

## FEMINISM AND GAY LIBERATION: TOGETHER IN STRUGGLE

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### ABSTRACT

The thesis of this Essay is that any successful movement for equality—indeed, any movement for freedom—for gay people needs the insights and theories of feminism for sustenance and for flourishing. Drawing heavily on the work of radical feminist scholar Ann Scales, and with special emphasis on the importance of feminism to the lives and political aspirations of gay men, the Essay compares the theoretical matrices of feminist legal theory and queer legal theory. By exploring the relevance of issues generally thought of as “feminist issues,” such as pornography and abortion, to gay men’s lives, the Essay shows that, rather than abandon feminism as much of queer theory suggests, gay men—and all LGBT people—should embrace feminism as a fundamental component of an ethical movement toward substantive, social, and legal equality.

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Solidarity is possible. . . . Solidarity is also the only viable option for progressive people. The liberal ideal of absolute individualism makes no sense in a world of inevitably interdependent language users. . . . Solidarity requires constant reevaluation of issues and constant rejuvenation of commitments and coalitions.

—Ann Scales<sup>1</sup>

Outsider jurisprudence asserts . . . that oppression on the bases of race, gender, sexual orientation, disability, and class is unjust if anything is unjust.

—Ann Scales<sup>2</sup>

I would not wish to be anything other than An Other at this moment.

—Ann Scales<sup>3</sup>

#### A NECESSARY PROLOGUE

I have to say that I have been and remain ambivalent about being a part of this Symposium. It is, without question, the most difficult writing I have undertaken in my professional life. This kind of occasion, in which a friend is memorialized, is a splendid thing. It invites us to remember that Ann is present, all of her, in her written work, and that she lives on in it, continues to speak to us through it. For those of us close to her, that offers some comfort. Nevertheless, an event like this also requires one to practice an ethics of interpretation on one's friend. It asks that a whole human life, and the body of work from which that life was in ways large and small inseparable, be cut to pieces. The fact that one must be *dismembered* in order to be *remembered* is, in my opinion, the saddest of ironies. So I struggled.

Because of the breadth and depth of Ann's insight, I could have gone in many directions with this piece. At first, I thought I would write something about legal education. That would have been easy; there's plenty wrong with it, as Ann knew well. Had I read her incredible article, *Surviving Legal De-Education*, before going to law school, I would have been a better law student. At the least, I would have understood what law

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1. Ann Scales, *Poststructuralism on Trial*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 395, 407 (Martha Albertson Fineman et al. eds., 2009).

2. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 *UCLA WOMEN'S L.J.* 1, 28–29 (1992).

3. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 *VT. L. REV.* 139, 163 (1990).

school was doing to me, why my energy was drained—why I was a little crazy. In *Surviving Legal De-Education*, Ann riffed on Scott Turow's *One L*, in which he described law students in a way that assumed a lot about who law school, and by extension the law, was really for.<sup>4</sup> Of course, Turow was writing about that law school “Shining on a Hill,” as it were, the prestigious<sup>5</sup> Harvard, where students and faculty are thought of as Olympians.<sup>6</sup> Ann and Turow were classmates, and she makes an appearance, albeit a background one, in *One L*.<sup>7</sup> Of course, the problems in legal education that Ann identified don't just exist at Harvard. They are systemic. In short, the late, great Derrick Bell would have to have blown up more than just Harvard Law School in order to save us.<sup>8</sup> In the end, I felt I couldn't improve on what Ann saw and addressed, returning as she did to the theme in *Midnight Train to Us*<sup>9</sup> and *Feminists in the Field of Time*,<sup>10</sup> and in other work. I abandoned the theme.

Then I pondered the question with which Ann began her beautiful book, *Legal Feminism*: “Does [legal feminism] have a future?”<sup>11</sup> If it does, what does it look like? I remembered Adrienne Rich's observation, a lifetime ago now, that so very little work had imagined a feminist utopia.<sup>12</sup> I noted that little has changed since Rich originally penned this observation in 1974. So, I set about the work of imagining such a thing. A friend had encouraged me to write a narrative piece. Now, I thought, was the time to do it. After all, Ann had been emphatic about storytelling's importance to liberation.<sup>13</sup> So, I imagined that Ann, now abiding in the Feminist Future, came to visit me. I imagined our conversations about what this future would be like and what those of us here, now, could do to realize its possibility. Hearing Ann's voice in my head, revealing, again, in her sharp wit and keen sense of humor, and of course her

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4. Turow had written of his first year classmates: “We are men and women drawn to the study of rules, people with a native taste for order.” SCOTT TUROW, *ONE L* 300 (1977). Ann improved substantially upon this perspective, writing: “The day is coming soon when some right-minded successor to Scott Turow can write about her first-year classmates: We are women and men drawn to the living of life, people with a native taste for survival, for diversity, and for freedom.” Scales, *supra* note 3, at 164.

5. I am always mindful that the original meaning of the word prestige is a “trick.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 983 (11th ed. 2003) (defining the word *prestige*).

6. See TUROW, *supra* note 4, at 10, 12.

7. See Scales, *supra* note 3, at 164.

8. See Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2382 (1989).

9. Ann C. Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710, 710–11 (1990).

10. Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 97–98 (1990).

11. ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, & LEGAL THEORY* 1 (2006).

12. ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966–1978*, at 153 (1979) (“I have been trying to think of a celebrated literary utopia written by a woman. . . . Even minds practiced in criticism of the status quo resist a vision so apparently unnerving as that which foresees an end to male privilege and a changed relationship between the sexes.”).

13. See, e.g., Ann Scales, *supra* note 3, at 148 (“Included in these alternative realities are transformative versions of authority, power, and order. . . . [I]n Robin West's words, . . . we [must] ‘flood the market with our own stories,’ until they are heard, until there is room for us simply to be who we are.” (quoting Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988))).

masterly feminist philosophy, was a beautiful experience. I wrote all of these conversations down. But something wasn't quite right. How would these "conversations" translate in a forum requiring a live address to a room full of people? In short, how could this project translate as anything other than schizophrenic? I may yet take this quantum leap with my friend, but now isn't the time. So I put it all away and started over again.

I think the reason for all of this grasping, the fits of starting and stopping, was that I resisted saying what needed to be said. I didn't want to talk about what this Essay ended up discussing. I didn't want to talk about the relationship of radical feminism to gay men's lives—at least not now. Mostly, I think, I didn't want to do it because it risks contributing to the well-worn criticism that feminism should be avoided because it is too contentious.<sup>14</sup> And certainly I didn't want to take this moment about Ann, rightly perceived as a moment about women, and turn it into something about men (thus reinforcing the suspicion that many women have about male feminists). And most assuredly I didn't want to be perceived as taking a moment that is supposed to be all about Ann and making it all about me. Basically, my fear was that in saying what I wanted to say for this occasion Ann might be, somehow, lost. What I finally realized, what made this Essay finally possible, was that far from being lost in it, Ann's work is essential to any discussion uncovering why and how gay liberation goes "off the rails," as one of my readers put it,<sup>15</sup> when it attempts to separate from radical feminism. It was Ann's great love for gay people—for gay women and men—that led her to insist that feminism matters in our lives, *even* in the lives of gay men, and led her to take unpopular positions on gay pornography.<sup>16</sup> And it was Ann's friendship—her love for me and mine for her—that made so much of my work possible.

Ann was always interested in what she called feminism's sharpest edges, by which we continually shape its possibilities. And so I joined

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14. See Diane Richardson, "Misguided, Dangerous and Wrong" on the Maligning of Radical Feminism, in *RADICALLY SPEAKING: FEMINISM RECLAIMED* 143, 143–54 (Diane Bell & Renate Klein eds., 1996), for a discussion.

15. E-mail from Jeffrey Vanek to author (Aug. 28, 2012, 12:48 PM).

16. Ann supported an equality-based regulation of pornography in Canada, in the landmark decision *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), and opposed excepting gay marketed materials from that definition. See Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of Butler*, 7 CAN. J. WOMEN & L. 349, 349 (1994). In fact, Ann was called as an expert witness for the Little Sisters Book and Art Emporium, a distributor of gay porn at issue in the Canadian case *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.), in which several gay groups lobbied for gay porn to remain unregulable under the *Butler* standard because it, according to them, isn't harmful. See Scales, *supra*, at 352 n.4. Ann very nearly was not called when these groups found out that her position was that gay pornography did produce equality-based harms to gays as a group and should be subjected to the *Butler* analysis. See Audrey Fannin, "Conversation with..." *Speaker Advises Students to Not Do Work They Hate*, WAKE FOREST U. SCH. L. (Oct. 7, 2010), <http://news.law.wfu.edu/2010/10/a-conversation-with-...-ann-scales/>. She was careful to underscore that gay pornography should not be marked for any especially burdensome legal targeting simply because it was gay-oriented. Scales, *supra*, at 356.

this Symposium to talk about the role that feminist jurisprudence has to play in the lives of gay men, not because I enjoy doing it, but because I think it is what Ann would have wanted me to say in relation to her work. I think the most striking possibility feminism brings to gay men's lives is the possibility of love unmodified. As Ann emphasized, quoting Robin West, "I can't imagine any project more crucial, right now, to the survival of this species than the clear articulation of the importance of love to a well-led public life."<sup>17</sup> I haven't had the opportunity to hear or read Katherine Franke's keynote address before drafting these thoughts, but if this is what she is reflecting when she describes Ann's feminist method as "[t]aking a [b]reak from [a]crimony," then she will have done Ann's life and work some justice.<sup>18</sup>

Ann believed in solidarity. Although it may not be apparent on the surface, the practice of solidarity flows directly from the feminist practice of relating political ideas and actions to personal experiences through seeking in one's own oppression a basis for solidarity with others. In this very real sense, emotional support becomes political support, laying aside forever the false dichotomy posed by the patriarchalists that tells us that choosing the values of connectedness necessarily means walking away from moral agency.<sup>19</sup>

#### INTRODUCTION

Ann Scales dedicated her life to "[f]eminism [u]nmodified,"<sup>20</sup> which is to say Radical Feminism, which is to say exactly what Ann

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17. Scales, *supra* note 9, at 718 (quoting West, *supra* note 13, at 65 (1988) (internal quotation marks omitted)).

Ann's focus on a "public life" makes her revelation here no less relevant to queer theory, despite queer theory's preference for an explanation of the world centered on individual choices, as opposed to recognition of group-based realities. As I have noted:

The political and civic institutions that create, shape, and enforce laws and define communities—and our active and conscientious involvement in them—are necessary because without them many of the intensely private and personal aspects of our lives would not be possible. . . . [O]ur neglect of our public responsibilities will not only perpetuate our public inequality but also will ultimately threaten the privacy we often prize above all else.

SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 86–87 (2006).

18. Katherine Franke, Isidor & Seville Sulzbacher Professor of Law & Dir., Ctr. for Gend. & Sexuality Law, Columbia Law Sch., Keynote Address at the University of Denver Sturm College of Law Symposium Honoring the Work of Ann Scales: Taking a Break from Acrimony: The Feminist Method of Ann Scales (Mar. 30, 2013).

19. See Scales, *supra* note 9, at 718 n.25 ("I am not suggesting that we have to choose the values of connectedness and caring and survival over our individual freedom or well-being or moral agency. To posit that either set of values must be relinquished in favor of the other is simply to buy right back into the same destructive dichotomy between self and world.").

See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306–07 (1995), for a discussion on the role of the concept of "agency" in feminist theory, particularly for its centrality to strains of feminism critical of radical feminism.

20. This is, of course, a direct reference to the work of Catharine MacKinnon. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 262 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]. Ann was proud to be associated with MacKinnon. Time and again in her written work and public speeches on feminism, Ann invoked MacKinnon. For Ann, feminism was synonymous with the "antibordination theory" or dominance femi-

said—and meant—when she said “feminist jurisprudence”—a field, it is useful to remember, that she named.<sup>21</sup> So I would feel somehow dishonest contributing to a symposium remembering her and celebrating her work without taking a close look at what feminist jurisprudence is, what it looks like, and what it does in the real world, which Ann’s work taken in its totality emphatically tells us is the only place it matters. In sketching out what feminism means for gay men, I can do little better than build on the definition Ann provided:

Positively, the feminism I know is concrete, antiessentialist, contextual, instrumental, eclectic, and open-minded. It is concrete because it grew from and answers to the real experiences of subordination caused both to women and men by gender hierarchy. It does not depend on any transcendental moral principle, unless a commitment to equality is that. Indeed, the feminism of which I speak is antifoundationalist . . . because it recognizes that foundationalist explanations usually are excuses for social inequalities. The feminism of which I write is antiessentialist because not only is point-of-view the primary referent for social action but point-of-view is itself an elastic and contextual phenomenon. All of the ways that each of us participates

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nism MacKinnon has done so much to shape. See SCALES, *supra* note 11, at 9, 13 (internal quotation marks omitted).

In her book, *Legal Feminism*, Ann described the importance of MacKinnon’s theory to her own feminist theory and activism.

Before critics dismiss the book solely on [the ground of its reliance on MacKinnon’s work], I would ask them to consider why they would do so. Even those who vehemently disagree with MacKinnon must acknowledge that much contemporary legal theory is inspired by her work or transpires in (sometimes saliva-sputtering) response to her work. As a purely academic matter, it is distressing to me how MacKinnon has been caricatured. I have observed, again and again, how often MacKinnon’s critics have not read her writings, or not read them with care, or have failed to reread those works as circumstances required. . . . [O]ne needs to understand . . . that much of contemporary United States jurisprudence is connected to MacKinnon. No serious treatment of feminist legal theory can fail to engage her work.

*Id.* at 13.

Ann also describes her own feminism being in a place of “stuckness,” until she encountered MacKinnon’s “inequality approach,” presented in CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 174 (1979) (emphasis omitted). See Scales, *supra* note 2, at 11. In 1997, Ann wrote:

I read Professor MacKinnon’s first book, *Sexual Harassment of Working Women*, and I began to feel that an explanation (maybe even a better world) was possible. . . . I spent many hours mapping her dominance approach against everything I knew about law, and testing it against my entire experience of politics and human misery. It rang not only true, but transformative.

Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN’S L.J. 34, 39–40 (1997) [hereinafter Scales, *Disappearing Medusa*] (footnote omitted).

21. See BLACK’S LAW DICTIONARY 932 (9th ed. 2009) (crediting Ann Scales with the first published use of the term “feminist jurisprudence” (quoting GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 129–30 (1995)) (internal quotation marks omitted)). Compare Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 193 (1989–1990) (identifying a panel moderated by Ann Scales as the inaugural forum for “feminist jurisprudence” (internal quotation marks omitted)), with Sheila James Kuehl, *For the Women’s Reach Should Exceed Their Grasp, or How’s a Law Journal to Be Born?*, 20 HARV. WOMEN’S L.J. 5, 9 (1997) (crediting Ann Scales with coining the term “feminist jurisprudence” (internal quotation marks omitted)).

in our various identities are constituted by historical, cultural, and individual practices. The sources of essentialism are beyond feminist control. Existing modes of power attempt to essentialize our identities, the better to capture each and every new incarnation as a market niche. My feminism is built from resistance to that.<sup>22</sup>

In order to expand on this kind of definitional project, it is necessary to include some things and exclude others. This is bound to make some in my audience nervous, if not bitterly resentful. This is a risk I feel is worth bearing in this moment, in the name and memory of the woman whose life and friendship meant so much to me, who taught me just exactly what the well-worn feminist quote “[t]he personal is political” means.<sup>23</sup> Our friendship was simultaneously personal and political, the two inseparable, fiercely both at all times, and in hindsight left me doubtful of my own admonition that “lov[ing] [someone] for political reasons” might be an impossible thing.<sup>24</sup> Ann’s place in my life as a strong lesbian mother–sister–friend, thus her feminism *and* magnificent gayness, and my experience of it, has taught me that.

In honor of that presence, I want to use the space allotted me here to draw, as directly as I know how, the links between radical feminism and gay male liberation. In so doing, I will engage the poststructuralist theoretical project generally named “queer theory,” in order to show just exactly what its engagement with reality on a contingency basis only (making it an antithesis of feminism) costs.<sup>25</sup> My many conversations with Ann infused my last book, *The End of Straight Supremacy*.<sup>26</sup> Although most of the reviews of that book have been praiseful, I was struck by one review, by Dennis Altman, that chastised me for “[t]he application of an

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22. SCALES, *supra* note 11, at 8. To Ann’s final point, I would add these illuminating observations about queer life, generally of the trend in consumerism experienced as politics and a more mainstream cultural trend that both invites and disavows queer . . . identity . . . . To cite a few prominent examples: the rise of a new gay and lesbian niche market in the 1990s; the new “cultural visibility” of queers in public life; the cultural fascination with the figure of the “metrosexual”; the recycling and mainstreaming of lesbian sartorial styles, ranging from the campiness of drag king culture to the refined and sexy androgyny of the L.A. lesbian look (popularized by the *The L Word*); and the neutralization of “queer” through shows such as *Queer Eye for the Straight Guy*, which cemented the association of homosexual aestheticism with a particularly vapid and rationalized notion of lifestyle.

ELISA GLICK, MATERIALIZING QUEER DESIRE: OSCAR WILDE TO ANDY WARHOL 162 (2009).

23. See Robin Morgan, *The Personal Is Still Political*, 16 NEW PERSP. Q. 53, 53 (1999) (internal quotation marks omitted).

24. SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION 43 n.46 (2011) (internal quotation marks omitted).

25. Queer theory and queer legal theory are not monoliths. And not all work identifying with queer theory or as queer aligns itself with straight supremacy in the ways I critique in this Essay. Professor Francisco Valdes’s work is a notable example. See, e.g., Francisco Valdes, *Outsider Scholars, Critical Race Theory, and “OutCrit” Perspectivity: Postsubordination Vision as Jurisprudential Method*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 399, 399 (Francisco Valdes et al. eds., 2002). However, much of, if not most of, queer theory and queer legal theory shares the characteristics I critique below.

26. GILREATH, *supra* note 24, at xiii.

anti-porn feminism to mainstream gay pornography . . . .”<sup>27</sup> As grateful as I am for Ann’s mentorship that so shaped the theory that emerged in *The End of Straight Supremacy*, I find myself grateful to her, again, for the context to address this important criticism of *our* work.<sup>28</sup>

### I. FEMINISM AND GAY MEN

To query what feminism has to offer gay men—why it is essential to our lives—requires me to define feminism. Notwithstanding the general history of feminist infighting for theoretical primacy, one reason that *my* defining feminist jurisprudence will be a source of unease is, frankly, that I am a gay man. I think a lot of people become uncomfortable when a gay man starts talking about feminism.<sup>29</sup> When straight men do it there is, naturally enough, suspicion. Yet, somehow the straight man can be accepted because perhaps he is one of those darling men who has gotten in touch with his “feminine side” and has made the absolutely Herculean effort to learn to cry. My own experience, in some cases, is that when a gay man speaks of feminism there is outright contempt from some women. Does he think he is a woman? Is he co-opting women’s experiences and women’s oppression for his own ends? Surely it is not news to any of us that a historical tension has existed between some radical feminists and some gay men.<sup>30</sup> There have been some good reasons for this, namely that gay male culture is infused with a most recalcitrant form of misogyny.<sup>31</sup> There is no denying that. It is also the case that in its rush to an ethic of sexual limitlessness, much of so-called queer theory has inadvertently or intentionally exalted the very sexual sadism and ritualized violence radical feminism opposes.<sup>32</sup>

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27. Dennis Altman, *Can the Revolution Be Recovered?*, GAY & LESBIAN REV., Mar.–Apr. 2012, at 30, 30–31 (reviewing SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* (2011)).

28. I say *our* work because Ann too believed a sex equality theory of pornography was essential to gay liberation. In many ways, her work prefigured my own. See Scales, *supra* note 16, at 350, 358.

29. There is absolutely no question that most feminist work, not to mention feminist writing, has been done by women—men have rarely and exceptionally participated in the project. See, e.g., Brian Klocke, *Roles of Men with Feminism and Feminist Theory*, NAT’L ORG. FOR MEN AGAINST SEXISM, <http://www.nomas.org/node/122> (last visited Dec. 5, 2013).

30. DAVID FERNBACH, *THE SPIRAL PATH: A GAY CONTRIBUTION TO HUMAN SURVIVAL* 18 (1981) (“Gay men start out from a very different relationship to the gender system than do women, and the same applies to lesbians in so far as they struggle on the specific basis of their gayness. While women are oppressed by being what the gender system requires them to be, offering them a certain reward of legitimacy for being a ‘proper’ woman and accepting oppression, gay people are oppressed by our inability—or refusal—to be ‘proper’ women or men. . . . The minimum starting-point of the gay struggle, accordingly, is the demand for our right to exist, for a basic social tolerance. These two very different starting-points explain how it is that the women’s and gay movements have by no means immediately recognized each other as allies.”).

31. See GILREATH, *supra* note 24, at 173–76, for discussion of male-over-female dominance in gay pornography.

32. See, e.g., *id.* at 169–203 (discussing the dehumanization of gay pornography and women in pornography); see also Marc Spindelman, *Sexual Freedom’s Shadows*, 23 YALE J.L. & FEMINISM 179, 191–200 (2011) (reviewing TIM DEAN, *UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING* (2009)) (discussing the idea of sexual freedom).



I think there has been, too, a self-imposed “gotcha” of sorts by some radical feminists, whereby, in the attempt to shore up the distances separating individual women, and thus create some solidarity in sisterhood, seclusion from men was deemed necessary. This move alienated women from a group—gay men—that should be a natural ally to feminist causes. The late Mary Daly comes to mind with some prominence here. She once wrote that women who identify as “gay” cannot be “Female-identified.”<sup>33</sup> In contrast, I have argued that solidarity between women and gay men is essential to both groups.<sup>34</sup> This is in the tradition of radical feminists, like the late Andrea Dworkin, who understood the connections we share in a gender system that operates to constrain and subdue us.<sup>35</sup>

Some of my male colleagues in the academy seem to think that my work is accepted or better regarded by women in the academy because I am a gay man, that the fact of my gayness somehow gives us, the women and me, a common denominator of sorts. Naturally, I am, on account of this, immediately suspect to these same male colleagues. I think, at times, the phenomenological reality I always bring with me as a gay man helps. For example, I think the fact that I can begin to explain a point in a faculty meeting without relying on some asshole sports analogy is probably appreciated by most of my women colleagues (and, for that matter, in class by my women students).<sup>36</sup> And I think this is where the link that my straight male colleagues believe they have identified between me, as a gay man, and women stops in their minds. There is something more, of course: there is the special bond between people who struggle together for liberation from patriarchy—be they male or female. I have always liked the way Andrea Dworkin put it when she said, “Women and male homosexuals are united in their queerness . . . .”<sup>37</sup> Ann could be counted with Andrea and with me in this understanding.<sup>38</sup> Her feminism was un-

33. MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 376 (1990) (internal quotation marks omitted).

34. See, e.g., GILREATH, *supra* note 24, at 25–27.

35. See ANDREA DWORKIN, *Biological Superiority: The World’s Most Dangerous and Deadly Idea*, in *LETTERS FROM A WAR ZONE* 110, 110–15 (1993), for a discussion of the downfalls of superiority based on immutable traits, such as gender.

36. Ann had something to say about sports metaphors. She wrote with characteristic lucidity that “the function of sports metaphors is not only to illustrate, but to legitim[ize] [male supremacy].” Scales, *supra* note 3, at 149–50.

37. ANDREA DWORKIN, *WOMAN HATING* 90 (1974) (“Women and male homosexuals are united in their queerness, a union which is real and verifiable . . . which contributes to the cultural oppression of both.”).

38. Of course, other feminists have also understood the need to include men in the struggle against male supremacy. Bell Hooks, for example, wrote in 1984 that

[s]eparatist feminist rhetoric suggested that all men share equally in male privilege, that all men reap positive benefits from sexism. Yet the poor or working-class man who has been socialized via sexist ideology to believe that there are privileges and powers he should possess solely because he is male often finds that few, if any, of these benefits are automatically bestowed on him in life. More than any other male group in the United States, he is constantly concerned about the contradiction between the notion of masculinity he was taught and his inability to live up to that notion.

modified but it was inclusive. As she put it, “[F]eminism” is not “a way of thinking available only to persons born female. Rather, . . . feminism . . . [is] the critique of objectivity in epistemological, psychological, and social—as well as legal—terms.”<sup>39</sup> Ann understood as well as anyone I have yet encountered the importance of feminist writing that speaks to everyone who might resist sexist oppression. She understood that real feminist revolution happens when patriarchy is actually recognized and resisted by women and men galvanized to challenge male supremacy.

Claiming radical feminism as my ground means that I challenge the queer theoretical project, which has been antagonistic to the insistence of feminist jurisprudence that real sexual injuries to real people, even when those people are gay men, be acknowledged by the law and responded to in concrete ways. This is a point of critical importance: feminist jurisprudence—in the way that Ann conceptualized and practiced it—means to use the law to respond to and undermine social hierarchy in whatever form, and not merely peripherally, but as the heart of feminist practice. This feminism is, simply put, a theory of inequality based on the realities of male-over-female domination, which has been the model for all forms of systemic and systematic oppression. It is concrete and specific in this regard, with the realities of women’s lives lived under male dominance forming the crucible from which a new way of knowing (not merely of thinking)—an epistemology—emerged and continues to develop. The work of legal feminism has been to connect this knowledge to the law, to the coercive power of the state, and thus to speak truth to power.

The method of this feminism has been exposing the lies of male supremacy, which are mostly backed by the authority of the state through the force of law—a law that takes the male point of view as the objective, neutral universal. As Ann put it, it is a system of law that “made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality.”<sup>40</sup> Significantly for the application and importance of radical feminism to gay liberation—and to gay men specifically—this feminism was never, and never aspired to be, a claim to *female subjectivity*. It was never a quest to supplant patriarchy for matriarchy. As Ann put it, “Feminism does not claim to be objective, because objectivity is the basis for inequality.”<sup>41</sup> The feminism Ann embraced, worked for, sacrificed

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BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 75 (2d ed. 2000).

I agree with the sentiment Hooks expressed here. Classism—and virtually every other “-ism”—is a functionality of male supremacy. I do think, however, it’s a shame that Hooks doesn’t engage gay male reality here, especially since she stresses that lower-class men “[m]ore than any other male group” suffer from male supremacist norms. *Id.* I should think that of all men who suffer from the “contradiction” between socialized masculinity and the “inability to live up to that notion,” gay men deserve, at least, a mention. *Id.*

39. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373, 1373 n.2 (1986).

40. *Id.* at 1377.

41. *Id.* at 1385.

for, and practiced was not about access to a subject position or its corollary power of objectification.<sup>42</sup> Rather, this feminism was about naming the reality of patriarchal oppression, establishing its contours, and changing them for the good of women and men. And surely no men suffer this oppression more acutely than gay men. To accomplish this goal, it is necessary, as Ann put it, to “resist[] abstraction.”<sup>43</sup> In that sense, feminism cannot be “a practice that makes claim to objective, universal truth in the way that, for example, some of the wilder versions of ‘law and economics’ theory do.”<sup>44</sup> Nor is radical feminism interested in the “oppression sweepstakes,”<sup>45</sup> in that it does not insist that women’s experiences as women are superior or constitutive of a metanarrative or meta-theory that must exclude all men. It acknowledges that women *and* men are defined and controlled by gender.

This brings me to my first point of engagement with feminist jurisprudence and its relationship to queer theory. Whereas feminism has been in many important ways a practice before it was a theory, with the theory emerging from the practice of establishing an account of reality under patriarchy based on lived experiences, queer theory has been an academic enterprise, the result of postmodern theory, which has as its basis a suspicion, even rejection, of claims to reality. Like everything postmodern or poststructural, queer theory is an idolatry of the unreal; it disputes that there are such creatures as “homosexuals” or “gays” or such a thing as “gay identity.”<sup>46</sup> Again, this is simply an extension of the old

42. As I have said, “In a subject–object culture, one must be a subject in order to be objective about much. To be objective about being objectified is to be dead.” GILREATH, *supra* note 24, at 21.

43. Scales, *supra* note 39, at 1374.

44. Ann Scales, *Law and Feminism: Together in Struggle*, 51 U. KAN. L. REV. 291, 291 (2003).

45. Scales, *supra* note 3, at 160 (defining “oppression sweepstakes” as “a heated discussion about whose treatment has been worse” (internal quotation marks omitted)).

46. One recent example is Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1 (2012). Franke’s is an extremely nuanced piece that resists simplification, but despite its many qualifications, the article reveals the risk that poststructuralism poses for gays (I suppose I should write “same-sexers” or something here, because “gay” as an identity is anathema to queer theory poststructuralism) who do not have even the meager protections liberal legal concepts afford. Franke writes:

Once we recognize that the normative homosexuality that undergirds human rights discourse is not merely a “fact” in the world, but more of a complex value, it becomes easier to see how the state’s embrace of the sexual citizenship of these new human rights holders risks rendering more vulnerable a range of identities and policies that have refused to conform to state-endorsed normative homo- or heterosexuality. This is true both for queers whose desires refuse to orient themselves ineluctably toward marriage, *as well as for Muslims with sexual norms and practices of polyamory, homosociality, and modesty*. *Id.* at 40 (emphasis added). Professor Franke seems to make a (very nuanced) apology for Iran’s President Ahmadinejad’s insistence that there “is no such thing” as a homosexual in Iran. *Id.* at 34. For Franke, Ahmadinejad is possibly a victim of Western, imperialist misinterpretation. Quoting an Iranian colleague translating Ahmadinejad, Franke explains:

[N]ow the other issue is that when the second time he says “In Iran there is no such thing” the phrase that he uses is literally “such a thing has no external presence/*vojud e khareji nadareh*”—now this phrase. “[*V*]ojud *e khareji nadareh*” idiomatically means “does not exist” but literally means “has no external existence”—yet another polyvalent phrasing that has embedded in it the suggestion that homosexuality is not a socially ac-

antifeminist bugaboo that feminist jurisprudence is flawed for asserting such a human being as “woman,” or for claiming that women could have a point of view or constitute a community or share a common experi-

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ceptable behavior in Iran, namely we do not see it in public space—adding credence to

... a sympathetic reading of Ahmadinejad that in Iran these are private matters.

*Id.* at 34–35 (first alteration in original) (quoting an E-mail from Hamid Dabashi, Hagop Kevorkian Professor of Iranian Studies & Comparative Literature, Columbia Univ., to Katherine Franke (Feb. 12, 2011, 12:29 PM EST) (on file with Katherine Franke) (internal quotation marks omitted)). Actually, the price of a public queer identification in Iran is state-sanctioned (often state-mediated) death, a fact to which the string of citations Franke collects attests. *See id.* at 35–37; *cf., e.g.,* Iranian Queer Org., *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and Homosexuality in the Islamic Republic of Iran*, INT’L GAY & LESBIAN HUM. RTS. COMMISSION, 1–3, 6–7 (Oct. 5, 2011), <http://iglhrc.org/sites/default/files/537-1>. (identifying Iranian statutes that punish homosexual acts by death); BE LIKE OTHERS (Tanaz Eshaghian 2008) (documenting experiences of men and women seeking gender reassignment in Iran). But Franke seems to take Iran’s position that documented executions of gays in Iran are perhaps not really obvious examples of the murder of gay men at all, but actually only documented executions of pedophiles (again, a misinterpretation by Western imperialists with a human rights agenda?). Franke, *supra*, at 36–37 (“It turns out, however, that the young men in this picture were very likely prosecuted for sexually assaulting a thirteen-year old boy, not for consensual homosexual conduct.”). And, interestingly, here, unlike for Ahmadinejad, there is no laborious examination of alternative interpretations. *See id.* I’m not sure on what grounds, or with what evidence, Franke is convinced that those executed in the particular episode to which she refers, youths who were, in fact, adolescents themselves, were pedophiles.

In any event, there is sympathy in Franke’s piece with Joseph Massad’s idea that there is no such thing as a gay identity in the Muslim Middle East. *Id.* at 33–34; *see* Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 363 (2002). I suppose it’s all in whom you ask: Maybe it’s reasonable to consider Ahmadinejad a reliable source. What is most distressing for me about this particular aspect of Franke’s article is that it moves to erase the state’s complicity in producing gay identity as always and only a private identity because the penalty for public identification is death. Franke diminishes the price of public queerness exacted from gays in Iran and all around the world. Feminists and gay liberationists have the pesky habit of asking gay people for an account of their experiences and then believing what they tell us. So here are some questions I’d like to put to queer theorists: If there is no such thing as gay people in the Middle East or in Africa, as is widely claimed by multiculturalist theorists, then why was Hassan El Menyawi tortured and exiled? Why is David Kato dead? Why did Abdellah Taïa flee Morocco? Why do roving death squads in Iraq target certain kinds of men for brutalization and death? Why do countless men in Iran mutilate their bodies in order to conform their homosexuality to the mandated gender dichotomy in an act of transsexualism sanctioned by the Iranian government—often undertaken at state expense—and glorified by queer theory? This latter query alone should stand as an unassailable indictment of the public price of queerness in Iran. What norm of modesty explains all of this? And where, exactly, is the murder of gay people not an expression of religious or cultural (often the same thing) values? *See* Shannon Gilreath, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 WM. & MARY J. WOMEN & L. 7, 17–23, 27–30 (2011) (documenting assault, murder, and terrorization of gay people in the Middle East and the United States by citing various reports).

I believe Franke and I are in agreement on the rudiments of the larger argument she makes about resisting cooptation. I’m all for resisting essentialism, and cooptation and universalization, but to take the real life experiences of gays in “foreign” places and to make of them merely a figment of the Western mind seems a lot like cooptation to me. To say to gay women and men who have claimed a gay identity, affirmatively and courageously, in the Middle East and Africa, and who have suffered appallingly *real* experiences on account of it, that their identity is always a non-identity, seems awfully essentializing to me. And a culturally relative defense of the murder of gays anywhere is a defense (to borrow from Martin Luther King, Jr.) of the murder of gays everywhere. *See* MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 290 (James Melvin Washington ed., 1986) (“Injustice anywhere is a threat to justice everywhere.”). That seems pretty universal.

I thank Hassan El Menyawi for pointing out Professor Franke’s article to me and for his always-clarifying conversation.

ence.<sup>47</sup> When Will Roscoe said of gays, quite profoundly, in my opinion, that he could “think of no other contemporary minority whose intellectuals are so deeply invested in erasing their [identity],”<sup>48</sup> he could have added to these anti-identitarian censors the “anti-essentialism” critics of feminism, who have engaged, whatever their motivation, in the same kind of cover-up enterprise.<sup>49</sup>

You know Ann, despite her dazzle as a classroom teacher and her genuine love for and appreciation of her students and her groundbreaking writing, never really identified as an academic. She saw herself as a feminist activist. I think the academic obscurantism just summarized explains why. Ann agreed with Catharine MacKinnon that to be a good theory, a theory has to be good in practice.<sup>50</sup> In other words, for her, feminist theory was not the playground of the especially enfranchised—a group at whose apex lawyers must surely be placed. Ann was the child of academics (her father was a university president); she was educated in the privileged cocoons of Wellesley and Harvard; she got “the job” with a fancy Wall Street law firm—the kind of job that tells law graduates they’ve “made it.”<sup>51</sup> But Ann was not the sort of person to luxuriate in the comfort of academic degrees or family privilege. She did what academics do not have to do: she faced reality. She cared about women—and men—for whom sexual subordination *is* reality.

For Ann, feminist jurisprudence meant seeing sexual injury as a form of discrimination. It also meant realizing that women’s subordination to men is not natural or inevitable, but political, thus structural. From the perspective of radical feminism, sexuality itself is structural. This is the central tenet of feminism, and it is the central importance of feminism to gay male liberation—the realization, as Andrea Dworkin put it, that “[e]very social form of hierarchy and abuse is modeled on male-over-female domination.”<sup>52</sup> To understand this is to see, in the light of feminism, that the gay sexuality gay men experience is, in fact, produced

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47. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 158–59 (1988).

48. Will Roscoe, *Afterword* to HARRY HAY, *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER* 331, 347 (Will Roscoe ed., 1996). But see Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 105, 133–35 (Michael Warner ed., 1993) (noting “a turn in poststructural gay theory beyond a critique of identity politics to a politics against identity”).

49. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585–601 (1990) (criticizing Catharine MacKinnon’s dominance theory as “flawed by its essentialism”).

50. See Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 *YALE J.L. & FEMINISM* 13, 13 (1991) (“It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?”).

51. See Audrey Fannin, ‘Conversation with...’ *Speaker Advises Students to Not Do Work They Hate*, *WAKE FOREST U. SCH. L.* (Oct. 7, 2010), <http://news.law.wfu.edu/2010/10/a-conversation-with-...-ann-scales/>.

52. ANDREA DWORKIN, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* 68 (1976).

in the subject–object context of straight male supremacy. In other words, the reality of sexuality for gay men, no less than women, is forged on the anvil of straight male power. As MacKinnon put it, the “situation offers no outside to stand on or gaze at, no inside to escape to . . . no place else to go.”<sup>53</sup> If you doubt this is true, take a moment to really look at gay male pornography. Here you see in technicolor the hermetic precision of sexual hierarchy at work. In gay male pornography the structural dominance of heteronormative sexuality—that sexuality in which sex is “gendered to the ground”<sup>54</sup> and wielded as a weapon—is twisted open for all but the willfully blind to see.<sup>55</sup> The fact that so many gay men do not see it is testament to the ontological and epistemological perfection of straight male supremacy. This is precisely why consciousness-raising became synonymous with feminist method as a form of political practice.<sup>56</sup>

## II. QUEER LEGAL THEORY AND GAY LIBERATION (QUEER THEORY AS ANTITHESIS)

The best point of entry to engage queer theory jurisprudentially is *Oncale v. Sundowner Offshore Services, Inc.*<sup>57</sup> and the queer theoretical debate that emerged from the case.<sup>58</sup> Ann certainly thought *Oncale* was profoundly important.<sup>59</sup> The case established that same-sex sexual harassment was actionable;<sup>60</sup> thus, men could no longer sexually dominate other men in the workplace and be untouchable. As Marc Spindelman put it, because *Oncale* disrupted the conventional social understandings of men subordinating other men as simply “boys [being] boys” and of the

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53. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 639 (1983).

54. *Id.* at 655.

55. GILREATH, *supra* note 24, at 169–70. *See also infra* Parts III, IV.

56. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 543 (1982) (“The pursuit of consciousness becomes a form of political practice.”); Scales, *supra* note 39, at 1401 (“Feminist method proceeds through consciousness raising.”); Scales, *supra* note 2, at 29 (“The historical and personal experience of the oppressed, revealed through consciousness-raising, is amply persuasive. In the meantime, lawyers must give up on monolithic reality and believe that there is something to be learned and a better society to be achieved by listening to formerly silenced people.”).

57. 523 U.S. 75 (1998).

58. In reality, Joseph Oncale’s life was one of pornographic torture. While working on an oil rig in the Gulf of Mexico, he was subjected to sexual torture by several male co-workers and supervisors. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996), *rev’d*, 523 U.S. 75 (1998). He was sexually assaulted on several occasions, during which he was held down while a co-worker placed his penis on Oncale’s body. *Id.* at 118. He was threatened with rape and only narrowly escaped one rape attempt perpetrated in a communal shower. *Id.* at 118–19. Eventually, fearing for his safety, Oncale quit his job. *See Oncale*, 523 U.S. at 77. His claims of sex discrimination through same-sex sexual harassment were held actionable under Title VII of the Civil Rights Act of 1964 by the United States Supreme Court. *Id.* at 76–79.

59. *See infra* notes 79–80 and accompanying text.

60. *Oncale*, 523 U.S. at 79.

victims committing the normative infraction of failing to “take it like a man,” *Oncale* was a blow to male-supremacist thinking.<sup>61</sup>

Professor Janet Halley, however, assails the result as an invitation for the Supreme Court to license homophobia in legal decision making, particularly criticizing the brief filed by Professor Catharine MacKinnon in support of Oncale’s sex discrimination claim.<sup>62</sup> Setting aside Halley’s various interpretive distortions of MacKinnon’s brief and, by extension, radical feminism,<sup>63</sup> what I find most disturbing is Halley’s reimagining of Joseph Oncale’s complaint. In truth, Oncale was the victim of attempted gang rape and various other sexual assaults while employed on an oil rig in the Gulf of Mexico. His assailants were all men.

Proclaiming that she is going to “put [Oncale’s] allegation of unwantedness aside, as a mere allegation”<sup>64</sup> (as if that’s somehow new, instead of the standard male-supremacist response to any unwanted sexual attention by men), Halley proceeds to turn Oncale’s life into pornography by making of his attempted rape the “fantasy” of gay male sexuality that male supremacy dictates as truth: Oncale wanted this rape as a gay man.<sup>65</sup> He, as gay men do, wanted to be sexually dominated by (ostensibly) straight men. Halley writes:

We can imagine that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in Oncale’s complaint, or engaged in some of that conduct and fantasized the rest, or, indeed, fantasized all of it—and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.<sup>66</sup>

Halley’s pornographic fantasy of Oncale’s real life is an extension of the ethic of derealizing the real that flavors queer theory as, itself, an extension of postmodernism. It also clearly demonstrates how “[q]ueer theory . . . has in significant ways aligned itself with male supremacy and its regulation of the general erotic economy that gives meaning to women’s and men’s sexual lives.”<sup>67</sup> You see, queer theory as an epistemological project—as an explanation of how we know who we are as gay men and women—effectively turns “the Closet” inside out. The Closet ordi-

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61. Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 201, 201 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (internal quotation marks omitted).

62. Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 61, at 182, 189–93.

63. Marc Spindelman lucidly illumines Halley’s misperceptions in his piece in the book. See Spindelman, *supra* note 61, at 204–16. Professor Spindelman subsequently revised and expanded his argument while maintaining his disagreement with Halley. See Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 10–47 (2004).

64. Halley, *supra* note 62, at 192.

65. *Id.*

66. *Id.*

67. Spindelman, *supra* note 61, at 202.

narily functions as a shroud. It is the place to which gay men and women retreat in order to escape persecution and stigma. The price for this escape is invisibility. Thus, in order to be “free” from stigma (and consequently to have or retain any value whatsoever) in this basest conceptualization of what that means, queers must accept their place in the heterosexual hierarchy. Just as gays had forced the door of this existential deathtrap open, queer theory came along and said that in order to live meaningful, fulfilled lives—indeed, in order to *be*—queers should open themselves to the erotic possibilities of the very sexual hierarchy that is the engine of male supremacy, which means for gay men (as Halley reveals in her *Oncale* critique) that to be fucked by a straight man is the apogee of sexual liberation.

Thus, in the insistence on the absence of limits as the meaning of sexual liberation, Halley and queer theory suggest something much more alarming than that lesbians and gay men cannot be legally liable for the sexual injuries they cause, but rather that (at least in most cases) such sexual injuries are not possible or, more precisely, are a function of the victim’s own internal homophobia—his refusal to live outside of the Closet. If this is what Halley means when she says that queer theory deemphasizes the differences between heterosexual and homosexual, then we should all—gay and straight alike—be terrified.<sup>68</sup> Whatever other conclusions may be drawn from it, it certainly illumines what she means when she says that queer theory “thinks it is fine to be ‘queer in the streets, straight in the sheets.’”<sup>69</sup> For the materialization of this revelation in the daily reality of gay men’s lives, gay male pornography serves as the perfect propaganda.<sup>70</sup> Now, how you can realize this and fail to see that straight male supremacy is metaphysically nearly perfect is beyond me. I’m still waiting for gay men to resent it.

Extending her critique, Halley insists that queer theory’s objection (and antagonism) to radical feminism stems from radical feminism’s perceived failure to understand that surrendering to such “pleasures” “rearranges conventional associations of the feminine with subordination and the masculine with power.”<sup>71</sup> Halley provides as her example the fact that lesbians and (according to her) increasing numbers of straight women fuck their partners with strap-on dildos.<sup>72</sup> Here, Halley’s argument

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68. See Halley, *supra* note 62, at 194.

69. *Id.*

70. See GILREATH, *supra* note 24, at 169–203. Indeed, Halley could be simply describing gay male porn when she explains that queer theory “tends to minimize . . . the differences between same-sex eroticism and cross-sex eroticism.” Halley, *supra* note 62, at 196. Sadly, as I argue in *The End of Straight Supremacy*, much of the mainstream gay rights movement serves this same function, as in, for example, the push for assimilation into the marriage paradigm. See GILREATH, *supra* note 24, at 207–32; see also Nelson Tebbe et al., Debate, *The Argument for Same-Sex Marriage*, 159 U. PA. L. REV. PENNUMBRA 21, 28–35 (2010) (including Shannon Gilreath’s rebuttal argument about gay marriage at the debate).

71. Halley, *supra* note 62, at 196.

72. *Id.*



reveals queer theory as little more than a manifestation of an aggressive, reductive, and assimilationist transsexualism. At its most successful, queer theory aspires to little more than gender role reversal. It might fairly be called transintellectualism, for like the false claim of transsexualism to any real gender disruption,<sup>73</sup> queer theory merely tinkers with the system of sexual hierarchy from which straight supremacy is ontologically and epistemologically inseparable. As a normative project, queer theory remains committed to that same system. After all, if a central tenet of male power is that the penis is a weapon,<sup>74</sup> how does a lesbian using it in the way it normally functions—to effectuate subordination through sex—disrupt anything? And if gay men, in the porn they produce for themselves, merely follow the script set for them by male supremacy, how is the sex held aloft as “fantasy” not simply heterosexuality in drag? But queer theory cannot see this, refuses to see it, since its preferred conceptual framework makes power an individual plaything—something to be “perform[ed]”<sup>75</sup>—and thus renders structural critique impossible. By contrast, feminist jurisprudence as a normative project works to undermine male supremacy. In this, it is queer theory’s anathema, and it is for gay women and men (and for all women and men), unlike queer theory, a possible path to liberation.

To understand the connection between gay pornography, sexual violation, and queer theory in this way is to understand the truth in Ann’s definition of feminism with which I began: “Existing modes of power attempt to essentialize our identities, the better to capture each and every new incarnation as a market niche. My feminism is built from resistance to that.”<sup>76</sup> It is also to underline the life force of feminist jurisprudence, the belief that in order for any of us to exercise any legal right—certainly the right to free speech or the right to equality or the right to privacy—we must first have an integrity of the body that is absolute. This is a plausible reading of what Ann meant when she said, “Gender literacy is among the most serious pro-life work that anyone can undertake.”<sup>77</sup> It is also what led her to understand same-sex rape as a sex equality issue and abortion as a queer issue.<sup>78</sup>

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73. GILREATH, *supra* note 24, at 271.

74. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 23–24 (1981) (“The seventh tenet of male supremacy is that sexual power authentically originates in the penis. Masculinity in action, narrowly in the act of sex as men define it or more widely in any act of taking, is sexual power fulfilling itself, being true to its own nature.”).

75. The notion of “performativity” is most closely associated with the work of Judith Butler. *See, e.g.*, JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 139–46 (1990).

76. SCALES, *supra* note 11, at 8.

77. *Id.*

78. *See generally* Scales, *supra* note 1, at 407–10.

Ann saw *Oncale* as “the most positive queer case ever decided in the U[nited ]S[tates] . . . more important than *Romer v. Evans* . . . or *Lawrence v. Texas*.”<sup>79</sup> More specifically,

*Oncale* opened the wider range of gender issues, including abuse by sexualization in circumstances that no one can mistake for flirting. In that case, the court came as close to understanding as it has yet that sex discrimination is centrally about the production and manipulation of gender norms: the issue was not that Joseph Oncale was harassed because he was a man—he was harassed because of the kind of man he was perceived to be. It had to be a sex discrimination case under federal law, but it was also a victory for the principle, dear to the hearts of feminists and queer theorists and all combinations thereof, that no one should be forced “to occupy a gender norm that is undergone, experientially, as an unlivable violation.”<sup>80</sup>

Understanding this “force,” however, remains problematic for queer theory, because queer theory, not unlike liberalism, is obsessed with “choice,” and its legal equivalent, “agency.” Indeed, in a rhetorical frame in which nearly everything is up for grabs, in which hardly any facts can be established and where every experience is merely contingent, “choice” seems to be the only thing that is absolute; hence Halley’s bottom line that Joseph Oncale should simply have surrendered to the eroticism offered him by his assailants in her (only just) imagined version of what happened to him, and her proffer of the “lesbian phallus” as a revolutionary culture shift.<sup>81</sup>

In queer theory’s version of liberation, sexual liberation hinges on seizing the dominant role by turns—on having the “option” to assume the dominant position in sexual hierarchy, thus on sexualizing inequality. Here we see queer theory most closely aligned with the trans-politics that has emerged from it (and, I think, eclipsed it). Essentially, gay men no less than gay women are told that we should become “male impersonators,” claiming the gender-specific power of which the masculinized dominance of male supremacy robs us by gendering us feminine based on our refusal to sexually dominate women—in other words, for siding with the girls. This is supposedly revolutionary because, even though some of us must necessarily assume the “submissive” role some of the time, we have the option of trading it off for the dominant role. For gay men especially, this means we have the option to be men again, in a system in which to be a man is defined as being socially permitted to sexually dominate a feminized “other.” (“Man fucks woman; subject verb object.”<sup>82</sup>) This is the revolutionary potential queer theorists see in the “bot-

79. *Id.* at 403–04.

80. *Id.* at 404 (quoting JUDITH BUTLER, UNDOING GENDER 213 (2004)).

81. Halley, *supra* note 62, at 194 (citing Judith Butler’s discussion of the “lesbian phallus” in BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 57–91 (1993)).

82. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989).

tom” having the option of becoming the “top,” to use gay male cultural lingo.<sup>83</sup>

Missing entirely from this analysis is the fact that in this vision of liberation gay men are liberated to do nothing not already scripted for us by heterosexuality. Lesbians in strap-ons, too, are left in the same bind, “liberated” to do little more than mimic sexually how male supremacy says women are to be touched and fucked. What is jettisoned in all of this pornographic “performing” is the ability to claim a space in which some substantively equal alternative to this catatonia-inducing repetition might be formulated.<sup>84</sup> Queer theory, then, mistakes a sexuality embodied by gender as an escape hatch from sexual inequality when, in fact, this very sexuality is “the linchpin of gender inequality.”<sup>85</sup> It is also, it should be said, a theory that does absolutely nothing for women, including for lesbians qua women. As Andrea Dworkin explained, “devalued males can often change status, escape; women and girls cannot.”<sup>86</sup> Certainly, the female usurpation of the dominant role socially, especially sexually, is usually delimited by what women can work out with men on male terms. In every conceivable incarnation, the sexuality aspired to by queer theory reflects the hierarchical absolutes of male supremacy. It is straight “in the streets” and “in the sheets.”

### III. PORNOGRAPHY

I want to probe further the ways in which queer theory reifies male sexual power as the substance of culture, as well as expose this cultural root in “gay male” pornography, through a reading of Janet Halley’s reading of Duncan Kennedy’s *Sexy Dressing*.<sup>87</sup> In her claiming of Kennedy’s avowedly heterosexual perspective as “queer,”<sup>88</sup> Halley quite clearly summarizes what Kennedy intended to say when he wrote *Sexy*

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83. See, e.g., Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857, 886, 892 (1992) (internal quotation marks omitted). The “top” is the insertive partner; the “bottom” is receptive.

84. Radical feminism, by contrast, has always supposed that such an alternative is possible, indeed, that it already exists in certain counterfactual instances. So much for the old canard that radical feminism theorizes all sex as “bad.”

85. MacKinnon, *supra* note 56, at 533.

86. DWORKIN, *supra* note 74, at 61.

87. See DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993). By concentrating on Halley’s work as I have in this Essay, I hope I am not interpreted as making some normative evaluation of Halley’s work as the best representative of queer theory, although it certainly is representative. I focus on Halley here only because her work fetishizing sexual injury in the name of queer theory handily translates queer theoretical concepts to the realm of jurisprudence (by which I mean, as Ann did, “legal theory generated by lawyers, as opposed to theories about law emerging from other disciplines.” See SCALES, *supra* note 11, at 153 n.1); because Halley, openly lesbian, claimed to articulate queer theory in a male voice; and because Ann used Halley’s work specifically as an example of the limitations of poststructuralism. See, e.g., *id.* at 3, 139–40.

To avoid any possible misunderstanding, Ann Scales thought Janet Halley’s prescription to “take a break from feminism[.] . . . is a bad idea.” *Id.* at 3.

88. Janet Halley *sub nom.* Ian Halley, *Queer Theory by Men*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS, *supra* note 1, at 9, 17–18.

*Dressing*, which in fact espoused nothing particularly new. What is so interesting about her gloss on Kennedy is how neatly it exposes the heteronormativity of what masquerades in theory circles as “queer.” It is precisely the unabashed heterosexual-ness of Kennedy’s theory that makes Halley, notably writing here *sub nomine* Ian Halley (I suppose thus as a “queer man”), claim it as “queer” and, thus, antifeminist. Halley writes:

*Sexy Dressing* takes women’s sexy dress as a semiotic system that registers, in subtle and dynamic ways, the degree to which women are able to enter as strong, self-interested bargainers into sex and sexually fun symbolic play with other women and with men. He argues from a position of highly identified “erotic interests”—his own—which he bluntly characterizes as those of a heterosexual white middle-class male who wants there to be women (on the street, in the media, at work) who can afford to be erotically thrilling to him. . . . The project is unequivocally pro-sex.

To me, moreover, it is distinctly “queer” in its analysis of sexuality, power, and knowledge. It fragments and “flips” the male/female model—and because its reasons for doing so emerge not from Freud but from social theory—the resulting pattern of sexual complexities is explicitly political. . . . It’s not feminist. It “Takes a Break from Feminism.” Moreover, seeing it as “queer” instead—because of its embrace of male heterosexual erotic interests—provides deep satisfaction to my own ambition that queer work would be able to “Take a Break” not only from these feminist strictures, but also the homo- and bi-supremacy that more or less go with the term so far.<sup>89</sup>

First, Halley’s synopsis of Kennedy’s argument that he takes women dressed in sexually-objectifying ways as a/the way in which women can “enter as strong, self-interested bargainers into sex . . . with men,” as if it is somehow radical, strikes me as extraordinarily dim.<sup>90</sup> If Kennedy is articulating the point of view of heterosexual male-ness, then, of course, this is his theme. This is little more than a restatement of the role male supremacy has always allotted women. Women should be sexually desirable and accessible everywhere for men. Women are told by the same men who want to keep them this way that this is what makes women strong. (How convenient.) Historically, even when viewed as somehow ruinous (think Eve), a woman’s carnality has been propagandized as her source of power. Even when the truth is closer to a woman’s sexuality being defined as the reason she is to be subdued, harassed, raped, subjected, married, and bred, the fiction is that men do everything in life to win her sexual attentions. The male orgasm at the hands of a woman is so powerful a motivator that he is powerless before her sinister, manipu-

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89. *Id.*

90. *Id.* It is also consonant, I think, with the postmodern trend of taking a very simple concept and smothering it with language in the hope that it will become unrecognizable and thus “novel.”

lative charms. Via this fiction, “[t]he male, through each and every one of his institutions [the public street, the media, any place of employment], forces the female to conform to his supremely ridiculous definition of her as sexual object.”<sup>91</sup> And if any lawyer or law professor needs “proof,” I should think the overwhelming content of any law library would suffice.<sup>92</sup> Halley’s spin on this as being somehow sharp seems to me to implicate exactly what I think Ann Scales meant when she criticized “poststructuralism” for continually covering ground that has already been covered.<sup>93</sup> In any event, Halley names Kennedy’s stance of (hetero)male subjectivity and female–feminine objectivity unequivocally as “pro-sex.”<sup>94</sup> This is no surprise for anyone familiar with Halley’s take on the sexual assault endured by Joseph Oncale. To be pro-sex in the queer theoretical model is to be pro-objectification.

Next, and most interestingly, Halley moves to call Kennedy’s straight-male “algorithm” for maintaining straight male supremacy “queer.”<sup>95</sup> In so doing, she lays queer theory’s cards on the table. In her reimagining of Oncale’s ordeal, the acme of homosexual male sexual experience is taken to be rape. In her reading of Kennedy, she broadens this to include sexual objectification generally.<sup>96</sup> As in the general thrust of the transintellectual project, and following on her critique of *Oncale*, Halley claims this “flips the male/female model,” thus undermining structuralism of the feminist sort that Professor Kennedy claims is “paranoid.”<sup>97</sup> But, of course, nothing is flipped here. Assigning to women the power of sex, when men in fact have it, has been an important way male supremacy has perpetuated itself. (And in what universe is this not political?) The fact that some women no doubt do feel powerful in this frame proves little more than its metaphysical perfection. As Andrea Dworkin once put it: “When those who dominate you get you to take the initiative in your own human destruction, you have lost more than any oppressed people yet has ever gotten back.”<sup>98</sup> Finally, and in this light, Halley’s “ambition” that queer politics become more hetero-affirming aspires to precious little.<sup>99</sup> The thoroughly heterosexual, assimilationist value register of most of mainstream gay and queer politics is already nearly total, as I have documented at great length.<sup>100</sup>

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91. DWORKIN, *supra* note 74, at 22.

92. A large and growing body of feminist work critiques the male supremacist bias of the law’s “objectivity” in nearly every facet of law. Ann contributed to this criticism. *See, e.g.*, Scales, *supra* note 9, at 718–23.

93. Scales, *supra* note 1, at 404.

94. Halley, *supra* note 88, at 17.

95. *Id.* at 17–18 (internal quotation marks omitted).

96. *See id.*

97. KENNEDY, *supra* note 87, at 143, 145.

98. ANDREA DWORKIN, *INTERCOURSE* 143 (1987).

99. Halley, *supra* note 88, at 18.

100. *See generally* GILREATH, *supra* note 24, at 77–79, 223.

Halley's recurring insistence that what is "queer" "flips" the male/female structure is delusional. One needs to look no further than gay male pornography for evidence.<sup>101</sup> A popular genre of this pornography is "gay for pay" porn, in which an ostensibly straight man is induced into sex with a gay-identified man by one of two manipulations: either the straight man is persuaded to have sex with the gay man by the mediating influence of a woman, either for promise of sex with the woman (whom he really wants), or because she tells him it turns her on sexually to see him with another man. Or, he is induced into pornography through an exploitation of sheer economic desperation, i.e., by the promise of money, hence the "gay for pay" styling of much of this material.<sup>102</sup> In the first scenario, wherein a straight man is induced to have sex with a gay man because he wants a woman, the intractability of the male/female model, as Halley styles it, should be obvious enough.

The second scenario, in which money serves as a form of force, may need more unpacking. In the system of male supremacy, money is acutely sexual and is, indeed, indistinct from heterosexuality in operation, such that heterosexuality as we know it would cease to exist if the money were extracted from it. As Andrea Dworkin observed,

Money is primary in the acquisition of sex and sex is primary in the making of money: it is tied into every industry through advertising . . . or items are eroticized in and of themselves because of what they cost. In the realm of money, sex and women are the same commodity. Wealth of any kind, to any degree, is an expression of male sexual power.<sup>103</sup>

"Gay for pay" pornography is in keeping with this general script of male supremacy because what makes sex with straight men sexy is that in each of these cases gay men work out the "objectification" of the straight men in explicitly straight male terms. In other words, this pornography reveals that masculinity follows from the use of money as force, primary in the acquisition of sex, and internalized in gay men as a function of the masculine process taken as the route to value. "A commitment to money as such follows as an obvious and public commitment to the display of

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In 1986, Ann described the hegemonic method of patriarchy as: "[I]ts aims are united within a social fabric by assimilating the subordinated classes into the dominant one, and by allying those classes with it." Scales, *supra* note 39, at 1379. If there is a more lucid description of what is going on in the liberal support of same-sex marriage, I wish someone would clue me in to it.

101. Halley argues that queer theory emerged, at least in part, as an opposition force to the MacKinnon/Dworkin anti-pornography civil rights ordinance. Compare *infra* note 110 and accompanying text, with Halley, *supra* note 88, at 26 ("[W]e probably wouldn't have queer theory if there had not been the need for articulate pro-sex opposition . . . to male/female model regulatory ambitions (for example, anti-pornography ordinances).")

102. See generally GILREATH, *supra* note 24, at 174–75 (explaining the two manipulations: promises of money or sex with women).

103. DWORKIN, *supra* note 74, at 20–21.

masculinity as an aggressive and an aggrandizing drive.”<sup>104</sup> Thus, in both form and function, this “gay” pornography is compulsorily heterosexual, and so is the queer theory that endorses the primacy of its message. No “break” from “homo-supremacy” need be taken.<sup>105</sup> Straight men remain in control ontologically, because their existence as straight men drives the fantasy and shapes its parameters.<sup>106</sup> They are still firmly on top hierarchically because this gay experience is little more than their desires, and the process for achieving them, functionally translated, however briefly, into “queer” form.<sup>107</sup> Gay men have negotiated this “liberation” only on the terms allowed them by the oppressor. A theory aggrandizing this as subversive is a case of *The Emperor Having New Clothes*.<sup>108</sup> As I have noted elsewhere, “[i]n gay pornography we see what heterosexuality is”;<sup>109</sup> in Halley’s explication of queer theory, we see it too.

#### IV. FEMINISM AND GAY LIBERATION: TOGETHER IN STRUGGLE

Ann Scales was a fervent supporter of the anti-pornography civil rights ordinance proposed by Catharine MacKinnon and Andrea Dworkin. The ordinance, to date the only serious legal proposal to deal with pornography’s harms, defined pornography as “the graphic[,] sexually explicit subordination” of women, men, children, or transsexuals.<sup>110</sup> Of the effort, Ann wrote:

It is possible that pornography regulation would cut into the vicious cycle of gender hierarchy. The social construction of gender could change, and that would be to everyone’s benefit. Both women and men are significantly eaten up by genderization. The gender hierarchy deprives men of their humanity; it deprives women of their lives.<sup>111</sup>

Radical feminists, like Ann, who have opposed pornography because of the recognition that it is the nerve center<sup>112</sup> of male supremacy, have at-

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104. *Id.* at 22.

105. Halley, *supra* note 88, at 18.

106. See GILREATH, *supra* note 24, at 173–76 (discussing the masculine archetype).

107. *Id.*

108. See HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (Naomi Lewis trans., Candlewick Press 1997). Or, if the reader prefers an analogy better made to high literature, perhaps “a tale / Told by an idiot, full of sound and fury, / Signifying nothing” fits. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5.

109. GILREATH, *supra* note 24, at 169–70.

110. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 20, at 262, for a discussion of the ordinance. Although MacKinnon and Dworkin proposed their ordinance in slightly different versions at different times, the structure reflected here was unaltered. *See id.*

111. Scales, *supra* note 2, at 32 (footnote omitted). I think Ann would permit me a correction here. Pornography does deprive gay men of our lives in myriad ways. See GILREATH, *supra* note 24, at 190–201 (detailing the correlation between an upsurge in “bareback” pornography and spiking HIV infection rates, the risk to performers in gay pornography in terms of sexually transmitted infections as well as substance addiction, and the connection between pornography and pervasive rates of sexual abuse within male–male homosexual relationships).

112. See, e.g., DWORKIN, *supra* note 74, at 24–25. (“The harmony and coherence of hateful values, perceived by men as normal and neutral values when applied to women, distinguish pornog-

tacked its role in the subordination of women *and* men. Gay men, mostly blind to pornography's harms, have not been as quick to see the relationship of "women's issues" to their lives or their politics. But as I noted before, in her analysis of queer theory, Ann gave us this gem: "[A]bortion is the queerest issue there is."<sup>113</sup> Abortion is a sex equality issue, to be sure, but Ann illumines it as a gay liberation issue as well. She wrote:

One is ineluctably reminded of the ongoing kerfuffle about what "causes" homosexuality . . . . It is convenient to the powers-that-be to portray homosexuality as an unconstrained "choice" that could simply be . . . remedied by the advances of science. Abortion is another context where "choice" is portrayed by opponents as a matter of destructive petulance on the part of women with unwanted pregnancies. In real life, reasons for abortion vary hugely, and simply must not be constrained by some legislature's schedule of acceptable considerations.<sup>114</sup>

Abortion, like pornography, constructs women and men as such. Restrictions on abortion for women (necessarily, since only women need abortions), who have virtually always less say over the when, how, and why of pregnancy in the first instance, is a function of sexual hierarchy. Gender is not irrelevant to the abortion question, and gender's meaning produces men and women in its image.<sup>115</sup> Anti-abortion restrictions operate as sexual politics forming an integral part of the male-supremacist process that makes gender hierarchy—inequality—into social reality. For many, if not most, women seeking an abortion, as Ann pointed out, choice is not how they got there. I am reminded of a line from a Maya Angelou poem that reads: "She stands / before the abortion clinic, / confounded by the lack of choices."<sup>116</sup> The focus on choice or agency, or whatever other convenient legal synonym can be thought of, merely serves to invisibilize the overwhelming force that is ineluctably a part of the environment that produces the need for abortions and the restrictions that limit access to them. This conceit, this fiction of autonomy masking a reality of force, is what keeps male supremacy running like a well-oiled machine. As Adrienne Rich asked, "[W]hose interest is served, and whose fantasies expressed, by representing abortion as the selfish, will-

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raphy as message, thing, and experience. The strains of male power are embodied in pornography's form and content, in economic control of and distribution of wealth within the industry, in the picture or story as thing, in the photographer or writer as aggressor, in the critic or intellectual who through naming assigns value, in the actual use of models, in the application of the material in what is called real life . . . .").

113. Scales, *supra* note 1, at 407.

114. *Id.*

115. This is crucial to understand: Gender hierarchy is never not relevant. Males learn, practice, and affirm heterosexual values because mastery of these values is the only way to win the acceptance of fathers and male peers.

116. MAYA ANGELOU, *Our Grandmothers*, in *I SHALL NOT BE MOVED* 33, 36 (1990).



ful, morally contagious expression of *woman's* predilection for violence?"<sup>117</sup> Following Rich, Ann provided much needed clarification:

The abortion decision is too much like history-making: it is morally complex, it is often morally compromised, it is a matter of taking responsibility for difficult and sometimes unanticipated results. It is important for the right-wing to describe the abortion decision as capricious. In the context of the oppression of women, arguments against abortion often involve perverse attempts to portray the violated as the violent. . . . But "violent" is precisely what women cannot be, according to the law, and the legal power to do "violence," however narrowly defined, is a credential for the autonomy that the law presumes men and women to possess equally.<sup>118</sup>

Ann illuminated how the seemingly contradictory faces of the "pro-life" movement in fact pose no contradiction at all. While it is true that many members of the "pro-life" movement condemn abortion but "support the death penalty and the moral righteousness of war," there is no actual tension in these positions because "*those* are decisions traditionally made by men in legislatures and situation rooms; a woman *qua* woman just doesn't have the capacity to decide any matters of life and death."<sup>119</sup>

I began this Essay with an explanation of just how far queer theory is willing to go. Taken at face value, it stands for the principle that sexual injuries to gay people are a virtual impossibility. How one can express a devotion to gay/queer people and yet embrace that position is hard to understand. And yet I think Ann, through her careful attention to the abortion question and her linkage of the abortion issue to gay liberation, has given us the building blocks for the best explanation of queer theory's embrace of gender and death.<sup>120</sup>

Gay people have been denied by compulsory heterosexuality the capacity to decide matters of life and death. Queer theory purports to claim that capacity, in the process eschewing anything that smacks of victimization, including, generally, any admission that gay men raped by straight men didn't want what they got. It is a theoretical posture purporting to give gays what male supremacy and its Closet have stolen from us:

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117. RICH, *supra* note 12, at 17.

118. Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 37 (1989).

119. *Id.*

120. Ann wrote that, "[u]ltimately, force and gender are parts of the same death-seeking process." *Id.* at 26. When you couple this with Simone Weil's observation of the kind of "force that does *not* kill, i.e., that does not kill just yet . . . [but rather has] the ability to turn a human being into a thing while he is still alive," you see why those threatened with this force feel they have little alternative but to "imitate nothingness in their own persons." SIMONE WEIL, *THE ILIAD, OR THE POEM OF FORCE* 4, 7 (Mary McCarthy & Dwight Macdonald trans., Pendle Hill 1983). We also see exactly what queer theory (and liberal theory) risks by invisibilizing force through a rhetoric of "choice" or "performativity." See generally Marc Spindelman, *supra* note 32, at 179–222, for an especially lucid look at how gender and death are equally generative principles for queer theory.

the capacity to choose sexual autonomy. What the queer theorists seem to miss is that they have provided no choice that the dichotomization of the Closet did not already offer: the choice between existential destruction and physical destruction.<sup>121</sup> To miss this is to miss much.

What “academented”<sup>122</sup> theory obscures, pornography makes plain. Gay porn mogul Chuck Holmes said that his legendary porn production company, Falcon Studios, presented characters “who looked like they wouldn’t ever do anything but be the best little fellows—the little businessmen, the good members of their community—and all of a sudden they’d just kiss each other, and all hell would break loose, and they’d just try to fuck one another to death.”<sup>123</sup> If in pornography straight men are actualized by the fuck, both in the films and in the application of pornographic values in the real world (which civil libertarian defenders of pornography encourage us to think of as two separate spheres), gay men are actualized too, each according to his purpose. What Chuck Holmes elucidates is the stark difference in what this actualization means—the difference in what the fuck means—for gay men submerged in pornography and pornographic culture, fucking is annihilation. And it is more than just self-annihilation; it is mutual annihilation, not merely suicidal, but homicidal.<sup>124</sup> So much for contingency; so much for choice.

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121. MacKinnon, *supra* note 53, at 654–55 (“Whose subjectivity becomes the objectivity of ‘what happened’ is a matter of social meaning, that is, it has been a matter of sexual politics. One-sidedly erasing . . . violation or dissolving the presumptions into the subjectivity of either side are alternatives dictated by the terms of the object/subject split, respectively. These are alternatives that will only retrace that split until its terms are confronted as gendered to the ground.”).

122. See MARY DALY & JANE CAPUTI, WEBSTERS’ FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE 184 (1987) (defining “academentia” as “*n* : normal state of persons in academia, marked by varying and progressive degrees; irreversible deterioration of faculties of intellectuals” (attributing Diana Beguine with the invention of “academentia”).

123. JEFFREY ESCOFFIER, BIGGER THAN LIFE: THE HISTORY OF GAY PORN CINEMA FROM BEEFCAKE TO HARDCORE 134–35 (2009) (quoting *Falcon: The Bird’s-Eye View, How Founder Chuck Holmes Built a Sex-Video Giant*, UNZIPPED, Apr. 13, 1999, at 16, 21 (internal quotation marks omitted)).

Ann Scales understood that death and mass murder were supreme pornographic values enacted by male supremacy on a worldwide scale. “Mount Rushmore is ecologically pornographic. . . . Mount Rushmore portrays nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do.” Scales, *supra* note 10, at 95. And then, with regard to the images carved into Mount Rushmore, she added, “Mount Rushmore might as well be sublimely ridiculous. As long as we are defacing, let’s add Edward Teller, Ivan Boesky, and Richard Speck.” *Id.* at 95 n.2.

124. In most heterosexual pornography, the assumption is that the used female bodies will survive. Thus, as Dworkin notes, “[r]uthless blame—‘you provoked me’—is used to encourage the individual and social silence which is the most hospitable environment for the continuation of conquest.” DWORKIN, *supra* note 74, at 24. In gay male pornography, by contrast, there is apparently no presumption of survival. As Marc Spindelman explains of gay sexuality, expanding on Catharine MacKinnon’s rendering of male supremacy into grammar (“Man fucks woman; subject verb object.”): “Man fucks man, man kills man.” See Marc Spindelman, *Sexuality’s Law*, 24 COLUM. J. GENDER & L. (forthcoming 2013) (manuscript at 198) (on file with Ohio State University, Moritz College of Law).

One wonders, given Janet Halley’s pornographic reframing of Joseph Oncale’s experiences, what she would have said to Konerak Sinthasomphone, a fourteen-year-old victim of Jeffrey Dahmer, who briefly escaped but was returned to Dahmer by Milwaukee police, despite his head

Gay men have our situation, generally on the bottom of male-supremacist hierarchy, propagandized as a choice, in the way that Ann notes—that our sexuality is a function of choice—but in other important ways too. When, as boys, we are tormented and abused by other males, we are told that “boys will be boys” and that if we are going to be so openly gay we should simply expect abusive treatment.<sup>125</sup> When we are sexually assaulted and sexually harassed out of our jobs as adults, we are told by bourgeois law professors that we wanted it and that we should choose to enjoy it. And the pornography in which and through which we are objectified is defended as a choice, too. In fact, we are told it is *our* choice, and when we refuse to accept that, we are told that it is somebody else’s choice to objectify us, which also happens to be these same somebodies’ free speech or art or fantasy. We are told that their choice to objectify us is more important than our desire not to be an object—not to be their speech or art or fantasy. When we are told that pornography and our objectification in and through it is an idea, or an expression, or a fantasy, we are not told that it is a process. We are encouraged not to see that pornography is a process of objectification. The objectification I am talking about cannot be admitted by most liberals or by queer theory or by other poststructuralist strains that claim to be “pro-sex” because something real is going on here in which choice—at least for those being objectified—is merely an illusion. In order to be objectified, one must first be a subject—a status in which choice is said to reside. But through the process of objectification the subject becomes an object, a thing defined always only by the potential use to which it can be put. Choice is alien to this frame. A chair does not choose to be sat upon. A car does not choose to be driven. They are objects existing merely as an extension of their use. They are made for this use. To be objectified for the purpose of sex, which is to be made for sex, which is to be made into a “sex object,” is to be in exactly the same place as the chair or the car.<sup>126</sup>

Thus it is not enough to say simply that pornography *depicts* gay men—those in pornography and by extension the majority of gay men who are overwhelmingly the consumers of pornography<sup>127</sup>—as wanting

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bleeding from the obvious wounds where Dahmer had attempted to drill holes in his skull with a power drill, because the officers believed they were witnessing typical gay sex gone slightly awry. *Milwaukee Panel Finds Discrimination by Police*, N.Y. TIMES, Oct. 16, 1991, at B8; GILREATH, *supra* note 24, at 200. Let’s imagine (as queer theorists like to do) that Sinthasomphone, a Laotian immigrant who spoke nearly no English, made it to Harvard and encountered queer legal theory in all its macabre grandeur. Should he have taken Halley’s advice to embrace this torture—experienced as sexually arousing by Dahmer, thus as sex—to the point of death? This is not a rhetorical question.

125. See *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996) (internal quotation marks omitted).

126. Accord MACKINNON, FEMINISM UNMODIFIED, *supra* note 20, at 173 (“A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself.”).

127. See GILREATH, *supra* note 24, at 170 n.3. Of the “multibillion dollar per year business” that is pornography, “revenues from sales of gay male pornography constitute approximately half of

to be humiliated, subjected, battered, possessed, ultimately sexualized—to *be* sex—because here, again, the conceit of choice is preserved. But an object exists only as a function of its use. Pornography is a process of objectification that, by definition, obliterates the choices of those pornographed to make it and those who internalize its meaning through consumption of its message.<sup>128</sup> We are made things. Things do not choose. Things are acted upon according to their purpose. To see choice here is an option available only to a very few—usually, it seems to me, an artifice contrived by the patriarchalists and those most useful to them for perpetuating the system, mostly academics and the criminally insane. One thinks here of the various theories of how the Jews, systematically slaughtered by the Nazis, went willingly to the ovens.<sup>129</sup>

Once objectification has been accomplished, the dominant succeed ontologically on their own terms: the force necessary to sustain the system is invisibilized. Pornography is a process by which heterosexuality remains compulsory, no less for gay men than for anyone else, since in gay pornography the images we see of gay sex are merely reflections of the heterosexual norm. The only fantasy involved is the fantasy that we choose any of it. You see, for all the queer theoretical posturing about role choice, “topping” and “bottoming,” fucker or fuck-ee, a sexuality locked in genderized hierarchy through eroticized dominance and submission permits no real choice. In pornography—on film and in everyday life—we do not choose a role; we are assigned a role. And as MacKinnon noted, “Gender is an assignment made visually.”<sup>130</sup>

Building on Simone Weil’s observation that force “is that *x* that turns anybody who is subjected to it into a *thing*,”<sup>131</sup> Ann Scales observed that “[t]he patriarchal combination of force and gender accounts for our frustrating experience of patriarchy as a house of mirrors as well as an imposing monolith. . . . It requires that men thingify women in order to be worthy to be thingified themselves.”<sup>132</sup> And anyhow, if being a “sex object,” or if being pimped on film or otherwise is such a great “choice,” one has to wonder why more straight men aren’t doing it. Or, for that matter, why more tenured law professors aren’t “choosing” it. As

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[the profit].” *Id.* Since estimates putting us at around ten percent of the total population are considered generous, this fact is really quite astonishing. *Id.*

128. See *id.* at 130 (“The oppressed person begins to wonder if he, indeed, may be that thing that his oppressors say he is. Dehumanization is a very effective means of changing someone into nothing because it ensures that the messages one hears from *others* about oneself eventually become the messages one hears from oneself about oneself, and that is all the more damaging.”).

129. See Samuel P. Oliner, *Jewish Heroes and the Wilhelm Bachner Story*, HIDDEN CHILD (Anti-Defamation League of B’nai B’rith, New York), 2012, at 7, 19–20 (discussing the myth of Jewish passivity during the Holocaust and noting that “[t]he distortion by anti-Semites, and even by some Jews, that Jews didn’t care about themselves or their family and that they walked passively to their death, is far from the truth. It is a falsehood that needs to be corrected.”).

130. MACKINNON, FEMINISM UNMODIFIED, *supra* note 20, at 173.

131. WEIL, *supra* note 120, at 3 (emphasis added).

132. Scales, *supra* note 118, at 26.

Ann Scales explained: “Being on the bottom of a hierarchy is not a pose, it is not a choice, there is nothing safe about it, and it only looks brave and defiant to those for whom its choicelessness and violation and dead-ended chances look romantic and elevated because they are not real.”<sup>133</sup>

Queer theory, with its celebration of sexual violence and death and its pointed rejection of law as a means to change, is anchored in this kind of unreality because it is detached from gay people’s experiences. This is not to say, of course, that those people postulating queer theory are not entitled to a claim to experiences that matter or are real, but only to say that queer theory proceeds from a posture that is swallowed by its particularities. Until very recently, gay people have not had much of a claim to choice or to the law. Instead, choice and agency and, indeed, law itself, have been only alien concepts. If it weren’t for the fact that queer theory comes primarily from those who have had a choice, or at least are now at the apex of choice, being mostly in the academy, the surrender posited by queer theory might be an understandable response to a lethally anti-gay culture. Instead it is a willful abandonment of law and the state by people who should know better. When law is thus abandoned, left to the devices and prerogatives of the already powerful, that power is consolidated and strengthened. How can it escape notice that in this environment the physical force to which Joseph Oncale was subjected, and to which countless women and gay men are subjected daily, *is the law* and, thus, *is reality*?<sup>134</sup> Queer theory is, in this respect, either remarkably cruel or its progenitors are really quite far removed from the realities most women and gay people face. Force and sexual abuse seem a lot less like a lovely academic game of charades when you are the one with the fist in your face.<sup>135</sup> As an opposite of queer theory, “A feminist theory and practice attempts to account for the fracturing of reality, and then to make reality whole again.”<sup>136</sup>

Ann once told me that what drew her to the law was the law’s ability “to make itself stick.” I have always found that explanation incredibly appealing. It is this power of the law to change circumstances and power realities that make it a necessary tool for gay liberation, not something to run away from or satirize. Several years ago, Jamie Nabozny, the gay plaintiff in *Nabozny v. Podlesny*,<sup>137</sup> the case establishing that same-sex sexual harassment of one student by another in school, when the school administration discriminates in its response on the basis of sexual orien-

133. Scales, *supra* note 39, at 1392.

134. Compare GILREATH, *supra* note 24, at 137–39 (discussing violence against gays generally), with *id.* at 199 (discussing the high degree of physical and sexual violence within same-sex relationships).

135. ANDREA DWORKIN, LIFE & DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 118 (1997) (“There’s nothing abstract about it. This is a war in which his fist is in your face.”).

136. Scales, *supra* note 118, at 52.

137. 92 F.3d 446 (7th Cir. 1996).

tation, could be the basis for a sustainable constitutional suit,<sup>138</sup> told me how much his victory in that case meant to him. What the law did for Nabozny was to give him back the hope his abusers had taken from him. It allowed him to go from a sullen, suicidal, defeated youth to the remarkably well-spoken, confident, witty grown man I met. It also gave him the drive to devote his life to other victimized gay youths. It gave him back his humanity. And what Nabozny's case did for gay children was to give them a tool to reclaim this same hope, without which there is no humanity. Any theory that purports to have as its focus the lives and hopes of the sexually marginalized can do nothing if it cannot do that. Right now I can hear Ann saying, "I'm [o]nly [g]onna [t]ell [y]ou [t]his [o]ne [m]ore [t]ime"<sup>139</sup>: A theory not good in practice is not a good theory.<sup>140</sup>

#### CONCLUSION

In April 2005, only a little before Ann delivered her critique of queer theory at Emory Law School, Andrea Dworkin died. In the last couple of paragraphs of that paper, Ann remembered her friend. It is hard not to see the parallels between these two women, both of whom were brilliant, tough, warm, empathic, and humble. Ann wrote:

Andrea Dworkin died the same week as Pope John Paul II. Millions of people mourned publicly for the Pope. I wished that there were a women's St. Peter's Square where those of us who loved and respected and owed so much to Andrea could gather to grieve. This will have to do.<sup>141</sup>

I am grateful that Ann is getting this Symposium, which she deserves. It's something that Andrea, to date, hasn't gotten, at least not in the United States.

Ann continued, with Andrea's memory as context:

There is nothing to be gained by portraying any particular experience of oppression as inevitable or primary. At the same time, there is much to be lost from refusal to recognize the regularity of some kinds of injuries. There is no reductionism or essentialism, nor anything intellectually passé about recognizing the suffering that women undergo as women, simply because they are women. Ditto for the injuries suffered by transgendered people because of that status, and by gay people because of that status, and by anyone else who isn't measuring up to the dictates of sacred and narrow institutions. We should always engage in debates about the difficulty of grounding

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138. *Id.* at 457–58.

139. Scales, *Disappearing Medusa*, *supra* note 20, at 36 n.10.

140. See MacKinnon, *supra* note 50, at 13 ("It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?").

141. Scales, *supra* note 1, at 409.

normative claims, and the dangers of normativity being transformed into normalization. Those disputes will never be over. In the meantime, however, we should put more energy into opposing demonstrable instances of injustice.<sup>142</sup>

I can't really think of a better way to close this Essay, except to remember a facet of Ann's life that she definitely would have wanted remembered: Ann never let anyone forget that she was a Westerner—an Okie—a real cowgirl. As a young woman, in fact, she was a successful rodeo rider, earning her among her close friends the honorific title "Rodeo Gal." These experiences gave her an authentic pioneer spirit—a real freedom of mind and spirit that made all of us who came close to her a little freer. Certainly, experiencing her freed me to say all of this. Perhaps now Ann is freer still, for as Ann's dear friend and mine, Jane Caputi, recently reminded me, energy does not "pass away," as we like to say, but is simply transformed.<sup>143</sup> So, in the words of Ann's beloved Kitty MacKinnon, "precious rodeo gal, ride on."<sup>144</sup> As for me, I'll keep on doing my best to live what Ann taught me, which is to say: I'll see you on the barricades, which is exactly where Ann wanted us to be.<sup>145</sup>

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142. *Id.* at 409–10.

143. See Jane Caputi, Professor, Fla. Atl. Univ., Remarks at the University of Denver Sturm College of Law Symposium Honoring the Work of Ann Scales: Ann Scales on the Patriarchal/Pornographic Paradigm, with Meditations on the Ongoing Medusean Makeover (Mar. 30, 2013).

144. E-mail from Catharine MacKinnon to Ann Scales (Jan. 12, 2009, 6:58 AM) (used with permission).

145. These are the words with which Ann closed her remembrance of Andrea Dworkin. Scales, *supra* note 1, at 410 ("See you on the barricades, where Andrea would want us all to be.").