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How Queer Theory Makes Neoliberalism Sexy: Right-Wing Economic Politics and the Queer Challenge to Feminism

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Conservative economic ideology lurks below the surface of the current tension between gender and sexuality in some prominent strands of queer legal theory. By exploring this underlying politics of economics, I aim to show how queer theory has tended to adopt and reinforce an uncritical perspective on questions of law and intimacy similar to conservative strands of “liberal” political theory. This new queer flirtation with liberalism is particularly problematic because queer theory claims a position more rigorously critical of liberalism than feminist theory.

Queer theory offers an important critique of feminist politics and progressive justice by warning of the limits of a project of identity-based quest for rights and recognition (Weigman, 2004). Nonetheless, the tendency in some queer theory to separate rather than complicate the relationship between economic politics and identity politics, and between market, state, and family, ironically can serve to reinforce the rigid identity conventions and intimacy regulations this queer theory aims to unsettle. .

I. Choosing the Right’s Sides: Economic and Social Conservativism

A. Feminist Theory Questions Autonomy

Drawing on and developing feminist theory, Martha Fineman (2004) identifies the myth of autonomy as a central obstacle to justice in contemporary U.S. law and politics. Fineman argues that, in contemporary U.S., policies promoting equality have been sacrificed to a simplistic ideology of individual self-sufficiency. This ideology masks and disparages the

dependency inevitable to human existence by relegating the costs of dependency to an ideal of the family constructed as separate from the state and market. Furthermore, these policies distributing the costs of dependency to the family tend to construct the family in terms of sex, gender, race, and class position rather than in terms of family function.

Fineman (1995) shows how the autonomy myth fuels recent political interest in economic privatization, which further shifts the costs of dependency onto that status-based family. For example, critics of welfare demanded that impoverished single mothers of dependent children develop their self-sufficiency by working outside the home—or by marrying a wage earner (McCluskey, 2003a). In the reformers' view, single mothers who care for their own children are unproductive and dependent, regardless of the quality or amount of their caretaking labor, because their work is not formally sanctioned and supported by a husband or by a market employer. In this view, the welfare recipient becomes self-sufficient by performing the same work for others' children in the commodified market as a low-waged child-care worker (Roberts, 1997, p. 74), or by performing the same unpaid work for her own children as a wife of a breadwinner. Fineman (2004) advocates rethinking autonomy and renewing equality by challenging the divide between family, state, and market so that the costs of dependent caretaking in (and out) of diverse families become a public responsibility.

Fineman's analysis of dependency builds on and advances earlier feminist analyses of coercion underlying the myth of the autonomous liberal individual negotiating "his" self-interest in state and market (Olsen, 1983). Feminists have shown how the separation of family, state, and market helps make extensive systems of constraint, subordination, and violence appear to be a matter of individual choice. For example, by showing the role of the state and market in what have been construed as consensual personal relationships, feminists worked to make sexual

harassment and wife-battering public wrongs, rather than private bargains (Fineman & Mykitiuk, 1994; Siegel, 1996).

B. Queer Theory Questions Authority

By contrast, some strands of queer theory recently have gained attention and prestige by defending an ideal of autonomy against feminist analyses of dependency and dominance. In particular, some argue that a queer vision of justice diverges from feminist reform efforts designed to better protect women from rape, sexual harassment, intimate violence, or from the costs of domestic caretaking work (e.g., Halley, 2001). If queer theory and practice affirms the centrality of freedom, danger, and self-satisfaction in sexualities, it runs against the frequent feminist emphasis on care, safety, and equality in intimacy. By redeeming intimate dominance and resisting intimate interdependence in the name of good sex and radical freedom, this strand of queer analysis tends not only to defend a myth of autonomy, but also to make autonomy sexy.

This queer celebration of intimate autonomy against feminism's vision of intimate equality echoes and amplifies a theme prominent in traditional liberalism. The conventional story of American legal and political theory pits equality against liberty as a tough tradeoff or delicate balance, with the political liberals pushing for more equality and political conservatives pushing for more liberty. Beginning in the second half of the twentieth century, an increasingly powerful "neoliberal" movement based on conservative economic ideology (Harvey, 2005) has used this theme of liberty over equality to undermine civil rights and welfare state initiatives (McCluskey, 2003a). As Milton and Rose Friedman (1980) proclaimed, "a society that puts freedom first will, as a happy by-product, end up with both greater freedom and greater equality" (p. 139). Law-and-economics scholarship, which exerts substantial market power in contemporary legal theory and legal education (Roithmayer, 2005; Hanson & Yosifon, 2003, pp. 272-74), generally follows this

ideology by positing and promoting market “freedom” over egalitarian “redistribution.” Much of that scholarship is devoted to describing how soft-hearted “redistributive” policies claiming to protect against the harsh effects of tough-minded “market freedom” end up making things worse for both society overall and for the disadvantaged groups they are supposed to help (McCluskey, 2003a).

But while this queer theory risks looking like a bedfellow of libertarianism (see Halley, 2001, p. 89), it cautions that the alternative is to consort with an authoritarianism reminiscent of the cultural and religious right. Queer legal theory has helped analyze how feminist support for protections against violence or dependent care can reinforce a gendered, raced, and (hetero)sexualized vision of societal vulnerability and virtue. Social conservatives have long been happy to insist that women—and indeed most people—need protection not freedom, and self-sacrifice not self-satisfaction. By challenging autonomy and demanding protection for vulnerability, queer theory worries that feminism makes authoritarianism ~~authority~~-seem caring.

C. Challenging The Autonomy/Equality Opposition

Martha Fineman’s (2004) critical feminism helps push beyond this double bind that forces progressives to choose sides between economic and social conservatism. By examining the family in relationship to state and market, she shows how the conservative ideologies of authority and autonomy are interrelated and complementary. Fineman’s analysis challenges the standard liberal presumption that issues of law and intimacy involve an inevitably tough tradeoff between libertarian and communitarian ideals, such as individual freedom versus community control, self-satisfaction versus self-sacrifice, protecting vulnerability or encouraging risk and responsibility.

Fineman (2004) emphasizes that autonomy is a *myth*, infused with political and social presumptions and contradictions (pp. 20-22). Contrary to the libertarian ideal of the autonomous individual, everyone has (and most of us will eventually) depend on extensive caretaking labor to develop or maintain the capacities that mark us as successful participants in state and market as citizens, workers, family members, and consumers. Many of those deemed dependent, lazy, and irresponsible outsiders deserving of penalties in state and market are those who shoulder the risk and responsibility of extensive direct caretaking for this inevitable human dependency (McCluskey, 2000). Fineman (1995) explains and critiques the subordinated status of caretakers as “derivative dependency” (pp. 161–3). A variety of U.S. laws and institutions structure state and market to ensure that a large share of dependent caretaking is performed by unpaid family members (particularly mothers of children and daughters of elderly and ill relatives) and by low-waged workers (particularly women of color and noncitizens) (McCluskey 2002).

On the other hand, Fineman (2004) also challenges the communitarian ideal of a family grounded in interdependence, sacrifice, and community responsibility. She explains that this ideal begs the underlying political questions of what (and who) counts as family and community, who is responsible for what sacrifices, and what counts as virtue (pp. 73-79). Fineman develops the long history of feminist analysis to emphasize that the two-parent marital family is not just a font of care, altruism, and spiritual satisfaction but also a site of violence, inequality, and economic pressure from a market that forces many families to devote their resources to earning and spending at the expense of love, pleasure, and nurturing of self and others (pp. 87-92).

In Fineman’s critique, intimacy should be regulated neither as a special zone of individual-fulfilling autonomy above the constraints of state and market (as in the libertarian myth) nor as a special zone of community-oriented virtue and security beyond the freedom and

independence of state and market (as in the communitarian myth). Instead of grounding the law of intimacy in a separation of family from state and market, Fineman argues that public policy should separate the functions of intimate relationships *within* the family. In particular, Fineman argues for distinguishing between sexual relationships and dependent care.

Fineman breaks down the conventional opposition between libertarian and communitarianism (on both the political right and left) by showing how the current system regulates dependent care by restricting sex, and also regulates sex by devaluing dependent care. Revising law to make dependent care a public responsibility of state and market can be fundamental to a progressive vision of individual privacy and intimate freedom. In the current system, maintaining (or increasing) private responsibility for dependent care helps to limit individual freedom and equality in consensual intimate relationships. At the same time, restricting public licensing and privileges to a particular *form* of *sexual* relationship helps to produce and enforce an unequal and inadequate system of domestic caretaking. Fineman advocates shifting the law of intimacy from its current focus on producing, privileging, and policing adult sexual relationships toward supporting and protecting caretaker-dependent relationships.

Fineman's examination of the dual functions of family shows how the social and economic branches of right-wing politics coincide and collaborate. Economic libertarian efforts to restrict government and employer support for child care, health care, and elder care help social conservative goals by particularly penalizing those who seek intimacy outside the bounds of the marital breadwinner/homemaker family. In the late twentieth century movement for welfare reform, social conservatives (and some liberals) widely discussed how public economic support for mothers' caretaking of their children undermined traditional male authority and male

heterosexual pleasure and privilege. For example, George Gilder (1981) argued against Aid for Families with Dependent Children (AFDC) on the ground that “nothing is so destructive” to men’s values, emotional well-being, productivity, and sexual potency than the knowledge that his wife and children may not need him as a financial provider (p. 115). This view shows how neoliberalism enhances what might be called a system of economic bribes to produce marital heterosexuality (and to reinforce other status-based inequalities).

Conversely, social conservative efforts to restrict or penalize gay sexuality, nonmarital sexuality, and non-gendered divisions of labor have helped to produce and maintain the market inequalities that help further the interests and ideals of economic conservatives. In a system that makes widely inaccessible (and often contradictory) sex and gender ideals preconditions for economic security, employers and capital owners can enjoy greater bargaining power over workers and consumers while deflecting blame from economic inequality to sex and gender deviance. The economic right likely owes some of its political success to economically insecure voters who seek to recoup their power by identifying with racial, gender, heterosexual, and religious authority rather than by challenging economic inequality.

II. Challenging Law’s Limits: Queer versus Feminist Strategies

Fineman’s analysis shows the potential for some convergence between queer interests in foregrounding intimate freedom and self-satisfaction and feminism’s interest in foregrounding intimate dependence and constraint. Nonetheless, some queer theory pushes away from this possible convergence with feminism by putting two positions at the center of social and political change: anti-statism and anti-moralism.

A. Queer anti-statism

Fineman (2004) insists that “a strong and vital state is necessary” to a feminist vision of the law of intimacy (p. 271). She criticizes centrist and progressive politics for joining the right in its ideological effort to reject state power in deference to a purported free market. Wendy Brown and Janet Halley (2001) take a contrasting position in their book articulating a vision of left legal critique. They blame the left’s political weakness on what they see as its turn toward state power. Halley (2004) and others use the term “governance feminism” to single out feminist deployment of legal power for particular disdain (Weigman, 2004).

Brown and Halley (2001) complain that the 1960s racial justice movement seduced the left into becoming attached to civil rights at the expense of increased political organizing and economic power (p. 8). Duncan Kennedy (2001) (whom Ian Halley¹ (2004) praises as a leading queer legal theorist) similarly contrasts an “old left” socialist focus on controlling the market with the civil rights era focus on demanding state recognition and protection (pp. 181-183). This vision suggests that market-based “redistribution” offers more meaningful opportunity for progressive legal change than state-based “rights” (Kelman & Lester, 2001).

More broadly, queer theory has helped to revive and update a longstanding critique of legal rights. Drawing on its roots in Foucauldian theory, queer legal scholarship often emphasizes that legal rights regulate rather than simply liberate those who are subordinated; rights produce as well as protect their subjects. Halley (2001) argues, for instance, that feminist-inspired law reforms giving workers the right to bring claims for sexual harassment will not necessarily give workers more control over their sexual interactions or over their work life. Instead, Halley warns that laws favoring sexual harassment plaintiffs will give the state more power to enforce traditional constraints on sexuality, to punish sex and gender deviance, and to shape workers’ ideas about what sexual interactions they are free to want. For this reason, Halley suggests that

feminists concerned about workplace subordination should turn from sex to class (p. 81-32), following (for instance) Vicki Schultz's (1998) efforts to reformulate the problem of sexual harassment to emphasize economic inequality.

Similarly, Brown and Halley (2001) suggest that feminists concerned about the sexual violence related to pornography should turn from the state to the market. Rather than suing pornographers or regulating the pornography business through zoning ordinances, they suggest that feminists should walk into porn shops and try to shame customers or trash the magazines (pp. 20-21).

Directly addressing Fineman, Katherine Franke (2001b) picks up this theme to argue that feminist demands for legal rights to support for dependent care will bring new constraints on caretakers and other women. By shifting responsibility for dependency from the private family to public state and market, Franke argues that feminists risk "inviting greater involvement from both state and market actors" into private family rule (p. 1544). Franke illustrates and elaborates her challenge to feminist rights with historical stories of African Americans newly freed from slavery, whose new right to marry provided new opportunities for the state to constrain and condemn choices of intimate relationships (pp. 1545-54). This strand of queer critique of feminist law reforms is problematic not because it rejects liberal legalism too much, but because it buys into it too much. The queer critique of rights does not sufficiently distinguish its anti-statism from the conventional argument of neoliberal politics. This right-wing economic politics is promoted through the following standard law-and-economics formula: all rights have a cost; all costs are subject to private power; and (implicitly) most private power outside of the state is distinctly natural, normal, neutral, inevitable, or good.

1. All Rights Have a Cost

This “economic” reasoning, and its queer variation, partly tracks a longstanding left critique of the limits of liberal law reforms (articulated most famously by critical legal scholarship). That critique explained how a “right” is a mystifying label that claims a policy or preference should take priority over others (Kennedy, 2001). Labelling something a “right” gives a veneer of moral authority that begs the hard question of *why* and *when* that policy or value deserves priority, and over *which* other policies and values. In addition, from this vantage point, new rights do not simply benefit the rights-bearers or society as a whole. Instead, conferring particular rights on a person means choosing to favor some interests or values over others, so that rights confer both costs and benefits on the rights-bearer and on others. Furthermore, if rights are simply policy and values choices about how to distribute costs and benefits, then they are conferred and controlled by private power of market and family not just by state-sanctioned legal rules.

Drawing on neoliberal ideology, law-and-economics scholarship has taken this critique of rights and shaped it into a staple of contemporary jurisprudence and right-wing politics. Whatever the progressive proposal for legal rights, law-and-economics has a formulaic answer that explains why any such legal right will backfire to hurt society overall as well as those the right is supposed to help (McCluskey, 2005; McCluskey, 2003a) . For example, suppose you want a legal right to access to health care, so that you are not limited to receiving only whatever health care you can afford to buy. Or suppose you want a right to family leave, not just whatever leave you can bargain for with your employer. Or perhaps you want that right to family leave to avoid having to make a costly choice between having a family and having an income. The law-and-economics answer is that all rights involve tradeoffs between competing interests. Rights do not constrain power but are subject to it. You need to pay for your rights, which means that you

are still subject to the unaffordable or costly choices that rights are supposed to avoid. If you lack market bargaining power relative to those who have competing interests, that price will likely fall most heavily on you— regardless of your legal claim to a “right.”

For example, your “right” to health care might get you lower quality health care, or a shortage of doctors willing or able to provide care, or lower wages or lower government spending to pay for other pressing needs (like your retirement, your child’s education, or an environment safe enough to prevent serious health damage) (Epstein, 1997). Or, in the example of family leave, your “right” to workplace accommodations for family responsibilities might come at the price of lower wages, fewer jobs, fewer promotions, or more discrimination by employers against women or others construed as likely to have family responsibilities (Kimmel & Amuado-Dorantes, 2004).

The lesson of this law-and-economics story is that rights should be rejected as little more than dishonest, self-serving, destructive attempts to remove certain interests from tough-minded responsible calculations of the costs and benefits of various policies or interests. Accordingly, most interests should be subject to private negotiation, rather than state-determined “rights,” and any state decisions of law and policy should mimic the private market in rejecting “rights” claims and instead subjecting any demand for state assistance to rigorous economic cost/benefit calculation.

This prevailing neoliberal incarnation of the rights critique contains an ideological trick that recent queer critics tend to repeat and reinforce. By insisting that all rights have a cost, this critique obscures that all costs have a right. And by emphasizing that all costs are subject to market power as well as to legal rules, this critique obscures that all market power is subject to legal rules. What makes the neoliberal chain of reasoning uncritical and politically conservative

is its presumed separation of state from market and public from private, and its naturalization of that privatized power.

2. All Costs Have a Right

Who pays, and how much they pay, for any change in rights depends on how *other* underlying rights shape different people's bargaining power. In the case of family leave, employers' power to shift the costs of workers' rights to others is not inherent or necessary but instead is contingent on a whole host of background and foreground factors thoroughly entwined with law and state power. Whether the employer can respond to a right to family leave by discriminating against women, for example, depends (in part) on whether those women are protected by effective (and effectively enforced) laws against sex discrimination. Whether the employer can respond by pressuring single workers (or other workers deemed to be free of family demands) to increase their workload depends (in part) on whether those workers are protected by effective unions or other regulatory agents capable of adopting and enforcing rules protecting their interests against employers.

More generally, whether the employer's owners and managers can resist various regulatory pressures by unions, consumers, or state authorities to bear rather than spread the costs of any new rights depends on whether those owners and managers are protected by legal rules giving businesses the mobility and flexibility to substitute other, more compliant, workers, consumers, and states. "Background" rules governing replacement workers for striking unions, intellectual property and antitrust regulations, and international finance and trade—for just a few examples—will effect businesses' power to shift the costs of workers' legal rights onto others. Different legal configurations will have different, complicated effects on who ultimately will

bear the cost of a new right to family leave—corporate executives and shareholders, consumers, workers in general, or workers who have the most family responsibilities.

Taking seriously the rights critique, each of these legal rules shaping the costs of any particular right should not be taken as given simply because they too have developed status as a “right.” Instead, to determine whether a new right is worth its price, these background policies also deserve to be scrutinized for their costs and benefits to society overall (as well as to those who hold these rights). Taken to its logical conclusion, the law-and-economics critique implodes: the calculation of costs and benefits of competing policy preferences becomes infinitely complex and contingent. The policy analysis that seemed at first glance like a more rigorous, rational, objective, and transparent alternative to the question-begging incantation of a “right” instead turns into a muddle of amateur guesswork and biased political judgment.

In the end, what seems to be a choice to reject subjective, deceptive “rights” claims in favor of more careful, honest evaluation of competing policy preferences ends up being a choice to stifle a more candid debate about competing subjective “rights.” Those who oppose new rights on account of their high “price” are simply using the term “price” as a label to mystify the subjective decision to privilege *other* policies by fixing them as necessary, normal background rights. By masking these other rights as part of a market “price,” law-and-economics creates a veneer of economic objectivity and technical authority that obscures the underlying historical contingencies and contestable moral and political judgments that ground these background rules.

The queer critique of rights similarly disparages certain policy choices as costly, dishonest, coercive state power even while it privileges and normalizes other policy choices as part of a privatized background of naturalized power. By implying that some safer—or more exciting—space free from regulatory effects awaits those who reject state support, queer theory’s

anti-statism joins right-wing free-market ideology in erasing the pervasive structures of legal rights and state control that inevitably govern the family and market. Particularly in the current social and political context, where neoliberalism exerts far more cultural, legal, and political power than queer theory or other left critiques, disdain for liberal rights and regulation may do more to strengthen an authoritarian state than to open up possibilities for more progressive alternatives.

A critical approach that instead aims directly and openly to reconfigure the state for feminist ends may have the advantage of directly engaging rather than conceding the questions of *what kind of* state power, in *whose* interests, we want to advance. In her analysis of feminist advocacy for rights to caretaking support, Mary Anne Case (2001) suggests that some state-centered reforms could paradoxically be *less* costly and regulatory with respect to feminist concerns than some reforms that seem less more narrowly targeted. Case criticizes reforms aimed at giving parents greater rights in the workplace, but not out of simple faith in an unregulated market or private family comprised of unconstrained individual choice. Instead, like those who are generally critical of liberal rights, she explores the harmful incentive effects likely to flow from such rights and warns that these effects could particularly impact women and others already subject to inequity in the workplace. She goes further, however, to explain how some law reforms that are even more state-centered might avoid some of these costs. For example, Case notes expanded rights to public recreation and public transportation would alleviate some of the burdens on women caring for children without setting up a zero-sum competition between family-focused mothers and work-focused women, or between competing groups of workers. Fineman (2004) similarly explains that her vision of caretaking rights requires expansive restructuring of both state and market to avoid shifting caretaking costs to others who bear

disproportionate shares of the costs of social production and reproduction (pp. 288-289). She links her proposal for caretaking rights to a broad vision of stronger workers' rights and stronger human rights to economic resources sufficient to address basic human needs regardless of caretaking responsibilities.

Rather than categorizing reform strategies as public or private, critical theory might better achieve its goals by focusing directly on the different normative goals of queer and feminist theory. But discussing those questions of substantive value leads to a second point of disagreement prominent in some queer and feminist legal theory.

B. Queer Anti-Moralism

Feminist legal theory has often grounded claims for political and legal change in a vision that aspires to truth and justice even while remaining critically skeptical of claims to fact and value. For example, consistent with many other feminist scholars and activists, Martha Fineman (2004) advocates a substantive approach to equality and freedom that aims to effectively advance the security, well-being, and full citizenship of most women, children, workers, and caretakers. She does not seek to prove her normative goals are neutral or uncontested. Fineman's arguments rely not only on unabashed value judgments, but on empirical judgments about the current distribution of power and privilege in society. She premises her project on what she sees as the unequal allocation of burdens and benefits of caretaking labor and of economic resources, and she is willing to judge who gains and who loses from this inequality—and to judge who deserves a better deal.

Queer legal scholarship, in contrast, tends to criticize feminism and other progressive projects for relying on moral judgments. First, queer theory eschews feminist moralism for being powerful—too willing to dictate and dominate others in the guise of what is good for all, too able

to reproduce and nurture the gender categories through which it is defined. Second, queer theory eschews feminist moralism for being too weak—too unwilling to effectively reject the sentiment, suffering and subordination that grounds its identity and purpose, too unable to engage in a more directly self-interested contest of power that might lead to radical change.

1. Morality Reduces to Power

Queer theory thrives on suspending and reconsidering conventional normative judgments in recognition and enjoyment of the complex, uncertain, irrational, and paradoxical in law and society (Halley, 2004). Queer theory rejects the idea that law can neatly and nicely incorporate moral principles that give legal subjects the choice of obeying and disobeying, subject to our moral approval or condemnation (Halley, 2004, p. 31). Drawing on Duncan Kennedy's work, Ian Halley (2004) explains that "the real action is not in law per se, but in wildly different interested players who participate in wildly complex social interactions" (p. 31) as they "bargain in the shadow of the law" (Mnookin & Kornhauser, 1979, p. #). The normative principles ostensibly embedded in law are produced and implemented through power not dependent on that law or on those stated norms. As a result, legal theory is naive, arrogant, or deceptive when it focuses on perfecting and purifying law's moral authority.

Because the realm of politics cannot be ordered by will and intention, but is a complex domain of unintended consequences that follow the unpredictable collisions of human, historical, and natural forces, a politics of abstract principle risks missing its aim and indeed producing the opposite of the wished-for result. (Brown, 2001, p. 27)

With this analysis, queer theory joins a wider body of legal realist and critical (including feminist) work devoted to digging beneath stated norms and rules to unearth the raw and messy dynamics of power. But queer theory also promotes a particular understanding of power that leads it to more directly challenge the normative approach common in other branches of critical

legal theory. Following Foucault, some queer theory analyzes power not as a problem of subordination and domination susceptible to moral judgments of good and bad, but as a process of subject production (Halley, 2004). The problem of law and intimacy, in this view, is not that the law unjustly reinforces external social power by privileging some and penalizing others in their expression of sexuality or relation to dependency. Instead, queer theory starts from the presumption that our ideas about morality cannot serve as a benchmark by which to measure and correct power imbalances. Power, whether inside or outside of law, inevitably shapes, grounds, and confounds ideas about morality.

More specifically, queer theory emphasizes that in penalizing and privileging sex, law shapes our ideas about who we are, what we want, what counts as sex, and what counts as pleasure and pain. Queer theory takes an ideological position that affirms sex and diverse sexual performances, but it does not justify that position by arguing that sex is a moral good. Instead, queer theory affirms sex not just despite but *because* it involves moral ambiguity, contradiction, and even immorality—it especially affirms sex as *bad* (Halley, 2004). Queer theory explores the dynamics of sex to show that pleasure often comes from pain, power from prohibition, and that domination often is impossibly mixed up in subordination (Halley 2004). Queer theory sometimes takes that complexity and fluidity of the harmful and the beneficial in sex to question moral judgments in general.

From this theoretical standpoint, Halley criticizes feminist efforts to prohibit sexual harassment for arrogantly claiming to “know” what forms of sexual interactions are good and which harmful, and for attempting to impose that vision on others. For instance, she chides feminism for knowing that “A husband who introduces his penis into the vagina of his sleeping wife has raped her and should be prosecuted,” or for “think[ing] that a man who would joke to a

female subordinate at work about pubic hairs appearing on his Coke can has shown himself unfit for higher office” (Halley, 2001 p. 89). Analyzing litigation ostensibly aimed at gaining protection against sexual subordination, Halley (2003a; 2003b) argues that,–the facts in the record are subject to multiple interpretations about who was dominating whom, and whether that domination was harmful or pleasurable to the dominated. From a Supreme Court case recognizing same-sex sexual harassment as actionable employment discrimination,² Halley (2001) hypothesizes that the alleged harassment victim could instead be (in theory if not in reality) an agent of sex panic seeking to deny his desire for same-sex sadistic eroticism and to shift the blame for that activity to others. She suggests that this uncertainty shows that we should discuss questions of law and intimacy raised by such cases not on moral grounds, but on political grounds, as conflicts of interested power between (for example) those who prefer protection against the risk of sexual coercion in the workplace and those who prefer protection against the risk of sex panic in the workplace (Halley, 2001).

Queer theory’s anti-moralism plays a tune familiar in contemporary theory and culture. In what has become a conventional formula of legal scholarship and public policy debate, “economic” analysis inverts the purported public values justifying liberal or progressive law and policy to show that what seems on the surface to protect the vulnerable against subordination instead promotes unjust domination by suspect and special interests. In the neoliberal ideology, as in the queer theory I have been discussing, public values always reduce to private interest, so that morality always reduces to power.

For example, “economic” analysis of law has tended to reduce workers’ rights laws to race and gender privilege (Bernstein, 1997), and reduced civil rights laws to economic privilege (Bernstein, 1990). Turning to other common targets of law-and-economics, plaintiffs’ rights in

tort law become economic privilege for wealthy lawyers; regulatory protection for consumers become anticompetitive economic protections for elite businesses; rights to compensation for workplace injury become opportunities for fraud and malingering; anti-poverty programs become support for bloated bureaucracies and lazy bureaucrats and for future criminals.

But, under the surface, this neoliberal anti-moralism ends up being thoroughly moralistic. It does not criticize the self-interested power behind certain normative principles (typically progressive or liberal) simply on the ground that these self-interested gains undermine the competing self-interested gains that critics prefer. Instead, “economic” arguments tend to criticize these “special interests” on the ground of their sinister motive and character (they are *undeserving and elitist*) and because they undermine some normative conception of the public interest (they are “inefficient” or contrary to some naturalized and normalized ordering). For example, legal rules enhancing consumers rights in tort law are *bad* in this view not because these rights hurt the competing political and economic self-interests of wealthy corporate shareholders. Instead, these free-market economic arguments challenge these rights on the ground that they enrich undeserving interests at the expense of overall welfare. Although economic calculations of the overall societal interest in maximizing efficiency sound neutral and scientific, they rest on thoroughly subjective and contestable moral judgments about, for example, whose interests (measured in what time and place) count as the aggregate interest, or what counts as a cost and what counts as a benefit (Kennedy, 1981; McCluskey, 2000; McCluskey, 2003b). Stripped of their technical veneer, these law-and-economics arguments *against* moralistic pursuit of the “public interest” are simply another version of arguments about what counts as the “public interest” versus “special interests.”

Queer theory's anti-moralism—like neoliberal anti-moralism—does not go far enough in probing the power and interest underlying competing normative claims. Halley (2001) faults “cultural feminism” by saying that it is “easily offended; schoolmarmish, judgmental, self-righteous” (p. 89). She warns that the moral certainty asserted by feminist law reforms “can trend toward totalitarian regulatory projects” (p. 89). These sorts of criticisms seem to slide into *moralism*, even though they may claim to be merely aesthetic. Regardless of theory or intent, in practice and impact queer attacks on feminist “moralism” may tend to upend the idea of a moral “good” defined as understanding and reducing pain, suffering, and subordination in favor of a new version of public moral purity defined as *not* knowing and *not* caring about pain, suffering, and subordination. That inverted moral stance is likely to have a particularly problematic impact, from a progressive perspective, in a sociopolitical context saturated by neoliberal “free market” ideology and right-wing power.

Taking anti-moralism even more seriously (and playfully) leads us to the kind of paradox queer theory might learn to love. By continuing to embrace moral and empirical judgments, even while recognizing the inevitable partiality, privilege, and uncertainty these judgments entangle, feminism is not necessarily less critical or more politically suspect than queer theory. Instead, such a position could be the most astutely political, recognizing the political context where anti-moralism is a rhetorical strategy that may have a particularly anti-feminist and anti-progressive political impact and interest.

2. Power Reduces to Morality

But progressives' faith in the possibilities of deploying moral arguments against power is helpfully complicated by the second prong of queer theory's critique of feminist moralism. This prong draws on the philosophy of Friedrich Nietzsche to challenge law reform strategies that rely

on moral arguments. As Wendy Brown (1995) explains in her critique of feminist moralism, Nietzsche understands that “morality emerges from the powerless to avenge their incapacity for action; it enacts their resentment of strengths that they cannot match or overthrow” (p. 44). Morality is power, but a power that acts as “a complaint against strength, an effort to shame and discredit domination by securing the ground of the true *and* the good from which to (negatively) judge it” (p. 44). This power of *ressentiment* is distasteful because it is “born of weakness . . . [and] fashions a culture whose values and ambitions mirror the pettiness of its motivating force” (p. 44). Nietzsche disdains what he terms “slave morality” for becoming dependent on the suffering and subordination it loves to avenge.

Following this analysis, queer theory argues that by grounding reform strategies in moral and emotional sympathy for injured victims, progressive politics detracts from a more hard-headed political confrontation of the self-interested powers at the heart of current inequalities. Since truth and morality are inherently subjective, in this view, it is likely to be more intellectually honest and politically effective to assert one’s positions in terms of individual desires and interests—the “will-to-power,” using Nietzsche’s terminology. It is a naive illusion to imagine that moral principles trump power, or that sympathy for suffering will stop the slaveowners of the world. Putting faith in those moral and sentimental arguments legitimates unequal power and coopts the subordinated into a problematic sense of virtue and superiority through suffering (Berlant, 2001). An idea of justice that depends on feelings of injury and subordination ends up nurturing and codifying that injured status (Adler, 2005).

Janet Halley (2003b) applies this theory to a tort case, *Twyman v. Twyman*,³ brought by a woman seeking damages against her ex-husband for emotional distress resulting from allegedly violent marital sex. Halley hypothesizes that feminism may hurt rather than help the plaintiff by

encouraging her to experience herself as “utterly powerless, utterly broken” even as she ignores her own well-being in favor of devotion to gaining the moral upper hand in court over her former husband (pp. 614-15).

Although not directly invoking Nietzsche, Katherine Franke’s (2001a) criticism of feminist interest in supporting dependency makes some similar moves. Franke argues that feminist legal theory should focus more on promoting women’s pleasure and self-satisfaction instead of on protecting women from the costs of injury and dependency. In her view, a feminist vision of law centered on the inevitability of intimate dependency may reinforce a problematic feminized powerlessness and self-sacrifice even as it exerts oppressive power on behalf of heterosexualized reproduction.

Again, these critiques of feminist morality’s weakness resonate with arguments common to contemporary free-market ideology. Since claims to public morality are contested and easily captured in the interests of private power, justice is best served, in this view, by rejecting moral correctness and instead promoting a power struggle between private, self-serving interests. The harsh results produced by that ideal market competition are part of the discipline that produces the fittest individuals and overall society. Protecting against competitive injury out of sentimental sympathy for the weak or regretful dulls the rational signals that induce us to become our best.

Incorporating this neoliberal ideology, both popular culture and law-and-economics scholarship tend to promote what could be called cynical legal realism, a version of *realpolitik* in which the powerful can smugly imagine their strength and legal privileges as adequate justification for their success at the expense of others. This vision doubts that failure to succeed in the currently configured state, market, or family is a sign of unjust subordination or tragic malfunction. Instead, harmful results in this view are likely to indicate failure to make the grade

or a bad faith refusal to accept the necessary or natural consequences of one's own free choices and preferences. After all, perfectly free markets by definition presume that victims have always freely chosen to incur the costs they bear. Accordingly, victims who seek legal intervention to override market harms are simply refusing to pay the price of the goods they have enjoyed—just as Halley speculates that the alleged victim of marital violence or same-sex workplace harassment may have asked for it and enjoyed it but now wants to shift the cost and responsibility for their desire to others.

While neoliberal economic analysis presumes to eschew moral or political judgment of people's preferences as expressed by their market behavior, it routinely second-guesses the motives and uncertain impact of those who seek legal protection or compensation for their injuries. By interpreting cries of victimization as attempts by market losers to sell their cake and eat it too, it turns moral claims of protection against subordination into evidence of immoral domination. Claiming subordination after the fact allows victims to escape paying for what they say they want (or allows them to deny wanting what they choose to buy). In this view, if affluent women leave high-paying jobs for family responsibilities, this reflects not injustice or market failure but a rational market preference for a simpler life of domesticity. Accordingly, if we adopt liberal law reforms to protect such women from the loss of their careers in the interest of family values, we help those women reap gains from their own irrationality and irresponsibility at the expense of others. This reasoning warns that if you want a good professional job, don't expect good family time; if you want good family time, pursue and put up with less personal income or husbands with more wealth or longer work hours; if you cannot find or qualify for well-paying family-friendly jobs or husbands, then don't expect a family—or at least work harder and wait longer to get one. In short, neoliberal thinking revives the nineteenth century tort principle of

assumption of risk, which often treated workers' and consumers' injuries not as moral wrongs or faults to be corrected but merely as market prices resulting from equally powerful agents striking rational deals about their competing interests.

Queer theory might find itself closer to feminism and further from conservative economic politics if it pushed its critique further to explore the conventions of this line of economic anti-moralism. Existing work on critical analysis of free-market ideology provides a good starting place, especially taking seriously a genealogical method that would explore Nietzsche's categorizations not as transcendent truths but as historical products steeped late nineteenth century moral orderings—especially the Social Darwinism that also shaped prevailing economic theory. From a perspective critical of the division between state and market that grounds free-market ideology, the bargaining that takes place in the “shadow of the law” in market or intimate relationships is not simply an exercise of raw, self-interested power but implicates and depends on the law. Conversely, the bargaining that directly illuminates the questions of legal protection—bringing a tort claim or sexual harassment claim or seeking regulatory protection for workers with family responsibilities—is only superficially more moralistic and less honest about its coercive impact than the seemingly private power exerted in state and family.

In the first half of the twentieth century, legal realist Robert Hale (1952) famously challenged the fundamentalist contrast between freedom of contract and coercive status designed to promote some asserted moral order. Hale explained that legal protection directed at moral concern for the weak was no more a reinscription of status-based identities than is private bargaining in a supposedly free competition of interests. The free exercise of individual power of so-called voluntary private bargaining is an illusion that comes from denying how that private power works through and for coercive legal rules based on public moral ordering conveying

privilege and protection through property laws, for instance. In this view, the laissez-faire tort principle of assumption of risk does not advance individual power to choose but simply reflects a bad faith denial of the moral choices structured into contract and other “background” laws that falsely give some people’s bargaining power status as natural and normal (see Hale, p. 37).

From this critical perspective, demands for family leave laws (or for rights to collective bargaining for unions, or sexual harassment protection, or tort damages for marital violence) do not involve departing from rational free choice in favor of special protection for helpless injured victims. Instead, by seizing power over the legal rules that distribute private bargaining power, such actions can be viewed as an effort to throw off a passive “slave morality” that imagines freedom and power in acting out the losing choices the master dictates and normalizes. Whether, when and which people *should* have to choose between family and work, health and income, sexual safety and sexual pleasure are inextricably moral questions even though they are always also about political power. Considering Halley’s analysis of the *Twyman* case of alleged marital violence, it is no more moralistic to presume ex-wives should *not* use tort law and claims of injury to extract more money from their husbands for what they perceived as coercive and harmful sex, than to presume that they should only be entitled to the money or the sex that they can “privately” bargain for under some other configuration of legal rights.

Distinguishing the authentically and rationally powerful actor pursuing self-satisfaction from the sentimental victim reacting to others is a matter of value and politics, not fact. Queer theory’s anti-moralism itself risks appearing in sentimentalized injured terms, if queer theorists cultivate their image as brave martyrs wounded by rejection from their feminist sisters as they struggle to right the wrongs of the overwhelming forces of “governance feminism.” How do we know whether they are not instead cultivating their own suffering from feminism’s sex-negativity

and theoretical disagreement in a self-interested but bad faith ploy to gain power and prestige in a market for ideas and academic jobs that is structured to protect wealthy elites' interest in promoting personal sexual titillation at the expense of organized left and feminist political rebellion?

On a grander scale, many presumed masters of the world who appear to exude confident, bold, self-satisfying autonomy and authority may, depending on one's perspective, simultaneously appear as needy performers locked in a sentimental drama where they assert ever more control and superiority out of feelings of desperate horror and covert pleasure from their potential vulnerability to supposedly weaker opponents lacking capacity for freedom (global terrorists, perhaps, or the feminist "thought police"). The historical Nazi use of Nietzschean ideas to advance a fearful search for power over contaminating "others" should caution us that celebration of individualistic anti-moralism can be quite compatible with or even conducive to cultivating a highly moralistic authoritarian fundamentalism (Yablon, 2003).

Lennard Davis (1995) argues that a critical disability perspective challenges us to switch the postmodern tables to consider not *morality* but the Nietzschean "will-to-power" as grandiose thinking rooted in sentimental fantasies. Though it is naive to assume that morality can trump power, it is equally naive to assume that power can trump (or transcend) morality. Anti-moralism in queer theory, as in law-and-economics, tends to veer away from a critical understanding that individual desires are inevitably dependent on social values, even though not perfectly determined or fixed. Any judgment about or performance of individual interest and power inevitably draws on, produces, and is limited by moral interpretations.

Like Fineman's feminism, critical disability theory aims to reclaim dependency not necessarily as a weakness deserving *special* protection, nor as a special strength or sacrifice

deserving paeans and privileges, but as a normal, necessary part of human existence (both pleasurable and painful) meriting public material support. Rejecting a moral politics of pity for the injured, disability theorists and activists have resisted being the objects of sentimental poster-child compassion as well as models of moral superiority and heroic transcendence of suffering. At the same time, however, critical disability theory challenges constructions of effective power as an *uninjured* status contemptuous of human vulnerability. Nietzsche's philosophical venom for imperfect, dependent bodies⁴ and his expressed disdain for feminine deception and righteousness (Yablon, 2003) might serve as a warning of the dangers of obsessive *denial* of human injury and suffering, read as a reaction to his embodied life consumed by illness and disability and dependent on his female family members' caretaking labor (Gass, 2005]).

IV. Making Right-Wing Legalism Sexy

A. From Political and Moral Justice to Neoliberal Economic Justice

Queer theory's anti-moralism works together with its anti-statism to advance not simply "politics," but a specific vision of good "politics" seemingly defined in opposition to progressive law and morality. This anti-statist focus distinguishes queer theory from other critical legal theories that bring questions of power to bear on moral ideals of justice. Kendall Thomas (2002), for example, articulates a critical political model that sees justice as a problem of "power, antagonism, and interest," (p.86) involving questions of how to constitute and support individuals as *citizens* with interests and actions that count as alternative visions of the *public*. Thomas contrasts this political model of justice with a moral justice aimed at discovering principles of fairness or institutional processes based in rational consensus and on personal feelings of respect and dignity. Rather than evaluating the moral costs and benefits of a particular

policy by analyzing its impact in terms of harm or pleasure, Thomas suggests that a political vision of justice would focus on analyzing how policies produce and enhance the collective power of particular “publics” and “counterpublics” (pp. 91-95).

From this political perspective of justice, neoliberal economic ideology is distinctly *moral*, even though it appears to be anti-moralist and to reduce moral principles to competition between self-interested power. Free-market economics rejects a political vision of justice, in this sense, in part because of its expressed anti-statism: it turns contested normative questions of public power into objective rational calculations of private individual sensibilities. Queer theory’s similar tendency to romanticize power as the pursuit of individualistic pleasure free from public control risks disengaging from and disdaining the collective efforts to build and advance normative visions of the state that arguably define effective politics. Brown and Halley (2001), for instance, cite the Montgomery bus boycott as a classic example of the left’s problematic march into legalistic and moralistic identity politics. In contrast, Thomas (2002) analyzes the Montgomery bus boycott as a positive example of a *political* effort to constitute a black civic public, even though the boycott campaign relied on moral language to advance its cause, because it also emphasized and challenged normative ideas of *citizenship* (p. 100 n. 14).

By glorifying rather than deconstructing the neoliberal dichotomy between public and private, between individual interest and group identity, and between demands for power and demands for protection, queer theory’s anti-statism and anti-moralism plays into a right-wing double bind. In the current conservative political context, the left appears weak both because its efforts to use state power get constructed as excessively moralistic (the feminist thought police, or the naively paternalistic welfare state) and also because its efforts to resist state power get constructed as excessively relativist (promoting elitism and materialism instead of family values

and community well-being). The right, on the other hand, has it both ways, asserting its moralism as inherent private authority transcending human subjectivity (as efficient market forces, the sacred family, or divine will) and defending its cultivation of self-interested power as the ideally virtuous state and market (bringing freedom, democracy, equality to the world by exercising economic and military authoritarianism).

B. From Egalitarian Politics to Renewed Conservative Identity

Queer theory's anti-statism and anti-moralism risks not only reinforcing right-wing ideology, but also infusing that ideology with energy from renewed identity politics. Susan Fraiman (2003) analyzes how queer theory (along with other prominent developments in left academics and culture) tends to construct left resistance as a radical individualism modeled on the male "teen rebel, defined above all by his strenuous alienation from the maternal" (p. xii). Fraiman observes that this left vision relies on "a posture of flamboyant unconventionality [that] coexists with highly conventional views of gender [and] is, indeed, articulated through them" (p. xiii). Fraiman links recent left contempt for feminism to a romantic vision of "[c]oolness . . . epitomized by the modern adolescent boy in his anxious, self-conscious and theatricalized will to separate from the mother" who is by definition uncool—controlling, not sexy, moralistic and sentimental (p. xii). Even though queer theory distinguishes itself from feminism by repudiating dualistic ideas of gender, its anti-foundationalism covertly promotes an essentialist "binary that puts femininity, reproduction, and normativity on the one hand, and masculinity, sexuality, and queer resistance on the other" (p. 147).

This binary permeates queer theory's condemnation of "governance feminism," (Brown & Halley, 2001; Weigman, 2004) a vague category mobilizing images of the frumpy, overbearing, unexciting, unfunny, and not-so-smart "schoolmarm" (Halley, 2001) whose

authority will naturally be undermined when real “men” appear on the scene. Suggesting the importance of gender conventions to the term’s power, similar phrases do not seem to have gained comparable academic currency as a way to deride the complex regulatory impact of other specific uses of state authority—for instance postmodernists do not seem to widely denounce “governance antiracism,” “governance socialism,” “governance populism,” “governance environmentalism” or “governance masculinism” (though Brown and Halley do criticize progressive law reform more generally with the term “governance legalism,” Brown & Halley, p. 11).

Queer attraction to an adolescent masculinist idea of the “cool” dovetails smoothly with the identity politics of the right. Right-wing politics and culture similarly condemns progressive and feminist policies with the term “nanny state” (McCluskey, 2000; McCluskey, 2006). The “nanny state” epithet enlists femaleness or femininity as shorthand to make some government authority feel bad to those comfortable with or excited by a masculinist moral order. It adds to this sentimental power by coding the maternal authority to be resisted as a “nanny” (rather than simply a “mommy”), enlisting identities of class, age—and perhaps race and nationality—to enhance uncritical suspicions of disorder and illegitimacy. The “nanny state” slur tells us that a rougher and tougher neoliberal state, market, and family will bring the grown-up pleasures, freedom, and power that are the mark and privilege of ideal manhood. The “nanny state” is not an isolated example of the use of gender identity to disparage progressive or even centrist policies that are not explicitly identified as feminist or gender-related. For example, “girly-man” gained currency in the 2004 presidential election to disparage opposition to George W. Bush’s right-wing economic and national security policies, and a right-wing news commentator ridiculed

the *Washington Post's* coverage of the nomination of Supreme Court Justice Samuel Alito by calling the reporter a “policy bimbo” (Podhoretz, 2006).

These terms open a window into the connections between economic libertarianism and moral fundamentalism. Libertarianism’s anti-statism and anti-moralism requires sharp distinctions between public and private, morality and power, individual freedom and social coercion. The problem, if we assume these distinctions are not self-evident facts, is that libertarianism must refer covertly to some external value system to draw its lines. Identity conventions have long helped to do this work, albeit in complex and sometimes contradictory ways. Power appears weak, deceptive, illegitimate, manipulative, controlling, undisciplined, oppressive, exceptional, or naive if it is feminized; but strong, self-satisfying, public-serving, protective, orderly, rational, and a normal exercise of individual freedom if it is masculinized. Conventional political theory and culture identifies legitimate authority with an idea of a masculine power aimed at policing supposedly weaker or subordinate others. A state that publicly depends on and promotes such power enhances rather than usurps private freedom and security in citizenship, market, and family, according to the traditional theory of the patriarchal household as model for the state (see Dubber, 2005).

Queer theory updates this pre-modern political ideology into smart postmodernism and transgressive politics by re-casting its idealized masculine power in the image of a youthful, sexy, disdain for feminized concerns about social, bodily or material limits and support. In her challenge to this queer romanticization of “coolness,” Fraiman (2003) instead urges a feminism that will “question a masculinity overinvested in youth, fearful of the mutable flesh, and on the run from intimacy... [to] claim, in its place, the jouissance of a body that is aging, pulpy, no longer intact...a subject who is tender-hearted ...; who is neither too hard nor too fluid for

attachment; who does the banal, scarcely narratable, but helpful things that moms' do" (p. 158). Feminist legal theory concerned with economic politics adds to this alternative vision an ideal that advances and rewards the pleasure, power and public value of the things done by some of those moms' nannies (McCluskey, 2006)—or by the many others engaged in the work (both paid and unpaid) that sustains and enhances others' pleasure and power in and out of the home (Young, 2001; McCluskey, 2003). One means toward that end would be to make the domestic work (and its play and pleasure) conventionally treated as both banal or spiritual (see Roberts, 1997) deserving of a greater share of state and market material rewards and resources on a more egalitarian basis, as Fineman's (2004) vision would do.

Queer theory presses feminists to ask important and difficult questions about the costs of such a vision to other possibly competing egalitarian interests, particularly the interest in seeking intimate pleasure outside of and against domesticity and reproduction (Franke, 2001a or b). Halley (2003b) warns that queer theory and feminism should refrain from imagining a morally correct solution where these interests converge to allow everyone to live happily ever after. Indeed, thanks to Martha Fineman's (1995) analysis of the sexual family, we can better understand how conservative ideology powerfully works to divide us, constructing punishment of diverse sexualities as the price many people are expected to pay to earn even minimal support for dependent care. But by challenging the traditional trade off of (unequal and limited) sexual pleasure and freedom for (unequal and limited) security against dependency and danger, feminism suggests that the possibilities for convergence are a matter of politics as much as a matter of romantic moralism. The bad choices that widen our divides are produced and reinforced as a matter of interested power that can be resisted in the interest and pleasure of better choices. To do that, we must take seriously (and pleasurably) the power that might come

from stronger and more critical and creative coalitions between feminists, queers, and others whose interests are at risk from right-wing reconfigurations of state, market, and family.

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1 Ian Halley is the name assumed by the author of the article *Queer Theory by Men* based on a talk by the legal scholar otherwise identified as Janet Halley.

2 *Oncle v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

3 855 S.W.2d 619 (Texas 1993).

4 For example, Nietzsche (1967, p. 389) wrote, "[s]ympathy for decadents, equal rights for the ill-constituted--that would be the profoundest immorality, that would be anti-nature itself as morality!"