GENDER, SEXUALITY, AND POWER: IS FEMINIST THEORY ENOUGH?+

BRENDA COSSMAN, DAN DANIELSEN,** JANET HALLEY,*** AND TRACY HIGGINS*****

I. EDITOR'S NOTE: AN INTRODUCTION

What are the boundaries of feminism? What is the relationship between feminism and non-feminism?

In the following dialogue, four authors critically examine how to describe feminism and what it can and cannot do, particularly with regard to sexuality. The authors use the Texas Supreme Court case Twyman v. Twyman,[1] involving divorce, sadomasochistic sex, and a claim of emotional distress, as a focal point to explore how feminism deals with gender, sexuality, and power, and whether it does so sufficiently. The roundtable discussion revolves around Janet Halley's radical suggestion that not only is feminism not enough, but that we should "Take a Break" from it in order to see the issues feminism does not address as well as the effects of a feminist perspective.

In the next Part, Brenda Cossman lays the groundwork with a synopsis of the case. In Part III, Halley describes what she sees as essential elements of feminism, and uses the case to explore feminism's costs and shortcomings and to support her assertion that it would be a good idea to "Take a Break" from it. In Part IV, Cossman challenges Halley's claim that "Taking a Break" is the only or best way to analyze sexuality, noting that feminism is a strong tool for analyzing gender and that feminism benefits from the critiques of its limitations. In Part V, Dan Danielsen uses the case to offer his own description of feminism in contrast to both Halley's and Cossman's. He focuses on the practical political project of each strand of

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* Professor of Law, University of Toronto. With thanks to Janet Halley for her provocative engagement in ongoing conversations.

** Visiting Professor of Law, Northeastern University.

*** Professor of Law, Harvard University.

**** Associate Professor of Law, Fordham University.

[1] 855 S.W.2d 619 (Tex. 1993).

feminism, highlighting their varied goals and examining the costs and benefits of the proposed analytic strategies in the context of real political choices. In Part VI, Tracy Higgins contrasts, critiques, and works to reconcile the positions of the first three authors. Part VII contains Halley's response to the discussion. Finally, in the last Part Higgins ties the conversation to the symposium's query.

II. BRENDA COSSMAN: SYNOPSIS OF TWYMAN V. TWYMAN

In Twyman v. Twyman,[2] a wife sought damages for emotional injuries that she claimed she suffered because her husband induced her to engage in some sadomasochistic (S/M) bondage. According to the plurality opinion of the Texas Supreme Court, which described the S/M as "deviate sexual acts,"[3] the wife was particularly susceptible to emotional harm because she had been raped at knifepoint prior to the marriage. One of the dissenting opinions in the case describes the S/M encounter in more consensual terms. According to Justice Hecht, it involved two or three occasions in which "the couple engaged in what they referred to as light bondage—tying each other to the bed with neckties during their sexual relations."[4] The encounters ceased when the wife told her husband that she associated the activities with the trauma of being raped. But the husband subsequently pursued his S/M desires elsewhere, and had an affair with another woman who shared his interests. When the wife found out about the affair, the husband said it was her fault and that the only way to save their marriage was for her to engage in S/M with him. She tried again, but found the activity to be "so painful and humiliating that she could not continue."[5] They divorced. The lower court ordered the husband to pay $15,000 for emotional distress.[6] The Texas Court of Appeals held that the wife could recover for negligent infliction of emotional distress.[7]

The plurality of the Texas Supreme Court[8] refused to recognize negligent infliction of emotional distress, but did recognize intentional infliction of emotional distress. The court abrogated interspousal immunity to these actions and set out some guidelines for coordinating a simultaneous divorce and property action with a tort proceeding.[9] However, because the

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[2] *Id.*

[3] *Id.* at 620.

[4] *Id.* at 636.

[5] *Id.*

[6] *Id.* at 620.

[7] Twyman v. Twyman, 790 S.W.2d 819 (Tex. App. 1990).

[8] Twyman, 855 S.W.2d at 619-26.

[9] *Id.* at 624-26.

trial had proceeded on the basis of negligent rather than intentional infliction of emotional distress, the plurality remanded the issue for retrial.

Two concurring and dissenting opinions by the Chief Justice Phillips[10] and Justice Hecht[11] would not have extended the tort of intentional infliction of emotional distress to married couples. The Chief Justice emphasized that divorce always involves some degree of emotional distress, and recognizing this tort would require the courts to draw "virtually impossible distinctions between recoverable and disallowed injuries."[12] Further, it would unduly restrict the court's discretion of taking fault into account in dividing marital property.[13]

Justice Hecht emphasized that the sexual relationship was amongst the most intimate aspects of marriage, and "*any* breach of such an intimate and essential part of marriage may be regarded as outrageous by the aggrieved spouse and will often be the cause of great distress."[14] In Hecht's view, many other sensitive aspects of marriage can cause profound disagreement and result in the breakup of the marriage. If these disagreements and distresses become actionable, "tort claims will be commonplace in divorce cases."[15] Moreover, the inquiry required would simply require "too great an intrusion into the marital relationship."[16]

A third dissenting opinion by Justice Spector[17] would have recognized both torts of negligent and intentional infliction of emotional distress, and allowed the plaintiff to proceed on the theory of negligent infliction. Spector framed the conduct in this case and claims of emotional distress more generally in terms of the harms that men do to women, observing that most cases of emotional distress are brought by women against men. Spector thereby connected the recognition of the tort with the struggle for women's rights, citing authors who have critiqued the gendered nature of tort law and its marginalization of women's claims. Spector pronounced a strong indictment of the plurality's rejection of the claim for negligent infliction of emotional distress: "Today, when the widespread mistreatment of women is being documented throughout the country—for instance in the areas of sexual harassment and domestic violence—a

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[10] *Id.* at 626-29.

[11] *Id.* at 629-40

[12] *Id.* at 627.

[13] *Id.*

[14] *Id.* at 636.

[15] *Id.* at 637.

[16] *Id.*

[17] *Id.* at 640-44.

majority of the court takes a step backward and abolishes one way of righting this grievous wrong."[18]

III. JANET HALLEY: TAKING A BREAK FROM FEMINISM

Does feminism have an outside? Is there, or should we hypothesize that there is, something about the social world, something about justice, something about left ambitions, that need not be referred to feminism? Maybe so. I am here to sell you the idea that Taking a Break from Feminism is a good thing to do.[19]

Of course there are many, many forms of feminism. The variety is quite staggering. But I notice some elements that are virtually *essential* to feminism as it is practiced and performed in the United States today. I could be wrong about these essential elements; and feminism could change so that these elements fade out and/or new ones become definitional. So in the spirit of offering an impressionistic description of current conditions, here are the essential elements of feminism in the United States today.

First, to be feminism, a position must make a distinction between M and F. Different feminisms do this differently: some see men and women, some see male and female, some see masculine and feminine. While "men" and "women" will almost always be imagined as distinct human "groups," the other paired terms can describe many different things: traits, narratives, introjects. However a particular feminism manages these subsidiary questions, it is not "a feminism" unless it turns in some central or core way on the distinction between M and F.

And second, to be a feminism in the United States today, a position must posit some kind of subordination as between M and F, in which F is the disadvantaged or subordinated element. At this point feminism is both descriptive and normative; it takes on the quality of a justice project while also becoming a subordination hypothesis. Feminism is feminism because, as between M and F, it carries a brief for F.

If the essentials are this minimal, there are many many features of contemporary and historically important feminism that are optional, however much they appear to their proponents as indispensable. For instance, the register on which subordination should be noticed is seriously contested. For Catharine A. MacKinnon, the relationship is one of power, whereas for cultural feminism, it is one of ethical ranking. In MacKinnon's power theory, the eroticization of domination *produces* men and women, male and female, masculine and feminine, *as* domination and subordination, and this is bad because, however much the subordinated feminine might

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[18] *Id.* at 643.

[19] These remarks are derived from my paper Take a Break from Feminism?, *in* Gender and Human Rights (Karen Knop ed., forthcoming 2004).

desire domination, she also longs for liberation from it. For cultural feminism, male or men's or masculine values have trumped those of femaleness or women or femininity and this is bad because women's values are at least as good as—indeed are usually understood in cultural feminism to be *better than*—men's.

There are also profound disagreements within feminism about how to describe subordination. Later in this volume Katherine Franke and Mary Anne Case assess the debate that addresses childbearing, care work, and related matters. There are equally powerful debates on the place of sexuality in subordination. Countering MacKinnon's alliance with some cultural feminists to regulate heterosexual eroticism on the assumption that it is a key element in women's subordination and is always (or almost always or too often) bad for women, there have been powerful sex liberationist, sex radical, and more recently "sex positive" feminisms that understand sexuality to be a domain of "pleasure and danger"[20] to which women need untrammelled access. And there have been breakaway movements like the anti-identitarian "politics of sexual acts" and "queer theory" which seek alternative theoretical, social, and political modes of assessing the relationships between sex and power—modes in which M and F are not necessarily presupposed to have the salience that they have in feminism.

Feminisms also differ a great deal in the degree to which they figure women's subordination as structural or episodic. A strictly structural theory would be one which posits the universal totality of male domination. MacKinnon's "feminism unmodified" is strongly structural in this sense. Many feminists resist this aspect of MacKinnon's theory, and seek to understand male dominance as having an "outside." Now that would be where they might also want to Take a Break from Feminism: if male dominance is not always already there, then we don't always need feminism.

I have noticed feminism resisting these moves in the direction of Taking a Break from Feminism in two chief ways. One is what my colleague, Duncan Kennedy, writing about something else, calls "paranoid structuralism."[21] Feminist paranoid structuralism either hypothesizes or presupposes (please note a big difference there) that, although things in the world *seem* to be organized in a way that does not invoke M/F or require us to carry a brief for F, this perception is probably a deep error, and profoundly counterintuitive investigation will eventually reveal that, yep, it's M > F all over again. I am a huge fan of hypothetical paranoid structuralism. It is a crucial element of every radical theory that regards the

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[20] I refer to the decisive intervention offered by Carole S. Vance in Pleasure and Danger: Exploring Female Sexuality (Carole S. Vance ed., 1984).

[21] Duncan Kennedy, Afterword: A Semiotics of Critique, 22 Cardozo L. Rev. 1147 (2001).

very consciousness of those propounding it to be one of the "powers" against which it works. I love it also for how hard it works; it takes nothing for granted; it is a persistent incitement to critique. I love it for its love of the covert, its need for highly astute interpretive practices, and its constant yearning for a radical transformation of consciousness. But when paranoid structuralism is promoted from a hypothesis to a claim—when one *presupposes* the covert importance of one's favorite paranoid idea, or claims to see it precisely *because of* its seeming absence—it runs into the big downside of being, well, paranoid. It can lead you to not noticing other things that *are* going on, things that just can't and probably shouldn't be forced into the vocabulary of M > F.

The second mode in which feminism recuperates an ostensibly rejected structuralism is most noticeable in what I call the hybrid feminisms: socialist feminism, antiracist feminism, postcolonial feminism. These feminisms share the essential features of feminism as I have listed them; and they *also* posit that *some other system of social subordination*, operating according to *some other difference that defines the theory* and is essential to it in that sense, is also at work in the world. Class, race, empire: these are systematic social events that organize subordination in ways that are at least hypothetically distinct from M and F. There are two basic tendencies in these feminisms with respect to structuralism: a divergentist and a convergentist tendency. Divergentist hybrid feminism is ready to say that there are some things in, say, racism, that are simply not capable of being merged into the presupposition of M > F. There are tensions, splits, and sheer breakaway moments, in which an antiracist feminism would see things in terms of race *and not gender*, would be for a man *against a woman*, and so on. Work like this ends up performing a firm rejection of the structuralist wish. These feminisms have learned how to Take a Break from Feminism, and I would argue that the strength of so much of this work (or perhaps simply my own admiration for it) is directly the result of a willingness to do so. Rejecting this approach, convergentist hybrid feminism posits that the theory is not good enough, the explanation not worked out enough, until everything in the socialist dimension, the antiracist dimension, or the postcolonial dimension of the project can be fully referred to and merged into its feminism. My notes from this conference record myriad reiterations of this jealously guarded moment in feminist thought. Oddly enough, it sometimes seems that feminism imagines that it will stand accused of racism and imperialism (or orientalism) if it does not posit its ambition to "top" both antiracism and anti-imperialism by emerging, when all is said and done, as their ultimate conceptual, normative, and political reference point. Structuralist ambitions figure in these gestures as an ultimate fealty to a transcendence, utopia, or harmonic convergence which, if we were only smart and good enough, we would be able to produce out of the terrible conflictual material we have to work with.

Assessing the Costs

There are costs to these recuperative strategies, to the structuralism they covertly reintroduce, as well as to the definitional demands of feminism itself: its precommitment to M/F and to carrying a brief for F.

Before offering a few thoughts on that, allow me to insist that there are costs to Taking a Break from Feminism as well. They include: relaxing the epistemic vigilance that is needed to resist male epistemic hegemony; risking further splits among feminists at a higher conceptual location than most other splits, and thus risking new fissures in the intellectual, social, political, and legal endeavor; demobilizing and demoralizing feminists; laying oneself and one's arguments open to cooptation by the enemies of women's well being; legitimating male dominance generally and specifically. If, for instance, feminism is our best weapon against the constant pressure of male sexual violence, weakening feminism in any of these ways could actually result in some guy's decision to rape a woman he would otherwise leave unmolested, or some prosecutor's willingness to see reasonable doubt in a rape case that would otherwise have seemed a clear prosecutorial priority. I see all that. Believe me, I do.

Still, I think it is also important for "us" to get clear about the costs of feminist structuralism, paranoid structuralism, and convergentism, and even of maintaining a constant focus on the conceptual priority of M/F, and the normative or political priority of perpetually carrying a brief for F.

Some of those costs are:

Brain drain. Everywhere I go women complain to me that academic feminism has lost its zing. Many key intellectual figures in feminism have decamped to other endeavors. Women's Studies Programs have undergone tumultuous transformations into Gender and/or Sexuality Studies Programs or disappeared altogether. Feminist journals accept articles only on the proviso that the authors produce the effect of M > F, so that important new work gets submitted and published elsewhere. Faced with these trends, feminists say they have been betrayed and abandoned, and urge one another—the saving remnant—to a renewed commitment to feminist tenets. (It has even been suggested at this conference that the situation is so bad that feminists should "go underground.") I think the feeling is misplaced and the remedy is probably counterproductive. One motive force driving the brain drain is, surely, the sheer preclusion imposed on inquisitive minds and avid justice seekers by the paranoid structuralist and convergentist presuppositions. Another is a widely-held and powerful hunch that, as Kendall Thomas put it at the conference, "women don't own gender": perhaps we need to examine M and F while suspending the stipulation that subordination is always their relation, and always takes the form of M > F. And then there is the hunch that many of the most devastating problems in the world might not be about M/F *even a little.*

Bad faith. If you look around the United States and Canada, at least,

you see plenty of places where feminism, far from slinking about underground, is running things. Sex harassment, child sexual abuse, pornography, sexual violence: these feminist justice projects have moved off the street and into state and corporate bureaucracies. Schools and employers devote substantial resources now to extensive sexual harassment regulatory schemes. Child sexual abuse and rape enforcement have serious priority in many jurisdictions and frequently tap into "zero tolerance" enforcement modes much more readily than other kinds of child neglect and interpersonal violence. The Canadian Supreme Court has held that pornography that depicts the sexual subordination of women is an equality violation.

In some important senses, *feminism rules*. Governance feminism.

Not only that, it *wants* to rule. It has a will to power.

Here its commitment to M/F and to carrying a brief for F has real-world distributive consequences that feminism should not disavow. It wants to do, has done, and will do things on behalf of women *at the expense of men and other social interests*. This is not necessarily bad; justice in the real world sometimes means imposing costs. When it does this, feminism has effects. It gets blood on its hands. It needs—and I suggest it is utterly without—a theory and practice of its own role in governance, of itself as a responsible wielder of power.

Feminist convergentism and paranoid structuralism bring their own special contributions to the denial of feminist power, the maintenance of the myth that feminism remains an utterly underdog movement needing complete and unbroken solicitude. But the possibility of a more nearly responsible attitude to the problem of "feminism with blood on its hands" might also require Taking a Break from Feminism's definitional stakes of M/F and the subordination of F. I would suggest that these stakes not only make feminism what it is today, but also make it hard for it to see around corners of its own construction. Unless it Takes a Break from itself, it can't see injury to men. It can't see injury to men by women. It can't see other interests, other forms of power, other justice projects. It insists that all justice projects will track a subordination model. And this refusal to see, sustained while feminism imposes costs on interests and projects outside its purview, gives us a textbook case of *bad faith*.

Power masquerading as servitude. At this point in my argument, I frequently hear that I don't care about women, have belittled the harm suffered by women, have denied the harm suffered by women, and have silenced women. These are fascinating charges. More than that, they sting. Happily, the final panel of the symposium was devoted to the problem of sting.[22] Whatever their merit, feminism imposes costs *on itself* when it

[22] The papers corresponding to the panel "Why Do We Eat Our Young?: Disagreements Among Feminists" are located in the final section of this issue, beginning at page 638.

makes these charges.

First, nothing in what I've said *requires* me to concede these charges. Saying that women might harm men, for instance, is not the same as saying that women are not harmed. Saying something feminist women disagree with does not silence them. To be sure, saying that we should Take a Break from Feminism might have as a *downstream consequence* harm to women, a silencing of women. I might get blood on my hands. But I can't help thinking that feminists who imagine that my critique not only risks those consequences but *contains* and intrinsically *performs* them are attributing to me the only kind of power they can imagine for themselves. Their implicit vision of themselves and their opponents as Gods capable of performative utterances on the level of "*Fiat Lux*" or "I sentence you . . ." is either very very flattering or very very scary.

Second, these accusations reassert precisely the presuppositions in feminism that I am calling into question. They redraw feminist disciplinary boundaries and implicitly require that feminists stay within them; a feminist will always describe everything in terms of M/F, and will always describe M/F as the domination of M and the subordination of F. That is, these charges are symptomatic of precisely the structuralism, with all the associated blind spots, which I am describing as costly *to* feminism.

Moral perfectionism and magic realism. Feminists hearing my line at this point have responded again and again with a formulation something like this: if feminism had blood on its hands it would be because it had become a dominator; but feminism is definitionally *against* domination; and if it has dominated, if it has caused harm, it must chasten itself; but most likely feminism has not actually caused any harm; after all feminism is powerless and in fact *suffers* harm. This argument, for all its moral modesty, is actually quite strict: feminism (to be feminism) must be morally immaculate. It is either subordinated (and harmless) or not itself. A profound structural totalism—feminism is *the* subordination theory *par excellence*—subtends this formulation.

This willingness of feminism to undergo chastening in the name of its moral perfectionism is not necessarily meek all the way down. It stipulates for a binarized outcome: feminism can either assume guilt *or* deny harm. At moments when guilt has been the preferred stance, feminism has been notoriously not fun. Memories of these episodes have probably done a lot to fuel the brain drain. The fact that denial is framed as the chief alternative has produced certain magic realist tendency in feminism, and it has produced a lot of distrust in allied projects (antiracist projects, pro-gay projects, etc.) whose constituency arguably ends up bearing the costs of the decisions made by governance feminism. Finally, this denial has discouraged the investigation of internal ambivalence among self-identified feminists. Feminism in this mode does not particularly want to hear me say, "As a gay man, I . . ." And I might well decide to Take a Break from Feminism rather than give up on the hope of finding out what it might mean

to say it.

Constituting women, heterosexuality, and women's suffering. One of the most crucial moments in the genealogy of United States feminism was the roughly simultaneous publication in 1990 of Judith Butler's Gender Trouble and Eve Kosofsky Sedgwick's Epistemology of the Closet.[23] In different ways, and opening onto different consequences, both of them argued that what I have called here the definitional stake tying feminism to M/F also ties it, at the most fundamental level, to *the heterosexual.* To the extent that feminism defines itself as the -ism of this distinction, it *is* heterosexual; it *requires* heterosexuality and is basically not friendly to the homo-affirmative aim. Sedgwick responded by seeking a suspension of feminism; to articulate a "gay affirmative" agenda she felt the need to Take a Break from Feminism. She asked instead whether the homoerotic could be understood with richness and nuance in an account that did not turn substantially on M and F and proposed that study of same-sex eroticism might well return to feminism, but at an uncertain future date. Butler responded to the very same dilemma by turning feminism *against* the M/F distinction itself. A feminism that did not question its own role in producing the discursive strictures that require there to be women, the feminine, and femininity could not escape the charge of heteronormativity and thus could hardly merit the name of feminism.

A similar critical move can be performed on the definitional stake tying feminism to the subordination of F. What if, as well as *describing* and *opposing* this social and psychic event, feminism *helps to produce it*? What if the politics of injury and of traumatized sensibility which have almost completely occupied the space cleared by MacKinnon's politics of domination and subordination are helping to authorize and capacitate women as *sufferers*? If indeed feminism is a powerfully constitutive discourse, it might well have a shaping contribution to make *to women's suffering* when, for instance, it insists that a raped woman has suffered an injury from which she is unlikely ever to recover. What if real raped women, believing this feminist line, proceed never to recover? What if some men are "guided" by this bull's-eye to target women for rape rather than fomenting other aggressions, perhaps more manageable, perhaps directed elsewhere? When feminism insists that any effort to trace the causes of particular rapes in the woman's conduct blames the victim, revictimizes her, is a second rape, it might make rape seem more magical and random than it is, might make women more risk averse about it than they need to be, and might induce women to concede more social power to the threat of rape than they otherwise would. So much feminist rape

[23] Judith Butler, Gender Trouble (1990); Eve Kosofsky Sedgwick, Epistemology of the Closet (1990). In the background for both Sedgwick and Butler was the crucial paper of Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, *in* Pleasure and Danger, *supra* note 20, at 267.

discourse insists on women's object-like status in the rape situation: man fucks woman—subject verb object. Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence?

These questions pose a very profound problem about the nature of power and resistance. If a social subordination exists and an anti-subordination discourse ratifies it, fixes it, creates the discursive capacity for its experiential uptake by the subordinated, all the while hanging a bull's-eye on it, then where does one intervene to attack it? It has fascinated me, as I have begun to learn how to ask this question, to notice the strong feminist impulse to refuse it as unfeminist. The reaction has fueled my intuition that we might need to Take a Break from Feminism precisely to be *for women* and *against this increment of injury.*

Re-reading the Facts of Twyman

In an effort to clarify some of the costs and benefits of feminism and of Taking a Break from Feminism, I'm going to sketch four re-readings of the Twyman facts. I am not trying to figure out what actually or probably happened between William and Sheila Twyman, the actual human beings. Instead, I am going to offer four very divergent readings of the case, each of which could be thought adequate to the record as reflected in the Texas Supreme Court justices' various renditions of the facts.

I've redacted the following collection of factual elements in the various opinions and tried to retain only what is uncontradicted. William and Sheila were a young married couple. William asked Sheila to participate in bondage in their sexual relations and she agreed to. They both tied each other up with neckties. Sheila told William she wanted to stop doing this and explained to him that it was too painful for her for reasons relating to her rape, several years earlier, by a man who threatened her with a knife and actually cut her. The S/M activities stopped. Several years went by. Sheila discovered that William was in psychotherapy and confronted him to find out why. He told her he was having an affair with a woman who was willing to engage in bondage. He took the position that he had to have S/M sex, and that the marriage could not last if Sheila could not participate in it with him. They went into counseling. They made an experiment with S/M in the final days of their marriage; their last sexual encounter, which did not involve bondage, left Sheila with gynecological bleeding. Soon thereafter she filed for divorce. Later she amended her complaint to add the claim for infliction of emotional distress damages.

A Sexual-Dominance Feminist Reading

Many factual understandings offered by the trial court and the justices manifest the success of sexual-dominance feminism (MacKinnonite

and cultural feminism) in recruiting state power.

The homology between the rape and marital sex involving bondage.[24] The remand presupposes that a fact finder could conclude that William intentionally or recklessly caused Sheila intense emotional distress because he persisted in wanting to have bondage scenes with her even though he knew she had been raped at knifepoint and associated bondage with the rape. This notwithstanding the differences, e.g., the rapist actually knifed Sheila and she had sex with him in fear for her life; every bondage scene we hear about between her and William happened upon her "consent" and the only one we have any details about involved both of them being tied up; knives and neckties have different technical capacities and symbolic associations. Important side note: not a single justice frames the "rough" sex[25] that left Sheila bleeding into the intentional infliction narrative, and Justices Hecht and Spector *distinguish* it from the S/M story upon which the intentional infliction remand is based.

Many cultural feminists and MacKinnonite feminists would regard this understanding as *just right*, in at least two ways. The more structural feminisms, and the more sexual-dominance feminisms, tend to (though they need not) see rape as the paradigm or exemplary event in male/female relations, and regard their analytic work as complete only when more peripheral events, like sexual harassment, pornography, etc., are rendered *homologous to it*. The more radical and less liberal they are, the more they also have a critique of consent, such that Sheila's consent—to marry William, to live with him, to have sex with him, to have bondage sex with him—are all understood to be indistinguishable from the sex she had with the rapist. Except for in *really* radical feminism of the sort we see in gloriously paranoid structuralist versions like MacKinnon's early work, the conclusion of most feminisms is that rape and its homologies are *coerced*. That is to say, they do not see a consent/coercion problematic nor do they have a critique of consent or coercion. (The early MacKinnon, let it be noted, did.) Instead, in most contemporary paranoid structural feminisms,

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[24] The justices give us a range of representations of the homology, from loose to tight, from unspecificied causation to similarity to identity. Justice Cornyn leaves it loose, telling us "Sheila testified that William pursued sadomasochistic bondage activities with her, even though he knew that she feared such activities *because she had been raped at knifepoint before their marriage*," Twyman v. Twyman, 855 S.W.2d 619, 620 n.1 (Tex. 1993) (emphasis added); Justice Hecht indicates that Sheila "associated" the rape and bondage, so that "she revealed to him that she *associated the activities with the horrible experience of having been raped* at knifepoint earlier in her life," *id.* at 636 (emphasis added); and Justice Spector reports that, for Sheila, the rape and the bondage were the same: after William "introduced bondage activities into their relationship after their marriage[,] Sheila told William that *she could not endure these activities because of the trauma of having been raped* several years earlier" and "William understood that Sheila *equated* bondage with her prior experience of being raped," *id.* at 641 (emphasis added).

[25] Justice Hecht's term. *Id.* at 636.

consent collapses *into* coercion (just as in postfeminist neoliberal backlashism, coercion collapses *into* consent). I myself want to think there are differences between rape, on one hand, and sex with someone you know and like but on terms (neckties?) that you *don't* like. Even more than that, I want a problematic of consent/coercion, not a collapse of everything on one side of the binary or the other. So I would want to Take a Break from these feminisms.

Domination as trauma. In the last twenty years, many sexual-dominance feminisms have turned to the vocabulary of trauma for describing what structural MacKinnonite feminism would call domination. In that vocabulary, rape (for a paradigmatic instance) is understood to inflict harm on the psyche from which it can never recover; it brings into being a new self that is constituted by its injury. There are plenty of feminist counterdiscourses of course, but the trauma understanding is alive and well.[26] Two Twyman justices describe Sheila's rape as experience or trauma, and thus (by the narrative presuppositions of this discourse in feminism) as persisting in a *perpetual present.* Past time is pulled through to the present and beyond when Justice Hecht says that Sheila presented to William her "*horrible experience of having been raped* at knifepoint earlier in her life,"[27] and when Justice Spector validates her "equation" of it with her claim to "*the trauma of having been raped* several years earlier."[28] I myself would want to get better after an injury of that kind, not to suffer it forever, so here, again, I want to Take a Break from these feminisms.

Of course these moves are optional, not essential, inside feminism. Many feminisms, particularly sex-positive and postmodernizing ones, have been resisting these moves in sexual-dominance feminism for quite some time. What, over and above their achievements perhaps, might we gain in our reading of this case by Taking a Break from the essential elements of feminism? To see what that would be like, here are two *non*feminist readings of the Twyman facts. They make some good moves, I think.

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[26] Pamela Haag, "Putting Your Body on the Line": The Question of Violence, Victims, and the Legacy of Second-Wave Feminism, 8.2 Differences 23 (Summer 1996); Sharon Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, *in* Feminists Theorize the Political 385 (Judith Butler & Joan W. Scott eds., 1992). For a recent restatement of the trauma understanding of rape, sounding both in MacKinnonite and cultural feminist terms, see Rape Is..., produced and directed by Margaret Lazarus and Renner Wunderlich (Cambridge Documentary Films 2002).

[27] Twyman, 855 S.W.2d at 639 (emphasis added).

[28] *Id.* at 641. Justice Spector further insists on the psychic, somatic, and ultimately clinical *painfulness* of Sheila's experience: her Sheila experienced "utter despair" and "devastation," weight loss, and prolonged bleeding that necessitated gynecological treatment. *Id.* She concludes that "the *pain and humiliation of the bondage activity* caused her to seek help from three professional counselors." *Id.* (emphasis added).

A Nietzschean Reading

Sheila's project with William was intensely moralistic. She was not content to seek a fault-based divorce, and apparently did not seek damages or pursue criminal charges against him for that last night of sex that left her bleeding. Instead she seeks a judge's finding that his solicitations of sadomasochism, especially after the rape disclosure, and his willingness to leave the marriage because of Sheila's refusals, were outrageous, beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized society.

What can we say about this strategic decision if we take Nietzsche's Genealogy of Morals[29] as our theoretical ground? Let us imagine Sheila as indeed dominated and injured by male sexual rapacity, as moralistic rather than rebellious about this defeat, as saturated in *ressentiment* that turns her will to power toward vengeance, particularly *moral* vengeance, and as willing to suffer the whips of a bad conscience to secure the upper moral hand. Sheila, the agent of slave morality.

Seeing the case from this angle, we can say things like this. Sheila's rapist, that blond beast, could have been her enemy, but (possibly with the assistance of feminism) became her master. His power to rape her at knifepoint became *a* if not *the* central fact of her life. Experiencing herself as utterly dominated, she determined to oppose him with the power of the weak; he was "bad" not in the sense that he acted inimically to her will, but in the sense that he was evil. And her moral project of punishing him, in its ferocious will for revenge, failed to notice that William was, well, a different guy. Wielding the moral code of good (vanilla) sex, Sheila made William grovel, but she also suffered intensely herself. Justice Spector (of course) provides us with the gruesome details: Sheila experienced "utter despair" and "devastation," lost weight, accepted sex with William that left her bleeding, and "the pain and humiliation of the bondage activities caused her to seek help from three professional counselors."[30] (As I have noted, Justice Spector's *and* Justice Hecht's Sheila seems to find sex with neckties, but not sex that produces gynecological injuries, to be painful and humiliating. A Nietzschean reading of this discrepancy would propose that this Sheila was devoid of a self-preservative impulse, could not attend to the well-being of the body, so devoted was she to quickening of her wounded soul.) She experienced her self as utterly powerless, utterly broken. The more intensely she sought and obtained vengeance on William, the more deeply she became embedded in the stringencies of the suffering that justified it.

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[29] Friedrich Nietzsche, On the Genealogy of Morals: A Polemic (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed., Vintage Books 1989) (1887).

[30] Twyman, 855 S.W.2d at 641.

What could we possibly gain by reading the case this way? Well, we are put on notice that we might want to divorce Sheila Twyman from our political alliances and exile her from the scope of our unreserved solicitude. *If* this reading of her is right—and the reading itself is no empirical warrant (but note that nothing in the facts we are given *prevents* me from reading it this way)—it warns us to think of her as no weakling, but rather (if we oppose her) as a formidable enemy who will pursue her goals with fierce drive. Second, we gain some insight into the claims made by her sheer suffering. It is (on this reading) the effect of domination to be sure, but it is also produced, focused, prolonged, intensified, and turned into a weapon by her will to power. The slave-moralistic slave suffers terribly with every new access of subordinated sensibility. Third, we are in a good position to ask: what if *feminism* is partly responsible not only for her power, but also for the terrible suffering that grounds it? We might need to Take a Break from Feminism to see how feminism might be making things worse not only for Sheila Twyman, but for everything under attack in her persnickety code of sexual morals.

A Foucaultian Reading (à la Volume One)

Many feminists developing the possibilities for postmodernizing feminism have attempted to converge Volume One of Michel Foucault's The History of Sexuality[31] into feminism. But here I am pursuing divergence. How would the Twyman facts look if our hypotheses about sexuality and power included the following: sometimes power is not domination but micro-relations; sometimes power is not *puissance* but *pouvoir*,[32] the capacity to produce effects, not bad or good but just there; freedom might be not a state of release of repression or de-subordination but a *practice* of active engagement *in* power; power might combine with knowledge to produce, as an effect of power, *intelligibility*; sexuality might be one such effect; sexuality might be organized by technologies like the psychiatrization of perversions; gender might be peripheral, not central, to it.

So let's read the Twyman facts as if these hypotheses were the only ones available. We are invited here in the direction of Justice Hecht's view that power relationships between husband and wife are myriad, indeterminate, and not readily captured by dominance/subordination models. And this might allow us to see that Sheila and William are involved in almost identical forms of sexual pathos. Both are committed to the idea that they have deep, inner, injured sexual selves beyond which they cannot

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[31] Michel Foucault, The History of Sexuality, An Introduction: Volume One (Robert Hurley trans., Vintage Books 1990) (1976).

[32] As always, thanks to Alan Hyde for this excellent distinction.

move one micron, and which they must enact with near fatal completeness. William *must* live out the affliction of a perverse implantation, a deeply resisted fetishistic desire. He is a classic subject of the psychiatrization of perversions. Sheila *must* live out the affliction of rape trauma. Rape trauma is her deep inner truth, and her experiential life must make it manifest. In a terrible way, William and Sheila are perfectly matched to provoke the complete manifestation of their diametrically opposite desires; but oddly, this is because they are basically the same.

Moreover, Foucault always seems to think this experience of deep inner truth is introduced into modern consciousness by a discourse—a power/knowledge—that imposes it on us while distracting us from the real action, the real place where power connects with sexual life. (This is *Foucault's* paranoid structuralism.) And where might we look in the Twyman facts for a warrant of the hypotheses of Volume One? We are looking for something broadly regulatory, not M/F, and capable of complex biopoweristic and micropoweristic deployments.

I propose marital monogamy. Marriage provides spouses with an amazing power over each other: the power to perform (and inflict) and to prohibit (and punish) infidelity. Of course there are many ways of reading infidelity on a moral register. One: William breaks the most important promise that subsists between people; Sheila is not only devastated but wronged. Another: Sheila is the anti-sex fidelity-enforcing wife from hell, who won't have mild S/M sex with her husband, won't let him sleep around to get it, *and* won't divorce in peace. But let's try instead for a reading without a victim and a victimizer, without dominance and submission, but *with* power. What if the struggle between the two over William's infidelity (their divorce had been pending for eight years by the time the Texas Supreme Court remanded the case *for a new trial*!) was for both of them a paroxysm of intimacy, a sustained crescendo of erotic interrelatedness, which, if it should ever end, would leave both of them aimless and lonely to the last degree?

Why would we ever want to read the case this way? For the sheer critical mobility that we get from decoupling the facts (forgive the pun) from M/F, from M > F, and even from >. Suddenly we can see that legal rules and cultural forms—marriage, divorce, fault-based divorce, marital torts, the fidelity requirement—might operate in social contexts where husbands and wives have worked to ensure that they have symmetric—mirroring or even identical!—rather than hierarchical bargaining endowments. The real hierarchy would be between those who like and those who don't like a social world ordered by marriage and its legally significant fidelity requirement, between those who do and don't like multiple partners and/or a little kink, between those who depend on the former to add fizz to the latter. And suddenly we can see that the discourses of de-repression as liberation from subordination might sometimes recruit us, M or F, to projects of intense and endless suffering. Most critically, we can see that

some of us might *want* that suffering; it helps, I think, to be able to see that suffering can be what people seek and a very commonplace upside to marriage at its most banal and normal. (This would be a queer theoretic insight.) Figuring out what to do about such perverse desires is very hard. Facing how hard this is might be a good thing to do. And I would suggest that we can best do that if we are not tethered 100% of the time to feminism.

IV. BRENDA COSSMAN: SEX, GENDER, AND FEMINISM AFTER

Feminism's relationship to sexuality has been a troubled one. Feminist theory's contribution to the analysis of sexuality has been profound, revealing sexuality as a site for the production of gender and the operation of power. But feminism's analysis of sexuality has also been fraught. The sex wars of the 1980s divided feminists into those who framed sexuality primarily as a site of danger and oppression for women and those who saw sexuality more ambivalently, as also a site of pleasure and liberation. Some critics, notably Gayle Rubin and Eve Sedgwick, began to suggest that the study of sexuality needed a degree of independence from feminism, and that sexuality and gender be conceptualized as two distinct domains of analysis.[33] Lesbian and gay studies and queer theory took up the defining challenge of theorizing sex and sexuality in an analytic framework independent of gender. This rupture with feminism has produced a sophisticated literature on sex and sexuality, allowing more focused attention on a troubling of heteronormativity than the framework of feminism with its focus on male/female relationships had allowed.

Yet, this rupture has also produced a somewhat stultifying divide. Feminism and queer theory are cast in an antagonistic relationship, their differences incommensurable. Feminism has come to be associated with one side of the sex wars—those who seek to regulate the harms that sexuality presents for women, while queer theory has come to be associated with a more liberatory politic that seeks to destabilize the disciplinary regulation of sexuality. It is a divide that obscures significant currents of feminist thought and fails to interrogate the more productive potential of analyses that lie in the interstices of gender and sexuality, feminism and queer theory.[34]

In a more recent intervention in the feminism/queer theory debates, Janet has provocatively argued that it is time to "give feminism a break." Janet has demonstrated the conflicts between dominant variants of feminist critique and queer theory in the context of sexual harassment law, with

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[33] Rubin, *supra* note 23; Sedgwick, *supra* note 23.

[34] Judith Butler, Against Proper Objects, *in* Feminism Meets Queer Theory 1 (Elizabeth Weed & Naomi Schor eds., 1997).

feminist "victories" producing queer losses. She argues that it may be time "to urge feminists to learn to suspend feminism, to interrupt it, to sustain its displacement by inconsistent hypotheses about power, hierarchy, and progressive struggle."[35] Janet's methodology is a productive one. It has allowed her to produce counter narratives of the operation of power on the terrain of sexuality, narratives that were obscured from within feminism's male/female binary.

Yet, as a methodology, taking a break from feminism runs the risk of reproducing some of the problematic effects of the feminism/queer theory rupture. While Janet recognizes the diversity within feminism and the deep ideological divisions within feminism on issues of sexuality, thereby avoiding the simplistic feminism/queer theory, gender/sexuality dichotomies, "Taking a Break" from feminism risks leaving in place rather than "moving between" the polarized worlds.[36] It is a risk, however, that can be mitigated, paradoxically, by supplementing taking a break from feminism with feminism.

In my view, feminism after the critique of queer theory—particularly its focus on gender as an axis of power—continues to have analytic purchase. Feminism should not shy away from its expertise in analyzing the multiple operations of gender. Gender, when understood broadly as, in Joan Scott's words, "a primary way of signifying relationships of power,"[37] as a way in which material and symbolic resources are produced and distributed in asymmetrical ways, remains an important foundational and analytical frame of feminism. Gender still matters in the world in real and symbolic, discursive and material ways. But it need not be an exhaustive analytic frame. Feminism, as an analytic lens on gender as an axis of power, can and should be supplemented, challenged, and confused by other theoretical and analytic frames.

Theorizing sexuality needs to be able to bring gender as an axis of power into view. But feminism must also be attentive to the limits of its imagination. Feminism must sometimes leave its feminism behind, however momentarily, to allow a critical engagement beyond its own imaginative borders. But feminism must also be encouraged to travel back. A reinvigoration of feminist critique lies in both a return to and a decentering of feminism.

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[35] Janet Halley, Sexuality Harassment, *in* Left Legalism/Left Critique 80, 102 (Janet Halley & Wendy Brown eds., 2002).

[36] The idea of moving between polarized positions is borrowed from Biddy Martin, Sexualities Without Genders and Other Queer Utopias, 24 Diacritics 104 (Summer-Autumn 1994). Janet's focus on governance feminism, radical, and culture feminism similarly runs the risk of obscuring the potential insights of the multiple variants of more marginal feminisms that live more closely on the porous borders between the feminist and the queer.

[37] Joan Wallach Scott, Gender and the Politics of History 42 (1988).

Reading Twyman Through a Feminism After

It is just such a feminism decentered and enriched by the insights of queer theory that remains an indispensable resource for understanding cases like Twyman.[38] I cannot make sense of Twyman without a critical engagement with feminism and its multiple discourses of gender. The various opinions animate many feminisms: dominant strands of liberal, dominance, and cultural feminism, and more marginal strands of sex-positive, queer/postmodern feminism, and redistributive feminisms. Alternative readings, both within and without feminism, are needed to supplement and disrupt, analyze and destabilize, dominant feminist readings of this case. But, unlike Janet, I need feminism to critique what is wrong with feminism. While I rely on the insights of queer theory in this disruption, I nevertheless need to keep a critical eye on the discourses of gender in analyzing the deployment of sex and sexuality.

Liberal, dominance, and cultural feminists would more or less agree on their analyses of this case, differing only in emphasis.[39] The story would go something like this. S/M is part of the systemic sexual subordination of women by men, and therefore, the S/M sexual encounter in the marriage should constitute an actionable sexual harm. The plurality got it wrong by applying a gender neutral standard that excludes women and their unique experiences of harm, thereby reinforcing the sexual subordination of women by men. But at least the plurality sent the case back for retrial on the basis of the intentional infliction of emotional distress. By contrast, both Chief Justice Phillips and Justice Hecht got it completely wrong by immunizing the private sphere of the family from intervention, and thereby failing to recognize the harms women suffer within this sphere and reinforcing the sexual subordination of women by men. Both failed to interrogate the gendered impact of the refusal to recognize this tort, and the extent to which both sexuality and the family are sites of women's subordination. By contrast, the dissenting opinion of Justice Spector would be heralded as a feminist victory in recognizing the unique harms that women suffer at the hands of men and connecting the harm of emotional distress to the broader issue of violence against women.

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[38] Twyman v. Twyman, 855 S.W.2d. 619 (Tex. 1993).

[39] Liberal feminism would highlight the ways in which a gender neutral standard excludes women and their experiences of harm. Radical feminism would highlight the ways in which women's subordination in and through sexual practices are rendered invisible in law's objectivity. Cultural feminism would highlight the exclusion of women's unique experiences of harm from the law, and argue for the need to accommodate these experiences within the law. While the three strands of feminism blend together into a single feminist reading, there is a difference in emphasis: exclusion, subordination, and the need for inclusion, respectively.

This is a feminist reading. But, it is not the only feminist reading to which the case could be subject. Redistributive feminism, for example, would read Twyman from the point of view of gender oppression, but it would deploy a very different analytic framework, with very different conclusions. It would retain a focus on the family as a site for the production and operation of gender as an axis of power. It might focus its analysis on the operation of dominant familial ideologies and the ways in which those ideologies shape and reinforce deeply gendered assumptions, roles, and responsibilities within the family. This reading might highlight the ways in which the opinions of Hecht and Phillips were shaped by the ideologies of affective privacy. A redistributive feminism might consider the distributional effects of the case in terms of the allocation of resources on family breakdown. It might evaluate the decision in Twyman from the broader context of the transformations in the legal regulation of the family. How does the effort to reintroduce fault operate within the context of the fundamental restructuring of family law from fault to failure? To what extent might the reintroduction of fault serve to undermine the efforts to recast family breakdown as primarily a question of restructuring financial and parenting relationships. Might the reintroduction of fault, particularly in the context of sexual harm, undermine family law's focus on equitable redistribution by refocusing attention on moral culpability?

Sex radical feminism would read Twyman very differently. It would dispute the normative and analytic assumption of dominance feminism that S/M sexuality is part of the systemic sexual subordination of women by men. Indeed, sex radical feminism rejects the very premise of dominance feminism that sexuality constitutes the primary site of women's subordination, insisting that sex and sexuality is a far more ambivalent site, producing multiplicities of pleasures and dangers.[40] Similarly, it would not frame S/M sex as inherently harmful to women, but as a potentially pleasurable and subversive sexual practice. A sex radical feminist reading would question the liberatory potential of recognizing S/M as a potentially actionable sexual harm, arguing instead that increased surveillance and regulation would reiterate a conservative sexual morality that has been highly problematic for women. Such a feminist reading would dispute the gendered assumptions of the dominant feminist narrative that women need to be protected from aggressive, male sexuality, arguing that such a protectionist approach simply reconstitutes women as weak, hapless, powerless victims. Sex radical feminism would insist on women's sexual agency, on their ability to negotiate the treacherous terrain of sexuality, consensually seeking pleasure and avoiding danger. But this feminist reading would not celebrate Twyman as a feminist victory, since the opinions each demonstrate a distaste towards alternative sexual practices,

[40] Rubin, *supra* note 23.

thereby reiterating the same underlying conservative sexual morality. Sex radical feminism would reveal the ambivalent discourses of sex and sexuality underlying the decision.

A queer theory postmodern feminism informed by the work of Judith Butler would provide yet another reading of Twyman. It would consider how the claims of harm and the deployment of legal discourses reiterate the very foundational categories of man/woman, male/female that feminism needs to disrupt. Feminist claims of harms to women help to produce the very bodies, subjectivities, and identities who experience this harm.[41] Such a reading of Twyman would be concerned with the extent to which a legal recognition of emotional distress for a sexual harm associated with a consensual practice would discursively produce women who do suffer these harms, that is, it would reiterate Woman as a victim of men's sexual subordination, as a subject who lacks sexual agency and who experiences psychic trauma from sexual engagements. This feminist reading would be concerned that this recognition of women's sexual injury by men would operate to further instantiate a heterosexual matrix that produces and polices sexed and gendered bodies. Such a reading would be centrally concerned with the discursive closures produced by these reiterations of gender.

Both sex radical feminism and queer theory feminism would have something to say about the fact scenario that gave rise to the claim for emotional distress. The "facts" of the sexual encounter are murky, told to us only through the court's narrative of "deviate sexual acts."[42] In a footnote, the plurality tells us the lower court found that William "attempted to emotionally coerce [her] in 'bondage' on an ongoing basis."[43] A slightly different account is provided in Justice Hecht's opinion, in which he describes the sexual encounters as two or three occasions in which "the couple engaged in what they referred to as light bondage—tying each other to the bed with neckties during their sexual relations."[44] The S/M encounters ceased when Sheila told her husband that she associated the activities with her trauma of being raped at knifepoint earlier in her life, and that she did not want to participate any further. We know little else of the sexual dynamic and erotic desires of this couple, aside from the fact that William's S/M desires did not wane, but ultimately led him to pursue his fantasies outside the marriage.

While the dominant feminist narrative, with its radical feminist influence, has no difficulty condemning the sexual encounter as abusive and

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[41] Halley, *supra* part III, at 610-11; *see also* Wendy Brown, States of Injury: Power and Freedom in Late Modernity (1995).

[42] Twyman, 855 S.W.2d at 620.

[43] *Id.* at 620 n.1 (quoting the lower court).

[44] *Id.* at 636.

oppressive, sex radical and queer theory feminism would have counternarratives to tell. Sex radical feminism, in keeping with its insistence on sex and sexuality as ambivalent, producing the possibilities of pleasure and danger, would focus attention on the question of consent. While the absence of consent could justify legal intervention, if the sexual encounters appeared to be consensual, if Sheila Twyman agreed to participate in the bondage, then the fact that she did not enjoy the sex encounter would not be sufficient to make it actionable. Sex radical feminism would emphasize that although consensual S/M may not be to everyone's erotic taste, it should be recognized as a legitimate sexual choice.

Queer theory feminism would similarly be interested in the multiplicities and ambivalences of sexuality, though its focus would not be on liberal conceptions of consent. Queer theory feminism would be interested in the potential for gender to be performed subversively. It would turn its critical eye to the ways in which S/M practices may disrupt dominant iterations and performativities of gender, seeking in turn to undermine the gender/sex/heterosexuality triad. Alongside sex radical feminism, it might explore the ways in which much S/M practice and imagery inverts the male subject/female object narrative of radical feminism. In much S/M imagery and practice, women perform sexually powerful, both self-possessed and other controlling, roles; they are the dominatrixes, men are their slaves. But, while this might be enough to affirm the liberatory potential for sex radical feminism, queer theory feminism would remain skeptical about such a simple reversal that remains firmly anchored within a heterosexual matrix. It would also be skeptical about such stable and coherent subject positions, either subject or object, self-directed or other controlled, seeking out instead the ambiguities of desire and the instability of identity.

Further, the S/M encounter in Twyman was *not* one in which the gender roles were reversed, at least not clearly so. Sheila agreed to participate, at the encouragement of her husband, and ultimately did not find the experience to be redemptive. While we know little about her sexual psychic life, she is not the dominatrix of popular culture S/M chic. This is no simple, celebratory reversal of gendered narratives. Nor is it one in which we even get to delve into the mysteries of female masochism, à la Jessica Benjamin. Unlike the film Secretary, where Lee Holloway, the lead character, comes to terms with her own masochism, redirecting her psychic trauma from self-mutilator to slave, Sheila finds no transcendence in her brief encounter with bondage. She is neither dominatrix nor slave, top nor bottom. Her experience is a complicated one—consensual, but disturbing for reasons that we cannot fully access. The ambiguities dissolve in the face of the story that Sheila subsequently tells: a story of being "forced" into S/M against her will, a story of adding injury to her psychic trauma of sexual violence, a story of a husband's deviant and uncontrollable sexual

practices ultimately destroying their marriage. She is no longer a sexual agent, but a sexual victim; the S/M encounter is no longer a complicated mix of erotic desire and abjection, but a coercive humiliation, made worse by her husband's subsequent infidelity. A queer theory feminism might seek to reveal these instabilities and ambiguities in the constitution of subjectivity and in the subject's effort to repudiate them through a victim narrative.

Together, sex radical, redistributive, and queer theory feminist readings would dispute and disrupt the dominant feminist reading of Twyman. But, each of these readings retains a focus on gender as an axis of power, as "a primary way of signifying relationships of power."[45] Each of these readings suggests that the material and discursive implications of the case must include an analysis of gender, and its complex intersections with the discourses of sex and sexuality.

While these alternative feminist readings produce important insights into the operation of sexuality and its legal regulation in Twyman, queer theory can further disrupt and supplement these insights with its own reading of the case. Queer theory might consider the disciplinary implications of the surveillance of sexuality for subjects whose bodies are marked by "other" sexualities: S/M subjects, queer subjects, transgendered subjects, sex worker subjects, and others whose bodies are erotically charged. Queer theory could read Twyman as a performance of heterosexuality, with the court, for example, policing the boundaries of stable heterosexual sexuality. Its focus on the contingencies and ambivalencies of sexual identity might consider the ways in which the S/M encounter in Twyman produced a disruption in the heteronormativity of marriage. But unlike a feminist reading, this focus on the heteronormativity of marriage would have nothing to do with gender as an axis of power. Rather it would interrogate the role of marriage in producing the heteronormative matrix and the hetero/homo binary. Such a queer theory reading of Twyman can provide a part of the story that feminism with its focus on gender simply cannot tell. Feminism needs to make space for the idea that critique that does not center gender may produce valuable insights into the workings of sexuality. And in allowing for the possibility of its own decentering, the alternative feminist readings of sex radical and queer theory feminism could be significantly enriched.

Conclusion: Disrupting Feminism

Decentering feminism is part of a broader project of disrupting feminism, that is, of reversing "the radical foreclosure of the very

[45] Scott, *supra* note 37.

intellectual range and reach."[46] Feminism, particularly in its dominant modalities, has foreclosed intellectual range and reach. It has seriously narrowed intellectual inquiry, prioritizing politics over critique. It has cemented a gendered lens as the only lens, and again in its dominant modalities of radical and cultural feminism, endeavored to cement a very particular gendered lens. The threat and the electrifying energy that postmodernism, postcolonialism, and queer theory has brought to this feminism is precisely its disruptive power, its challenge to the foundational concepts such as identity, rights, and reform. Feminism after the critique of feminism must be able to tap into these high voltage power lines. It must not be afraid to return to gender, nor rethink its meaning, its deployment, and its porous borders. In the realm of sexuality and beyond, the feminism of "feminism after" must be prepared to rethink the limits of its own categories and imagination, and deploy alternative analytical frames to move beyond these limitations and back again.

V. DAN DANIELSEN: WHAT'S IN A NAME? STAKES AND CONSEQUENCES IN DEFINING FEMINISM(S)

The conference organizers have asked us "Why a Feminist Law Journal?" Their question provokes debate about how we should imagine, identify, claim, or define what "is" and "is not" feminist. I would like to sharpen these issues in the context of the Twyman case to focus our attention on what is at stake in this definitional project. I start with the observation that Janet and Brenda approach the project of defining feminism quite differently.

I would describe Janet's project as an attempt to define feminism in order to contain it. She develops a map of feminist thought based upon the male/female split and gender subordination. This map is designed to enable her to get intellectually and methodologically "outside" feminism, both to consider alternatives and to get some critical purchase on the "inside"—feminism itself. Her suggestion that we "Take a Break from Feminism" is not only a call to resist the theoretical tradition her map articulates. She is also seeking an exit from the identity position, worldview, will to power, and moralism she associates with the male/female, dominance/submission models of feminism. Thus, Janet's containment project defines "feminism" so that we can know when we are *not* doing it and when we *are* doing something else.

By contrast, Brenda's project attempts to define feminism in order to preserve it. Her focus on the "gender lens" and on gender "as a primary way of signifying power" suggests, at least metaphorically, that there may

[46] Wendy Brown & Janet Halley, Introduction, *in* Left Legalism/Left Critique, *supra* note 35, at 1, 33.

be other lenses and that the feminist gaze or view may capture but one way of signifying power. Nevertheless, for Brenda the feminist view is broad, with plenty of room for multiple feminisms with very different intellectual and political agendas. For example, Brenda's definition would seem to include Janet's project, or at least parts of it, inside the feminist big tent.

How would the Twyman opinions look from these quite different perspectives? The opinions would seem to have various "outcome" implications—for men, women, married persons, for the legal field, for divorce, for power within the couple, for feminism. Which of these outcomes might most reasonably be termed "feminist"? Are some opinions decidedly not "feminist"? What might these characterizations themselves be implying? Can we evaluate our own opinions about what is and is not feminist by reference to the outcomes they generate?

Turning to the case, my sense is that both Janet and Brenda would classify Justice Spector's dissenting opinion[47] as "feminist"—employing strands of dominance and cultural feminisms. Evidence for this position would include Spector's opening characterization of the lower divorce court's decree as "an award to Sheila Twyman of $15,000 for the years of abuse she suffered at the hands of her husband'"[48] and her assertion that William's bondage requests could only be understood as "grossly offensive conduct" that were the "direct proximate" cause of Sheila's mental anguish.[49] There was no doubt in Spector's mind about what happened, or about who was victimized by whom or about the "reality" of Sheila's psychic injury. Spector's certainty about Sheila's superiority to her husband and moral innocence exemplifies the cultural feminist perspective, at least as characterized by Janet.

Spector also evidenced feminism's structuralist sensibility (again using Janet's terminology) when she suggested that the injury to Sheila was parallel (equivalent?) to the injuries regularly done to women by men, and when she suggested that these injuries were exacerbated (reenacted?) by the court itself in refusing to recognize Sheila's claim for negligent infliction of emotional distress. Spector stated, "Today, when the widespread mistreatment of women is being documented throughout the country—for instance, in the areas of sexual harassment and domestic violence—a majority of this court takes a step backward and abolishes one way of righting this grievous wrong."[50]

Spector's structuralist (dominance) feminism is strengthened by her assertion that the infliction of emotional distress is primarily, if not

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[47] Twyman, 855 S.W.2d at 640-45.

[48] *Id.* at 640.

[49] *Id.* at 641.

[50] *Id.* at 643.

exclusively, a "male" problem. She stated, "since the overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women, I do argue that men have had a disproportionate interest in downplaying such claims."[51] In each of these ways, Spector's opinion would qualify as feminist both in Janet's male/female, gender subordination framework and in Brenda's "gender lens" framework.

None of the remaining opinions qualify as feminist from Janet's perspective, while Brenda's "gender lens" framework might bring a couple more into the feminist fold. For example, in Justice Hecht's concurrence and dissent,[52] he concurred in the reversal of the divorce decree and damages but refused to recognize the tort of intentional infliction of emotional distress. It would be easy to read him as a traditional anti-feminist who hesitates to recognize or remedy emotional harms. He refused to treat women as either the primary victims of or the primary beneficiaries of a remedy for emotional distress.[53] He focused on the emotionally vulnerable situation of *both* partners in a marriage and their reciprocal abilities to cause each other tremendous pain.[54] He worried that men and women will routinely bring emotional distress claims in divorce proceedings and that sorting the compensable from non-compensable harms would prove intractable.[55] He found no ready metric to measure whether Sheila's emotional pain resulted from the affair her husband was having, from the breakup of the marriage, or from the requests for S/M sex.[56] He was concerned that prejudice will prove the only basis for courts and juries to decide what is "outrageous" conduct for purposes of the tort,[57] and he worried that courts will intrude too deeply into the intimate details of married couples' emotional and sexual lives.[58] It would be easy for both Janet and Brenda to place this discourse outside feminism.

At the same time, Hecht does seem to recognize that women are both victims and victimizers, that mutual emotional vulnerability might be a positive as well as a negative aspect of intimate relationships, that letting juries decide what constitutes "outrageous" conduct in a marriage might well affect sexual autonomy and experimentation within marriage, and that seeing the emotional distress as a "women's remedy" is demeaning to

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[51] *Id.* at 642.

[52] *Id.* at 629-40.

[53] *Id.* at 638-40.

[54] *Id.* at 637.

[55] *Id.* at 634-36.

[56] *Id.* at 636.

[57] *Id.* at 632-34.

[58] *Id.* at 637.

women. These positions fit comfortably within Brenda's description of sex radical and postmodern feminist positions. If she is right, we could also describe Hecht's opinion as "feminist." Hecht's positions also seem to be part of what Janet hopes to access by "Taking a Break from Feminism."

Much of the same could be said for Chief Justice Phillips's arguments regarding the intimacy and mutual vulnerability of marriage and the intrusiveness of court scrutiny.[59] Phillips concurred in the recognition of the tort of intentional infliction but dissented as to its extension to married couples.[60] Thus Phillips, like Hecht, might be a hero for sex radical feminists or postmodern ones.

In addition, Phillips made arguments that evoke another of Brenda's feminist categories: redistributive feminists. In arguing that the court should recognize intentional infliction of emotional distress as a tort, but not between married couples, he worried that the tort could become the dominant factor in the allocation and distribution of the marital estate. As Phillips put the problem:

> The court had broad discretion to weigh any fault along with other appropriate factors [for dividing the marital estate], such as relative financial condition, disparity of ages, and the needs of the children. Now, however, where fault takes the form of "outrageous" conduct intentionally or recklessly inflicted, it becomes a dominant factor that must be considered at the expense of the other factors. Unlike battery, fraud, or other torts resting on more objective conduct, a colorable allegation of intentional infliction of emotional distress could arguably be raised by one or both parties in most intimate relationships.[61]

In other words, the tort becomes another potential weapon in negotiating the distribution of the marital estate, and, like Hecht, Phillips did not seem convinced this new weapon would redound to the woman's benefit.[62] Like a good redistributive feminist, Phillips had serious dollars and cents concerns about whether this new cause of action would not be detrimental to the gains resulting from the abolition of the fault-based divorce scheme. Thus, by my reckoning, Phillips's opinion could be fairly described as feminist from a sex radical feminist, a postmodern feminist, or a redistribution feminist perspective. At the same time, this cool-headed analysis of distributional impact is part of what Janet promises us if we take a break from the overheated sentiments of feminism.

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[59] *Id.* at 627-28.

[60] *Id.* at 626.

[61] *Id.* at 627-28.

[62] *Id.* at 628.

This leaves us with the plurality opinion recognizing the tort of intentional infliction of emotional distress in the marital relationship and remanding the case for further findings.[63] My guess is that neither Janet nor Brenda would classify the plurality opinion as "feminist." This seems in part because the opinion rejects both Spector's more traditional feminist assertions of the gendered nature of the harm as well as the sex radical or postmodern feminist concerns about pleasure, autonomy, and power expressed by Hecht and Phillips.[64] Writing for the plurality, Justice Cornyn refused to see the tort of emotional distress in the context of marriage and divorce as affecting a gendered dynamic of power. From this perspective, this opinion falls outside even Brenda's broad "gender lens" definition of feminism. On the other hand, although the opinion evades any focus on gender, it strongly resonates with a liberal/equality feminism by recognizing women's autonomy and subjectivity outside the confines of male dominance while also affirming and compensating egregious abuses of marital relationships. Perhaps this perspective is part of what Janet has in mind with her "Take a Break" strategy but I believe her description of feminism would overlook the feminist aspects of the plurality position.

What should we make of the idea that all the positions taken by the justices could be lined up with fairly prominent, widely-held feminist positions?[65] Even if we recognize, as we must, that these positions might be subject to critique by other feminist positions or by divergent views within particular feminist positions, the fact that they are subject to contention cannot preclude them from being designated "feminist." But if each of these radically different and contradictory opinions can be reasonably understood as "feminist," what can we say is gained or lost by calling one or another "feminist"?

A common response shifts the focus from a conceptual definition of feminism, like the ones offered by Janet and Brenda, to a more pragmatic, outcome-focused one. Perhaps one could decide which opinions or outcomes to call feminist simply by asking which are better for women. Still this shift in focus does not get us far. Each strand of feminism, like each opinion in the Twyman case, is working toward its own vision of what is good for women. A focus on outcomes simply reframes the question as one of "Which women?" or "Good in what sense?"

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[63] *Id.* at 619-26.

[64] *See id.* at 622-24.

[65] While I have not treated Justice Gonzalez's opinion separately, the moral tone and unequivocal certainty of his opening paragraph suggests that he might well be in Justice Spector's feminist camp. On the other hand, he did not join Justice Spector's dissent, so I could be wrong. Unfortunately, he simply offered us too little text to form a clear opinion. *See generally id.* at 626.

For example, for the dominance or cultural feminists aligned with Justice Spector, recognition of the tort of negligent infliction of emotional distress would have been an affirmation of the reality of gender subordination and a means of compensating for systematic emotional injury of women by men. Even this would, of course, only be the first step in assessing this outcome. To complete the analysis, we would need to explore what would happen next. Who would use the new tort? Against whom? Would there be a backlash? How would this regime compliment or disrupt related regimes?

At the same time, for a sex radical or postmodern feminist aligned with Justice Hecht, recognition of the tort would be bad for women's agency, autonomy, and freedom of sexual experimentation, allowing juries to adjudicate after the fact what is "outrageous" in the emotional or sexual treatment of the parties to an intimate relationship. For redistributive feminists perhaps aligned with Chief Justice Phillips, recognition of the tort in the marital context might be good for women if it leads to larger awards of the marital property. It could also be bad for women if it results in a higher bar for fault than the court might have required in divorce proceedings before the tort was permissible or if husbands successfully assert tort claims on a regular basis that would not have been recognized previously under a no-fault or a more discretionary system of marital property allocation.

It turns out that we cannot escape the differences within and amongst feminists about what will, in fact, be most advantageous for women. It is clear that this is not a new situation for feminism or feminists. Nor should we necessarily see this as a crisis for feminism or feminist law journals. For some feminists, dealing with such differences is what feminism is all about.

What remains unclear is how adopting either Janet's or Brenda's strategy about feminism as a whole might affect the status of forces *among* these positions. The definitional strategies suggested by Janet and Brenda might lead to quite different intellectual, political, and personal practices. At a personal level, Janet's feminist containment strategy might lead one to leave feminist methods, identifications, and commitments behind and move on. On the other hand, it might enable some people to get enough critical purchase on feminism to define a new place for themselves and their projects within it. A "big tent" strategy like Brenda's may intensify or erode a person's sense of feminist identity and community. Further, beyond the personal, these strategies might well have different consequences for the field and for the distribution of resources, status, and power in feminism and in society. In either case, it would be helpful to know—or at least to wonder—about these second order consequences before deciding to go with either Janet or Brenda.

Notwithstanding their quite different approaches, at some level both Janet and Brenda seem indifferent to differences within feminism. For

Brenda, being a feminist does not mean you agree with other self-described feminists about any aspect of gender, power, or what is good for women. For Janet, "Taking a Break from Feminism" means leaving it all behind, even the parts she might find least problematic.

Yet both strategies seem to facilitate some perspectives and obscure others. Employing Janet's "Take a Break" strategy would arguably enhance our ability to identify instances of slave morality in gendered contexts and trace trajectories of power outside the M > F paradigm of many feminist discourses. Yet it may make it harder to see those situations when structural subordination is an accurate description of the situation or when gender discrimination, as traditionally understood, is the best available explanation for the behavior and consequences of certain acts. Further, from the pragmatist's perspective, we cannot decide whether or not signing on to a "Take a Break" strategy is a good idea until we know more about how such a strategy would impact the women or men or politics or subjectivities we most care about promoting and at what cost to other constituencies. What kinds of women and men, what sexualities, what domestic arrangements, what employment opportunities would be promoted or retarded by "Taking a Break from Feminism"?

We should ask the same questions about Brenda's "big tent" strategy. It will also come with costs as well as benefits. Diverse interest groups often get lost in broader political coalitions or movements—will something similar happen in Brenda's big tent? If your theoretical perspective or political project is quite different from or critical of more prominent or well-known feminist perspectives, should you take a break or enter the tent? What will be the impact on a mainstream feminist agenda of associating with other perspectives, projects, and politics in the tent? Adopting Brenda's "big tent" feminism might mean that you will have to accommodate and therefore legitimate a broader range of "feminist" projects than you would yourself support, perhaps including some projects you think would be bad for the women you most care about or even for women generally. Moreover, it remains altogether unclear what the "real world" consequences of such a broad feminist coalition would be. Would it make the divergent feminist positions more effective? Less effective? Generate more effective opposition?

These questions become all the more dramatic if we imagine feminism not as a marginal academic discourse but as a governance project. It is one thing to have deep ideological disagreements when you are an opposition group or outside the citadels of power. Left politics is full of such debates, rifts, and struggles. But now, thanks in large part to feminist successes, feminists and feminist perspectives have power and purchase in many political contexts. Under these new conditions, what does it mean for feminists to be on both sides of a law reform project like expanding or contracting the sexual harassment laws or creating tort remedies for emotional distress in the marital context? Does either side gain from the

feminist association or from denying it? What might one refrain from saying or doing in the name of feminism or in the name of taking a break from it? What alliances might you avoid? What constituencies might you empower by taking one or another of these positions? Which might you disable?

These questions can only be answered in the context of real political choices about winners and losers. It seems to me they remain on the table whether one is "Taking a Break from Feminism" or sitting comfortably—or uncomfortably—within the "big tent."

VI. TRACY HIGGINS: IS FEMINISM ENOUGH?

In asking whether feminism is a sufficient tool for the analysis of sexuality, this discussion raises two related areas of inquiry. The first concerns the boundaries of feminism itself: what does it mean when we say that a critique is *feminist*? The second concerns alternatives to feminism, particularly nonfeminist left critiques: how do such nonfeminist critiques contribute to an understanding of sexuality and its regulation? And, more specifically, how might they reveal the regulatory implications of a feminist agenda?

Dan's analysis of Twyman focuses primarily on the first question. Dan argues that all of the opinions in Twyman can be read as "feminist" in some sense, ranging from a dominance feminist critique in Justice Spector's dissent to a sex radical reading of Justice Hecht's opinion. He rightly asks what this means for feminism given that the justices disagree on so many points and reach different conclusions. Brenda argues, equally convincingly, that each of the opinions is subject to a thoroughgoing critique from one or another type of feminism. Indeed, the opinions might even be read as anti-feminist or at least unfeminist (as opposed to Janet's nonfeminist readings). For example, as Brenda points out, the plurality opinion got it wrong from a feminist standpoint by applying a gender neutral standard that excludes women and their unique experiences of harm. Chief Justice Phillips and Justice Hecht both got it wrong by insulating the private sphere of the family and thereby reinforcing women's subordination to men in that sphere. Finally, even Justice Spector may have gotten it wrong: from a sex radical standpoint, characterizing S/M as necessarily and uniquely harmful to women further reinforces women's victimhood and invites further conservative regulation of sexuality.

So, to complicate and reinforce Dan's point, each of the contradictory opinions can be read, not only as "feminist" but as "unfeminist" as well. This foregrounds the question of whether feminism is simply indeterminate. The question arises not just because of the postmodern challenge to the coherence of the category "women" but because, even assuming the meaningfulness of the category, feminism just

means too many different things to too many different people. This is especially problematic for a theoretical enterprise joined to an identity-based political movement. How can contradictory political claims be understood as *feminist* without undermining the effectiveness of the movement? It is also a serious challenge to the enterprise that is the focus of this symposium, the feminist law journal. How should a feminist journal pursue its mandate in the face of utterly incommensurate assumptions and assertions about what feminism is?

Without attempting to answer these questions directly, Brenda offers an appealing way simultaneously to preserve the complexity of the relationship among various feminist theories and to acknowledge that feminism itself has boundaries, disputed though they may be. She writes, "Feminism needs to make space for the idea that critique that does not center gender may produce valuable insights into the workings of sexuality."[66] I agree. Moreover, such a recognition offers at least a couple of benefits *for feminism*. First, acknowledging boundaries is a way to resist the indeterminacy problem—feminism is everything to everyone and therefore nothing (or at least nothing very interesting or provocative). Second, as Brenda notes, "the alternative *feminist* readings of sex radical and queer theory feminism could be significantly enriched"[67] by such nonfeminist critiques.

Here I would observe a significant point of difference between Brenda and Janet. By emphasizing the overlap of feminism with nonfeminist/left critique, Brenda's paper treats "Taking a Break from Feminism" as either neutral toward or beneficial to feminism. Maybe, but maybe not. It seems to me that Janet goes considerably further to suggest that we need to "Take a Break from Feminism" *not*—or at least not simply—because the resulting insights might enrich feminism but for other reasons. First, assuming that feminism can explain Everything—or, somewhat more modestly, everything about sexuality—is paranoid, dishonest, or even a little silly. Second, and more importantly, assuming that a theory of gender subordination, which Janet considers a definitional component of feminism, can fully account for the domain of sexuality allows feminists to ignore the consequences of our power and even the fact that we wield power at all. Perhaps to oversimplify, the point is that feminist gains might mean not less oppression for everyone but *different* oppression resulting from an exercise of feminist power. Nonfeminist left/progressive readings (or "Taking a Break from Feminism") could reveal feminist complicity in that oppression and, one hopes, encourage us to grapple with it.

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[66] Cossman, *supra* part IV, at 623.

[67] *Id.* (emphasis added).

So why is the idea of "Taking a Break from Feminism" so hard for feminists to take? Why is it so provocative and controversial? I would like to suggest three reasons. First, it seems dangerous and threatening to the interests of women in that it creates openings that could be exploited by interests hostile to women and feminism. Second, just as many feminists resented Catharine MacKinnon's insistence that "radical feminism *is* feminism,"[68] so too we might resent Janet's assertion of what feminism is not and, by implication, what it is. Finally, I think it is also because we do not like to consider the possibility that feminism is not good for everyone, indeed it might be bad for groups of people we do—or ought to—care about. Or put differently, we might feel that Janet is being a bit too hard on feminists and our unreflective will to power.

Janet acknowledges the first objection that "Taking a Break from Feminism" might be dangerous. Indeed she assumes that it could harm both the cause of women generally and individual women—for example by rendering them more vulnerable to sexual violence than they would otherwise be. She insists, however, that these risks are worth taking, both because refusing to "Take a Break from Feminism" carries its own risks and because doing so offers benefits. Her analysis of these risks and benefits provokes the other two objections I have noted: that her definition is too narrow, and that as a result, she is too hard on feminism. These objections are important because they affect one's assessment of the cost/benefit analysis of "Taking a Break from Feminism."

In order briefly to explore this definitional objection, I would like to test Janet's critique of feminism by beginning from Brenda's definition and asking whether the costs of adhering to such a perspective still obtain. Janet defines feminism as having two (really three) fundamental elements. She suggests that a feminist position must "make a distinction between M and F,"[69] and "posit some kind of subordination as between M and F, in which F is the disadvantaged or subordinated element,"[70] and "carr[y] a brief for F."[71] In contrast, I think Brenda would be satisfied with the first and third elements—a focus on gender and the interests of "F" without the assumption of a relationship of subordination. To be fair, Janet does acknowledge that feminists differ with respect to whether women's subordination is structural or episodic, but she suggests that the usefulness of feminism is limited to the fact of women's subordination: "if male dominance is not always already there, then we don't always need feminism."[72] In other words, in Janet's argument, the relevance of feminism

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[68] Catharine A. MacKinnon, Toward a Feminist Theory of the State 117 (1989).

[69] Halley, *supra* part III, at 604.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 605.

maps perfectly the boundaries of male domination, assuming that those boundaries even exist.

To present her argument most powerfully, Janet cannot adopt Brenda's definition of feminism because she needs feminism to be about subordination. Indeed, all but one of the costs she ascribes to feminism, "the conceptual priority of M/F, and the normative or political priority of perpetually carrying a brief for F,"[73] arise most directly from the assumption of subordination, M > F rather than the other elements. For example, according to Janet the brain drain in academic feminism results, at least in part, from an inability to acknowledge the possibility of analyzing gender while suspending the assumption of subordination. The bad faith she ascribes to governance feminism (its inability to see the blood on its hands) comes not from a focus on gender per se or even from carrying a brief for F (though that might account for the blood itself). Rather, the blindness to the costs of governance feminism comes from feminism's assumption of its own powerlessness, a corollary of M > F. Janet makes similar arguments with respect to feminist power masquerading as servitude and "moral perfectionism and magic realism."[74] Again, I understand these costs as rooted primarily in an assumption of subordination rather than what Brenda calls a gender lens.

Of the various costs Janet ascribes to unbroken adherence to feminism, the only one that is associated with the gender lens itself rather than the assumption of subordination is the role that feminism may play in constituting women, heterosexuality, and women's suffering. Here she cites Judith Butler as "turning feminism *against* the M/F distinction itself"[75] to reveal "its own role in producing the discursive strictures that require there to be women."[76] She extends this argument to M > F and asks whether feminism, premised on this assumption of subordination, could be "contributing to, rather than resisting, the alienation of women from their own agency."[77] Perhaps so; but I would suggest that performing this analysis itself *requires* feminism, at least in the sense that Brenda means it, in that we must see the situation in terms of gender and evaluate the consequences from the standpoint of women in order to know whether the premise of M > F is complicit in maintaining M > F.

In short, what Dan calls Brenda's "big tent" feminism (which is still very much recognizable as feminism and perhaps more so than Janet's, at least for some of us) greatly reduces, it seems to me, many of the costs

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[73] *Id.* at 607.

[74] *Id.* at 609.

[75] *Id.* at 610.

[76] *Id.*

[77] *Id.* at 611.

Janet associates with steadfast adherence to a feminist position. And, to address the third of my objections, it suggests that Janet may be a bit too hard on feminism broadly defined. I do not mean to suggest that she has set up a straw man in the service of her "Take a Break" argument, but that her target is properly something less than feminism as a whole. I find her argument most compelling with respect to a particular kind of feminism, albeit one that is widespread and influential, that assumes not only subordination but structural subordination. Of course, challenging us to "Take a Break from Subordination Feminism" is not as catchy or provocative as Janet's original appeal, but it seems worth considering. Although I believe that the subordination assumption remains powerful and continues to reflect the reality of gender relations in much of the world, "Taking a Break" may allow us to understand these relations more fully and respond to them more effectively for the reasons Janet articulates.

Finally, even if we begin from Brenda's more fulsome definition of feminism, might we still have reason to accept Janet's invitation to "Take a Break"? I think the answer is yes. Even if we adopt a broader definition of feminism, one that is not premised on M > F and therefore allows us better to see the consequences of our own exercise of power, it may nevertheless be useful to "Take a Break from Feminism" from time to time for many of the reasons both Janet and Brenda endorse. For me, the most important among these are the potential for nonfeminist analyses to enrich feminism in significant ways and the likelihood that such analyses will better allow feminism to "see around corners of its own construction."[78]

VII. JANET HALLEY: CODA

I am quite excited by Tracy's discovery in my "essential elements" of a new possibility for feminism: M/F and carrying a brief for F, without M > F. Here are some thoughts on that, in the form of a fourth reading.

A "Minimalist" Feminist Reading

We have encountered the sexual-dominance feminist image of Sheila Twyman, an image of male power and female subordination. The utter pathos of Sheila, submitting to sex with her husband that he wants but that they both know will humiliate and anguish her, all to save her marriage precisely to the author of her suffering. Of course it is not at all required by feminism *tout court*. But can feminism accommodate a completely *reversed* image of the Twyman's marriage? Imagine it: the utter pathos of William, begging for sex he can't get from his wife, guiltily sneaking off to have it with another woman, whipped through round after round of psychotherapy

[78] *Id.* at 608.

to figure out why he is such a pervert, and finally submitted to the public humiliation of testifying about his hopeless intimacies and suffering a published opinion deciding that his marital conduct is very likely outrageous, beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized society. As against that, imagine: the astonishing powers of Sheila, laying down the moral law of the couple's sex life, pursuing William like a Fury for breaking it, and extracting not only a fault-based divorce but possibly also money damages specifically premised on her alliance with the state against him. So far we have M/F, but in the form of F > M. Imagine further: Twyman as a background family-law rule that husbands with enduring ineradicable desires for sex that their wives find humiliating must either stay married to those wives or, if they seek a divorce (which they might well want to do simply to remarry and have nonadulterous sex with women who do not find their desires humiliating), pay a heavy tax in shame, blame, and cash. 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?

This seems to start us down the path that Brenda and Tracy want to open *for feminism*. Further on down the path would be many subtler readings of the power exchange between Sheila and William. As Tracy astutely points out, feminism might be able to give up on M > F; it could still be feminism if it retained only M/F and carried a brief for F. This fourth reading of Twyman suggests that it might do a better job *for women* if it could do so.

Still, although it may be a sign of my lack of analytic carry through, I didn't see Twyman this way until I had Taken a Break from Feminism; I could not have described this path until I had the Neitzschean and Foucaultian readings. I am deeply grateful to Brenda and Tracy for seeking the benefits *for feminism* in Taking a Break, for welcoming *into feminism* the capacity for a critical engagement with female power, but this reading raises a question: why remain tethered to M/F and to carrying a brief for F? Shouldn't we be ready to see power between Sheila and William in terms of a fidelity rule that has stringencies that might help or hurt them without reference to their sex or gender? Shouldn't we be ready to say that, even on this minimalist feminist reading, we'd prefer to spend our time working to get a better outcome for the pervert, M *or* F? Finally then, I wonder whether Dan's project—a fully elaborated left, critical distributional analysis—can be tethered 24/7 to M/F and to carrying a brief for F. I see Dan's shift from sheer antisubordination to distributional analysis as an indispensable element of strong-minded, critically engaged left justice seeking. He suggests that a left imagination would try to trace the distributional effects

of various governance moves through all the perverse turns that postmodernism makes visible. The suppleness and range of the project he proposes would be constrained if we undertook it even with Tracy's minimized feminist presupposition that we will do our descriptive and activist work on behalf of F, and even within Brenda's capacious feminism. I want to learn how to do it. I would like to have feminism with me, not against me, in the work. So it's not only on behalf of women, or of feminism, that I will close by saying how much I would love to see feminism fall in love with a sustained inquiry over the edge of its own limits.

VIII. TRACY HIGGINS: POSTSCRIPT

So what has all this to do with the question posed by the organizers of this symposium, "Why a Feminist Law Journal?" Asking this very question invites us to consider the boundaries of feminism and to see beyond them. It may be that this exercise suggests a new role for feminist journals: attending to the boundaries of feminism and its relationship to nonfeminist/left analysis could be something that feminist journals are particularly well suited to do. Indeed, feminists might find it easier to explore the idea of "Taking a Break from Feminism" from within the pages of a feminist journal perhaps as a way of reducing the risks of this project. In any event, I would like to thank the Columbia Journal of Gender and Law for providing an occasion for all of us to reflect on that possibility.

WHY DO WE EAT OUR YOUNG?

Journals as a Feminist Battleground