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Janet Halley and the Art of Status Quo Maintenance

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Janet Halley turned herself over the past few years into one of the most avid critics of campus rape feminist activists on university campuses. Activists pushed for the reformulation of university investigative rules to shift burden of proof from the accuser to the accused. Halley argued that such rules were procedurally unsound, bad for the boys, bad for sex, and charged that the feminist activists’ agenda was influenced by “radical feminism.” Halley’s arguments on campus rape were consistent with her long-held “queer theory” with its anti-feminist deregulatory drive. In this article I argue that Halley’s “Queer Theory”, which she developed by critiquing Catharine Mackinnon’s work with a view to giving the “sex positivist” strand in legal academia the dignity of “fancy” theory, in effect stands Mackinnon on her head. It is Mackinnon flipped. By flipping Mackinnon theoretically, Halley’s “Queer Theory” turns into an idealist proposition that postulates that it is feminism that invented sexual injury and that duped women into turning what were innocuous facts into causes for protest and outrage. If women thought of the world differently, Halley suggested, sexual assault would go away!

Flipping Mackinnon’s equality approach when it comes to legal rules, takes Halley to the right of “consent” where Mackinnon had gone to its “left”. By mirroring Mackinnon’s critique of “consent” except from the right, Halley’s theorizing echoes a sexual libertarian agenda without/before feminism. It defends male sexual entitlement avant liberal feminism.

Ideologically, such theoretic formulations along with the bundle of rules they advocate are designed to keep pressure on ruling liberal feminism from departing in its understanding of sex from the “pathology” model whereby all men are good except for those who are “pathologically” violent (classical liberalism) in the direction of understanding sexual entitlement as part of the social construction of maleness. By clamoring from the right of liberal feminism, mainstream liberal feminism is kept in check.

I also argue that Halley brings into crisis the careful formulation of gender/sex of her comrade-in-arms, Duncan Kennedy, who had dubbed himself in the nineties as a pro-sex feminist ally by splitting the difference between radical and liberal feminism in response to the rising influence of radical feminism within the forces of the academic left. We need more rules in the books to stop “male sexual abuse” and to enforce extant ones more seriously, Kennedy had argued meeting Mackinnon half way. In 2000, Halley accused Kennedy of “sucking up” to radical feminism, charging in response that women could very well be “subordinating” men sexually by denying them sex.

Kennedy signed the two petitions Halley circulated at HLS protesting the campus feminist activists showing the limit of the “more” of regulation that he is willing to tolerate. Apparently, the pro sex Kennedy rattled swords with the feminist Kennedy and the former won. In this case, the alliance with Halley seems to have dragged Kennedy from the left of liberal feminism to its right.

In order to explain the various elements of Halley’s theorizing on sex/gender and show their underlying pre feminist “classical liberal” orientation, I situate it comparatively with the theories

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on sex/gender prominent within the ranks of the non-liberal academic left. I end the article with offering my critique of Halley’s theoretic excursions and propose that Halley is guilty of five different kinds of “misrecognition”: historical-advocating a “sex positive” agenda in radically sex positivist times; sociological- reading women’s sexual injury through the eyes of an “uninjurable” promiscuous gay man advocating a radical sexual ideology; theoretical-oscillating between an antagonism to the very idea of sexual injury and proposing a neutral proceduralist approach to identifying it; political-targeting radical feminism with her critique while smashing liberal feminism on the way and ideological-attempting to ally her sexual libertarianism with the left when the ideological universe it travels is “classical liberalism” which the left has defined itself as its most pronounced critic.

**Introduction**

As I write this introduction, the #MeToo campaign on social media inviting women to narrate their experiences of sexual assault has already swept the globe, causing men célèbre or not, to deny, then apologize, then resign, then risk a lawsuit or prosecution, all in a sequence approaching a script. Women of different ages, races, ethnicities and nationalities stepped forward, sharing personal stories that struck a cord in most women. Each story had a similar narrative structure: admittance of reluctance (“I sat on this story for a while”), underlying emotion (“I suffered in isolation”), sense of empowerment (“but call to action by other women turned my depression into outward rage”), and a courageous act of defiance (“enough is enough”). To anyone watching, the fact that the truth of “femaleness” was proving global, only begged the truth of feminism as universal. Feminism, in so far as women of my generation were

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concerned, had never seen a better day.

This was not always the case. In fact only yesterday it seems, the various factions of the academic left that had taken trouble to write about feminism denounced its universalist claims, especially so by the women of that left. The anti-imperialists decried its universalist claims as, well, imperialist; the multiculturalists decried its universalist claims as “Eurocentric;” the anti-racists decried its universalist claims as white; and the post-modernists—attached to their localism creed—decried its universalist claims as, expectedly, “universalist.”

Feminism and its status aside, these various factions of the left have themselves been of late suffering a crisis of confidence in the claims they had filled academic journals with for the past couple of decades or so. Withdrawal of the US empire and globalization of the problem of terrorism left the anti-imperialists with a lot

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3 For a definition of “women of the left” see, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 33-37 (1970) (outlining several subsets of “políticos” which exist between conservative feminism and radical feminism: “[t]he políticos of the contemporary women’s movement are those women whose primarily loyalty is to the Left. (“The Movement”) rather than to the Liberation Movement’s Proper. Like the políticos of the Progressive Era, contemporary políticos see feminism as only tangential to “real” radical policies, instead of central, directly radical in itself . . . .”), a definition that by large holds true till today.


of paranoia to parade and little cause to show for it as empire withdrew to the benefit of regional powers—long imagined as “victims” in the literature of the anti-imperialists—yet wreaking unspeakable destruction, one befitting imperial behavior. The pro-Islam multiculturalists find themselves struggling to dissociate from the universalist Islamist claims of ISIS, the state that implemented Islamic Law in its most “perfect’ form and the embodiment of the multi-culturalists’ dream of the otherness of the other in its most anti-Westernness. The anti-racists find themselves struggling with the impact of vast economic inequality sweeping in its wake all races, begetting a Sanders and a Trump in renunciation of the pro-race Clinton. And the post-modernists struggle to distinguish their “irrationalism” and its “all political” creed from Trump’s irrationalism and “it’s all political folks”.

I have written before critiquing the anti-imperialists⁸ and the multi-culturalists⁹.

In this paper, I wish to take on the post-modernist left¹⁰ as represented by the

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¹⁰ I am referring to the post-modernist left that built a base at HLS graduate program under the auspices of Duncan Kennedy and his ex student David Kennedy. The brilliance of the former and the fundraising and organizational skills of the latter combined to create an academic scene, mostly among foreign graduate students, that worked at “academizing” the post-modernist strand of long dead CLS, while obscuring the other strands. Janet Halley joined the scene in 2000 when she joined the HLS faculty. Her brand of anti-feminism which she dubbed “Queer Theory” slowly became the official line of the “scene” displacing the loose alliance with radical feminism.
writings\textsuperscript{11} of Janet Halley at Harvard Law School (HLS) and her colleague and 
comrade-in-arms Duncan Kennedy. I specifically would like to take on their 
 writings on feminism. Both Halley and Kennedy wrote to critique feminism from 
a “sex positivist” perspective, and both have put to use the post-modernist 
theories popular among their generation of academics on the left in doing so. 
While their political position on feminism differs—Kennedy offering himself as a 
pro-sex ally of feminism and Halley sworn to its destruction lock, stock and 
barrel\textsuperscript{12}—they nevertheless operate within the same theoretic universe (the 
critical legal left), share students for supervision, consider themselves ideological 
allies—especially so on the question of Title IX—and, as I will show below, 
Kennedy’s position proves so “fragile” in its articulation of its pro feminist 
allyship (as the young activists like to say) that it easily collapses into that of 
Halley’s.

\textbf{Title IX}

The recent battle over Title IX, which Halley waged at HLS, seems a good 

\footnotesize{represented in Duncan Kennedy’s “Sexy Dressing” article (discussed below) that Kennedy 
offered his supervisees in the nineties (including me). Halley pushed Kennedy’ difference splitting 
strategy into a crisis and he conceded to her “leadership” of the “girls” - referred to by the 
Kennedys as “Janet’s girls” by sending “feminist” students her way to share in supervision. Halley 
worked quite efficiently on turning the feminist students’ animus away from men and for 
feminism itself. Soon enough the feminist became “queer”.

\textsuperscript{11} Lama Abu Odeh, \textit{Secularism’s Fault}, 2 FEMINIST DISSENT 148 (2017); Lama Abu Odeh, \textit{Book 
and my review of Wael Hallaq’s The Impossible State

\textsuperscript{12} John Sutherland, \textit{The Ideas Interview: Janet Halley}, The Guardian (Aug. 06, 2006), 
https://www.theguardian.com/world/2006/aug/08/gender.academicexperts.}
occasion to take on their writings, especially as this battle catapulted Halley into the public square, interviewed in publications like the NYTimes\textsuperscript{13} and mainstream liberal media outlets like NPR,\textsuperscript{14} her views represented by her colleague protégé Professor Jeanne Suk in various prestigious publications like the New Yorker\textsuperscript{15}, as well as journalist Emily Yofee.\textsuperscript{16} Halley proved one of the most avid and outspoken opponents on the left—joined by libertarians and conservatives—of the revival of Title IX by the Obama administration in an attempt to curb the occurrence of sexual assault on university campuses. She was nonplussed if not altogether pissed with the feminist student activists on her campus who were, like many others across university campuses, pushing for more serious consideration by the school’s administration of rape charges by students. She circulated not one but two petitions to the HLS faculty (both signed by comrade Kennedy)\textsuperscript{17} to show her disapproval and got a good thirty or so people to sign, mostly male, and most in their declining years. Halley seemed


incredulous that the students hadn’t received the memo that “sex positivism”

had won way back then when the sex positivists won the pornography wars

against the radical feminists and sexual joie de vivre was the order of the (gender
day). If you were fucked in drunken stupor after a long night of fraternity

partying, well, you just called it a “bad night”. She charged the activists with

reviving radical feminism, which she had spent her legal academic career
denouncing, somewhat obsessively, in the figure of Catharine Mackinnon. 18

Standing up to the activists was a ballsy act on the part of Halley. Campus rape

activism found ears of sympathy in the Obama administration, which soon put its

(federal) money where its mouth was,19 and consequently the liberal “public

square,” sensitive as it was to the liberal president. But ‘ballsiness’ was never

something Halley lacked. Ever since she stormed legal academia with her article

on “Sexuality Harassment” in 2000,20 she had taken the very ballsy position of

calling for the deregulation of all sexual harassment in the workplace because

such regulation was, she declared, bad for “queers.”21 If in the feminist

narrative, regulating sexual harassment in the workplace was the

commemoration of girls’ long struggle in the courts against boy employers’

18 Bazelon, supra note 12.
https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
20 JANET HALLEY, SEXUALITY HARASSMENT, IN LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet
Halley, eds. 2002) [hereinafter Sexuality Harassment].
21 Id. at 98-99 (“Homosexual panic . . . can be extremely dysphoric. Some people might even say
that having a homosexual panic experience at work was unwelcome and sufficiently severe to
alter the conditions of their employment and create an abusive working environment. Under
Oncalse, they can sue for that.”).
demand for sexual favors in return for promotion (quid pro quo) or poisoning the office with demeaning stereotypes and sexual innuendo (hostile work environment), then for Halley, so-called feminist victories were rules thrown like pebbles in the path of gay cruising in the office. Title IX was therefore a battle she relished, one that she had been charging herself up for, and her small circle of (foreign graduate) fans, for some time.

Halley's theoretic teeth were sharpened through repeated and obsessive attacks on the work of Catharine Mackinnon. It was through those attacks that she articulated her queer line. It wasn't strange at all then that she, mistakenly, identified the student activist agenda as "Mackinnonite." Invoking Mackinnon was invoking a long-term obsession of hers, a person whose privileged position

\footnotesize{22 Id. at 98 ("[T]he regulatory project would only make the problematic of wantedness more covert . . . After all, it’s not just the perverts who engage in scenes like those I’ve just affirmed as good who seek incoherent experiences in sex: I think most of us experience sex (when it’s not routinized) as an alarming mix of desire and fear, delight and disgust, power and surrender, surrender and power, attachment and alienation, ecstasy in the root sense of the word and enmired embodiment. Essential elements [of this] are enacted, I imagine many more sexual relationships that you would guess just by looking around the boardroom or seminar room, and the edgy experience of unwantedness in sex is probably cherished by more people than are willing to say so.").

23 Id. at 92 ("The Mackinnon brief thus maintains the ontological supremacy of the male/female model by simultaneously evacuating sexual orientation of any distinct components and flooding it with gender understood as male superordination and female subordination. This is, I think, a big mistake . . . This formulation causes the brief to argue that the homosexual orientation of the “perpetrator” [may be relevant.] Gay rights organizations have fought to close this route off ever since circuit courts first opened it, however, because it is also a quick and easy route to homophobia . . . ."); see also Bazelon, supra note 12;

24 There is no evidence that campus rape activists were Mackinnonite. While they tried to push the “consent standard” to the “affirmative” type, their approach is too “consent” based to be Mackinnonite. Moreover, those activists saw Mackinnon’s position on sex as “too prudish”. They were “sex positivist,” gender bending feminist activists whose agenda and discourse is unique to their generation that synthesizes the old battles within feminism (sex positivist vs. feminist) rather than allies itself with either strand. See generally VANESSA GRIGORIADUS, BLURRED LINES: RETHINKING SEX, POWER, & CONSENT ON CAMPUS (2017).

25 Yoffe, supra note 10.}
as a theorist within the ranks of the radical legal left (the non-liberals) was indisputable, and Halley’s project was to offer an alternative theoretic arsenal to displace that of Mackinnon’s within the ranks of this left. In short, Halley wanted to unseat radical feminism as articulated by Mackinnon and replace it with “Queer Theory” as the primary source of theory on how to understand gender and sex in legal theory. Her doctrinal project was to push for the “de-regulation” of feminist injury-based rules in the name of “sexual pleasure”.

Creating an oppositional relationship between the two, raising the stakes for the latter (the pleasurists=the libertarians) in the presence of the former (legal regulation of “sex”=the egalitarians) was her (formalist) strategy. Halley was largely unsuccessful in pushing her project in legal academia, if footnotes in law review articles are to go by, seemingly unable to line up the camp that would

26 The left of legal academia has yet to produce a single work of theory that matches in its brilliance the first two theoretic pieces on feminism and the state that Mackinnon wrote in 1982 in *Signs: Feminism, Marxism, Method and the State: An Agenda for Theory, & Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*. I will quote Duncan Kennedy in a private conversation: “When those two pieces first came out, we (boys on the left) felt our balls busted.” I can see why: nothing Kennedy himself has ever written equals in its brilliance to those two pieces. The two pieces were then turned into a book, *Towards a Feminist Theory of the State*, and were heavily critiqued by feminists before others. I disagree with the bulk of these critiques (see below). I see those two pieces as mines of theory to dig for inspiration in representing gendered relations in any corner of the globe. The core animus embedded in her views on gender appeals to me, and these days, I see it everywhere. Feminism is only possible it seems to me when women are willing to deploy this animus to men to their advantage, fearlessly. MeToo is such a historic moment even though it departs in its understanding of “consent” (left of liberalism) from that of Mackinnon (critique of consent).

27 I call this position formalist because it mimics the right-wing argument on the market in which the right argues that regulation of the market aimed at equality curbs the freedom of entrepreneurship. The leftist response to this right-wing argument has always been a corrective: the comparison is not between the freedom of some (entrepreneurs) and the equality of others (workers) but between the freedom of both or the “equality” of both. Halley’s doctrine is formalist and right wing in the sense that it insists that regulation for the purpose of women’s equality curbs sexual freedom. And of course, the proper answer is that the question of feminist regulation is about whose sex is it that should prevail, mine or his? I will go for mine. Halley, by attacking regulation, writes for “his” whether by design or by default.
have been her natural allies, the sex-positivists of yesteryear. Her devotees proved a small circle of graduate students at HLS that circulated within the rarefied scene of the (CLS) post-modern left developed, since the early nineties, through the deliberate recruitment efforts of the Kennedys (Duncan and David) of (mostly foreign) graduate students at HLS. Till Title IX surfaced that is and she suddenly became a public figure. Halley’s IX battle came to fruition when Trump’s Secretary of Education, Betty Devos, withdrew the federal government threat.

I will divide this article into three sections. Section I describes Halley’s obsessive attacks on Mackinnon. I argue that Halley’s critique of Mackinnon in effect stands Mackinnon on her head. Queer Theory as understood by Halley turns out to be Mackinnon flipped, its lines developed through aping Mackinnon except in the other direction as a form of “reaction formation.” Flipping Mackinnon takes Halley to the right of “consent”. Section II offers a comparative exercise of the theories on gender/sex by Catharine Mackinnon, Judith Butler, Duncan Kennedy and Janet Halley. I argue that Kennedy splits Mackinnon’s line with liberal feminism on law while aligning himself with post-modernist theories on culture and “resistance” (Butler’s) and Halley turns Butler ‘s gender indeterminacy into radical gender voluntarism (I am the gender I choose) while pushing Kennedy’s difference splitting with radical feminism into a crisis. The exercise includes

28 I was one of them.
comparing the ideological positions of the theorists: radical (Mackinnon), left liberal (Kennedy), radical libertarian (Halley)); the theoretical traditions they delve into: Marxism (Mackinnon), post-modernism (Kennedy and Halley), post-structuralism (Butler); the relationship between gender and sex they espouse: (sex is gender simpliciter (Mackinnon), gender is sex simpliciter (Halley), splitting the difference between gender and sex (Kennedy); and the doctrinal approaches they adopt: left of consent (Mackinnon), right of consent (Halley). Through comparison, I argue that only Mackinnon’s social theory with its pronounced social conflict (animus) approach offers an agenda with transformational horizon that is worthy of leftist embrace. The post-modernist/structuralist approaches of Butler, Kennedy and Halley, by rejecting social theory, reproduce classical liberalism on the one hand and limit the horizon of change to cultural reinterpretation on the other. The political consequence of such theoretic pronunciation is ambiguous at best, reactionary at worst. In Section III, I argue that Halley’s approach to Title IX commits a series of “misrecognitions”—theoretical, political, sociological, historical and ideological. I conclude by arguing that it is “liberal feminism” alone (not radical feminism) that can be ascribed the quality “governance”-“Feminist Governance” and that liberal feminism itself is a compromise formation between the equality principle and the liberty one. I further argue that the MeToo movement is an attempt to push this compromise formation as it has settled in our present day to the left, to
become more egalitarian. Any push to the right of this formation, as Halley does, serves to preserve the status quo that young activists are rebelling against.

Section I

Oh, Catharine

For much of her legal academic career, Janet Halley went after Catharine Mackinnon, and she did so rather obsessively.\(^\text{29}\) She read the latter’s “texts closely,”\(^\text{30}\) as those like Halley’s generation trained in the humanities were taught to do. She offered her critique of Mackinnon and reproduced it in various guises over a range of law review articles\(^\text{31}\). And as she did, she turned her, or at

\(^{29}\) \text{JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 326-40 (2006) [hereinafter Split Decisions].}

\(^{30}\) \text{Id. at 38-39.}

\(^{31}\) \text{Janet Halley, \textit{Sexuality Harassment in Directions in Sexual Harassment} 182, 191 (“There is a third warning note [to the MacKinnon brief], and it sounds like the last gasp of a small yellow bird.”), 192 (“Here is what I think the problem with the male-female model emerges for analysis. It is just so complete and so settled. Men are over there with masculinity and superordination; women are over here with femininity and subordination.”); Janet Halley, \textit{Queer Theory By Men}, 11 Duke J. Gender L. & Pol’y 7, 11 [hereinafter Queer Theory By Men] (“It was not too long before MacKinnon significantly departed from [her earlier] claims . . . [b]y the mid-1980s she claimed to know many, many things, and to know them because women’s point of view had disclosed them to her without distortion.”), 18 (cultural feminism and Bersani are engaged in serious combat over the value of degradation and human erasure in sex: cultural feminism says these have been overvalued because they have been allocated exclusively to women; Bersani replies that they have been vastly undervalued through their association with women. But Bersani and cultural feminists agree, it seems, that the combat is waged on the field of “value”—a field which MacKinnon pushed over and beyond the horizon of her understanding.”); Janet Halley, \textit{Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict}, 9 MELB. J. INT’L L. 78, 114 (2008) [hereinafter Rape in Berlin] (“ . . . [W]hat is women’s suffering? What is this thing that should, we all agree, be visible? One, admittedly partial, way into that question is to ask, what is rape to women who have been raped? American feminists involved themselves in the Balkans situation because they thought they knew: the women were silenced and needed IHL to help them find their voice as raped women. But not all the women they sought to represent recognized themselves in the lens provided by American feminist activists.”).}
least she tried, into a cause célèbre again, the second time around (or is it the third?), long after the pornography wars\(^3\) of the eighties had died down—their protagonists moving on to other causes or just getting old or even getting married—and long after anybody could remember whether it was Mackinnon or someone else who had said “intercourse was rape!” In fact, Halley’s critiques came long after radical feminism, indeed feminism proper, had turned into a non-event in US academia: women’s studies departments having turned from “feminism” as their organizing discourse to “gender and sexuality” under the heavy influence of Judith Butler’s post-structuralist theorizing on sex/gender, herself one of the fiercest critics of Mackinnon.

It is not an exaggeration to say that Halley saw Mackinnon everywhere. And every time she noted Mackinnon’s shadow (and she noted it all too often), she protested vehemently. Mackinnon was bad—really bad, Halley never tired of repeating—she was really, really bad for sex.

Indeed, she saw her behind every feminist regulatory gesture that touched upon sex, even when such regulatory gestures were a serious compromise on Mackinnon’s ideas\(^3\). She went after her in the figure of other feminists, seeing them as Mackinnon’s surrogates, even as they split the difference with


\(^3\) Rape in Rome
Mackinnon’s ideas. She even went after her—or rather her surrogates—alert and vigilant as the latter crossed the borders of the US to the international seeking to criminalize rape at war, recording “every step they make, every breath they take,” and screaming, “Foul! Feminists want to universalize feminism!” Read Rape at Rome and you have a veritable stalker at hand. Read Rape in Berlin, and Halley’s critique of Mackinnon reaches a stark raving mad pitch!

All this “stalking” wasn’t just for the public good, for there was a hint or two of something personal. Halley was a “dominance” feminist in her youth, as she likes to say in press interviews, but then she was no longer. And you know it was personal when the charge directed is one of “invaginating” institutions with their “sword” the law! And it doesn’t help that Mackinnon has taken up the strategy of never responding to Halley’s insatiable appetite for attacking her.

35 Find quote
36 Halley incredibly proposes that criminalizing rape at war was a bad idea for the pragmatic reason that if some men knew they would be prosecuted for rape they wouldn’t be available for entering into sexual bargains with their potential victims of rape such as sparing the victim rape by many in exchange for regular rape by one! See Rape in Berlin, supra note 34, at 116. Equally incredibly, she proposes in this article the term: “she let the men rape her”- note 47
37 Bazelon, supra note 12.
38 Rape At Rome, supra note 21, at 4 (“In particular, we recognized the complex way in which NG formations invaginate the State with non-state elements and their porosity to NGOs aiming to advance specific social interests. Feminism has grown up along with NG, and surely not accidentally, has co-invented its most salient features.”).
39 Rape at Rome, supra note 21, at 5 (They [feminists] seek to wield the sovereign’s scepter and especially his sword. Criminal law is their preferred vehicle for reform and enforcement; and their idea of what to do with criminal law is not to manage populations, not to warn and deter, but to end impunity and abolish.”), 65 (“[I]ndividual rape charges would drop the Damocles sword of IHL enforcement on purely individual wrongs and harms.”).
Halley’s thesis on Mackinnon is simple—in fact, shocking in its simplicity. You wouldn’t think so, of course, reading Halley’s cryptic prose, interspersed as it is with fancy French phrases and endless anthropomorphisms common among the literature professional class. But one way of thinking of Halley’s critique is as a form of reaction formation to Mackinnon’s thesis. “Reaction formation” is one among many defenses that Sigmund Freud had identified, and Wikipedia offers a crisp definition of it that I find helpful:

“Reaction formation is a defensive process in which emotions and impulses which are anxiety producing or perceived to be unacceptable are mastered by exaggeration of the directly opposing tendency.”

I am not saying that behind Halley’s unrelenting attacks on Mackinnon an undying love for her lurks (though that may very well be true); rather, what I am saying is that Halley’s theorizing takes its cue, piece for piece, from Mackinnon’s and could best be described in its articulation, in theory and in politics, as an “exaggeration of the directly opposing tendency.”

Another way of making the same point, and drawing from the history of Marxism

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40 Reaction Formation, WIKIPEDIA (last visited Jan. 01, 2018), https://en.wikipedia.org/wiki/Reaction_formation. As it happens, Freud’s favorite example of reaction formation is the homosexual who is a homophobe.
this time, is to think of Halley’s theorizing as the perfect idealist gesture in which Mackinnon is stood on her head. For Mackinnon, gender is one of the social axes that create conflict in society (class being another), which women (like the proletariat) need to collectively struggle to overturn; it is the regime that “screws” them.41 For Halley, gender and all its proclaimed injuries are fictions, “just in women’s heads,”42 an expression of a bad-for-sex ideology propped up by “Feminist Governance”43 which will simply go away if women stopped thinking that way!

More specifically, Halley attacks the feminist thesis by performing a simple flip, the goal being to radically undo the (radical and partly liberal) feminist association of sex with injury that had been the object of decades of feminist political mobilization. Halley doesn’t seek to qualify the association or bring nuance to it but to undo it altogether.

The feminist proposition has been that women suffered injury in fact that was left unnamed until feminism came. Feminism gave women’s injury a name and a politics that mobilized women to ask for change. Feminism named the regime it sought to change “patriarchy”/male domination (or “gender discrimination” in the liberal version).

41 Its materiality lies in the “sex taken.”
42 See generally Rape At Rome, supra note 21.
43 Split Decisions, supra note 19, at 20-22 (“In some important senses . . . feminism rules. Governance feminism. Not only that, it wants to rule. It has a will to power. And not only that, it has a will to power—and it has actual power . . . .”) (original emphasis).
Halley’s flip goes like this: there is no sexual injury in fact; there is only injury in (according to) “feminism.” When women complain about sexual injury, they lie, they manipulate, they act in bad faith; therefore, our ontological (legal) posture towards women has to be radical suspicion (in this paranoid vision women are complaint happy).44

In lieu of patriarchy, or discrimination in the liberal version, there is “Feminist Governance,”45 Halley claims, an all-encompassing regime of hegemonic phallic feminists that have managed to "invaginate" our institutions and minds "with law their sword."46 If (radical) feminism complicates the category of consent to argue for legal regulation that would cover cases that don't look like non-consensual sex on their face, Halley complicates it in the other direction by reinterpreting traditional rape as consensual sex. To the radical feminist (not Mackinnon’s but Dworkin’s) "intercourse is rape" she counters that rape may very well be

45 Janet Halley et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J. L. & GENDER 335, 340 (2006) ("[Governance Feminism] is, I think, an underrecognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want--far from it--but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power."). While Halley has a good, elegant definition of “Feminist Governance,” I find that the concept’s affective life is indistinguishable from the conservative “Feminazis”: the feminist who is so opposed to sex she is happy to cut your dick.
46 See supra note 38.
intercourse. Halley has incredibly coined the phrase "she let the men rape her" (interestingly this quote doesn’t seem to find its way to the NY Times).

To the radical feminist thesis that sex is what men take from women thereby subordinating them, she counters the thesis that when women withhold sex from men, they are, wait, not making them horny, pissed, unhappy; rather they are subordinating them. In other words, sex is what women take from men (by depriving them of it) thereby subordinating them!

What needs to be done, according to Halley is not put rules in place that protect women from “male sexual abuse” (in fact she argues for getting rid of many of those rules that we do have in place) but convince women to change their

47 Rape in Berlin, supra note 34, at 106 (“During the first days of occupation the Woman and her first ‘wolf’ had persuaded the widow to let herself be raped by a man so violently threatening that he filled everyone with dread.”), n.119 (Several readers have balked at my locution here: she let herself be raped? Rape is coerced, by definition, they say; coercion is inconsistent with permission; no one can let herself be raped. But see for yourself if that protocol actually helps you to understand the passage in which the widow both suffers coercion and decides . . . If you don’t have a concept of coerced-but-consented-to rape, you can’t call this a rape. As we’ve seen, feminists who seek to eliminate the consent defence do so on a theory that the widow’s choice was itself coerced and not in fact a choice--but the Diary strongly suggests that she, and everyone else involved in the decision that she should be raped for the common good, did decide. Whether you therefore want to criminalise it as rape--in particular whether you want to give it the same legal treatment as entirely coerced sexual contact--is entirely another question.”).

48 Queer Theory By Men, supra note 30, at 36-37 (“. . . [I]f heterosexual men experience women’s sexual autonomy as a threat—not only their power to deny men something they want very much, but also their ability, in providing it, to humiliate, disorient, and abject them—then there is a second tolerated residuum of risk to take into account: men’s. . . . [W]omen can secure a bargaining advantage whenever men want them to produce the effect of bold, indifferent female sexual autonomy and are willing to make concessions to get it. On this side of the ledger, if Kennedy had filled it in, he would have said that men not only come into bargaining with women with a distinct source of bargaining disadvantage, but they also seek complex erotic goods, so that they might, over the full range of bargains that they make with women, find themselves in subordination.”)
minds, to get them to snap out of feminism the vicious governance regime that has implanted injury in their heads. Injury remember, has no factual reality according to Halley; it's all in women's heads. There is no sexual injury that Halley saw that ever impressed her: not sexual harassment, not rape, not even repeated rape.

You see the “reaction formation?”

*Inducing Ambivalence in Others*

Halley’s writing could be seen as the ideological descendant of a strand of writing called “sex positivism.”⁴⁹ In fact, I think that Halley’s aspiration is to offer the “sex positivism” of legal academia all the resources of “queer theory” as such theory was developed in the humanities department.⁵⁰ In other words, to offer their “liberalism” the prestige of fancy theory, very much the way Catharine Mackinnon offered feminism mired in “discrimination talk” the prestige of social theory developed by the leftist boys with the Marxist education.

The “sex positive” position had historically been antagonistic to Mackinnon as “bad for sex” and had opposed her in her anti-pornography wars.⁵¹ Those who populated this strand, and in so far as they sought to express their “sex

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⁵⁰ *Id.*

⁵¹ *Id.*; see also Bazelon, * supra* note 7.
positivism,” had a special affinity with liberal theory and they paraded concepts such as women’s “agency,” “consent,” and “contract” to counter Mackinnon’s Marxian-like critique of liberal “consent,” namely that against the background of gender hierarchy, consent was meaningless. And precisely because of this camp’s affinity with liberalism, they found the limit for their love of sex in cases where coercive sex was concerned.

By all accounts, those “sex positivism” advocates should come all out for Halley and declare themselves her undying fans. Sadly, they appear absent.

By aping Mackinnon through “exaggeration of the directly opposing tendency,” Halley induces ambivalence in this strand within feminism. She does so because she bulldozes in the wake of her theorizing, even liberal ideas about violence as the limit of consent. Halley uses up a lot of ink to bypass violence against women, by either seeing it as in women’s heads, or not so bad—for why is rape

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52 See generally Sex Wars, supra note 48; Queer Theory By Men, supra note 30, at 13 (“[] MacKinnonite feminists and cultural feminists began in the early 1980s to converge on some fairly specific targets of activism--rape and other forms of direct violence, pornography, intergenerational sex, sex between social unequals (for example, boss/secretary, teacher/student), sex in public-- as leverage points for the de-subordination of women.8 They formed important alliances with social and religious conservatives morally opposed to these practices, and together these allies made significant progress in articulating and enforcing legal sanctions against a wide array of sexual relations. This simultaneous turn “to the state” and “against sex” broke alliances between MacKinnonite and cultural feminists on the one hand and radical, sexual-liberationist feminists on the other. The result was the “sex wars.” In them, the radical, sexual liberationist feminists precipitated abruptly and with great energy out of male/female-model and cultural feminism, and, looking back to the radical feminist sources from which MacKinnon's early work emerged, formed a distinct “sex-positive” feminism specifically in struggle with Late-Mackinnonite and cultural feminism.”).
different from a slap on the face?\textsuperscript{53} Or that it is open to semiotic interpretation\textsuperscript{54}, or that it is something women lie about, or that there are things worse than violence against women, surely. By taking aim at violence and coercive sex, Halley negates the liberalism in the sex positivist and so induces her to silence.\textsuperscript{55}

Halley then is aping Mackinnon “in the opposite direction” in another way, perhaps unintentionally. Mackinnon herself had historically induced ambivalence in liberal feminists who had struggled throughout Mackinnon’s legal reform career (on sexual harassment law and rape law) on the question of how much of reform and in what instances exactly to support her on. It was Mackinnon’s posture, which as we saw Halley reverses, that much of consent is “coercive”, which had induced this ambivalence.

So, one way to look at the Mackinnon/Halley “duel” is as an encounter between two positions each articulated in maximalist fashion: in one, much of consent is coercive (Mackinnon), and in the other, much of coercion is consent (Halley). The maximalist quality of these two alternative positions are as much a function

\textsuperscript{53} A private conversation I had with Halley
\textsuperscript{54} Queer Theory By men, supra note 30, at 44-48. Halley engages in a discussion defining the “completely reversed image” of the subordination/domination paradigm, asking: “Can feminism acknowledge that women emerge from the court's decision with new bargaining power in marriage and a new role as enforcers of marital propriety? And can feminism see how costly this “bargaining endowment” might be to women, who can tap into it only if they find the sex in question painful and humiliating? Can feminism read the case as male subordination and female domination--and still as bad for women?”
\textsuperscript{55} Even more paradoxically, Halley’s furious discrediting of women’s claim of being victims of non-consensual injury makes her real adversary in fact liberal feminists, and yet “cross-eyed-ly” she directs most of her ire at Mackinnon in a classic case of political misrecognition.
of the dominant liberal orientated positions within legal feminism which would experience Mackinnon’s Marx-like arguments as “off putting” (“Marxism” is an unfamiliar tradition in US academia) as they would equally Halley’s unfettered pre-realist libertarianism. In other words, once the two phallic girls laid down their positions, there is no place to go except “in-between.” In short, by aping Mackinnon, Halley aped the tragedy of her isolation within academic feminism.

Section II

In this section, I offer a condensed account of the theories on gender/sex that became a hallmark of a generation of non-liberal leftist academics. The point of the exercise is to highlight the shift from (objectivist) social theory (theorizing society) that Mackinnon represented, i.e. plotting the gender “revolution” by taking the cue from the sociality of gender relations, to discourse theory that substitutes “discourse” for “society”, so that gender becomes the effect of the former, and “locks people in”-inside discourse- with no hope of reprieve except in individual performances to subvert this discourse (like Butler), to subjectivist theories that substitute culture for society and proceed to interpret away the bad stuff (Kennedy), to radical skepticism where society is treated as the sum of individual interactions none reflecting a larger social structure (Halley), or aestheticism where literary commentary substitutes social one (Halley), or

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56 Halley’s critique of feminism is reminiscent of both conservative rants against “feminazis” as well as principled discrediting of women’s accounts of sexual assault common in those circles.
idealism where social transformations happen in your head (Halley again). The shift was not just “theoretical” but also political in the deep sense: a shift from theorizing gender as a problem of social hierarchy to theorizing it as either a cultural ruse that hinders sexual liberation or an invention of anti-sex “feminazis”. The upshot is the re-direction of animus away from the problem of male sexual entitlement to the general cause of “fucking” tied to gender-bending where feminism itself becomes not the spokesperson for subordinated women, but a discourse formation suspect for its sex biologism and “anti-sex(i)ness” to which women’s animus should be directed.

Theories on Gender/Sex by the Non-Liberal Academic Left

A - (Marxism-like) Mackinnon on Gender/Sex

1- Gender is the effect of social conflict. People produce it as they enter into conflictual social relations with each other and are in turn produced back by it as the men and women that they are.57

2- The conflict revolves around sex/sexuality in which men push for, insist on, and assume the right to appropriate women’s sexuality. Men get the better deal: they are on top and women are at the bottom.58

57 Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635 (1983) [hereinafter Toward A Feminist Jurisprudence]
58 Id. at 635-36.
The regime is called *male domination*. “Male domination” here is not a reference to specific individuals but to the system as a whole.\(^{59}\)

It acquires its stability through the *eroticization* of this domination by both men and women. Through eroticization of domination both men and women acquire an investment in the regime, in the status quo so to speak (though by men far more than women).\(^{60}\)

The conflict around sexuality might be termed the *material* aspect of the conflict, represented by social practices in which women “give” men “sex” as their femininity—their woman-ness—requires. Men, in turn, act as the entitled recipients of what is on “offer” to them, what is their due as their man-ness entails.

Given that women do not determine the terms of their own “femininity,” extant femininity is completely constructed by the regime of male domination.\(^{61}\)

Eroticization of domination through which the regime acquires stability might be termed its “*ideological*” aspect—this unequal exchange is experienced as “sexy.”

But since the “erotic” is not only lived in the mind but also materially in the body—it is somatized, and since “sex/sexuality” is not only experienced in the body, but also as an affect and in the mind, then in the

\(^{59}\) Id. at 638.


regime of male domination, and uniquely so, the material lives

ideologically (in consciousness) as much as the ideological lives materially
(in the body).

9- Through consciousness raising women as a social group begin to
comprehend, question, and get a grip on the nature of the regime by
drawing a connection between their varied experiences otherwise
experienced as individual and unique. They identify the collective aspect
of their experience.⁶²

10- Feminism is the politics that names the regime, identifies its institutional
structures, and mobilizes women for the purposes of changing it. It
deploys “consciousness–raising” as its method which is used to
identify/describe the nature (the “is”) of social institutions.

11- Feminism in this sense has a dual condensed role: it names the regime
(descriptive) in order to change it (transformative).

Things to note about these sets of “Marxism-like” arguments on gender:

1- The regime “male domination” is inherently conflictual. It is so in the
sense that because men get the better deal, their objective interests lie in
the preservation of the regime. Those interests clash head on with the
objective interests of women, which point in the other direction: that of
the undoing or dismantlement of the regime. In other words, within

⁶² Agenda For Theory, supra note 36, at 519-20, 535.
domination lie the seeds of insubordination. The system is understood to be *objectively dynamic*.

2- This dynamism, understood as a kind of simmering of clashing interests underneath the veneer or surface of stability, acquires a lurch forward, a qualitatively different leap or momentum, once the objective interests of women are experienced in their consciousness as collective, i.e., once they are experienced *subjectively*. Feminism is the politics expressive of this realization.

3- Feminism in this theory *represents* women in a dual sense: it represents women’s situation, i.e., it *describes* it through language, but it also represents women’s objective interests, i.e. it *speaks for* them.

4- These sets of arguments rely on an idea of the *truth* of gender, i.e. an “*is*” of gender that the role of feminist theory is to *represent*.

5- Because gender is understood as an effect of social conflict—produced as people enter into social relations with each other—this theory understands change as consequently social. It is social in the sense that nothing short of a transformation in those social relations, and the institutions that embody them, accounts for a qualitative change in the relations of gender. Law and legal relations is one of many such social institutions.

B - (Foucault-like) Butler on Gender/Sex:
1- Gender is the effect of discourse. Discourse here is understood as an institutional, political, and linguistic representational system that produces gender as an effect. 63

2- Gender is produced as an effect through a kind of ideational ruse. Discourse creates a kind of necessitarian logic that strings along sex with gender with sexuality (desire), one leading necessarily to the other. It naturalizes the connection by creating relations of coherence and continuity between these elements. Once a body is hailed “female,” then “woman” and “heterosexual” ensue as of (dis)course. What is concealed is the indeterminacy of the connection. 64

3- The name of the regime is Compulsory Heterosexuality (sometimes appearing as Phallogocentricism). 65

4- In so far as feminism claims to be “representing” women, it is at par with, or it does the same bad thing as, the regime of Compulsory Heterosexuality. It should therefore be treated with utmost suspicion. 66

5- Feminism as discourse is suspect for three reasons: a) it assumes a “subject” of feminism (woman) thereby naturalizing the very category “subject”; b) by assuming the subject “woman” it naturalizes sex/gender; and c) by assuming a universal category “woman” that cuts across

64 Id. at 6-7.
65 Id.
66 Id. at 13.
cultures and other axes of identity, it assumes a pre-discursive “woman”
that precedes culture, race, class, etc.

6- In short, what feminism is denying is that—as representational
discourse—it is producing the very “woman” it claims to represent
thereby acting as its own system of power (that regulates, prohibits,
disciplines, excludes, etc).67

7- Compulsory Heterosexuality can be subverted when the relations of
coherence and continuity that connect sex/gender/desire are shown to
be “made up.” The goal is to show that the relationship of each one of
these elements to the other is indeterminate.

8- If there is no truth of “gender” but merely a performance of it, then
subversion occurs when individuals perform gender differently, when
they repeat their performance differently. Drag performance is an
example of such subversion: it shows that femininity as such is
performed.68

9- Feminism can drop the idea of representing the universal “woman”69—
subvert its will to power, if you like—and instead adopt a politics
premised on temporary alliances expressive of temporary identities,
alliances that dissolve along with the identities themselves.70

67 Id. at 141.
68 Id. at 146.
69 Id. at 15 (“Is “unity” necessary for effective political action?”), 142-49.
70 Id. at 16 (“. . . it will be an open assemblage that permits of multiple convergences and
divergences without obedience to a normative telos of definitional closure.”).
Things to note about these Foucault-like\textsuperscript{71} sets of arguments on gender:

1- There is no outside to “discourse”. Everything is a discursive effect—the body, sex/gender/desire, etc. We are inside ideology \textit{tout court}. The “is” is always already constructed.

2- This is a radically objectivist theory of the world (discourse “wall to wall”), since the very “subject” is no more than an ideological ruse of the “object” discourse.

3- In this universe of “wall to wall” discourse, the only way “out” is through subversion/disruption by using the very resources of discourse itself. It is not a real “out” rather it is an “in” that is done somewhat differently.

4- In the specific case of the discourse on “gender,” subverting it is done, according to this theory, through performing gender differently. But since the “subject” is dead, it is not clear who is performing differently, i.e., who is making the calculations to disrupt and why?

5- Moreover, it is not clear how performing differently is disruptive exactly. Is the norm “disrupted” by one different performance? Two? Ten? A hundred? Is there a cumulative magical number of “different performances” after which the discourse on gender starts to shift?

6- Furthermore, the dynamic of “disruption” described in this theory divides the actors into a dyad of performance/audience. It is not clear how in

\textsuperscript{71} Butler’s \textit{Gender Trouble} marries Foucault to Freud to Hegel. A kind of theoretical pastiche that is hard to follow and harder to explain to students.
this dyad of performance/audience exchange something on the scale of
social institutions would change.

7- It would appear that having “killed” the subject, this theory resorts to the
“performative” to perform some of the functions of this dead subject.
Indeed, the performative sounds very much like the individual of
liberalism who gets to convince his audience rapt in his/her performance
to change their minds about what they think of gender!

8- The theory comes close to suggesting that the “individual” performer
changes the “social.”

9- If there is no way out of “discourse,” if subverting one discourse simply
means entering into another, then in this theory there is no such thing as
“emancipation”—no sooner one subverts than one enters another
system of power. The very “discourse” that emancipates us is the one
that comes to dominate us! According to theory therefore, we are
always in the position of the Beautiful Soul\textsuperscript{72} who finds herself
permanently living on the margins while at the same time and
paradoxically enough having the power through one performance to
send norms melting away!

10- In so far as a “thick” definition of “discourse” is presumed (institutional,
political, linguistic), then it is not clear how feminism can be treated as
constructive “discourse.” In other words, it’s not clear how a feminist

\textsuperscript{72}\textit{Martha Nussbaum, The Professor of Parody, THE NEW REPUBLIC} (1999),
statement such as “men dominate women; women are subordinated to men” can have a “constructive” effect and be treated as complicit with Compulsory Heterosexuality with all of its institutional kick. It would appear, therefore, that for this statement to be valid either a “thin” definition of discourse is presumed, which is a “linguistic” one: just by virtue of saying “men dominate women” feminism unleashes a torrent of discursive power that imprisons people inside hateful “identities.” Alternatively, feminism is given institutional power measured by feminist reforms. In so far as feminist reforms have been successful and acquired an institutional kick, then feminism gets to be a constructive discourse. Butler seems to treat feminism as a “linguistic system.”

C - Duncan Kennedy’s theory on Gender/Sex: “Sexy Dressing”—Splitting the Difference between Liberal Feminism and Radical Feminism:

1- Duncan Kennedy offers a theory of gender-sex from the position of a “white middle class man allied with pro-sex feminism.”

2- Kennedy denounces the regime that he calls “male sexual abuse” and asserts that he would like to see less of its ills. Kennedy’s “Male sexual abuse” is defined as more expansive than the liberal feminist “sexual violence” but less than Mackinnon’s “male domination.”

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3- Rather than using social theory (Mackinnon) or post-structuralist theory (Butler) to describe the sex/gender dyad, Kennedy deploys legal language (rules and tolerated residuum) along with the economic language of wins and losses.\textsuperscript{74} According to Kennedy, male sexual abuse occurs in the “tolerated residuum”\textsuperscript{75}, i.e., the tolerated residue of abuse that occurs because of failure of extant rules to address abuse (more is needed), or alternatively failure in enforcing extant rules (better enforcement is needed).

4- As a pro sex male radical allied with feminism, Kennedy asserts that he would like to see more rules passed and extant rules better enforced that seek to make male sexual abuse less. The argument is: the less male sexual abuse there is in the world, the more women are free to offer him sex he can live with.\textsuperscript{76}

5- Kennedy however notes that his objective interests as a man would go in the opposite direction: increasing tolerance for the residuum of abuse.\textsuperscript{77} Stricter rules, or stricter enforcement of the extant rules to minimize abuse would expose him as a man to a larger number of “unpleasant”

\textsuperscript{74} Id. at 1323-27 (delineating the “cost” to women of insisting on precautions, the “burden” of excess enforcement, and the “benefits” to men).

\textsuperscript{75} Id. at 1314.

\textsuperscript{76} Id. at 1390 (“I think that men and women might fantasize, play, experiment, and innovate more, and \textit{perhaps} more happily, if there was less . . . danger.”), 1393 (explaining that “[a]buse screws women up sexually, and that’s bad for men,” that it “discourages” women from taking sexual—and pleasurable—risks).

\textsuperscript{77} Id. at 1326.
experiences (ex. charged unfairly with peeping in the Gap store fitting room\textsuperscript{78}) that he would rather do without (women be damned).

6- When Kennedy addresses the “sex” part of the gender/sex dyad he resorts to postmodern theory on culture: popular culture is treated as a text to be interpreted which Kennedy marries to phenomenological accounts of having sex.

7- According to Kennedy, “sexy dressing,” a form of clothing that deviates from the norms of the context in which it appears, does not merely reproduce “male sexual abuse” \textit{a la} radical feminism.\textsuperscript{79} It \textit{could}, though the sexy dresser (always a woman) may very well be turning the “power” table on the sexed (always a man.) She may, through sexiness, be using “the master’s tools [to dismantle] the master’s house.”\textsuperscript{80}

Things to note about Duncan Kennedy’s left postmodernist theorizing of gender/sex from the position of an ally of feminism:

1- Left-of-liberalism: Kennedy’s gender/sex scheme can be called left liberal reformist. \textit{More rules, less} abuse, plus a “resistance” virtue gleaned from the status quo. It is hard to understand in what sense Kennedy is a “radical” (as he self-describes).

2- The conflict between ideological orientation and objective interest: It is

\textsuperscript{78} \emph{id.} at 1325.
\textsuperscript{79} \emph{id.} at 1342-54.
\textsuperscript{80} \emph{id.} at 1339.
not clear how to understand the relationship between the objective interests of the man—pushing for more abuse—and the ideological orientation of the man (pro sex feminist ally) leading in the opposite direction, i.e. minimizing abuse. Kennedy appears to be warning us that beneath the ally there lurks a “man” who when push comes to shove will be the one to decide. Maybe Kennedy is signaling that his “ideological appetite for change” has a limit and that limit is the man driven by his \textit{objective} interests.

3- The “resistance” problem: Kennedy asserts that there is no out of “the culture” of male sexual abuse we are born in and all we can do—as fuckers within it—is tinker with the elements we are given, which tinkering we might call “resistance.” It is not clear however how survival within the culture, or even support of it, is distinguished from \textit{resistance thereof}. Moreover, it is not clear what this “resistance” is doing exactly to the regime of abuse. Is it doing anything more than making the participants feel better (no shame, no fear, and a hard on?), especially that many of the descriptions of “resistance” are offered by Kennedy on the “phenomenological level” (how people feel or what people think of what they are doing). Is the regime of male abuse noting how resisters are feeling? Is it being shaken by their “joie de vivre”? In short, what is the sum total of hard-ons without shame at the thought of rape that will leave a dent on the regime of male sexual abuse?
4- The relativization problem: Kennedy contrasts “abuse” with “sex”—the former is described “objectively” through the medium of rules and “losses and wins” and the latter “subjectively” through the medium of culture as text (open to interpretation) and phenomenological descriptions (psychological). But why would the relativizing gesture (textual interpretation) be directed at “sex” only? Why can’t we also relativize “abuse”? Isn’t abuse also “subjective” as Janet Halley claims (see below)?

5- The relativization problem again: if our relationship to the structure of male sexual abuse is mediated by signs that split us into “interpretive communities” (“sex/danger po mo resisters” coexisting with “sex vanilla interpreters” coexisting with “anti sex feminist interpreters” coexisting with “religious ‘total woman’ interpreters”) don’t we end up with a flat network of “differences,” some form of multicultural pluralism of difference rather than “resistance” proper?

6- A sexual ontology of gender difference: Kennedy comes close to naturalizing gender differences by creating the binary voyeur (always male)/sexy dresser (always female). He appears to replace the radical feminist structure of “men on top/ women at the bottom” with “men looking up your skirt/ women wearing skirt.” Kennedy produced many words to that effect, about a hundred pages in fact, with no hint—not even the slightest—of anything less "paranoid", one willing to switch the
male/female roles\textsuperscript{81} By creating this tight sexual ontology of gender, even if power was claimed to reside in the sexing-up “object” as much as in the voyeuristic “subject,” Kennedy suggests the limits of his “resistant” project. The binary sexy (female)/voyeur (male) is the abiding framework of this proposed political disruption of “male sexual abuse.”

7- In sum, what Kennedy’s theorizing of gender/sex offers is not social transformation but a movement along a spectrum to the left in the direction of minimizing male sexual abuse that is nevertheless threatened from within the same theoretical schema he offers to slide back to “the objective interests of men,” a relativizing gesture of the resistance scenario that turns it from “resistance” to cooptation, and a set ontology of sexual interaction in which women seduce and men are seduced. What is uniquely missing is an account of Kennedy’s pro sex partner, when male sexual abuse penetrates her consciousness as a threatening system, herself sliding back to her own “objective” interests as a woman, turning her sexiness into animus and gazing back at him firmly asserting: enough is enough. In that “enough” there lies the politics of transformation.

\textsuperscript{81} The strangeness of this comes from the fact that Kennedy was known among his graduate students as a seducer exhibitionist who sat beside his desk stretching his feet on it, lifting his crotch up at an angle that very much offered his students, the up of “his skirt”, and he did it habitually as if insisting that “sex” was indeed a text in this office to be read and thought about by his students though never discussed (except through the medium of what he wrote). It appears that thinking of himself as an object of a gaze rather than its subject was so terrifying to Kennedy that not the lightest attempt at exploring it is made in his paper on Sexy Dressing.
D - Janet Halley’s Queer Theory on Gender/Sex—Radical Post-modernism:

1- While Mackinnon had aspired to give feminism the dignity of “theory”, Halley aspired to give “sex positivism” the dignity of “theory”.

2- Halley’s Queer Theory stands Mackinnon’s Radical Feminism on its head. If for Mackinnon sex is gender (gender needs sex to eroticize and consequently naturalize gender hierarchy), for Halley gender is sex (sex needs gender hierarchy to happen, to heat things up, we need gender to fuck). If for Mackinnon gender comes with the weight of the social, glued by the ruse of the erotic, for Halley, gender comes in unbearable lightness, voluntarily adopted and dropped, its hierarchies the very stuff of sex. If for Mackinnon, patriarchy is the culprit behind gender hierarchy that requires feminism to overturn, for Halley, the culprit is feminist regulation, which she calls “Feminist Governance”, that implants sexual injury in women’s heads and threatens to stabilize gender and overturn the erotic potential of gender play.

3- In this sense, Halley differs significantly from Butler. While the “performer” of Butler struggles on the margins to disrupt the discourse on gender and can only do it by “repeating” differently—the constraint of the discourse on “compulsory heterosexuality” being too overwhelming

85 Sexuality Harassment
(wall to wall)—for Halley, one wears gender and takes it off like one wears a condom and takes it off. In fact, in Halley’s *imaginaire*, the former (gender) performs the same role as the latter (condom). We are gendered to fuck and to heighten our sexual pleasure. Gender’s relationship to sex is one of functionalism.

4- Halley’s version of the relationship between gender and sex is a slight modification of the religious conservative one. Instead of ‘we are gendered to reproduce,’ it is ‘we are gendered to fuck.’ Halley is very moralistic—indeed almost fundamentalist—about her version.86

5- In law, Halley’s project can be described as the aspiration to change “feminist” rules on sexual injury in the direction of rules for “sexual pleasure,” (more “queer”), i.e., dismantling rules that have been the outcome of feminist struggle.87

6- While Halley stands Mackinnon on her head, she destabilizes Kennedy’s “difference splitting” careful theorizing.88 Halley counters his “male sexual abuse” with “sexual subordination of men by women” as a possible alternative framing of any given dyadic interaction that centers on sexual injury, in effect pushing Kennedy’s careful, left-of-liberalism theory making back along the spectrum to classical liberalism. If each interaction is unique and “male sexual abuse” can be countered with

87 *Id.* at 321-26 (describing the relationship between harm and regulation as it operates in the feminist legal agenda).
88 *Id.* at 167-86.
“women blue-balling men” on the other side, and since power moves in mysterious ways and unknowable *a priori* (the Foucaultian idea), then one has to weigh everything against everything else.\(^{89}\)

7- Halley’s project is libertarian. As such, it commits the pre-realist mistake of equating less regulation with more “sexual freedom.” See note above on the parallel to the market.\(^{90}\)

Things to note about Halley’s Queer Theory:

1- Halley rejects social theory altogether (ex. domination/subordination) as an indulgence in the “copula” that she dismisses as a form of “moralism.”\(^{91}\) The “copula”\(^{92}\) is replaced with the principle of radical indeterminate-ness. Halley is therefore impatient with the left’s classic causes: homophobia, misogyny, racism, etc. They assume too much. They

\(^{89}\) *Id.*

\(^{90}\) *Id.* at 25

\(^{91}\) Queer Theory By Men, *supra* note 30, at 23 (“One of the most breathtaking tropes in MacKinnon’s structuralist rhetoric, as well as in those dark cultural feminisms that take patriarchy as a transhistorical truth, is the simple word “and.” Rape and pornography and sexual harassment and domestic abuse and prostitution and “trafficking in women” and marriage and makeup and the Boy Scouts—they are all mere instances of the structure of male dominance and are basically all alike. Following Judith Butler, we could designate this basic trope the copula . . . It is the rhetorical form of many of MacKinnon’s most breathtaking statements: “Socially, femaleness means femininity, which means attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms. What defines woman as such is what turns men on.” The tendency is, if anything, more pronounced in her later work.”).

\(^{92}\) *Id.* at 30 (“Recall what that structuralism means in MacKinnon’s thought: the eroticization of domination precipitates women as women and men as men; it produces women as subordinated to men, by definition. In MacKinnon’s thought, this is not only a social, but also a metaphysical and ontological achievement, so that no human consciousness is free of it. Sexuality as women’s subordination and men’s superordination pervades human reality, such that rape is merely the paradigmatic form of heterosexual interaction; and it pervades human consciousness, such that no one is in a position to say for sure that a given act of “voluntary” or “ordinary” heterosexual intercourse (or watercooler flirtation) is not precisely homologous to what we call rape. The copula, the decision to attribute to the woman who files a complaint the “truth” of all women.”).
assume a society.\textsuperscript{93}

2- For Halley, each interaction is unique on its own with its own unique traffic of power, the terms of which cannot be determined \textit{a priori} through social theory’s resources.

3- Instead of social theory, Halley resorts to literary and aesthetic language to describe the sex of her “Queer Theory.” It is “abject”, full of “shame”, loves “metaphor and catachresis.” Her queer sex is not socially lived, it is the fictional kind, the one that is narrated and commentated upon in humanities departments of US academia.\textsuperscript{94}

4- Lacking the pull of the “social,” Halley treats theory as constitutive. She pedals in theories in her writing with “unbearable lightness,” moving them around, switching them, dropping some, picking up others, each time seemingly creating the world anew: the world doesn’t constrain theory, theory creates the world, every bit of it.

5- Halley doesn’t promise “objectivity and neutrality” as an ethos for deciding as would be the case in classical liberalism,\textsuperscript{95} instead, she opts for “consultation with her friends on the merits of each situation”\textsuperscript{96} after which she ‘wings’ her decision. She offers an existentialist theory of decision (decisionism) as is typical of postmodern writing.

\textsuperscript{93} Split Decisions, \textit{supra} note 19, at 3-10.
\textsuperscript{94} \textit{Id.} at 151-67.
\textsuperscript{95} \textit{Id.} at 11-15.
\textsuperscript{96}
Section III

Critique of Halley’s sex libertarian project that she dubs “queer”:

1- Halley’s framework oscillates between an advocacy of a
neutral framework of wins and losses that she offers as a
response to feminist regulation, after Robert Hale is
pulverized,\textsuperscript{97} and a partisan agenda of dismantling feminist
regulation on sex (the problem of theoretic oscillation).

2- Halley targets radical feminism in her critique, but in fact her
critique jeopardizes most liberal feminism. Halley bulldozes
consent on her way to the “right” of the political spectrum as
a response to Mackinnon and “consent” is a liberal sacred cow
(the problem of political misrecognition).

3- Halley adopts a radical sexual ideology—fucking unto death—
that grew out of a narrow clique of gay men defending the
promiscuous sexual practices of the public bath in the
aftermath of the AIDS epidemic that is a poor fit for women’s
sexual biographies. Halley keeps asking: if gay men can fuck
unto death, what’s so bad about rape? (The problem of

\textsuperscript{97} Halley invokes Hale quite often in her writings. Hale is famous for deconstructing the ideology of the market by showing that “regulation” is everywhere in the “free market.” To invoke his analysis in pushing for the ideology of “free sex” in which “regulation of sexual injury is pitted as the enemy of free sex” is indeed ironic. The only way Hale can perform the theoretic function Halley asks of his work is by turning him from a deconstructor of free market to an advocate of a neutral technology of weighing the wins and losses. Hale was not “neutral” about the ideology of the market.
sociological misrecognition).

4- The attempt to ally this sexual ideology with the “left” when the discourse it promotes is premised on voluntarism, individualism, nominalism and culturalism all of which go against the grain of leftist politics and merge seamlessly with the neoliberal creed that we live (the problem of ideological misrecognition).

5- The promotion of a form of sexual libertarianism that is indistinguishable in content from the dominant sexual ideology of the times. Halley fails to catch up with our radically sex positive times and the saturation of pop culture with sex and sexual practices especially through the medium of internet pornography and dating apps. She sounds like an aging sex preacher who hasn’t caught up with the fact that we are living sex-saturated times (the problem of historical misrecognition).

Conclusion

Behind Halley’s localism, decisionism, nominalism, voluntarism, aesthetism, and functionalism lies a radical sexual libertarian maximalist proposition: every form of sexual regulation to achieve gender equality
threatens to undermine sexual freedom. Like its parallel on the economy, it is a right wing proposition. It takes Halley all the way to the right of consent while filling the air with cries of doom about “Feminist Governance”.

The rise of campus rape activism and the MeToo movement at its heel reveals that there is indeed a governing feminism but not in the way Halley posits. For one, “Governance Feminism” is far from being the radical feminism that occupies much of Halley’s obsession. Rather, it is a ruling liberal feminism with an organic relationship to ruling liberalism empowered by the latter’s network of partisan organizations, activist networks, institutional power, and mainstream discourses, etc. Like all forms of ruling liberalism, ruling liberal feminism is a compromise formation that splits the difference between equality (liberal feminist regulation) and freedom (the sex positivism of liberal feminism that places the limits on how far this regulation should go). The rise of the feminist activism (MeToo especially) is an expression of dissatisfaction among young women with that compromise as it has settled in our contemporary historical moment in an attempt to push it to the left: in the direction of more equality. Young women have decided that the equality terms of the current sexual moment have to be redefined because those terms are quite literally “screwing them”. In formalist terms, Halley is of course right that this push for equality is ipso facto less sexual freedom. But substantively, a push for equality is a push for the redefinition of sexual freedom on women’s terms. It is a push for
freedom to be more equal. When Halley insists on her formalist articulation: more is less, she ends up defending the status quo, the very one that triggered activists’ cries of protest.

After all is said and done and the upheaval of the current activist moment settles, ruling liberal feminism will arrive at a new compromise formation. It will move an inch or two to the left. Women’s lives will improve, an inch or two, and sexual culture will be redefined hopefully with more possibilities of pleasure for women than the contemporary moment has offered them.

This should please Halley if only she could control her sex panic for a moment to see.