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PART THREE

HOW AND WHY TO TAKE A BREAK FROM FEMINISM
Would it possibly be a good idea for feminists, and for people involved in related justice-seeking intellectual/activist enterprises, to learn to suspend feminism—indeed, to suspend antiracism, queer theory, trans theory, any theory—to interrupt it, to sustain its displacement by inconsistent hypotheses about power, hierarchy, and progressive struggle? I argue for the remainder of this book that it may well be. First, though, I want to show what I mean by Taking a Break from Feminism.

I’ve divided this chapter in two, one portion appearing both here and at the end of Part Three, and thus at the very end of the book. In both segments I look at feminist and gay-identity legal issues: up front, the decisions to seek workplace accommodations for pregnant women and to make male/male sexual harassment actionable as sex discrimination, and later, the decision to regulate the sexual injury husbands impose on their wives by letting wives sue for money damages on the grounds that they’ve been emotionally harmed. The idea is to read (and reread, and reread . . .) these legal decisions in the mode of Taking a Break.

My first such effort, “The Costs of ‘Making Difference Costless,’” is a rather abstract thought experiment, seeking to identify interests other than those of pregnant women that an emancipation- and equality-loving leftist might want to take into account, but which feminists have worked hard to omit from their policy calculus. The second and third subdivisions (one now, one later) involve actual legal victories, both via adjudication, won by feminists and gay-identity advocates suing in court. One of these has already been considered: we have examined Oncale v. Sundowner Offshore Services in order to understand MacKinnon’s brief to the U.S. Supreme Court in that case; here I revisit her factual and legal understandings of the case in order to compare them with those we can generate from cultural-feminist, gay-identity, and queer theoretic presuppositions. The third Taking a Break exercise is deferred until the end so that I can offer an intervening section surveying all the arguments I know of against Taking a Break and all the reasons to do it anyway. Only then will I attempt
How and Why to Take a Break

Taking a Break to Decide (I)

to read and reread *Twyman v. Twyman* in the language of different social theories—feminist sexual-subordination social theory, feminist social subordination theory, Nietzsche’s idea of the slave revolt in morals, and Foucault’s *Volume One* idea of biopower—to ask whether we want divorcing wives to be able to sue their husbands for sexual injury during the marriage. If the section on *Oncale* is primarily about the adversity of interests among incommensurable social constituencies, several of which fall well outside the scope of feminist theory and advocacy, the rereadings of *Twyman* probe the adversity of interests suggested by incommensurable social theories of sexuality and power.

I stress that these readings are thought experiments. Since real living people are involved in both of the judicial opinions I look at, I must emphasize that I am not denying that the real actual plaintiffs involved in the real actual litigation were victims and suffered subordination of the sort that power feminism and cultural feminism (and gay-subordination theories tracking them) attribute to them. Maybe they, individually, are fully and only intelligible within the terms of those theories. But maybe they aren’t. My rereadings attempt to explain all the facts we’re given just as well as feminism does. I’m not merely agnostic but skeptical that we could learn anything more about these cases that would resolve this ambiguity as a matter of fact. And surely people who are not victims and are not subordinated in feminist terms will invoke these cases and obtain victories over their foes using them. If we are to evaluate the social effects that can be produced by a legal rule, a responsible approach—one tracking the methodology deployed by Kennedy in “Sexy Dressing”—includes scanning for its fragmented, disparate, and paradoxical consequences, not just its beauty as a statement of moral values. If these victories could allow social outcomes like those I describe in my rereadings, people on the left should be concerned. And we might have to Take a Break from Feminism, sometimes even from the feminist minima m/f, m > f, and carrying a brief for f, to see those possible consequences and decide whether we want to risk them.

My method here is to engage theory to make apparent some radically incommensurate patterns of the costs and benefits of legal decisions. My hope is that, for at least some readers, these rereadings will put in question their ideas of what a cost and a benefit are. Above all I hope this disorientation—however painful it might also be—will be pleasurable, erotically animating, and politically enabling.

The Costs of “Making Difference Costless”

What should we do with learning disabled kids in school? Mark Kelman and Gillian Lester have shown that our current answer sounds not in distributive terms, but in antidiscrimination. In the last chapter of their brilliant book *Jumping the Queue*, Kelman and Lester reflect more broadly on the political and political-theoretical implications of similar framings all over the range of projects they describe as “left multiculturalism.” By this they mean left-of-center advocacy framed on the subordination model of social power, seeking primarily equality for a wide range of subordinated social groups. Kelman and Lester observe that these projects persistently argue that desubordination requires not mere formal equality or abstract equal treatment but affirmative action, accommodation, and remedies not only against invidious and malicious treatment but also against disadvantageous outcomes. Almost all left feminist law reform efforts today sound in antidiscrimination, so Kelman and Lester’s analysis is highly suggestive about their structure.

Kelman and Lester show that left multicultural subordination-theory remedial schemes relating to employment discrimination
persistently yield the proposed rule that employees presenting “real” differences—real differences that we have decided to protect, specifically, against illegitimate “discrimination”—must be accommodated by the employer. The calculus that left-multicultural subordination theories advocate would require the employer to accommodate, ignore the costs of accommodation, ignore the employee’s net, accommodated output, and take into account only the employee’s gross output. To do otherwise is what it is to discriminate.

Let me translate that. Two people apply for an entry-level job in a law firm. They are exactly similar with the sole exception that one of them reads and writes more slowly because he has a mild learning disability. The remedial ideal of left-multicultural subordination theory would require the employer not to prefer the nondisabled applicant, but at minimum to toss a coin in deciding which one to hire, and maybe to go further and prefer the disabled employee. In doing so, the employer must embrace the following mode of economic thinking. The disabled applicant will need more time and/or more equipment, and/or a downward adjustment in his workload (those are “the accommodation”). Every unit of work he produces will cost me more (that is the net, accommodated output). But I must evaluate him on the basis of his gross output, which (once we’ve left out the additional time and the downward adjustment in workload) is identical to that of the nondisabled applicant. As a result, the costs of the disability (at least with respect to our employment relation) will fall entirely on me, the employer; and if I shift any of the costs in this calculus to my disabled employee (by not hiring him, or compensating him differently, or not promoting him), I am discriminating.

Many, many feminists think that this is the way the legal system should approach “women’s difference” in employment. In Christine Littleton’s phrase, our antidiscrimination paradigm should operate “to make [female] difference costless”—costless, that is, to women. But, in the context of LD kids and equality in education, Kelman and Lester ask an important question: why should members of the subordinated group on whose behalf we have constructed our antidiscrimination regime be our only objects of solicitude when it comes time to spend education dollars? What about garden-variety slow learners—kids who could benefit, too, from the accommodations we give disabled kids, but who don’t get them, sometimes even because we’re spending those dollars on antidiscrimination?

Let’s play that out in the context of the chief example Littleton is considering, pregnancy and work. Her argument is not only that the costs of remedying the disparate impact of workplace rules on pregnant workers, for instance, should be entirely shouldered by employers, so that these workers would experience no downturn in compensation, promotion, seniority, medical and other leave, quality of work assignment, and the like. It is also that such a remedial structure eliminates rather than shifts the costs of pregnancy.

This is of course magical thinking. As Kelman and Lester insist, the costs don’t disappear; they go to the employer, who will then allocate them somewhere, possibly to places where they will hurt women; possibly to places where they will hurt men; maybe only blacks will shoulder them, or third-world workers; maybe they will go to places where no current subordination theory can find them. For many feminisms, that means they fall off the edge of the analytic universe. Bringing them back is seen as unfeminist. So, as long as feminism feels that way, let’s Take a Break from Feminism and see if we can imagine where the costs might go. Indeed, let’s go further and see how far feminism, reduced to the definitional minima that I have attributed to it—m/f, m > f, and carrying a brief for f—can travel with us as we seek to follow the costs wherever they may go.
How and Why to Take a Break

From outside feminism, it appears strange that feminism would be so bent on ignoring the first possibility—that women might end up shouldering all or some of the costs of pregnancy accommodations. Feminism seems at this point to have allied itself with maternalism; otherwise, ignoring the costs of pregnancy accommodation to unaccommodated women—the de facto transfer of social resources from nonreproducing women to pregnant ones—would be understood to breach any “duty of fair representation” that promulgators of the theory might bear to the entire constituent group. It may be a symptom of left multicultural/feminist flight from the politics of distribution that feminist conflicts about this trade-off get so nasty so fast. What if black or offshore workers end up bearing the costs? Convergentist feminist antiracism and feminist postcolonial work seek solutions that merge the interests of black workers, offshore workers, and pregnant women in the United States. And I agree that it is very important to seek possibilities of such merger, and to act on them politically. But even to see them clearly you have to be willing to see moments in which their interests don’t converge, and you have to be ready to decide when to give up and do things for one group of workers at the expense of another. The thought experiment of a mostly-divergentist-but-ultimately-aspirationally-convergentist hybrid feminist project would have to pass through many, many moments in which it would try to see how protecting one group might harm another.

The potential adversity of interests between American working women who get pregnant, and black and brown workers at home, and all workers in “globalization” (some of whom will be men) can be illuminated only if we are willing to entertain divergentist antiracist and poco feminist hypotheses. But this brings us face-to-face with harm to men. I will argue below that feminists doing policy-oriented work in the United States today tend to have a strong commitment to a triad of descriptive assumptions: that m > f takes place as female innocence, female injury, and male immunity. But even without that thought habit, the feminist minima m/f, m > f, and carrying a brief for f make it very difficult for feminists to imagine first-world women subordinating men in global markets—as they may well do if they preserve their pregnancy leaves.

And then let’s go back home, and imagine the costs as allocated strictly between “men” and “women” workers there; let’s imagine that pregnancy accommodations cost just enough to motivate a workforce reduction that happens to fall entirely on male workers, who are now without jobs. It could happen—and it could happen without the operation of sex discrimination against women by anyone. (To imagine that, picture this: the employer could decide to eliminate the least profitable segment of the workforce; and that could be a segment that became all-male because working conditions there were so grim that women, enjoying the superior bargaining power that they derive in low-wage employment markets from their productive roles as homemaker/mothers and their ability to secure wage-earning men [that is, husbands] on whom to be wholly or partially dependent, did not seek to work there.) Here again, feminists have been seriously averse to hearing—from anyone, but especially from feminists—that the possibility of harm to men as such is any of its concern. This aversion is yet another symptom of the tight logic linking female injury, female innocence, and male immunity as mutually fixed terms in feminist argument. But the definitional criteria of feminism operate as well here: short of a new feminist politics of incommensurable political theories, we’d have to Take a Break from Feminism to notice and care about those laid-off men.

And let’s take it one step further, and imagine that the costs of accommodating pregnancy fall diffusely but with a certain weight on the enterprise itself. Let’s say it’s the last straw in a troubled industry or economic downturn; the business fails. Theoretically,
at least, all the workers could be laid off before feminists committed to “making difference costless” while tethering female injury to female innocence and male immunity could notice that women are sometimes not women but workers simpliciter, and that being permanently laid off is usually a bad outcome for a worker.

My observation has been that, at this point, feminists will reconfigure “a worker” as “a woman,” and thus occlude the sheer workforce impact of joblessness in the high winds of late modern capitalism, in order to keep itself in a position of theoretic indispensability. But let’s resist the temptation. At this point it’s not clear what we should do about the resulting bad outcome. All the other straws “caused” it too; and there is no reason to think that pregnant women must cut back their demands in deference to them: it’s the politics of distribution all the way down. But there’s also no reason to think that pregnancy leaves are of such absolute and sublime importance that they primordially trump all the other costs and benefits at stake in the politics of a hypothetical business on the brink of failure. We might want to Take a Break from Feminism—not only specific, contingent feminisms with strong commitments to redistribution toward pregnant women, but even feminism in general, minimally defined by commitments to the m/f distinction and to carrying a brief for f—in order to assess and participate in those politics.

Oncale v. Sundowner Offshore Services

The facts alleged by Joseph Oncale are disturbing. Working on an oil rig in an all-male workforce, he was repeatedly menaced and assaulted by his supervisor and two coworkers. They threatened to rape him; twice they held him down while placing their penises up against his body; once they grabbed him in the shower and did something (one cannot be sure quite what) with a piece of soap. His complaints were ignored, and he quit under protest.

Oncale complained in federal court that he had suffered the form of employment discrimination under Title VII that we call “sexual harassment.” In doing so he challenged a then-strong line of cases in federal trial and appellate courts holding that same-sex sexual harassment, though not a good idea or commendable practice, was not sex discrimination and therefore was not actionable under the federal employment discrimination statute. The Supreme Court reversed all these holdings when it ruled, on Oncale’s appeal, that he could sue under Title VII.

The Court held that same-sex sexual harassment on the job could be found to be discrimination based on sex in two ways. First, where the plaintiff alleged “proposals of sexual activity,” courts could inquire into whether the alleged harasser was homosexual: if so, they could return to an assumption they always make in cross-sex sexual-overture cases, that the sexual overture was targeted at the plaintiff “because of [his or her] sex.” And second, a plaintiff could show that conduct not motivated by sexual desire was sex discrimination by showing an animus against members of his or her sex, a general practice of treating members of one sex worse than those of the other, or other equally circumstantial manifestations of discriminatory intent. “[M]ale-on-male horse-play [and] intersexual flirtation” would not be sanctionable, the Court held, because in all cases, the conduct had to be “severely or pervasively abusive,” such that a reasonable person in the plaintiff’s position would find it hostile or abusive. The “common sense” of juries and judges, together with their “appropriate sensitivity to social context,” would guarantee that they could “distinguish between simple teasing and roughhousing among members of the same sex” and illegal harassment.

Let’s read the facts and the outcome from inside the hypotheses of power feminism, cultural feminism, gay-identity politics, and queer theory. Wherever they could converge, I’ll try to split them.
As we’ve seen, MacKinnon was able to construe the sexual violence and sexual ridicule alleged by Oncale as male dominance and female submission, and thus sexual harassment, because she said that Oncale had been feminized. The same-sex or homosexual dimension of the case presented no mysteries to her: she maintained the ontological supremacy of feminism by simultaneously evacuating sexual orientation of any distinct components and flooding it with gender understood as male superordination and female subordination. She converged.

Cultural feminists like West would want the same basic legal rule that MacKinnon wanted, but for different reasons. To them, the facts alleged by Oncale constitute a classic moral struggle between a virtuous feminine or feminized man and a bunch of morally defective testosterone-poisoned coworkers. Oncale on this reading is a surrogate for actual women: his attackers would have harassed a woman if she had been there; their overall goal was to masculinize oil-rig work, and to maintain the oil rig as a province for male privilege. The consolidated masculinity of the rig after Oncale has quit not only limits women’s employment opportunities but also confirms that sexuality is a, if not the, crucial vehicle for women’s subordination.8

Cultural feminism would want Oncale to be able to sue for sex discrimination for a lot of reasons. It wants feminine men to have plenty of social stature. It wants masculine men to come under discipline. It wants the law to make official statements about gender virtue and gender vice, to send good gender-morality messages. It also wants to feminize or, faute de mieux, degender the oil rig. That would push male-dominant values out of this segment of public life; and it would clear the way for women to work there and to bring femininity with them. It’s willing to desexualize the workplace, either because it shares MacKinnon’s structuralism, and so thinks that sex (almost?) always carries male dominance and female subordination, or because it thinks morally good sex—intersubjective, caring, respectful; alert to human dignity, human values, human sensibilities, human sensitivities—just can’t happen between people as lightly connected as coworkers (only domestic monogamy is up to the challenge).

Anyone who cares about gay men or who wants to promote and protect gay identity has to regard these feminist projects, and the outcome of the case, with ambivalence. Gay rights advocates really resented the legal state of affairs before Oncale was finally decided, in which people harassed by someone of the same sex didn’t get anywhere near as much protection as people encountering cross-sex harassment. It was for them mostly an equality and dignity harm; but they also liked the idea of homosexual predators’ coming under regulation on grounds similar to Kennedy’s will to punish and deter heterosexual male rapists of women. Both objected that members of their own social group were spoiling a cherished sexual scene. But there were plenty of reasons to worry.

One was a subrule, directly proposed by MacKinnon in her brief and adopted by the Court, making the homosexuality of a sex harassment perpetrator a special fact that, if established, makes the plaintiff’s case easier to win. Sexual harassment law had long held that heterosexual sexual advances were sex discrimination because the male perpetrator, assumed to be heterosexual, would not have treated a man the same way. MacKinnon’s brief argued that plaintiffs in same-sex cases should be allowed to prove the homosexuality of their perps so that they could get the same conclusive finding of sex discrimination (24). The Supreme Court in Oncale agreed, and we can now have little trials—within-the-trial to prove the homosexuality of alleged sexual harassment perpetrators.

Gay rights organizations had fought to close this route off ever since circuit courts first opened it, however, because it is also a quick and easy avenue via homophobia to false-positive liability,
via the inference that because the defendant is homosexual, he probably has done this bad sexual thing. In a male-male case the inference is even richer, borrowing as it does from the feminist commitment to $m > f$ and carrying a brief for $f$: because the defendant is a male homosexual, he is a sexual dominator.

To be sure, MacKinnon's brief counsels that courts may be institutionally unable to make findings of parties' sexual orientations, and it also indicates that courts admitting evidence of the parties' sexual orientations must prevent "homophobic attacks" (24). But a gay-identity-affirmative project would say that she entirely misses the commonsense status of the inference from a defendant's homosexuality to his character as a sexual wrongdoer. It would resent the brief's virtual invitation to the Supreme Court to indulge in this inference in the form of an entirely unnecessary footnote quoting from Joseph Oncale's deposition testimony: "I feel that they made homosexual advances toward me," Oncale opined; according to the brief, "I feel they are homosexuals" (23 n. 7). Neither lower-court opinion in Oncale, and none of the briefs submitted to the Supreme Court, had brought this detail in the record to the justices' attention. And the justices did not ask for it: the questions they certified for their review made no mention of homosexuality.

Oncale made its way up the appellate ladder as an "Animal House" case: the plaintiff's allegations of cruel, repeated, and unwelcome sexual assaults were persistently read as male-male homosocial high jinks gone awry—in Justice Scalia's terms, "simple teasing or roughhousing among members of the same sex" that is aberrational only in that it has become "objectively severe." Alternatively, of course, Oncale's deposition testimony could support a reading of the scene as homosexual predation. It is difficult to escape the conclusion that the MacKinnon brief aimed to induce the Court to adopt just such a reading.

A gay-affirmative mind-set reacts with horror to this state of affairs. It is quite clearly an open vehicle for antigay mobilization. But to power feminists and cultural feminists—committed as they are to their convergentist idea that homosexuality fully resides within $m > f$ gender—the costs aren't apparent. They're suspicious of male/male eroticism: unless redeemed by the femininity of one partner, or a thoroughgoing display of categorical-imperative respect, and the like, what men do with men strikes power feminism as a concentration of dominance, and cultural feminists as morally fraught. They would suspect that Oncale was right that his assailants were homosexuals, and would regard their sexual aggression as a textbook case of morally defective masculine eroticism. The social costs of having nasty little trials on whether or not someone is homosexual, and the possibility that plaintiffs in these cases might win more easily, are either worth it, or they're not costs at all: they might be exactly what these feminisms would want.

The overall ruling—that same-sex cases like Oncale's can be brought under Title VII—is similarly problematic. There are two bad scenarios—one antigay, the other antisex—that can now find vindication under this ruling. Indeed, none of the facts published in the various court decisions in Oncale (except Oncale's allegation of unwantedness) preclude the possibility that this very case embodied one or the other of these scenarios.

Before I elaborate them, allow me to reiterate that I am not saying anything about the human being Joseph Oncale, or making any truth claims about what actually happened on the oil rig. Instead, I want to show how his factual allegations can be read. I am going to put his allegation of unwantedness aside, as a mere allegation, and then connect the remaining dots. And since that heuristic produces the equivalent of a court's knowledge of a same-sex sex harassment case of this type up to and beyond summary judgment, the patterns I draw will become predictions about two alarming classes of cases that will make it to trial—
likely also leading to settlement damages and possibly also actual verdicts—under *Oncale*.

In the first of these alternative readings, we can posit, at least for purposes of contemplating what sex harassment law after *Oncale* might authorize, that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in *Oncale’s* complaint (or that he engaged in some of that conduct and fantasized the rest; or even that he fantasized all of it), and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.

That is to say, *Oncale* might have been a homosexual panic case. It would be easy enough to generate this reading of the case out of entirely gay-identity presuppositions: in that event, *Oncale* is actually a gay or bisexual man, but a shame-ridden one, who reacted to his own (identity-appropriate) sexual behavior and/or desires and fantasies with remorse and a lawyer. *Oncale’s* many television appearances in which he (I am told) affirmed his horrified heterosexuality would be taken, on this reading, as merely a closet-drama, a project in deep bad faith; my insistence on the possibility of this other reading of the case would be, then, a gesture in the direction of an outing (though note that I am reading the record, not the human being). On this, first rereading of the case, a pro-gay analysis would have to understand *Oncale* as the aggressor, the other men on the oil rig as the victims, and the lawsuit (not any sexual encounter on the oil rig) as the wrong.

But a more thoroughgoing queer approach would make the facts outright uncertain. Recall how Sedgwick’s queered gender wanted to notice that sexual super- and subordination can both be complex objects of desire.

It’s easy to read the facts in *Oncale* in a number of ways that perform many of these queer-theoretic operations. We can imagine that the oil rig has a culture with rules, and that these rules draw not on a feminist or a gay-identity script, but on the ways in which masculine and feminine performances and gay-identified and gay-disidentified performances can diverge and converge to make the power relationships in sex expressly problematic. The rules allow *Oncale* to indicate a willingness to be mastered, indeed to stipulate that he is sexually accessible only if those approaching him take on the task of mastery; they submit by taking control; and something happens with a piece of soap. There’s not enough in the record to say much more about how it could have been, but (assuming we are going to take *Oncale’s* allegations about unwelcomeness as merely that—allegations) nothing I’ve said so far is ruled out by the record. From this starting point, the possibilities, in terms of masculinity and femininity and in terms of gay and straight, are probably endless. Mix, match, and omit as you will.

1. *Oncale* performs a feminine man in order to signal his willingness to be mastered; it’s the discrepancy between his male body and his gender that gets things going; the other guys comply with a big display of masculinity; and it’s the discrepancy between their mere bodily selves and the grand controlling personae they assume that keeps things going; so “man fucks woman” but with a twist that undoes the capacity of feminism to underwrite *Oncale* as a victim.

2. *Oncale* performs a perfectly masculine man but only one kind of masculine man; it’s the discrepancy between his masculinity and that performed by the other men involved that gets things going. Femininity is not important
in this version—it’s just absent; the men are differentiating themselves within some diacritics in masculinity. The terms of differentiation could sound in sentiment, age, refinement, race, moodiness, or simply (this is important; convergence is not mandated) masculinity itself. So “It’s a guy thing” that creates the space for a dominante/submission sexual interaction. So “man fucks man”—maleness and masculinity are important products of the interaction, but with a twist that undoes the capacity of feminism to underwrite Oncale as a victim.

3. The other men perform a kind of femininity associated with power—for example, they become bitchy. There is no necessary gender correlate for Oncale. He could be the heterosexual partner of the bitch and thus masculinized, but that doesn’t tell us whether he’s henpecked or intensely phallic. He could be their lesbian partner, but that doesn’t tell us whether she’s butch or femme. Or he could merely play the bottom to the power on display—no gender at all. So “man or woman fucks man or woman,” or perhaps “man or woman fucks,” always with a twist that undoes the capacity of feminism to underwrite Oncale as a victim.

4. Possibly more than one of these is happening at the same time, or rather, perhaps, they all flicker as the scene unfolds. Or it could be that the sheer bodily homosexuality of the scene is so dominantly what it is about that any effort to attribute to it legible gender signification is simply doomed to defeat. In either case we would have a power/submission relay, but with a twist that undoes the capacity of feminism to underwrite Oncale as a victim.

None of the above involves homosexual panic. Indeed, a person could pass through most of the scenes I’ve described without a sexual-orientation identity; you could even do some of them “as” heterosexual; more likely homosexual and heterosexual desire would—each—be, at every moment, complexly achieved, defeated, and deferred. So to that extent the object of desire for any of the players would be some relationship to sexual orientation. Similarly, where gender is of any moment, it reads not as a property or determinant of the bodily self but as a performative language, as a means of transmitting desire. Certainly we can say that, when gender matters at all, the object of desire is not a gendered object, but a relationship to a gender or perhaps to gender more generally.

But I’ve made the assumption that the lead theme in the scene is power and submission. And here’s the rub. The mix-and-match volatilities of gender and sexual orientation work to make the question of who is submitting to whom extremely difficult to answer. Indeed, the chief theme would have to be that the desire of the parties to any of these scenes has as its object a mise-en-problème of desire itself. To the extent that the decision in Oncale allows one participant in scenes like these to have a panic about it afterward and sue, it sets courts and juries administering Title VII a deeply problematic function.

Let me reapproach that last point from the perspective of MacKinnon’s power feminism. The rereadability of the facts in Oncale, rather than confirming her theory, shows what’s wrong with trying to understand this case with it and only it in your hypothesis repertoire. It is just too complete and too settled. Men are over there with masculinity and superordination; women are over here with femininity and subordination. Sex and sexuality are never good; they are always tools by which women are assigned subordination and men either assign or suffer it. Sexual orientation both matters and doesn’t matter precisely and only to the extent that it confirms this mapping. Everything is accounted for; there is nothing left over. The model produces great
How and Why to Take a Break

Taking a Break to Decide (1)

300

301

Certainty: Oncale transparently represents all men injured by this totalized gender system because the system frames all options for understanding his injury. But if the model doesn’t apply—if homosexual panic or more complex problematicness panic is what “the case is about”; if we want to be able to notice it because we are politically, ethically, strategically concerned that it might be happening—that certainty should evaporate.

The resulting uncertainty intensifies, moreover, as we move from the homosexual panic hypothesis to the problematicness panic hypothesis. Things are bad enough under the former. Surely, on that reading of the facts, Joseph Oncale’s hesitant sense that his attackers “are homosexuals” is volatile: Does his “feeling” about his attackers tell us that they are homosexuals or that he might be? That they attacked him on the oil rig or that he attacked them by invoking the remarkable powers of the federal court to restore his social position as heterosexual? If we could know the answer to these questions, at least we’d know how to judge the case: we know we’re against assault, and we know we’re against homosexual panic. But how, in an actual case, would we know? Surely we would not want Justice Scalia’s “common sense” to be our guide: after all, homosexual panic is common sense.

Of course we could advocate putting Pat Califia on the stand to persuade juries out of their commonsense intuition that no one could want to be mastered sexually, or could take control by demanding to be mastered. But the problem in the problematicness panic rereading of the Oncale facts runs much deeper than that. On that reading, it was precisely the loss of certainty about wantedness that the players were seeking. That was their desire. It’s a risky desire: acting on it places one in the way of having some unwanted sex. Things can go wrong; we need to keep one eye on the cause of action for assault. But more profoundly, if things go right, the wantedness of the sex that happens will be unknowable. The queer theoretic reading of the case reminds us that we will always do violence when we decide.

How can we think responsibly about that violence, that decision? Of course throughout we are concerned about sexual predators who make the workplace impossible for their victims. But we might also worry that Oncales who inhabit my fourth rereading contradict their own past decisions when they claim access now to a less problematic set of norms about wantedness. We might want to estop them from claiming now that then they didn’t want to put wantedness en abîme, not only because we find this dishonesty repulsive, but also because the social forces they will gather and sharpen, if they win, bid to make Title VII a vanilla-sex regime. It might turn the normative screw in the direction of less problematic sex, making problematic sex more unwanted by more people, and increasingly more actionable. From this angle, MacKinnon’s reading of the case is not a transparent translation of suppressed consciousness into the law; it’s a trumping move in a culture war among leftists interested in sexuality as a dark power. There are lots of people out there—cards-on-the-table moment: I am one of them—who think the problematic of wantedness isn’t just tolerable; we think it’s beautiful; it’s brave; it’s complicated and fleeting and elaborate and human. Workplace discrimination rights to bring problematicness panic suits against it insulate a big part of the world from our political reach.

On the other hand, suppressing performances that make the problematic of wantedness explicit would not make it go away; the regulatory project would only make the problematic of wantedness more covert; indeed regulation might intensify by narrowing the vocabularies that subversion has to mobilize. After all, it’s not exclusively the perverts who engage in scenes like those I’ve just affirmed as good who seek incoherent experiences in sex: I think most of us experience sex (when it’s not routinized) as an alarming mix of desire and fear, delight and disgust, power and
surrender, surrender and power, attachment and alienation, ecstasy in the root sense of the word and enmired embodiedness. Essential elements of the third Oncale scenario are enacted, I imagine, in many more sexual relationships than you would guess just by looking around the boardroom or seminar room, and the edgy experience of unwantedness in sex is probably cherished by more people than are willing to say so. Suppressing performances like my third Oncale scenario might make sex on Sunday afternoon, with your spouse, in the sacred precincts of the marital bedroom, more banal or more weird—it’s hard to tell which, in a domain of experience so routinely enriched by prohibition. The queer project carries a brief for the weirdness of sex wherever it appears; it is (or should be) agnostic about where, when, and among or between whom the intensities of sex are possible. But (and this is probably the queerest reason to protect the problematic of unwantedness from regulation as sex harassment, and it is a distinctively queer feminist view) it would resist the redistribution of sexual intensities achieved under color of women’s equality or moral virtue. Feminist queer theory resents and opposes constructions in which women become the guarantors of sexual purity: power feminism and cultural feminism promote them.

Those are some pretty striking downsides to the Oncale decision. They might not be worth it. Protecting feminine gay men is a good thing to do; same-sex wrongdoing should not be exempted from regulation; people should be made to worry about how their sexual desires affect other people; everybody has to work and should be able to do so without running irrelevant and acute dangers; and so on. But we can’t get those social gains without the social costs. The benefits have costs. And the costs have benefits: as long as erotic masochism is a powerful position, we face the problem of infinitely unknowable preferences. Not only that; diverging various social theories of sex and identity that I’ve been using to articulate the costs of the benefits promotes their incom-