

Left Legalism / Left Critique

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Suffering the Paradoxes of Rights

It is hard to acknowledge that liberal individualism is a violating enablement. - Gayatri Chakravorty Spivak, *Outside in the Teaching Machine*

This essay does not take a stand for or against rights, but rather, seeks to map some of the conundrums of rights for articulating and redressing women's inequality and subordination in liberal constitutional regimes. The essay responds to the question posed by the organizer of an American Philosophical Association session as that session's title: What is the value of rights language for women? An impossible question in many ways, especially when it is uninflected by historical, political, or cultural specificity, I nevertheless took it as an opportunity to consider, at a very general level, the difficult relation between select contemporary feminist ambitions and rights discourse in the United States. There is a certain political immediacy to the study of this relation, given the transposition of venue from the streets to the courtroom of many social movements over the past two decades. If much of the struggle against male dominance, homophobic practices, and racism now dwells irretrievably in the field of rights claims and counterclaims, what are the perils and possibilities of this dwelling?

Speaking for the disenfranchised in loose cross-cultural fashion, Gayatri Spivak depicts liberalism (and other modernist emancipatory formations) as "that which we cannot not want." This from a Derridean Marxist postcolonial feminist critic keenly aware of what liberalism cannot deliver,

what its hidden cruelties are, what unemancipatory relations of power it conceals in its sunny formulations of freedom and equality. Indeed, Spivak's grammar suggests a condition of constraint in the production of our desire so radical that it perhaps even turns that desire against itself, foreclosing our hopes in a language we can neither escape nor wield on our own behalf. Patricia Williams refigures this condition of entrapment as one that might be negotiated through dramatic catachresis. Forcing rights out of their usual ruses of abstraction that mystifies and universalism that excludes, she insists that we procure them for "slaves. . . trees. . . cows. . . history. . . rivers and rocks. . . all of society's objects and untouchables."² Albeit in a very different register, Drucilla Cornell argues in parallel with Williams, insisting that women's right to "minimum conditions of individuation," and in particular to an imaginary domain in which a future anterior is not beyond women's grasp, is the surest way to finesse the tradeoff between liberty and equality that liberal rights discourse is generally thought to force.~ Yet even in Williams's and Cornell's critical yet ultimately utopian rapprochements with rights discourse, there is a tacit confession that recalls Spivak's own weary recognition of the historical limits of our political imagination. If we are constrained to need and want rights, do they inevitably shape as well as claim our desire without gratifying it?

Given the still precarious and fraught conditions of women's existence in a world ordered by a relentless construction and exploitation of sexual difference as subordination, certainly rights *appear* as that which we cannot not want. Our relative reproductive unfreedom; our sexual violability and objectification; the highly exploitable character of much of our paid and unpaid labor; our vulnerability to losing our children, means of subsistence, and social standing when we resist compulsory heterosexuality- all of these require redress if we are not only to survive in this world but amass the strength and standing to create a more just one. And the panoply of rights women have acquired in this century - to vote, work, and divorce; to keep our children when we deviate from sexual norms; to not be sexually harassed at work and school; to have equal access to jobs and be paid equal sums for the work we do side by side with men; to prosecute sexual violence without putting our own sexual lives on trial; to decide whether, when, and how we will have children; to be free of violence in our homes - these are things we cannot not want. And if these acquisitions remain tenuous and partial, then surely procuring and pressing our rights to them can only abet the process of making them more certain possessions.

Yet this very list of our historical woes and their minimal redress over the past century through a proliferation of rights for women also recalls that rights almost always serve as a mitigation – but not a resolution – of subordinating powers. Although rights may attenuate the subordination and violation to which women are vulnerable in a masculinist social, political, and economic regime, they vanquish neither the regime nor its mechanisms of reproduction. They do not eliminate male dominance even as they soften some of its effects. Such softening is not itself a problem: if violence is upon you, almost any means of reducing it is of value. The problem surfaces in the question of when and whether rights for women are formulated in such a way as to enable the escape of the subordinated from the site of that violation, and when and whether they build a fence around us at that site, regulating rather than challenging the conditions within. And the paradox within this problem is this: the more highly specified rights are as rights for women, the more likely they are to build that fence insofar as they are more likely to encode a definition of women premised on our subordination in the transhistorical discourse of liberal jurisprudence. Yet the opposite is also true, albeit for different reasons. As Catharine MacKinnon has rightly insisted, the more gender-neutral or gender-blind a particular right (or any law or public policy) is, the more likely it is to enhance the privilege of men and eclipse the needs of the women as subordinates.⁴ Cheryl Harris and Neil Gotanda have made similar claims about race and the "color-blind" Constitution.¹

The first part of the paradox might be understood as the problem that Foucault painted most masterfully in his formulation of the regulatory powers of identity and of rights based on identity. To have a right *as* a woman is not to be free of being designated and subordinated by gender. Rather, though it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation. Rights ranging from the right to abort unwanted pregnancies to the right to litigate sexual harassment have presented this dilemma: we are interpellated *as* women when we exercise these rights, not only by the law but by all the agencies, clinics, employers, political discourses, mass media, and more that are triggered by our exercise of such rights. The regulatory dimension of identity-based rights emerges to the extent that rights are never deployed "freely," but always within a discursive, hence normative context, precisely

the context in which "woman" (and any other identity category) is iterated and reiterated.

The second paradox is the one illuminated by Marxist and neo-Marxist critiques of liberalism: in inegalitarian orders, rights differentially empower different social groups, depending on their ability to enact the power that a right potentially entails. This is not to say that generically distributed rights offer nothing to those in the lower strata of such orders – First Amendment rights offer something to all- but that, as countless critics have pointed out-;the more social resources and the less social vulnerability one brings to the exercise of a right, the more power that exercise will reap, whether the right at issue is sexual freedom, private property, speech, or abortion. And still another conundrum of rights comes into play here. To the extent that rights such as private property rights are exercised not only against the state but against one another in economic arrangements in which some gain at the expense of others, universally distributed rights function not only as power but as deprivation: the right to private property is a vehicle for the accumulation of wealth through the production of another's poverty. Some

in feminist jurisprudence and critical race theory argue that free speech functions in similar fashion: hate speech against historically subordinated peoples and pornographic male speech is said to enact the silence of its subjects. Antiabortion activists have argued that women's right to abort limits the fetus's right to its future as a person, and advocates of gun control have argued that an absolutist reading of the Second Amendment compromises the safety of all citizens. The point is that even as rights that are gender-specific entrench the regulation of women through the regulative norms of femininity, rights that are neutral and universal potentially entrench the subordinated status of women by augmenting the power of the already powerful. The paradox, then, is that rights that entail some specification of our suffering, injury, or inequality lock us into the identity defined by our subordination, and rights that eschew this specificity not only sustain the invisibility of our subordination but potentially even enhance it.

There are still other variations on this dilemma. Consider the manner in which feminist legal reformers often appear pinned between a tendency, on the one hand, to inscribe in the law the experience and discursive truths of *some* women which are then held to represent all women, and, on the other hand, to render gender so abstractly that the particulars of what constitutes women's inequality and women's violation remain unarticulated and unad

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dressed. This is a recurring problem not only in the political and legal debates concerning pornography, where it has been extensively rehearsed, but in sexual harassment law and numerous corners of divorce and custody law. What understanding of the interconstitutive powers of gender and sexuality is lost when sex discrimination (as sex harassment) is cast as something that women can do to men? On the other hand, what presumption about women's inherent subordination through sexuality is presumed if sexual harassment is understood as a site of gender discrimination only for women? What do women lose in economic standing and custody claims - when we are treated as equals in divorce courts, and yet what possibility of becoming equals-of sharing responsibility for child rearing with men and of having equal potential for earning power-is forfeited if we are not treated as equals in this setting? Similarly, if some women experience pornography as a violation and others maintain that it is sexual prudishness, shaming, and regulation that constitute their unfreedom, what does it mean to encode one or the other perspective as a right in the name of advancing women's equality? Hate speech legislation has presented a parallel dilemma: whereas Mari Matsuda insists that hateful racist speech is "shattering" and "restricts its victims in their personal freedom" and Charles R. Lawrence III claims it is equivalent to "receiving a slap in

the face," Henry Louis Gates and others claim a different experience of racial invective and fear its legal restriction more than its circulation.⁶ In the pornography dilemma and the hate speech dilemma, two related problems emerge: first, how to restrict hateful speech or pornography in the name of equality and through civil rights discourse without, on the one hand, inscribing certain victims of hatred as its permanent victims (i.e., as permanently hatable) and without, on the other hand, making all persons equally viable as victims of such speech, thereby forfeiting a political analysis that recognizes the specific function of hateful epithet in sustaining the subordination of historically subordinated peoples. In other words, how can

rights be procured that free particular subjects of the harms that porn, hate speech, and a history of discrimination are said to produce without reifying the identities that these harms themselves produce? Second, how to navigate the difficulty of differences within marked groups: this woman feels oppressed while that one feels liberated by pornography; this black person is shattered, that one almost indifferent to racial invective; one gay man is devastated by homophobic slurs, another speaks them.

A second, related dilemma is that rights procured specifically for women

tend to reinscribe heterosexuality as defining both what women are and what constitutes women's vulnerability and violability. This problem emerges whenever it seems that "woman's difference" must be addressed. Indeed, gender tends to be treated as synonymous with heterosexuality in the law, not only because most "gender issues" are framed in terms of heterosexual women, but also because sex and sexuality are treated as two different bases of discrimination. The framing of reproductive freedom primarily in terms of accidental and unwanted pregnancy - the need for abortion - represents the first problem; conventional codes of nondiscrimination, in which gender and sexual preference are distinct and unrelated items in a list, represent the second. Of course, legal reformers working on behalf of gay and lesbian rights have actively sought reforms in laws pertaining to childbearing, adoption, and custody by homosexual parents, and have struggled as well to make visible homophobic harassment in schools and workplaces, but this only reaffirms the extent to which these issues, defined as gay and lesbian issues, are understood as separate from the project of securing *women's* rights. The problem here is not just that heterosexuality continues to be naturalized and normalized by these moves while other sexualities are marginalized, but that the extent to which the category woman is itself produced through heterosexual norms remains completely untouched by this approach. In sum, the process by which women become women, by which both woman as signifier and woman as effect of gender power is produced and sustained, is eschewed and thereby reinforced by the heteronormativity of most women's rights projects. Put more generally, the rights that women bear and exercise as women tend to consolidate the regulative norms of gender and thus function at odds with challenging those norms.

This problem emerged in a complex way in the case heard in 1997 by the Supreme Court on same-sex sexual harassment, in which a man claimed that he was repeatedly subjected to sexual harassment on the all-male offshore oil rig where he worked. The plaintiff in *Oncale v. Sundowner 0* (*shore Services* argued that same-sex harassment ought to constitute discrimination, whereas the defense argued that a man harassing another man could not constitute gender discrimination, either because there was no gender difference between the parties or because there was no way to establish that the victim had been harassed *because* of his gender. (If there had been women on the oil rig where the harassment occurred, the defense argued, perhaps the putative harasser would have treated the women in the

same way.)⁷ The questions raised by this argument, indeed by the Supreme Court Justices themselves, are many: Does gender discrimination transpire only when women and men are treated differently, even if both can be sexually humiliated or subordinated? Is there no sexual harassment, or simply no gender discrimination when one humiliates both women and men? Does sexual harassment, defined as gender discrimination, not exist if it is equally deployed against both women and men by a single agent (i.e., are bisexuals inherently incapable of committing the act of sexual harassment)? Does sexual harassment as currently defined in the law then depend on the sexual orientation of the putative harasser? The confusions in this case suggest, among other things, a disadvantage in the move to cast sexual harassment as gender discrimination if gender discrimination is something that can happen to anyone and be perpetrated by anyone. (This disadvantage does not mitigate but does complicate the fact that the *Meritor [1986]* case, which established sexual harassment as gender discrimination, involved a critical feminist recognition about the relationship between women's subordination and sexual harassment.) These confusions also reveal the extent to which classification of sexual harassment as gender discrimination tacitly defines gender heterosexually. More broadly, they reveal the extent to which sexuality and gender have been folded together in the rights designed to protect women from injuries sustained on the basis of heterosexually defined gender. That is, they reveal the extent to which the basis of the injury, the heterosexual designation of women, is reinscribed in the formulation of rights promising redress.

I want to make brief mention of two other paradoxes in the framing of feminist aims in terms of rights. The first pertains to the problem of the compound production of subjects, theorized most prominently in the legal arena by Kimberle Crenshaw as the matter of "intersectionality" in black women's experience of racial and gender subjection; the second pertains to the problem of conflating acts with identity, theorized most prominently by Janet Halley as a dilemma for gay rights advocates working against sodomy laws. ⁸

Crenshaw argues persuasively that to the extent that black women cannot have the social perils of their blackness, and hence their existence as black women, addressed within the terms of gender discrimination, gender functions as a category purified of *all* inflection by race, and hence as a tacitly white category. Historically, the fiction that gender is produced and regulated autonomously, independently of other modalities of social

power, has been one of the most severe impediments to the development of a racially inclusive feminism, a feminism that does not require an analytic or political distinction between feminism and the experiences of women of color. Yet within civil rights law, it is nearly impossible to feature subjects marked by more than one form of social power (race, gender, age, sexual orientation, disability) at a time. Not only must plaintiffs choose a single basis on which discrimination occurred, but the widely divergent modalities of power through which racialized, gendered, and other dimensions of subject production (and injury) are achieved means that even well-intentioned critical legal scholars tend to focus on one form of social power at a time, or at best, sequentially.⁹

Here is the central paradox constitutive of this problem. On the one hand, various markings in subjects are created through very different *kinds* of powers, not just different powers. That is, subjects of gender, class, nationality, race, sexuality, and so forth are created through different histories, different mechanisms and sites of power, different discursive formations, different regulatory schemes. Thus, theories that articulate the workings of social class, or the making of race, or the reproduction of gender are not likely to be apt for mapping the mechanisms of sexuality as a form of social power. On the other hand, we are not fabricated as subjects in discrete units by these various powers: they do not operate on and through us independently, or linearly, or cumulatively, and they cannot be radically extricated from one another in any particular historical formation. Insofar as subject construction does not transpire along discrete lines of nationality, race, sexuality, gender, caste, class, and so forth, these powers of subject formation are thus not separable in subjects themselves. As many feminist, postcolonial, queer, and critical race theorists have noted in recent years, it is impossible to pull the race out of gender, or the gender out of sexuality, or the colonialism out of caste out of masculinity out of sexuality. Moreover, to treat these various modalities of subject formation as simply additive or even intersectional is to elide the way subjects are brought into being through subjectifying discourses, the way that we are not simply oppressed but produced through these discourses, a production that does not occur in additive, intersectional, or overlapping parts but through complex and often fragmented histories in which multiple social powers are regulated through and against one another.

Law and critical legal theory bring this problem – that distinctive models of power are required for grasping various kinds of subject production,

yet subject construction itself does not transpire in accordance with any of these models - into sharp relief. Bracketing the sphere of formal and relatively abstract antidiscrimination law, where discrimination on the basis of a laundry list of identity attributes and personal beliefs is prohibited, it is rare to find the injuries of racism, sexism, homophobia, and poverty harbored in the same corners of the law. They are rarely recognized or regulated through the same legal categories and are rarely redressed through the same legal strategies. Consequently, legal theorists concerned with these respective identity categories not only turn to different dimensions of the law depending on the identity category with which they are concerned, but they often figure the law itself in quite incommensurate ways.¹⁰

Now, given these kinds of variations, it is unsurprising that concern with securing certain legal terrain does not simply differ, but often works at cross-purposes for differently marked identities. Privacy, for example, is for many feminists a site that depoliticizes many of the constituent activities and injuries of women: reproduction, domestic assault, incest, unremunerated household labor, and compulsory emotional and sexual service to men. Yet for those concerned with sexual freedom, with welfare rights for the poor, and with the rights to bodily integrity historically denied racially subjugated peoples, privacy generally appears unambiguously valuable. Indeed, the absence of a universal right to privacy was the ground for invading Hardwick's bedroom in *Bowers v. Hardwick* (1986). This absence is also the legal basis on which surprise visits by social workers to enforce the "man in the house rule" for welfare recipients were tolerated for so many decades. Like rights themselves, depending on the function of privacy in the powers that make the subject, and depending on the particular dimension of marked identity that is at issue, privacy will be seen variously to advance or deter emancipation, to cloak inequality or procure equality.

If the powers producing and situating socially subordinated subjects occur in radically different modalities, which themselves contain different histories and technologies, touch different surfaces and depths, form different bodies and psyches, it is little wonder that it has been so difficult for politically progressive legal reformers to work on more than one kind of marked identity at once. And it has made it nearly impossible to theorize a socially stigmatized legal subject that is not single and monolithic. We appear not only in the law but in courts and public policy either as (undifferentiated) women, or as economically deprived, or as lesbians, or as racially stigmatized, but never as the complex, compound, and internally

diverse subjects that we are. This feature of rights discourse impedes the politically nuanced, socially inclusive project to which feminism has aspired in the past decade.

Janet Halley's reflections on the figure of sodomy reveal a different dimension of the troubling way rights discourse not only reinforces the fiction of a monolithic subject but potentially regulates us through that monolith. In "Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*," Halley explores the way the remarkably mobile and unstable signifier sodomy stabilizes homosexual identity through a routine conflation, by homophobes and homophiles alike, of sexual act with sexual identity. Although sodomy's technical definition (any form of oral-genital or anal-genital sexuality) itself undoes the linguistically achieved opposition between homosexuality and heterosexuality precisely by undoing the presumed singularity of the sex acts that take place on either side of the divide, the equation of sodomy with homosexuality (again, in both anti- and pro-gay discourses) resurrects the binary opposition between homo- and heterosexuality. Halley calls for exploiting the instability of the term, for dissociating act and identity, in part to establish more effective coalitions among those targeted by sexually repressive legislation, in part to expose the discursive mechanics of what she calls "heterosexual superordination."¹¹ To the extent that heterosexuals engage in sodomitical acts yet are immune from their stigma (and criminality) when sodomy operates as a metonym for homosexuality, homosexuals appear to be prosecuted not for the kind of sex they are having but for being associated with a kind of sex that heterosexuality disavows in order to mark its distance from homosexuality. The point for thinking about rights is not only that gay rights activists ignore at their peril the way the act-identity conflation works against them, but that rights in this context must be understood as shoring up a fictional identity, an identity premised on the fictional singularity of sexual acts that privileges while masking the privilege of heterosexuals.

What happens if we think about gender along the lines that Halley has mapped? To what extent is male identity as well as male superordination consolidated through the ontological disavowal of certain activities, vulnerabilities, and labors and their displacement onto women? If gender itself is the effect of the naturalized sexual division of almost everything in the human world, then rights oriented toward women's specific suffering in this division may have the effect of reinforcing the fiction of gender identity and entrenching the masculinist disavowal of putatively female experiences or

labors, from sexual assault to maternity. More generally, to the extent that rights consolidate the fiction of the sovereign individual generally, and of the naturalized identities of particular individuals, they consolidate that which the historically subordinated both need access to - sovereign individuality, which we cannot not want-and need to challenge insofar as the terms of that individuality are predicated on a humanism that routinely conceals its gendered, racial, and sexual norms. That which we cannot not want is also that which ensnares us in the terms of our domination.

It would appear that a provisional answer to the question of the value of rights language for women is that it is deeply paradoxical: rights secure our standing as individuals even as they obscure the treacherous ways that standing is achieved and regulated; they must be specific and concrete to reveal and redress women's subordination, yet potentially entrench our subordination through that specificity; they promise increased individual sovereignty at the price of intensifying the fiction of sovereign subjects; they emancipate us to pursue other political ends while subordinating those political ends to liberal discourse; they move in a transhistorical register while emerging from historically specific conditions; they promise to redress our suffering as women but only by fracturing that suffering-and us - into discrete components, a fracturing that further violates lives already violated by the imbrication of racial, class, sexual, and gendered power.

Paradox is certainly not an impossible political condition, but it is a demanding and frequently unsatisfying one. Its master theorist in the Western tradition is Jean-Jacques Rousseau, whose thought stands historically as both incitement to and constraint on radical political aims. The constraint is generally attributed to his own penchant for paradox; indeed, Rousseau's aporias may be one of the reasons paradox has such a bad political reputation. But if Rousseau insisted that men must be forced to be free, and that the development of human culture is inevitably accompanied by a descent into unfreedom, inequality, and alienation, how much is the paradoxical nature of these claims the consequence of the discourse of progress, freedom, and human perfectability into which he was speaking, and which he was also seeking to displace with an alternative discourse? In other words, to what extent can political paradox be read not as truth

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confusion about certain political conditions, but as the constraints imposed by those conditions on the truths that may be uttered?

Paradox may be distinguished from contradiction or tension through its emphasis on irresolvability: multiple yet incommensurable truths, or truth and its negation in a single proposition, or truths that undo even as they require each other. But paradox also signifies a doctrine or opinion that challenges received authority, goes against the doxa. In *Only Paradoxes to Offer*, a study of nineteenth-century French feminists, Joan Wallach Scott parlays this definition into a political formation: "Those who put into circulation a set of truths that challenge but don't displace orthodox beliefs create a situation that loosely matches the technical definition of paradox."12 Scott then suggests that the paradoxical utterances and strategies of the feminists she studied emerged as a consequence of arguing on behalf of women's rights, and of women's standing as individuals, in a discursive context in which both individuals and rights were relentlessly identified with masculinity. Thus, feminists were arguing for something that could not be procured without simultaneously demanding a transformation in the nature of what they were arguing for, namely, the "rights of man" for women. This rendered paradox the structuring rather than contingent condition of their political claims.

Scott's insight into nineteenth-century French feminism may be of help in understanding our own circumstances. First, the problem she identifies persists into the present, namely, that women's struggle for rights occurs in the context of a specifically masculinist discourse of rights, a discourse that presumes an ontologically autonomous, self-sufficient, unencumbered subject.1.1 Women both require access to the existence of this fictional subject and are systematically excluded from it by the gendered terms of liberalism, thereby making our deployment of rights paradoxical. Second, moving beyond Scott's focus, even as invocations of rights for a particular subject (e.g., women) on a particular issue (e.g., sexuality) in a particular domain (e.g., marriage), all of which have been historically excluded from the purview of rights, may work to politicize the standing of those subjects, issues, or domains, rights in liberalism also tend to depoliticize the conditions they articulate.14 Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way. Thus rights for the systematically subordinated tend to rewrite injuries, inequalities, and

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impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation. Yet the absence of rights in these domains leaves fully intact these same conditions.

If these are the conditions under which rights emerge as paradoxical for women, as simultaneously politically essential and politically regressive, what are the possibilities for working these paradoxes in politically efficacious fashion? Unlike contradictions, which can be exploited, or mystification, which can be exposed, or disavowal, which can be forced into confrontation with itself, or even despair, which can be negated, the politics of paradox is very difficult to negotiate. Paradox appears endlessly selfcanceling, as a political condition of achievements perpetually undercut, a predicament of discourse in which every truth is crossed by a countertruth, and hence a state in which political strategizing itself is paralyzed.

Yet, it is telling that the language carrying the fatality of paradox occurs in the temporality of a progressive historiography: precisely the language Marx used in evaluating rights when he argued that "political emancipation certainly represents a great progress. . . not the final form of human emancipation. . . but the final form. . . within the framework of the prevailing social order." Might the political potential of paradox appear greater when it is situated in a non progressive historiography, one in which, rather than linear or even dialectical transformation, strategies of displacement, confoundment, and disruption are operative? How might paradox gain political richness when it is understood as affirming the impossibility of justice in the present and as articulating the conditions and contours of justice in the future? How might attention to paradox help formulate a political struggle for rights in which they are conceived neither as instruments nor as ends, but as articulating through their instantiation what equality and freedom might consist in that exceeds them? In other words, how might the paradoxical elements of the struggle for rights in an emancipatory context articulate a field of justice beyond "that which we cannot not want"? And what form of rights claims have the temerity to sacrifice an absolutist or naturalized status in order to carry this possibility?

Notes

1. Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993), 45-46.

2. Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991), 165.
3. Drucilla A. Cornell, *The Imaginary Domain* (New York: Routledge, 1995).
4. Catharine MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), 73.
5. Cheryl Harris, "Whiteness as Property," and Neil Gotanda, "A Critique of 'Our Constitution Is Color Blind,'" in *Critical Race Theory: The Key Writings That Formed the Movement*, ed. Kimberle Crenshaw, Neil Gotanda, et al. (New York: New Press, 1995).
6. Mari Matsuda, Charles R. Lawrence III, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993), 2.4, 68; Henry Louis Gates, "Truth or Consequences: Putting Limits on Limits," *ACLS Occasional Paper 2.2.*, p. 19.
7. "Court Weighs Same-Sex Harassment," *New York Times* 4 Dec. 1997, A2.1. It is worth noting that the argument by the defense attorney that gender discrimination cannot be proven because there were no women on the oil rig where the harassment occurred tacitly cloaks the homosexual overtures of the accused by drawing on the trope of the sexually frustrated heterosexual prison inmate. Lacking available women to have sex with, this reasoning suggests, men will turn to or on one another, but this does not equate with homosexual desire. That this argument has enough salience to be advanced before the Supreme Court Justices, when it is unimaginable as a defense in the more conventional scene of a man harassing a female employee, further suggests both the impossibility and the necessity of conceiving gender and sexual discrimination simultaneously if gender justice is to be pursued.
8. Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex," *University of Chicago Legal Forum* 12.9 (J 989), and "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," in Crenshaw, Gotanda, et al., *Critical Race Theory*; Janet Halley, "Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*," *Virginia Law Review* 79.7 (1993).
9. A handful of critical legal scholars escape this categorization, but, probably by their own accounts, none do so with complete success. See the work on race, gender, and sexuality in A. I. Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1977), especially Angela Harris's reprinted essay, "Race and Essentialism in Feminist Legal Theory." See also Cornell, *The Imaginary Domain*, which attends to gender and sexuality inside a single analytic frame.
10. For a fuller development of this argument, see Wendy Brown, "The Impossibility of Women's Studies," *differences* 9.3 (1997).
11. Halley, "Reasoning about Sodomy," 1770-71.
12. Joan Wallach Scott, *Only Paradoxes to Offer* (Cambridge, MA: Harvard University Press, 1996), 5-6.
13. The masculinism of liberalism generally, and rights discourse in particular, is something I discuss at length in "Liberalism's Family Values," chapter 6 of *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995).

I have pursued this argument at length in "Rights and Losses," chapter 5 of *States of Inquiry*. This paradox articulated as a troubling contradiction by Marx in "On the Jewish Question" in his recognition that civil and political rights for the disenfranchised both articulate that disenfranchisement and trivialize it as a simple failure of universality to realize itself. However, this paradox is also cast as a certain form of political possibility by Judith Butler in her argument that "the temporalized map of universality's future" is a kind of "double-speaking" by those who, "with no authorization to speak within and as the universal, nevertheless lay claim to the term." She argues: "One who is excluded from the universal, and yet belongs to it nevertheless, speaks from a split situation of being once authorized and deauthorized Speaking and exposing the alterity within the norm (the alterity without which the norm would not 'know itself') exposes the failure of the norm to effect the universal reach for which it stands, exposes what we might underscore; *the promising gambivalence of the norm*" (*Excitable Speech: A Politics of the /Performative* [New York: Routledge, 1997], 9 I).

15. Karl Marx, "On Jewish Question," in *The Marx-Engels Reader*, 2d ed., ed. R. Tucker (New York: Norton, 1978), 35.

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