

Queer Theory, Foucauldian Feminism and the Erasure of Rape

Historical Notes for a Present War



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Introduction

This is an unmodified chapter, taken from my PhD thesis. I've been meaning to knock it into shape for some time, but it's still in the backlog with all the other things I've been meaning to knock into shape for some time. Given where we are, and the current crises created by the wholesale absorption of a regressive theory of gender, I thought it worth sending it out in its present form for those of you who are interested. I was inspired to do so by talking with Kathleen Stock, and her observation that one of the reasons we got into this mess (among many), is because the thinking in Gender Studies departments comes from a particular intellectual tradition and, as Kathleen says, "THERE IS NO EFFECTIVE ACCOUNT OF FEMALE INTERESTS IN THOSE DISCIPLINES."

Well quite.

This was originally the methodology chapter of my thesis. My thesis (which I hope will get knocked into shape in its entirety at some point), explored a French feminist interpretation of rape, paying attention to how we think of bodies as territory, and how that confounds the way we understand, and prosecute, sexual violence. I decided therefore to deal first with the other main strand of feminist post-structuralist thought, the one that comes from Foucault, and why it leads people - *women* - to spout the most absurd, rage-inducing drivel about rape. The battle we're in now was never far from my mind while I was writing - although it's only present in the background. But many of the themes should be familiar to you - the prioritization of male sexual needs, the critique of 'carceral feminism,' the thought that naming victims creates victims, and the thought that talking about and prosecuting rape 'upholds the gender binary.' (*headdesk*)

It starts with a discussion of the ICTY ruling on the Bosnian rapes as a war crime and crime against humanity - a landmark feminist victory. And then looks at the way Foucauldian feminism decided to shit all over that victory and why...and finally weaves its way towards Judith Butler. I don't have the time to make of it quite what I'd want right now. It's a little stitched together, and it's pretty dry and academic (no jokes and swears for Jane this time :)). But I thought it might be useful to some of you.....

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Background

The ICTY rulings on the Bosnian war crimes

The Bosnian mass rapes played an unparalleled part in the history of international law and the influence of feminist jurisprudence on the definition and prosecution of rape as a weapon of war. In response to the unfolding situation, in May 1993, the UN Security Council passed Resolution 827 establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY emerged within a context of developing international feminist activism which had, since the 1975-1985 UN Decade for Women, been focused on “mainstreaming women’s concerns and experiences into the human rights framework whilst simultaneously arguing that there were gender-specific violations which were currently ignored.” (Kelly 2005:478) As noted by Kelly Askin – one of the human rights lawyer involved in the ICTY campaign – the predecessors to the ICTs, the Nuremberg and Tokyo Tribunals established after the Second World War, had given little treatment to gender-based crimes in their judgments, although they had recorded significant evidence of sexual violence against women and girls committed during the war. (Askin 2004:16) The 1949 Geneva Conventions, negotiated in the war’s aftermath, had recognized the criminality of war time rape, but while it shifted the definition from an offense against male honor and sexual ownership to the demand that women “be especially protected against any attack on *their* honour” (Fourth Geneva Convention, Article 27; my emphasis), this focus, with its connotations of modesty and chastity as virtues proper to a woman, still served to obfuscate the violence of rape as an assault on women’s personhood. At the time of the formation of the ICTY then, feminist activists recognized an historic opportunity for the international community to establish the horror of rape in war, and to do so in terms of the violation of women’s human rights.

On February 22, 2001, the ICTY handed down its judgment in the case of *The Prosecutor v. Kunarac, Kovac and Vukovic*, a trial pertaining to the detention, enslavement and repeated rape of multiple women by Serb forces in the then Bosnian town of Foča over several months in 1992. The three defendants were found guilty of rape *qua* rape, and rape *qua* torture as both a violation of the laws and custom of war (Tribunal Statute Article 3) and, remarkably, a crime against humanity (Article 5). The verdict was widely hailed as a progressive victory which, Debra Bergoffen writes, “re-signified women’s legal status and reconstituted human rights law,” transforming “rape from an issue concerning a woman’s

honor, morality and modesty to a matter of human dignity.” (Bergoffen 2012:1, 27) As Bergoffen’s assessment here indicates, in addition to granting epistemic authority and judicial recognition to the victims of the *Kunarac* case, the wider significance of the verdict can be understood to inhere in the determination of rape as a particular type of egregious moral harm. Nonetheless, legal realists such as Janet Halley –skeptical of the substantive moral function of juridical articulation – have expressed concern about both the details of the verdict and the nefarious power-politics at work in feminist activists’ securing of the ICTYs attention to, and understanding of, sexual crimes. Given the feminist and deconstructive frame of this enquiry, it is evidently necessary to take seriously concerns about the deployment of juridical instruments for feminist aims, and the contingency and disciplinarity of legal normativity. These questions, as well as issues about the role of sexual violence advocacy in perpetuating images of women as ‘passive victims,’ will be considered at greater length in the following methodological discussion.

Given the paucity of international precedent with respect to rape, the *Kunarac* judges, following the example set in the ICTY *Furundžija* case, determined their definition of the *actus reus* of rape “by reference to the general principles of law common to the major national legal systems of the world.” (Kunarac 2001:para.439) They found, contra the *Furundžija* case, that the common underlying legal principle was not the presence of “an element of force, coercion” or “threat” but rather that “sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.” (para.440) The harm identified by the judgment was thus distinguished from the violence of forceful coercion, and found to inhere in “violations of sexual autonomy,” (para.441) and “repeated violations of the sexual integrity of the victims.” (para.554)

In the course of the Appeal judgment issued the followed year, the tribunal clarified, and further elaborated, its findings. In response to the defendants’ claim that demonstration of rape required both “force or threat of force and the victim’s ‘continuous’ or ‘genuine’ resistance,” (Kunarac 2002:para.125) the chamber underlined that while “[f]orce or threat of force provides clear evidence of non-consent” it “is not an element *per se* of rape,” (para.129) and that the claim that “nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.” (para.128) The appellants also attempted to refute the judgment’s prosecution of rape *qua* torture, arguing that they had “committed no act which could inflict severe physical or mental pain or suffering,” (para.135) they “did not intend to inflict pain or suffering” as “their aims were purely sexual in nature,” (para.137)

and that, most egregiously, one of the victims “objectively...would not have experienced severe mental pain or suffering as a result of the alleged rape, as she had been raped on previous occasions by other perpetrators.” (para.136) In also attempting to refute the cumulative prosecution of rape as a war crime *in addition* to a crime against humanity, the appellants’ diminution of the seriousness of rape *qua* rape becomes absolutely apparent. In the “absence of described distinct infliction of physical or mental pain” they argued, “the infliction of physical or mental pain is brought down *only to the very act of sexual intercourse, without the consent of the victim.*” (para.188; my emphasis)

The chamber’s responses to these claims constitute the most significant parts of the judgments. In defending the convictions of rape *qua* torture, they argued that, “some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act...Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.” (para. 150) This assertion was substantiated with a note referring to the proceedings of forty-eighth session of the UN Commission on Human Rights, which had concluded that “it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being” and hence “accordingly constituted an act of torture.” (note.205) This opinion was further supported by the findings of the European Commission of Human Rights in the case of *Aydin v Turkey*, that rape “strikes at the heart of the victim’s physical and moral integrity” and must therefore be “characterised as particularly cruel and involving acute physical and psychological suffering.” (para. 184)

With respect to the claim that it was impermissible to prosecute rape *qua* rape as a war crime, the chamber concluded that in addition to Common article 3 of the Geneva Conventions, which specifies the criminality of torture and “outrages upon personal dignity, in particular humiliating and degrading treatment,” the ICTY statute on war crimes (Article 3), was applicable in cases involving, “serious...infringement of a rule of international humanitarian law,” where ‘serious’ is determined as “a breach of a rule *protecting important values.*” (para.194; my emphasis) On the basis of the “universal criminalisation of rape in domestic jurisdictions, the explicit prohibitions contained in the fourth Geneva Convention...and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights,” the chamber concluded that rape *qua* rape meets the requirement of a serious violation of international humanitarian law and “therefore, constitutes a recognised war

crime.” (para.195) This opinion was also substantiated with a note to the ICTY’s judgment in the *Furundžija* case that the “right to physical integrity is a fundamental one, and is undeniably part of customary international law.” (note.261)

There is a great deal to commend in these judgments. Most notably that force is not an essential feature of the act of rape; that the suffering inflicted through the act inheres in the violation of consent *per se*, understood as an assault on the dignity of the person, irrespective of whether other violence is used in its commission; and that that suffering is by itself substantive enough for it to be accorded the status of a serious moral harm, and hence recognized as a war crime and a crime against humanity. There are also, however, questions, and these pertain to the framing of the *actus reus* in terms of consent, and the grounding of the moral harm of rape in terms of the violation of the right to bodily integrity.

Vitiating consent, is, to be sure, a vast improvement on force or threat of force as the determining criteria of the occurrence of the crime. However, as we will explore more fully in Chapter 3, consent is still embedded in a liberal doctrine of property in the person which inherently undermines the sexuate personhood of women, positions women’s bodies as territory which are, by default, sexually available unless they have adequately indicated otherwise, and undermines women’s abilities to credibly testify to the wrong committed against them. It is notable, in this respect, that the coercive context of the crimes committed in Foča was taken by the tribunal as evidence of the impossibility of voluntary consent, and that the victims were in this instance, not therefore confronted with the barriers that the consent framing routinely creates to the successful prosecution of many domestic cases. As we know, despite formal legal recognition of the devastation caused by rape, it is criminally under-prosecuted, with conviction rates well under 2% of the best estimates of prevalence. (Cf. Appendix I) That is impunity. And for an act considered sufficiently serious to merit the description of a crime against humanity, it is intolerable.

§

While the case of *The Prosecutor vs. Kunarac, Kovac and Vukovic* was widely hailed as a progressive development in the juridical articulation of the harm of rape, the judgment also evoked considerable critique, both from women who thought it didn’t go far enough, and from those who thought it went too far. The criticisms leveled at the judgment – that

it presented women as passive victims, reinscribed the patriarchal gender binary, reified the harm of rape, and colluded with the carceral state – are exemplary of the types of criticism addressed to anti-rape theory and practice by predominantly Foucauldian/queer feminists from the early 1990s onwards. Reading these critiques and considering their theoretical bases thus provides an entry-point into the Foucauldian feminist literature on rape; a literature which so far constitutes the most extensive application of post-structuralist thinking to the question of sexual violence and its juridical articulation.

In addition to its influence on both academic and popular feminism, my concern with this literature is two-fold. Firstly, an excessively totalizing application of the analytic of productive power, and concomitantly totalizing suspicion of all normativity, is implicated in a more-or-less explicit effacement of the existence of sexual harms, and is predicated on a blindness to – or erasure of – the patriarchal socio-political conditions which foster such harms. Such effacement cannot, therefore, serve as the basis for a just account of sexual wrongs, or a just accounting of how we are to respond to such wrongs. Secondly, while this study is informed by a deconstructive analysis of the metaphors of sovereignty, and has taken its point of departure from an interrogation of the juridical discourse of bodily integrity, such discourse is not simply constitutive or disciplinary but is, rather, a *site of the surfacing* of an implicit ontology that, as I have already indicated, underwrites a thoroughgoing existential infrastructure. Contra Foucauldian feminist interventions, it is therefore inadequate to think that sexual harms are merely discursively constituted, and can thus be discursively reconstituted, where ‘discourse’ is taken to mean ‘constitutive linguistic and cultural representations or practices.’ An existential infrastructure will produce cultural representations and practices, and will reproduce itself through such representations and practices, but it is also, above all, an embodied psycho-ontological structure through which individuals live the negotiation of their needs, dependencies and vulnerabilities. Any challenge to this existential infrastructure must necessarily account for the work it does in negotiating – or disavowing – the experience of lived vulnerability. To leave the structure intact, but stipulate that we will not speak of its operation or effects, is to do more harm than good.

The Analytic of Productive Power, Antinormativity and the Effacement of Harm

The Foucauldian innovation that has exerted most influence on accounts of rape, and judicial responses to rape, is the suggestion that discursive regimes – as regimes of power/knowledge – produce the subjects they purport to describe. According to Foucault, the movements of history express no underlying structural principles, and genealogical attention to the discontinuity of these movements reveals, he argues, that “truth or being do not lie at the root of what we know and what we are.” Given the absence of any ‘truth’ about ‘what we are’ the “forms operating in history” are hence “not controlled by destiny or regulative mechanisms,” but arise rather through “the exteriority of accidents” in response to “haphazard conflicts.” (Foucault 1988:153) The claims to expertise exercised by various discursive regimes which style themselves authorities on the patterns of history are hence no more than illegitimate arrogations of power, impelled by a pure Nietzschean imperative. The function of such discourses is not to describe or diagnose, they do not deal in politically or therapeutically effective interventions and cures, rather, they *produce subjects*, either by direct action – as in the case of the clinic and the prison – or by informing the proliferation of subjectivizing technologies of self.

The core of this claim is that discursive regimes subjectivize by installing stable identities in place of discontinuous behaviors. Thus, in Foucault’s most famous example, a man who occasionally or exclusively has sex with other men becomes ‘the homosexual,’ or, most pertinently for our purposes, the individuals involved in an instance of sexual violence become ‘the rapist’ and ‘the victim.’ Subjectivization thus functions by fostering the repeated performance of behaviors in accordance with an ascribed identity, and in this sense is both productive and disciplinary. On this account then, the analytic of productive power is evidently half-right; we all spend a good deal of time doing things we understand to be the sort of things done by whatever kind of person we identify ourselves as, and this type of analysis has been useful for accounting for the way gender is accreted through the microphysics of power and daily acts of performance. By this reckoning then, all discursive regimes, and the norms they propagate, are no more than instruments of ascription by which individuals are disciplined into certain sets of behaviour.

In order to justify the type of totalizing claims made by Foucauldians however, it is necessary to think that a person is *nothing other* than an accretion of performance in accordance with an ascribed identity and its associated norms. Just as there are no underlying structural principles informing the movement of history, there are no underlying psychophysical structures informing the unfolding of persons. We have neither dispositions nor particular potentials, and it is meaningless to concern ourselves with how human flourishing is disrupted by the neglect of critical needs, or traumatic injuries to self-worth. To the Foucauldian's mind, normativity is necessarily expressive of a prescriptive and disciplinary will to power, because there is no basis on which we might understand norms as supportive of the conditions of a flourishing life. Surely the Foucauldian is right to be leery of norms given the extent to which sexual, juridical, clinical, and educational regimes function as apparatus of pernicious prejudice, pointless Judeo-Christian moralism, and exploitative intent. It is, however, absurd to extrapolate from this evident truth to an obdurate suspicion of all normativity, as if there were no basis by which we might meaningfully say that some conditions are better for people, or that other experiences tend to be harmful. It is absurd to erase the possibility of any distinction between deleterious disciplinary norms, and the attentive practices of care. And it is absurd, and politically reprehensible, to efface the injury inflicted by certain types of experience in favor of asserting that the only harm which merits attention is that perpetrated by normativity itself.

In addition to the antinormative effacement of harm, the Foucauldian privileging of genealogical discontinuity constitutes a near-willful ignorance of the historical patterns produced by persistent patriarchal domination. And, when this obviation intersects with Foucault's singular focus on the ill-effects of disciplinary discursivity, it can issue in a passage both breathtaking in its obfuscation and gut-punching in its callous disregard for the sexual harms experienced by women and girls. In the middle of Part Two of *The History of Sexuality Vol. I*, as Foucault is forensically refuting 'The Repressive Hypothesis,' we come across this passage:

One day in 1867, a farm hand from the village of Lapcourt, who was somewhat simple-minded, employed here then there, depending on the season, living hand-to-mouth from a little charity or in exchange for the worst sort of labor, sleeping in barns and stables, was turned in to the authorities. At the border of a field, he had obtained a few caresses from a little girl, just as he had done before and seen done by the village urchins round about him; for, at the edge of the wood, or in the ditch

by the road leading to Saint-Nicolas, they would play the familiar game called ‘curdled milk.’ So he was pointed out by the girl’s parents to the mayor of the village, reported by the mayor to the gendarmes, led by the gendarmes to the judge, who indicted him and turned him over first to a doctor, then to two other experts who not only wrote their report but also had it published. What is the significant thing about this story? The pettiness of it all; the fact that this everyday occurrence in the life of village sexuality, these inconsequential bucolic pleasures, could become, from a certain time, the object not only of a collective intolerance but of a judicial action, a medical intervention, a careful clinical examination, and an entire theoretical elaboration (Foucault 1978:31)

In case is not abundantly clear what’s wrong here, allow me to enumerate: 1. The detailed attention given to establishing the person of the farm hand, intended to elicit sympathy for his hardship. 2. The absence of any similar personification of the victim, a mere ‘little girl’ without history. 3. The obfuscatory use of the passive to avoid naming the farm hand as the agent of the action, and deflect attention from how the non-specific ‘caresses’ were ‘obtained.’ 4. The exculpation of this action by appeal to its normality, noting that it had been done before and that other ‘urchins’ had also done it. 5. The attempt to make the action picaresque by relaying a purportedly charming pastoral term for that type of caress that produces ‘curdled milk.’ 6. The further exculpation of the action by noting that this purportedly charming pastoral activity was ‘familiar’ and a ‘game.’ 7. The inattention to the fact that the parents’ reporting of the incident might suggest that it was more than just that. 8. The attention given to the disciplinary response aimed at the farm hand. 9. The total absence of concern for the consequences for the victim. 10. The claim that the story’s significance is its ‘pettiness.’ 11. The minimization of sexual abuse as an “everyday occurrence in the life of village sexuality.” 12. The claim that such acts are “inconsequential.” 13. The claim that they are “bucolic.” 14. The suggestion that what is most outrageous about this story is the “collective intolerance” directed at the poor unfortunate farm hand as opposed to the apologia for the molestation of children.

All this would be damning enough, but Foucault is not quite finished. On the next page we learn this case is important because it is “doubtless the first in history” to assemble “a whole machinery for speechifying, analyzing, and investigating” in response to these “timeless gestures,” “this everyday bit of theater” or these “barely furtive pleasures between simple-minded adults and alert children.” (32) With the publication of *Abnormal* – the 1974-75 lectures at the Collège de France – we now know that Foucault’s treatment

of the case in *The History of Sexuality* was not his first. On this occasion he gives more detail about the 'obtained caresses' than he was willing to put into print, while nonetheless retaining his stance of steadfast obfuscation and assuring his audience that the matter "you will see...is extremely banal." (Foucault 2003:291-292). The farm hand named – amusingly Foucault imagines – Jouy, was, we learn, "denounced...by the parents of a little girl he had almost, partly, or more or less raped." The assault occurred on "the day of the village festival" when "Jouy dragged young Sophie Adam (unless it was Sophie Adam who dragged Charles Jouy) into the ditch alongside the road to Nancy. There, something happened: almost rape, perhaps." But this is nothing to trouble ourselves about. Jouy, you will be reassured, "very decently gives four *sous* to the little girl" who entirely unperturbed "immediately runs to the fair to buy some roasted almonds." (292)

Of all the terrible things I've read while researching this study, this is the one that wounded the deepest. The implacable, complacent contempt for the harm to victims, when taken with Foucault's towering intellectual authority, the endless reverent citation, and the near-total academic evasion of this unconscionable erasure, recreates almost perfectly the conditions which now, and have always, pushed women to paroxysms of illegible horror; bedraggled and tongueless Philomelas sewing tapestries only other women will read. Here, at what many of us know as the edge of hysteria, one has to gather one's words, and perform – according to the logos of legibility – a creditable accounting, one that can never do the damage justice. Look here, we will calmly say, at an 'almost,' 'perhaps' or 'more-or-less' rape, or over there, at the easy shifting of responsibility from the 'simple-minded' adult to the 'alert' and precocious Lolita of a girl. Consider the suggestion that giving pennies to someone you have just assaulted is indicative of 'decency,' or the final attempt to erase all harm by zooming out on an image of a child gamboling innocently towards the fair in search of sweet treats. Sometimes indeed it is hard to speak smoothly over the sound of the screaming Furies.

And beyond this unspeakable recoiling, the simple observation that it is remarkable (or is it, *really?*) to find here this arch-critic of normativity invoking the normality of this incident, and hence, so many thousands like it, to buttress his dismissive assurance of its 'pettiness' and 'banality.' In the mind of Foucault there is evidently more than just one type of normativity. There are the 'bad' disciplinary norms of the clinician or the judge – the kind that ruins lives by taking harmless pastoral pleasures and making them a pretext to subject hapless individuals to a terrifying panoply of discursive 'machinery.' And then there are the 'timeless gestures,' 'everyday occurrences' and cutesy 'familiar games' – acts

which just happen to involve the use of female bodies for the gratification of men's pleasure, but have, we must understand, nothing whatsoever to do with underlying historical structures and should be left well alone as the inconsequential acts they so evidently are.

My intellectual and emotional response to this is an obdurate 'No.' No, I will not be discursively disciplined into sympathizing with an 'unlucky' farm hand over against the little girl he dragged into a ditch. No, I will not be convinced by pastoral conceit that the norms of patriarchal appropriation are 'petty' and 'banal' while those of discursive machination are diabolical and disciplinary. No, I will not be persuaded by rhetorical evasion that the sexual abuse of children is 'harmless' and 'inconsequential' and no, I won't be prevailed upon to choose men's pleasure over women and girl's personhood. No, I do not assent to a regime of truth that stipulates that discourse only ever produces, and never describes, harms. No, I don't think our accounts of sexual injury should defer to a man who clearly cared nothing about them. No, I don't believe this obfuscation is an 'exteriority of accidents.' And no, I don't think the academic evasion of this passage is 'accidental' either.

This staggering refusal to recognize the existence and impact of sexual harms is reproduced, with more or less explicit sleight-of-hand, throughout the Foucauldian feminist literature on rape. We will turn to this now, taking responses to the *Kumarac* judgment and gender mainstreaming in international law to guide us through a somewhat unwieldy corpus, and beginning with the critique of the disciplinary discourses of 'governance' and 'carceral' feminism.

I: Feminist Normativity: Governance Feminism and the Carceral State

a) *Governance Feminism and Janet Halley's 'Queer Thought.'*

In 2006, Harvard Law Professor Janet Halley coined the term 'Governance Feminism' (GF) to refer to "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power." (Halley, et al. 2006:340) The feminist regime of truth had reached the halls of power, but while Halley chose 'governance' to echo "Foucault's distinction between sovereigntist and governmental... forms of power," feminist governance projects she noted, show a "strong trend to advocate" for "very state-centered, top-down, sovereigntist feminist rule preferences," which "emphasize[s] criminal enforcement" and "speak[s] the language of total prohibition." (341)

Within her Foucauldian frame Halley deems it unnecessary to argue for exactly why we should regard prohibiting rape as an evidently sinister objective. She appeals rather to her realist sensibilities, the fact that we should better concern ourselves with how "violence will be channeled, legitimated...or diffused," given that we "surely...know it will not be stopped." (423) She documents in detail feminist involvement at the ICTY as evidence of the "fascinating infiltration of specifically feminist activism into generalist forms of power-wielding," (343) and notes that the "structuralist thesis" of "GFeminism" is "controversial within feminist discussions" and should be "rejected as magical realism." (Halley 2008:121) Feminist legal activists are involved, she suggests, in a "transvaluation" of the meaning of interest, claiming to work in the "interests of justice" when they are instead, a "politically self-interested group" (33) which has illegitimately arrogated itself authority on "the badness of rape." Radical feminism has "learned to walk the halls of power" dressed, Halley cattily notes, "not in...butch street clothes...but in power suits from Nieman Marcus," (6) and discovered it can take its seat at the table, providing it speaks "with the voice of sweet reason and especially of *expertise*." (20)

What interests me most about Halley, however, is not her by-the-book worrying of feminist regimes of 'governance,' but the palpable animus which animates it. In her semi-autobiographical *Split Decisions: How and Why to Take a Break from Feminism* (2006), we learn

more about the concerns behind her couched legal critique. She reiterates her antipathy to a feminism framed “not as a raw preference or as the self-interest of women, but as a matter of justice or emancipation,” (Halley 2006:18) adding a more explicitly Nietzschean twist. Feminism is guilty of disavowing its own will to power and the way in which its governance project has “blood on its hands,” (33) and it hence arouses Halley’s “deep distrust of slave-moralistic pretensions to identity-political ‘powerlessness.’” (15) This question – which I would reframe as whether all normativity can be assimilated to a singular masculinist modality – is not insignificant, and we will touch on it in our concluding discussion of Butler’s deployment of Foucault’s totalizing analytic. However, more interesting still is Halley’s frank confession that her decision to ‘take a break’ from feminism is motivated by her own “erotic interests” (12) as best represented by “the distinctively queer features” (164) of Leo Bersani’s ‘Is the Rectum a Grave?’

What we find underneath Halley’s suspicion of feminist influence at the ICTY is the erotic concerns of someone who claims that, were she able to click her heels and “become ‘a gay man’” she “would do it in an instant.” (12) When Halley suggests that the problem with feminism is its failure to be “a universal advocacy project for all sexual interests” (11) what she means is that it lacks “affirmations of *male masculinity*,” (65) and that its theories of “sexual harm deletes” the “vital and life-affirming dimensions of men’s bodily immediacy, phallic drive, and aggression.” The problem with feminism is that it’s too concerned with the feminine, whereas Halley prefers Bersani’s “love of the cock,” (65) over an intersubjective erotics she imagines to be some wishy-washy touchy-feely “*lesbian sensibility*,” an “entirely *feminine* sexual ethics.” (66) Halley’s evidently masculinist critique is, while ridiculous, also usefully indicative of a conflation that commonly bedevils anti-rape efforts and has long animated the sex-wars between feminists; that is, the inability to distinguish the erotics of intersubjective aggressivity and consensual dissolution from the unilateral assault on personhood that constitutes abuse.

Following Bersani, Halley is right to suggest that much sex is erotically “animated...by a desire for annihilation’ (151) and the “thrill of encountering our own metaphysical and experiential dissolution.” (154) Existing as an individual awareness can be burdensome, and letting that go in erotic *ekstasis* is a profound element of what makes sex so compelling. There is, however, all the difference in the world between determining to temporarily relinquish one’s determination, and having one’s determination aggressively ignored, overridden or erased. For Halley, citing Bersani, this distinction is entirely obscured by the fact that “[t]o be penetrated is to abdicate power,” (Cited Halley:152) and, as

such, stands as an invariant index of “degradation and human erasure in sex.” (155) What, we might ask, could be more normative, and less queer, than conceiving penetration as a humiliating annihilation of personhood? This is indeed a ‘timeless gesture,’ and one we will devote Chapter 3 to exploring at length. Bersani and Halley’s analysis thus suffers from exactly the same defect of patriarchal ontology that also, we will see, holds Dworkin in its grip; if penetration is a degrading abnegation of the integrity of the person, then what is the real difference between the temporary and pleasurable dissolution of personhood in erotic *ekstasis* and the enduring and damaging injury to personhood inflicted in rape? If, the argument goes, sexual pleasure inheres in “self-shattering,” (159) then it follows that ‘shattering-selves’ is just what sexuality does, as if the traumatic injury to dignity through being treated as a non-person is extensive with the abnegation of personhood our culture wrongly attributes to penetration *and* the determined relinquishment of determination which comprises erotic *ekstasis*. It is akin to Halley’s ‘magical realism,’ Bersani seems to suggest, to think that sexuality could remain erotic while being “less disturbing...less violent, more respectful of ‘personhood’” than it is under the current conditions of “male-dominated, phallo-centric culture.” (Cited: 159)

For Halley, Bersani’s “willingness to affirm sexuality as carrying an appetite for deep threats to integrated selfhood” is thus neatly coterminous with the “willingness to lose touch with propositional ethical logic to do so,” (165) and it should then strike us as little surprise that Halley is so leery of legislative expectations that prospective lovers treat each other as persons. As is the wont of those who cannot conceive sex-positivity as accommodating unequivocal respect for our partner’s desires, in a recent blog for *Signs* Halley sets herself against the feminist push for affirmative consent, suggesting that it would “foster a new, randomly applied moral order that will often be intensely repressive and sex-negative.” The arrival of “[c]riminal unwantedness...in the American legal mainstream” is, to she continues, nothing less than “astonishing,” and as such, she claims – reaching for a trusty Men’s Rights trope that both willfully misconstrues enthusiastic consent, and invokes the ever-popular specter of the vindictive lying women – affirmative consent will open the way to the “conviction of people who initiated sexual penetration... with passionately desirous partners who later charge sexual assault.” Moreover, as we will explore in our discussion of ‘victim-feminism,’ such “protective legislation,” Halley continues, “encourages weakness among those they protect” and “will install traditional social norms of male responsibility and female helplessness.” Lastly, such measures have “their origin in a carceral project that is overcommitted to social control through

punishment in a way that seems to me to be social-conservative, not emancipatory.” (Halley 2015)

b) Carceral Feminism

This last point has some substance, although reviewing the literature on ‘carceral feminism’ requires forbearance given how readily its authors engage in ungrounded extrapolations, or reduce all juridical activity to a singularly pernicious exercise in disciplinary normativity. The term is credited to a 2007 article by Elizabeth Bernstein outlining the findings of her ethnographic study of how a “relatively small number of committed feminists and sex-worker activists, has come to occupy the center of an ever spiraling array of faith-based and secular activist agendas, human rights initiatives, and legal instruments.” (E. Bernstein 2007:130) Bernstein’s coining of ‘carceral feminism’ with reference to the “law and order agenda” of American sex-trafficking activists and the “drift...to the carceral state as the enforcement apparatus for feminist goals,” (143) was picked up by Halley in 2008 and folded under the rubric of governance feminism. In an article on feminist influence on the *Rome Statutes* which inaugurated the International Criminal Court, Halley deploys ‘carceral feminism’ to denote, Sune Sandbeck noted in 2012, “a certain mode of feminist justice-seeking within international humanitarian law (IHL) and international criminal law (ICL), which aims to elevate and particularize crimes of sexual violence” with the intent to “move sexual violence up the ladder of criminality and impose tougher sentences on perpetrators, while separating sex crimes out from among other crimes in order to make it possible for indictment on charges of sexual violence and rape alone.” (Sandbeck 2012:2)

There are a variety of problematizations of this phenomenon, some significant, some spurious, and some sloppy. Firstly, concerns about the intersection of a feminist law and order agenda with the massive inflation of prison population in the US since the mid-seventies are to be taken very seriously. The US locks up its citizens four times more often than the UK, Spain, Argentina, Australia, China, and Saudi Arabia, and eight times more often than the Scandinavian nations, Canada, Japan, Italy, India, and Mozambique. Not even Russia, that once great American icon of unfreedom imprisons its people quite as readily as does the United States. From a 1974 rate of around 100 prisoners per 100,000 head of population – an index that had been relatively stable throughout the twentieth century – the prison population exploded throughout the eighties and nineties,

reaching present levels in the region of 750 prisoners per 100,000 residents. (Park, et al. 2013) This situation, which certainly warrants the description of “a new carceral regime,” (Sandbeck 2012:4) has been variously attributed to the economic imperative of a neo-liberal prison-industrial complex, the increase in drug trafficking and the ‘War on Drugs,’ and the conservative law and order agenda advanced by Nixon, Reagan and Bush the elder. It is, unequivocally, a disgrace, especially when taken with the wholly inadequate social safety net the US provides for its citizens, and the fact that, as in other Western nations, but given its specific history, even more so, the carceral regime in the United States is an instrument of racist domination.

One of the major weaknesses of the literature on carceral feminism, however, is the extent to which its – mostly American – authors are so quick to assimilate all judicial activity, especially that which occurs on the international stage, to a critique which originates in the specific context of the United States. There is a great deal of indicting “white, middle-class women” who “helped to facilitate the carceral state” (Taylor 2009:3) for their racial ignorance and “production of racialized...bodies as object,” (Sandbeck 2012:1) or for involving themselves in conflicts while “being oblivious to political, economic or historical context.” (Kapur 2013:22) And yet, at the same time, there is precious little consideration of whether a US-derived model is so easily applicable to the whole world, or if it might be inappropriate to read a program fostered over fifteen-years of global conferences through a specifically American analytic.

Arguments can of course be made about the extent to which the very foundation of international law as a regime of rights is derived from a Western liberal tradition that is open to a panoply of radical and postcolonial critiques, but the literature on ‘carceral feminism’ largely evades this theoretical work in favor of appealing to an allegedly universal empirical relationship between feminist anti-violence measures and the proliferation of a regime of excessive and excessively retributive incarceration. Had they attended to Marie Gottschalk’s study, *The Prison and the Gallows*, they would have encountered a detailed historical account of the way in which the anti-rape efforts of feminists in the US, intersected with a punitive, right-wing ‘victim’s rights’ movement which, in the absence of the social democratic infrastructure of Europe, was able to exert an enormous effect on the direction of US law and order policy in a way that did not happen in other Western nations. In Britain, even the punitive impulses of Thatcherite neoliberalism were held in check by consensus among civil servants and law and order professionals about the undesirability of using incarceration as a prime instrument of

social policy. Likewise, feminist rape crisis services in the UK were also able, unlike those in the US, to resist having their revenue and professional expertise co-opted by the singular objective of securing more prosecutions. (Gottschalk 2006)

Unlike the harm of rape, which is not, I would contend, historical, the alliance of feminist activists with a particularly punitive carceral system actually is, but the proponents of carceral critique are not wont to let such details derail a good Nietzschean/Foucauldian story about the dire consequence of unleashing the *ressentiment* of women in a “tightening” of “the sexual security regime.” (Kapur 2013:4) There are serious empirical and theoretical questions to be asked about the efficacy, and humanity, of various custodial, non-custodial, and treatment protocols for sexual offenders, and they deserve to be given sustained consideration, not reduced to lazy Foucauldian dismissals about the “disciplining of the body and the regulation of populations” (Sandbeck 2012:5) or the effects of a ‘security discourse’ that aims to “govern sexual conduct,” (Kapur 2013:22) “contain sexual expression,” (29) and “incarcerate people for ‘bad’ behaviour.” (22) Here the Foucauldian’s contempt for sexual harm becomes abundantly clear. Bad behavior is a term we usually reserve for, say, someone standing you up at short notice, or a good friend getting drunk and causing embarrassment or inconvenience. One would assume then that ‘bad’ behaviour is even more inconsequential. I’m fairly certain that ‘grave assaults on someone’s sense of personhood’ aren’t covered by its remit.

Despite all the allegedly impressive bumph about “the fundamental historical shift towards the biopolitical regulation of the species-body” (Sandback 2012:1) and the way “sexual surveillance techniques” (Kapur 2013:29) are implicated in “the market... harnessing gender to advance the project of neoliberal economic processes,” (26) the literature on ‘carceral feminism’ is extended over a two-fold evasion it can’t quite evade. Firstly, what are we to do about ‘men behaving badly’ if all forms of custodial, non-custodial and treatment programs are just so many dubious instruments of ‘sexual security,’ and is the answer to that question really the never-voiced yet ever-echoing ‘even less than we do now?’ And secondly, can feminist calls for adequate juridical articulation really be so easily caricatured as the wailing of a bloodthirsty chorus demanding greater and ever-more punitive retributive measures? Certainly for myself, and for most of the women I know, the issue is not retribution, but impunity, where the concern with impunity is not about the absence of punishment *qua* revenge, but what the absence of punishment communicates to men and women about whose needs matter, and who can be gravely harmed without consequence or restitution. Our hope is directed at what might change in

sexual mores if men understood that they would be legally expected to provide a convincing account of how they knew that their partner was consenting, and what would change if women knew that even though they froze, or dissociated, or didn't understand what was happening until after it was over, the law would still bear witness that what happened to them was wrong. Every time a judge dismisses a case, or suspends a sentence, because a woman was drunk, or a child was precocious, or a man has a shining future in front of him, I – and many women I know – hear just one thing. *You don't matter.*

II: Discursive Constitutions

In addition to the general critique of feminist normativity, there is also a significant body of Foucauldian-inflected feminism addressed to the implication of anti-rape activism and jurisprudence in the production of women as victims, the reification of the harm of rape, and the reinscription of patriarchal constructs of sex and gender. We will first review this literature before moving onto a consideration of its claims and the extent to which this variant of postmodern feminism is consonant with the politics of anti-feminist backlash.

a) Producing the Victim

Janet Halley's 2006 discussion of the role played by 'governance feminism' at the ICTY "acknowledges particular debt" (Halley, et al. 2006:335) to the 2005 article 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina,' in which Karen Engle argues that the "international criminalization of rape – as a grave breach, a war crime, and a crime against humanity – is neither as pathbreaking nor as progressive as the doctrinal recognition might suggest." (Engle 2005:780) Her principal objection to the "approach of the United Nations, and particularly the ICTY" is that it "treated women as part of the same concept of 'women and children' that has long been deployed...to provide women with special protection" (780) and failed to consider "what negative effects such criminalization might have on the understanding of women's agency, especially during wartime." (784) Engle's concern with women's agency encompasses both their role as subjects and as objects of violence, as well as their capacity to freely engage in sexual activity with individuals from the 'other' side. The jurisprudence of the ICTY, Engle maintains, "tended to treat most women as victims of the war," (794) to "diminish women's capacity to engage in sexual activity with the 'enemy' during the war" and to "downplay the extent to which any but extraordinary women could be perpetrators in war." (784)

As we will explore more fully in our discussion, Engle's argument here consists largely of repeated appeals to the uncontested good represented by 'agency' and 'power.' The *Kunarac* judgment's decision that the coercive situation in Foča vitiated meaningful consent is indicted because it "reinforce[d] an understanding that Bosnian Muslim women had little, if any, sexual agency during the war." (803) The feminist portrayal of

“women as victims of male violence and subordination” and the “very success that feminists now acknowledge...in calling international legal attention to rape...relies at some real level on a denial of women's power.” (813) Alexandra Stiglmayer’s detailed and harrowing 1994 report of ‘The Rapes in Bosnia-Herzegovina’ is pulled up by Engle for suggesting that “most rape victims were so powerless that they did not have anything to do with their own children...they were powerless to fight back or to support those who depended on them. They were ‘broken.’” (796) Psychiatrist Vera Fonegovic-Smalc, who “worked with twenty-nine rape victims in a clinic in Zagreb,” is equally reprimanded for the pathologizing tendencies of her account of the “[s]uicidal thoughts...evident...in women who have become pregnant as the result of rape,” and for a “telling” in which “women who have been raped have few opportunities for agency.” (796) Such representations are responsible, Engle concludes, for “[p]erpetuating images of women as powerless victims” and thus “function to strip women of many types of power, including the power to resolve or prevent conflict.” (812)

This critique recurs across the literature on the Yugoslav conflict, and on feminist and international humanitarian responses to sexual violence in general. Dianne Otto’s 2010 review of ‘feminist engagement’ with the UN is concerned that a number of recent resolutions give “sexual violence suffered by women...disproportionate attention,” (Otto 2010:106) and notes the tendency for “protective stereotypes of women to normatively re-emerge” instead of “more empowered” (106) or “liberating representations...crediting women with agency in the face of sexual violence and questioning the inevitability of their powerlessness.” (117) Ratna Kapur’s 2002 reflection on ‘The Tragedy of Victimization Rhetoric,’ likewise characterizes the success of “VAW discourse” as down to its “appeal to the victim subject” (Kapur 2002:5) who, “thoroughly disempowered and helpless... becomes the universal subject of human rights discourse for women.” (10) Dubravka Žarkov also sounds a note of alarm about the “overwhelming visibility and presence of women as rape victims in public discourse” on the grounds that “these practices continue to produce women as victims, and as the only victims, denying women both subjectivity and agency and denying men their vulnerability.” (Žarkov 2007:178)

The two major sources for this line of argument are Sharon Marcus’ ‘Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention,’ from Judith Butler and Joan Scott’s 1992 collection, *Feminists Theorize the Political*, and Wendy Brown’s *States of Injury* (1995). Marcus’ influential intervention set itself against a feminist politics that “designate[s] rape and the raped woman’s body as symbols of the real,” (Marcus

1992:386) and asked us instead to “refuse to recognize rape as the real fact of our lives.” Rather we should “treat it as a linguistic fact,” interrogating “how the violence of rape is enabled by narratives...which derive their strength not from...immutable... force but... from their power to structure our lives as important cultural scripts.” (388-9)

Rape as a ‘linguistic fact’ or ‘cultural script’ refers “to the many images of rape which our culture churns out, representations which often transmit...ideological assumptions” which “can collude in and perpetuate rape.” (389) Marcus includes among these scripts many rape myths feminists would recognize as fostering a rape-prone culture, but the essay’s importance inheres in her suggestion that the most powerful aspect of the ‘rape script’ is the belief that “women are always either already raped or already rapable.” (386) This script, Marcus argues, is propagated by both feminist anti-rape discourse and masculinist culture, and takes “male violence or female vulnerability as the first and last instances in any explanation of rape” serving therefore “to make the identities of rapist and raped preexist the rape itself.” Rape is an interaction that is “not only scripted” but “also scripts,” in which “one person auditions for the role of rapist and strives to maneuver another person into the role of victim.” (391) As such, Marcus argues, rape can be disrupted through changing our narratives, and encouraging women to refuse to play their allotted part. A “feminist discourse on rape” and more effective form of rape prevention, would begin, she suggests, “by displacing the emphasis on what the rape script promotes – male violence against women – and putting into place what the rape script stultifies and excludes – women’s will, agency, and capacity for violence.” (395)

Wendy Brown is equally concerned about the way ostensibly emancipatory political projects, including anti-rape activism, “inadvertently redraw the very configurations and effects of power that they seek to vanquish.” (Brown 1995:ix) “Foucault” she notes, “reminds us that the law produces the subjects it claims to protect or emancipate,” (131) and that “the inscription of gendered, racial, or sexual identity in legal discourse” has “the effect of reaffirming the historical injuries constitutive of those identities” and thus “installing injury as identity in the ahistorical discourse of the law.” (xi) Legal redress for “a certain injury-forming identity” thus “discursively entrenches the injury-identity connection it denounces” or “collude[s] with the conversion of attribute into identity,” thereby codifying “within law the very powerlessness it aims to redress.” (21) The “formulation of women’s civil rights as violated by pornography or sexual harassment” for instance, might then be seen to “produce precisely the figure MacKinnon (1989)

complains we have been reduced to by sexism, a figure of woman wholly defined by sexual violation” and “sexual victimization.” (131)

In the “contemporary proliferation of efforts to pursue legal redress for injuries related to social subordination,” (27) Brown discerns not only the ill effects of a Foucauldian ‘injury-identity’ formation, but also “a dissimulated political discourse of recriminations and toxic resentments parading as radical critique” (xi). In “its economy of perpetrator and victim,” political projects such as feminist anti-rape activism, seek, Brown suggests, “not power or emancipation for the injured or subordinated, but the revenge of punishment, making the perpetrator hurt as the sufferer does.” (27) In this respect it is an instance of “a cultural ethos and politics of reproach...the constellation detailed by Nietzsche’s account of *ressentiment*.” (26) “Politicized identity” comes to be based on slave-moralistic ‘wounded attachments,’ an “effect of domination that reiterates impotence,” and “reinscribes incapacity, powerlessness” and “rejection” as a “substitute” for a vital Nietzschean performance of “action...power” and “self-affirmation.” (69).

Brown considers that “much North Atlantic feminism partakes deeply of both the epistemological spirit and political structure of *ressentiment*,” (45) and this, she believes is the reason why feminists are so attached to the purported ‘truth’ of women’s experience, as granted by the theories of standpoint epistemology and the practice of consciousness-raising. “[P]ostfoundational political theory,” Brown argues, must reconcile itself to “giving up the ground of specifically *moral* claims against domination” (45) and recognize “moral ideas” as “a complaint against strength, an effort to shame and discredit domination by securing the ground of the true *and* the good from which to negatively judge it.” (44) Feminist consciousness-raising “operates,” Brown suggests, as “feminism’s epistemologically positivist moment,” producing material “valued as the hidden truth of women’s experience.” There is, she argues, a “homology between the epistemological-political operations of consciousness-raising” and those Foucault “assigns” to the type of “confessional discourse” (41) that “produces ‘truth’ as a secret contained within.” (42) Such discursive revelation is “construed as liberation from repression” and “as deliverance from the power that silences” but is rather, “a site and effect of regulatory power,” (42) through which truth is produced “as the secret of our souls not by us but by those who would discipline us through that truth.” (42)

For Renee Heberle, women’s practice of “piecing together our reality as a rape culture through speakouts and detailed descriptions of experience,” is likewise implicated in

consolidating women's victimization by "setting up the event of sexual violence as a defining moment of women's possibilities for being in the world" and "conferring a monolithic reality onto an otherwise phantasmatic, illegitimate, and therefore fragile edifice of masculinist dominance." (Heberle 1996:65) "[P]articipating in the construction of the spectacle of women's sexual suffering," does not then function as women "intuitively and understandably expected, that is, making men stop raping and beating women," but rather, "may contribute to sustaining the reality of masculinist power." (68) We would do better, Heberle argues, to follow Marcus' encouragement to focus on "stories of resistance which subvert the images of women as vulnerable," (69) and increase our "knowledge about the...fissures in...the rape script" which could "contribute to the general deconstruction of identifications of women with real sexual vulnerability and men with real sexual power." (72)

b) Producing Harm

For many critics informed by a Foucauldian account of the discursive constitution of sexual identity, anti-rape activism and jurisprudence is thus implicated in constructing women as victims, and in doing so producing the harm of rape. For Karen Engle, the *Kunarat* judgment, by "finding that rape per se constituted the harm required for torture ...reinforced the understanding that women are not capable of not being victimized by the rapes." (Engle 2005:813) Similarly, for Janet Halley, the judgment was a "huge victory for some feminists – a full-bore legitimation of the idea that rape always causes intense suffering – at the expense of others...who think...this is not right." (Halley, et al. 2006:383) Engle is concerned that the "portrayal of the harm of rape itself...perpetuate[s] a diminished sense of women's sexual and political agency," and suggests "feminist advocates...ask whether rape is really a fate worse than death." (813) Invoking the same phrase Marcus likewise notes that in "its efforts to convey the horror and iniquity of rape" feminist activism "often concurs with masculinist culture in its designation of rape as a fate worth than, or tantamount to, death." The "apocalyptic tone...it adopts and the metaphysical status...it assigns to rape" thus serves to disable challenges to patriarchal 'rape scripts' and fosters women's submission to assault by implying that "rape can only be feared, or legally repaired, not fought." (1992:387)

For Engle, the harm of rape inheres not in traumatic injury, but in a "Victorian idea of the effects of loss of honor" which, she claims, feminist activists involved with the ICTY

“projected onto Bosnian Muslim women.” (813) In ‘The Force of Shame’ (2010), Engle and Annelies Lottmann explore the role of stigma in the constitution of the harm of rape, noting that the ICTY viewed “shame and stigma...as inevitable,” whereas it “might not be” and “feminists and humanitarians” would do better to not “assume that women who have been raped in wartime are necessarily stigmatized by their... communities or that they are emotionally destroyed.” (Engle and Lottmann 2010:77) They assimilate the harm and shame of rape to stigma, defining it – according to a definition culled from the OED – as the ““painful emotion arising from the consciousness of something dishonouring, ridiculous, or indecorous in one’s own conduct...or of being in a situation which offends one’s sense of modesty or decency’ (OED 1989).” (76-7) They then suggest – citing Silvan Tomkins – that shame is “a theoretical construct, rather than an entity...defined by the word ‘shame.’” (Cited 77) The argument here is that if the harm of rape resides in shame *qua* stigma, and shame *qua* stigma is a ‘theoretical construct,’ then the harm can be unconstructed by not attributing stigma to victims. “[H]umanitarians and prosecutors who blame communities and cultures...for the shame and stigmatization of rape victims sometimes make it so,” (87) and can thus, it is surmised, make it un-so. Accordingly, without “the harm of shame...rape would lose a degree of its legal force as rape” and “sexual violence might not constitute genocide or even a crime against humanity.” (88)

In her 2009 essay ‘Foucault, Feminism and Sex Crimes,’ Chloë Taylor takes a more straightforwardly Foucauldian approach to undermining the harm of rape. Her ‘Fragment of a Genealogy of Rape’ begins by announcing that “[h]istorical studies indicate that, in the Renaissance, sex crimes were considered a consequence of passion” and rape was understood as “an inevitable and more or less acceptable activity of bachelors.” (Taylor 2009:10) The “wedding night of every man” she continues, “was imagined as a rape” and “mythological” depictions, such as “the rape of the Amazon and Sabine women,” were “frequently commissioned to decorate nuptial chambers and trousseau chests.” (10) Furthermore, the Renaissance “practice of marrying women to the men who raped them” implies, she contends, that there “was no Renaissance notion that women were trauma-tized by rape” and the practice of conceiving “the wedding night” as “a performative rape” rendered “rape normal rather than traumatic in the early modern imaginary.” (11) The prevalence of “references to the rape of the Sabine women within discourses on marriage” underline, Taylor claims, “this trauma-less conception of rape.” (11)



Figure 1: Detail of ‘Susanna and the Elders’ by Alessandro Allori (1561)

Sexual crimes were not (conceived as) traumatic, Taylor argues, prior to the modern codification of sexuality *qua* identity, and hence, when “women are raped in the modern West...one reason that rape is so terribly traumatic is that it undermines and determines their very sense of who they are. A woman who is raped is henceforth a rape victim, with all the symptoms that this entails, and if she is lucky, a survivor.” On this basis, Taylor notes that for Foucault, even “violent and non-consensual sex will be less likely to be repeated by the offender, and less permanently traumatic to the victim” if it does not get “caught up in the identities of both, constructing one person as a rapist, bound to re-offend, and the other as a rape victim, bound to be scarred sexually” and “in our age of sex as identity, to the core of her very being.” (13) Foucault thus proposed that, when “approaching sex-crime legislation reform...that we cease to submit sexual offenders to the disciplinary practices of the prison and its experts,” (14) and while, Taylor does admit, Foucault was more “concerned about so-called perverts, including the agents of sex crimes,” his notion of “the discursive constitution of sexualities” nonetheless, she maintains, applies equally to “the passive victims of such agents.” (13)



Figure 3: Detail of 'Susanna and the Elders' by Artemisia Gentileschi (1610)

c) Producing Gender

Foucault's approach to sex-crime legislation was famously exhibited in a 1977 round-table discussion in which he called for the complete desexualization of rape, arguing:

[T]here is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex...It isn't a matter of sexuality, it's the physical violence that would be punished, without bringing in the fact that sexuality was involved... sexuality can in no circumstances be the object of punishment." (Foucault 1988:200-202)

As Ann Cahill has noted, at "first glance, it would appear that Foucault's suggestion was remarkably in keeping with the current feminist wisdom, which sought to define rape

solely as a violent crime,” such as Susan Brownmiller’s call in *Against Our Will* for “a ‘gender-free, non-activity-specific’ law.” (Brownmiller 1975:378; Cited Cahill 2000:44) However, as Foucault was aware at the time – noting that he was “not at all sure that women would agree” (Foucault 1988: 200) – the response from feminists was swift and trenchant. In her magisterial excoriation, ‘Our Damages and their Compensations, Rape: The Will Not to Know of Michel Foucault,’ Monique Plaza responded sharply, “Michel Foucault, you know very well that we *do* not *at all* agree.” (29) As Cahill notes, Foucault had unsurprisingly “forgotten to ask the question of the bodily significance of the experience of being raped,” or to attend to rape’s “role in the production of the sexual hierarchy through the inscription of individual bodies.” (Cahill 2000:60) Rape, Plaza, wrote, is “sexual...above all in the sense that it opposes men and women: it is *social sexing*” which “rests on the *very social* difference between the sexes.” Men, she continued, “rape women insofar as they belong to the class ...which has appropriated the bodies of women. They rape that which they have learned to consider as their property, that is to say, individuals of the other sex class.” (Plaza 1981:29) Were it the case that rape was simply “an aggression *like others*,” Plaza dryly notes, then “men would have a much more persistent experience of it as a reality that they have suffered.” (30)

Within a social structure supportive of the sexual appropriation of women’s bodies, and which marks bodies as those of women precisely insofar as it marks them also as appropriable, to desexualize rape and “speak against sexual penalization and repression” is, Teresa de Lauretis argues, “to uphold the sexual oppression of women.” (Lauretis 1987:37) This oversight is explicable in terms of Foucault’s failure to grant any attention to the existing patterns and structures of patriarchal power, the “tremendous irony” that, Annie Bunting notes, in the course of “a three volume treatise devoted to the history of sexuality...Foucault barely acknowledges the gendered nature of Western discourse about sexuality and that he himself is participating in that long tradition of male dominated discourses.” (Cited Hengehold 1994:92) The whole roundtable discussion following Foucault’s proposal is conducted, Plaza observes, “from the point of view of the rapist, of what men want to have the right to do with complete impunity.” (30) Indeed, one of Foucault’s interlocutors interjects to note that while “in the name of women’s liberation, one is on the antirape side” in “the name of antirepression” it might be “the reverse” (Cited Plaza 1981:30) – an opposition which illuminates how far the discourse of ‘antirepression’ is concerned with male sexual entitlement and cares little or nothing for the fact that it here signifies, as Plaza spells out, “the maintenance of the oppression-

repression” that men “exercise over women.” (31) That Michel Foucault, “he who denounced the postulate of sexual repression for 159 pages in his book” has nothing to say about this “masking” of “the oppression of women by men” constitutes, Plaza maintains, “something here like a will not to know.” (31)

What is most fascinating about Plaza’s riposte to Foucault is, however, its prescience. Foucault’s claim is that by determining rape as sexual one is saying that “sexuality as such has, in the body, a preponderant place; the sexual organ is not a hand, it is not a hair, it is not the nose. It must be protected, surrounded...vested with legislation which” is not “valid for the rest of the body.” (1988:201-202) Plaza’s correct rejoinder is to note that Foucault seems to be suggesting that it will be “the fault of women” who, by noting the sexual nature of rape, are “going to” endow sexuality with its “preponderant place” while he has evidently “forgotten that this has *already* been done.” (32) Feminists would, Plaza suggests, welcome the “destruction of the ‘difference between the sexes,’” which is enforced through the “deployment of sexuality.” It is, she emphasizes, “*exactly this that we are demanding*” But while it is “certainly not we who wish that the sexual organ not be a hair,” it is crucial to understand that “we cannot function in an ideal state and act as if – here and now – the sexual organ was a hair!” Foucault’s “line of argument” rubs out any possible distinction between describing the gendering operations of sexual violence under patriarchal power, and the production of those operations, and it is, therefore, Plaza prophesies, “dangerous in that it risks making us, women, guilty.” The phenomena that men “situated in a patriarchal power relationship – persist in creating and perpetuating (the oppression of women, the ‘difference between the sexes,’ the primacy of sex)” they then “impute to us as wanting to create and perpetuate,” suggesting it is feminist women who “want to make rape something else than aggression” and that by wanting “to punish rapists for raping you – therefore, you are repressive.” (32)

This observation, from 1978, neatly sums up the trajectory of Foucauldian feminist critique we have been surveying. And with respect to the role of rape in the gendering of women, Plaza’s predictions were equally apposite. In her study of the engendering of sexual subjects during the Yugoslav Wars, Dubravka Žarkov notes that the “rapes of women in violent conflict...gain meanings through intersections of the dominant... notions of gender and norms of sexuality...relations of race, ethnicity and religion...and through a very specific political context.” All “these elements,” she continues, “inform both the particular acts of violence and the visibility of the female and male victim, indicating that both violence and its representations are produced through the same

discursive practices” and are “mutually constructive.” This “further means” that for “violence or its representation to be effective...dominant notions of femininity and masculinity, and norms of sexuality” must be “shared by victims and perpetrators.” (174) Žarkov thus correctly observes that both rapist and victim draw on the same cultural resources to interpret the event and ‘construct identities,’ and that “a woman’s experience of rape cannot be abstracted from her experience of the world in which she learns what it means to be raped.” But she then makes the common error of thinking that because x is indissociable from y, x is identical to y, and is persuaded by Marcus’ “groundbreaking criticism” (179) that “strategic intervention” should focus on ‘what women learn about rape,’ and that by “subverting practices through which the meanings of power and violability becomes productive of specific masculinities and femininities,” we could come to “dissociate femininity from sexual vulnerability.” Importantly, she underlines that by ‘practice’ she means not only “the practice of violence” but also practices of “representation” and particularly “identity politics within feminism.” (180)

Likewise, Ratna Kapur’s discussion of UN Resolution 1325 notes its deployment of “[g]ender categories” that “remain intact and fixed,” (Kapur 2013:24) as an instance of the way “a stable and normalised understanding of gender continues to be performed within the international legal arena.” These non-‘counter-hegemonic’ measures align gender with women’s vulnerability, which is “primarily addressed within the context of sexual violence, inviting interventions that conform to the normative gender script.” These “normative arrangements,” Kapur suggests, “produce[s] ahistorical and universal accounts of gender and sexuality” and “close[s] down the possibilities of change in existing gender and sexual arrangements.” (26) As such, this “overwhelming focus on violence against women” which has “been an integral feature of international law” (4) has “contributed to the reaffirmation of the categories of gender...and strengthened the border policing of these categories. (4-5) It is responsible for the “reproduction of the idea that sex is a stable, natural category” and is “the primary site for female subordination.” (10) This “dominant narrative” on “sex and sexuality as a biological category” has been “launched into crisis by...Judith Butler, who focused on sex as discursively... produced ...through gender rather than a naturalised pre-existing body.” (10) “Queer theory thus rebukes” this “dominant understanding of sex as stable” (12) and international “gender mainstreaming” for reproducing “an essentialised...understanding of the category ‘woman’” and leaving “gender itself... unproblematised.” (25)

Interlude on (an) Ontological Confusion

The power of the performative should neither be under nor overstated. We can do things with words, and we can do things with our hands. But while we can make things happen, we do not bring the whole world into existence. Not with a ‘Let there be’ (as in the first story) or by getting our hands dirty (as in the second). That *with*-which we make a world has also a life of its own, and if it lacked its own obdurance, we would never grasp it at all. We can in-form matter, but we cannot make it take just any form. Wood makes lousy sheets or shirts, and cotton terrible tables. Some things will not conform; they have their own ideas. The body is not the prison of the soul, but neither, as Foucault maintained, is the soul the body’s prison. (Cf. Foucault 1977:30)

The type of post-structuralism we have been surveying tends to arrogate itself an unimpeachable theoretical sophistication and to treat (that which it conceives of as) belief in the bodily or natural or psychic ‘pre-discursive’ as a quaintly naïve realism. But the opposition between ‘discourse all the way down’ and the ‘pre-discursive’ is false, and we have Karen Barad’s ‘agential realism’ to thank for a thinking of the intra-action of discursivity and matter that moves us past the intellectual dead end of the realist/idealist opposition. There is no phenomenon that is not a happening of both matter and idea, an assemblage of environment and unfolding potentiality. One can never be abstracted from the other, as Aristotle, against Plato, knew of the relation of form to matter. But the inextricable interpenetration of the one with the other is not the same as their identity. To think otherwise is to be confused about con-fusion.

To assimilate the observation that phenomena are discursively constituted to the proposition that phenomena are nothing but discursive is to commit an error of impermeability thinking. Two bodies cannot occupy the same space at the same time. Something must be *either* this *or* that. And if it is entirely this, then it cannot be all that as well. Culture or Nature. Discursive or Pre-discursive. One or Two. Never *both-and-at-the-same-time*. Never *Yes and No*. Never *the-same-and-also-different*.

The fact that any happening is always permeated by discourse becomes then the belief that any happening is only ever discourse, a singular, solid mass inscribed against its ‘pre-discursive’ exterior – some canonical blank-slate – which, of course, does not exist. But the relation of one to the other, of the ideal to the material, is one of permeability, not

exteriority. And permeability is not colonization, or assimilation, or erasure; not exclusion, or othering, or abjection. It is, rather, *co-existence*. It is being-*with*.

An animating premise of this study is that impermeability thinking is an original and repetitive error, and one that is, moreover, a mark – perhaps *the* mark – of the masculine. Entirely anti-foundational forms of post-structuralism remain committed, by dialectical reversal, to a masculinist metaphysics of solids and unstriated space. If there is no ground, then there must be only chasm, and, having discovered that the liberal subject is a lie – that he is not an atom, or an island, or an autochthonic city-state – it is decided that there is no one there at all. As if people without clear edges must also have no heart.

What I have always taken from Jacques Derrida – who remained, unlike Michel Foucault, ever attentive to the phallogocentric gendering of thought – is the ontological impossibility of this either/or. Everything is suspended inside the aporetic tension of the ‘both’ and the ‘and.’ The task is to think within this tension, not to replace ‘the real’ with ‘the script,’ or ‘the descriptive’ with ‘the performative,’ or the ‘idea of injury’ with the ‘idea of injury-as-idea.’ If there is always both, then we cannot abstract our descriptions from our prescriptions, or believe an object is untouched by observation, but neither will we think that our observation *is* the object, or that we have the power to describe anything into existence, and can just as easily, if we choose, describe it out again. We, as all things, are being-in-the-world, and as such we are both world-making and made by the world. We, just like the world *with*-which we are, are both matter and idea. And world-making is not just a matter of ideas, but of being-at-work with what matters in the world, working out which ideas work, and where to make a mark that will matter.

For Shame

There is, however, much more going on here than an ontological confusion about confusion. As observed by Alison Convery in her excellent 2011 thesis, ‘Feminist Theory and Discursive Intersections,’ the “particular mode of referencing victimhood” now usual “in academic feminist writing,” depends on a “feminist rhetorical practice” that assumes in the reader a “certain knowledge” corresponding to “a readily recognisable set of derogatory connotations around concepts of ‘victimhood.’” (Convery 2011:3) Indeed, as we have seen, it is, Convery continues, “now commonplace for feminist theorists to repudiate victimhood as a viable ontology of women’s experience of gendered subordination, preferring instead to highlight the ways women exercise agency...within the constraints of that subordination.” (15) In another recent article, Rebecca Stringer similarly notes that “across these critiques the broad message emerges that to represent women as vulnerable victims is disabling...regressive, and harmful, whereas to recognize women as agents is enabling, progressive, and liberating,” a tendency she terms “the ‘victim-bad/agent-good’ formulation.” (Stringer 2013:152)

A large part of this literature, Convery observes, establishes itself in opposition to a presumed feminist practice of emphasizing women’s passivity, vulnerability and powerlessness, often designated, following Naomi Wolf’s *Fire with Fire* (1993), as “so called ‘victim feminism.’” (Convery 2011:137) However, Convery’s survey of academic discussions of ‘victim feminism’ across recent decades “reveals that the evidence provided for the existence of this feminism is thin...and that the historiographies of its emergence are replete with contradictions.” (137) The reader is very often “asked to accept as common wisdom,” that a “depressingly large body of literature on the female ‘victim’” exists, and that “an alternative to it is currently lacking and sorely needed,” whereas, Convery’s survey suggests, quite the reverse is true. (156) “[F]ocusing on resistance is well-established as the normative framework for feminist theory,” she notes, and moreover, “feminists are rhetorically disciplined towards that norm,” while the “literature that privileges agency...and denigrates victimhood far outweighs that which tries to revalue victim terminology.” (158)

In the field of feminist activism, there is equally a dearth of evidence for the prevalence of a ‘victim-mentality.’ In her 2002 critique of Marcus and Brown, Carine Mardorossian notes that the “focus on the psychological effects of power” initiated by the second wave

and still characteristic of sexual violence advocacy and support services, has always been allied to an active feminist politics in which “being a victim” does not signify “being incapacitated and powerless,” but rather “being a determined and angry (although not a pathologically resentful) agent of change.” (Mardorossian 2002:767) Questions can furthermore be asked about the Foucauldian-inflected claim that, as Stringer notes of Marcus, “rape law reform efforts are counter-productive, because...they merely reinscribe patriarchal constructions of femininity as embodied vulnerability, perpetuating a sexist linking of femininity with victimhood rather than agency.” (Stringer 2013:152) However, as we will explore throughout this study rape culture is not animated by images of women’s passivity, but by resentment of their seductive power, their conniving schemes, and their role as gatekeepers of sexual goods that men think themselves entitled to. Moreover, the prosecution of rape hinges entirely on whether a woman adequately exhibited her lack of consent. Women who were too passive *are not victims* in the eyes of the law. As Stringer notes, “rape law typically figures femininity not as embodied vulnerability but as responsible agency,” (149) and “mobilizes constructions of women as agents in order to *withhold* victim recognition from certain...rape complainants.” (153)

The construction of women as ‘passive victims’ is then not normative in feminist academia, and nor is it normative in feminist activism, in the prosecution of rape, or in the rape-supportive attitudes that animate patriarchal culture. And we are then compelled to ask, what on earth is going on here? My intuition is that what is going on here is shame; time-honored woman-denigrating shame now given a shiny new neoliberal twist. Let’s look at the language. In her survey of articles published between 1987 and 2007 in solid scholarly journals like *Hypatia*, *differences*, *Signs*, and *Feminist Review*, Convery found nine associations of victimhood with “helplessness,” seven associations with “diminished rationality,” eight attributions of a “lack of complex subjectivity,” six of “false innocence,” seven of “entrapment,” and two of “being pathetic or abject.” (2011: 182-3) The “semantics of victimhood” she uncovered documented a “cluster of supposedly repellent characteristics,” (182) and the extent to which these attributions were intended to “signify diminishment is evident from the frequent...images of women” described as being “‘merely’, ‘simply’ or ‘just’ ‘passive victims.’” “As readers recognis-ing these named objects,” Convery observes, “we must agree to be repulsed.” (201)

Being re-pulsed – being ‘driven back’ by an object of disgust – is the phenomenological manifestation of a self in flight from shame; an experience in which not only the body, but also the mind, recoils. Shame, I would argue, is one of – if not *the* – most painful

human emotion. It is not a potentially morally useful sense of wrong-doing, but a singularly eviscerating sense of *wrong-being*. A vertiginous caving-in at the center of oneself we will do almost anything to escape. A person shamed in public will fold in on themselves, as if to disappear, and, when we are alone, the conscious mind will, almost always, tie itself in knots to avoid any kind of reckoning with a thought, or memory, that makes us feel a stab of gut-slicing shame. We treat our own shame, usually, just like we treat the shame of others. We push it very quickly, and very forcibly, away.

When Karen Engle's assimilated shame to stigma, she was not quite wrong, but she was very far from right. As Sandra Lee Bartsky notes, the "structure of shame" is "inter-subjective," (Bartsky 1990:86) and there is, therefore, an aspect of the experience which is inflected by social mores about what is shameful. But, to return to our opening discussion of moral injury, we are not merely, or even primarily, shamed by things we have been told are shameful. Rather, we are shamed by being treated as if we are worthless. Shame is, writes Kelly Oliver, citing Helen Block Lewis, the "'destruction of self in acute self-denigration' that comes from 'the...experience of the other's negative evaluation' of oneself." (Oliver 2004:115) As I suggested in the introduction, this is why it is facile to claim we can make rape uninjurious by removing the stigma around rape. The 'negative evaluation' that harms rape victims is not reducible to the 'negative evaluation' embedded in social stigma or conventions. Being raped is, in itself, a profound 'negative evaluation,' and the effects of this evaluation pertain, I would argue, whether or not the victim admits to herself, or to those around her, that she has been assaulted. Rape victims still experience the effects of rape even when they do not identify themselves as rape victims, and even when they are not subject to the social consequences of being identified as a rape victim – whether that includes 'stigma,' or the alleged patriarchal conviction that rape is a 'fate worse than death,' or the equally alleged (but contradictory) historical belief that rape was not traumatic at all. Genealogical accounts that attempt to efface the harm of rape by appealing to patriarchal representations that were themselves committed to that effacement, or by locating harm in the identification of harm, are thus based on a fundamental misconception of the way rape functions as moral injury.

It is not, however, facile to suggest that the social stigma around rape is an important aspect of the social conditions that amplify the injury. Despite the mind's recoiling inclination, shame has to be reckoned with, or rather, it has to be held, compassionately, in a manner that enables the evacuation of its lacerating power. To be bearable, shame has to be sublimated, the affect attenuated by being discharged through signifying

practices, and, most often, by being spoken. To speak shame requires, as Kelly Oliver notes, “not only social acceptance and support but also social forgiveness.” (91) It requires compassionate witness; that which not only facilitates the sublimation of shame, but also the repair of intersubjective trust rent by the experience of moral injury. It is compassionate witness which is denied in situations of social stigmatization and which leads to the phenomena Oliver calls the ‘colonization of psychic space,’ whereby “experiences of humiliation” are “covered over and denied... through the double movement...which operates first as a form of social...exclusion and second as a form of silencing.” (88) Under such circumstances, when “bodily...affects become cut off from words, the result is depression” in which, at its most extreme, “the depressive becomes cut off from others and enters a catatonic state.” Very often, Oliver notes, “the depressive has given up on words and society because they have given up on her.” (90)

Given this, it is incredible and unconscionable that the Foucauldian feminist idea of what to do about the harm of rape is – bluntly – to tell women to shut up about it; a suggestion which amounts to the withdrawal of compassionate witness *within* feminism. This withdrawal is aligned with the misconstrual of the function of consciousness-raising, which is not, as Renee Heberle seems to think, a mass exhibition of suffering intended to persuade men to stop raping women, or, as Wendy Brown would have it, ‘a site of regulatory power’ constituted by ‘those who would discipline us’ and which produces the truth of our victimhood ‘as the secret of our souls.’ The accounts of consciousness-raising produced early in the second-wave understood it as a form of “political therapy” which functioned by “getting rid of self-blame” and enabling women to “discover...that personal problems are political problems.” (Hanisch 1970:76) As Mardorossian suggests, it was – and as practiced within networks of feminist women, remains – “a site of collective enunciation,” through which shame is sublimated and women are freed to examine their painful experience and “come to understand” that they don’t have to continue shouldering responsibility for their own abuse; abuse which issues not from their own wrong-being, but is rather “rooted in historical and social relations.” (2002: 764) What I hear – or rather, what strikes my stomach when Foucauldian feminists try to rhetorically discipline me into ‘agreeing to be repulsed’ – is the projection of women who have been unable to speak their shame, who are stuck, still, at the stage of shoving it away, hard and fast, over there, onto the others – onto *the victims*.

I suspect this shame comes from multiple sources. Individual trauma perhaps, quite-possibly an over-identification with the masculine ideal of invulnerability, but also, as

Oliver explores in *The Colonization of Psychic Space*, being a being-in-a-world in a world that thinks you're not quite a proper being takes its toll on women's self-worth. It is not uncommon for people to evade their own shame by projection, just as it is not uncommon for women to hold rape victims responsible for their own assaults, and in so doing reassure themselves that they are immune. But, as Mardorossian, Convery and Stringer all note, this tendency to ascribe responsibility to victims, increasingly evident in academic feminism over the last three decades, has also occurred within a particular historical context; one marked by the rise of neoliberal individualism, the shredding of social structure and structural accounts of the social, the privatization of suffering, the denigration of the vulnerable, and the popular dissemination of a brand of feminism named by more radical women as 'choicy-choice' or 'empowerfulment' feminism.

According to Stringer, who is "[m]indful of David Harvey's warning that 'Any political movement that holds individual freedoms as sacrosanct is vulnerable to incorporation into the neoliberal fold,'" the "post-structuralist feminist critiques of victim feminism are incorporated into the neoliberal fold through their participation in the 'victim-bad/agent-good' formulation." (2013:154) Moreover, facile invocations of 'agency,' and critiques such as Marcus' that exhort women to take responsibility for interrupting 'rape scripts,' serve, as Mardorossian notes, to "locate[s] the source of male violence in the female subject's failure to reinvent the self." (2002:757) Not only does inciting women to take responsibility for their own abuse amplify the conditions of their shame, it also colludes with a neoliberal agenda that is "more than ever invested in transforming...social problem[s] into a personal trans-action[s]" (753) and has consequently spawned "a proliferation of victim-blaming discourses." (Stringer 2013:150)

There is, moreover, according to Convery's account, a line of continuity from the early nineties right-wing backlash against 'victim-politics,' through the work of feminism's 'prodigal daughters,' to the present feminist preoccupation with the opposition of agency and victimhood. The "'political correctness' code" emerged, Convery notes, as part of the backlash to "minority challenges to the status quo" and functioned by "discursively collapsing all claims of disadvantage as being about victimhood...and then by devaluing victimhood as a morally, and not just a practically, reduced state." Early nineties best-sellers such as Katie Roiphe's *The Morning After* (1993) and Wolf's *Fire with Fire* (1993), then developed, Convery suggests, as "part of these general attacks on feminism within the discourse of 'political correctness.'" (2011: 6) These accounts, Convery continues, "establish a climate that severely restricts the valid criteria for claiming victim status in

feminist terms” in which “the definition of sexual coercion is pared back; there is no evidence on which to base a theory of structural inequalities; articulating victimisation ‘creates’ victims; and lack of effective resistance to oppression is interpreted as weakness of individual will, not imposed constraint.” (115) In deploying the “binary opposition of victimhood and agency,” feminists are thus invoking “interpretive frameworks that were automated outside feminism,” and “oversee[ing] a normative structuring of feminist approaches and modes of argument...supported at its origins by the meanings encoded in a hostile discourse.” (ii)

Indeed, as Convery’s narrative suggests, there is a great deal of resonance between the backlash writings of Roiphe and Wolf and the tropes we have encountered in our survey of Foucauldian feminist responses to rape. These include “a general scepticism in regard to concepts like patriarchy,” the belief that “[p]atriarchal theory...promotes a view of women as powerless victims” (2011:110), Roiphe’s claim that radical analyses deploy “a ‘Victorian’ version of female virtue” which “den[ies] female sexual agency and infantilize[s] women,” (Mardorossian 2002:748) and both Wolf and Roiphe’s contention that women’s victimization is tied up with their “identifying as a victim.” Indeed, for Roiphe – who was notoriously dismissive about rates of sexual assault on college campuses – feminism was singularly responsible for fuelling the ‘rape epidemic’ by furnishing women with “stock plots” that “implant the idea that women are victimised,” and then “encourage” them “to play out the role of the victim.” (Stringer 2001)

Naming the Problem

“Is this symbolic order...we are talking about primarily or paradigmatically masculine?” (Butler 1998:27)

This all sounds very familiar, all these ‘stock plots’ and ‘rape scripts,’ all this acting-out and playing a part, all this *performing* the victim. And so at last, after a winding, tortuous, and shame-soaked approach, we finally find ourselves at Butler’s door. *Gender Trouble* (1990) was, of course, what started a lot of this trouble, but after forty-some pages, time and space preclude an extensive engagement with Butler’s influential thoughts on the performativity of sex and gender, beyond the allusions already made in the interlude. There is however, one final exploration I cannot forgo.

At first glance, the account of subject formation – of subjectivization or ‘*assujettisse-ment*’ – presented by Butler on the opening pages of *Gender Trouble*, strikes us as straightforwardly Foucauldian. “Foucault points out,” we are told, “that juridical systems of power *produce* the subjects they subsequently come to represent,” (Butler 1990:2) that “subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures,” and that “[i]f this analysis is right, then the juridical formation of language and politics that represents women as ‘the subject’ of feminism is itself a discursive formation and effect of a given version of representational politics.” (3)

On closer inspection, however, something is slightly off. Foucault famously distinguished between the historical regimes of ‘juridical’ and ‘disciplinary’ power, where ‘juridical’ refers to the representation of law authorized by the sovereign right to violence, the issuing of interdiction, and the practice of spectacular punishment, and ‘disciplinary’ denotes the micropolitical regulation of subjects through the creation of norms, discourses of expertise, and the propagation of technologies of self. Foucault’s argument against ‘the repressive hypothesis,’ is, essentially, that by granting excessive prominence to the interdictions of juridical power, we misunderstand the diffuse dissemination of distinctively modern forms of disciplinary power, which not only repress, but also *produce* subjects.

It would seem then, that when Butler claims that Foucault ‘points out’ that ‘*juridical* systems of power *produce*...subjects,’ she is mistaken, and indeed, Moya Lloyd has argued that there is “evidence of conceptual confusion in how Butler uses the term ‘juridical,’” which she attributes to the fact that Foucault “also conceptualizes power, in general, as productive” and terms this power, ‘juridico-discursive.’ Lloyd thus explains Butler’s apparent ‘conceptual confusion’ as issuing from a kind of short-hand, concluding that, “[w]hen Butler uses the terms ‘juridical, it seems she actually means juridico-discursive.” (M. Lloyd 2007:162-163) But Butler is not an imprecise thinker, and I would suggest her deployment of ‘juridical’ in place of ‘disciplinary’ is both more deliberate and philosophically significant than that. Just after her opening account of productive power, we encounter a clue, a Foucauldian phrase with a distinctively Derridean ring pops off the page; the “question of women as the subject of feminism” writes Butler, “raises the possibility that there may not be a subject who stands *‘before’ the law,*” and is thus “awaiting representation in or by the law.” (1990:4; my emphasis)

Butler’s ‘juridical’ is actually serving, I would argue, as the site of the insertion of the critique of what I am calling here ‘the logic of sovereign integrity’ into a Foucauldian account of totalizing disciplinary productive power. Hence, the explicitly “*juridical structures* of language and politics” (7; my emphasis) by which “subjects *are invariably produced* through certain exclusionary practices” (3; my emphasis) “constitute the contemporary field of power” such that “there is *no position outside this field.*” (7; my emphasis) I have no argument here, of course, with the idea that juridical – or sovereign – structures inform subject constitution according to a spatialized logic, or “prevailing assumption” of “ontological integrity,” (4) accompanied by ‘exclusionary practices.’ That would, indeed, be one version of the premise of this study. However, what Butler achieves by inserting this idea into the Foucauldian analytic of productive power is the proposition that ‘juridical structures’ constitute the totality of ‘the field of power,’ and that the logic of sovereign integrity thus delineates the ‘invariable’ mechanism of subject constitution.

Indeed, in *Bodies that Matter* (1993), Butler maintains that the “sexed subject, grounded as that subject is in a repudiation,” is “constituted through the force of exclusion and abjection, one which produces a constitutive...abjected outside, which is, after all, ‘inside’ the subject as its own founding repudiation.” (Butler 1993:3) As will become familiar in the course of our engagement with Jessica Benjamin, this claim about a ‘founding repudiation’ is central to the feminist psychoanalytic account of the way masculinity *qua* sovereign integrity is enacted through the violent disavowal of the feminine, and the

dependency and vulnerability that ‘woman’ connotes. But in Butler’s hands, this account, and its consonance with the Derridean critique of phallogocentric sovereign logic, is radically de-gendered. The universal subject that difference feminists have painstakingly unmasked as masculine turns out to be universal after all, and as such, the mechanism by which hegemonic masculinity wreaks its violence on women is, once again, invisibilized. Indeed, incredibly for a thinker who professes a commitment to feminism, in the preface of *Gender Trouble* Butler recalls that she learnt – from Beauvoir it is implied – about the way in which the “radical dependency of the masculine subject on the female ‘Other’ suddenly exposes his autonomy as illusory.” But then breezily adds that “[t]hat particular dialectical reversal of power... couldn’t quite hold my attention.” (1990:xxx) It’s hard to know how to read this other than as a matter-of-fact admission that Butler just isn’t very interested in the oppression of women. And that would be fine from most theorists – we all have our interests – but it’s more than just troubling coming from the most influential thinker in the field of contemporary feminism.

And yet, it makes sense. Butler’s political concern is not with the abjection of women as the constitutive outside of masculinist sovereign integrity, but with the abjection of those who fall outside the “heterosexual matrix.” (xxx) To this end, she is invested in demonstrating that sexual dimorphism is a discursive constitution, and that the construction of sexed subjects within the heterosexual matrix functions according to an identical logic of sovereign exclusion. Her interest is in how “power” appears “to operate in the production of” the “very binary frame for thinking about gender.” (xxx) By this logic, any discussion – such as this study – which deploys a ‘binary frame’ of sex and/or gender (the distinction between which Butler has collapsed), to describe or explain the mechanism of women’s oppression becomes itself an ‘operation of power.’ The designation of women as a sex-class, and the analysis of the way in which women are oppressed *because they are women*, thus becomes inexpressible. Men’s dependency on women – the dependency that couldn’t quite hold Butler’s attention – occurs *within the heterosexual matrix*, and is borne not only of emotional dependency, but also of men’s need for access to women’s bodies as both a sexual and reproductive resource. The way in which this dependency is disavowed by the structure of sovereign integrity – and the violence that attends the impossibility of this disavowal – is the driving mechanism of patriarchal appropriation.

But, according to Butler’s account, we can neither think the material nature of this dependency, nor describe the fact that it issues in particular appropriations and violence,

which flow overwhelmingly in one direction, from male persons to female persons. In fact, as with so many accounts we surveyed, simply describing this structure makes us, as Plaza predicted, ‘guilty,’ and, in Kapur’s words, in need of ‘rebuke.’ The most egregious ‘operation of power’ in play when women identify female persons as particularly subject to certain types of sexed and sexual violence is the ‘stabilization of sex.’ Feminism has itself elected to make masculine-pattern violence unspeakable. And it is, I suspect, entirely non-coincidental that this is the form of feminism – a form that disavows a discourse of male violence in its very fundamentals – that has, uniquely, escaped the academic feminist ghetto to be embraced across the disciplines.

Given that there are few other phenomena that so starkly exhibit the sexed structure of patriarchal appropriation, the attempt to efface the harm of rape becomes then, not so much a side effect, as a theoretical necessity. Moreover, by Butler’s account, there is no mechanism by which the sexed and gendered nature of rape could be explicable. There is neither sexed-based material dependency, nor a structure of sovereign masculine invulnerability contorted by its own impossibility. By degendering the logic of sovereign integrity Butler has disallowed the most powerful explanatory framework we have to explain the structure and function of patriarchal domination. And while such domination doesn’t seem to interest her much, such an explanation is in the interest of the hundreds of thousands of women whose lives are blighted by patriarchal violence. For those women, the absurd Foucauldian suggestion that patriarchal violence is ‘spoken’ into existence and that it can be ‘spoken’ out again, is not a mere academic irritation, but the disallowal of the practice by which their injuries are repaired. When sex based violence fades from history, we will, by all means, stop speaking it. Until then, we will continue doing what works. And what works, for individual women, steadily, pulling each other up, one after another, are the techniques of compassionate witness and political therapy developed by the second wave, and still used by victim support practitioners today. What works is ‘Break the Silence,’ ‘I Believe Her,’ and ‘Name the Problem.’

Lastly, unless one considers the masculinist logic of sovereign integrity to be, in fact, the mode of constitution of all sexed subjects, there is no reason to suppose that ‘woman’ as ‘the subject of feminism’ is necessarily formed by abjection. Butler – or at least early Butler – does not believe in that which Derrida might call the otherwise, or Irigaray denotes as ‘the feminine.’ To her mind, “the ‘I’ emerges upon the condition that it deny its formation in dependency, the conditions of its own possibility,” (1993:10) and there is, therefore, no space in her thinking for a subject who exists in an acceptant, aporetic

awareness of their constitutive relational vulnerability. Despite the fact that, according to sovereign logic, women's bodies prevent them *a priori* from incarnating invulnerability, female subjects are, to Butler's mind, constructed by precisely the same existential infrastructure as are men. And it cannot be *otherwise*.

Were this the case, there would be little point in the critique of sovereign integrity I am about to advance, or the account I will give of its role in undermining women's personhood, and in generating the appropriative sexual violence the discourse of bodily integrity is intended to resist. But I do not think this is so. The critique of phallogocentrism, the Irigarayan account of the male imaginary, feminist psychoanalysis, the ethics of care, the structure of misogyny, the preponderance of male violence, the mechanics of rape culture – all this convinces me that sovereign integrity is a gendered phenomenon, that it is animated by a foundational repudiation of vulnerability and the feminine, and that, moreover, while it is anchored by deep historical, psychic, ontological and cultural roots, it is not inevitable. This conviction – that we are dealing not with a universal, but with a gendered principal of patriarchal domination – is then, that which distinguishes this study from the evasion of male violence, and effacement of sexual harms, presaged by Butler's Foucauldian intervention. It is my hope that this contribution, while informed by post-structuralism, is also, therefore, still consonant with the values and theory that informs the practice of women who dedicate their lives to supporting and advocating for the victims of sexual violence. They are the experts.

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