

## SOME ABCS OF FEMINIST SEX EDUCATION (IN LIGHT OF THE SEXUALITY CRITIQUE OF LEGAL FEMINISM)

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This Essay has two aims. First, it offers some guiding principles, or “ABCs,” for a feminist vision of sex education. Second, in keeping with this symposium’s topic, “Sexuality and the Law,” the Essay evaluates that feminist project in light of what I call “the sexuality critique” of legal feminism—a line of criticism leveled by feminist and post-feminist scholars against feminist legal theorists’ work on sexuality. The ABCs advanced here reflect a liberal feminist approach to sex education, which stresses the three themes of fostering capacity, equality, and responsibility. Such an approach, the Essay maintains, is better suited for facilitating the development of young women’s and men’s capacities for responsible sexual self-government than the abstinence-until-marriage model of sex education (“abstinence-only”) embraced in the federal welfare law codified as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>1</sup> “Abstinence-only” sex education reflects a conservative sexual economy. As put into practice in various curricula funded by the federal government, such sex education is laden with gender role stereotypes about “his” and “her” sexuality that reinforce women’s role as sexual gatekeepers.<sup>2</sup>

This Essay, given the constraints of space, presents a condensed account of a basic liberal feminist framework for sex education and contrasts such a framework with the conservative sexual economy of “abstinence-only” sex education.<sup>3</sup> For this symposium, I will address the

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<sup>1</sup> See 42 U.S.C. §§ 710, 702-03, 705-08 (2000).

<sup>2</sup> See discussion *infra* Part I.

<sup>3</sup> For a fuller elaboration of an approach to sex education that moves “beyond women as gatekeepers,” please refer to LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 256-89 (2006).

following issue: what implications for sex education—and in particular, feminist frameworks for sex education—grow out of the sexuality critique? The gist of this critique, leveled by feminist and post-feminist scholars against feminist legal work on sexuality, is that feminist legal theory analyzes sexuality as a site of subordination of and harm to women. As a consequence, such theory calls for and embraces legal regulation, protection, and remedy aimed at such harm, but abdicates to others the task of developing a positive account of sexuality.

Situating her critique as one lodged within legal feminism, Katherine Franke charges that legal feminists have failed to “theorize ‘yes,’” and instead have reduced sexuality either to dependency (that is, reproduction, mothering, and caregiving) or to danger (that is, sexual subordination and sexual harm).<sup>4</sup>

Stepping outside of feminism, Janet Halley, in a series of writings, argues that it would be beneficial to those doing “left pro-sex intellectual and political work,” including feminists, to “Take a Break from Feminism.”<sup>5</sup> Like Franke, Halley divides legal feminists into those who focus on “reproduction, care work, work in the paid economy, and related matters,” and those who concern themselves with “male power and female subordination in sexuality.”<sup>6</sup> Feminism’s commitment to viewing questions of sexuality through the lens of subordination theory, Halley charges, leads it to find in every issue, however complex, a basic subordination dynamic in which  $M > F$ , with men always powerful and women always powerless.<sup>7</sup> But even as feminism has become “governance feminism,” or, in other words, has become instantiated in laws addressing such matters as sexual harassment, sexual violence, and the like, Halley argues that feminism fails to admit its “will to power” or to recognize the costs that “governance feminism” imposes on men and other groups.<sup>8</sup>

This line of critique further contends that feminist legal theory has failed to generate positive accounts of sexuality. Instead, a cluster of intellectual and political movements, including “Queer Theory” in particular, have challenged the subordination paradigm and taken up this

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<sup>4</sup> See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

<sup>5</sup> See Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 7 (2004); see also Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM / LEFT CRITIQUE 80, 88-89, 94-102 (Wendy Brown & Janet Halley eds., 2002); Janet Halley, *Take a Break from Feminism?*, in GENDER AND HUMAN RIGHTS 57, 65-66 (Karen Knop ed., 2004).

<sup>6</sup> Halley, *Queer Theory by Men*, *supra* note 5, at 8.

<sup>7</sup> See *id.*

<sup>8</sup> See Halley, *Take a Break from Feminism?*, *supra* note 5, at 57, 65-66.

positive task left undone by feminism.<sup>9</sup> Franke and Halley, for example, claim that legal feminists seek to sanitize or feminize sex by sharply separating the categories of “desire” and “danger,” thus leaching out of sexual desire inherent elements of risk and jeopardy.<sup>10</sup> Moreover, Halley argues that, to the extent legal feminists do offer an affirmative vision of sexuality, it is of a problematic “feminine” sexuality.<sup>11</sup>

In an earlier exchange published in this Journal, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, Professor Halley engaged in a thought-provoking dialogue with Professors Brenda Cossman, Dan Danielson, and Tracy Higgins over the question of whether feminism was “enough,” in the sense of offering an adequate tool kit to assess matters of gender, power, and sexuality.<sup>12</sup> In this Essay, I draw on the dialogical method, proposed by Cossman, of a “feminism after.” This is a method of feminist legal theory that is enriched by engaging with forms of analysis, such as “Queer Theory” or Halley’s “Taking A Break from Feminism,” that do not share feminism’s unrelenting focus on gender and the male/female dynamic. However, “feminism after” such a critique, Cossman contends, still has a distinct and valuable perspective to offer by training a gender lens on matters of sexuality.<sup>13</sup> Thus, in this Essay, I consider how analyses of intimacy and sexuality, arising outside of legal feminism, would critique and enrich my own analysis. I also ask whether these approaches enrich my own critique of the “abstinence-only” model favored by the federal government.

This Essay considers two texts; the first is *Intimacy*, an anthology edited by Lauren Berlant,<sup>14</sup> which reflects a variety of critical perspectives, including Queer Theory. I note some striking convergences and divergences between the sharp critique, in several essays in that anthology, of the institutions of intimacy and of the human toll exacted by channeling men and women into marriage in the service of orderly social reproduction and the vision of marriage apparent in the conservative sexual economy. I also

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<sup>9</sup> See Franke, *supra* note 4, at 182-83; Halley, *Queer Theory by Men*, *supra* note 5, at 13-14.

<sup>10</sup> See Franke, *supra* note 4, at 182-83; Halley, *Sexuality Harassment*, *supra* note 5, at 88-89, 94-102 (discussing the “problematic of wantedness”).

<sup>11</sup> See Janet Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice*, 1 UNBOUND 65, 70-71 (2005), available at <http://www.law.harvard.edu/students/orgs/unbound/index.php> [hereinafter *The Politics of Injury*].

<sup>12</sup> See Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601 (2004) [hereinafter *Gender, Sexuality, and Power*].

<sup>13</sup> See *id.* at 618-24.

<sup>14</sup> See INTIMACY (Lauren Berlant ed., 2000).

raise some questions about how a liberal feminist approach to social reproduction might mediate between these two stark positions. I then engage with Halley's recently published review of Robin West's book *Caring for Justice*, in which Halley critiques West's articulation of a "redemptive" "feminine" sexuality.<sup>15</sup> I choose this particular writing by Halley because I have also reviewed West's book<sup>16</sup> and can therefore readily compare my liberal feminist critique of West's vision of sexuality with that of Halley. I defend the gender lens of my own approach, noting some problematic aspects of Halley's critique, but also conclude that Halley's analysis fruitfully opens avenues for further inquiry about sexuality and sex education. I conclude by raising some questions (for a more complete airing at the live symposium) about how to address the challenge of developing feminist conceptions of the place of intimacy, sexuality, and family that may compete with the vision manifest in the conservative sexual economy.

### I. CONSERVATIVE VERSUS FEMINIST ABCS OF SEX EDUCATION

The "abstinence-until-marriage" model of sex education reflects the triumph of a conservative sexual economy: a cluster of ideas about the proper arrangement of sexuality that seeks to revive and fortify what are claimed to be traditional moral values and social norms.<sup>17</sup> On this view, young people should be sexually abstinent until marriage. Courtship, rather than dating, is the pathway to marriage. A critical component of the model is that girls and women are gatekeepers; they are responsible for the proper regulation of boys' and men's sexuality. In this vision, men and women differ not only in sexual desire, but in their capacities, needs, and ambitions.

In the conservative sexual economy, marriage is the only proper site for the expression of sexuality. Heterosexual sex within marriage is the only normatively acceptable form of sex. Marriage is a necessary institution for channeling sexual drives (especially those of men) into the constructive social forms of monogamy, reproduction, and parenting.

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<sup>15</sup> See Halley, *The Politics of Injury*, *supra* note 11 (reviewing ROBIN WEST, *CARING FOR JUSTICE* (1997) [hereinafter WEST, CFJ]).

<sup>16</sup> See Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 *LAW & SOC. INQUIRY* 477 (1999) [hereinafter *The Liberal Future*].

<sup>17</sup> The idea of a "conservative sexual economy" is developed in McCLAIN, *supra* note 3, which offers examples of its operation both in "abstinence-until-marriage" sex education, *id.* at 256-63, 276-81, and in the courtship movement, *id.* at 281-89. The book also argues that the notion of women as gatekeepers, who civilize men through marriage, is prominent in the marriage movement. *Id.* at 135-38.

One conspicuous embodiment of the conservative sexual economy is the “Abstinence Education” provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “PRWORA”). Congress approved federal funding for sex education programs with an “exclusive purpose” of teaching abstinence. Among the messages the programs must teach are: “abstinence from sexual activity outside marriage [i]s the expected standard for all school age children,” “a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity,” “sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects,” and “bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society.”<sup>18</sup>

The governmental embrace of the conservative sexual economy as the expected national standard for all citizens conflicts with important public values of sex equality, equal concern and respect for all members of society (including gay men and lesbians), and respect for reasonable moral pluralism. Viewing women as gatekeepers is in tension with viewing them as responsible, self-governing persons. This vision of personal responsibility places upon women the responsibility for men’s behavior and men’s sexuality, even as it insults men’s moral capacity and relieves them of responsibility.

In my recent book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*, I critique this governmental embrace of the conservative sexual economy and offer an alternative liberal feminist approach to sex education.<sup>19</sup> Such an approach builds on the basic premises of “abstinence-plus” or comprehensive sex education by combining the provision of basic information about sexuality and contraception with clear messages about abstaining from sexual activity and deferring pregnancy and childrearing until one is emotionally, socially, and financially prepared.<sup>20</sup> But instead of preaching that any expression of sexual desire other than in marriage is contrary to an expected national standard, the proposal treats an emerging sense of sexuality and sexual desire as part of adolescents’ healthy development and helps them develop a sense of themselves as responsible sexual subjects. I take seriously the feminist criticism that sex education stresses danger and typically is “missing [a]

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<sup>18</sup> See 42 U.S.C. § 710 (2000).

<sup>19</sup> The summary of the approach offered in this section of the essay draws upon McCLAIN, *supra* note 3, at 256-89.

<sup>20</sup> On the effectiveness of such sex education, see DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (2001).

discourse of desire,” particularly with respect to articulating female sexuality.<sup>21</sup>

Two distinct concerns are at play in sex education: how to instruct youths about the place of sexuality in their current lives, and how to prepare them for the place of sexuality and reproduction in their adult lives. Problems such as teen pregnancy and parenthood, the prevalence among teens of sexually transmitted diseases, and pressured as well as coerced sexual activity properly lead to a focus upon immediate issues in teens’ lives. But a broader view of the aims of sex education would prepare them for eventual responsible self-government in their intimate and reproductive lives as adults.

My approach to fostering sexual and reproductive responsibility focuses on capacity, equality, and responsibility. It is liberal in emphasizing affirmative governmental responsibility to foster children’s capacity for eventual self-government and in addressing obstacles to such self-government. This emphasis on capacity is particularly relevant to understanding problems of early sexual activity leading to pregnancy and early parenthood. Slogans like “the best contraceptive is a real future” express an important point about teen pregnancy, childbirth, and teen motherhood and fatherhood. Such behaviors often take place in circumstances of economic deprivation, in which a young person’s life prospects seem to offer no better option. A firm liberal response is that fostering sexual and reproductive responsibility is but one facet of the government’s affirmative responsibility to foster the capacities of such adolescents. Otherwise, in the words of Dr. Henry Foster, founder of the I Have a Future Program, “[w]e are culpable as a society” for not helping teens have any other vision for themselves.<sup>22</sup>

My approach is also feminist in highlighting that, in addition to poverty, sex inequality, gender role expectations, and gender stereotypes may stand in the way of adolescents developing capacities for responsible self-government and acquiring a sense of personal agency with respect to intimacy and sexuality. Problems such as sex inequality, domination, and sexual violence, along with cultural constructions of femininity and masculinity, constrain young people’s development of a sense of personal autonomy and responsibility with respect to sexuality. An adequate program on sexuality and sex education should address salient gender issues that shape the environment within which girls and boys act and choose. Some of those issues include (1) cultural scripts about female and male sexuality that

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<sup>21</sup> See Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29 (1988).

<sup>22</sup> *New Report Details Sexual Trends Among Low-Income Black Urban Youth*, CAMPAIGN UPDATE 8 (2004), available at <http://www.teenpregnancy.org/about/announcements/pdf/UpdateSpring2004.pdf> (quoting Dr. Henry Foster).

encourage girls to repress sexual desires and teach boys that male irresponsibility, aggression, and entitlement are natural and inevitable; (2) the persistence of the sexual double-standard; and (3) approaches to sexuality that conflate “sex” with sexual intercourse, thus reinforcing the association of desire with danger and hindering the development of a broader conception of sexuality that is consonant with developing a sense of responsible sexual agency.

Education about gender issues would help illuminate how gender role expectations shape and constrain adolescents’ understandings of sexuality and responsibility. Such gender education could be an important resource for young people by helping them better develop their capacities for responsible sexual agency. As Kathryn Abrams observes, feminist analyses of sexuality recognize that, even as women face such constraints as coercion and rigid gender scripts, they nonetheless exercise a capacity for self-direction and resistance.<sup>23</sup> Rigid gender role expectations harm both females and males. Men as well as women may be victims of efforts to police proper gender role behavior.<sup>24</sup> Notably, legislation introduced in Congress for “comprehensive” sex education would include funding for education fostering the development of “healthy attitudes and values” about “gender roles,” as well as “body image, . . . racial and ethnic diversity, [and] sexual orientation.”<sup>25</sup> Taking my approach, part of this education would include fostering the capacities of young people to recognize, discuss, and reflect upon how various cultural and social norms, as well as stereotypes, shape ideas about gender roles and the other matters listed above. By contrast, one Congressional investigative report of several curricula funded under PRWORA found that the representations of male and female sexuality, as well as of the relative relationship needs of men and women, “present stereotypes as scientific fact.”<sup>26</sup> In such models of “his” and “her” sexuality, male sexual desire is strong and natural, while female desire is more slowly aroused and more cultural; men need little preparation for sex, while women may need hours of “emotional and mental preparation.”<sup>27</sup>

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<sup>23</sup> See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326-29 (1995).

<sup>24</sup> See Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693, 696, 759-63 (1997).

<sup>25</sup> See Family Life Education Act, H.R. 768, 109th Cong. § 3(c)(4) (2005); Responsible Education About Life Act, S. 368, 109th Cong. § 3(c)(4) (2005).

<sup>26</sup> MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REP., CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS 16 (2004), available at <http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf>.

<sup>27</sup> *Id.* at 18 (quoting WAIT Training curriculum); see also SIECUS Reviews Fear-Based, Abstinence-Only-Until-Marriage Curricula, <http://www.siecus.org/reviews.html> (reviewing the Sex Respect curriculum) (last visited Dec. 22, 2005).

The gatekeeper role, then, logically falls to girls, who can more easily slow things down. But this gatekeeper role, against the backdrop of the sexual double standard, exacts a cost both in terms of women not feeling able to act on their desire and perceiving themselves as being responsible for male desire.

## II. "FEMINISM AFTER" THE SEXUALITY CRITIQUE

In the dialogue published in this journal, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, one point of agreement was that, to date, feminist legal theory has not risen to the task of imagining or envisioning a realm of female sexuality other than that of subordination.<sup>28</sup> Halley contends that one reason is that feminism's fixation on the proposition "M > F" constrains feminists to a grim world in which they must discern that subordination on the basis of gender is at the root of every problem.<sup>29</sup> Even feminism's defenders, such as Cossman and Higgins, acknowledge that feminism stands to gain if it steps outside itself to consider analyses of sexuality that are not constrained by what Halley calls feminism's essentials: a division of the world into male and female, a premise of female subordination, and carrying "a brief" for females.<sup>30</sup> Like Franke and Halley, Cossman and Higgins recognize that there has been an outpouring of imaginative work on sexuality being done in other quarters, especially the field of Queer Theory. In this section, I concur with Cossman and Higgins as to the value of what Cossman describes as "feminism after," feminism enriched by the critique of Queer Theory and other perspectives, while "retain[ing] a focus on gender as an axis of power."<sup>31</sup> I now step back from my liberal feminist approach to sex education and consider the perspectives on sexuality offered in the anthology, *Intimacy*, and in some of Halley's work. I focus on their positive account of sexuality and on how they might critique and enrich my approach to sex education and shed light on the conservative sexual economy.

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<sup>28</sup> See *Gender, Sexuality, and Power*, *supra* note 12.

<sup>29</sup> See *id.* at 604-07 (remarks by Janet Halley).

<sup>30</sup> See *id.* at 617-18, 623-24 (remarks by Brenda Cossman); *id.* at 631-36 (remarks by Tracy Higgins).

<sup>31</sup> *Id.* at 618, 623.

### A. Intimacy as (Problematic) Experience and Institution: The *Intimacy* Collection<sup>32</sup>

In *Intimacy*, a book of essays based on an earlier award-winning issue of the journal *Critical Inquiry*, the editor, Professor Lauren Berlant, identifies intimacy as “a special issue” because it implicates both the personal (or private) desire for “a life” and the public dimension of “institutions of intimacy.” These institutions are frameworks for encouraging people to identify “having a life with having an intimate life” and for regulating and repressing desire. Intimacy is also “a special issue,” Berlant argues, because of “strong ambivalences within the intimate sphere” and ambivalences about desire: “utopian, optimism-sustaining versions of intimacy” may ill fit the institutions of intimacy that organize people’s lives and fantasies of intimate life may encounter “unavoidable troubles, . . . distractions and disruptions.”<sup>33</sup> Thus, a basic premise of the collection is that “[c]ontradictory desires mark the intimacy of daily life,” yet these “polar energies” are “seen not as intimacy but as a danger to it.”<sup>34</sup>

Society, Berlant argues, deals with these ambivalences and contradictions by cabining or repressing them. Thus, one life narrative, that of the heterosexual (marital) couple, is given primacy by the institutions of intimacy. As a result, “desires for intimacy that bypass the couple or the life narrative it generates have no alternative plots, let alone few laws and stable spaces of culture in which to clarify and to cultivate them.”<sup>35</sup>

But even favored institutions of intimacy face the destabilizing aspect of desire. Several essays in the collection address the toll taken by the task of orderly social reproduction. The essays discuss how organizing sexuality into a narrative about marriage and reproduction based around heterosexual marital couples can lead to unhappiness, sexual discontent, adultery, thwarted desires for communication, and the like.<sup>36</sup> These couples, the authors contend, long for a greater imaginative space, for better ways to envision and live out intimacy. But, as other essays in the volume explore, persons whose desires for intimacy do not fit this narrative of the marital couple also need such imaginative space. As Berlant puts it, “[t]o rethink intimacy is to appraise how we have been and how we live and how we might imagine lives that make more sense than the ones so many are living.”<sup>37</sup>

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<sup>32</sup> See INTIMACY, *supra* note 14.

<sup>33</sup> Lauren Berlant, *Intimacy: A Special Issue*, in INTIMACY, *supra* note 14, at 1-2.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> See *infra* notes 37-55 and accompanying text.

<sup>37</sup> Berlant, *supra* note 33, at 6.

What light does this collection shed on the task of shaping guiding principles for sexuality/sex education? How might it critique and enrich my own analysis and illuminate the conservative sexual economy? I emphasize two themes in the anthology: (1) the cost that orderly social reproduction exacts from husbands and wives and how desire and sexuality threaten to destabilize this preferred life narrative of the couple, and (2) the “world-making” project of Queer Theory and its challenge to the project of “national heterosexuality.”

### ***1. The Costs of Orderly Social Reproduction***

The argument that harnessing sexuality in the service of orderly social reproduction exacts a cost in terms of personal happiness and pleasure is prominent in Berlant’s anthology. Several contributors paint a grim picture of marriage and its discontents. Do alternative visions of sexuality and freedom underlie these analyses? Are they of use for a feminist approach to sexuality and sexuality/sex education?

A vivid portrait of marital misery and of the wish to imagine another world appears in Laura Kipnis’s essay, *Adultery*.<sup>38</sup> She writes: “If marriage is society’s container for intimacy, property, children, and libido, adultery doubles as its dumpster for all the toxic waste of marital strife and unhappiness . . . .”<sup>39</sup> Adultery is appealing because it “unravels” the married person from the “welter” of “commandments that handcuff inner life to the interests of orderly reproduction”; it is “destabilizing” because it involves a person “deeply wanting something beyond what all conventional institutions of personal life mean for you to want.”<sup>40</sup> Adultery seems to “allow space for new forms to come into being,” an “unbounded intimacy outside contracts, law, and property relations.”<sup>41</sup>

Marriage, in Kipnis’ essay, is a dreary, de-eroticized state. She refers to the would-be adulterer’s “torpid married body.”<sup>42</sup> She scoffs at the adage that “good marriages take work,” as though marriage is a “domestic factory policed by means of rigid shop-floor discipline designed to keep the wives and husbands of the world choke-chained to the reproduction machinery.”<sup>43</sup> Thus, what staying together “for the sake of the children” means in practice, she argues, is “habituating children to contexts of chronic

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<sup>38</sup> See Laura Kipnis, *Adultery*, in *INTIMACY*, *supra* note 14, at 9.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 42.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* at 11.

unhappiness and dissatisfaction; to unmet needs as status quo; to bitching mothers, remote fathers, and other gendered forms of quotidian misery.”<sup>44</sup>

What is the liberatory project that Kipnis proposes as an alternative to such misery in the service of social reproduction? It is not clear. Adultery, whatever else it is, is “a placeholder for more sustained kinds of transformation and honesty.”<sup>45</sup> To envision such alternatives, to install “optimism and desire into ordinary life in place of emotional fatigue and renunciation,” would require utopian thinking and fantasy.<sup>46</sup>

Infidelity, one consequence of the strain of orderly social reproduction, is also the theme of Michael Hanchard’s essay, *Jody*. His focus is on representations in black popular culture of “Jody,” an “erotic scavenger” who “exist[s] at the margins of others’ love relationships” with “promises to sate unfulfilled, unquenchable desires.”<sup>47</sup> Often, Jody is a man who poaches on another man’s wife while he is away from the home working to secure material provision for his wife and the household. Consequently, Jody upsets the political and sexual economy at work. Under conventional views of masculinity (including black masculinity), material provision ought to ensure fidelity, respect, and compliance, but the Jody figure signifies that wage labor may be at odds with fulfilling erotic desires.<sup>48</sup> As such, Hanchard observes, Jody appears to reflect a clash between the reality principle (e.g., wage labor, the strain of material provision) and the pleasure principle (the desire for intimacy, pleasure). He may also be seen as a “referent for certain female desires” or “an outlet for satisfaction, frustration, or revenge,” depending on his female partner’s situation.<sup>49</sup>

A third essay, *Sex and Talk*, written by Candace Vogler, speaks of the strain of orderly social reproduction, not in the form of adultery, but instead in terms of the diverging paths husbands and wives follow in pursuit of a common end.<sup>50</sup> That end is depersonalized intimacy, intimacy that is self-forgetting or self-shattering. Focusing on accounts of unhappy wives and husbands in popular American psychology books, Vogler observes that the consumers (predominantly female) of such books are the “moral proletariat” of “exemplary U.S. heterosexuality,” “charged with producing

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<sup>44</sup> *Id.* at 46.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 46-47.

<sup>47</sup> Michael Hanchard, *Jody*, in *INTIMACY*, *supra* note 14, at 193, 193-95.

<sup>48</sup> *See id.* at 193-206.

<sup>49</sup> *Id.* at 217.

<sup>50</sup> *See* Candace Vogler, *Sex and Talk*, in *INTIMACY*, *supra* note 14, at 48.

exemplary heterosexual intimacy at home and managing family values for children.”<sup>51</sup> What are the “gender-typical heterosexual complaints” this literature reveals? “[C]ase-study wives complain that their husbands won’t talk, and case-study husbands complain that their wives won’t have sex.”<sup>52</sup> I will not recount all the steps in Vogler’s analysis, but she concludes that husbands actually seek “refuge from the burdens of heterosexual masculine selfhood” in the form of “depersonalizing” sex *with their wives*, “a mode of intercourse at home that does some violence to their senses of themselves as husbands, fathers, heads of household, authorities, and so on.”<sup>53</sup> But if husbands feel safer having sex than talking, wives seek in talk a safe “self-forgetfulness”; they seek “the sort of intimacy with their husbands that they get from talk with other women,” often called “troubles talk,” “the sort that allows one to forget who one is for a little while.”<sup>54</sup> Vogler’s concluding prescription for such husbands and wives is “[t]o imagine intimacies that are neither entirely self-expressive nor strictly self-disrupting.”<sup>55</sup>

## 2. The “World-Making” Project of Queer Theory

Some essays in the *Intimacy* anthology challenge “heteronormativity” and would decenter the heterosexual couple to open up space for a broader realm of sexuality. In a provocatively-titled essay, *Sex in Public*, Lauren Berlant and Michael Warner speak of the “radical aspirations of queer culture building,” which include “the changed possibilities of identity, intelligibility, publics, culture, and sex that appear when the heterosexual couple is no longer the referent or the privileged example of sexual culture.”<sup>56</sup> They identify a “core national culture” of “national heterosexuality,” or “a sanitized space of sentimental feeling and immaculate behavior, a space of pure citizenship.”<sup>57</sup>

If sexuality is a central focus of certain strands of feminism, namely dominance feminism, out of a conviction that sexuality is the foremost site of women’s subordination, sexuality is, for Queer Theory, “an inescapable category of analysis [and] agitation,” but for a different reason. Berlant and Warner argue that sexuality is a central focus because of its role in

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<sup>51</sup> *Id.* at 51.

<sup>52</sup> *Id.* at 50.

<sup>53</sup> *Id.* at 52.

<sup>54</sup> *Id.* at 81.

<sup>55</sup> *Id.* at 85.

<sup>56</sup> Lauren Berlant & Michael Warner, *Sex in Public*, in *INTIMACY*, *supra* note 14, at 311-12.

<sup>57</sup> *Id.* at 313.

heteronormativity. They argue that “heteronormativity” is “a fundamental motor of social organization in the United States, a founding condition of unequal and exploitative relations throughout even straight society.”<sup>58</sup>

To the criticism that they put forth a “radical anti-normativity” that fails to allow for, or envision, ordinary life, Berlant and Warner respond that “to be against heteronormativity is not to be against norms” and is not to repudiate family and children. Rather, their concern is that “the space of sexual culture has become obnoxiously cramped from doing the work of maintaining a normal metaculture.”<sup>59</sup> Social membership is not available unless persons can identify with “the heterosexual life narrative.”<sup>60</sup> A queer world-making project would disrupt this life narrative and offer different visions of intimacy, sexuality, and a good life.

The “world-making project” that Berlant and Warner describe poses challenges to a heteronormative vision of intimacy that confines sexuality to—or, perhaps even better, harnesses it in service of—orderly social reproduction. Instead of relegating the sexual and the erotic to the private, to the family, and to reproduction, it would disrupt this ordering. Queer culture, due to both the criminalized and stigmatized status of homosexuality in society and the linking of the institutions of social reproduction to the forms of hetero culture, has had to develop “kinds of intimacy that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.”<sup>61</sup> They point out the fundamental inequality that is part and parcel of heteronormativity: “Heteronormative forms of intimacy are supported . . . not only by overt referential discourse such as love plots and sentimentality but materially, in marriage and family law, in the architecture of the domestic, in the zoning of work and politics.”<sup>62</sup> By contrast, “[q]ueer culture . . . has almost no institutional matrix for its counterintimacies.”<sup>63</sup>

Some proponents of equality for gay men and lesbians might move from this diagnosis of inequality to advocacy for opening up the institutional forms that foster orderly social reproduction to gay men and lesbians: marriage, family life, the rights and responsibilities of parenting, and the like. Not Berlant and Warner. They seek a more fundamental transformation of intimacy, not merely “to destigmatize those average intimacies [of gay and lesbian couples], not just to give access to the

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<sup>58</sup> *Id.* at 328.

<sup>59</sup> *Id.* at 321.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 322.

<sup>62</sup> *Id.* at 326.

<sup>63</sup> *Id.*

sentimentality of the couple for persons of the same sex, and definitely not to certify as properly private the personal lives of gays and lesbians.”<sup>64</sup>

Berlant’s and Warner’s picture of heteronormativity and the contrasting queer culture suggest that a queer counterpublic holds promise not only for gay men and lesbians but also for straights. For example, they note that when a heterosexual couple, whose lives are otherwise governed by “reproductivity,” can take an interest in sex toys “and other forms of nonreproductive eroticism,” they are engaging in “queer sex practices” and “their bodies have become disorganized and exciting to them.”<sup>65</sup> By this, I infer that the authors mean “disorganized” in the sense of temporarily taken out of the service of orderly social reproduction and put into the service of pleasure, that is, eroticism that is not simply instrumental to reproduction. On this broad reading of “queer sex practices,” many heterosexual Americans do engage in such practices, if the recent government sex survey reporting rates of intercourse using condoms, oral sex, and anal sex are any indication.<sup>66</sup>

### 3. Sex Education “After” Critiques of Intimacy

Examining the *Intimacy* reader and, in particular, essays like that written by Kipnis, which paint a bleak picture of how uneasily the institution of marriage harnesses sexuality in the service of social reproduction, provides an additional perspective from which to assess the conservative sexual economy’s vision of marriage as necessary to channel otherwise unruly heterosexuality. Indeed, parallels between Kipnis’s portrait of the fragile state of marriage and certain contemporary arguments made in favor of marriage promotion and of a constitutional federal marriage protection amendment that would define marriage, throughout the United States, as the union of a man and a woman, are striking. Marriage needs protection, its defenders argue, because the bond between men and women, although natural, is fragile. Allowing same-sex marriage, the argument runs, could weaken marriage’s tight nexus between heterosexual

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 328. Berlant and Warner also seem to be arguing for “sex in public” in the sense of erotic performance, or “the production of nonheteronormative bodily contexts,” in social settings, such as bars or clubs. *Id.* at 329. Recounting their own fascination with a performance at a leather bar, they offer that performance as an example of “forms of sociability that unlinked money and family from the scene of the good life; because they made sex the consequence of public meditations and collective self-activity in a way that made for unpredicted pleasures.” *Id.*

<sup>66</sup> See William D. Mosher et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Sept. 15, 2005, at 25, available at <http://www.cdc.gov/nchs/products/pubs/pubd/ad/361-370/ad362.htm>.

sex, on the one hand, and procreation and parenting, on the other, so that marriage seems unnecessary.<sup>67</sup>

The notion that marriage is a struggle comes through strongly in the recent report from the Council on Family Law, *The Future of Family Law: Law and the Marriage Crisis in North America*, which was co-sponsored by the Institute for American Values.<sup>68</sup> Marriage, as envisioned in this report, is agonistic and “unique” because its main feature is “the attempt to bridge sex difference and the struggle with the generative power of opposite-sex unions.”<sup>69</sup> Marriage as an institution is far more than a close adult personal relationship because it encompasses

fundamental facets of [traditional] human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the procreativity of male-female bonding; the procreativity of heterosexual bonding, the unique social ecology of [heterosexual] parenting which offers children bonds with their biological parents; and the rich genealogical nature of [heterosexual] family ties.<sup>70</sup>

The report stresses both the dangers of unregulated heterosexuality and the fragility of marriage. Marriage “addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage.”<sup>71</sup> The report makes explicit the importance of the orderly social reproduction critiqued by *Intimacy*’s contributors, stating: “This mutual attraction is inherently linked to the ‘reproductive labor’ that is essential to the intergenerational life of all societies, including modern liberal societies.” Without regulation of heterosexuality through “conjugal marriage,” the “default position” is “multiple failed relationships and millions of fatherless children,” “too many” fatherless children, men “abandoning the mothers of their children,” and “women left alone to care for their offspring.”<sup>72</sup>

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<sup>67</sup> For a discussion of these arguments, see Linda C. McClain, “*God’s Created Order*,” *Gender Complementarity, and the Federal Marriage Amendment*, 20 *BYU J. PUB. L.* (forthcoming 2006) [hereinafter “*God’s Created Order*”].

<sup>68</sup> See DAN CERE, COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 5-8 (2005), available at [http://www.marriagedebate.com/pdf/future\\_of\\_family\\_law.pdf](http://www.marriagedebate.com/pdf/future_of_family_law.pdf).

<sup>69</sup> *Id.* at 15.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> *Id.*

Kipnis stresses that the marital yoke rests uneasily: marital unhappiness and the “torpor” of the marital body may lead spouses to turn to third parties, thus threatening the fidelity norm for marriage. Her essay seems to be an indictment of the constraints of the marital form and a call to open up space to imagine forms of intimacy not so at odds with erotic happiness. Marriage defenders contend that marriage is a worthy social institution that secures happiness, health, and well-being, but argue that society must shore it up and support it. For example, they oppose expanding its definition to include same-sex unions, lest this send a message to heterosexuals that marriage has “nothing to do” with procreation and children.<sup>73</sup>

The liberal feminist approach to sex education that I support embraces neither the agonistic vision of marriage articulated by marriage defenders nor Kipnis’s grim picture of Eros compromised for the sake of conscripting husbands and wives into national service for the cause of social reproduction. Rather, my premise is that sex/sexuality education stressing themes of capacity, equality, and responsibility aids in helping people form and sustain, as part of their view of a good life, relationships embodying *mutual* agency, desire, and responsibility. Here, a feminist focus on the lingering hold of gender scripts and gender ideology upon males’ and females’ development as sexual subjects may help to lessen the “toll” exacted by orderly social reproduction. Developing the capacities of children and adolescents to respect and communicate with each other, rather than viewing the “opposite” sex as fundamentally alien, may help them develop friendships and prepare them for intimacy. Marital happiness, particularly for women, bears a relationship to the quality of marriage. As I elaborate elsewhere, one important component of this is *equality*, in the sense of a fair and equal, mutual partnership, rather than an unfair and hierarchical relationship.<sup>74</sup> Moreover, a curriculum that does not exclude gay and lesbian adolescents and adolescents sorting out their sexual identity could help all students reflect on what values they believe are important to personal relationships. Of course, my support of a role for schools in encouraging reflection on values as part of sex education should not obscure that parents, families, and other institutions of civil society play an important role in shaping children’s and adolescents’ values and in developing their capacities.

Sexual ethics—even apart from how it bears on sex education—is also a salient subject for adults. What sort of sexual ethics might address some of the discontent and unhappiness alleged by critics of “national heterosexuality”? Pondering the substance of a “gay and lesbian sexual

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<sup>73</sup> I discuss these arguments in McCLAIN, *supra* note 3, at 191-96; “God’s Created Order,” *supra* note 67.

<sup>74</sup> See McCLAIN, *supra* note 3, at 134-54.

ethic,” Carlos Ball identifies values of openness, mutuality, and pleasure, but adds that, because many heterosexuals also emphasize those values, they could form the foundation of a progressive sexual ethic.<sup>75</sup> Ball, who supports same-sex marriage, argues that, in addition to committed relationships, other forms of mutual sexual relationships could have ethical value.<sup>76</sup> Further, some scholars, such as Elizabeth Emens, argue that there could be ethical alternatives to monogamy and that, given the gap between the ideal and practice of monogamy (vividly sketched by Kipnis), governmental regulation should not preclude people from exploring such alternatives as polyamory.<sup>77</sup>

This Essay will not take up Emens’ specific argument, but simply notes that one issue such an argument attempts to put on the table is whether tensions over monogamy warrant a fundamental reconsideration of its privileged place in the legal system. Even putting this issue on the table might be a way—as Halley has argued—to shift the focus from gender subordination as the most salient dynamic in heterosexual marriage to the tensions arising from the regulatory power of the marital monogamy norm and how, because of this norm, spouses wield “an amazing power over each other” to “perform” and “prohibit” infidelity.<sup>78</sup> One might further argue that, because infidelity and extramarital affairs are a frequent reason for divorce, monogamy is an unrealistic ideal. On the other hand, recent state-wide surveys on attitudes about marriage and divorce found that both men and women reported that, by far, the most frequent reason given for divorce—even more frequent than adultery—is “lack of commitment.”<sup>79</sup> Does it follow logically that we should dispense with marital commitment as an unrealistic ideal? Or did Massachusetts’s highest court have it right (in opening up marriage to same-sex couples) when it stated that “it is the exclusive and permanent commitment of the marriage partners to one

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<sup>75</sup> See CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* 206-17 (2003). Ball quotes Gayle Rubin’s observation that “[a] [sexual ethic] should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of pleasures they provide.” *Id.* at 214 (citing Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 283 (Carole S. Vance ed., 1984)).

<sup>76</sup> See BALL, *supra* note 75, at 208-12.

<sup>77</sup> See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 283-86 (2004).

<sup>78</sup> *Gender, Sexuality, and Power*, *supra* note 12, at 616 (remarks by Halley).

<sup>79</sup> See CHRISTINE A. JOHNSON ET AL., OKLAHOMA STATE UNIVERSITY BUREAU FOR SOCIAL RESEARCH, *MARRIAGE IN OKLAHOMA: 2001 BASELINE STATEWIDE SURVEY ON MARRIAGE AND DIVORCE* 15-16 (2002); UTAH GOVERNOR’S COMMISSION ON MARRIAGE, *MARRIAGE IN UTAH: 2003 BASELINE STATEWIDE SURVEY ON MARRIAGE AND DIVORCE* 13 (2003).

another, not the begetting of children, that is the sine qua non of civil marriage?"<sup>80</sup> There is a liberatory and anti-institutional strain in the *Intimacy* anthology, a vision of desire as inevitably dulled and deadened by duty owed by spouses and parents. A powerful counterargument is that only by foreclosing infinite possibility in favor of making a commitment to a specific person, toward whom one develops loyalty and responsibility, is genuine intimacy possible.<sup>81</sup> Moreover, the stark picture of orderly social reproduction and the war between the reality principle and the pleasure principle leaves out the personal and social goods growing out of family life.

The theme in the *Intimacy* collection of "national heterosexuality" or "exemplary heterosexuality" also enriches analysis of the "expected national standard," set forth in the PRWORA, of abstinence from all sexual activity until marriage. Berlant and Warner's observation about the absence of normative institutional frameworks for any form of life other than the heteronormative script of the marital couple also helps fortify the point that abstinence-only-until-marriage leaves no room for imagining or validating lives where desire for intimacy flows toward other life narratives. For example, gay men, lesbians, bisexuals, and transgendered young people continue to experience difficulty developing a healthy sense of selfhood and identity amidst problems of discrimination and invisibility in high school.<sup>82</sup> A majority of parents, however, want teachers to talk about homosexuality (albeit without taking a stand about whether it is acceptable or wrong).<sup>83</sup> It is encouraging that some public schools do include education about homosexuality and/or about accepting gays and lesbians and that a growing number of high schools have after-school clubs (gay-straight alliances) that bring gay and gay-friendly straight students together.<sup>84</sup> Both of these developments, however, are targets of conservative groups.<sup>85</sup> Sex education that reinforces a marital, heterosexual national standard leaves out alternative life scripts. As I argue elsewhere, a regulatory framework that supports same-sex marriage as well as a kinship registration system for other forms of committed intimate relationships (whether or not they

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<sup>80</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

<sup>81</sup> See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993).

<sup>82</sup> See, e.g., Carol Lee, *Gay Teens Ignored by High School Sex Ed Classes*, WOMEN'S ENEWS, Feb. 10, 2002, [www.womensenews.org](http://www.womensenews.org).

<sup>83</sup> See *Sex Education in America: An NPR/Kaiser/Kennedy School Poll*, NPR.ORG, Feb. 24, 2004, <http://www.npr.org/templates/story/story.php?storyId=1622610>.

<sup>84</sup> See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18; John Cloud, *The Battle Over Gay Teens*, TIME, Oct. 10, 2005, available at <http://www.time.com/time/archive/preview/0,10987,1112856,00.html>.

<sup>85</sup> See Janofsky, *supra* note 84.

included sexual intimacy) would affirm persons' capacities to form and establish the terms of relationships, promote equality among families, and foster responsibility and interdependency by linking relational responsibilities to rights.<sup>86</sup>

### B. Janet Halley's Critique of Robin West's "Feminine" Sexuality

Halley observes that, in West's book, *Caring for Justice*, "patriarchy operates by harming women on every conceivable dimension but especially in sexuality and reproduction."<sup>87</sup> Women suffer various "harms of invasion" (West's term), which, as Halley characterizes the argument, "cut women off from themselves; make it impossible for them to align desire, pleasure, and action."<sup>88</sup> Although West shares MacKinnon's diagnosis of the centrality of sexuality to women's subordination, she, unlike MacKinnon, also offers a positive vision of sexuality, or, as Halley puts it, a redemptive vision of women's sexual virtue. West (following Adrienne Rich) derives this "entirely *feminine* sexual ethics," Halley contends, from the intimate bonds between girls and their mothers and among girls. Patriarchy thwarts these intimate bonds. Quoting West, Halley writes that "a young girl's natural, early, fierce, loving, erotic and caring identification with women and girls is shattered by the pervasive patriarchal institution of compulsory heterosexuality."<sup>89</sup>

Halley contrasts the trajectories West paints for male and female sexual development: as boys enter manhood, they enter a realm of safety and "state-created and law-created equality," while "a girl entering adulthood leaves behind the relative calm, placidity, and equality of young female companionship and enters a state-created world of sexual vulnerability and radical inequality."<sup>90</sup> West, Halley contends, shows little interest in the harms men may suffer. In this worldview, men are phallic and powerful, while women, their diametric opposites, have selves wounded by patriarchy.<sup>91</sup> This diametricality illustrates what Halley calls the "Injury Triad": "female injury + female innocence + male immunity."<sup>92</sup>

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<sup>86</sup> See MCCLAIN, *supra* note 3, at 155-219 (arguing for recognizing same-sex marriage and for establishing a kinship registration system).

<sup>87</sup> Halley, *The Politics of Injury*, *supra* note 11, at 65.

<sup>88</sup> *Id.* at 69.

<sup>89</sup> *Id.* (quoting WEST, CFJ, *supra* note 15, at 286).

<sup>90</sup> *Id.* at 78 (quoting WEST, CFJ, *supra* note 15, at 147) (emphasis omitted).

<sup>91</sup> *See id.*

<sup>92</sup> *Id.*

How, then, does redemptive female sexuality emerge? For West, on Halley's view, it stems from replacing patriarchal sexuality with a "feminine" sexuality, rooted in a safe haven of girlhood and female-female intimacy that is "original, innocent, mutual, sharing, giving, affirming."<sup>93</sup> Noting West's quotation from Luce Irigaray's *This Sex which is Not One*, which reads "[e]rection is no business of ours . . . . Don't make yourself erect, you'll leave us," Halley characterizes West's vision both as one of a "lesbian sensibility, and an entirely *feminine* sexual ethics."<sup>94</sup> West's cultural feminism, thus, "has a sexual ethics for everybody, derived from women's vital, infantile and generative sexual experience:" Indeed,

The naive expressiveness of the aboriginal self, the erotic disposition to give and receive in mutuality, the happy embodiedness of the un[a]shamed female form and of the idyllic symbiosis originally experienced by mother and daughter—this is the stuff of ethically good sex. It's got everything that the invasive harms would erase. And if everyone had sex this way, the invasive harms would disappear from the face of the earth.<sup>95</sup>

What's wrong with this picture? For one thing, Halley contends, it has a feature "widely characteristic of feminist legal theory today and highly puzzling if not downright inexplicable: a pervasive lack of interest in women's erotic yearning for men and a foreclosure of theoretic space for an affirmation of men's erotic yearning *for them*."<sup>96</sup> This feature is "puzzling" given that many of the "chief producers" of U.S. feminism are "women with husbands, women with boyfriends, women who have sex with men, and women with sons," yet they fail to articulate or understand "*women's heterosexual desire for masculinity in men*."<sup>97</sup> Why, Halley asks, have cultural feminists (and those other theorists who embrace these concepts) "not been asked to explain how they can excuse or affirm precisely the male desire which they do desire, and why so many feminists who interdict it ethically seem to keep going back for more of it?"<sup>98</sup>

West's vision of sexuality in *Caring for Justice* seems to reflect a shift from a more nuanced reading of women's desires and experiences to a view of the "structural subordination of women in heterosexual sexuality."<sup>99</sup>

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<sup>93</sup> *Id.* at 70.

<sup>94</sup> *Id.* at 71.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 70.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 71.

<sup>99</sup> *Id.* at 88.

In her often-discussed earlier writing about women's "hedonic lives," West grappled with how to account for some women's reports of finding pleasure in erotic domination by men. She proposed to distinguish problematic cases when such pleasures were rooted in fear from those in which they were rooted in trust.<sup>100</sup> Halley concludes that, in *Caring for Justice*, West not only "maps female sexuality" in a way that omits the possibility of this form of trust, but also omits "any happy heterosexuality for women," leaving women with two options: either "an endless sojourn in heterosexuality under the ubiquitous conditions of patriarchal threat" or women's "infantile, lesbian, entirely feminine sexuality—a sexuality of mutuality, reciprocity, self-affirming integrity, naive embodiment, empathy and care."<sup>101</sup> Such feminine sexuality, as Halley interprets West, is the "fount" of women's moral virtue and "the source of their authority to rule."<sup>102</sup> Translated into legal reform, this feminist governance project would simply instantiate this feminine sexuality at the expense of other conceptions of sexuality.

### C. Feminist Sex Education "After" Halley's Critique of "Feminine Sexuality"

What has engaging with Halley's critique of West taught me about my own approach to sex education? First, I did not need to "Take a Break From Feminism" to find that West's depiction of how women, constrained by patriarchy, turn themselves into "giving selves" is too categorical and leaves insufficient room for women's agency. But my review of West gives more credence to her diagnosis of harm than does Halley. Thus, in my own review of *Caring for Justice*, I observed that West's account "certainly gets something right in suggesting a constitutive role played by fear in women's lives; it is undeniable that sexual violence continues to pose a serious problem to women's well-being and ability to act as sexual subjects."<sup>103</sup> I further observed that:

West's claims that young girls and women take the further step of managing that fear by becoming giving selves are too general and unqualified. . . . What is missing in West's account of sexuality is the dialectic, spoken of in earlier feminist work on women's quest for sexual liberation, between pleasure and danger: that is, the insight that sexual pleasure is an important component of

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<sup>100</sup> See Robin L. West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81, 129-33 (1987).

<sup>101</sup> Halley, *The Politics of Injury*, *supra* note 11, at 89.

<sup>102</sup> *Id.*

<sup>103</sup> *The Liberal Future*, *supra* note 16, at 502.

women's liberation and self-determination, but that negotiating sexual pleasure can be a source of danger, not only because of the reality of men's sexual violence but also because of norms and stereotypes denying that "good" women should or can enjoy sex.

A central theme in West's work is bringing women's narratives into the open to gain a better understanding of their hedonic lives. . . . Yet her account of women's sense of terror, and the severing of will and desire from act, seems out of touch with contemporary culture, in which heterosexual women and lesbians use such media as art, literature, music, and film to express a rich range of ideas and emotions about sexuality. These range from the seeming embrace of gender ideology of male sexual entitlement, to active critique of and anger at such ideology, to various forms of subverting and transforming such ideology. . . . [R]ather than sweeping claims about fear, a more nuanced analysis of how cultural ideology about gender, romance, and sexuality shape both adolescent females and males is necessary if feminists are to find ways to empower girls and to alter the cultural ideology of male entitlement and sexual irresponsibility.<sup>104</sup>

Like Halley, I also noted a shift from West's earlier writing on the possibility of a positive account of women's sexuality to the stark picture she presents in *Caring for Justice*:

From her earliest work in feminist jurisprudence, West hinted at the possibility of a heterosexuality premised on trust, love, and pleasure, rather than dominance, fear, and pain. . . . She evidently all but abandons such a possibility in *Caring for Justice*. This is discouraging, for it presupposes a monolithic account of women as victims instead of a more complex model of the possibility of agency amidst constraint and of the many ways in which heterosexual women can and do negotiate sexuality and marriage to make them better serve women's well-being. Here, especially, West needs to engage more constructively with anti-essentialism's call for a more provisional and contextual analysis of women's experience.<sup>105</sup>

This assessment of West indicates that it is possible to lodge an internal feminist critique about the problems with categorical claims about gender-based injury. But Halley's emphases and those of this Essay are, concededly, different. While emphasizing the need to recognize and

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<sup>104</sup> *Id.* at 502-03.

<sup>105</sup> *Id.* at 504.

theorize women's sexual agency, I embrace the feminist goal of challenging cultural norms of male sexual entitlement and irresponsibility with a view to helping males and females better form themselves as capable and responsible sexual subjects. I believe this two-fold focus on female agency and male entitlement is appropriate. As gender scholar Michael Kimmel has observed, "the sexual gender gap has been closing in recent years, as women's and men's sexual experiences [have] come to more closely resemble one another's"; however, "[w]omen's increase in sexual agency, revolutionary as it is, has not been accompanied by a decrease in male sexual entitlement, nor by a sharp increase in men's capacity for intimacy and emotional connectedness."<sup>106</sup> Halley's focus is on the erasure in West's account of any positive place for "masculinity" in men. Without knowing more about what Halley means by "masculinity," I cannot say whether she would view my own project as similarly advancing a "feminine" sexuality at the expense of masculinity.

But I do find Halley's notion of the Injury Triad helpful for focusing on how assumptions about powerless women run parallel to envisioning men as all-powerful and may consequently deter important work on men's hedonic lives. The Injury Triad may deter feminists from having any interest in, or affiliation with, "the boy on the playground" and his fate.<sup>107</sup> In my approach to sex education, I urge attention to how cultural scripts about gender roles shape adolescent females' and males' self-understandings. Both adolescent females and males, Kimmel reports, have "sexual experiences for reasons other than intimacy and pleasure," a problem he attributes in significant part to pressures and communication problems arising out of "gendered sexual socialization" in which the traditional male sexual script stresses pursuit and victory, and the female script, controlling the situation and protecting her reputation.<sup>108</sup> But Kimmel also notes some striking findings about gender difference: when adolescent males had unwanted sexual intercourse, they were more likely than females to have done so "because they wanted to get sexual experience, wanted something to talk about, or wanted to build up their confidence," or because "they did not want to appear to be homosexual, shy, afraid, or unmasculine or unfeminine."<sup>109</sup>

Another useful focus of feminist thinking about sexuality could be to assess the narrowing gender gap between women and men and between adolescent females and males with respect to heterosexual experience and

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<sup>106</sup> MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 248, 252 (2d ed. 2004).

<sup>107</sup> Halley, *The Politics of Injury*, *supra* note 11, at 84.

<sup>108</sup> KIMMEL, *supra* note 106, at 245-46.

<sup>109</sup> *Id.* at 246.

practices.<sup>110</sup> Conversely, feminists might also analyze an apparent gender gap between women's (eleven percent) and men's (six percent) respective rates of sexual experience with same-sex partners and women's higher rate (than men's) of bisexual and same-sex attraction.<sup>111</sup> Halley's discussion of "feminine" sexuality could be illuminating here. One possible reason for these differentials is that men were asked about engaging in specific sexual practices with a male partner (oral or anal sex). Women, on the other hand, were asked a broader question: "[h]ave you ever had any sexual experience of any kind with another female?"<sup>112</sup> Perhaps, we might glean from Halley, this different framing of the questions reflects underlying conceptions of feminine sexuality as fundamentally diffuse, emotional, and relational, and of masculine sexuality as phallic, specific, and act-oriented.<sup>113</sup> Or, as recent discussions of the so-called "gay cowboy" film, *Brokeback Mountain*, suggest, the gender gap could reflect the harsh toll that conceptions of masculinity take on men's freedom to develop their sexual identity or express sexuality that does not take a heterosexual form.<sup>114</sup> Of course, merely knowing the respective rates at which persons engage in particular sexual practices does not reveal the interpretation they place on those practices or the affective dimensions of sexuality. Halley's urging attention to interpretive frames other than gender may also help here. Thus, after the federal government released a recent report on sexual practices of adolescents and adults in the United States, some analysts discerned generational differences in understandings of intimacy and sexuality, with teens differing from adults by viewing oral sex as a less intimate and more casual act.<sup>115</sup>

Finally, Halley's contention that feminism fails to offer an account of women's and men's heterosexual desire is intriguing. Perhaps "Taking a Break from Feminism" helped Halley to diagnose this absence. Halley also makes a fair point that feminist models of sexuality may champion a redemptive "feminine sexuality" that leaves out "the possibly vital and life-

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<sup>110</sup> See Mosher, *supra* note 66, at 1-4.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.* at 2, 9 (emphasis deleted).

<sup>113</sup> By contrast, the survey did ask women about engaging in specific heterosexual acts. *See id.* at 9.

<sup>114</sup> For examples of such commentary, see Manohla Dargis, *Masculinity and Its Discontents in Marlboro Country*, N.Y. TIMES, Dec. 18, 2005, at 2:13; Guy Trebay, *Cowboys, Just Like in the Movie*, N.Y. TIMES, Dec. 18, 2005, at 9:1.

<sup>115</sup> For rates of oral sex, *see id.* at 1-2; for this interpretation, *see* Laura Sessions Stepp, *Study: Half of All Teens Have Had Oral Sex*, WASH. POST, Sept. 16, 2005, at A7, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091500915.html>.

affirming dimensions of men's bodily immediacy, phallic drive, and aggression."<sup>116</sup> But the way Halley seems to mock, both in the review of West discussed here and in her other critiques of feminism, the feminist goal of safety in sexuality is troubling. Does it indeed rob sexuality of all its force, or channel it into a confining "feminine" form, to aspire to a sexual ethic of respect for bodily integrity and of a prohibition against sexual assault? When Halley chides feminists for trying to sanitize sex by trying to separate desire and danger and by insisting on the distinction between wanted and unwanted sex,<sup>117</sup> how might this critique translate into a vision of sex education? Are there any fundamentals or basic preconditions for developing sexual agency in which she might find common ground with feminists? Determination of whether there is such common ground between feminists and proponents of the sexuality critique would be a valuable path of inquiry. For there exists an ironic parallel between remonstrations by Franke and Halley about feminists' efforts to make sex safe and warnings by abstinence-only proponents that the only "safe" sex is "saved sex"—sex within marriage. Although these pro-sex legal theorists would distance themselves from the abstinence champions who loudly proclaim their own pro-sex stance, what seems to link them is an underlying vision of powerful forces at work that are not easily channeled or disciplined. This Essay suggests that feminism, or, perhaps, "feminism after," has the resources to offer a better vision.

### III. CONCLUSION

This Essay offered some "ABCs" of feminist sex education as a counter to the conservative sexual economy reflected in federal funding of abstinence-only sex education. A liberal feminist focus on capacity, equality, and responsibility would better prepare young people for responsible sexual self-government than a "national standard" that treats all sexuality outside of heterosexual marriage as dangerous and threatening, and curricula that perpetuate gender role stereotypes about women as gatekeepers and men as irresponsible. I have also engaged with the sexuality critique of legal feminism, which argues that it has failed to articulate a positive vision of sexuality that moves beyond conflating sexuality with danger. Endorsing the value of a "feminism after" constructive engagement with critiques of legal feminism and with other theorizing about sexuality, I considered how certain texts about sexuality might critique and enrich my own approach to sex education and sexuality and shed light on the conservative sexual economy. I noted some striking convergences and divergence between the conservative sexual economy and

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<sup>116</sup> Halley, *The Politics of Injury*, *supra* note 11, at 71.

<sup>117</sup> See Halley, *Sexuality Harassment*, *supra* note 5, at 98.

more radical accounts of intimacy with respect to the role played by marriage in containing and confining intimacy in service of orderly social reproduction. In doing so, I suggested how a liberal feminist approach to social reproduction might mediate between these two stark positions and identified fruitful areas for further inquiry.