

# The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks

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## INTRODUCTION

In the mid- and late 1980s—a time that could arguably be described as the golden age of feminist legal thought, for North America at any rate—empirical researchers as well as theorists were virtually obliged to take sides in the cross-disciplinary debate (or dialogue of the deaf) concerning “postmodernism.”<sup>1</sup> The intrafeminist fights often focused on the work of feminist philosopher Judith Butler. Butler’s analyses were not primarily focused on legal mechanisms,<sup>2</sup> but the implications of postmodern theorizations of gender such as those developed by Butler for legal studies loomed large in the investigations of feminist legal thinkers, both those who were “in favour” (e.g., Drucilla Cornell, Janet Halley, Wendy Brown, Nicola Lacey, Carol Smart) and those who were “against,” who included not only mainstream liberals like Martha Nussbaum, but also socialist feminists such as Nancy Fraser and radical feminists such as Catharine MacKinnon. Regardless of the answers given, the question addressed by these heated debates—

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1. FEMINISM/POSTMODERNISM (Linda J. Nicholson ed., 1990).

2. While not a legal theorist as such, Butler has analyzed the regulation of sex and gender through law at various points in her work. More pertinent to this Article is the fact that Butler has also made a major contribution (which does not seem to have been much read by professional legal theorists) to thinking about the gendering of justice from a postessentialist perspective via a reflection on the way in which the figure of Antigone has been taken up in Western philosophy. See JUDITH BUTLER, ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH (2000).

is postmodern theory useful for feminism?—was based on a presupposition that was rarely, if ever, made explicit. This presupposition perhaps could only emerge as itself a question later on, in retrospect: namely, that theories, postmodern or otherwise, should be judged for their value for theorizing gendered *subjectivity*.

In the second decade of the twenty-first century, there are remarkably few traces of the great wars about postmodernism versus humanism and about essentialist versus anti-essentialist views of gendered subjectivity within legal theory and in broader feminist theory circles. While the relative weakness of today's feminism as compared to the more powerful and more hopeful movement of the 1980s has received a great deal of attention and commentary,<sup>3</sup> the question this Article addresses is not the quantitative one of strength versus weakness, but rather the qualitative, indeed philosophical, question of the object of theory. That is, while understanding the changing political winds that may have brought about a weakening or a dispersal of the feminist impulse in the English-speaking world is important, such political commentaries have not shed much, if any, light on shifting assumptions regarding the fundamental question of the purpose, the driving force, and/or the *telos* of theoretical work, and theory's basic form and logic. At this level, one can see, in retrospect, that the famous fights about postmodernism of the 1980s were fights about how to theorize subjectivity, and in the case of feminist theory, gendered subjectivity. If the great intrafeminist fights about postmodernism that took place in the late 1980s and early 1990s now seem quaint, this is because the focus of theoretical attention has shifted away from subjectivity—that which the postmodern debates sought to theorize. But why and how did subjectivity recede into the background for legal and social theory? In this Article I show that in feminist legal studies, as in other areas, a dual shift in theoretical scale is what explains the relative decline of debates about gendered subjectivity.

The first component of this thus far unnoticed scale shift concerns what we could call the venue or the locale privileged by theory. Specifically, the everyday subjectivity or consciousness of ordinary metropolitan folk, which was the primary object of analysis for second-wave white feminism,<sup>4</sup> does not now appear nearly as interesting as the far less individualized situation of people—women, for feminist theory—in locales that are far removed from the writer's own and that are often perceived, or more often imagined, through an Orientalist or exoticist filter. The geographic and jurisdictional shift<sup>5</sup> in theoretical interest that has taken

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3. See, e.g., Margaret Thornton, *An Inconsistent Affair: Feminism and the Legal Academy*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 25 (Martha Albertson Fineman ed., 2011) [hereinafter *TRANSCENDING THE BOUNDARIES OF LAW*]; *FEMINIST PERSPECTIVES ON LAW AND THEORY* 25–39 (Janice Richardson & Ralph Sandland eds., 2000).

4. FEMINISM/POSTMODERNISM, *supra* note 1, at 1.

5. See Mariana Valverde, *Jurisdiction and Scale: Legal Technicalities as Resources for Theory*, 18 *SOC. & LEGAL STUD.* 139, 140 (2009).

us away from the domestic realm—both in the sense of domestic national policies and in the sense of the ordinary household—and to the transnational has certainly brought about theoretical innovations and successes, and I hasten to note that I am not in any way advocating a return to the sometimes parochial and often ethnocentric paradigms of the 1970s and 1980s. However, the shift to the transnational has had the perhaps unintended effect of sidelining or even burying certain critiques (the feminist critique of “ordinary” marriage, for example) that still have validity today, but that are rarely taken up as serious questions for feminist theory.

The second component of the scale shift with which this Article is concerned is that theoretical fashions today encourage us (and I include myself in this critique) to focus not on people and their consciousness and self-consciousness, but rather on flows, networks, governance assemblages, and so forth. This scale shift, again, has many virtues; but it may have brought about a neglect not only of particular theories of gendered subjectivity popular in the 1980s, but even of subjectivity itself. Combined with a shift to “global” locations and venues historically regarded by Westerners as giving rise to undifferentiated victimhood rather than self-aware subjectivity, a loss of theoretical attention to subjectivity may be problematic.

Before analyzing this dual scale shift in some detail, it is useful to ask the genealogical question, namely, how did subjectivity come to occupy, often implicitly and without discussion, such a central location for theory in the 1980s? Very briefly, the questions about subjectivity, subject positions, consciousness, and the like, which were central for the 1980s, were inherited from the structuralist theorizing of the 1950s and 1960s, as opposed to carefully chosen.<sup>6</sup> But the question of the subject then gained a new and eventful life through the varied poststructuralist investigations of contradictory and fragmented subjectivity, and of course, also through the denunciations of postmodernism that followed, denunciations that often claimed that postmodern theorizations were disrespectful of or inimical to the politically conscious subjectivity that critical theorists all sought to promote.

Whatever the answer, however, it seemed clear that the question of the subject was *the* question for theory in the 1980s and early 1990s. For example, Judith Butler’s most famous work, *Gender Trouble*, was devoted to showing that the humanist assumptions conceiving subjectivity as static and inborn were wrong,

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6. The large debt that poststructuralism owed to classic structuralist analyses was often minimized or left unmentioned. One notable essay that did make this debt explicit was Gayle Rubin’s *The Traffic in Women*, which used a detailed commentary on Levi-Strauss’s theory of kin relations to build something like the germ of queer theory. Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 157–210 (Rayna R. Reiter ed., 1975). But in general, feminist and left-wing writers of the 1980s minimized their debt to the structuralist paradigms that shaped not only anthropology, but also cultural studies and social theory, generally in the 1960s and 1970s.

and that the modern self-aware subject with a complex interiority, a self-consciousness, is actually the product of juridical and disciplinary governance processes, with gender being one of the key vectors for subject formation.<sup>7</sup> Few noticed at the time that Butler began her argument by presupposing that subjectivity is that which needs to be theorized: “The question of ‘the subject’ is crucial for politics, and for feminist politics in particular, because juridical subjects are invariably produced through certain exclusionary practices . . . .”<sup>8</sup> Significantly, Part One of this book is entitled “Subjects of Sex/Gender/Desire.”<sup>9</sup> For all the attention, positive and negative, that Butler’s theory of gendered subjectivity drew, little was said about the original, shared question to which Butler gave a particularly innovative answer.

A similar concern with finding more sophisticated, less conventional tools for theorizing subjectivity, and gendered subjectivity in particular, undergirded Drucilla Cornell’s important explorations of what Lacanian psychoanalysis and deconstruction might do for feminist legal thought. Her book *Transformations* begins by declaring that the task of critical sociolegal theory is to analyze the transformation of “the subject” in work in which the “subject” or topic is itself “transformation.”<sup>10</sup> If Cornell, along with other (mainly European) feminist thinkers, spent time reading and reflecting on Jacques Lacan’s work, this was because Lacan was then regarded as the most important theorist of psychic formation, that is, of individual subjectivity, just as neo-Marxist writers such as Ernesto Laclau and Stuart Hall were regarded as providing better answers than orthodox Marxism to the questions of class and, more generally, group subjectivity or consciousness.

The answers to the question of “what is subjectivity?” clearly varied. Socialist humanists as well as feminist humanists defended the “agency” of subaltern subjects (in keeping with the now-neglected but then tremendously influential work of E.P. Thompson, which had a huge impact on the nascent enterprise of

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7. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND SUBVERSION OF IDENTITY* 3–9 (1990).

8. *Id.* at 5.

9. *Id.* at 3. This section of Butler’s book draws on Foucault’s work, but also on Butler’s earlier, magisterial work on French appropriations of Hegel’s theory of self-consciousness, which had been her doctoral dissertation and appeared later as a book, significantly entitled *Subjects of Desire*. JUDITH BUTLER, *SUBJECTS OF DESIRE* (1987). Butler’s interest in French twentieth-century theories of the subject was by no means idiosyncratic. For reasons that would require another article to explain, France—and Paris in particular—was widely regarded as the privileged source of theories applicable to the world at large during the second half of the twentieth century, from Sartre in the 1950s through Althusser and Lacan in the 1960s and 1970s to Derrida and Foucault in the 1980s and 1990s. Therefore, if “the subject,” subjectivity, and subject positions were in vogue in Paris, there was a good chance these entities would also come to be regarded as the default objects for critical social theory everywhere else.

10. DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* 1 (1993).

feminist history as well as in some social science networks).<sup>11</sup> On their part, hard-core structuralist Marxists, a shrinking but still influential group, ridiculed the agency of subaltern subjects as a liberal humanist delusion. Feminists influenced by Lacan, in turn, explored the nonidentity of the subject (e.g., in the English journal *m/f*, and later in some contributions to *Law and Critique*). In the meantime, feminist thinkers influenced by deconstruction and other tools for revealing the contradictions of fragmented subjectivities proceeded to show how the opposition between “feminine” and “masculine” deconstructed itself,<sup>12</sup> with Gayatri Spivak being arguably the leader in this regard and Drucilla Cornell making the most sustained effort to use insights from Lacan as well as deconstruction in legal contexts.<sup>13</sup>

The problem of how to theorize gendered and sexed subjectivity gave much food for thought for feminist legal theory as for all progressive thought in debates that attracted large and not exclusively academic audiences both in print and in real life.<sup>14</sup> Thus, if we now want to ask whatever happened to feminist legal theory, and we are interested in philosophical shifts rather than political winds of change, the question can be reworded, more concretely, as the question of whatever happened to theorizing (gendered) subjectivity.

This Article attempts to provide a genealogical account of the epistemological assumptions of today’s feminist legal thought focusing not on the rise of neoliberalism or globalization or any of the other keywords popular today, but rather on the obverse process: the quiet sidelining of subjectivity as the central issue for critical theory, including feminist legal studies. And to explain how “the subject” of critical theory was displaced or quietly moved to the back burner—in a move that put an end to the endless postmodern debates without any winners having been declared, or any closure having been reached—the theoretical metaphor I use, as already mentioned, is that of “scale shift.” I argue that just as the 1980s focus on gendered subjectivity was not an autonomous product of feminist reflection, but was rather rooted in and reflective of larger theoretical currents, so too, the project of theorizing gendered subjectivity fell victim to a dual theoretical scale shift also affecting other fields of critical thought.

Like all scale shifts, the processes described here brought certain phenomena

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11. See, e.g., EDWARD PALMER THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963).

12. See, e.g., Mary Poovey, *Feminism and Deconstruction*, 14 *FEMINIST STUD.* 51, 57 (1988) (“[A]sking women to read as ‘woman’ . . . is to make a self-contradictory request, for it appeals to the condition of being a woman as if it were a given and simultaneously urges that this condition be created or achieved.”) (internal quotations omitted).

13. DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT* (1995); CORNELL, *supra* note 10, at 5 (describing her attempt to “dismantle the rigid structures of gender identity” while simultaneously upholding the “affirmation of feminine sexual difference”).

14. Cf. Mariana Valverde, *Beyond Gender Dangers and Private Pleasures: Theory and Ethics in the Sex Debates*, 15 *FEMINIST STUD.* 237 (1989).

into focus that had previously been blurred or pushed to the background; but by the same token, other forms of power and other sites of masculine privilege became increasingly invisible. And at the level of feminist politics of law reform, the most glaring absence in the new paradigm is that of the critique of the institution of marriage and of contractual models of family and intimate relations, a critique generated by theorists focusing on the “everyday” subjectivity of ordinary heterosexual Western women, the theoretical object shared by socialist and radical feminists of the 1970s and 1980s (and to some extent also by liberal feminists).

The following section describes, in general terms, the dual scale shift that made contemporary theory possible. Part II will briefly consider some key works of the 1980s, works that are still heavily cited today but which have been very selectively appropriated so as to bury some aspects of their radical critique of the subjectivity or legal consciousness of ordinary everyday Western married women—aspects that could perhaps be usefully revived. This Article then concludes, in a necessarily speculative manner, with the consequences and implications of the scale shifts described here for critical legal thought and practice today.

#### I. FEMINIST LEGAL THEORY RESCALED: GEOGRAPHY, CULTURAL DIFFERENCE, AND THE INVISIBILIZATION OF “ORDINARY” FEMININE SUBJECTIVITY

Around 1980, most critical work in legal and political analysis available in English was concerned with what was then called the “consciousness” of ordinary everyday people living in the metropole. Marxist theorists focused on working-class consciousness, using Gramsci and Marxist cultural studies to ponder whether consumer culture had fatally tainted the class consciousness of the working class in affluent countries. Feminist thought concerned itself with political representation, with abortion rights, and with access to nontraditional jobs (blue-collar and professional), but it also spent much time and energy addressing the dynamics of ordinary married heterosexual life. *Ms.* magazine, for example, promoted the American bootstrap theory of social change by urging women to become professionals and managers, but the magazine also critiqued the dynamics of everyday domesticity—“the personal is the political” was a slogan that was not confined to the more radical sectors of the women’s movement.

In U.S. law and society circles—which, like other American intellectual networks, generally remained either hostile to or simply untouched by the hard-line Marxist structuralism popular in Western Europe and other places with a strong Marxist tradition (e.g., Latin America, India)—the focus on the consciousness of ordinary folk gave rise to such innovations as the idea of “legal consciousness,” almost always studied, in the early days of that literature, by examining the actions, thoughts, and aspirations of working-class Americans. Sally

Merry's influential *Getting Justice and Getting Even* is one of several important works in this line,<sup>15</sup> and it was heavily cited in later work that focused more directly and explicitly on the gendered subjectivity of ordinary Americans. She and others within the law and society movement focused on working-class and poor people's struggles with law, as distinct from mainstream liberal feminists' focus on cross-class gender issues or issues specific to middle-class and professional women; but alongside these political differences there was a common theoretical focus: the subjectivity (or consciousness) of ordinary, mainly white, mainly married folks living in the metropole.<sup>16</sup>

The consciousness/subjectivity of ordinary Western folks was also the focus of the nascent radical feminist theorization of patriarchy developed by many activists and writers, amongst whom only Catharine MacKinnon is now remembered.<sup>17</sup> MacKinnon and her more populist friend and colleague Andrea Dworkin sometimes used particularly violent instances of patriarchal domination for emotional effect, but their analysis was radical precisely because they insisted that patriarchal power was present everywhere, even in ordinary happy marriages, and was even constitutive of gender, and thus of female subjectivity, as such.<sup>18</sup> It is significant, in retrospect, that even when finding and publicizing extreme examples of masculine domination, their favorite examples came from the California pornography industry, not from exotic Third World locales.<sup>19</sup>

In contrast to the default locales of 1980s feminist thought, namely the ordinary households and workplaces of the metropole, and in contrast to that thought's theoretical focus on ordinary Americans, feminist thought and analysis today—within legal studies, but also in other disciplines—tends to focus either on “exotic” locales (Asian brothels, African refugee camps) or on transnational and diasporic populations in the West. Feminist work on migration, on the

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15. SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LOCAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

16. See, e.g., Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in *LAW IN EVERYDAY LIFE* 63, 63–108 (Austin Sarat & Thomas R. Kearns eds., 1993).

17. Mary O'Brien authored another innovative work that also turned Marxist paradigms of labor and surplus value on its head, but focused on reproduction and childbirth rather than on sexual activity. MARY O'BRIEN, *THE POLITICS OF REPRODUCTION* (1981). O'Brien had been a midwife in Scotland for many years before she arrived in Toronto to earn a doctorate in social theory, writing a dissertation that used Hegelian and Marxist language to theorize women's oppression as rooted in men's appropriation of women's reproductive labor. Despite its high intellectual quality, her work had only short-term and local influence, perhaps because she never sought media attention or travelled widely to give talks, unlike Dworkin and MacKinnon. Susan Griffin and Mary Daly were two other noted radical feminist philosophers of the time who are now forgotten. SUSAN GRIFFIN, *WOMAN AND NATURE* (1978); Daly's work will be briefly discussed below. See *infra* note 27 and accompanying text.

18. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 9, 24, 128 (1987).

19. ANDREA DWORKIN, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* 101–11 (1976); MACKINNON, *supra* note 18, at 128; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 195–214 (1989).

international division of labor, on diasporic communities in the West, and on exploited “Third World” women has come to displace the old socialist-feminist interest in working-class Western women, as well as the old liberal-feminist focus on professional or would-be professional Western women. Significantly, Sally Merry’s recent work has been almost exclusively concerned with international human/gender rights and has focused attention on parts of the world that had been virtually ignored by the pioneers of second-wave feminist legal analysis.<sup>20</sup>

Liberal legal feminism is a diffuse mainstream movement, which makes its history difficult to pin down or analyze; but the tremendous popularity, today, of human rights and philanthropic campaigns focused on racialized women and girls in Asia and Africa (e.g., the corporate “Because I’m a girl” campaign<sup>21</sup> to provide private development aid specifically for girls’ projects) suggests that even though liberal feminists have by no means stopped worrying about gender differences in salary in the metropole, abortion access, and other traditional liberal feminist campaigns, the shift to the transnational is visible in liberal feminism too. That liberal, pink-ribbon quasi feminism tends to exoticize girls and women in foreign locations and to demonize “brown men”<sup>22</sup> in its portrayal of the gender politics at work in such locales has already been pointed out by numerous feminist writers.<sup>23</sup> But what is less obvious is that, despite the marked political differences separating liberal feminists from both the progressive feminism of people like Sally Merry and the radical feminism of MacKinnon and her followers, a similar quasi-geographical scale shift can be observed in liberal feminist concerns about law and state power. (I say “quasi-geographical” to draw attention to the connotations of locales such as the sex industry of Thailand or war-torn villages in Africa, locales that come already infused with certain Orientalist meanings that are not a necessary product of geographical difference.) The shift may have been more opportunity-driven than theory-driven, insofar as during the 1990s the possibilities for feminist legal change were rather dim in the United States while international law provided some points of entry, such as the development of the “rape as a war crime” campaign<sup>24</sup>—points of entry into the transnational opened up by radical feminists, but later exploited by feminist lawyers and activists working closely with

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20. See, e.g., SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

21. See *BECAUSE I AM A GIRL*, <https://becauseiamagirl.ca> (last visited Jan. 29, 2013).

22. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 297 (Cary Nelson & Lawrence Grossberg eds., 1988).

23. E.g., Ratna Kapur, ‘Faith’ and the ‘Good’ Liberal: *The Construction of Female Sexual Subjectivity in Anti-Trafficking Legal Discourse*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS* 223, 227–232 (Vanessa E. Munro & Carl F. Stychin eds., 2007); PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* (2011).

24. See, e.g., Jina Moore, *Confronting Rape as a War Crime: Will a New U.N. Campaign Have Any Impact?*, 4 *CQ GLOBAL RESEARCHER* 105 (2010).



Hillary Clinton's State Department.<sup>25</sup> But whatever the immediate reasons for the scale shift, the fact remains that what Betty Friedan had diagnosed as "the problem with no name" in the very early stages of second-wave American feminism,<sup>26</sup> that is, the gendered troubles of ordinary white American women, completely receded from view.

In regard to radical feminism, some of the key theoretical works of the 1970s and 1980s were written at the scale of grand philosophy, the now-unknown work of feminist theologian Mary Daly<sup>27</sup> being perhaps the best known in North America. In continental Europe, where university-educated women were likely to have read Kant, Hegel, and Lacan, and were very unlikely to be interested in theological paradigms, feminist or otherwise, Luce Irigaray and Helene Cixous pioneered a certain brand of radical feminist philosophy that sought to celebrate not so much women's biology as women's desire.<sup>28</sup> And in many Western countries, analyses of the inherently rapacious character of masculinity as such converged to some degree with the environmental radicalism that was then emerging, with the gendering of the Earth as a vulnerable female figure being key in this intellectual merger; but for present purposes the fate of this type of thought need not concern us, since it had little, if any, interest in legal reform or legal analysis. The more relevant currents for our purposes were those that swirled around Catharine MacKinnon, whose first book, important because it invented the term "sexual harassment," shared many of the initial questions also posed by Sally Merry's work on ordinary working-class Americans, even though their answers were markedly different.<sup>29</sup>

At the level of politics and practical legal change, Andrea Dworkin and Catharine MacKinnon's most important campaign of the 1980s concerned pornography. As is well known, the innovative strategy they pursued was to break with the legal habit of governing pornography by means of the criminal law of obscenity and turn instead to civil law remedies.<sup>30</sup> The theoretical drive for this ultimately unsuccessful strategy was that they wanted to stress that pornography harmed women directly, women as a group (not just the women working in the industry or the women whose male partners were unduly influenced by its images),

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25. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 356–58 (2006).

26. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 15 (1963).

27. MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* (1990).

28. See, e.g., LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* 23–33 (Catherine Porter & Carolyn Burke trans., Cornell Univ. Press 1985) (1977); Hélène Cixous, *The Laugh of the Medusa*, 1 SIGNS 875, 876 (Keith Cohen & Paula Cohen trans., 1976).

29. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*, at xii (1979) (describing her project as "bring[ing] to the law something of the reality of women's lives," and arguing for the recognition of the phenomenon of sexual harassment).

30. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 20–70 (1985).

and that this harm was essentially a civil group harm—rather than an offense against public morals that should be legally regulated as a crime against the state.<sup>31</sup>

Whatever its legal and political defects—analyzed and debated by numerous critics and supporters, both feminist and nonfeminist, at the time—the campaign to redefine pornography as a civil-law harm to women as a group had the theoretical virtue of strongly unifying the ordinary women of metropolitan countries, regardless of race, class, age, marital status, or any other demographic variable. This unification of women, considered as collective victims of an industry based on the commodification and objectification of the female body, was a theoretical move that drew heavily on the structuralist theory of working-class subjectivity that had been promoted by Louis Althusser and his many followers in previous decades. Althusser is only quoted once in *Toward a Feminist Theory of the State*,<sup>32</sup> but it may be significant that the book cited there, *For Marx*, carried out a systematic critique not only of Hegelian and humanist interpretations of Marxism, but, much more radically, of any effort to create a historically grounded socialist theory of social change.<sup>33</sup>

The Althusserian influence on MacKinnon's approach to theorizing gendered subjectivity may not have come directly. At that time, any attempt to theorize “the” state—as we used to say—necessarily engaged with the Althusserian paradigm of subjectivity as wholly constituted through the operation of “state ideological apparatuses,” and much of the debate about what we always called “the” state in fact consisted of nothing but minor modifications of the Althusserian model. It made sense that just as Althusserians proclaimed that all workers in capitalist economies are structurally oppressed,<sup>34</sup> no matter how contented they might be, so too MacKinnon, who more than any other feminist legal analyst put herself forward as a grand theorist on a par with Althusser, would proceed to argue that what individual women say or think about either pornography or about their experience with individual men is irrelevant when theorizing pornography, and gender in general.<sup>35</sup> Applying Althusser's paradigm to

31. MACKINNON, *supra* note 18, at 162.

32. MACKINNON, *supra* note 19, at 108.

33. See LOUIS ALTHUSSER, *FOR MARX* (Verso 2005) (1969).

34. LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 132–33 (Ben Brewster trans., 1971).

35. In a remarkable passage buried in a footnote, MacKinnon went so far in the direction of denying individual—and collective—agency as to claim that it is easier to change nature than social relations: “The intractability of maleness as a form of dominance suggests that social constructs, although they flow from human agency, can be less plastic than nature has proven to be.” Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 n.3 (1983). Equally surprisingly, MacKinnon told women that discovering and exploring their attraction to other women does not represent freedom, since sex is by definition the oppression of one group by another: “[W]omen sexually choosing women can challenge the position of women as the sexually acted-upon. . . . But so long as gender is a system of power . . . it can merely extend this choice to those women who can get the power to enforce it.” MACKINNON, *supra* note 18, at 14. Her portrayal of lesbianism—which in the late 1980s, was a much more difficult and braver choice than it is

gender, MacKinnon argued that gender is not just shaped, but also actually constituted by the ideological apparatuses of patriarchal power, not by the thoughts or deeds of actual women.<sup>36</sup> And just as Althusser and structuralist Marxists generally thought that one had to identify an overriding factor, a single process that “in the last instance” took precedence over other factors—the relations of production—so too MacKinnon clearly believed that if she was going to offer feminists a general theory on the same epistemological plane as the most rigorous Marxist theories then prevalent, historical and cultural diversity in women’s experiences had to be minimized in favor of what Althusser famously called “determination in the last instance”—which for her was the sexual relationship. While gay and lesbian writers were at this time emphasizing sexual diversity, MacKinnon, intent on building a grand, rigorous, and therefore (given the standards of the time) structural theory, went in the opposite direction, stressing that underneath the apparent diversity of sexual experiences one can identify a constant, basic structure that is inherently oppressive and that constitutes all subjectivity as gendered subjectivity.<sup>37</sup>

MacKinnon’s key choice of pornography as a political target for her early work can also be said to have an Althusserian influence or at least an Althusserian flavor, given his well-known insistence—as against more conventionally materialist, labor-oriented Marxists—that material oppression is not only facilitated but actually produced through ideological forces that take the form of words. Words are not mere words; when inscribed in and generated by ideological systems, words have material effects, Althusser famously argued, because without those words and beliefs the material forces would be revealed for what they are and start to crumble. As Althusser wrote in his most influential essay, *Ideology and Ideological State Apparatuses*:

[T]he reproduction of labour power requires not only a reproduction of its skills, but also, at the same time, a reproduction of its submission to the rules of the established order, i.e. a reproduction of submission to the ruling ideology for the workers, and a reproduction of the ability to manipulate the ruling ideology correctly for the agents of exploitation and repression, so that they, too, will provide for the domination of the ruling class ‘in words’.<sup>38</sup>

Replacing “workers” with “women” in this passage results in a very good paraphrase of MacKinnon’s analysis of the importance of recognizing pornography as an attack on women, rather than further empowering the patriarchal state by supporting criminal sanctions. The ill-fated pursuit of a civil

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today—as an opportunity for some women to sexually exploit other women, underscored MacKinnon’s radical structuralism.

36. MACKINNON, *supra* note 18, at 14.

37. MACKINNON, *supra* note 19, at 116.

38. ALTHUSSER, *supra* note 34, at 132–33.

remedy for the harms caused by pornography was rooted in the belief that pornography is a key ideological apparatus of the (patriarchal) state.

Now, for legal purposes, whether in the antipornography campaign or in other contexts, MacKinnon and those radical feminist writers (e.g., Kathleen Berry, Sheila Jeffreys) who emphasized sex over other dimensions of life did not have to claim that sexual objectification is the basis of all gender oppression. Althusserians were not, after all, forced to privilege any one of the numerous ideological state apparatuses in their analyses (the church, the bourgeois family, the mass media, etc.). At the purely theoretical level, it was sufficient for radical feminist purposes to prove that there is collective harm, say in pornography, and that the harm should have a legal remedy (which of course was nearly impossible in the United States, given the constitutional obstacles to “hate speech” provisions that exist in other jurisdictions). But the analogy between surplus value and women’s structural oppression through the sexual objectification produced and reproduced in pornographic imagery was made stronger than it had to be for legal purposes. MacKinnon took gender structuralism to the extreme and claimed that sexual objectification is not just one amongst many patriarchal evils—as liberal and socialist feminists generally believed—but is in fact the foundation of patriarchy as such, lying at the root of all the other oppressions suffered by all women, regardless of economic class, geography, or culture.<sup>39</sup>

It was clear that the greatest Marxist theorist of the 1970s, Althusser, rose to fame by minimizing the concrete differences amongst workers revealed by historians and social scientists, instead relentlessly insisting on rigorous structural analysis of the “underlying” relations of power that supposedly remain constant. It was thus equally clear that anyone wanting to write a feminist version of *For Marx* and the famous ideological apparatus essay was going to have to eschew multifactorial and historically specific analysis in favor of a single “determination in the last instance.”

The intellectual debt to Marxism was openly acknowledged by MacKinnon; but what she never acknowledged was the specifically Althusserian framework that she borrowed. Given that she is a U.S.-trained lawyer, it may be that she happened to know Althusser’s work but never appreciated the rich heterogeneity of Marxist thought, which was much more apparent outside of the United States. Internationally, Marxist thought was a rich intellectual environment which (in the 1970s) featured Gramscians; the then-eminent but now forgotten Trotskyist theorist Ernest Mandel; other, competing Trotskyist groups; an assortment of Maoists; and, of course, a range of socialist feminist thinkers. But whether the Althusserian framework was consciously chosen out of a set of alternatives, or whether it simply appeared for whatever reason as the top-rated, highest-ranked Marxist theory, and thus as the model worth following, the fact is that

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39. MACKINNON, *supra* note 19, at 124, 130.

MacKinnon's theoretical paradigm for subjectivity out-Althussered Althusser in wholly dispensing with history.

While even the most unhistorical structuralist Marxist would see capitalism as having a finite history, since the story of the birth and death of capitalism is the story that all versions of Marxism tell, in different ways, MacKinnon does not provide any discussion, however tentative, of either a prepatriarchal past or a postpatriarchal future. Her frame therefore lacks any feminist equivalent of what Marxists used to call the motor forces of history. Therefore, the subjectivity that is theorized in MacKinnon's work of the 1980s is even more structured, so to speak, and less "agentic," than that of the hardest of hard-line structuralist Marxists.

In the 1970s and 1980s, feminists of all stripes routinely incorporated a historical dimension into their analyses by differentiating gender, regarded as historically specific and cultural, from natural "sex." However problematic the binary distinction between nature and culture would prove to be, as later feminist theorists influenced by science and technology studies and actor-network theory convincingly showed, the taken-for-granted contrast between sex and gender helped to emphasize the variability and therefore changeability of many conventional gendered habits. MacKinnon sometimes spoke as if her analysis of the sexual relationship applied only to the present and perhaps only to advanced capitalist economies; nevertheless, the marked absence of any mention of alternatives—whether drawn from anthropological studies of matriarchal societies, from utopian feminist literature, from philosophical speculation of the Mary Daly type, or from any other of the available sources—had the effect of making her analysis seem universal and transhistorical. In a typical passage, she writes: "In the society we currently live in, the content I want to claim for sexuality is the gaze that constructs women as objects for male pleasure."<sup>40</sup> The phrase "[i]n the society we currently live in" suggests historical specificity; but in the absence of any consideration of "motor forces of history" that might possibly give sexuality a different content in the future, the gesturing toward historicity remains an empty gesture, as the reader is left with a hyperstructuralist picture of relentless and static domination.

Sidelining history, without going so far against the (socialist) current as to explicitly declare history to be dead, was arguably the key epistemological move characterizing not only Althusser but also the structuralist tradition generally. This covert antihistorical move was the key precondition of the kind of grand theorizing that gave rise to such now-forgotten moments of intellectual excitement as the Poulantzas-Miliband debate<sup>41</sup> (featuring Ralph Miliband, father of the current British Labour leader). Adopting this basic theoretical stance, the

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40. MACKINNON, *supra* note 18, at 53.

41. PARADIGM LOST: STATE THEORY RECONSIDERED 3–5 (Stanley Aronowitz & Peter Bratsis eds., 2002).

essay that made MacKinnon famous in theory circles, *Feminism, Marxism, Method, and the State: An Agenda for Feminist Theory*, begins as follows:

Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away. Marxist theory argues that society is fundamentally constructed of the relations people form as they do and make things needed to survive humanly. Work is the social process of shaping and transforming the material and social worlds, creating people as social beings as they create value. It is that activity by which people become who they are. Class is its structure, production its consequence, capital its congealed form, and control its issue.

Implicit in feminist theory is a parallel argument: the molding, direction, and expression of sexuality organizes society into two sexes—women and men—which division underlies the totality of social relations. Sexuality is that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their relations create society. As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific . . . . As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman.<sup>42</sup>

The use of the phrase “historically specific” is misleading, as pointed out above, since nowhere in her work does MacKinnon ever contemplate a feminist equivalent of the transitions from feudalism to capitalism and from capitalism to socialism that make up Marxism’s practices of temporalization. In the early essay just cited, MacKinnon points to the then-popular practice of small-group, face-to-face consciousness raising as a source of potentially revolutionary knowledge,<sup>43</sup> but in later works this glimpse of the possibility of substantial social change recedes well into the background. “Female power,” MacKinnon famously replied to a question, in an answer later published in a major book, “is a contradiction in terms.”<sup>44</sup>

Similarly, while it was customary then to point to “lesbian existence”<sup>45</sup> as a quasi-utopian social experiment that few women would personally pursue but that systematically undermines masculine privilege and the heterosexual presumption that oppresses all women, MacKinnon refused to give lesbians (much less gay men) any special status, treating them as only slightly modified versions of the “male” and “female” subjects constructed in her theory. Her most important

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42. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP 227, 227–28 (Elizabeth Abel & Emily K. Abel eds., 1983) [hereinafter THE SIGNS READER].

43. *Id.* at 231–32.

44. MACKINNON, *supra* note 18, at 53.

45. See, e.g., Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in THE SIGNS READER, *supra* note 42, at 139.

work, *Feminism Unmodified*, has four entries for “lesbian” in the index (and none for gay men); but it is significant that all four of these mentions concern men’s myths about or representations of lesbians.<sup>46</sup> And the only mention of homosexuality (according to the index) is hardly flattering: homosexuality “may be no less gendered” than heterosexuality, the reader is told.<sup>47</sup> This pessimistic reading of nonheterosexual relationships is very much in keeping with the hard-line Marxist structuralist contempt for such alternative forms of economic life as cooperatives.

The picture of gender oppression that emerges from MacKinnon’s analyses is therefore one of historical stasis and geographic homogeneity—one that produces the most solidly unified “female/feminine subject” imaginable, through an analysis that, however reductive, is certainly much more rigorous than competing feminist theories of the time. While cast in universal terms, however, the oppressed female subject of MacKinnon’s early work has a distinct location: she is American, she is white, and she is found not only in pornography film studios, but also, and most important theoretically, in ordinary American family homes. This skewing of a supposedly geographically and culturally neutral subject position is not caused by a defect in MacKinnon’s rigor, but rather by the inherent contradictions of the Western project to theorize human subjectivity as such; as we have repeatedly seen, the logic of feminist legal theory is not at all limited to feminist legal subject matters.

While much critical attention has been devoted over the years, in legal as well as other publications, to the sexual and gender reductionism of MacKinnon’s approach, the *scale* of MacKinnon’s early work has not to my knowledge been critically analyzed. And while at one level—that of womanhood in general—its scale was universal, the constantly repeated claim that even women who do not feel oppressed or are not being abused by men are just as oppressed, structurally, as their more obviously unhappy sisters had the effect of focusing the critical feminist legal gaze on the situation of ordinary American women. They were the intended beneficiaries of the ill-fated pornography ordinance, and were the actual beneficiaries of the numerous laws and policies naming and governing sexual harassment that emerged in the wake of the analyses produced by MacKinnon and others of the failings of domestic laws.

However, the eventual success of the campaign to name the new wrong of sexual harassment did not create a benefit, in intellectual capital terms, for its inventor, since over the past decades sexual harassment has been constructed and governed through largely liberal mechanisms: the same civil-rights, formal equality mechanisms that also govern racist behavior in the workplace. The campaign met with success precisely because it could be repurposed by a liberal legal establishment concerned with eliminating disturbances in the workplace that were no longer in keeping with the increasing diversity of the global capitalist

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46. MACKINNON, *supra* note 18, at 15, 86, 122, 199, 311.

47. *Id.* at 60.

workplace. Therefore, sexual harassment is regarded and governed as an unusual abuse of power—not as the normal everyday product of the gender/sex system. But in its early form, the critique of sexual harassment problematized what was then “ordinary” workplace behavior by ordinary guys<sup>48</sup>—a far cry from today’s focus on evil, alien sex traffickers from Asia and Eastern Europe.

A sharp contrast exists between the way in which the sexual harassment of ordinary American women is constructed, in popular culture as well as in law, and the way in which the sexual oppression of women in exotic far-off locales is imagined. This contrast is at the root of the success of American radical feminism in the sphere of international gender/human rights. The scale shift to the Orient—if one can call it that without reproducing the very binaries I am calling into question—that took place as MacKinnon and many of her feminist lawyer friends shifted their attention away from domestic law and to the international has been amply criticized by postcolonial critics. Ever since Gayatri Spivak eloquently denounced white middle-class women’s long-standing project to flex their own political muscles and legal subjectivity by trying to free “brown women from brown men,” postcolonial critics have shown that existing Western missionary narratives are a crucial “switchpoint” enabling white Western feminists to construct themselves as the (legal) saviors of women in locales regarded as eternal sites of victimization.<sup>49</sup> The scale shift described here has also been criticized for its tendency to tie feminist legal victories to campaigns that privilege coercive law and coercive mechanisms and thus often rely on unsavory law-and-order and/or racist allies.<sup>50</sup> Both of these criticisms are very well taken; but what these critiques have not included within their purview is an analysis of the previous stage—that is, the relative failure of the hard-structuralist radical feminist theory of female subjectivity to prosper in the venue in which it was invented, namely the prosperous parts of the West.

So if instead of asking why debates about gender and international law are so dominated by certain essentialized images of victimized femininity that draw heavily, if unwittingly, on missionary discourses,<sup>51</sup> a point that has by now been well established, we ask what might have prompted or merely encouraged radical feminist theorizing to shift to the transnational in the first place, we might begin to see something that to my knowledge has not been identified in the voluminous literature on legal feminism: namely, the failure of the structuralist feminist paradigm of female subjectivity to catch on at home.

Why did the MacKinnon perspective not prosper at the domestic level,

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48. MACKINNON, *supra* note 29.

49. KOTISWARAN, *supra* note 23; Spivak, *supra* note 22, at 297.

50. See, e.g., Halley et al., *supra* note 25, at 381–82.

51. See, e.g., Sophie Day, *The Re-Emergence of ‘Trafficking’: Sex Work Between Slavery and Freedom*, 16 J. ROYAL ANTHROPOLOGICAL INST. 816, 819–23 (2010) (drawing parallels between contemporary discourse about sex trafficking and the nineteenth- and twentieth-century “panic” over “white slavery”).



which was its initial scale? Any answer to this question is of course bound to be rather speculative. But one factor that must have played a role, at however unconscious a level, is the fact that MacKinnon was, after all, a product of middle-class American law school culture—as was her primary audience—and American culture has long been dominated by ideas of individual agency. American law school culture, and indeed the mainstream white culture of which it forms an integral part, is largely made up of narratives of individual freedom and equality, in which equality is usually regarded as the product of struggles against discrimination led by courageous individuals. That the heroine of a feminist best seller of the 1970s, *The Woman's Room*, is portrayed as struggling against adversity for a long time until the wonderful moment at which she gains admission to the Harvard Law School<sup>52</sup> is by no means a coincidence. While feminists everywhere, not just in the United States, have often borrowed this type of feminist Horatio Alger narrative to inspire their troops, feminists in the United States may well have been particularly susceptible to the Oprah Winfrey paradigm suggesting if you work hard enough and believe in yourself, you can go to Harvard, and your sisters everywhere will benefit even if you only practice corporate law. *Ms.* magazine, the key liberal feminist house organ of the 1970s and 1980s, relied precisely on popularizing, for a female audience, this most American of all narratives of the self and its quest for freedom. And white middle-class women did indeed start to go to law school, including Harvard, in large numbers, and even to become corporate executives, albeit in smaller numbers. The feminization of the Horatio Alger narrative was not a merely discursive move.

In retrospect, we can see that within white middle-class women's circles, the perpetual optimism and individualism of the liberal *Ms.* was very likely to prevail over the relentlessly bleak, universal oppression narrative of the MacKinnon analysis. Hard-line structuralism, if one can venture a generalization, has never prospered and is unlikely to ever prosper on American soil.<sup>53</sup> The political and philosophical content of MacKinnon's view of gendered subjectivity has been repeatedly critiqued, but commentators have not pointed out that its practical fortunes were heavily influenced by the fact that her audience, largely brought up on vapid liberalism, was undoubtedly swayed by the radical and grand scope of her theorization of gender—but it was unlikely that they would for long identify with

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52. MARILYN FRENCH, *THE WOMEN'S ROOM* 233 (1977).

53. I do not here mean to claim that all struggles for freedom or all indigenous American cultural narratives are necessarily liberal; indeed, I thank Chris Tomlins for educating me about the great diversity of freedom narratives found in U.S. legal cultures. See CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865* (2011). My claim is simply that since the socialist alternative to liberalism was never popular in the United States, especially in its law schools (social science departments harbored socialists then and now), MacKinnon's hardline determinism thus appeared as the only real alternative to vapid rights liberalism to many young legal feminists. But in the long run, applying the Althusserian paradigm to "domestic subjects" was bound to fail.

the wholly victimized and unindividualized subject of the theory (in both senses of “subject”).

The MacKinnon/Dworkin narrative of universal and structural oppression was, by contrast, very much in tune with traditional Western depictions of the Third World, particularly of women in the Third World. American middle-class women who go to law school or imagine themselves as potentially going to law school are unlikely to think of themselves as always already victimized by the very fact that they are sexed as women. But that, for women in Africa and in Asia, sex and the gender relations that arise from sex are nothing but opportunities for oppression is a claim that resonates with both missionary and liberal-feminist narratives and that therefore has plausibility. Shifting attention away from domestic law, away from ordinary Americans and everyday gendered subjectivity, and focusing instead on exotic locations in which women can be easily imagined, by Western feminists, as essentially and inherently victimized merely by virtue of being women, was arguably the crucial scale shift that allowed radical feminism to revive itself in the twenty-first century by shifting to the transnational. By contrast, on the domestic front, the turn of the century brought no good news, only the hypermasculine patriotism and right-wing reaction occasioned by the events of September 11, 2001.

The second scale shift that becomes visible if one compares today’s feminist legal thought to that of thirty years ago is not geographical at all, but rather theoretical, perhaps even ontological. It is the shift away from “the subject” and what we used to call its “consciousness,” including its gendered consciousness, and toward nonsubjective, indeed nonhuman scales: those of spaces, flows, and networks. Whether influenced by legal geography, by actor-network theory, or by sociological studies of “the networked society,” today’s theoretically inclined legal feminists tend to speak about spaces and about networks of governance rather than about “the subject” (or, for that matter, “the state,” which throughout the 1980s was theorized alongside the political subject, and with the same tools).

Looking through library databases for recent work in feminist legal theory in preparation for this Article, I came across a keynote address given at the University of Kent Centre for Law, Gender, and Sexuality, an important node in contemporary feminist legal analysis. Entitled *Text and Terrain: Mapping Sexuality and Law*,<sup>54</sup> Bela Chatterjee’s talk struck me as being on the theoretical leading edge. It explores different ways of using spatialization as a theoretical tool in the analysis of sexuality and law.<sup>55</sup> The abstract reads:

Drawing on recent work in theoretical cartography, this article seeks to argue that a cartographical reading of law can be usefully brought to bear on the legal analysis of sexuality. . . . [of] how sexuality is mapped both

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54. Bela Chatterjee, *Text and Terrain: Mapping Sexuality and the Law*, 17 LAW & CRITIQUE 297 (2006).

55. *Id.*

within and without the law through cultural texts, and how law's encounters with the terrains mapped out by those texts might be enriched and diversified.<sup>56</sup>

I hasten to add that I am not criticizing Chatterjee's project; indeed, I, or some of my graduate students, might well have written the same abstract. I am merely using the text as an example of a kind of symptom of our current fascination with space and flows—and, occasionally, temporalization. The focus on space and time and flows does not necessarily imply a turning away from subjectivity, since for years now legal geographers have shown that subjectivity can be and often is constructed through spatial techniques; but in the case of Chatterjee's article, and much work in the same vein, subjectivity is a secondary category, with particular forms of subjectivity appearing, in a somewhat black-boxed manner, as the inevitable products of spatial or quasi-spatial flows and networks.<sup>57</sup>

The apparently complete disappearance of psychoanalytic language from today's feminist legal theory is another symptom of the same phenomenon. To resort to biographical data for a moment, around 1990, a feminist reading group I belonged to spent much time poring over Lacanian texts, in the belief that to do serious feminist theory we had to decide whether Lacan, rather than the more conventional psychoanalytic theory then current amongst feminists, offered promise. The reading group's agenda thus presupposed that subjectivity was *the* question. Today, graduate students, feminist or not, are much more likely to have read Henri Lefebvre's extremely obscure and dense work on the social production of space than to have glanced through any psychoanalytic works, Lacanian or otherwise. I regularly teach Foucault to both graduate and undergraduate students, and I have come to realize that to teach *The History of Sexuality Volume 1*<sup>58</sup> to today's students, one first needs to explain that progressives in the 1970s thought that sexual "repression" was a key evil of capitalist society. Repression, which in the 1970s and 1980s was a widely used, not purely academic concept, appears now as an odd, libertarian theory of the hippie generation. Today's students understand "biopower" quite readily, but the critique of the repression hypothesis requires a fair bit of intellectual history contextualization.

In general, whether or not psychoanalysis is useful, and, if so, what kind of psychoanalysis were burning questions when the taken-for-granted object of theory was "the subject" and the subject's consciousness or subjectivity. If one is interested in mapping global networks of capital flows or of migrant labor or of

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56. *Id.* at 297.

57. See, e.g., DAVID DELANEY, *THE SPATIAL, THE LEGAL AND THE PRAGMATICS OF WORLD-MAKING: NOMOSPHERIC INVESTIGATIONS* (2010); DAVID HARVEY, *COSMOPOLITANISM AND THE GEOGRAPHIES OF FREEDOM* (2009).

58. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1990) (1978).

women sex workers, by contrast, psychoanalysis seems irrelevant, since its various answers are not answers to today's questions.

The scale shift toward the transnational is hardly unique to today's feminist thought and practice.<sup>59</sup> Similarly, the turn away from "the subject" to the nonpsychological and often disembodied language of spaces, territories, networks, and flows is hardly a feminist invention. But even if the causes of the current generation's scale shifts are not unique to any one movement or political perspective, the particular features of the broader shifts will naturally differ, depending on the issues and the interests involved. And if we focus on the transformation of feminist concerns, the quiet abandonment of domestic-scale analyses that the past few decades have witnessed has resulted in the equally quiet demise of two (related) critiques that gave concrete shape to the overall agenda of theorizing gendered subjectivity. One was the radical critique of liberal feminism's long-standing interest in equalizing marriage, a critique that involved questioning the contractual model of human relations that underpins liberalisms of all sorts, from classic to neo-, including feminist liberalism. The second literature that disappeared from view as a result of the scale shift away from the domestic was the debate around domestic labor, its role in capitalism, its value, and its politics.

## II. WHATEVER HAPPENED TO THE CRITIQUE OF MARRIAGE AND DOMESTICITY?

The radical questioning of the contractual paradigm underlying the companionate marriage ideal was carried out most explicitly and thoroughly by Australian political theorist Carole Pateman.<sup>60</sup> But, in a less explicit manner, it also permeated Catharine MacKinnon's relentlessly pessimistic view of all sexual relationships,<sup>61</sup> which like Pateman's work attacked not only existing inequalities but also the ideal of the freely choosing liberal (female) subject that liberal feminism had long held as the remedy to the disease of sexism.

Carole Pateman's *The Sexual Contract*, one of the most heavily cited theoretical feminist works of the 1980s (MacKinnon aside), had an ambiguous character. At first sight, the book, which reads a lot like a dissertation in classical political theory, seems to aim to produce an internal critique of liberal theory by pointing out the systemic exclusion of women from the social contract. The way in which classic contract thinkers, especially John Locke and Jean-Jacques Rousseau, repress and yet use the subordination of individual women to individual men in marriage as the unspoken premise of the social contract amongst male heads of household is critiqued at great length<sup>62</sup> in analyses that are still heavily cited today by feminist political scientists. Pateman shows that the social contract

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59. See, e.g., NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (2009).

60. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

61. MacKinnon, *supra* note 42, at 245 (referring to sexuality as "the linchpin of gender inequality").

62. PATEMAN, *supra* note 60, at 1–14.

theorists' rejection of patriarchy and traditional paternal authority masks the fact that the new liberal contract is not an agreement amongst ungendered, equal sovereign beings, but rather a pact amongst brothers or quasi brothers, who defeat the patriarch and then agree to respect each other and each other's sway over their private domestic realms, including the women in those realms.<sup>63</sup> The subordination of women to men is both an effect and a key precondition of the social contract, Pateman shows; it is what sociolegal scholars would call constitutive (though she does not use that language).<sup>64</sup>

Some, if not most, of Pateman's critiques of the structural sexism of liberal contract theory could have been recuperated either for liberalism—by arguing that women too need to be included as foundational agents, as parties to the original social contract—or, alternatively, by the Hegelian-Marxist critique of contract as the model for political society. But Pateman chooses to use her critiques differently, more noticeably in the latter parts of the book, which engage directly with feminist legal and political analyses. The radical critique of the idea (or myth) of equality that grounds all forms of contractualism is not taken in either a Hegelian, Durkheimian, or a Marxist direction. (Indeed, Marxist critiques of liberal legality from Pashukanis onward are barely mentioned, despite the fact that they then constituted the main theoretical resource to critique contractualism). Instead, what one might call a pure feminist approach is taken, an approach that, drawing on some radical feminist ideas of the time, rejects not only liberal social contract theory, but also the whole liberal feminist project of attempting to gain for women the right to be equal with men, legally and socially.

A brief discussion of this influential book in the light of subsequent intellectual developments in feminist theory illuminates one of the key differences between then and now—namely, the curious and unremarked disappearance, over the past decade or so, of second-wave feminism's critique of that contractual or quasi-contractual mechanism that is marriage.<sup>65</sup>

Rejecting the liberal feminist ideal of marriage as a contract among equals, Pateman, while not explicitly endorsing the then-popular French feminist philosophy of sexual difference, argues that even if marriage were to be equal, the only kind of equality that contract can provide is one that presupposes and reproduces the masculinist isolated individual of classic liberal thought—the individual that does not need others, is not significantly affected by age and

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63. *Id.* at 2–3, 77–78.

64. *Id.* at 2–3.

65. Marriage seems to only come under critical scrutiny in some queer-theory-driven discussions about the negative, conservatizing political effects of the gay movement's focus on same-sex marriage as a key political goal. These discussions, however, are addressed to competing actors within the gay rights movement, not to legal theorists in general or to feminists in general. Noted family law scholar Martha Fineman comments that neither feminist nor mainstream family law today is centrally concerned with marriage, even though marriage was the core of family law for many decades. Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey, in* TRANSCENDING THE BOUNDARIES OF LAW, *supra* note 3, at 47, 47–61.

biology, is not constituted in relationships, and does not have a serious commitment to children.<sup>66</sup> “Woman can attain the formal standing of civil individuals but as embodied feminine beings we can never be ‘individuals’ in the same sense as men.”<sup>67</sup>

Other chapters devoted to particular issues are all variations on the theme of the evil effects of contractualism. One chapter attacks prostitution on the basis that the very existence of prostitution demeans women and shows the evil effects of commodifying one’s body.<sup>68</sup> It also attacks the then quite new practice of surrogacy, using the same arguments about the commodification of women’s bodies.<sup>69</sup> And the most significant chapter, in retrospect, attacks the institution of marriage.<sup>70</sup> Even the most equal of marriage contracts, Pateman writes, has the effect of turning female sexuality and female reproduction into quasi commodities; if relations between the sexes are thought of as contractual, there is virtually no difference between marriage and “universal prostitution.”<sup>71</sup> Some feminists, Pateman adds, attempt to achieve liberal equality by focusing on workplace equality and eliminating patriarchal vestiges within marriage, but all that this kind of feminism can achieve is a situation in which (some) women are expected to act and think like men and equality is contingent on achieving masculine personal goals.<sup>72</sup>

Rereading Pateman’s influential work sheds light on the fortunes of feminist legal theory at a number of levels. Most striking, in retrospect, is her eloquent but clearly dated appeal to female bodily experience as a concrete and immovable fact that no amount of legal abstractions about “the person” can abolish—an appeal that one rarely hears today, if ever, in either legal or political theory contexts, since anything striking of gender essentialism fell by the wayside from the late 1980s onward, attacked on all sides by queer theory, postcolonial feminism, science studies feminism and antiracist feminism. But is Pateman’s denunciation of the feminist pursuit of the ideal of an equal marriage contract equally outdated? Is it perhaps ironic that feminists today are more likely to be supporting the extension of the legally and culturally privileged institution of marriage to gays and lesbians than to be rereading the old critiques of marriage as inherently oppressive? Has the fairly successful international campaign to legalize same-sex marriage managed

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66. PATEMAN, *supra* note 60, at 5–6.

67. *Id.* at 224. Pateman emphasizes bodily difference more than most North American feminists, but a similar, albeit more sociological, critique of the masculine assumptions undergirding the sovereign individual of liberal political theory was simultaneously being carried out by many feminist legal theorists. Martha Minow, for example, promoted a “relational” view of subjectivity, but she distanced herself from gender essentialism and biological determinism. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 230–31 (1990).

68. PATEMAN, *supra* note 60, at 189–218.

69. *Id.* at 209–18.

70. *Id.* at 154–88.

71. *Id.* at 184.

72. *Id.* at 153–55.

to achieve what the John Stuart Mill ideal of the equal, companionate heterosexual marriage of two fully autonomous liberal subjects did not manage to do—namely, inoculate the institution of marriage against radical critique by feminist legal thinkers?

A very important point here is that radical feminists who did not flirt with the French feminism of difference, and who were skeptical of all appeals to nature, physiological reproduction, and biological pregnancy and birth, nevertheless shared Pateman's goal of de-exceptionalizing both prostitution and other overtly commercial practices, such as contract pregnancy, by repeating the old Emma Goldman argument that marriage is not qualitatively different from prostitution, at least as long as women do not have access to adequate incomes of their own. MacKinnon, for example, states as a matter of course that "feminism stresses the indistinguishability of prostitution, marriage, and sexual harassment."<sup>73</sup>

MacKinnon never developed the critique of marriage at any length, perhaps because she did not want to alienate either the mainstream liberal feminists or the conservative antipornography and antiprostitution organizations on which she has always relied to push her campaigns forward politically; but in her early work, marriage was routinely described as inherently patriarchal, in keeping with standard feminist wisdom of the era. The effect of including marriage amongst other examples of legalized gender oppression was to focus feminist critiques on the everyday lives of ordinary Americans engaged in "normal" activities, radically "estranging" them by denouncing the hidden structures of oppression present in every happy suburban home. This is a far cry from today's fascination with Asian and African sites of extreme gender oppression, a fascination that cannot but produce self-satisfaction about middle-class Western women's own position.

Along with the institution of marriage, which today almost never appears as the explicit focus of feminist legal critique (with the partial exception of queer theory's critiques of gay and lesbian domesticity, though these do not circulate widely),<sup>74</sup> domestic labor too (in the sense of unpaid labor in the household) received much critical attention and gave rise to innovative theoretical work, mostly by socialist feminists critiquing the omission of this type of work from the Marxist paradigm of labor power and surplus value.<sup>75</sup> It should not be surprising

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73. MACKINNON, *supra* note 18, at 59.

74. Many gay-movement critiques of the choice to pursue same-sex marriage over other political goals arise from a somewhat masculinized libertarianism, but there are also critiques that are specifically feminist. One interesting example is Katherine Franke's critical commentary on the gay-lesbian movement's use of the *Loving v. Virginia* precedent. Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008) (arguing that proponents of marriage equality should be careful not to interfere with "efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire").

75. See, e.g., MEG LUXTON, *MORE THAN A LABOUR OF LOVE: THREE GENERATIONS OF WOMEN'S WORK IN THE HOME* (1980); MARIA MIES, *PATRIARCHY AND ACCUMULATION ON A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOUR* (1986).

that the disappearance of marriage as an object of feminist legal critique should be accompanied by the invisibilization of the unpaid work of housewives.

Within North America, Meg Luxton's pioneering book *More than a Labour of Love* constituted one important effort to effect an internal critique of the Marxist theory of labor and labor power.<sup>76</sup> In a manner that had some similarities with Pateman's critique of the constitutive role of women's exclusion from social contract, though informed by empirical studies of working-class families rather than by the history of political thought, Luxton showed that the unpaid, uncommodified work performed in the household, largely by women, is fundamental for the success of capitalism.<sup>77</sup> Marx had, of course, recognized that capitalism downloads the cost of reproducing labor power to working-class households, both at the scale of each working day and at the scale of the generational reproduction of the labor force. But he had not considered the gendering of domestic labor theoretically significant, and neither he nor his followers had paid serious attention to the way in which the working-class male head of household benefits as much as the capitalist from the patriarchal arrangements. Luxton's analysis, arising out of a socialist feminism that considered masculine privilege as politically and economically on par with class privilege, paved the way for feminist critiques of the internal dynamics of working-class households.

In Europe, and to a lesser extent in other parts of the world, the "domestic labor debate" usually featured the group Wages for Housework, which remained small, but was politically visible in numerous metropolitan cities with active feminist movements in the 1980s—until, in keeping with the scale shift analyzed in this Article, it quietly disappeared from the scene as the 1990s wore on. At a more theoretical level, Maria Mies developed an influential analysis that connected women's unpaid work in the home with imperialist economic relations,<sup>78</sup> creating a new approach to theorizing female subjectivity that, unusually for the time, worked at the global scale, but retained a more or less Marxist, political economy framework while focusing on everyday gender relations. Mies's work has been aptly characterized by Kotiswaran—one of the very few feminist theorists of the current millennial generation to cite her work—as "dependency feminism."<sup>79</sup>

Mies's now-neglected work is important here because it demonstrates that some feminist theorists of the 1980s (those working in socialist and anti-imperialist frameworks) considered the scale now called transnational or global to be crucial to their analyses of gendered subjectivity and patriarchal power. Liberal and radical feminists were largely uninterested in the field of practice and theory that was then called "anti-imperialism,"<sup>80</sup> and therefore their gaze remained

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76. LUXTON, *supra* note 75, at 16–21.

77. *Id.*

78. MIES, *supra* note 75, at 216–24.

79. KOTISWARAN, *supra* note 23, at 63–67.

80. I am not aware of any studies of recent intellectual history that trace the disappearance of



trained almost exclusively on issues of concern to women in the metropole. But socialist feminists of the 1980s did not confine their analyses or their political activities to the sphere of the national, a fact that underlines the contingency of the “turn to the transnational” visible in the late 1990s and the early twenty-first century. In fact, socialist feminists had a long-standing interest in what Marxists called “internationalism,” and so they were better placed to make the transition to the transnational than radical feminists; but socialist feminists would have refused to collaborate with and support the kinds of coercive interventions in the “Orient” that radical feminists have supported under the banner of protecting women.<sup>81</sup> In other words, since socialist feminists had no allies, either amongst mainstream liberal feminists or amongst governments that, for their own imperialist reasons, have been interested in promoting anti-trafficking and other campaigns in the international arena, they had no way to reinvent their enterprise in the twenty-first century, unlike radical and liberal feminist legal activists and thinkers who, foiled at home, found a fertile field of activity in the transnational.

There was no theoretical reason why the critique of the constitutive role of women’s unpaid domestic work carried out by Mies and others should have been the victim of the decline of Marxism, since liberal economics too fails to value women’s unpaid work in the home. But somehow, as the scale of analysis shifted for feminists interested in questions of political economy away from domestic (in the sense of national) welfare-state policies to the scale of transnational or global neoliberalism, domestic uncommodified labor seems to have also fallen by the wayside as a topic of interest. If the domestic scale, in the sense of state-level policy, receives far less attention today than it did at the high point of social democratic national politics, the domestic in the other sense has become downright invisible. Indeed, Fraser’s *Scales of Justice*, one of many works that notes the shift from national to transnational legal arenas as a key element of the transformation of feminism in recent decades, focuses so exclusively on the dialectic of national and transnational or international governance that Fraser completely neglects both marriage and domesticity—as if the scale of the ordinary family were no longer important for feminist theory.<sup>82</sup> The absence of the domestic scale from Fraser’s recent work is particularly notable because Fraser’s own earlier, highly influential work provided important theoretical tools (based in part on Habermas and in part on Marxist feminism) that could have been used to continue analyzing the complex relations linking the family/household, civil society, and the state.<sup>83</sup>

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the phrase “anti-imperialist,” a term which did a great deal of work in the 1970s and 1980s, within feminism as in other contexts.

81. See Halley et al., *supra* note 25.

82. FRASER, *supra* note 59.

83. NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989).

## CONCLUSION

Reflecting on the disappearance, since the 1980s, of two key topics of feminist legal critique (the marriage contract and the implied domestic labor contract) that, taken together, performed not only a systematic critique of the liberal legal subject that underpins mainstream feminism, but also a radical critique of the social relations of ordinary domesticity in the metropole, helps us to see that the scale shift that characterizes contemporary feminist legal and political analysis does not consist only of a geographical turn toward the global and/or a jurisdictional turn toward international law. The widely noticed shift from nation-state frames to transnational/global frames is connected to a less visible or less discussed shift in what one might call ontological (rather than geographical) scale. While the gendered subjectivity of individual, everyday, Western married women was the main theoretical object for Western feminist thinkers in the 1970s and 1980s, giving rise not only to battles about abortion rights and equal pay, but also to a vast array of popular feminist Bildungsroman-style novels, films, and magazine articles, the current paradigm maintains an almost obsessive focus on the collective condition of exotic non-Western women, imagined as always already victimized by inhuman labor conditions and (most importantly, for radical feminists) a systematic sexual exploitation generally described in exoticist and Orientalist terms. What we could call the “Orientalization” of female oppression is linked not only to a geographic scale shift away from the metropole, and more generally away from the scale of the nation-state, but also to the rise of an Orientalist ontology within which subjectivity is not even a question, an ontology that undergirds the work of both liberal and radical feminist lawyers and writers on international issues.

While the Orientalization of women’s oppression is probably the key element in American feminist lawyers’ international endeavors, theoretically inclined feminists working within postcolonial and other antiracist paradigms work at the transnational level without perpetuating this exoticization of the object and the subject of feminism, and indeed make the critique of Orientalism central to their analyses of gender. But they too seem to have put subjectivity on the back burner, for quite different reasons. Perhaps as a response to the exhaustion that set in as the battles about postmodernism degenerated into fruitless trench warfare, feminist thinkers who eschew both liberal and radical-feminist frameworks and work within left-wing and anti-Orientalist paradigms often avoid discussing either subjectivity or women, focusing instead on “text and terrain”<sup>84</sup> or on spatializations and temporalizations that are not gender-specific. Noted feminist legal thinker Martha Fineman, for instance, now prefers to talk about vulnerability as the basis of entitlement for purposes of state benefits, a construction that deliberately shifts the focus away from both women and other specific identities and toward relations that are changeable and not identity-

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84. Chatterjee, *supra* note 54.

based.<sup>85</sup> On her part, Judith Butler writes as much about U.S. militarism and Israeli nationalism as about gender.<sup>86</sup> My own work too has only rarely featured the word “gender” in either titles or subtitles since about 1993; and, in keeping with actor-network theory and other new approaches, I now tend to focus more on spaces and flows and networks than on people and/or self-consciousness.<sup>87</sup>

The turn away from people and their subjectivity no doubt has good theoretical reasons supporting it; but a certain political price has been paid for this choice, whether we realize it or not. The disappearance from critical legal studies, including most feminist legal studies, of the kinds of critiques of marriage and domestic labor produced in the 1980s may be a case of collateral damage. Despite the celebrations of happy gay and lesbian marriages, some of us remain critical of the institution of marriage for all the “old” feminist reasons; but whether the choice to put the critique of marriage and domesticity in the closet was intentional or not, conservatizing or not, this choice may hold great significance for the future fate of feminism in metropolitan countries. What that fate will turn out to be, nobody can predict. But the dual scale shift documented in this Article needs to be understood and discussed by those who still care about feminism’s aspirations.

I hasten to add that I am not engaging in nostalgia here by lamenting the fragmentation of feminist legal theory over the past couple of decades. On the contrary, I am actually quite pleased that it has finally become very clear that the grandiose project to elaborate a general theory of gender and law has proved to be impossible, as Nicola Lacey pointed out some time ago,<sup>88</sup> and as I think is widely accepted now. While MacKinnon still holds on to gender as not only the main, but even the only category of analysis (e.g., her ludicrous argument that the attacks on the United States of September 11, 2001, should be understood as caused by hypermasculinity<sup>89</sup>), other feminist theorists have to a large extent, moved on to critical reflections on law and state power in which gender is regarded as inseparable from other processes, such as racialization, religion, nationalism, and colonialism. That is no doubt a positive development insofar as it eschews ghettoizing gender as an analytical category and ghettoizing feminists within the world of theory. But something was lost as the analyses of the everyday subjectivity of ordinary women that gave us the critique not only of marriage but also of contractualism<sup>90</sup> and the critique of unpaid housewifely labor disappeared from view. Just what has been lost in the dual scale shift mapped in this Article

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85. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *TRANSCENDING THE BOUNDARIES OF LAW*, *supra* note 3, at 161, 161.

86. See, e.g., JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* (2004).

87. See, e.g., Valverde, *supra* note 5.

88. NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* 13–14 (1998).

89. Catharine A. MacKinnon, *Women’s September 11: Rethinking the International Law of Conflict*, 47 *HARV. INT’L L.J.* 1, 3–4 (2006).

90. PATEMAN, *supra* note 60, at 154–88.

needs to be the subject of collective reflection if we are to move forward in a reflexive and self-aware manner.