure in making a contribution to the culture she respects—even deeply respects—through a fusion of intellectuality and sexuality. It can feel like a mystical blend: a transcendental, transformative experience. Self-objectification can feel beautiful. It feels palpably *meaningful* to enrich the life of someone who is admirable and immersed in a discipline you value by merely *being*, and by giving what you are. The gift of self can feel more significant, universal, transcendental, and religious than the paltry competition for status in the seminar rooms in which one's (ex)-peers are engaged.

The pain of these relationships—as well as the damage they do—far exceeds their Cassandra-like high. The woman's self-respect will hit a new low with which she is probably unfamiliar and for which she is totally unprepared, for at least three reasons. First, for a life of such servitude to feel of value, the man being served must be perceived as truly superior. The more skeptical the woman becomes of the man's genius, the more she must downgrade her own potential in order to maintain what is really central to these relationships—the distance between them. Whatever intellectual insecurities she brought with her are multiplied. This is a very bad way to feel about oneself. Second, the life of servitude to genius is likely to be a lazy, privileged, and pampered life. The woman will lose whatever employable skills she once had. She becomes unable to support herself. A given, empty self will not have the self-possession it takes to *work*. This sort of self-imposed, consensual unemployability is debilitating and infantilizing. This is also a bad way to feel about oneself. And finally, the woman who is using the relationship as a means of entrance into a discipline is being manipulative, and knows it. This too is not a good way to feel about oneself. The cumulative effect is a smothering blanket of self-contempt. You lose your respect for your intelligence, your competency in the world, and your moral character, and all for good reason: you have lost yourself.

This is not a subtle point, nor an invisible loss. "Falling-in-love" with high school teachers, college professors, or research assistants really does destroy the productivity, the careers, the earning potential, and eventually the self respect of many gifted women. Smart women drop out of high school, college and graduate school (and pretty women are at highest risk) to date, to marry, to help, and to serve those they perceive as intellectual giants. Eventually they learn boredom, the weariness of inactivity, and the self-contempt of nonproductivity. But in spite of its incredible familiarity, most academic men and many academic women do not see this as a harm at all, and if they do see it



as a harm, they do not see it as worth discussing. This ignorance must be ideological. My guess is that we cannot see the harm of these consensual relationships to precisely the degree to which we have adopted the blinders of liberalism. It is a harm caused not by coercive, occasional acts, but by the way we have defined the self that consents to the non-coercive relationships in which we engage. It is a harm that a liberal legal regime which resolutely regards the giving of consent as the infallible proxy of an increase in self-regarded and self-assessed value cannot possibly address.

As I have argued elsewhere, there is no reason that liberalism or liberal legalism need be thus constrained. Liberalism need not commit itself to the narrow normative category of consent, and when liberalism has been at its strongest—when it has been a generous and spirited force for progress—it has not been. There is even greater reason why a liberal feminist theory of law should not be so constrained. A “liberal feminism” would be truer to not only the guiding historical strengths of liberalism but also to the goals of feminism if it would aim to eradicate the fear that presently dominates women’s choices, rather than merely celebrating in the name of formal equality whatever choices we presently make. The stunted self-definitions which women embrace today are at least in part a reaction to fear: the fear we have learned first hand from the violence in our lives, and the fear we have been taught to harbor. Both feminism and liberalism have been at their best when they have attacked the multiple dangers that rule people’s lives. If we could get rid of the danger, we could get rid of the fear; without the fear, our choices would, I have no doubt, take on great meaning. When we are free of fear, we will indeed be strengthened rather than weakened by the “voluntary transactions” which we enter. When we are free of fear we will be truly autonomous. Then our “giving selves”—if we choose to be such—will be something to admire rather than disparage. For only then will our generosity, our charity, and our communitarian instincts be true to ourselves as well as nurturant of the needs of others.

## II. RADICAL FEMINISM AND THE ETHICAL PRIMACY OF POWER AND EQUALITY

Radical feminist legal theory begins with a description of women which is diametrically opposed to that embraced by liberal feminists. Liberal feminists assume a definitional *equality*—a “sameness”—between the female and male experience of consensual choice, and then argue that the legal system should respect that fundamental, empirical equality. In sharp contrast, radical feminists assume a definitional *inequality* of women—women are *definitionally* the disempowered group—and urge the legal system to eradicate that disempowerment and thereby make women what they presently are not, and that is equal. Radical feminism thus begins with a denial of the liberal feminist’s starting assumption. Women and men are *not* equally auto-

mous individuals. Women, unlike men, live in a world with two sovereigns—the state, and men—and this is true not just some of the time but all of the time.<sup>39</sup> Women, unlike men, are definitionally submissive twice over; once vis-a-vis the state, and once vis-a-vis the superior power of men. A legal regime which ignores this central reality will simply perpetuate the fundamental, underlying inequality.

The cause of women's disempowerment, as well as its effect, is the expropriation of our sexuality. Women are the group, in Catharine MacKinnon's phrase, "from whom sexuality is expropriated,"<sup>40</sup> in the same sense that workers are, definitionally, the group from whom labor is expropriated. Women are the gender from whom sex is *taken*. Women *as women* suffer the threat of acquisitive and potentially violent male sexuality. The threat of male violence and violent sexuality both defines the class *woman* and causes her disempowerment and the expropriation of her sexuality, just as the threat of starvation and material deprivation both defines the worker, and causes his disempowerment and the expropriation of his labor.

This much, radical feminist legal theory shares with radical feminism, and with this much I am in full agreement. Where radical feminist legal theory has departed from radical feminism, I believe, is in the normative argument it draws from the insight that women are, definitionally, the group from whom sexuality is expropriated. The argument, I believe, owes more to radical legalism than to radical feminism. The argument has three steps.

First, radical feminist legal theory, like radical legalism, begins with a highly particularized although largely implicit description of the human being. People are, in short, assumed to be such that there exists a correlation between objectively equal distributions of power—

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39. To my knowledge, Catharine MacKinnon has given the only detailed exposition of radical feminist theory. See MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *Signs* 515 (1982) reprinted in N. Keohane, M. Rosaldo, and B. Gelpi, *Feminist Theory, A Critique Of Ideology* 1 (1982) (hereinafter, MacKinnon, *Agenda*, with page references to the Keohane text) and *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635 (1983). Her two articles in *Signs* are deservedly regarded as classics. There is, however, very little else, although Ruth Colker's submission to this journal is a notable exception. Perhaps unsurprisingly, there are remarkably few radical feminist legalists teaching in American law schools, which is not to say that there aren't a great many radical feminist lawyers.

40. The exact quote:

As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.

MacKinnon, *Agenda*, *supra* n.39 at 2. See also *id.* at 14-15.

including sexual power—and subjectively happy and good lives.<sup>41</sup> Domination makes us evil and submission makes us miserable; substantive equality will make us both moral and happy; and both claims are true because of, and by reference to, this conception of our essential human nature.<sup>42</sup> Radical legal theorists, including radical feminist legal theorists, are as committed to the equation of objective, substantive equality and subjective well being, and the view of our nature on which it rests, as the liberal legal theorist is committed to the equation of objective consent and subjective happiness.

Second, both radical legalism and radical feminist legalism draw from this depiction of the human being the normative inference that it is the imbalance of power which facilitates expropriation (of work for the radical legalist, of sex for the radical feminist legalist), rather than the expropriation itself, which is *definitively* bad, and then the further inference that it is definitionally bad *whether or not the expropriation it facilitates is experientially felt as painful*.<sup>43</sup> The strategic consequence immediately follows: radical legal reform should aim to eradicate hierarchy and thereby attain a substantively equal social world. Thus we should oppose not what makes us miserable—the violent expropriation of our work or our sexuality—but the hierarchy of power which facilitates it, for by doing so we will better target the true cause of our misery.<sup>44</sup> We should support not what makes us happy, but what makes us substantively equal, because by doing so we will invariably further our true interest, even if not our felt pleasure. Thus, radical feminist legal theory shares with general radical legal thought a refusal to ground its opposition to expropriation (whether of sex or work) in the subjective suffering of the disempowered which such expropriation entails. Instead, for both groups expropriation must be opposed because it is symptomatic of the true cause of our misery—our material or sexual disempowerment, respectively—reflecting in turn our relative material or sexual inequality. The expropriation which the disempowered suffer is regarded by the radical as *bad*, but *not* because the expropriation has been shown to be painful, but instead because it is symptomatic of a larger violation of our essential nature, *and hence of our inherent ideal*.

Finally, radical feminist legal theorists share with radical legalists a methodological insistence that the correlation between objective

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41. The assumption that powerlessness and subordination are against our true interest is so pervasive in radical discourse that it is rarely explicated. It does not, of course, imply that the powerless can never feel happy. It does, though, imply that our nature is such that in an ideally equal world, we would be happier, more fulfilled, or more fully human.

42. See MacKinnon, *Agenda*, *supra* n.39. This comes through strongly, although still implicitly rather than explicitly, in MacKinnon's exchange with Carol Gilligan, published in *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buffalo L. Rev.* 11, 72-77 (1985) (hereinafter, *Buffalo Symposium*).

43. MacKinnon, *Agenda*, *supra* n.39, at 19-20.

44. *Id.* at 19. Also see *id.* at 25-26, n.59.

equality and subjective well-being is foundational and definitional; it is therefore *not* something that can be discredited by counter-example. Both groups of theorists accordingly refuse to credit the *phenomenological* evidence that the essentially descriptive claims that underlie the normative commitment to substantive equality may be false.<sup>45</sup> Thus, to radical legalists generally, and to radical feminist legalists in particular, the extent to which the disempowered desire anything other than their own empowerment, and anything at odds with an equalitarian idea, is the extent to which the disempowered are victims of false consciousness. Phenomenological reports by the disempowered of pleasure and desire that counter the radical correlation of equality and subjective well-being thus reinforce, rather than cast in doubt, the radical's definitional assumptions. They reflect the permeating influence of our objective condition, not the limit, imposed by subjective pleasure and desire, of the normative ideal.

The striking political contribution of radical *feminist* legal theory has been to extend the umbrella of the normative argument of radical legalism to include women as well as men, and thus to address hierarchies of gender as well as hierarchies dictated by class and race. If hierarchy is bad, then hierarchies and sexual hierarchies according to sex and gender are bad; if disempowerment is a prescription for misery, then women's disempowerment is a prescription for misery; and if expropriation is bad, then expropriation of our sexuality is bad.<sup>46</sup> The radical feminist legalist's commitment to gender equality stems from her empirical insistence that in the only respect which should be of concern to radical legalists, women and men are *the same*: women,

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45. The problem is succinctly stated in the following passage:

In order to account for women's consciousness . . . feminism must grasp that male power produces the world before it distorts it. Women's acceptance of their condition does not contradict its fundamental unacceptability if women have little choice but to *become* persons who freely choose women's roles. For this reason, the reality of women's oppression is, finally, neither demonstrable nor refutable empirically. Until this is confronted on the level of method, criticism of what exists can be undercut by pointing to the reality to be criticized. Women's bondage, degradation, damage, complicity, and inferiority—together with the possibility of resistance, movement, or exceptions—will operate as barriers to consciousness rather than as means of access to what women need to become conscious of in order to change.

MacKinnon, *Agenda* at 28.

Consciousness-raising is itself defined restrictively, so as to minimize conflict between commitment to method and the substantive goal of equality:

In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women's experience, from the perspective of that experience.

MacKinnon, *Agenda* at 5-6.

Further attempts to deal with the same problem appear at 20 n.42, 19-20, and at 6, n.7.

46. Thus, the persistent parallelism between work and sex, class and gender, Marxism and Feminism. *Id.* at 2.

like men, *suffer* from relative disempowerment and inequality, and will therefore benefit from empowerment and equality. Women, like men, just are such that objective inequality will cause us subjective misery, and objective empowerment—and thus, equality—will be our script for salvation. The legal strategy is directly entailed. Women are made miserable by inequality and enlivened by equality. What we should do with law, then, if we mean to address the problem of women's suffering, is disable the objective hierarchies of gender that cause it. The scope and depth of women's power must be increased, and the sphere of disempowerment must be shrunk. Legal reform should therefore be directed toward a dismantling of gendered hierarchies.

The inclusion of women under the radical legalist's normative umbrella is a great triumph, but it is costly: the adoption of radical legalist methodology by feminist legal theorists has also occasioned a damaging methodological divide between radical feminism and radical feminist legalism. Radical feminist legal theorists, true to their radicalism, refuse to consider whether or not the definitional implication it assumes between objective equality and subjective well-being resonates with women's desires and pleasures, and hence whether the conception of the human on which that implication is based is true of *women*. The radical feminist legal theorist—to the extent that she is a radical—will—must—deny that substantive equality in any sphere could ever be less than ideal or that empowerment of women could ever work to our disadvantage. Thus, to radical feminists, that women on occasion take pleasure in their own submissiveness, is simply a manifestation of their disempowered state, not a meaningful counter-example to the posited egalitarian ideal. As with radical legalists generally, the stated definitional ideal must trump the experiential counter-report.

For feminists, this radical legalist methodology should raise serious warning signals. First, we should remember that the ideal and the description of "essential human nature" on which it rests is itself drawn from a male, if "left" intellectual tradition, and is therefore *not* an ideal we should readily assume will be true of *women*.<sup>47</sup> The ideal, in other words, against which we are judging our own and each others' consciousness to be "false" may be an ideal which is true of men, but not women. But second, and perhaps more fundamentally, it is feminism's most crucial insight that *our experience* must be primary—and not to be trumped by posited ideals or definitions.<sup>48</sup> As

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47. I do not mean to imply that either the concept or the experience of "women" is or should be any more fixed than the concept or experience of equality. When and if the concept of "human" comes to include women's experience, the point made in the text could be modified accordingly: the ideal posited by radical legalism is not true to *human*, rather than just *woman's* reality.

48. The methodological difference traced in the text between radical feminism and radical legal feminism is reflected in this substantive difference: radical *legal* femi-

feminists, we should be wary of our attraction to a masculinist ideal, and we should be even more concerned when that ideal is then employed to run roughshod over experimental insights, painstakingly unearthed from our consciousness.

A. *A Hedonistic Phenomenological Critique of Radical Feminist Legal Theory*

Radical feminist legal theorists' failure to credit phenomenological reports of conflict between egalitarian ideals and women's subjective, hedonic, felt pleasures is generally benign, for one simple reason. The area of conflict is not great. Women want the fruits of substantive equality, and increasingly want them regardless of whether the means for getting them implicate equal treatment of the respects in which we are *like* men, or "different treatment" of the respects in which we are different. Thus, women both want and would be better off with equal pay for work of comparable worth, equal protection of laws, equal voice in governance, equal access to political, educational and business employment opportunities. Women both want and would be better off with special treatment of the different ways in which pregnancy disables us from employment, affirmative action to correct the decades of exclusion from all-male employment opportunities, and non-parallel, have-it-both ways legislation which at one and the same time mandates the integration of all-male enclaves and the protection of all-female clubs and schools, if that's what it takes. Women want the goods which substantive equality will deliver. Over vast areas of our lives, there is no conflict between our desires, our felt pleasures, and radical feminist ideals.

In one area of our lives, however, —namely our erotic lives— there has emerged a conflict between the radical feminist legal theorists' conception of an equalitarian ideal and women's subjective desire. The radical feminist's commitment to equality, and identification of the expropriation of our sexuality as the consequence of our relative disempowerment entails the normative conclusion that sexual inequality *itself* is what is politically undesirable. Thus, male dominance and female submission in sexuality *is* the evil: they express as well as *are* women's substantive inequality. But women report—with increasing frequency and as often as not in consciousness-raising sessions—that equality *in sexuality* is not what we find pleasurable or desirable.<sup>49</sup> Rather, the experience of dominance and submission that go with the controlled, but fantastic, "expropriation" of our

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nists place women's condition in her lack of power, while radical feminists describe her condition in terms of greater concreteness and specificity, such as her reproductive and mothering role. For a discussion of radical feminist conceptions of human nature, see A. Jagger, *Feminist Politics And Human Nature* 83-123 (1983).

49. For some descriptions from heterosexual women, see A. Snitow, C. Stansell, and S. Thompson (eds.) *Powers of Desire: The Politics of Sexuality* (1983) and for some descriptions from lesbian women, see P. Califia, *Sapphisty: The Book of Lesbian*

sexuality is precisely what *is* sexually desirable, exciting and pleasurable—in fantasy for many; in reality for some. This creates a conflict between theory and method as well as between stated ideal and felt pleasure: what should we *do* when the consciousness that is raised in consciousness-raising finds pleasure in what is definitionally regarded as substantively undesirable—sexual submission, domination and erotic inequality? In the words of one prominent feminist: “how can you maintain that you desire freedom and equality, when fundamentally [what you desire is to be] a slave?”<sup>50</sup> The conflict between felt pleasure and stated ideal has become a dilemma for radical feminism, but it has created an unprecedented debacle for our very young radical feminist legal theory, and one which threatens to be fatal.

The dilemma for feminism, I believe, is a real one; but the crisis atmosphere to which this dilemma has led in radical feminist *legal* thought, I will argue, is unnecessary. Radical feminist legal theorists—distinctively, in feminist literature—respond to the conflict between political ideal and subjective, erotic pleasure by adamantly refusing to address it, and it is that refusal more than the dilemma itself which is threatening the survival of radical feminist legal theory. In the feminist legal literature two strategies of avoidance have emerged. The first—advocated by Andrea Dworkin and Catharine MacKinnon—regards the undeniable reality of the pleasure many women find in the eroticization of controlled submission as simply an example—perhaps an example *par excellence*—of the false consciousness of the oppressed.<sup>51</sup> The desires reflected in fantasies of erotic domination are false definitionally—they are false because the object of desire is submission, and submission is precisely what is definitionally *undesirable*. The second strategy—advocated by Sylvia Law and Nan Hunter—constitutes in essence a retreat to liberal principles. Fantasies are private and beyond political analysis; the role of law should be to expand, not shrink, the options available to women, including the option, if freely chosen, of masochistic desire, fantasy, practice and pleasure.<sup>52</sup>

I will examine in another section the pornography debate which these two feminist responses have generated. Here, I want to focus on what the two factions share: *both positions, at critical theoretical junctures, abandon feminist practice*. As a result both positions definitionally exclude the very issue which should be of greatest concern to feminists,

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Sexuality (1980) and Rubin, *Sexual Politics, the New Right and the Sexual Fringe*, in *What Color Is Your Handkerchief: A Lesbian S/M Sexuality Reader* 28 (1979).

50. M. Marcus, *A Taste For Pain: On Masochism and Female Sexuality* 210 (1981) (hereinafter, Marcus, *A Taste for Pain*).

51. See *Agenda*, *supra* note 40. Also, see E. Morgan, *The Eroticization Of Male Dominance/Female Submission* (1975) and Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Signs* 631 (1980).

52. See the Amicus Brief filed by Nan Hunter and Sylvia Law on behalf of the Feminist Anti-Censorship Taskforce, in the United States Court of Appeals for the Seventh Circuit, in *American Booksellers Association v. William Hudnut*, No 84-3147 (1985).

and that is the meaning and the value, to women, of the pleasure we take in our fantasies of eroticized submission. The MacKinnon position that the pleasure in erotic submission is “false” because sexual submission *is* that which is undesirable resolves by definitional fiat what should be resolved by experiential, particularized, contextualized investigation—and that is what these fantasies of eroticized submission mean, what their value is in our lives, and what they can tell us about the desirability as well as the nature of sexual equality and power. The Law/Hunter position that fantasies are free choices which—again definitionally—must like all other choices be respected, hides the same issues, but this time in the name of liberal tolerance rather than radical equalitarianism.

This abandonment by feminist legal theorists of the phenomenological realm of pleasure and desire is a function of legalism, not true feminism. It reflects the extent to which we have embraced the ideals of legalism—whether we regard those ideals as substantive equality, liberal tolerance, privacy or individual autonomy—rather than the methodology of feminism—careful attention to phenomenological narrative. It reflects the extent to which we have allowed liberal and radical norms drawn from non-feminist traditions to become the criteria by which we judge the narratives of our lives that emerge from consciousness-raising, *instead of the other way around*. More than any other issue, the pleasure that we obtain from the eroticization of submission poses an indissoluble conflict—or exposes an indissoluble conflict—between feminist method and feminist-legalist ideals, whether that legalism is radical or liberal. Hiding this conflict under the rug—whether in the name of liberal tolerance or radical equality—does far more harm than the conflict itself could ever dream of inflicting.

### 1. Equalitarian Ideals and Erotic Submission

Consider these two quotes, juxtaposed by the Danish radical feminist Maria Marcus in the introduction to her book on female masochism, *A Taste For Pain*:<sup>53</sup>

“We regard our personal experience, and our feelings about that experience, as the basis for an analysis of our common situation . . . . The first requirement for raising class consciousness is honesty, in private and in public, with ourselves and other women.”

SISTERHOOD IS POWERFUL (Redstockings Manifesto)

“And Sister, if you can’t turn on to a man who won’t club you and drag you off by the hair, that’s yours (hang-up). Keep your hang-ups the hell out of this revolution.”

SISTERHOOD IS POWERFUL (Lilith’s Manifesto)<sup>54</sup>

53. Marcus, *supra* n.50.

54. *Id.*, dedication page.



The definitional exclusion of phenomenology now evident in radical feminist legal theory is not, as the above quotes should demonstrate, *solely* a function of legalist loyalties. It reflects a broader dilemma in radical feminism. Feminists outside of law, however, are at least talking about the problem, and it is to that conversation I want to briefly turn.

The contours of the conflict between stated ideal and felt pleasure, and between method and theory with which radical feminism is now grappling, I believe, are starkly brought out in Marcus's detailed, moving, and candid account of her own profoundly ambivalent reaction to *The Story of O*.<sup>55</sup> *The Story of O* is, in Marcus's phrase, a "masochistic pipedream."<sup>56</sup> Written pseudonymously in the mid-fifties, it is without question the unsurpassed, modern, masochistic text. It is a stunning piece of pornography. Marcus summarizes the plot thusly:

Chateau Roissy is owned by a secret brotherhood, and there Rene abandons his lover to the inhabitants and their regime. Briefly, this aims to turn the women who come there into utter slaves, with the aid of force, whips and rape. These means are used according to carefully arranged and familiar rituals—performed sometimes by the gentlemen, sometimes by the servants—and in the course of a few weeks O has become what they wish her to be. She has learnt to obey the rules of the mansion, which are all concerned with her three orifices—never to close her mouth; always to be dressed so that she is freely accessible, including from behind. The three orifices are the only things of hers that are of importance, so they no longer belong to her, but only to the men. She may not use her mouth to speak with (except when asked to do so) and neither is she allowed to look on a man's face—she may not raise her eyes above the level of his genitals, her lord and master . . . .

Sir Stephen (her Master) treats her with a mixture of chivalry, contempt and cruelty. He mainly makes use of the orifice most subject to shame . . . , he whips her or has her whipped, he lends her to others and talks about her in most brutal terms to the others . . . .

*The Story of O* is the best pornographic book I know for a sadomasochistic public. Just listen to how O is shown the whip:

Her hands were still pinioned behind her back. She was shown the riding-crop, black, long and slender, made of fine bamboo sheathed in leather, an article such as one finds in the display-windows of expensive saddle-makers' shops; the leather whip—the one she's seen tucked in the first man's belt—was long, with six lashes each ending in a knot; there was a third whip whose numerous light cords were several times knotted and stiff, quite as if soaked in water, and they actually had been soaked in water, as O was able to verify when they stroked her belly with those cords . . .<sup>57</sup>

55. P. Reage, *The Story Of O* (1954).

56. Marcus, *supra* n.50, at 197.

57. *Id.* at 193-95.

Marcus quickly alludes to the very general conflict between pleasure and democratic political ideal which she perceives to be at least in part the novel's subject-matter:

O's compulsive submissiveness goes against all the ideas we live by in Western democracies, in which every human being is born free and equal and this freedom and equality must not be suppressed. *The Story of O* says the opposite, that some people, possibly all people, are born into inequality and bondage, and can only be happy by losing their false freedom and equality and giving themselves over to submissiveness and slavery.<sup>58</sup>

But Marcus is clear, *The Story of O* is not a story about democracy; it is a "fable about women."<sup>59</sup> She is equally clear that O's masochistic pleasures and desires, like the rest of ours, are socially constructed:

*The Story of O* is simply the story of a woman as male society sees her. . . .

O has everything. She is the unaggressive, passive, penis-less little creature adapting to the role offered to her. She accepts all pain as part of her condition. She has an unconscious need for punishment, connected with the fact that her original sadism has turned inwards to become masochism, . . . She is faithful to her feelings, and she has no especially strong superego, which is demonstrated by her accepting no morality except what at any given moment she feels most fits the occasion. She is basically a narcissistic creature reflecting her body and feelings, but she has learnt that she is forbidden to touch her clitoris. She can play with women, but only give herself, and thus know fulfillment as a woman, with men . . . .

O becomes the image of the *natural woman* and many readers will feel (whether they dare admit it openly or not) that it is good and right . . . and that all genuine women belong there . . . . Readers will feel all that, and trust their feelings, for feelings are natural, and anyone who doubts feelings, and starts talking about feelings being influenced by external forces, is at best a cold and bloodless creature in the clutches of the intellect.<sup>60</sup>

The analysis would be fine and comfortable if it stopped there; but it does not. Marcus does not simply condemn O and the society that created her. She has an intensely empathic and sexual response to *The Story of O*:

When I first read *The Story of O*, it filled me with a mixture of sexual excitement, horror, anxiety—and envy. I read it many times, each time with the same feelings. But gradually, as I had the good fortune to plunge to some extent into acting out an "Imitation of O," my envy, anyhow, lessened, because on one (sic) imitates O with overstepping a boundary into a state which is not particularly enviable.

58. *Id.* at 204.

59. *Id.* at 209.

60. *Id.* at 206-07.

But I must still say that Pauline Reage is right—the description is correct and I understand O. I understand her pride in the weals from the whip . . . He owns me. I'm worth owning. Look what he makes me put up with. Look how strong the man who loves me is. Look I'm valuable. I *exist*. I understand that O comes to feel an inner peace, strength, dignity, security and psychic energy in this particular way, an energy that is nothing like anything else I (O) know.<sup>61</sup>

*The Story of O*, Marcus concludes, is *the* text with which radical feminists must concern themselves, and the magnitude of female readers' responsive, empathic and erotic response to the text is the issue with which radical feminism must come to grips.<sup>62</sup>

Radical feminists have responded, I believe, to the conflict between pleasure and ideal posed by the undeniable female eroticization of sexual submission in three characteristic ways. First, some feminists claim that there is no conflict between stated ideal and felt pleasure because feminist consciousness-raising—properly understood—has revealed the falsity of these pleasures. Thus there is no contradiction between feminist methodology—consciousness raising—and feminist goal—sexual equality. What the methodology reveals is that the pleasure had in sexual submission is false. Justine Jones, an English radical feminist, accounts in the following passage for her own masochism:

Our sexuality has been constructed by male-dominated society. We are brought up to kow-tow to men in every area of our lives, accept a generally lousy deal in jobs, pay, etc., etc. . . . How can sexuality possibly escape? We have to *fight* to begin to define it for ourselves, just as we have to fight for everything else that's ours that has been taken away from us, . . . control over our bodies, our fertility, our right to do any sort of paid work, a culture of our own . . .

Relating sexually to women, or being a celibate lesbian, I still sometimes have masochistic fantasies. I *hate* them and fight to accept I'm not alone, nor a pervert. I *don't* believe the answer is to welcome and revel in them as "natural," I don't think they come from my own self-definition of my sexuality. I think they were granted and grew there as I grew up as a means of adapting my sexuality to the demands of a heterosexist society where men are supremely in control . . . .

So—my sexuality, and that of many other women, was twisted into masochism, which came out most strongly in my fantasies, which made me enjoy being screwed, which gave me an extra thrill. Many women have been turned on by "The Story of O." Many of us have carried our fantasies into reality, have put up with or indeed initiated extremely humiliating sexual practices with men, . . . . What about the way this humiliation carries over into everyday life with

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61. *Id.* at 207.

62. *Id.* at 209.

men, how we allow ourselves to be treated like slaves, insulted, joked about? Who could "enjoy being a girl" with all that implies now, unless she was helped along by masochism?<sup>63</sup>

In a similar vein, "danu" states in a working paper on lesbian sado-masochism (prepared for the WAVAW conference):

In our masochistic fantasies, many women strive to reconcile the impossible: to feel pleasure (men's) and pain (women's) at the same time: that is, sexual pleasure (men's) and bodily pain (women's). In our fantasies, many of us become sexually aroused and enjoy rape, torture. We strive to enjoy what men enjoy—believing that thereby we shall survive.<sup>64</sup>

The second response (which was, until very recently, the near-standard feminist response) is simply to abandon feminist methodology. One way of maintaining the ideals of freedom and equality is by abandoning whatever methodology brought you to the conclusion that you enjoy being a sexual slave. If that methodology is feminist consciousness-raising, then so much the worse for consciousness-raising. Thus, in her response to Pat Califia's defense of lesbian sado-masochism (that it is (1) consensual; (2) rebellious; and (3) threatened),<sup>65</sup> Jayne Eagerton abandons entirely the first person narrative voice which is the distinction of consciousness-raising as moral method and adopts instead an outsider's condemnatory voice:

I don't find any of the arguments convincing. The endless images of fist fucking, flagellation, bondage and leather sex which come flooding into my mind when I read about lesbian S&M are irrevocably associated with male power and female powerlessness. It is impossible to divorce the concepts of domination and submission from the sexual relationships between men and women. That is where they come from. What of all those women who *are* forced into humiliating and painful sex with men—women who have no 'choice'. It seems that these lesbians are parodying the reality of this oppression and diffusing its significance. They play games while other women suffer. I think sado-masochism takes the heterosexual model and mimics and exaggerates all its horrors and inequalities. It both reflects and reenforces men's power over women. How can we hope to fight male power when we are practicing male defined sexuality among ourselves?<sup>66</sup>

The third possible response to the conflict between the pleasure we take in erotic domination and our equalitarian ideals is to put our

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63. WAVAW, *supra* n.25, at 56-57.

64. *Id.* at 225.

65. See P. Califia, *Sapphisty: The Book Of Lesbian Sexuality* (1980). See also Deirdre English, Amber Hollibaugh and Gayle Rubin, *Talking Sex*, 58 *Socialist Review* (1981) and Rubin, *Sexual Fringe*, *supra* n.49. Califia and Rubin's arguments are summarized, and categorized as "libertarian feminist," in Ann Ferguson's excellent review essay of the pornography debate in *Pleasure, Power and the Porn Wars*, Vol. 3 No. 8 *Woman's Review Of Books* 11 (1986).

66. WAVAW at 212-13.

ideals in abeyance—maybe they are what is false—and hold true to consciousness-raising. This is the position for which I will argue. First I want to comment on the two feminist responses which I think fail.

What I have identified as the first response—the dismissal of the desire for erotic submission and the pleasure obtained from it, as instances of false consciousness *as revealed by consciousness-raising itself*—is, I believe, wildly out of line with the methodology of consciousness-raising, as that method is more widely understood in feminist practice. There is a striking—and revealing—discontinuity between the criteria by which fantasies of erotic submission are judged as “false,” and the criteria by which other felt desires are discovered through consciousness-raising to be “false.” Feminist consciousness-raising, and the correlative meaning of “false” in the phrase “false-consciousness,” is governed, I believe, by three methodological principles. First, a woman discovers the “falsity” of her felt pleasures and desires in consciousness-raising *when she discovers that they are not her own*—when she discovers, quite literally, that she has been seeking the pleasure of others, not herself. The desire, and the pleasure had from the desire’s satisfaction, is subjected to a test of *source*, not substance: whose desire is it? Whose pleasure is it? Second, she discovers the “falsity” of her desires when she discovers, again quite literally, that she has been lying, either to herself or others. Thus, the desire and its attendant pleasure is tested by reference to its *genuineness*, not its substance—is it truth or falsehood? The desire (or the pleasure) is discovered to be “false” when she discovers that what she has been calling “desirable” is *not* in fact—to her—desirable. And third, and perhaps most centrally, she discovers the “falsity” of her desires when *she herself*—not outside observers—feels their falsity. It is when the subject herself discovers the disjunction between her purported desire and her discovered identity that the desire is felt to be false and is rightly abandoned.

The feminist position that the desire for and pleasure obtained in erotic submission are “false,” I believe, flagrantly violates all three of these methodological principles. First, the judgment that women’s desires for erotic submission are “false” is typically made by reference to the *content* of those desires, not their source. The desire for eroticized submission is false because of the content of the desire itself, not because it has been discovered to constitute, in masked form, the desires of others. Second, the desire is judged false not because it is determined to be *a lie*—not truly felt to be pleasurable but only reported as such—but solely because of its content, solely because it is a desire for sexual submission. And, finally and most revealingly, with the noteworthy exception of Justine’s and Danu’s statements quoted above, the discovery of the falsity of these desires has not typically come from the women who have them, but almost always from the women who do not. The desire is judged to be false, not because the subject herself has come to feel it as false, but because someone else has come to judge it as such. The judgment of falsehood is almost

always against the will as well as the opinion of the woman who has the desire. This truly is a profound departure from feminist methodology which is also truly offensive—consciousness-raising is not about the imposition of judgments of truth or falsity on the desires of others.

I do not believe that on the basis of a truly feminist consciousness-raising methodology these desires would inevitably be discovered to be false. First, they do not ring of the “giving self.” The women who have desires for, construct fantasies of, and take pleasure in erotic submission are rather clearly expressing desires, fantasies and pleasures that are their own. In Maria Marcus’s description of her own experience, and her ambivalent response to it, for example, there is nothing to suggest anything other than full ownership of either the desire or the ultimate pleasure:

Then one day he was there, my Black Prince—my dream lover, the sadist, just like in fairy tales when someone waves a wand. Everything went of its own accord. I didn’t even have to provoke him. He did everything I had hoped for in my fantasies. He spoke quietly and menacingly and he beat me, and while in bed, forced me to do humiliating things. I was taken up as high as never before.

But not quite to the top.

I was completely disoriented when this was repeated several times. I was even more disoriented when shortly after that, I had my first orgasm. An orgasm within marriage, after nearly twenty years of active sexual life, after experiencing childbirth and achieving professional success.

I kept wondering what it all meant.

First of all, a colossal tension had been released. The miracle had happened and the prince had been there. He had opened a door into that forbidden room for me.

Secondly, I am sure that prince of mine took me to places where I had never been before, probably right to the beginning of the path and perhaps even quite a way up it—so high up that for the first time I didn’t immediately register it consciously, I think that glimpse etched itself in so that I did not forget it again. <sup>67</sup>

It could, of course, be argued that fantasies of erotic domination are “false” for the straightforward reason that their verbal articulation reveals them to be such. Pleasure is not pain—they are opposites—and anyone who confuses the two is for that reason alone sustaining false desires. Anti-S&M feminists, to their credit, do not typically make this linguistic or logical argument, but it may nevertheless be worth commenting on. In short, the hedonic descriptions—gleaned from both consciousness-raising and traditional therapeutic contexts—do not bear this charge out. Practicing sexual masochists may be, in our culture, singularly *unconfused* about the relationship of pleasure and pain and the difference between the two of them. Marcus describes her *experience* of this purported contradiction thus:

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67 Marcus, *supra* n.50, at 118-19.

I found . . . that if physical pain is to be used directly as sexual stimulation, then it has to be on a defined and strictly limited level. Perhaps this is not true of everyone, but it certainly was for me. If anything hurts really badly, there is no room for pleasure. Then I cannot think of anything else except that it hurts and ought to stop, and that I must get away. If it doesn't really hurt, nothing happens. The ideal pain should be governed by a computer that ensures it stops just within that tiny area when it becomes sexual pleasure. This hair-line balance is easy enough to achieve in the imagination, but in real life it is almost impossible. So in reality I had to write off pain as a direct stimulant.

But not as an indirect one. I got as far as realizing that the coveted state was *outside* the actual pain. Pain is a necessary part of it, but because the mechanism is so finely graded and the balance so hopeless to achieve, the pain is active only outside the actual situation—before and after. It *has* to be passed. There has to be a moment when I hate and loathe the pain, and only wish I could get away from it. But once you have been on the pain-level, it can be used sexually at another moment in time.

When it really hurts seriously, the sexual connection practically ceases—when, for instance, you're beaten with some object or other. But before and after, there is plenty of opportunity for sexual use of the situation. There is sexual stimulation in the memory . . . or in the threat . . . and perhaps in combination . . . . This assumes that you *have* already tried out pain on your body . . . . It is only the pain you hate that can be manipulated in a certain way so that it may become sexual stimulation.<sup>68</sup>

The crux of the feminist claim that the pleasure had in fantasies and enactment of erotic submission is "false" is not that the pleasure is logically incoherent. It is that the pleasure is quite literally *false*, not contradictory: submission is felt to be pleasurable, *but it is not*. Submission is thought to be desirable, *but it is not*. The pleasure is *therefore* on some level a lie, either to others or oneself. And yet, if we examine the accounts of the pleasure had in erotic submission and domination for indicia of lying by any criterion other than content, the charge is singularly hard to substantiate. In this passage, Maria Marcus elaborates on O's enjoyment of her submission, and Marcus' own identification with that enjoyment:

What [O] finds is that she is becoming happier and happier, happy over the way she is being used, happy over being whipped, happy over not being allowed to speak and happy not to move. . . .

How can she describe the joy, the inner peace and dignity and cleanliness she feels after being whipped and soiled by the sweat and semen of the men and her tears? . . .

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68. *Id.* at 119-120.

At one moment, O is standing naked in a room, two men looking at her, and she is waiting obediently for them to give her orders. But something is wrong. She looks appealingly up to Sir Stephen:

He understood what the trouble was, smiled, came up to her and, taking her two hands, drew them behind her back and held them pinioned there in one of his. She slid back against him, her eyes shut, and it was in a dream . . . .

Not until the moment O(I) becomes freed of her body, of the use of her arms, of the right to decide for herself, of the right of her own desires—not until the moment I(O) lose my identity, do I find my own identity. Not until that moment is there no longer anything to doubt. Not until that moment have I found my place in a system . . . . At last I can be secure, strong, bold, proud, clean, filled with a great inner peace. At last I find myself—because I have lost myself. At last I have become—O.

O—a letter, impersonal, the name of anyone.

O—a whole, eternally accessible to men; O, a sexual symbol, a symbol that women are for men to empty themselves into.

O—an object, a creature that can only be dealt with.

O—a zero, a creature with no identity.

O—the complete form, the circle that encloses the world, that finally contains the world inside it; O, the banishing point, back to the womb, into the peace of non-existence—death.<sup>69</sup>

There is much to be disturbed about in this passage, both in O's reaction and in Marcus's, but I do not spot any lies.

Most radical feminists, however, who have endorsed the dismissal of fantasies of erotic domination, have justified that dismissal not by reference to criteria stemming from feminist methodology at all, but by reference to feminist and supra-feminist substantive normative standards. To these feminists, (I think) the bringing to consciousness of the pleasure women feel in erotic submission simply represents the *limits* of consciousness-raising as feminist methodology. That the dismissal of pleasure cannot be justified by reference to the methodological criteria of consciousness-raising represents not an argument against the dismissal of pleasure, but an argument for abandoning, at precisely that point, the methodology. Thus, it is simply not the case that we should validate whatever emerges in consciousness-raising; there are and should be external criteria or external norms—such as equality or autonomy—by which the content of our pleasures and desires should be judged. Those norms, in turn, are derived not from our felt pleasures—even when those pleasures are fully and correctly identified as our own—but from our political ideals. Where felt pleasure conflicts with derived ideal, ideal must trump; where feminist method reveals anti-feminist pleasure, feminist method must cease. In short, if we desire sexual submission, then so much the worse for the primacy of desire, even if—especially if—those desires are re-

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69. *Id.* at 202-04.



vealed to us through feminist consciousness-raising as being very much our own.

Marcus eventually endorses something like this position. Her ultimate suggestion for the fate of female sexual masochism reflects a strongly felt *moral* and even medical judgment that the pleasure, if incorrect, must go:

Even if we are cured of our authoritarian masochism, we may still suffer some sexual masochism. As long as we do, it will also be used to keep us down, and it will be interpreted as evidence that inwardly we long to submit ourselves to a ruling power. And many women may retain their faith in the link with authoritarian masochism. So if for no other reason, we should do something about it together.

We should try to analyze the origins of sexual masochism, and *even if we cannot, still try to find out how to cure it*—in ourselves and in others. We could set up self-help groups with the aim of mapping muscular tensions that arise when we become sexually stimulated, with or without masochistic elements. We could try to divert sexual arousal so that it does not have to take the route through the head, enabling it to spread unhindered to our soft relaxed receptive sexual organs, *without being soiled by fantasies that we feel are destructive and degrading.*

I think we should plump for the physical way, because the psychic way is so intangible and complicated that it would demand too much of us. But together, in groups, we might be able to cope with the physical track, in the way we have learned to cope with so much else.

If we do it together, we may learn to cope with the violent physical dramas that would presumably take place when resistance is swept away and orgasm threatens to break right through. For we know each other and we know ourselves. . . .

*The aim must be to allocate our problems—our female masochism—their right place and no more. . . . [W]e have to deal with sexual masochism and if possible dispose of it—not because it is shameful, but because in itself it is muck we can well do without. . . . I will try to be cured of my sexual masochism, or else to live with it without feeling compromised when faced with the women's movement or the rest of the world.<sup>70</sup>*

This abandonment of consciousness-raising as method and its concomitant dismissal of women's internal lives as a criterion of value in favor of an objective political agenda has at least three costs. First, it has already done and will continue to do enormous damage to our integrity. As Adrienne Rich has eloquently argued, one of women's most disabling problems is that women *lie*.<sup>71</sup> For a multitude of reasons, we lie to ourselves and to others. And, one thing women lie about more than any other, perhaps, is the quality and content of our own hedonic lives. We tell others we are happy when we are not; we

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70. *Id.* at 252-60.

71. A. Rich, *On Lies, Secrets, And Silence: Selected Prose 1966-1978* (1979).

tell others that our marriages are good when they are in fact brutal; we tell others we are orgasmic when we are not; we tell others we are sexually fulfilled when we are deprived. We smile on the street—we express pleasure—when we are being threatened and feeling pain. One reason we lie, perhaps more than any other, is to fulfill the politically dictated expectations of others. We say we are flattered, happy, fulfilled, orgasmic, because the social and political visions of others demand that we should be so. This lying has hurt us. We lie so often we don't know when we are doing it. We lie so often we lack the sense of internal identity necessary to the identification of a proposition's truth or falsity. We lie so often that we lack a self who lies. We just *are* lies; we inhabit falsehood. Our lives are themselves lies.

Consciousness-raising, more than any other feminist methodology, has given women a means by which to break the chain of deception in which we live. By learning to identify the falsehoods we utter, we have learned to create a self who can assert a truth. Consciousness-raising is the discovery of the power of *truth*, not just *a* truth. When we abandon consciousness-raising we run the risk of losing truth. We run a high risk of losing ourselves again in yet another morass of deception. We run the risk of once again living a lie. We run the risk of once again having to *feel* subjectively what it is forbidden to *be* objectively, and we will once again end up paying the piper. I am not willing to take that risk.

Second, if feminists abandon consciousness-raising as a method in favor of an authoritatively pronounced objective ideal, many women will pay by foregoing a source of sexual pleasure. This is not a trivial sacrifice. When we deny what gives us sexual pleasure, and when we thereby deny ourselves that sexual pleasure itself—when we deny both truth and pleasure—we deny not just one but two important aspects of our selves. We become, yet again, *not entitled*; this time—and, let's not forget, not for the first time—not entitled to sexual pleasure. We become, once again, sexually *errant*. [God damn: Wrong *again!*] We become, if we forego the sexual pleasure we have learned to own, once again, the conveyors of sexual pleasure for others, and once again, our role will be dictated by someone else's conception of sexual right and wrong.

Third, if we give up on feminist consciousness-raising, we will be giving up a method of self-creation that has, for many women, *worked*. We have learned through consciousness-raising to trust our experiences. We have learned to give meaning to those experiences, and to validate the meanings they teach. We have learned to assert hidden experiences as meaningful—full of meaning. By giving meaning to the past, we have acquired some sense of control of the future. If we now shift ground—if we now begin to test the validity of our lived experiences by reference to political ideals—we run the risk of forgetting. We run the risk of forgetting the exhilaration of self-affirmation and self-creation. We run the risk of forgetting the pleasure of shared

trust. We run the risk of forgetting the importance of learning to identify, acknowledge and act on the desires we have painstakingly learned to honor as our own. We run the risk of giving ourselves once again, this time for principle rather than protection.

So—the third response to the problem posed by women's enjoyment of erotic submission, endorsed by a small but growing number of radical feminists, is to understand rather than judge these pleasures in their historical context and in their full experiential truth. The first requires study of history; the latter requires information which can only be gained through consciousness-raising, and with no political pre-judgments. Such an understanding, I believe, is essential to any dynamic future for radical feminism. First, only by such a process will we achieve any meaningful understanding of these pleasures, but we will not achieve that so long as we allow stated ideals to trump and silence felt pleasure. But second, I believe, only by understanding our felt pleasures will we achieve any meaningful understanding of our stated ideals. We cannot possibly give content to the substantive equality we seek until we understand the erotic appeal of submission. If we can identify what human needs are met through eroticized submission, perhaps we can better understand, and identify, the human needs which will be met or frustrated through political, legal and economic equality.

Jessica Benjamin describes the danger of this explanatory and nonjudgmental approach:

[An analysis of the controlled, ritualized, rational form of violence characteristic of sadomasochism] is probably not applicable to all forms of violence, or even all male violence against women. . . . There are a great many other forms of violence against women which do not partake of this rational character, in which women are simply assaulted and cannot successfully defend themselves. The danger is that even in such cases women blame themselves and feel guilty for prosecuting the assailant. This makes the topic of rational violence or erotic domination, where participation is voluntary or only a fantasy, seem to some a subtle apology for all male violence.<sup>72</sup>

She then warns of a deadened future if we fail to meet the danger:

A politics that denies these issues, that tries to sanitize or rationalize the erotic, fantastic components of human life, will not defeat domination, but only play into it. The power of a fantasy, the fantasy of rational violence, must be attributed to the interplay of great social forces and deep human needs. Finding the means to dissolve that fantasy, so as to tolerate the tension between true differentiation and mutual recognition, will be no easy achievement.<sup>73</sup>

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72. Benjamin, *The Bonds of Love: Rational Violence and Erotic Domination*, in H. Eisenstein & A. Jardine, *The Future Of Difference*, 42 (1985).

73. *Id.* at 66.

On this issue no less than any other, women must face the high risks posed by honesty if we are going to avoid the sure death that is self-deception.

## 2. The Erotic Appeal of Submission

I believe that sexual submission has erotic *appeal* and *value* when it is an expression of *trust*; is damaging, injurious and painful when it is an expression of *fear*, and is *dangerous* because of its ambiguity: both others and we ourselves have difficulty in disentangling the two. Here, I want to emphasize—I hope not overemphasize—the value of sexual submission when it is an expression of trust, because that, I believe, is the source of the pleasure women find in voluntary and fantasized erotic submission, in all of its forms. Absolutely pliant obedience—the willingness to transform one's subjectivity into another's object—is sexually arousing (for some) when it enables the submissive subject to transcend her own selfhood, and thereby to abdicate her responsibility for her own action. That this total abdication of responsibility can be erotic, I think, reflects a genuine human truth and a deep human need. It can be pleasurable and exhilarating and sometimes so much so that it is sexually stimulating to forego authorship of one's actions. When we grant power to another to control—to author—our acts, that grant may, and I have argued often does, express a deep seated and forgotten (or not so forgotten) fear. But it might not. It *might* also express our total trust in that other. That "other" *might* be trustworthy. That placing trust in one who is stronger is felt by some to be intensely pleasurable, and that the fantasy of doing just that is felt by many more to be so, should teach us something.

Jessica Benjamin's powerful interpretation of *The Story of O* is complex, but on this central point (I think) she is in agreement. Thus, Benjamin says of O:

*The Story of O* is an exceedingly self-conscious attempt to represent the . . . tension between separation and recognition, rationality and violence, transcendence and negation of self . . . . Perhaps the greatest objection to this work is its emphasis on O's voluntary submission. But it is only by virtue of O's volition that the allegory of the struggle for recognition can unfold. . . .

The novel makes clear that behind the physical humiliation and abuse which O suffers is a search for an ultimately unattainable spiritual or psychological satisfaction. De Beauvoir pointed out that real masochism is wanting the suffering of pain not for its own sake, but as proof of servitude. That is, masochism is essentially a desire for subordination rather than . . . the experience of pain as such . . . . She also distinguishes this submissive impulse from the impulse to transcend the self by giving oneself to another person. . . .

This distinction is crucial, as long as we see the relation between the two values. The submissive impulse stands in relation to real transcendence as the part to the whole. . . .

If we accept the idea that O's consent to pain and enslavement is a search for transcendence, we still want to know why she chooses this form, rather than the possibility of mutual, reciprocal giving of self. [The answer may be that the form she chooses] allows one partner to remain rational and in control, while the other loses her boundaries. In fact, it is the master's rational, calculating, even instrumentalizing attitude which excites submission . . . . The pleasure, for both partners, is in his mastery. Were both partners to give up self, . . . this disorganization of self would be total. . . . O could not then experience her loss of control as a controlled loss. She could not safely give in to her urge to lose control.<sup>74</sup>

Benjamin concludes:

I believe that we are facing unbearably intensified privatization and discontinuity, unrelieved by expressions of continuity. Given that social structure and instrumental culture enforce individual isolation so rigidly, the transgression which attempts to break it may necessarily be more violent. . . . The more rigid and tenacious the boundary between individuals and the more responsible each individual for maintaining it, the greater the danger it will collapse. If the sense of boundary is established by physical, bodily separation, then sexual and physical violence (if not in reality, in fantasy) are experienced as ways of breaking the boundary. *The fantasy as well as the playing out of rational violence does offer a controlled form of transcendence, the promise of the real thing. Sadomasochistic imagery may be popular because it embodies this promise of transcendence without its fearful reality.* Similarly, if masochists far outnumber sadists, it may be because people are in flight from discontinuity and rationality—especially men who have been charged with upholding it. The rejection of male rationality and control by men has become at least thinkable, because it represents an intolerable strain.

*Beneath the sensationalism of power and powerlessness, the yearning to know and be known lies numbed.*<sup>75</sup>

Are the desires to “know and be known,” to trust another, to blend in identity, at least sometimes expressed in the eroticization of submission and dominance, of any value, and do they express anything of value? Or are they soiled by their extremity, by their expression in forms which implicate “sweat and semen,” whips and whiplashes, marks of obedience, and of objectification? *It's a close question. When (if ever) and why (if ever) are these desires and the pleasure felt in their satiation beautiful? When are they not “muck we could well do without”?* If they cannot, as I have argued they cannot, be entirely dismissed as false, can they be in any sense affirmed as truth? Do they express a political truth? Minimally, as (I think) Jessica Benjamin has argued, they remind us of the hedonistic limits—the limits of pleasure, pain and desire—upon the otherwise near relentless quest by

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74. *Id.* at 53-58.

75. *Id.* at 65.

both feminists and non-feminists of the fruits of liberal individualism—of subjective autonomy, of severe differentiation, and, in Benjamin's language, of "discontinuity and rationality."<sup>76</sup> That so many women and more than a few men undeniably take pleasure in control objectification may be testimony to the limit of the desirability of the pure subjectivism endorsed by virtually all forms of liberalism, including feminist liberal legalism. In a parallel fashion, the fact that many women and more than a few men take pleasure from sexual submission can be read as a critique of the absolutist commitment to substantive equality endorsed by radical legalism of all forms, including feminist radical legalism. The trust expressed by the submissive party *in a controlled* and unequal sexual encounter is such a high pleasure that it is erotic. That *fact*—that the trust felt by the submissive party in controlled inequality *is* pleasurable—should serve to remind us that to the extent that absolute equality comes at the cost of the trust of which human beings are capable, often expressed in the consensual abandonment of autonomy and relinquishment of control over oneself to another, that equality will come at a high cost.

The political lesson of the pleasure in eroticized submission is not that we should forsake either individualism or equality as ultimately "undesirable." But there is no discontinuity here: *nor* is it the case that the woman who enjoys fantasies of erotic domination would enjoy literal servitude, or for that matter thinks she would. The lesson—the truth—of the erotic pleasure many feel in controlled submission may be this: while we crave liberal autonomy and radical equality, while we crave the freedom which the liberal feminist pursues and the equality the radical feminist envisions, *at least in this society as it is presently constituted, we also crave—because we also need—the capacity to trust one another, including those who are stronger than we are.* The weak and the strong are in fact interdependent in this society—we *aren't* equally autonomous individuals—and what that means is that the weak need to be able to depend on the strong. The capacity to safely depend on another, to look after one's own well-being, is a desirable state, and it is no great mystery that it is pursued as pleasure. When we test the limits of our capacity to trust, of our willingness to embrace absolute dependency, and when we discover erotic pleasure lurking at that limit, we give expression to our desire to be able to trust someone who is strong and trustworthy—which may be a fully human, and not just female, need.

Either trust or fear can prompt us to submit to the will of the other. Trust is enlivening, and fear is deadening. There is a difference. It is a subjective, internal, hedonic difference. It is the difference between the battered woman's consensual endurance—motivated by fear—of beatings, and the lover's consensual enjoyment—motivated by trust—of controlled submission. The first submission is deadening, the second (can be) enlivening. It is a

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76. *Id.*

difference we will only be able to *see*, much less understand, if we look at our *internal* lives. From an external perspective, this difference is muted. From an internal perspective, it is glaring.

There is—*of course*—a danger in this. The internal difference is not *inevitably* glaring, even to ourselves. And because it is not, there is a danger in the pleasure of submission just as there is a limit to the desirability in the non-sexual world of relationships of dependence and trust. To return to *The Story of O*, O pays for her pleasure with her life. As Marcus reminds us, “If it were ever a good trip it ends as a bad one.” Any reading of O, Marcus rightly insists, which celebrates the very good trip at the beginning, but fails to come to grips with the very bad trip at the end, is a betrayal of O:

[It] is a game with high stakes, and you never get anything for nothing. O does not know this. But Pauline Reage knows very well, which is why *The Story Of O* is such a strong book, because she shows both sides, the gains *and* the losses.

How does O pay?

She sells with her own body, the right to her own body, her own pleasure. She sells her ability to speak. . . . She sells her relations with other people, for she lives isolated from the world about her. She particularly sells her relations with other women, for she can only betray them. . . . She sells her ability to stand on her own. She sells her ability to act, and her will, her responsibility and her individuality. She sells her emotions and finally her own death. She has nothing left.

And what does she get for it? Is her story one of a mystic experience, a consciousness-expanding trip? . . . Is it the old story about having to lose yourself in order to find yourself?

Beneath those stares, beneath those hands, beneath those sexes which raped her, beneath those lashes which tore her, she sank, lost in a delirious absence from herself. . . . She was—who? Anyone at all, no one.

On the way, O feels a security she cannot do without and cannot acquire in any other way. But at the bitter end, she is alone, disguised as an animal, . . . dumb, without feeling. If it were ever a good trip, it ends as a bad one. She has given herself up and has received nothing in exchange. Only the rest of them have gained.<sup>77</sup>

At the end of the story, O is dead, but her subjectivity dies long before that “bitter end,” as has, I suspect, most women’s erotic enjoyment of her exploits. At some point O becomes a real slave, not a play-slave, and I suspect it is at that point that, for most female readers, the book loses its erotic appeal and becomes a nightmare. At some point, O becomes entirely devoid of subjectivity—at some point she can no longer control her relinquishment of self. But this leaves questions, not grounds for condemnation. At *what* point does the

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77. Marcus, *supra* n.50, at 207-08.

pleasure become deadly? Is the ending true to the character development that preceded it? Are we running the risk that O runs if we take pleasure in her exploits? In our own lives, at what point should we unequivocally seek to disown—to shed—our pleasures as coming with too high a risk of danger? When the pleasure is no longer pleasure—when it is no longer backed by trust? When it has given way to a numbing terror—when it is backed by fear? Or at an earlier point, when we suspect that such a transformation might occur? Or even at an earlier point, when in someone else's judgment, such transformation might occur?

I believe these questions should be undertaken and answered. *At some point* in O's progression, she crosses a volitional threshold: at some point she is no longer able to leave. At some point she also crosses a hedonic threshold: at some point she no longer feels pleasure. If we can specify when and why that occurs, we can better understand why her story (up until that point) is so erotic, as well as why her story (past that point) is so frightening. If we do that, I believe, we will better understand the reason we take pleasure in sexual submission, and that understanding, in turn, may lead us to a deeper understanding of the value of trust and submission. More importantly, it will clarify the danger, evidenced by our empathic and frightened response to O's eventual enslavement and death, of sexual submission past the threshold. That understanding, in turn, can only clarify the basis of our pure political commitment to equality.

#### B. *Radical Feminist Legal Reform: The Pornography Debate*

As I said at the outset of this section, the radical feminist legal theorist's refusal to engage in phenomenological critique of the ideal she proposes—substantive equality—is usually benign, for the straightforward reason that generally there is no conflict between our felt pleasures—once we have correctly identified them—and radical feminist ideals of political and substantive equality. Occasionally, though, the radical legalist's refusal to check stated objective ideal against felt subjective pleasure will result in a misfire. The Indianapolis anti-pornography ordinance is a now notorious instance of just such a misfire.

Catharine MacKinnon asks, again and again, why feminists are defending the rights of pornographers.<sup>78</sup> The question may not be very nice, but it is a very good one: if the ordinance offends the first amendment rights of pornographers, let the ACLU make the argument. I believe that the first amendment issue for feminists is a sincerely felt feminist concern—the FACT (Feminists Against Censorship Taskforce) women, I'm sure, do genuinely fear that censorship will

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78. At the 1985 National Conference for Women and the Law, as well as in any number of other forums. She has not, to my knowledge, addressed the issue in print, but I might be wrong.



hurt women (as opposed to hurting pornographers) more than pornography hurts women, and they may be right.<sup>79</sup> I also believe, though, that the First Amendment is not the only reason feminists are opposing the ordinance. I want to suggest another reason why feminists may be lining up in opposition to this ordinance, and, thereby, how we might repair the damage.

The ordinance and the theory behind it defines and targets pornography as the subordination of women through sexually explicit graphic or textual means.<sup>80</sup> *Subordination* is (unfortunately) not defined, but nevertheless, the ordinance rests on the clear normative premise that it is bad.<sup>81</sup> Furthermore, to “submit” is to consent to one’s subordination. Sexual submission, then, is likewise bad. More directly, sexual submission is bad because submission itself is bad, and submission is bad because equality is good, and equality is good because people, definitionally, simply are such that equality is good. Yet many women—including some feminists, and including some lesbians—don’t *feel* sexual submission as bad. In fact, many women feel sexual submission as pleasurable, as so pleasurable as to be erotic, and as so erotic as to be orgasmic. And many women have come to this understanding of themselves and of their pleasure through consciousness-raising sessions. The anti-pornography ordinance has defined the depiction or expression of sexual submission as objectively bad, when for many women both the thing expressed and its expression is subjectively pleasurable. The ordinance raises the conflict between objective ideal and subjective pleasure, and the result has been chaos.

First, a historical reminder—it was not always thus. When the anti-pornography campaign commenced in the late seventies and early eighties, there was *widespread* feminist consensus on the evil of pornography. That consensus, it now goes without saying, has dissolved. Why? One reason might be this: in the early days of the campaign feminists understood the evil of pornography to be that it causes *violence* (and more specifically sexual violence) against women.<sup>82</sup> Now, anti-pornography advocates urge that the evil of por-

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79. Being sincere, of course, is not the same thing as being right.

80. The model ordinance I am using is reprinted as Appendix A in *The MacKinnon/Dworkin Model Anti-Pornography Law*, 20 *New England Law Review* 759 (1985). See section 2 of that document.

81. We badly need radical feminist definitions of “subordination,” “submission,” “inequality,” “power” and “powerlessness.” If these words are to have the normative meanings generally associated with them in male progressive or radical legalism, we need a feminist defense of that endorsement. If they mean something different, we need to hear the difference. Gilligan makes the same point in *Buffalo Symposium*, *supra* n.42, at 74.

82. Pornography is characterized in both the model ordinance and in the Minneapolis and Indianapolis versions as sex discrimination and as central in creating and maintaining sex as a basis of discrimination. The first charge presents a highly controversial theory of the relation between the depiction of discrimination and discrimination itself—between Little Black Sambo and racial oppression—while the lat-

nography is not that it causes *violence* against women, but that it *subordinates* women, on the theory, no doubt, that the former is symptom, the latter is root cause. The shift from “violence” to “subordination” has splintered the movement, for, I think, primarily the reason noted above—subordination is taken to be both reflected in and caused by sexual submission, and consensual, controlled, sexual submission, is hedonically, for many, pleasurable.

This is the lesson I draw: we might be able to re-build a consensus on pornography by focusing our attention on the harm we want to eradicate, rather than on the classification or description of the thing we want to prohibit. I suggest we go back for a moment to what we know of our own pleasure and pain and *trust* it. What we all know—and by “all” I mean, on some level, all women—to be undeniably painful is the expropriation of our sexuality which is motivated by *fear*—sexual submission under threat or memory of sexual compulsion—the ever-present threat of that expropriation, the fear which the threat engenders, the danger with which we consequently live, and the torture we endure when the fear proves to have been horrifically well-grounded. When we “give” ourselves because we have been taught to *and the teacher is fear*, the “giving” is *not pleasurable*. It is painful. The transaction is neither erotic, pleasurable nor valuable; it is damaging and deadening. Both the coercive *and the consensual* relinquishment of control expressed in sexual relationships, which is grounded in fear, is damaging, painful, unpleasant, deadening, and not at all erotic. Relinquishment of control over one’s body that is motivated by fear is damaging *whether or not the external indicia of “consent” to the relationship or transfer are present*. Pornographic literature that facilitates by legitimating *either* the violent expropriation of our sexuality or fear—induced *giving* so as not to be one from whom sexuality is taken, hurts us. It damages us. It injures us. If pornography proximately causes that injury and the proximity is provable, it should be civilly actionable.

By contrast, the relinquishment of authority and responsibility expressed in masochistic sexual fantasy and controlled masochistic practice at least sometimes constitutes a willed sexual submission which is motivated by *trust*, not fear. When motivated by trust, that submission

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ter presents a counter-intuitive and counter-historical thesis about the multiple causes of women’s oppression.

Contrast these claims: “Pornography leads to violence against women, and is central in maintaining sex as a basis for permissible violence.” This latter claim may be equally controversial among feminists but it is also, I believe, more intelligible. Whether true or false, it does not rest on undefined terms. And, for that reason, it gives us a better idea of how to draw lines. I believe, for example, that sexism, “discrimination,” and sexuality are so pervasive in this culture that practically every depiction of sexuality in the popular media fits the Minneapolis definition. But only a discrete subcategory of that literature even arguably causes violence. It shouldn’t be impossible—the Meese Commission has at least made the attempt—to define the boundaries of that subcategory.

can be pleasurable, erotic, and therefore valuable. Erotic literature that facilitates sexual fantasies or consensual practices (or understanding of those fantasies) which express and give rise to the experience of trust, can, I think, be pleasurable, erotic, and of value regardless of the content of the fantasy or the practice.

There is no contradiction in holding both of these positions simultaneously. What they pose is a difficult causation question, but that's a far cry from being faced with a disabling *contradiction* between theory and method or ideal and pleasure: We need to know what pornography hurts us and endangers us and what pornography frees us or enlivens us. We need to know if there is no overlap (ideal), a great deal of overlap (worst case) or some overlap (most likely). This may be a very difficult factual question; it may be too difficult, but it does not give rise to a "contradiction." Fire too sometimes warms and sometimes burns. And—it is not, after all, *always* hard to distinguish the warm glow from the scorching blaze. We need to know whether we can differentiate and describe the sub-category of what is now over-defined as "pornography" that hurts women by encouraging, validating or legitimating the violent expropriation through fear of our sexuality. Mounting evidence suggests that violent, pictorial pornography does precisely that, and if so, we should pursue a world which is rid of it. But we should be clear: it is the *injuries* that pornography causes—the violent expropriation of our sexuality—which is the "muck we can live without." The injury pornography causes is the expropriation, through violence, force, coercion, terror and fear, of our sexuality. If pornography injures us in this way, then we should rid ourselves of it, but not because it embodies or expresses a pleasure we have defined as undesirable. We should be rid of it because, and to the extent that, we discover that it hurts.

I have no doubt that a lot of pornography injures us in just this way—I have no doubt that pornography can precipitate sexual violence, because it has happened to me. I know that pornography legitimates sexual coercion and cruelty. I also know that women are coerced to participate in pornography, and I know that the violence depicted in pornography is, more often than we would like to think, a recording not a simulation of real violence. I also, though, have no doubt that some pornography—as it is defined under this ordinance—is pleasurable to women and occasionally profoundly so. The depiction of sexual domination and submission is for many women sexually arousing, and for some women it constitutes an important avenue of sexual release. Women do find pleasure in sexual submission, occasionally in its graphic representation, and often in its textual description. The understanding and eradication of the sources of women's suffering is obviously an important feminist goal. But it is also—or ought to be—an important item on any feminist agenda to facilitate the exploration of women's sources of pleasure. Women take pleasure—and often, intense pleasure—in eroticized submission.

Whatever causes women pleasure without causing attendant pain is something we should celebrate, not censure.

Empirically, we need to know what sub-category of the pornography as it is now defined significantly contributes to the violent expropriation of our sexuality. The pornography that should be actionable is the pornography that causes the violent expropriation of our sexuality—that is the injury. As the WAVAW insist: NO WOMAN WANTS THAT. Sexual violence, and the harm it does, is the evil facilitated, and sometimes proximately caused, by pornography. When we respond to violence, we give ourselves in fear: that is never pleasurable and never felt to be such. But pornography that depicts sexual relationships of domination and submission which does not legitimate or encourage the violent, forced, coercive expropriation of sexuality—even if it depicts unquestionably hierarchical sex—regardless of content and regardless of whether we call it S&M porn, butch-fem porn, soft-core porn, romance, or erotica—may well be relatively harmless, is probably a pleasure for many, and might be liberating for a few. If it is harmless, we ought to enjoy it if we want to, learn from it if we can, and otherwise leave it alone. The sexual violence that pornography may cause—not the erotic domination it may depict—should be the key to what is actionable, (and whether it is actionable) for the simple reason that it is the sexual violence in our lives, not the erotic domination, which hurts us.

I think the crisis in radical feminist legal theory which the pornography debate has engendered is false, for this reason. First, it is at least possible that on this issue we can have it both ways. Many of us are debating the pornography issue without having looked at much of it. We have a “category” in mind that might not be a sensible category. If we *look* at what is presently and too broadly defined as pornography, we might discover that the pornography that hurts us—the pornography that contributes to the violent expropriation of our sexuality—is not so hard to distinguish from the pornography that doesn't hurt us and which might be pleasurable—the description of controlled erotic submission. For example, it may just be true—the Meese report suggests it is<sup>83</sup>—that pictures are more prone to cause violence than words, and that violent pictures are more prone to cause violence than non-violent pictures. It may also be true—sales of pornography to women suggest it is—that *words* are erotic in the way described above while pictures of dominance and submission are not. *The Story of O*—unquestionably violent—is, as Marcus suggests, a “lyrical poem.”<sup>84</sup> Whatever else it is, it is *words*.

It also, of course, may not be true. *The Story of O*, no matter how erotic as text, might be proximately causing literally untold miseries—

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83. To date, I am relying on media reports of the contents of the Meese Commission's report.

84. M. Marcus, *supra* n.50, at 200.

silenced, actual, fearful, terrifying enslavements—and *no woman wants that*. If it is, then we cannot have it both ways, and as Wendy Williams has said in a different context, where we can't have it both ways we have to think carefully about which way we want to have it.<sup>85</sup> In my own mind, I have no doubt—if *The Story of O* is being re-enacted in real life on some farm somewhere in the hills of Kentucky right through to the bitter end, then we can all live without *The Story of O*. For me, this is not a close question, although I know it may be for others. But again—this poses a choice, and even if it is a hard choice, that is a far cry from a disabling contradiction. Erotic energy—no less than clean, cheap nuclear energy—comes with a price, and the price of both energies may be too high.

Finally, we should draft an ordinance which properly targets the real injury without offending First Amendment principles; first because we will have to if we intend to actually use it, and second because those first amendment principles further more than they hinder feminist goals. We *need* at least some of this literature, and we need it for genuinely liberal as well as genuinely feminist reasons. First, we need to understand our ideals better than we presently do. The sexual high many women reach from controlled objectification, domination and submission might stem from the pleasure of trust that can accompany inequality. Then again, it might not. But either way it would be nice to *know*. There may be contained in that pleasure the kernel of a critique of our dominant ideals of individual autonomy and equality. If we really believe that the personal is political, that should not sound ludicrous. It might, of course, be both nonludicrous and wrong: all that might be contained in our pleasure is a reflection of the extent of our debasement. But we won't know one way or the other unless we think about it, and we won't think about it so long as we regard the subject as taboo. One way to start thinking about it is to come to grips with the erotica—the textual representation of controlled sexual domination and submission—that pleases us.

There are other reasons, though, that women in particular need this literature. Some of us need it for sexual pleasure and release, which is not an insignificant need. All women, though, need the literature if we are ever to understand ourselves. We need, for example, *The Story of O*. If we are going to give it up because it causes injuries, then we should at least understand what we're giving up. Marcia Marcus explains why:

Germaine Greer was in Copenhagen in 1972 and a meeting was held at which she addressed and talked with Danish women. The atmosphere in the hall was high-spirited and optimistic, when suddenly a young woman cried out with desperation in her voice: "But

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85. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175, 195 (1982).

how can we start a women's movement when I bet three-quarters of us sitting in this room are masochists?"<sup>86</sup>

Marcus concludes her discussion of *The Story of O* with this plea:

I have kept back *The Story of O* for so long because I know no other book expressing so well all the contradictions involved in our image of womanhood. It features them so sharply and intensely that we cannot avoid feeling them in our bodies and deep down in our souls. What shall we do about those contradictions?

O gives us a kind of answer, for she lives out what many of the rest of us have vague dreams about. Her story can teach us something about ourselves—what we must expect if we join in on male society's idea of what a woman is. It is a *fable about women*. But it will never come up with an unambiguous answer. It offers no solution, only a question mark.

So we shall have to continue concerning ourselves with *The Story of O*, and I know no book that should be more central for the feminist movement to commit itself to, among other things, to be able to answer the young woman at the meeting with Germaine Greer.<sup>87</sup>

### III. CONCLUSION: WOMEN'S DIFFERENCE, AND AN ALTERNATIVE STANDARD FOR A FEMINIST CRITIQUE OF LAW

Although liberal and radical legalism are typically contrasted, as I contrasted them in the bulk of this paper, I want briefly to suggest in this conclusion that it is by virtue of an assumption that liberalism and radicalism *share* that their respective chosen proxies for well-being—choice and power—are so at odds with women's subjective, hedonic lives. Both liberal and radical legalism share a vision of the human being—and therefore of our subjective well-being—as “autonomous.” The liberal insists that choice is necessary for the “true” exercise of that autonomy—and thus is an adequate proxy for subjective well-being—while the radical insists the same for power.<sup>88</sup> But this strategic difference should not blind us to their commonality. Both the liberal and the radical legalist have accepted the Kantian assumption that *to be human* is to be in some sense autonomous—meaning, minimally, to be differentiated, or individuated, from the rest of social life.

Underlying and underscoring the poor fit between the proxies for subjective well-being endorsed by liberals and radicals—choice

86. M. Marcus, *supra* n.50, dedication page.

87. *Id.* at 208-09.

88. Liberal feminism's embrace of “pro-choice” rhetoric as the language in which to couch their advocacy of reproductive freedom is the most obvious reflection of this commitment. The claim that “a woman has the right to control her own body” similarly reflects the liberal's belief that choice is central to our physical, as well as legal claim to autonomy.

MacKinnon's belief that women's relationality reflects our victimization, not our essence, is vividly conveyed in her exchange with Gilligan in the Buffalo Symposium. See *Buffalo Symposium*, *supra* n.42, at 74-76.

and power—and women's subjective, hedonic lives is the simple fact that women's lives—*because of our biological, reproductive role*—are drastically at odds with this fundamental vision of human life. Women's lives are *not* autonomous, they are profoundly relational. This is at least the biological reflection, if not the biological cause, of virtually all aspects, hedonic and otherwise, of our "difference." Women, and *only* women, and *most* women, transcend *physically* the differentiation or individuation of biological self from the rest of human life trumpeted as the norm by the entire Kantian tradition. When a woman is pregnant her biological life embraces the embryonic life of another. When she later nurtures children, her needs will embrace their needs. The experience of being human, for women, differentially from men, includes the counter-autonomous experience of a shared physical identity between woman and fetus, as well as the counter-autonomous experience of the emotional and psychological bond between mother and infant.<sup>89</sup>

Our reproductive role renders us non-autonomous in a second, less obvious, but ultimately more far-reaching sense. Emotionally and morally women may benefit from the dependency of the fetus and the infant upon us. But *materially* we are more often burdened than enriched by that dependency. And because we are burdened, we differentially depend more heavily upon others, both for our own survival, and for the survival of the children who are part of us. Women, more than men, depend upon relationships with others, because the weakest of human beings—infants—depend upon us.

Thus, motherhood leaves us vulnerable: a woman giving birth is unable to defend herself against aggression; a woman nursing an infant is physically exposed; a woman nurturing and feeding the young is less able to feed herself. Motherhood leaves us unequal: because of her distinctive nurturing role, a mother is either stronger or weaker than those to whom she is closest. She is stronger than the infant, and because of her nurturing response to that fact she is weaker than her autonomous brother. Most assuredly, then, a mother is not *autonomous*; she is both depended upon and thereby dependent on others—she depends upon others who are stronger than she, as others who are weaker depend upon her. To the considerable degree that our potentiality for motherhood defines ourselves, women's lives are relational, not autonomous. As mothers we nurture the weak and we depend upon the strong. More than do men, we live in an interdependent and hierarchical natural web with others of varying degrees of strength.

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89. I am describing the way women's lives *are*, not the way they should be or have to be, and I therefore see no reason to distinguish biological from social causes of our counter-autonomous lives. If men became more nurturant of children, they too would become less "autonomous." My general point is that whatever subclass of adult human beings nurtures the young will be relatively less autonomous than the subclass that does not.

The goals the liberal and radical seek—increased freedom and increased equality, respectively—are surely intended to benefit the subjective well-being of human beings. That is, they are intended to benefit the well-being of autonomous creatures. These goals will simply not serve women, if women are not “autonomous.” If women’s “difference” lies in the fact that our lives are relational rather than autonomous, and if autonomy is a necessary attribute of a human being, then women’s difference rather abruptly implies that women are not human beings. Politics that are designed to benefit human beings—including liberal and radical legalism—will leave women out in the cold.

This is not a novel insight: that women are not human as human is now conceived has in a sense always been the dominant problem for feminism. But the two characteristic ways in which modern feminist legal theorists have responded to this dilemma are both, I think, flawed. The liberal feminist’s solution is to deny it. The fact that women become pregnant, give birth, and nurse infants is a difference that *does not count*. It does not make us any less “autonomous” than men.<sup>90</sup> For reasons which by now should be familiar, this response does not work: if the last century has taught us anything at all, it is that this liberal strategy of denial is a disservice.<sup>91</sup> If we embrace a false conception of our nature we can be sure of only one thing, and that is that legal reform based on such a conception will only occasionally—and then only incidentally—benefit real instead of hypothetical women.

The radical feminist’s proposal is that we seek to *become* autonomous creatures. We are indeed not “autonomous,” but what that reflects is our lack of power—our social, political and legal victimization—not our essential nature. To the extent that we become autonomous by gaining power, we will *become* the beneficiaries of the legal system designed to promote the well-being of just such people.<sup>92</sup> This radical vision is at root deeply assimilationist—by gaining power, we become equal, as we become equal we become less “relational”—meaning less victimized—as we become less relational we become more autonomous, and as we become more autonomous we

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90. As Sylvia Law says, “An assimilationist vision that ignores differences between men and women does not help us to reconcile the ideal of equality with the reality of difference.” Law, *Rethinking Sex and the Constitution*, 132 Penn. L. Rev. 955, 966 (1984). Law’s own position, though, that only biology differentiates women from men, has more in common with the assimilationist view she attacks than it does with radical feminism. See also Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L. J. 375 (1981).

91. See Law, *Id.*

92. Compare MacKinnon, who wants to “get the boot off of women’s necks,” with Dinnerstein, who wants to share the burden of child-rearing. Both view women’s lack of autonomy as the obstacle to full participation in society, and accordingly as the cause of women’s misery. Compare MacKinnon, *Buffalo Symposium*, *supra* note 42, with D. Dinnerstein, *The Mermaid And The Minotaur* (1976).



become more like “human beings”—more like men. Radical assimilation, though, has costs no less weighty (and no less familiar) than liberal denial. There is no guarantee that women can become autonomous “human beings,” no guarantee that women want to, and at heart, no persuasive argument that women should.

A very new and third response, which does not fit easily (or at all) within the liberal and radical models described above, and which I think has great promise, is that feminists should insist on women’s humanity—and thus on our entitlements—and on the wrongness of the dominant conception of what it means to be a “human being.” We should insist, as Christine Littleton has argued, for an equal “acceptance of our difference.”<sup>93</sup> This third course is surely more promising—it has truth and candor on its side—but without hedonistic criticism it is insufficient: *which* differences are to be accepted? The root of our difference may be that our lives are relational rather than autonomous, which is reflected in our needs and has its roots in our reproductive role. But even thus defined, our “difference” has many dimensions. If “difference” includes our differential suffering, or our differential vulnerability to sexual assault, or our differential endurance of pain, or our differentially negative self-esteem, then “acceptance” of those differences will backfire. We need more than just acceptance of our differences; we need a vocabulary in which to articulate and then evaluate them, as well as the power to reject or affirm them.

My proposal is that we address the multiple problems posed by our differences from men by adopting a critical legal method which aims directly for women’s subjective well-being, rather than indirectly through a gauze of definitional presuppositions about the nature of human life which almost invariably exclude women’s lives. We should aim, simply, to increase women’s happiness, joy and pleasure, and to lessen women’s suffering, misery and pain. As feminist legal critics we could employ this standard: a law is a good law if it makes our lives happier and less painful and a bad law if it makes us miserable, or stabilizes the conditions that cause our suffering. A shift toward this direct hedonism, I believe, would do four things for our developing feminist legal theory.

First, a move toward hedonistic criticism would free us from false conceptions of our nature. Our present “equality” discourse (whether cast in terms of equal freedom or equal power) has forced us to accept dominant visions of the “human being” whose equality we seek. By foregoing proxies for subjective well-being which are in turn derived from those visions, and insisting instead on pleasure and pain, happiness and misery, joy and sorrow, as our central normative cate-

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93. See in addition to Littleton’s contribution to this volume, Note, *Toward a Re-definition of Sexual Equality*, 95 Harv. L. Rev. 487 (1981).

gories, we can remain agnostic toward varying definitional conceptions of who we are.

Second, a move toward hedonistic criticism would facilitate an unclouded articulation of the equality of women's hedonic lives. When we try to squeeze descriptions of our lives into the parameters laid out for us, the results are often not just distorted, but profoundly anomalous. We are trying too hard to assimilate, in our theory as well as in our professional and personal lives.

Third, I believe, a shift toward a discourse that would focus attention on the pain in women's lives, and away from the oppression and subordination we suffer, would make us more effective. If we are ever going to make progress in alleviating women's misery—surely an important goal for feminist legalists—we must insist loudly upon the normative significance of our hedonic lives. To draw an analogy, Martin Luther King argued again and again<sup>94</sup> that the essence—the dominant fact—of the Negro's life is *pain*, that that fact would not change until the white liberal would come to *share* it, that he would not share it until he *felt* it, that he would not be able to feel it until he understood it, and that he would not understand it until the *Negro* succeeded in bringing the pain to the surface—until he could make its content palpable. Only then would the pain be mitigated. I believe that the same is true of women: the fundamental fact of women's lives is pain, that fact will not change until men share it, which will not in turn occur until its meaning and content is communicated. If we are ever to do anything about the pain which is women's lives—the violence, the danger, the boredom, the ennui, the non-productivity, the poverty, the fear, the numbness, the frigidity, the isolation, the low self-esteem, and the pathetic attempts to assimilate—we must first make the feel of that pain palpable, and hence shared. But we will not even attempt to do so as long as we embrace models of legal criticism that deny the relevance of subjective pain and pleasure, happiness and suffering, joy and sorrow, to the critical evaluation of law. The liberal and radical legalism to which feminist legal theory is now wed do precisely that. They both assume the sufficiency of an objective proxy—either choice or equality—for subjective well-being. By doing so, they virtually insure the irrelevance of rich descriptions of felt pain and pleasure to a feminist criticism of law.

Lastly, by forcing into the public discourse descriptions of women's subjective, hedonic lives, the conception of the "human being" assumed by that discourse—the substantive description of experienced human life which the phrase "human being" denotes—might change so as to actually include women. For this reason alone, women need to develop descriptions of the quality of our hedonic lives.

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94. See e.g., M. L. King, *The Words Of Martin Luther King* (ed., Coretta Scott King) 22 (1983).

There are two problems. Women's subjective, internal pain, because it is so silent and invisible—and because it is so different—is quite literally incomprehensible. To state the obvious—men do not understand, have not shared, have not heard, and have not felt, the pain—the numbing terror—of an unwanted pregnancy. They have not heard, shared or felt the tortuous violence of a stranger rape or the debilitating, disintegrating and destructive self-alienation of nonviolent marital rape. Men do not know that women's "frigidity"—our endurance of unpleasant, unwanted, nonmutual, and nonetheless fully "consensual" sex—is not only neither funny nor a "sexual disorder," but is painful, and thus injurious. Relatedly, men have no conception of what "non-violent" forms of rape are even *about*, for the simple reason that they have no sense of what could possibly be painful about sex, when it is not accompanied by a threat of violence. This communication breakdown is not slight or incidental, it is total. Men's conception of pain—of what it is—is derived from a set of experience which *excludes* women's experience. When women and men talk about pain (and to a lesser extent, about pleasure) we are employing vastly different experiential referents.

The second problem is this: women have a seemingly endless capacity to lie, both to ourselves and others, about what gives us pain and what gives us pleasure. This is not all that surprising. If what we need to do to survive, materially and psychically, is have heterosexual penetration three to five times a week, then we'll do it, and if the current ethic is that we must not only do it, but enjoy it, well then, we'll enjoy it. We'll report as pleasure what we feel as pain. It is terribly difficult to get to the bottom of these lies, partly because we convey them not just with our words, but with our bodies. Whatever else women have learned to do, women have learned to not speak the truth. It is now a commonplace that women don't "feel at home" with male language—but this is no wonder, when what we've mainly learned to do with it is lie.

Both problems strike me as surmountable. Women must start speaking the truth about the quality of our internal lives. The pain women feel may be unique, but women and men (I believe) are alike in this way: both women and men resist pain when it is our own, and (most) women and (most) men will sympathetically resist pain suffered by others, when that pain is meaningfully communicated. And even if that is unduly optimistic, it is at least clear that *without* a clear articulation of the content and meaning of our pain, it will not be sympathetically resisted by men who do not share it. But more fundamentally, women will come to recognize the truth about our inner lives only when we start to speak it. Women's inner reality simply does not fit the Kantian conception of human nature that underlies so much of our liberal and radical legalist commitments. It is only by starting with our own experiences that we will be able to develop a description of human nature which is faithful to our lived reality,

rather than one which ignores it. From that set of descriptions, and only from that set of descriptions, can we construct, or reconstruct, our own political ideals, whether they be autonomy, equality, freedom, fraternity, sisterhood, or something completely other, and as yet unnamed.

