

Leviticus in America: The Politics of Sex Crimes¹

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OVER the past decade of theorizing sexuality it seems that two camps have staked out the bulk of the critical territory. One group of thinkers and activists sees sexuality as attacked by scientific discourses, which, often through government institutions, exercise control in the form of “bio-power.” The other set of critics represents violence against sexuality as a matter of phallic prerogative gone wild, unrestrained by a passive, accommodating liberal state. To render the division more succinctly, one might say there are Michel Foucault and Catharine MacKinnon. Whereas Foucault’s central problem is “liberation,” MacKinnon’s is subordination. That is, Foucault does a genealogy of *scientia sexualis*’s false freedom of confession, while MacKinnon attempts to reveal the hidden, but real circumstances of women’s oppression. Foucault plays Nietzsche to MacKinnon’s Marx. Foucault says “The emperor is dead.” MacKinnon responds, “His sword still cuts, and I wish he would put some clothes on.” A betrayed or infinitely deferred “liberation” is not the same as subordination, and the response to false liberation must be fundamentally different from that to oppression.

Indeed Foucault and MacKinnon are almost completely at odds, and have come to stand for deep divisions among those theorizing sexual politics. On the one hand, there are those who seek to escape the “power/knowledge” grip of sexual discourse by denying the significance of a sovereign legal authority, and by inviting us to play with patriarchy’s symbols in such a way as to denaturalize them and thus impede any kind of regulation of sexual practices. On the other hand, there are those who insist that radical groups, and then society as a whole, must overtly institutionalize a refusal of gender-based oppression, using the state

¹ I want to thank Jill Frank, Jenny Terry, E.D.B. Vermeule and Margot Young for their suggestions and conversations. Laura Green’s comments on an earlier draft, as well as those of Hanna Pitkin and Michael Rogin on the 1990 APSA paper “Men Loving Men . . . Raping Women?: Sodomy Politics in the 1980s,” were especially helpful. I am grateful to Laura Stoker for introducing me to the literature on the religious right.

to enforce the right kind of regulations. Thus the former group—sometimes self-identified under the vague rubric of “post-modern”—sees the latter group—let’s call them “advocates”²—as naive, accusing them of reconstituting the very authorities they seek to escape. The advocates rebut the charge by criticizing post-modern writers for analyzing away actual oppression and thus refusing their own ethical responsibilities for what happens to real people.

This paper reviews three sodomy cases so as to explore the tensions between Foucault and MacKinnon, and attempts an alternative approach to understanding the relation between politics and sexuality. Specifically, it engages the question of how to think about the fact that the recent American Civil Liberties Union (ACLU) challenges of sodomy law as unconstitutional have been raised in contexts in which men are accused of raping, assaulting and forcefully sodomizing women, and that national lesbian and gay rights organizations have been supporting those legal challenges (and winning). First, I shall discuss some of the particularly salient political issues raised by sodomy laws and their applications. I focus on two typical cases that were reviewed by appellate courts, one in which the sodomy conviction was upheld, and another in which it was overturned, and compare these decisions to the Supreme Court’s opinion in *Bowers v. Hardwick* (1986).³ Second, I summarize the broader contours of the problem: what are the bases of alliances and antagonisms between gays, lesbians and women?⁴ Third, I will provide overviews of Foucault’s and MacKinnon’s analyses of gender/power relations, showing both where they are useful and inadequate for helping us understand these cases. In particular I discuss the centrality of Christian evangelicalism,⁵ which both theorists avoid, in shaping the discourse of contemporary sexual politics in the United States. The appropriate response to these religious representations, I argue, is not to deny the will to truth, or to displace the phallus, as Foucault and MacKinnon would have it, but—and here I follow Gayatri Spivak—to affirm the desire(s) of women and lesbians.⁶

² “Advocate” is from the Latin *advocare*, which means “to summon.” The first entry in *Webster’s* defines an advocate as “one that pleads the cause of another before a tribunal or juridical court,” and “one that defends or maintains a cause or proposal.” Such definitions capture the characteristics of those who seek to overturn conventional practices by arguments that appeal to the authority of the state, and who assert genuine differences between their views and those of others.

³ 478 U.S. 191 (1986).

⁴ Since sexuality is a construct of gender (and vice versa) and both derive from culture, not biology, “lesbian,” for instance, is not a sub-category of “woman,” but an identity *sui generis*. (For more on the distinction between “woman” and “lesbian” cf. Monique Wittig, “The Straight Mind,” *Feminist Issues*, Vol. 1, no. 1, Summer 1980.)

⁵ I am following James Davison Hunter’s definition of “evangelicalism,” which he says is the “North American expression of theologically conservative Protestantism . . . Fundamentalism is viewed here as a faction *within* Evangelicalism and not as a movement *distinct from* Evangelicalism.” *Evangelicalism: The Coming Generation*, (Chicago and London: University of Chicago Press, 1987), pp. 3–4.

⁶ “Displacement and the Discourse of Woman,” in *Displacement: Derrida and After*, ed. Mark Krupnick (Bloomington: Indiana University Press, 1983).

I. SODOMY LAWS

I.

To anybody concerned with challenging prevailing gender/power relations sodomy laws seem like they are nothing if not bad news, in nothing if not obvious ways. There is Michael Hardwick, for instance, a courageous gay man arrested in his bedroom for having oral sex, who has come to symbolize the precarious legal status of all lesbians and gays in the United States. Twenty-four states and the District of Columbia still have laws that make it criminal for people of the same sex to make love in particular ways, and there is something, if not unconstitutional, then at least clearly immoral and repulsive about such legislation. There are also Orrin Hatch and Jesse Helms. Michael Hardwick versus Jesse Helms. It doesn't seem as though there is much to think about. Except that "[C]onsenting adults are generally not prosecuted for nonpublic violations of sodomy statutes."⁷ The vast majority of sodomy charges and convictions are in circumstances in which men are accused of "aggravated sodomy" involving a woman, and convicted of "sodomy."⁸

Prosecutors or juries use sodomy statutes as a sort of half-way punishment of these defendants.⁹ Georgia and Oklahoma appellate court decisions, both prior to and following the United States Supreme Court *Bowers* decision, reveal this pattern quite clearly, with men being charged with rape and/or forcible sodomy, and being convicted of sodomy. Where, as in Oklahoma, even consensual sodomy is illegal, juries can send men to jail even when they are not convinced beyond a reasonable doubt that the men used force, that the women involved did not consent. It is always the men, and not the women, who are charged with sodomy in these cases. (Sodomy laws are also often the only recourse available for prosecuting homosexual rape cases.)¹⁰ Before proceeding I want to be quite explicit about my motives for pursuing the few apparently salutary effects of sodomy laws: they are a proxy for one version of what it looks like when the

⁷ "Developments in the law: sexual orientation and the law," *Harvard Law Review*, v. 102, (May, 1989), p. 1520.

⁸ *ibid.*

⁹ *ibid.* Curiously, later this essay states that sodomy laws are applied disproportionately against gays. The single source to which this and other authors who make this point refer is *U.S. v. Does*, D.C. Superior Court, 1973, in which the court decided that "discriminatory application of D.C. Code Sec. 22-3502 against homosexuals may present a selective enforcement problem of constitutional dimensions, *Yick Wo . . .*" In this case the court construed the sodomy statute to be constitutional only when applied to nonconsensual sodomy, or sodomy with children. However, recent constitutional challenges on these grounds were dismissed in *Ray v. State*, 389 S.E.2d 326 (Ga. 1990). In *Ray* the appellant contended that the Missouri sodomy law "violates his right to equal protection under the United States Constitution because, he alleges, the statute is selectively enforced only against homosexuals." The majority opinion of Georgia's Supreme Court continues, "We find no merit in this contention, as there is no evidence in the record that [the statute] is selectively enforced" (327).

¹⁰ *ibid.*, p. 1520.

state punishes men for sexual crimes against women without interrogating either the intent of the man or the consent of the woman, which is by no means to argue that there is anything that is intrinsically good about sodomy laws. Indeed, as we shall see, even in cases in which sodomy laws lead to the punishment of men for violence, the laws also efface women's identities and selfhood in profound ways.

II.

A sodomy charge shifts the focus away from women's consent and puts it on whether "something happened." Such a scenario overcomes the difficulties of punishing men for rape when we live in a rape culture. As MacKinnon puts it

men who are in prison for rape think it's the dumbest thing that ever happened. . . . It isn't just a miscarriage of justice; they were put in jail for something very little different from what most men do most of the time and call it sex. The only difference is that they got caught . . . Now this gets us into intense trouble, because that's exactly how judges and juries see it who refuse to convict men accused of rape. A rape victim has to prove that it was not intercourse. She has to show that there was force and she resisted, because if there was sex, consent is inferred.¹¹

A survivor of forced sodomy doesn't have to prove that it was "not sodomy" the way a victim of rape has to prove it was "not intercourse." In other words, sodomy laws appear to be a Catharine MacKinnon dream come true. Men are charged and convicted, if not of rape, then at least of something. Again, my point is not that sodomy laws are good things, but they do have the concrete effect of punishing some rapists who might otherwise go free. That state intervention achieves this apparent benefit for some women at the expense of gays and lesbians needs to be investigated.¹²

III.

What follows is from the majority opinion of the Georgia State Supreme Court in *Stover v. State*.

The evidence was in sharp conflict regarding the circumstances immediately surrounding the alleged sexual acts, but there was general agreement as to the events leading up to those acts. Stover and two male companions were riding about in a pick-up truck in the late afternoon or early evening hours. They happened upon

¹¹ *Feminism Unmodified*, (Cambridge: Harvard University Press, 1987), p. 88.

¹² A coalition of women's groups and gay and lesbian organizations in Washington, D.C. had been working with the city to rewrite the laws on sex crimes beginning in the late 1980s. The coalition broke up in the spring, 1991 after the district attorney told women working for various anti-rape organizations that the elimination of sodomy laws, which the gay and lesbian organizations had been advocating, would make it more difficult to convict men charged with rape. (Christine Spaulding, a Washington, D.C. attorney involved in these negotiations, informed me of these events.)

Holly Marie Capes who was walking beside the roadway and gave her a ride. The foursome spent the next several hours riding around together drinking beer and visiting here and there. Eventually they drove down a dirt road into a wooded area and stopped. It was about 10:30 p.m. Capes' testimony was that Stover forced her to commit acts of oral sodomy upon him and to have sexual intercourse with him on the open bed of the truck while one of his companions remained in the vicinity. Stover testified these acts were willingly done on his promise to pay money later.¹³

Stover was indicted for rape and aggravated sodomy. He was convicted of sodomy as a lesser included offense of aggravated sodomy, and sentenced to five years probation. He appealed his conviction on two grounds. First, that the statute was "unconstitutional for violation of the right of privacy guaranteed by the constitutions of the United States and Georgia."¹⁴ Second, Stover claimed that sodomy is not a lesser included offense of aggravated sodomy, since "fornication is not a lesser included offense of rape."¹⁵

The court dismissed the first contention, noting that sex in a truck with someone nearby is a "public act," so that "Whatever the constitutional privacy rights may be of one who engages in sodomy in private places they do not attach to another doing the same in public."¹⁶ The court dismissed the second challenge on the grounds that while consent does matter for the distinction between fornication and rape, consent is not at stake in the prohibitions against sodomy.

[A]ggravated sodomy is an act of simply sodomy plus the additional element: force and against the will of someone . . . The court in *Speer* held fornication is not a lesser included offense of rape since the offenses have directly opposite characters. But here, where the legislature has intertwined the definitions of sodomy and aggravated sodomy, basing one on the express inclusion of the other, we decline to extend the *Speer* rationale.¹⁷

Thus two legal principles against which sexual libertarians have been fighting—narrow interpretations of what counts as private, and prohibitions against non-procreative sex—seem to have served a feminist cause, i.e. convicting a man of a sex crime against a woman. If not for the restricted definition of what counts as "private" (basically, only one's bedroom, not the back of one's truck) and the prohibitions against sodomy, James Stover Jr would have had his ambition to have unlimited access to women's bodies affirmed rather than penalized, however slightly.

¹³ 350 S.E.2d (Ga. 1986). The Georgia sodomy statute reads: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person." (*Stover*, at 578.)

¹⁴ *Stover*, at 578.

¹⁵ *Stover*, at 579.

¹⁶ *Stover*, at 578.

¹⁷ *Stover*, at 579.

In *Post v. State* the circumstances of the crime were similar, but the legal results were quite different. Lester Post Jr was charged with Rape, two counts of the Crime Against Nature, and Maiming, After Former Conviction of a Felony.¹⁸ As in the *Stover* case, the plaintiff's and defendant's accounts of the events leading up to the crime were similar.¹⁹

H.C. went to the Red Eye Saloon in Claremore, Oklahoma on the morning of January 7, 1983. While at the saloon, she met the appellant, who invited her to his house to watch television and drink beer. H.C. accepted the appellant's invitation.²⁰

At this point the stories diverge.

When they arrived at the house, the appellant allegedly demanded sex. H.C. claimed she was forced, at knife-point, to have sex with the appellant. She also claimed appellant anally sodomized her and forced her to commit an act of fellatio. As appellant sexually assaulted her, he also repeatedly beat her and caused a severe injury to her eye, according to H.C.'s testimony. Finally, the appellant allowed H.C. to dress, and they left the house together. H.C. and the appellant eventually separated, and H.C. went to a friend's house and called her husband.

Dr. Raymond Townsend, an ophthalmologist, testified H.C. was blinded in the eye, which eventually was surgically removed . . . A forensic chemist testified that swabs taken during a rape examination of H.C. indicated the presence of sperm in the rectum.²¹

Post offered a different version of the events.

He claimed all of the sexual acts, including anal intercourse and oral copulation, were voluntarily performed by H.C. After completing these sex acts, the appellant fell asleep. He awoke suddenly when he discovered H.C. going through his pants pockets. Appellant testified he believed H.C. was attempting to steal his money, and he struck her in anger several times, though he did not intend to injure her. He and H.C. then dressed and left the house together. After walking several blocks together, H.C. asked that appellant not accompany her any further, as she would not be able to explain his presence to her husband.²²

At the very least we have a married woman who meets a man at the Red Eye Saloon and is blinded as a result of a sexual encounter with a 'Post' who is his father, i.e., Lester Post, Jr. That's all a bit too overdetermined to pursue. But what about the man who fears his wallet is being stolen out of his pants after having anal intercourse? Presumably the wallet is kept in his back pocket, so that, in his version, Post is the victim, and H.C. the aggressor. He was simply protecting his assets against H.C., and the state had no business intervening in

¹⁸ *Post v. State* 715 P.2d 1105.

¹⁹ According to the Oklahoma State Supreme Court, "the Crime Against Nature includes unnatural sex acts including copulation pre os [oral sex] between females, cunnilingus, fellatio, and rectal coitus (copulation per anus)," *Post*, at 1106-7.

²⁰ *Post* at 1106.

²¹ *ibid.*

²² *ibid.*

this private matter. Post, not H.C., experiences the anal violence, or at least that's the story the appellate court accepts.

The Court decided that since the "Crime Against Nature" prohibits consensual, as well as nonconsensual, "acts of unnatural copulation" the law unconstitutionally violated Post's privacy. Inferring that the rape acquittal meant that no force was involved in the sodomy, the Court overturned Post's sodomy conviction, and reduced the Maiming conviction to an assault conviction, on the grounds that Post did not intend to cause a permanent injury (but simply to protect his wallet). Interestingly, the Court's decision in *Post* reads like Laurence Tribe's Supreme Court brief on behalf of Hardwick in *Hardwick v. Bowers* (1986). Both the Oklahoma Court and Tribe root their arguments against consensual sodomy laws in the "modern judicial conception of constitutional privacy [that] originated in *Griswold v. Connecticut*," where "the Supreme Court found the existence of an implicit constitutional right of privacy in the 'penumbras' of various constitutional provisions."²³ Using the same argument that Tribe was to use unsuccessfully just months later, the Oklahoma Supreme Court opined that "It now appears to us that the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners."²⁴ The Oklahoma Supreme Court also drew the same inferences as Tribe from the *Stanley* decision—which states that the First Amendment protects the right of individuals to view pornography in the privacy of their homes—holding that the Supreme Court "obviously did not deal with protective choice within or without marriage, but instead extended the right of privacy to matters of sexual gratification."²⁵ In its essentials the Oklahoma Criminal Appellate Court's opinion reads like an ACLU brief.

We recognize it is the opinion of many that abnormal sexual acts, even those involving consenting adults, are morally reprehensible. However, this natural repugnance does not create a compelling justification for state regulation of these activities. The Supreme Court has determined that merely because the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of the community, or that the use of pornographic materials in the privacy of one's home would invoke general displeasure, does not provide a compelling justification to regulate either activity.²⁶

Yet we need to keep in mind the actual circumstances of the decision: a man who was accused of rape and aggravated sodomy, and who punched out a woman's eye. In *Bowers v. Hardwick*, as we shall see below, the United States

²³ *Post*, at 1107.

²⁴ *Post*, at 1109.

²⁵ *ibid.*, referring to *Stanley v. Georgia* 394 U.S. 557 (1969). In *Stanley* the Supreme Court held that "the individual's right to view obscene material in the privacy of his or her home could not be regulated by the state."

²⁶ *ibid.*

Supreme Court rejected the relevance of the reproductive choice decisions and *Stanley*. And yet, two months after *Bowers*, it let stand the *Post* decision, by refusing to hear the State's appeal. Although the above excerpt from *Post* runs directly counter to the majority opinion in *Bowers*, the fact that the *Post* decision explicitly stated "We do not reach the question of homosexuality,"²⁷ may have allowed the Supreme Court to convince themselves that the two opinions were not at odds.

In *Bowers v. Hardwick* the Court rejected Hardwick's argument that sodomy was protected by a constitutional right to privacy. Whereas the Oklahoma Supreme Court found that the procreative choice precedents spoke to the issue of consensual sex, the United States Supreme Court held that *Griswold* and *Eisenstadt* were really about protecting the privacy of families and heterosexual sex.

Accepting the decisions in [*Griswold*, *Eisenstadt*, and *Roe v. Wade*] . . . we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . .²⁸

At the same time, the Court noted that "Proscriptions against [consensual homosexual sodomy] have ancient roots" and that 24 states and the District of Columbia have laws against sodomy.²⁹ In its *Bowers* decision the majority interpreted *Stanley* to be primarily about First Amendment protections of what gets read in the home—about words, not acts.³⁰ Thus, the opinion concluded that there were no precedents for viewing sodomy as a fundamental right, and therefore no grounds for overturning the Georgia law. In *Stover*, sodomy laws are used to convict a man of sexual violence against a woman; in *Post* sodomy laws are ruled unconstitutional, and thus a man is not punished for sexual violence against a woman; and in *Bowers*, sodomy laws are upheld, and a man is punished for having consensual sex with another man. All three decisions were written in 1986, and there have been few changes in state laws or court interpretations and applications of sodomy laws since then.³¹

Before proceeding it is important to note that sodomy laws and their application are not some deviant quirk in the otherwise seamless social fabric of misogyny. It is not aberrant that men are punished for forced anal and oral sex,

²⁷ *ibid.*

²⁸ *Bowers v. Hardwick* 478 U.S. 191 (1986), citing *Griswold v. Connecticut* 381 U.S. 479 (1965); *Eisenstadt v. Baird* 405 U.S. 438 (1972).

²⁹ *Bowers*, at 193–4.

³⁰ The Supreme Court decision in *Stanley* held that "the individual's right to view obscene material in the privacy of his or her home could not be regulated by the state." Quoted in *Post* at 109.

³¹ The fact that the vote was 5–4, and that after he retired Justice Powell wrote an opinion piece for the *New York Times* stating he regretted his swing vote for the majority, may prove of interest to those fascinated by counter-factual speculations. However, because *Bowers* was heard relatively recently and the Court is dominated by Reagan-Bush appointees, there is little reason to believe a similar case will be heard, much less resolved differently, in the near future.

while they are not punished for forced vaginal intercourse. Sodomy laws have their historical roots, as Justice White was kind enough to remind us, in the Bible. During the reign of Henry VIII, Leviticus was interpreted to mandate prohibitions against sex that did not lead to procreation, specifically, prohibitions against “spilling seed.” Jeffrey Weeks writes,

Authoritative theologians argued that acts of sodomy were the gravest of sins because, by definition, they could not lead to procreation, whereas fornication, seduction, rape or incest could.³²

Indeed Justice Burger used this historical evidence as grounds for his concurring opinion, citing Blackstone’s description of “the infamous *crime against nature*’ as an offense of ‘deeper malignity’ than rape, an heinous act ‘the very mention of which is disgrace to human nature,’ and ‘a crime not fit to be named.’”³³ Sodomy was (is!) believed to be worse than rape, according to Weeks, because the idea that women’s uteruses are passive receptacles for male semen somehow naturalized, normalized any version of men’s appropriation of women’s vaginas, but called into question men’s efforts in other regions of the female body. Such a view of women is also consistent with the legal inattention to sex between women. Many countries in Europe formally prohibited only sex between men (although women thought to have sex with other women were sometimes punished under laws against witches—sex between women apparently being too unnameable even to count as “unnameable”). Juries also may be more likely to convict men for sodomy than for rape because there is the implicit belief that while women might mean “yes” when they say “no” in rape cases, our culture’s denial of the existence, much less the complexity, of women’s sexual desires means that juries have a hard time believing that women might enjoy sex that goes beyond the realm of traditional heterosexual, procreative intercourse.³⁴ In support of this conjecture is the fact that women are virtually never charged for sodomy, even though sodomy laws state that both consenting adults are violating the statute. If there were a general impression that men and women were equally desirous of non-procreative sex, we might expect to see both men and women charged with sodomy crimes.

These sodomy cases seem to represent quintessential instances of differences between Foucault and MacKinnon. On one hand, leaving these laws on the books clearly punishes gays and lesbians; on the other hand, removing them—reducing some of the state’s policing of sexuality—would remove some state protections of women. And yet this all sounds quite odd, as if there must be something wrong with how I am representing the two sides, since the dominant

³² *Sex, Politics, and Society: The Regulation of Sexuality since 1800*, (London, New York: Longman, 1989), p. 4.

³³ *Bowers* at 197, emphasis in original.

³⁴ Jenny Terry suggested this to me.

radical narratives of sexual politics emphasize the common sources of homophobia and misogyny, and thus seem to point to a political common ground among homosexuals and women.

IV.

The prevalent view among progressive critics who write about sex and politics is that gender and sexuality are two sides of the same coin, while the oppression of women and gays is how that coin gets spent.³⁵ Much of the recent work elaborating on the conditions by which this exchange constitutes both sexuality and gender draws on Gayle Rubin's essay "The Traffic in Women," in which she revisits Levi-Strauss's research on kinship. Rubin's thesis is that clear demarcations between what is masculine and what is feminine constitute the authority of men who marry, thereby oppressing both men who do not participate in traditional kinship structures, as well as all women.

The suppression of the homosexual component of human sexuality, and by corollary, the oppression of homosexuals, is therefore the product of the same system whose rules and relations oppress women.³⁶

Drawing on Rubin, Eve Kosofsky Sedgwick states, "[H]omophobia directed by men against men is misogynistic, perhaps transhistorically so."³⁷ Although Rubin discusses the doubly destabilizing consequences of female homosexuality for traditional kinship networks, which will be considered later in this essay, Sedgwick chooses to ignore this aspect of Rubin's work. Notably absent from Sedgwick's economy are lesbians, by now the visibly invisible. Sedgwick attempts to justify her silence on grounds that women do not direct much homophobia against women, and thus there is no distinctive category "lesbian" that stands opposed to "woman," whereas there are clear fissures between "homosexual" and "man."

[T]he diacritical opposition between the 'homosocial' and the 'homosexual' seems to be much less thorough and dichotomous for women, in our society, than for

³⁵ For examples from across a good part of the gender identity spectrum, cf.: Jill Johnston, *Lesbian Nation: The Feminist Solution* (New York: Simon and Schuster, 1973), p. 183; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, London: Harvard University Press, 1989), p. 111; Mario Mieli, *Homosexuality and Liberation: Elements of a Gay Critique*, tr. David Fernbach (London: Gay Men's Press, 1980), pp. 35, 46; Gayle Rubin, "The Traffic in Women: Notes Toward a Political-Economy of Sex," in *Toward an Anthropology of Women*, Rayna Reiter, ed. (New York: Monthly Review Press, 1975); Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (New York: Columbia University Press, 1985); Simon Shepherd and Mick Wallis, *Coming On Strong* (London: Unwin Hyman, 1989) introduction, pp. 14, 19. Barbara Smith, *Home Girls* (New York: Kitchen Table Press, 1983), introduction.

³⁶ "Traffic," p. 180.

³⁷ *Between Men*, p. 20. Sedgwick wisely qualifies her use of the term "homophobic," stating that "heterosexism" would be more "suggestive of collective, structurally inscribed, perhaps materially based oppression" (footnote, p. 219).

men. At this particular historical moment, an intelligible continuum of aims, emotions, and valuations links lesbians with the other forms of women's attention to women . . . it seems to make sense to say that women in our society who love women, women who teach, study, nurture, suckle, write about, march for, vote for, give jobs to, or otherwise promote the interests of other women, are pursuing congruent and closely related activities.³⁸

In the Sedgwickian economy there are only heterosexual men, homosexual men, and women. Although Sedgwick does not make a transhistorical claim for her representations of their relations, the "our society" qualification is rather disingenuous, since nowhere in the rest of the book does she show us moments at which sexuality *is* the site of divisions between women. Thus, according to Sedgwick, homophobia directed against gays also structures misogyny, and to fight that homophobia is to fight misogyny. (Sedgwick never cares to formulate the struggle in reciprocal terms.) Gays and women are comrades and sisters in struggle against a common oppressive gender system.

The common ground of lesbians, gays and women, however, at times is political quicksand, as anyone who has spent more than 20 seconds at a political meeting or academic conference organized around the themes of either feminism or homosexuality knows, meaning that Sedgwick's vision of trouble-free coalitions is utter nonsense. Women in 12-step incest recovery programs tell the leather dykes to take off the cock straps; the clones tell the queens to go back in the closet; minor posses are organized among some gays, lesbians, and other feminists in order to rid the community of Catharine MacKinnon. By comparing Foucault's and MacKinnon's views of sodomy politics I hope to shed some light on these antagonisms.

V.

As mentioned above, one might read Foucault's central problem, what he is most concerned with overcoming, as "sexual liberation"—a phrase for which the consistent quotation marks in Foucault's texts marks his argument that "it" doesn't exist, and pursuing "it" renders it even more distant. "Sexual liberation, Foucault claims," according to Atar Hussein, "is an illusory horizon created by a mistaken view of power which comes to bear on sexuality."³⁹ Foucault believes that the problem with contemporary social thought is that it is stuck in the seventeenth century. "[T]he representation of power has remained under the spell of monarchy. In political thought and analysis, we still have not cut off the head of the king," despite evidence that the sovereign, the law, is irrelevant to power relations in our daily lives.

³⁸ Sedgwick, pp. 2–3.

³⁹ "Foucault's History of Sexuality," *m/f*, 1981, 5 & 6, p. 169.

We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, or serving as its system of representation. Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French Revolution and the accompanying age of constitutions and codes seemed to destine it for a future that was at hand.⁴⁰

Foucault's history of sodomy discourses from the 16th to the 20th century is thus a genealogy of the shift from the power/knowledge nexus of religion and the state to that of psychology.

Consider for example the history of what was once 'the' great sin against nature. The extreme discretion of the texts dealing with sodomy—that utterly confused category—and the nearly universal reticence in talking about it made possible a two-fold operation.⁴¹

Foucault goes on to contrast this two-fold operation—the severity of punishment and widespread tolerance of sodomy as a religious/juridical violation through the eighteenth century—with the “appearance in the nineteenth century” of “a whole series of discourses on the species and subspecies of homosexuality, inversion, pederasty, and ‘psychic hermaphroditism’ [that] made possible a strong advance of social controls into this area of ‘perversity.’”⁴² The religious/juridical prohibitions against sodomy transformed into the medical community's regulation of homosexuals.

What Foucault outlines here is a profound shift—as opposed to a continuous progression—from what “sodomy” looked like in its religious/juridical representations to the appearance of “homosexuality” in the discourses of nineteenth century medicine and science. The same nineteenth century that brought us

discourses on the subspecies of homosexuality . . . made possible a strong advance of social controls into this area of ‘perversity’; but it also made possible the formation of a ‘reverse’ discourse: homosexuality began to speak on its own behalf . . .⁴³

The problem with such a ‘reverse’ response, deeply determined by the medical-scientific discourse of sexuality out of which it emerges, is that it cannot help but legitimate the regulatory practices against which it seems to argue. In response to the question “Who or what is it that co-ordinates the activities of agents of the political body?” Foucault states, “Naturally it's medicine which has played the basic role as the common denominator.”⁴⁴ And the more we talk about sex, regardless of what is said, the more the medical-scientific discourse—

⁴⁰ *History of Sexuality*, volume I, Robert Hurley, tr. (New York: Vintage Books, 1980). p. 89.

⁴¹ *ibid.*, p. 101.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *Power/Knowledge: Selected Interviews and Other Writings 1972–77*, tr. Colin Gordon, Leo Marshall, John Mepham, Kate Soper. Colin Gordon (ed.) (New York: Pantheon Books, 1980), p. 62.

which derives its authority from representations of sexuality—accrues and deploys its power. In his final sentence of *The History of Sexuality*, v.I, after pondering the significance of the modern psychoanalytic obsession with sex, Foucault writes, “The irony of this deployment is in having us believe that our ‘liberation’ is in the balance.”⁴⁵ Foucault implies that homosexuals ought not to seek sexual liberation, since it does not exist, while the modern confessional discourse that effort implies only reinscribes the legitimacy of concepts such as “pathology.” Thus Foucault observes that the women’s movements are more “inventive,” and pose more of a challenge to the prevailing sexual discourse than homosexual politics because “the homosexual liberation movements remain very much caught at the level of demands for the right to their sexuality, the dimension of the sexological,” which only reiterates the discourse of sexual regulation. “Women on the other hand are able to have much wider economic, political and other kinds of objectives.”⁴⁶

VI.

The linchpin of MacKinnon’s work is sexual violence against women, which she believes is at the root of women’s oppression. MacKinnon is not concerned, at the initial level of her analysis at least, with the stifling or manufactured nature of women’s desire. Feminism, for her, is not about false freedoms, but about actual suffering. To put it bluntly, “[F]eminism finds women oppressed as a sex . . .”⁴⁷ For MacKinnon (like Foucault) what happens in the name of sex represents a host of imbricated gender/power relations of what for MacKinnon (unlike Foucault) is most significantly women’s subordination. “A systematic inequality between the sexes” writes MacKinnon, “exists in the social practice of sexual violence, subjection to which defines women’s status . . .”⁴⁸ Although rape, perhaps the most central embodiment of this oppression for MacKinnon, does not have the quotation mark status of Foucault’s “liberation,” MacKinnon’s definition of the practice suggests some of the paradoxes of Foucauldian “liberation.” Just as Foucault understands the dominant discourse as categorizing, cajoling, producing a desire for “liberation,” and thereby causing one to question a simple rebuttal against homophobic discursive practices, MacKinnon too notes the continuity between what looks oppressive (rape) and what looks o.k. (intercourse), but also looks like rape. In other words, both theorists see the dominant set of power/knowledge relations as totalizing, even as Foucault resists a totalizing *theory* of this state of affairs. So whereas both Foucault and MacKinnon describe power in rather totalizing ways, the effects of that power that most

⁴⁵ *History*, p. 159.

⁴⁶ *Power/Knowledge*, p. 220.

⁴⁷ *Toward a Feminist Theory*, p. 69.

⁴⁸ *ibid.*, p. 245.

interest Foucault are those he notes in the phenomenon of “liberation,” while for MacKinnon power is what keeps women down.

VII.

Foucault’s project is to explain domination and subordination at the margins, “not the domination of the King in his central position, therefore, but that of his subjects in their mutual relations.”⁴⁹ His analysis is concerned with “the point where power surmounts the rules of right,” and thus he believes “one should try to locate power at the extreme points in its exercise, where it is always less legal in its character.”⁵⁰ Although it appears that Foucault does not have much to say about contemporary sodomy laws and court decisions *per se* (since they are juridical and thus seem to refer to a center), legal documents cannot be cleanly separated from the larger political culture in which they are written. Just because power has non-juridical forms at the margins does not mean that we can ignore its juridical expressions. So how would Foucault explain these decisions?

In this section I try to give the best gloss possible on Foucauldian interpretations of the three sodomy cases. These readings, however, sound thin, in large part because Foucault’s work, as will be explained in more detail later, is not all that relevant for understanding legal discourses in the United States. As Carol Smart has pointed out, in the United States the courts still exercise their authority in the name of rights, and not in the language of what she calls the ‘psy’ professions. For instance, in the matter of parental access to children after a divorce the courts no longer make decisions based on parental rights, and to a certain extent adopt the ‘psy’ professions’ argument that decisions should be made that are in the best interests of the children. And yet this privileging of the children’s interests over those of the parents is still couched in a language of rights.

Hence the law argues that access is the inalienable *right* of the child. Once defined as a right the law can deploy its traditional powers to defend this right (even to the extent of obliging a child to exercise his/her rights against his or her will). *This transformation of power conflicts into the language of rights enables law to exercise power rather than abdicating control to the ‘psy’ professions and the mechanisms of discipline.*⁵¹

Since what goes in as psychology still comes out as liberal ideology, Foucault’s work is problematic for social analyses in the United States.

⁴⁹ *Power/Knowledge*, p. 96.

⁵⁰ *ibid.*

⁵¹ *Feminism and the Power of Law* (New York, London: Routledge, 1989), p. 20, emphasis in original.

Foucault would most likely say that the *Stover* case, in which the appellate court upheld the sodomy conviction in the backwoods of Georgia, was an instance reminiscent of the communal interest which Foucault describes in the sexual encounter between a Lorraine peasant half-wit and a “little girl” in 1867.⁵² Like the peasant, Jouy, whose sporadic sexual encounters with a young girl (in exchange for a few coins) were punished by local authorities, the local Georgia police could be said to have intervened in what was also a case of sex undertaken on the basis of an allegedly consensual exchange. The view of sex in a flatbed truck as being “public” could be understood as similar to the community’s regulation of the extramarital sex in the barn in rural France, a predictable symptom of a sexually regulatory government which Foucault would attack.

Foucault no doubt would approve of the *Post* decision. He might explain the Oklahoma appellate court decision as one indication of the liberal state’s tendencies to withdraw from the overt regulation of sexuality. At the same time, Foucault might point to the court’s refusal to extend privacy protections to homosexual sex. That the opinion was justified on the basis of a series of Supreme Court decisions about the need for the state to respect *marital* privacy is consistent with Foucault’s observation that the state has given up on controlling sex in the family through the criminal code, and now leaves the sexual disciplining of the family to other (medical) authorities—many of whom may be employed by the state through its social welfare agencies, but play the role of confessor, not police.

Ironically, it is a homosexual sodomy decision, an obvious testing ground for a Foucauldian analysis, where Foucault’s work reveals its most glaring shortcomings. Foucault might make much of the fact that both Michael Bowers (the Georgia Attorney General) and Laurence Tribe (Hardwick’s lawyer), refer to medical literatures to support their respective contentions. For instance, Bowers states that male homosexuality leads to AIDS and hepatitis, and cites a social science article that connects homosexuality with “social disorder.” Bowers claims that

it should be permissible for the General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few . . . Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases such as anorectal gonorrhoea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus, and the concomitant effects of this relationship on the general public health and welfare.⁵³

⁵² *History of Sexuality* V. I, p. 31–2.

⁵³ Brief of Petitioner Michael J. Bowers, Attorney General of Georgia, December 19, 1985. No. 85-140, pp. 36–7.

Meanwhile, Tribe mentions that “the nation’s major scientific and professional associations . . . have officially declared their opposition to state regulation of private adult conduct by force of criminal sanction.”⁵⁴ For the most part, however, such references appear almost as afterthoughts, as tangential evidence that does not hurt either side’s case, but not the stuff on which either Bowers or Tribe hang their cases. Rather, the Attorney General includes frequent references to historical norms of “immorality” and cites several passages from the Bible. For instance,

No universal principle of morality teaches that homosexual sodomy is acceptable conduct. To the contrary, traditional Judeo-Christian values proscribe such conduct. Indeed, there is no validation for sodomy found in the teaching of the ancient Greek philosophers Plato or Aristotle. More recent thinkers, such as Immanuel Kant, have found homosexual sodomy no less unnatural . . . To find . . . the roots of modern conventional morality and law relative to the crime of sodomy, only a brief historical review is necessary. Sodomy was proscribed in the laws of the Old Testament (Leviticus 18:22) and in the writings of St. Paul (Romans 1:26, 27; 1 Corinthians 6:9, 10).⁵⁵

Bowers then provides a history of the moral tenor of sodomy laws, from the Romans through the Junkers. The Supreme Court opinion itself reads quite similarly, with Justice Burger basing most of his concurring opinion on the “millennia of moral teaching,” while Justice White, in his opinion for the majority, analogizes the state’s regulation of homosexual with its regulation of adultery, incest and prostitution.⁵⁶

VIII.

MacKinnon appears to have a fairly straightforward explanation of the *Post* and *Hardwick* decisions. Of course the same arguments that would free a man who assaults a woman would convict a gay man, since the root of misogyny is heterosexuality.

Women and men are divided by gender, made into the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.⁵⁷

MacKinnon’s critique of the privacy doctrine that has undergirded recent pro-choice legal arguments is also relevant here. The same justification used to protect a woman’s right to choose an abortion, according to MacKinnon, is what gives

⁵⁴ Laurence H. Tribe, Brief for Respondent, Michael Hardwick (January 31, 1986), No. 85-140, p. 26.

⁵⁵ Bowers, Brief, pp. 20–1.

⁵⁶ *Bowers*.

⁵⁷ *Toward a Feminist Theory of the State*, p. 113.

a man the 'right' to rape his wife. What the liberal feminist lives by—the right to privacy—is also what she may die by—her husband's right to privacy. MacKinnon's thesis is that "the law sees and treats women the way men see and treat women." She shows that, in the name of neutrality, the liberal state affirms male norms for everyone, at the expense of true equality. "Rape law assumes that consent to sex is as real for women as it is for men. Privacy law assumes that women in private have the same privacy men do." But in the absence of social equality between the sexes, neutrality, consent, privacy, and speech are not one-size-fits-all items.⁵⁸ Likewise it makes sense, according to MacKinnon, that the right to any form of apparently consensual heterosexual sex, upheld by the Oklahoma Appellate Court, would accompany a denial of homosexual rights.

At the same time, MacKinnon is not able to help us reason through *Stover*, in which the man was found not guilty of rape, but was convicted of sodomy. MacKinnon would, no doubt, approve of the sodomy conviction—as noted earlier in the paper—because she is not interested in consent, only in women's claims about experiencing harm. And yet the paternalism responsible for the man's conviction for sodomy does not lead to representations of women as autonomous, and genuinely equal, which is presumably what MacKinnon is after. Rather, both the decision and MacKinnon elide the relevance of women's desire(s). It is precisely this tendency of MacKinnon's work, to efface women's desire, that so many feminists find disturbing. Some note this in the context of MacKinnon's assumption of women's "false consciousness," her belief in which is implied in her equation of "normal" intercourse with rape (since most women do not believe their experience of intercourse is like that of a rape). But that a radical theory may be at odds with popular beliefs is nothing new, and really a methodological side issue in MacKinnon's work. The real problem with MacKinnon's representation of women's (sexual) desire is that it is a category *non gratis*. In MacKinnon's world, only men have desire (for women). "What is sexual is what gives a man an erection."⁵⁹ Women do not have desire, and lesbians do not exist (since they are not part of the sexual reality of men). Thus MacKinnon's critique of phallogocentrism remains strikingly phallogocentric.

IX.

MacKinnon's refusal to represent lesbian desire is consistent with the Sedgwickian economy, in which straight men are constituted through women and against homosexual men, in which, according to Judith Butler, "The relation of reciprocity established among men . . . is the condition of a radical nonreciprocity

⁵⁸ The preceding three sentences appear also in my "Penile Code," *Village Voice* (January 16, 1990), p. 61. The MacKinnon passages are from *Toward a Feminist Theory of the State*, pp. 161–2 and p. 169.

⁵⁹ *Toward a Feminist Theory*, p. 137.

between men and women, a relation as it were, of nonrelation among women.”⁶⁰ And yet for feminists to buy into that representation of the sexual economy is to turn away from our own reality. In fact there *are* relations among women, among lesbians, and between the two groups, which Sedgwick’s monolithic, elastic definition of “woman”—one that stretches from marching to fucking—does not represent. Jill Johnston, describing her experience of the infamous 1972 Town Hall meeting in New York City, at which Norman Mailer took on the feminists, is instructive on this point.

I had never seen Diana [Trilling] before and I supposed she despised me like the rest. I had met [Jacqueline] Ceballos [of NOW] the week before at a talk gig in longisland [sic] at hofstra college and she seemed to have the same attitude as Betty Friedan who’d declared the year before over the mikes at the swimming bash that I was the biggest enemy of the movement . . . Possibly it was remarks like these that gave people the idea I was protesting the discrimination against lesbians. Possibly I was. Betty wasn’t nice to me at all. And she had said that the two movements (gay and feminist) had nothing to do with each other.⁶¹

As I was writing this a disc jockey announced that “Martina Navratilova is a poor role model for women athletes because she is a lesbian, according to Margaret Court [the former record-holder for wins at Wimbledon],” someone Sedgwick presumably believes is “pursuing congruent and closely related activities”⁶² with Navratilova. (The response of the National Gay and Lesbian Task Force was that “Winning nine titles at Wimbledon qualifies one as a role model.”)⁶³ So much for the feminist continuum.

The problem with Sedgwick’s mistake is not that she fails to bestow a special title of oppression on lesbians, to give them their own claim to suffering analogous to that of women and gays who are victims of male homosocial exchange relations. While some lesbian political theories seek to give visibility to lesbians by showing that lesbians have been historically and are at present oppressed just like gays and just like women, it is lesbian desire, not lesbian oppression, that needs attention.⁶⁴ That is, one reading of lesbian invisibility, of why “homosexual” means “gay man”, is that people do not think that there is sex when there is no penis.⁶⁵ One response has been to dredge up instances of lesbian persecution,

⁶⁰ *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), p. 41.

⁶¹ *Lesbian Nation*, p. 19.

⁶² *Between Men*, p. 3.

⁶³ K100, FM, July 13, 1990.

⁶⁴ This paragraph borrows heavily from Luce Irigaray’s and Helene Cixous’s essays in *New French Feminisms*, Elaine Marks and Isabelle de Courtivron (eds) (New York: Schocken Books, 1980). At the same time, I want to beg the question of where what I am calling “lesbian desire” comes from, whether its origin is biological, a defect of the patriarchy, or a matter of individual choice (none of which sounds right to me). Before it can be properly theorized, at least we need to note that lesbian desire exists in some kind of form that cannot be instrumentally traced from heterosexist practices.

⁶⁵ For one example of this critique cf. *Gender Trouble*, p. 49.

implying that if the state punishes lesbians for their sexuality, then indeed there must *be* a lesbian sexuality. In response to Foucault, MacKinnon and Sedgwick, one might point to one's lesbian scars and say "me too." But such an approach continues to represent sexuality with respect to the phallic model of homosocially constituted juridical oppression, rather than articulate the reality of a sexuality that is not so simply contained by the homosocial violences inflicted by men. This is not to deny that lesbians experience violence on account of their sexuality, merely to note that the male homosocial/homophobic model does not represent that violence.

MacKinnon's and Foucault's silence on the subject of woman's desire and, even more particularly, lesbian desire, is related to their hesitance to talk about sexual desire or people as subjects. There are no female subjects, only objects that are ruled, in MacKinnon's state. And Foucault would reject efforts to discuss lesbian desire as participating in the will to truth. Indeed both the liberal state and psychoanalysis couch their claims to legitimacy in a language of truth, of objectivity and neutrality—norms which MacKinnon and Foucault believe disguise the actual instruments of power deployed at the center and margins of our society. Having correctly represented liberal neutrality and the psychoanalytic confession as instances of a will to truth that obscures questions of domination and subordination, MacKinnon and Foucault want to dislodge these discourses through an exposé of who has power and who does not. Their efforts are flawed, however, analytically as well as strategically. It is a religious discourse of power, reactionary ideals about gender in the name of the omnipotence of God, that needs to be confronted by the unveiling of Nietzsche's woman as truth—an action Nietzsche considers "indecent" and disrespectful. Similarly to Nietzsche, MacKinnon and Foucault both resist the possibility of representing any authentic desire of the female subject. But as we shall see below, this strategy is itself born of bad conscience and needs to be replaced by affirmative representations of female identity and desire.

In the context of sexual politics in the United States, MacKinnon is too hasty in representing the liberal state as even formally neutral and Foucault is too quick to assume the regime-organizing authority of psychoanalysis. Just because Locke and Freud "happened" between Henry VIII and George Bush does not mean that the sixteenth century version of sodomy discourse has been entirely superseded. While the position of women is indeed similar to that of the proletariat Marx describes in "On the Jewish Question," the same cannot be said for homosexuals.⁶⁶ That is, while women are *legally* men's equals, but exploited in

⁶⁶ For an excellent comparison of women's political freedom with Marx's idea of political emancipation, cf. Wendy Brown, "Reproductive Freedom and the Right to Privacy," in *Families, Politics and Public Policy*, Irene Diamond (ed.) (New York and London: Longman Publisher, 1983).

civil society, homosexuals are formally oppressed, i.e., are specifically singled out as subject to arrest for engaging in sodomy.⁶⁷ And since MacKinnon roots misogyny in heterosexuality,⁶⁸ the fact that homophobia is legally sanctioned, indeed mandated, means that MacKinnon's entire theory of the state is in jeopardy when she writes as though gender inequalities are a function of the liberal state's ostensible neutrality. Law in the United States is not yet indifferent to the distinction between homo- and heterosexuality, something to which neither Foucault nor MacKinnon attend in discussing sexual politics. Foucault emphasizes that the functions of sodomy laws now are clearly different from what they were 400 years ago, but one does not have to believe in an unchanging continuity of representations to notice the prevalence of religious arguments informing the current condemnations of sodomy in the United States.

II. SEX AND GOD IN THE UNITED STATES

I.

Foucault was writing in a country with a Socialist Prime Minister whose policies were not all that socialist, against the background of the Communist Party's "defeat" in 1968 through its absorption into the state. In other words, Foucault was writing in a climate in which the Left had gained the *form* of institutional power without accomplishing genuine liberation. In France it makes sense to claim that the relevant discourses representing domination and subordination are not juridical and not religious (since religion is not at all central to public debate in France), but medical. So Foucault concludes that those who want to challenge the power of the state should begin with the power of the medical community. "If one can succeed in modifying these relationships of power into which psychoanalysis enters, and rendering unacceptable the effects of power they propagate, this will render the functioning of the state apparatuses much more difficult."⁶⁹

France is not the United States, and it would be ahistorical (and also a-genealogical) to pretend that an explanation of sexual politics that holds for a country with 45 years of national health care, Communists in Parliament, and a state that mandates (and funds!) the distribution of an abortion pill (RU-486) would work just as well in a country that does not have a centralized health and welfare system, only recently allowed Communists legally to enter the country, and is on the verge of seeing abortion made illegal. In France there was May 1968; here we had Kent State. That is, in France a significant sector of the state

⁶⁷ Twelve of the 24 states with sodomy laws explicitly exclude heterosexual or married couples from their definitions of sodomy.

⁶⁸ *Feminism Unmodified*, p. 113.

⁶⁹ *Power/Knowledge*, p. 61.

technocrats joined “the people”—even if that led to diversion from the early radical aims of the movement—whereas in the United States the government’s reaction to social protest was to shoot its citizens.

II.

The discursive logic of *Stover*, *Post*, and *Hardwick* is not that of the scientization of sexuality, nor is it that of the agnosticism of the liberal state. Rather, it is the crude dogma of Christian evangelicals, whose views are circulated through state institutions and the media, that provides the rationale and coherence of prohibitions on homosexual sodomy that accompany a *laissez-faire* attitude toward rape. The 1982 Congressional “Family Protection Act,” for instance—the political meat-and-potatoes the Moral Majority expected to be fed in exchange for their 1980 support of Ronald Reagan—included measures to cut off any funding to lawyers who worked on homosexual rights cases *even when the federal funding was not going to that case*. That proposed law also included a provision that would prevent federal legislation from superseding state laws that exempt husbands from being charged with raping their wives.⁷⁰ Religion, particularly Christian evangelicalism, is a much more powerful cultural and political force in the United States than most of us atheists on the Left care to recognize, and sexuality is that discourse. Historian Martin E. Marty observes the following:

First, contrary to expectations, religion is very much in evidence [in the United States], which means that the secular paradigm and prophecy that had dominated Western thought has come to be questioned. Second, rather than being contained within formal institutions, religion has unmistakably and increasingly diffused throughout the culture, and has assumed highly particular forms in the private lives of citizens. Third, traditional religion has not fallen away, as expected, but has survived and staged an impressive comeback, establishing itself firmly and enduringly in large subcultures.⁷¹

What is true of the psychoanalytic discourse in France—its pervasiveness at the margins, its ability to shape state power—is true of religion in the United States. I find it rather bizarre that while the Louisiana state legislature’s 1990 vote against abortion rights took place literally in the midst of people swaying while clutching bibles, praying and clicking their rosary beads, an intellectually influential assortment of post-modern thinkers across disciplines actually pretends that God is dead.

⁷⁰ Section 105 of S.1378, The Family Protection Act of 1981, “provides that no federal law, program, guideline, agency action, commission action, directive or grant shall be construed to preempt state statutory law relating to spousal abuse or domestic relations.” *From the Congressional Record*, Senate, v. 27, part 10, 97th U.S. Congress, 1st session, p. 12694.

⁷¹ “Religion in America since Mid-century,” *Daedalus*, (Winter 1984), p. 149.

While Foucault and MacKinnon presumably inhabited the atheistic world of most academics, 55 per cent of Americans indicated to pollsters that religion is “very important” in their lives, and the rate of weekly church or synagogue-goers has been at a fairly constant 40–42 per cent since the 1950s (compared to about 5 per cent in France).⁷² Other social science evidence confirms Tocqueville’s prescient nineteenth century comparison of the role of religion in the United States with its place in the emerging democracies in Europe. A multinational survey conducted in 1981 asked people to “rate the importance of God in their lives on a ten-point scale.” In France, the average response was 4.72, while in the United States people gave God an 8.21, the highest of all the countries surveyed. (In fact, no other country’s citizens gave God more than 5.72—Great Britain, of course.) Furthermore,

three times as many young people in the United States say they include religious activities in their typical weekend events than in Great Britain, West Germany, or France. In the United States, the number of Bibles purchased annually per capita is more than double that in Great Britain, nearly five times as high as in West Germany, and eleven times the number in France.⁷³

Kristi Anderson complements the statistical evidence about the prevalence of religion in the United States with findings from intensive interviews with eight women who were referred to her by regional leaders in Ohio’s Moral Majority. Not only is religion a vital component of the American way of life, but, specifically, it provides the justifications used by those active in “pro-family” political movements. Anderson’s interviews

allowed respondents to recount their own versions of the evolution of their political beliefs. These versions make it clear that underlying the ‘family’ schema, for them, is a reliance on absolute laws laid down by God.⁷⁴

The fact that psychoanalysis is the pre-eminent discourse in France, and that British liberal theorists argued for religious tolerance, does not mean that either psychoanalysis or liberal principles are central to the terms of sexual regulation in the United States.

The discussion of sodomy cases in the United States has not “progressed” to the level of a Lockean tolerance of what happens in private—MacKinnon’s contention—much less to a Freudian psychoanalytic embrace of the sexual confession. Whereas France and England no longer have sodomy laws, many of the United States’ statutes still refer to sodomy as “the” Crime Against Nature—a 16th century phrase from Blackstone of which Foucault makes fun. Not Freud’s *Three Essays on Sexuality*, but Leviticus is what still matters to Justice Burger,

⁷² Robert Wuthnow, *The Struggle for America’s Soul: Evangelicals, Liberals, and Secularism* (Michigan: William Erdmans Publishing Co., 1989), pp. 143, 47.

⁷³ *ibid.*, p. 50.

⁷⁴ “Sources of Pro-Family Beliefs,” *Political Psychology*, (1988), 9, (2), p. 241.

who, like the sheriff who arrested the rap group 2 Live Crew in Florida in 1990, seems to be more influenced by those who believe in an afterlife than those who care about an “inner life.” Extra-juridical diatribes against homosexuality are couched in the rhetoric of fire and brimstone. Reverend Jerry Falwell is on record saying that AIDS is God’s punishment of homosexuals. If we are to understand contemporary manifestations of homophobia in the United States it is not psychoanalysis or medicine, but religious institutions that require investigation. Foucault seems to concede as much himself, after being prompted by Jacques-Alain Miller.

Foucault: In our time there isn’t one of the discourses on sexuality which isn’t, in one way or another, oriented in relation to that of psychoanalysis.

J.-A. Miller: Well, what I find amusing is that a declaration like that is only conceivable in the French context and the conjuncture of today. Don’t you agree?

Foucault: It’s true that there are countries where, owing to the way the cultural domain is institutionalised and functions, discourses on sex don’t perhaps have that position of subordination, derivation and fascination vis-a-vis psychoanalysis which they have here in France, where the intelligentsia, because of its place in the pyramidal hierarchy of recognized values, accords psychoanalysis a privileged value that no one can escape.⁷⁵

If in the United States the problem of gender/power representations is constituted by religious discourses, the solution is not the subversion of the *scientia sexualis* or the overthrow of the liberal state. While Foucault and MacKinnon do not deny the existence of religious discourses, their work does not help us understand them as they currently circulate in the United States.

III.

Christianity has not been such a great thing for women or for homosexuals, but in different ways and for different reasons, depending on the particular historical context. How do we put together, then, the discursive supremacy of religion with the hardships politically active religious conservatives impose on women and homosexuals in the late 20th century United States?⁷⁶ Clearly this is not the place for a thorough genealogy of the contemporary gender/power

⁷⁵ *Power/Knowledge*, p. 209.

⁷⁶ According to Wuthnow, “religious conservatives” are far more politically active than religious liberals, *Struggle*, p. 54.

representations of the contemporary religious discourse, along the lines of Foucault's work on *scientia sexualis*, or MacKinnon's theory of the state. But perhaps it is possible to make some preliminary and tentative observations.

According to Robert Wuthnow, a sociologist who studies modern religious organizations in the United States, the impetus for the religious conservative involvement in politics was resentment of a liberal judiciary. "The enemy," he writes, "was the Supreme Court."⁷⁷ Beginning in the early 1970s the religious right reacted to the multiple blows they received at the hands of the Supreme Court: *Roe v. Wade* in 1973, alongside prohibitions of school prayer. Both decisions mobilized the sector of society most strongly identified with evangelical and fundamentalist faiths, what Wade Clark Roof identifies as the "upwardly mobile lower middle class." He states that

Mobilization of this sector represents a reactionary, traditionalist movement within the larger culture on the part of those who have much at stake in preserving the old order. Ideologically, the class finds itself at great odds with the more liberal, secular 'knowledge' classes, locked into a struggle over power and influence in the public realm. Appeal to the 'old-time religion' gives legitimacy to a way of life, and serves to integrate the religious and cultural identity so important to a large number of Americans today.⁷⁸

It is this background that explains why in the midst of Reagan's "shining city," in 1987 when the rest of us were despairing over the *Bowers* decision and the state's chipping away at abortion rights, "Jerry Falwell asserted flatly that the Court's liberal views had established unconstitutional rights 'to kill the unborn, commit homosexual acts, repress religious freedoms, [and] exploit women and children through pornographic publications.'"⁷⁹ It is clear from the above statement, and from the nature of recent governmental actions instigated by religious conservatives, that control of sexuality, more than anything else, is at stake for Jerry Falwell and the millions of Americans moved by televangelists. There are a lot of moral issues the Christian evangelicals could pursue based on biblical injunctions. It is no less blasphemous to lie than to have homosexual sex, and in fact the Bible itself does not have much to say about sexuality *per se*. That issues around sexuality and the family seem to inspire the religious right more than numerous other topics raised in the Bible prompts one to want to know more about the specific power/knowledge discourses in contemporary Christian evangelicalism. Just as sexuality becomes science in Europe, and the two discourses are interwoven, so too the representations of religion in the United States

⁷⁷ *Struggle*, p. 55.

⁷⁸ "America's Voluntary Establishment: Mainline Religion in Transition," *Daedalus*, (Winter 1982), p. 180.

⁷⁹ *ibid.*, p. 56.

televangelist community are intrinsically bound up with its representations of sexuality.

IV.

Having named the power/knowledge discourse of religion as that which defines sexual politics in the United States, it may seem that the resolution to the apparent conflict between the narratives of “liberation” and oppression is at hand, since the religious discourse is so clearly one of the will to truth that we have the sophistication to reject, as opposed to the psychoanalytic discourse which Foucault asserts has a special insidious status (since it masks itself as progressive, as reasonable, as beyond the moralizing claims of religion in ways that are similar to the liberal discourse of equality). Foucault and MacKinnon imply that when the agents and logic of punishment are made explicit we will be less likely to tolerate, much less reinvent, the same oppressor. Whereas some of the arguments made by gay liberation organizations clearly refer to and support the authority of the medical community and liberal doctrines of privacy and tolerance, it is hard to imagine homosexuals using the Bible to justify anything, much less their sexual preferences. (It is clear, however, that what Foucault says about the tendency for “radical” sexual political actions to get absorbed into the dominant discourse holds for religion’s power/knowledge nexus. *2 Live Crew* did not subvert Bible Belt morality, but strengthened it, by “proving” the truth of religious attacks on sexual pleasures, and functioning as a call to action for the religious right.) All this is to say that while the apparently progressive representations of the liberal state and psychoanalysis obscure their authoritarian complexion, it appears that religion is nothing if not open and straightforward about the need for authority. Thus perhaps we can dispatch with the political difficulties for sexual liberation in Foucault’s *scientia sexualis* and MacKinnon’s neutral state by simply unveiling the religious will to truth in all its ancient decay, freeing ourselves to develop a more reasonable, i.e. 20th century, model of what counts as sexual agency and consent.

Having exposed the tension between the norms that supposedly govern a modern, post-industrial society—at the very least, those of political liberalism and a belief in the legitimacy of the scientific/medical establishment—and those of the Christian right, perhaps there is sufficient discursive space cleared to reconcile Foucault’s desire to subvert gender/power categories with MacKinnon’s ambition to displace gender/power exploitation by articulating a feminist version of consent, so that it would be possible for everyone to have a recognized agency, make their own choices, and thus know when their decisions have been violated, by the state as well as by other individuals. What really seems to be at stake in all three sodomy cases discussed above is whether the participants desired what

happened. Obviously Foucault does not think rape is a good thing, just as MacKinnon would not oppose “truly” consensual sex for either men or women. So might not it be proper to reconcile the concerns of Foucault and MacKinnon by replacing the liberal story of consent with one more sensitive to the actual realities of current gender/power relations? And yet such a formulation merely defers the question of an ethical-political language necessary to think about an alternative conception of consent.

v.

As Hanna Pitkin argues—in the context of the liberal social contract—it is not the logic of liberal models of consent *per se*, but the character of the government, the purpose of a particular political union, that determines whether an individual’s disobedience to the state is legitimate. After pointing out various inconsistencies that arise if one tries to deduce obligation to the sovereign from liberal (specifically Lockean) definitions of consent, Pitkin argues that in the guise of consent theory Locke really is elaborating, most appropriately, “what might be labelled either the doctrine of the ‘nature of the government’ or the doctrine of ‘hypothetical consent.’” Pitkin continues:

It teaches that your obligation depends not on any actual act of consenting, past or present, by yourself or your fellow-citizens, but on the character of the government. If it is a good, just government doing what a government should, then you must obey it; if it is a tyrannical, unjust government trying to do what no government may, then you have no such obligation.⁸⁰

That is, the concept of consent in Locke derives from notions about what counts as a legitimate government, and not the other way around. As Pitkin puts it, “[Y]our obligation depends not on whether you have consented but on whether you *ought* to consent to it.”⁸¹ Likewise, it is not consent itself, but the purpose, the character, perhaps we can even say the meaning, of a particular expression of sexuality that informs whether we regard it as legitimate or intolerable—interpretations of which are always open to debate even as we recognize that not all justifications will be equally persuasive.

Each individual does and must ultimately decide for himself and is responsible for his decision; but he may make a wrong decision and thereby fail to perform his obligations. But then who is to say someone has made a wrong decision? Anyone can say, but not everyone who cares to say will judge correctly; he may be right or wrong.⁸²

⁸⁰ “Obligation and Consent—II,” *American Political Science Review*, (January, 1966), p. 39.

⁸¹ *ibid.*

⁸² *ibid.*, p. 52.

Similarly, the difference between consent as we currently recognize it and a “feminist theory of consent” can only emerge from, and thus depends on, whatever story we tell about the nature of legitimate sexual encounters or relations.

The obvious difficulty in bringing Pitkin’s work on the state to a discussion of the bedroom is that there is something either prurient or policing, or both, about presuming to have anything at all to say about what happens in a realm of such personal intimacy. An uncloseted discussion of sex may ruin it, according to Foucault, at least. (I sometimes wonder whether that also explains MacKinnon’s silence about lesbians who do not play butch/femme roles—who do not fit MacKinnon’s description of those who play into the hand of heterosexism. The only lesbians who emerge in MacKinnon’s work are those MacKinnon describes as distorted by the patriarchy; MacKinnon does not discuss lesbian sex that is not somehow “perverted” by S/M, for instance. Her reluctance to talk about lesbian sex clearly is not a result of any prudishness, as her descriptions of heterosexual intercourse demonstrate. It is as if the only way to sustain the lesbian as the sole force outside of MacKinnon’s closed system of heterosexism and misogyny is for MacKinnon to keep lesbians out of her books.)

VI.

To the extent that we follow Foucault’s advice (and MacKinnon’s practice) and refuse to develop alternative representations of sex(ualities), we cave in to a special resentment Nietzsche does not acknowledge—in fact he praises such inclinations as noble—the backing away from the will to truth.

And as for our future, one will hardly find us [artists] again on the paths of those Egyptian youths who endanger temples by night, embrace statues, and want by all means to unveil, uncover, and put into a bright light whatever is kept concealed for good reasons. No, this bad taste, this will to truth, to ‘truth at any price,’ this youthful madness in the love of truth, have lost their charm for us: for that we are too experienced, too serious, too gay, too burned, too *deep*. We no longer believe that truth remains truth when the veils are withdrawn—we have lived enough not to believe this. Today we consider it a matter of decency not to wish to see everything naked, or to be present at everything, or to understand and ‘know’ everything. *Tout comprendre—c’est tout mépriser.*

“Is it true that God is present *everywhere*?” a little girl asked her mother; “I think that’s indecent”—a hint for philosophers! One should have more respect for the bashfulness with which nature has hidden behind riddles and iridescent uncertainties. Perhaps truth is a woman who has reasons for not letting us see her reasons?⁸³

Nietzsche and Foucault support the veil in the name of sophistication, of depth, of good taste, while MacKinnon writes as though it would be nothing short of

⁸³ Friedrich Nietzsche, “Contra Wagner,” in *The Portable Nietzsche* (New York: Viking Press, 1968), pp. 682–3.

a bizarre fantasy, at this point in history, to expose woman as anything other than a tawdry icon erected by and for men. What does it mean that the one occasion the post-modern gay man and feminist woman come together is to secure the woman's veil? What is everyone so afraid of?⁸⁴

In part we need to unveil the woman in order to provide something more than academic mumbo-jumbo to fight for. It is not the formal stability of the gender binary—the hierarchical principles of masculinity and femininity—that causes and endures pain. This is Seyla Benhabib's position, at least.

Carried to its logical consequences, poststructuralism leads to a theory without addressees, to a self without a center, and to the phantasmagoric play of signifiers and signifieds in the interstices of which power and society disappear as so many 'sites of discursive *differance*.' While Foucault celebrates the disappearance of man, feminists have just discovered woman. Are they ready to bid her farewell too? Derrida suggests, 'Perhaps . . . "woman" is not a determinable identity . . . Perhaps woman—a non-identity, non-figure, a simulacrum—is distance's very chasm, the out-distancing of distance, the interval's cadence, distance itself.' Are women ready to fight on the streets and in the legislatures for the needs and rights of a 'non-identity,' of a 'chasm,' of 'distance' itself? Is not a feminist theory that allies itself with poststructuralism in danger of losing its very reason for being?⁸⁵

A poststructuralist feminist politics seems to entail eschewing personal identities, and simply fighting against that which seems wrong. For example, in her essay "Identity Politics and Sexual Freedom" (in *Feminism and Foucault*) Jana Sawicki states that

We might even be prepared for the dissolution of feminism or lesbianism as we understand them in the future and thus not attach ourselves to our identities so rigidly. I am not suggesting that we can will them away, but rather that we might be more effective if we became less concerned with preserving them or imposing them on others and more concerned with eliminating injustices wherever they arise.⁸⁶

I can understand the analytic justifications for refusing identities such as "feminist" or "lesbian," though I do not agree with all of them, but to argue that strategically it would be "more effective" to refuse them and organize to "eliminate[e] injustices wherever they arise" is almost incomprehensible, especially when Sawicki later admits that her "practical pluralism is based on the implicit assumption that a power-free society is an abstraction and struggle an ubiquitous feature of history."⁸⁷ Martin Luther King Jr had just such a faith in the possibility of a "power-free society." King had a dream, and a good thing too because one

⁸⁴ I want to thank Michael Rogin for his provocative and helpful observations about this passage from Nietzsche.

⁸⁵ "On Contemporary Feminist Theory," *Dissent* 36 (3), (Summer 1989), p. 369.

⁸⁶ *Feminism and Foucault*, Irene Diamond and Lee Quinby (eds), (Boston: Northeastern University Press, 1988), p. 188.

⁸⁷ *ibid.*, p. 190.

hardly imagines half a million people assembling from across the country to hear him *kvetch* "If-it's-not-one-thing-it's-another."

As difficult as it is to see the face of the veiled woman, a fact that preserves a certain power in anonymity, it is equally difficult for her to be represented as controlling her own gaze, as being able to fix her desire on the rest of the world.⁸⁸ To the veiled woman, the world remains at a distance. She cannot see her enemy to refuse him, and she cannot desire herself. Thus her own oppression and self-affirmation remain murky. The simple refusal of the will to truth, the rejection of phallic desire, may undermine men's colonization of women's bodies, but it does not necessarily follow that the averted male gaze is itself empowering to the veiled woman. Following Irigaray, Spivak, in her critique of Derrida (and Levi-Strauss), counters the denial of woman as womb with the affirmation of woman as having her own sexuality.

In legally defining woman as object of exchange, passage, or possession in terms of reproduction, it is not only the womb that is literally 'appropriated'; it is the clitoris as the signifier of the sexed subject that is effaced. All historical and theoretical investigation into the definition of woman as legal *object*—in or out of marriage, or in the politico-economic passageway for property and legitimacy—would fall within the investigation of the varieties of the effacement of the clitoris.⁸⁹

Spivak wants to deconstruct the displaced phallus and render it an effaced clitoris, apparently pointing us to the possibility of the un-effaced clitoris, the possibility of woman as something other than a womb.

VII.

I am uncomfortable with the essentializing tendency of references to the clitoris, and therefore wish to restate the affirmation of non-phallic desire in a language of political identities, specifically a lesbian identity, since that is the persona that perhaps most fully captures the tensions between theories of "liberation" and theories of oppression. To put it in Foucauldian terms, the lesbian is, by virtue of her discursive invisibility, unsexed, unregulated, and nevertheless—as one who bears the stigma of woman and homosexual—oppressed.

Post-structural theorists, for instance Sawicki, distance themselves from such references (to a "lesbian") on the grounds that ascriptive, essential identities can only be undercut by avoiding identity altogether, by substituting abstract demands to end injustice. Such a strategy is based on the mistaken assumption that there are either ascriptive, essentialist identities or no identities. And yet to pretend there are no identities is to live in a world without history, without people. Such a jump from people's self-perceptions to the more scholarly-correct,

⁸⁸ Lisa Wedeen provided helpful information about the practice of *purdah* for this section.

⁸⁹ "Displacement," p. 190.

post-modern vocabulary is not just politically misguided, but also inaccurate, as it hides the reality of complex political identities inscribed on the same individual—identities rife with tensions and with concrete political possibilities. Indeed, denying what Hannah Arendt calls one's "outlaw" identity may be as dangerous as the punishments inflicted on those who lack the right identity.

Like the Jewish *parvenu* in Arendt's essays "We Refugees" and "The Jew as Pariah," gays and lesbians who conceal their identities pretend to an equality that does not exist.⁹⁰

If we should start telling the truth that we are nothing but Jews, it would mean that we expose ourselves to the fate of human beings who, unprotected by a specific law or political convention, are nothing but human beings. I can hardly imagine an attitude more dangerous, since we actually live in a world in which human beings as such have ceased to exist for quite a while; since society has discovered discrimination as the great social weapon by which one may kill men without bloodshed; since passports or birth certificates, and sometimes even income tax receipts, are no longer formal papers but matters of social distinction.⁹¹

Like the Jew in Germany, the homosexual in the United States is a legal identity that is subject to discriminatory treatment. Homosexuals are denied employment by various government agencies, and "homosexual" is also a category of aliens who are to be turned away from our borders. Income tax forms too discriminate against those who are in same-sex relationships. Thus, like the Jew, homosexuals can choose between passing and asserting their identities, between pretending that the categories that constrain their lives do not exist and taking responsibility—out of their recognition of their identity—for changing the oppressive nature of our political culture.

According to Gayle Rubin, the lesbian has a special role in the political economy of sex, which we might say results in a special political identity.

One last generality could be predicted as a consequence of the exchange of women under a system in which rights to women are held by men. What would happen if our hypothetical woman not only refused the man to whom she was promised, but asked for a woman instead? If a single refusal were disruptive, a double refusal would be insurrectionary. If each woman is promised to some man, neither has a right to dispose of herself. If two women managed to extricate themselves from the debt nexus, two other women would have to be found to replace them. As long as men have rights in women which women do not have in themselves, it would be sensible to expect that homosexuality in women would be subject to more suppression than in men.⁹²

⁹⁰ For a critique of the analogy between Jews and homosexuals see Eve Sedgwick, "The Epistemology of the Closet, I," *Raritan*, 7 (4), Spring 1988.

⁹¹ "We Refugees," in *The Jew as Pariah: Jewish Identity and Politics in the Modern Age* (New York: Grove Press, 1978), p. 65.

⁹² "Traffic," p. 183.

The distinct nature of lesbian “suppression” is such that the lesbian can perhaps be said to have a different kind of freedom than the gay man. Yes, the lesbian experiences the burdens of misogyny and homophobia, but it is no good simply to add up layers of discrimination in order to arrive at the nature of a particular political identity, and it is possible to see emancipatory possibilities that result from the double “suppression” (perhaps to be distinguished from “oppression”). On the one hand, there is more political work to be undertaken to claim an identity. The cloak of lesbian invisibility is possibly even more intractable than the woman’s veil. Gays have a public identity, as do women, whereas the lesbian is notoriously absent from public discourse.⁹³ Thus it seems that lesbians would have to create something from nothing to make an impression, to do what Arendt claims is impossible—to invent a self without a history. On the other hand, if we follow Arendt’s thoughts on the Jew as pariah, it is not the actual “content” of the identity of an oppressed people that determines the strength of their critical perspective. Certainly there are distinctively Jewish virtues associated with the Jew as pariah, but the Jew as “upstart,” the *parvenu*, also has distinctively Jewish shortcomings.⁹⁴ Thus it seems clear that there is nothing intrinsic to a particular outlaw identity that determines its political relevance and potency. Rather, it is the fact of a group’s political status, whether it is associated with the state or social outcasts, and then what the individual actor chooses to do with that political identity, that together determine whether one will be a *parvenu* or pariah. Arendt writes,

Those few refugees who insist upon telling the truth, even to the point of ‘indecentcy,’ get in exchange for their unpopularity one priceless advantage: history is no longer a closed book to them and politics is no longer the privilege of Gentiles . . . Refugees driven from country to country represent the vanguard of their peoples—if they keep their identity.⁹⁵

Similarly, the “indecentcy” of the lesbian is a criticism of prevalent sexual practices that include the valorization of rape alongside the criminalization of homosexuality. To the extent that lesbians present themselves as lesbian, as opposed to woman, the reigning logic of what Rubin calls the “sex/gender system”⁹⁶ is faced with a formidable challenge—“if they keep their identity.” And yet that is only a necessary, but not a sufficient condition, for a sexual politics. In the

⁹³ Although representing a silence has its limits, one recent example comes to mind. In a New York *Times* article on homophobia, Richard Isay, a psychiatrist at Cornell Medical College, was quoted as saying “seeing a feminine man evokes a tremendous amount of anxiety in many men; it triggers an awareness of their own feminine qualities, such as passivity or sensitivity, which they see as being a sign of weakness. Women, of course, don’t fear their femininity. That’s partly why men are more homophobic than women . . .” (July 10, 1990). Of course the only way the comparison between men and women makes sense is to imagine that the only homosexuals they are confronted with are male.

⁹⁴ “Jew as Pariah,” p. 66.

⁹⁵ *ibid.*

⁹⁶ “Traffic,” p. 159.

political economy of sex, identity is worth something—a lot even—but it is not destiny.

VIII.

A challenge to the prevailing sex/gender system depends on the assertion of sexual difference, on representations of sexual practices in their plurality so as to call into question the apparent normalcy and “naturalness” of the nuclear family. But to simply assert this as a complete politics is to assume as a means—the representation of non-heterosexist institutions and practices—what is in fact the end. To think that the production of such representations requires no more than accepting the invitation of various post-modern writers to make “gender trouble” with our identities is to believe that people stay in the closet out of a lack of imagination. If the failure to mount an effective challenge against heterosexist attitudes comes from something else, say, feeling that one’s life is at risk for holding a lover’s hand anywhere outside the Castro district in San Francisco, then it is necessary to develop more analyses of the *institutional* sources of gay-bashing, for instance, as well as to consider already mobilized groups in resistance. In the United States, such an analysis would require an investigation of the ways in which power is deployed through representations of sexuality and the family in the discourses and other institutional practices of Christian evangelicals. Still, American sexual politics is not all Operation Rescue. There is also ACT-UP, and thus we need to reflect also on the reality of homosexuals already in resistance, providing explanations of our political successes as well as our failures.

Foucault and MacKinnon ascribe too much and too little power to the institutions responsible for the regulation of sexuality in the United States. In failing to recognize already established norms of progressive resistance at the margins, which for some groups are born of an affirmative sense of community and identity, they blind us to the possibilities of working with the contradictions in our political culture, between the norms of the traditional nuclear family and the proliferation of alternative households, between the ideology of privacy and the fact of public controls of sexuality. Transforming prevailing oppressive institutions is not simply a matter of undermining their legitimacy, as Foucault suggests, or developing totally new and different accounts of equality, as MacKinnon implies. Instead, we need to confront the repressive discourse of Christian evangelicalism with agendas drawn from current realities such as female heads of households, homosexuals in public office, and lesbian and gay parents. Perhaps what needs to be theorized, then, is not the way that “liberation” binds us, but the paradoxical implications of what it means for persecution to free us.