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Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure

Bridget J. Crawford[†]

ABSTRACT

This article critically examines a growing body of non-legal writing by women who have proclaimed a "third-wave" of feminism and suggests the ways that legal theory might be enriched by this work. Scholars typically label the nineteenth-century woman suffrage movement as the "first wave" of feminism, and view the legal and social activism of the 1970s as the "second wave" of feminism. The third wave of feminism, with its intellectual origins in the response to the Clarence Thomas Senate confirmation hearings, is a reaction to the popular stereotype that feminists are humorless man-haters. Third-wave feminists proclaim their difference from second-wave feminists and celebrate "girl power," the joys of make-up and femininity, the complexity of human desire and the importance of fun.

Using pornography as the central focus, this article explores the main themes and methods of third-wave feminism. Third-wave feminists view the making and consumption of pornography as a matter of personal preference and actively resist any role for law in the regulation of pornography. These third-wave writings about pornography and other issues express: (1) dissatisfaction with earlier feminists; (2) the multiple nature of personal identity; (3) the joy of embracing a traditionally feminine appearance and feminine attributes; (4) the centrality of sexual pleasure and sexual self-awareness; (5) the obstacles to economic empowerment; and (6) the social and cultural impact of media and technology. The principal methods of third-wave feminism are personal story-telling, coalition-building and harnessing and interpreting the media.

Substantively third-wave feminism is neo-legal in the sense that it does not imagine a full role for law in achieving equality between men and women. The article concludes by suggesting a possible third-wave feminist legal approach to internet regulation, domestic violence, prostitution, abortion, reproductive technology, child care, and sexual harassment.

CONTENTS

INTRODUCTION ……... 3

I. THIRD-WAVE FEMINISM ……... 8

A. *Origins of Third-Wave Feminism* ……... 8

B. *Major Writings of Third-Wave Feminism* ……... 10

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C. *Principal Ideas of Third-Wave Feminism* ……... 16
1. *Dissatisfaction With Earlier Feminists* ……... 17
2. *Multiple Nature of Personal Identity* ……... 19
3. *Joy of Embracing Traditional Female Appearance and Attributes* ……... 20
4. *Centrality of Sexual Pleasure and Sexual Self-Awareness* ……... 21
5. *Obstacles to Economic Empowerment* ……... 22
6. *Social and Cultural Impact of Media and Technology* ……... 23
D. *Principal Methods of Third-Wave Feminism* ……... 24
1. *Telling Personal Stories* ……... 24
2. *Building Coalitions* ……... 26
3. *Interpreting and Harnessing the Media* ……... 26
II. THE SEX WARS OF THE SECOND WAVE ……... 31
A. *Pornography is a Feminist Issue* ……... 31
B. *Dominance Feminism and Pornography's Harms* ……... 33
C. *Liberal Feminism and Censorship's Harms* ……... 35
III. THE THIRD WAVE TAKES ON PORNOGRAPHY ……... 37
A. *Pornography as Sexual Expression* ……... 38
B. *Pornography as Performance* ……... 43
C. *Pornography as (Just Another) Exploitation* ……... 46
D. *Pornography as the Praxis of Pleasure* ……... 49
IV. THE THIRD-WAVE FEMINIST AGENDA ……... 51
A. *The Third Wave Agenda* ……... 54
B. *The Third Wave's Neolegalism* ……... 54
V. TOWARD A THIRD-WAVE FEMINIST LEGAL THEORY ……... 55
A. *Third-Wave Feminist Legal Goals* ……... 55
1. *Internet Regulation* ……... 55
2. *Domestic Violence* ……... 56
3. *Prostitution* ……... 57
4. *Reproductive Freedom and Technology* ……... 58
5. *Child-Care* ……... 59
6. *Sexual Harassment* ……... 59
B. *Third-Wave Feminist Legal Methods* ……... 60
CONCLUSION ……... 62

INTRODUCTION

Feminists are ugly, boring and shrill, according to their critics. The popular press stereotypes feminists as anti-beauty,[1] anti-pleasure[2] and anti-fun.[3] Many young women today shun the feminist label, not wanting to be lumped in with the bra-burning, hairy-legged, strident "women's libber" of the 1970s. Young women who do identify themselves as feminists go to great lengths to explain how their brand of feminism is different from the feminism of their mothers.[4] This self-proclaimed "third wave" of feminists consists of women who are too young to have taken part in the "second wave" of 1970s activism, let alone the "first wave" of nineteenth-century advocacy for women's rights.[5] These third-wave feminists

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[1] Writer Anna Quindlen quotes one professor as saying that "[t]here are a lot of homely women in women's studies . . . . Preaching these antimale, antisex sermons is a way for them to compensate for various heartaches – they're just mad at the beautiful girls." Anna Quindlen, *And Now, Babe Feminism, in* "BAD GIRLS"/"GOOD GIRLS": WOMEN, SEX, AND POWER IN THE NINETIES 4 (Nan Bauer Maglin & Donna Marie Perry eds., 1996) (quoting Clark University Professor Christina Hoff Sommers).

[2] *See, e.g.,* Kathleen Trigiani, *As Long as Men Like Mr. Mars and Venus Exist*, 3 FEMINISTA! No. 8, ¶ 2, *available at* http://www.feminista.com/archives/v3n8/trigiani.html ("[I]f I had to admit that Andrea [Dworkin] had a valid point or two, would my friends think I was anti-sex, anti-men, anti-pleasure, and anti-free speech?").

[3] As Tucker Carlson, the conservative former co-host of the CNN program *Crossfire*, has said, "The traditional anti-fun feminist point of view is that of course men are bad, and they make women do bad things." *Crossfire* (CNN television broadcast Nov. 20, 2002) (statement of Tucker Carlson).

[4] According to a 2001 Gallup Poll, 24.97% of surveyed respondents consider themselves feminists. Gallup Poll, June 11-17, 2001 (Q 30: "Do you consider yourself a feminist, or not?"). *Compare* 1999 Gallup Poll, Feb. 3-7, 1999 (26.09 % those surveyed consider themselves feminists); Gallup Poll Feb. 5-11, 1986 (10.25% respondents surveyed self-identify as a "strong feminist," 45.58% self-identify as feminist, 27.65% identify as not a feminist, 3.96% identify as anti-feminist, and 12.55% cannot say); Gallup Poll, Dec. 17-19, 1992 (32.53% people surveyed consider themselves feminists); Gallup Poll, Oct. 10-11, 1991 (30.40% people surveyed consider themselves feminists). One CBS poll reports that 22% of women said that being called a feminist would be considered an "insult." Carey Roberts, *Feminine Mystique, of Feminine Mistake?*, RENEW AMERICA, Feb. 14, 2006, http://www.renewamerica.us/columns/roberts/060214. *But see* Women's Equality Poll: 1995, Peter Y. Harris Research Group, Inc. (poll prepared for the Feminist Majority Foundation showing that 71% women and 61% men consider themselves feminists). One young woman attributes her peers' aversion to feminist identification to the negative stereotypes associated with the feminist movement: "The feminism that younger women are afraid of, it seems to me, is the feminism that assume there is one pure way to be and it is anti-capitalist, super-serious and hostile to bikini waxes and Madonna." Katha Pollitt & Jennifer Baumgardner, *Afterword: A Correspondence Between Katha Pollit and Jennifer Baumgardner*, *in* CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 310 (Rory Dicker & Alison Piepmeier eds., 2003) (statement of Jennifer Baumgardner).

[5] Some writers and scholars define third-wave feminists as those "whose birthdates fall between 1963 and 1973." Leslie Heywood & Jennifer Drake, *Introduction* to THIRD WAVE AGENDA: BEING FEMINIST, DOING FEMINISM at 4 (Leslie Heywood & Jennifer Drake eds., 1997). *See also* Lisa Jervis, *The End of Feminism's Third Wave*, MS., Winter 2004/2005, at 57 ("I was born in 1972, right smack in the demographic that people think about when they think about the third wave.").

bemoan the older generation's perceived monopoly on feminist leadership[6] and its failure to articulate a broadly inclusive (or even relevant) feminist movement.[7] The popular press and academic disciplines other than law have remarked on this incipient body of third-wave feminist writings,[8] but legal scholars have not yet

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The word "feminism" is a twentieth-century term that describes a particular subsection of woman suffragists. *See* NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 3 (1987) ("The appearance of Feminism in the 1910s signaled a new phase in the debate and agitation about women's rights and freedoms that had flared for hundreds of years. People in the nineteenth century did not say feminism. They spoke of the advancement of woman or the cause of woman, woman's rights, and woman suffrage."). For a brief historical background of United States women's movement, see generally FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 1-16 (Mary Becker et al. eds., 2001). On the nineteenth-century woman suffrage movement, see generally AILEEN KRADITOR, IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920 1 (1965). On nineteenth-century women's voting rights and other activism, see generally Ariella R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 947 (2002). *See also* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2001).

[6] *See* Lillian S. Robinson, *Subject/Postion, in* "BAD" GIRLS/"GOOD" GIRLS, *supra* note 1, at 182 ("All contemporary feminisms are anchored in the notion of breaking silence. The problem is that the feminism that went public in the late 1960s and early 1970s . . . broke silence about the systemic oppression of women, however we named the system, whereas the newer 'third-wave' seems inclined to break silence chiefly about oppressions perceived or experienced within feminism itself."). At least one commentator notes that the third-wave's self-proclaimed generational conflict is "overhyped," insofar as "many third-wavers have a past association with *Ms.*, a bastion of second-wave feminism. Women of color in the third-wave in particular very carefully portray themselves as contiguous with their foremothers and borrow heavily from their theoretical work." Jennifer Gilley*, Writings of the Third-Wave: Young Feminists in Conversation*, 44 REFERENCE & USER SERV. Q. NO. 3, 187, 191 (2005).

[7] *See, e.g.,* JENNIFER BAUMGARDNER & AMY RICHARDS, MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE 219 (2000) (describing young feminists' critique of older feminists' ideas such as "Take Our Daughters to Work" day).

[8] *See, e.g.,* Ginia Bellafante, *Feminism: It's All About Me!* TIME, June 29, 1998, at 54; Louise Story, *Many Women at Elite Colleges Set a Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1; DIFFERENT WAVELENGTHS: STUDIES OF THE CONTEMPORARY WOMEN'S MOVEMENT xvii (Jo Reger ed., 2005). *See also* Stacy Gillis & Rebecca Munford, *Harvesting Our Strengths: Third Wave Feminism and Women's Studies*, 4 J. OF INT'L WOMEN'S STUD. NO. 2 (Apr. 2003); Susan Frairnan, *Feminism Today: Mothers, Daughters, Emerging Sisters*, 11 AM. LITERARY HIST. NO. 3, 405, 525-544 (Autumn 1999); Linda Martin Alcoff, *The Politics of Postmodern Feminism, Revisited*, CULTURAL CRITIQUE NO. 36, 5-27 (Spring 1997); Jennifer Drake, *Third Wave Feminisms*, 23 FEMINIST STUD. NO. 1, 97-108 (Spring 1997); Natalie Fixmer & Julia T. Wood, *The Personal is Still Political: Embodied Politics in Third Wave Feminism*, 28 WOMEN'S STUD. IN COMM'N NO. 2, 235-257 (Fall 2005); Susan Archer Mann & Douglas J. Huffman, *The Decentering of Second Wave Feminism and the Rise of the Third Wave*, 69 SCIENCE & SOC. NO. 1, 56-91 (Jan. 2005).

taken notice of it.[9] This article explores the contours of third-wave feminism and suggests the ways in which legal theory might be enriched by it.[10]

To date, third-wave feminist writing focuses primarily on non-legal (and non-theoretical) aspects of female sexuality, economic mobility and the multi-faceted nature of racial, ethnic, class and gender identities. Third-wave feminists also acknowledge and emphasize the role of culture, media and technology in shaping those identities. These writers tend to take a broad view of "women's issues" by connecting traditional feminist concerns such as reproductive freedom and discrimination in employment with broader justice movements for workers, immigrants, gays and lesbians and other disadvantaged groups.

Notwithstanding their interest in social, political and economic justice issues, third-wave feminists do not write from an explicitly legal perspective. They approach problems of gender inequality as organizers, activists, writers or scholars in disciplines other than law.[11] Third-wave feminist writers focus on social change, not on legal issues, strategies or theories. Similarly, or perhaps because of this absence of legal theorizing in third-wave feminist writing,[12]

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[9] This lag in legal scholarship is not unique to the ideas of the third-wave. As Martha Chamallas notes, "[l]egal feminism has borrowed heavily from [other disciplines], sometimes taking years to incorporate themes that interdisciplinary scholars outside the law have already explored." MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 16 (2d ed. 2003).

[10] By virtue of the year of my birth, 1969, I admittedly fall into the demographic category associated with third-wave feminists. Although this may explain my initial attraction to the writings of women and men in my age cohort, this article neither embraces (or rejects) third-wave feminist ideas or methods. My aim is to explain and critique third-wave feminist writings in order to integrate them into the intellectual history (and future) of feminist jurisprudence. Third-wave and other feminist traditions value the first-person narrative (*see, e.g., infra* Part I.D.1), but I intentionally use a traditional, scholarly format in order to reach my intended audience of legal scholars.

[11] For example, in the introduction to Rebecca Walker's foundational volume of personal essays by third-wave feminists, she notes that the authors are "an eclectic gathering of folks: a fundraiser for women's organizations, a lawyer, a videomaker, an actor, a cultural critic, a professor, a musician, a director of special projects for a film company, a student, a writer or children's books, and yes, among others, two men and a 'supermodel.'" Rebecca Walker, *Introduction* to TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM xxvi (Rebecca Walker ed., 1995). The one lawyer who contributes to the volume writes not about legal issues but about being a young woman starting a career. *See* Min Jin Lee, *Pushing Away the Plate, in id.* at 87.

[12] Third-wave feminist writers are not generally preoccupied with the analysis of formal legal issues, but nevertheless, their work is full of what Paul Shiff Berman and Austin Sarat, among others, call "law talk," or "the use of legal concepts in everyday language. Such talk includes abstract (and often inchoate) ideas of street justice, due process, civil disobedience, retribution, deterrence, and rights, all of which are frequently invoked both in public discussions and dinner-table conversations alike." Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal, Cultural Analysis*, 13 YALE J.L. & HUMAN. 95, n. 21 (2001). *See also* AUSTIN SARAT, DIVORCE LAWYERS AND THEIR CLIENTS 25 (1995) (law talk is "the way in which lawyers and clients characterize the nature, operation, and efficiency of legal institutions and characterize the motivation and competence of legal actors. Such talk is deployed strategically and sets the context within which lawyers and clients make decisions about their cases"); Austin Sarat & L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1687 (1989) ("Law talk of the divorce lawyer's office may be partially responsible for the common finding that people who use legal processes tend, no matter how

contemporary law scholars have not yet posited any relationship between third-wave writings and feminist legal theory.[13]

This article explores the potentially rich intersection of third-wave feminism and feminist legal theory. Using pornography as the central focus, this article explores the main themes of third-wave feminism and interrogates the claim that third-wave feminism departs in substance and method from its predecessors. Third-wave feminist writing offers a new perspective on familiar issues like pornography, but must be integrated into a larger jurisprudential framework in order to make a meaningful contribution to feminist legal theory and praxis. In the case of pornography in particular, third-wave feminism's insights about the consumer's role in interpreting pornography would suggest a hands-off approach to its legal regulation.

Part I of this article explores the general themes of third-wave feminist writings. The article begins with an overview of third-wave feminist literature and its predominant concerns. These are (1) dissatisfaction with earlier feminists; (2) the multiple nature of personal identity; (3) the joy of embracing traditional feminine appearance and attributes; (4) the centrality of sexual pleasure and sexual self-awareness; (5) the obstacles to economic empowerment; and (6) the social and cultural impact of media and technology. Textual analysis reveals third-wave feminists' reliance on non-legal tools for remedying gender inequality. Although third-wave feminists acknowledge the law's role in women's historical advancement, they do not conceive of the law as crucial to achieving gender equality now or in the future.[14] Their methods instead are (1) personal story-telling; (2) coalition building; and (3) harnessing and interpreting media.

Part II next provides a brief overview of the history of feminist debates on pornography. Pornography has been a divisive issue for second-wave feminists. Historically these women have taken up strong ideological positions on either side of what have been called the "sex wars."[15] On the one hand, so-called "pro-

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favorable the results of their encounter, to have a less positive view of the law than those with no direct experience. Law talk in the divorce lawyer's office, as it is interprets the internal workings of the legal system, exposes law as failing to live up to the expectations which people have about it."). For examples of "law talk" in feminist scholarship, *see, e.g.,* RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 140 (1992) (describing discussion among participants in workshop on lesbian parenting in which one woman stated her preference to be called "mother" by her child because "[t]he law gives me twenty-four-hours-a day responsibility for that child. Me - and me only….").

[13] *Compare* Jane E. Larson, *Introduction: Third Wave – Can Feminists Use the Law to Effect Social Change in the 1990s*, 87 NW. U. L. REV. 1252 (1993); *and* Deborah W. Post, *Which Wave Are You? Comments on the Collected Essays from the Seminar "To Do Feminist Theory,"* 9 CARDOZO WOMEN'S L.J. 471 (2003).

[14] *See also* Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 L. & SEXUALITY 83 (1994) (questioning extent to which law is an effective force for social change for gays and lesbians). On the law as a social change force generally, see, e.g., Jack Greenberg, *Litigation for Social Change: Methods, Limits, and Role in Democracy*, 29 REC. ASS'N B. N.Y. 320, 331 (1974) (describing Brown v. Board of Education as "a paradigm of law making in the courts") *and* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1-3 (1978) (tracing roots of reform through law to the "Warren Court era and the extraordinary effort to translate the rule of Brown v. Board of Education into practice.").

[15] Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

regulation" feminists like Catharine MacKinnon[16] claim that pornography "is a form of forced sex, a practice of sexual politics, an institution of gender inequality."[17] Model ordinances drafted by MacKinnon and her colleague Andrea Dworkin define as sex discrimination any coercion into pornography, assault due to pornography and defamation due through pornography.[18] On the other hand, so-called "pro-sex" feminists like Lisa Duggan, Nan Hunter and Carole Vance oppose restrictions on pornography as evidence of constraining and puritanical sexual norms.[19] Both in popular culture and academic arguments, many people traditionally characterize the feminist debate on pornography as a struggle between the (bad) forces of censorship and the (good) freedoms of the First Amendment.[20]

After examining the second-wave debate on pornography in Part II, Part III details and critiques third-wave feminist writings on pornography. Although they claim to have a fresh perspective on the issue, third-wave feminists' emphasis on the individual consumer's role in the interpretation of pornography is in some ways an extension of the arguments of the "pro-sex" second-wave feminists. Third-wave feminists fail to acknowledge the possibility that pornography harms either the women who are involved in its production or those who consume it. Third-wave feminists view pornography as something entirely outside the law. Any problems with pornography should be addressed by the individual, not by the legal system.

Part IV pulls back from third-wave writings on pornography to explore the stated third-wave feminist social and political agenda. The third wave's substantive goals seem to fall into five subsets: politics, education, health, the economy and law. The least developed of these is law. Apart from broad aspirations for equality between women and men, it is not clear what third-wave feminists want the law to look like.

Part V outlines the contours of a potential third-wave feminist jurisprudence. From a substantive perspective, third-wave feminist writings on pornography suggest that young feminists would reject most, if not all, forms of internet regulation. This Part goes on to suggest a third-wave feminist approach to domestic violence, prostitution, abortion, reproductive technology, child care and sexual harassment. From a methodological perspective, third-wave feminism has

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[16] MacKinnon herself rejects the label "censorship" to describe her views or legal proposals with respect to pornography. **[cite].**

[17] CATHARINE A. MACKINNON, *Not a Moral Issue, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148 (1987).

[18] ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY & CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY, app. D (1988).

[19] Lisa Duggan, Nan D. Hunter & Carole S. Vance, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCHOOL L. REV. 133 (1993). *See also* Nan D. Hunter & Silvia Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., in American Booksellers Ass'n, Inc. v. Hudnut*, 21 U. MICH. J.L. REF. 69 (1987-88).

[20] *See, e.g.,* THE PEOPLE VS. LARRY FLINT (Columbia Pictures 1996); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (2002 ed.); WENDY MCELROY, XXX: A WOMAN'S RIGHT TO PORNOGRAPHY (1995).

much to offer legal theory. Third-wave feminists emphasize women's individual experiences,[21] define women's issues broadly, expand the theoretical understanding of inequality, and suggest the importance of multi-coalitional engagement with politics and the law.

I. THIRD-WAVE FEMINISM

A. Origins of Third-Wave Feminism

The 1991 Senate hearings on Clarence Thomas' appointment to the United States Supreme Court were a watershed event in the history of American feminism.[22] Anita Hill, a professor at University of Oklahoma School of Law and a former colleague of Thomas' at the Equal Employment Opportunity Commission, alleged that Thomas had spoken with her about pornographic films,[23] bragged of his own sexual abilities[24] and asked her for dates.[25] At first, the Senate Judiciary Committee did not respond to Hill's allegations of sexual harassment. When the Committee did raise the allegations with Judge Thomas and held formal hearings, some observers perceived a lack of sensitivity on the part of the all-male Senators. Women all over the country who witnessed the

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[21] Rebecca Walker highlights the ways in which feminist theory and praxis conflict when she describes her edited volume of third-wave feminist stories as evidence of young women's commitment to "being real (refusing to be bound by a feminist ideal not of their own making) and telling the truth (honoring the complexity and contradiction in their lives by adding their experiences to the feminist dialogue)." Walker, *Introduction* to TO BE REAL, *supra* note 11, at xxxiv.

[22] Bo Emerson, *Lessons From the Hill: What Have We Learned a Year After the Thomas Hearings*, ATLANTA CONST., Oct. 5, 1992, at C1 (Thomas hearings "represented a watershed moment in the politics of gender"). *See also* RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita Faye Hill & Emma Coleman Jordan eds., 1995). Naomi Wolf describes the hearings as setting off a "genderquake" in male-female relations. NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY xvi-ix, 142 (1993). *See also* Susan Jane Gilman, *Lunching with the Enemy*, MS., Oct.-Nov. 2000, at 61 (tracing origins of conservative Independent Women's Forum to the same period).

[23] *Hearing Before the Comm. on the Judiciary on the Nomination of Clarence Thomas*, 102nd Cong. 37-38 (1991) (statement of Anita Hill). Professor Hill specifically testified as follows:

> He spoke about acts he had seen in pornographic files involving such matters as women having sex with animals, and film showing group sex or rape scenes . . . . On several occasions Thomas told me graphically of his own sexual prowess . . . . One of the oddest episodes I remember was an occasion in which Thomas was drinking a Coke in his office, he got up from the table, at which we were working, went over to his desk to get the Code, looked at the can and asked, "[w]ho has put public hair on my Coke?" On other occasions he referred to the size of his own penis as being larger than normal and he also spoke on some occasions of the pleasures he had given to women with oral sex.

Id. at 37-38.

[24] *Id.* at 38.

[25] *Id.*

televised hearings became outraged at what they perceived as mistreatment of Hill by the "all-male club" of the Senate Judiciary Committee.[26]

Writing in angry response to the Thomas hearings, then-twenty-two year old writer Rebecca Walker[27] proclaimed in the pages of *Ms.* magazine that the Senate proceedings "were not about determining whether or not Clarence Thomas did in fact harass Anita Hill. They were about checking and redefining the extent of women's credibility and power."[28] Walker exhorted "all women, especially the women of my generation,"[29] to harness their angry responses to Anita Hill's treatment and "translate [those responses] into tangible action."[30] Walker then outlined her plan for large-scale resistance to misogynist behaviors, through words and action.[31] She urged women "of my generation" to take Anita Hill's "dismissal" as a spur to "political power," exhorting young women "[d]o not vote for [men] unless they work for us. Do not have sex with them, do not break bread with them, do not nurture them if they do not prioritize our freedom to control our

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[26] *See, e.g.,* Maureen Dowd, *The Thomas Nomination: The Senate and Sexism; Panel's Handling of Harassment Allegation Renews Questions About an All-Male Club*, N.Y. TIMES, Oct. 8, 1992, at A1. Linda Ammons comments that the Thomas hearings "illustrate how a well-respected, established black woman is vulnerable to attack when she challenges the veracity of a soon-to-be-appointed justice of the United States Supreme Court. Justice Thomas used racial imagery . . . to deflect attention from the disputed facts of his alleged misconduct . . . . Hill received the verbal lashing of senators, and was portrayed not just as unworthy of belief, but as mad (a jezebel-sapphire combination)." Linda Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery, and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1066 (1995).

[27] Rebecca Walker is the daughter of novelist Alice Walker and civil-rights lawyer Mel Leventhal. *See* REBECCA WALKER, BLACK, WHITE, AND JEWISH: AUTOBIOGRAPHY OF A SHIFTING SELF (2000).

[28] Rebecca Walker, *Becoming the Third Wave*, MS., Jan./Feb. 2002, *reprinted in* MS., Spring 2002, at 86.

[29] *Id.* at 86-87.

[30] *Id.*

[31] In the same article, Walker describes two other experiences that she does not link explicitly to the Thomas confirmation hearings. *See id.* First she relates a conversation with "the man I am intimate with" in which the man expressed concern about Thomas civil rights record. *Id.* Walker, in her own words, "launched into a tirade," asking, "When will progressive black men prioritize my rights and well-being? When will they stop talking so damn much about 'the race' as if revolved exclusively around them?... I need to know, are you with me, or are you going to help them try to destroy me?" *Id.* Although the identity of those "trying to destroy" Walker is not immediately obvious, one may surmise that she refers to men generally. *See id.*

The second experience Walker describes the rage she feels at hearing a man speak loudly on a train how he "fucked that bitch all night and then I never called her again," and the "girlies over there, you know that ho. Well, I snatched that shit up." *Id.* When she angrily tells the man to cease his vulgar boasting, the man reacts negatively, accusing Walker of overreacting. *Id.* In describing the other people traveling on the train, including a mother and her daughter with "brown skin...glowing and smooth," Walker explains that her thoughts are "how I can transform the situation, of all the people in the car whose silence makes us complicit." *Id.*

bodies and our lives."[32] She then abruptly ended the article with the portentous proclamation, "I am not a postfeminism feminist. I am the Third Wave."[33]

Historically speaking, Walker's article was the first that envisioned and called for a vibrant, active "third wave" of feminism as a generation-based movement.[34] Walker envisioned the accretion of political power to women generally, and to young women in particular. Other writers and activists subsequently adopted Walker's "third wave" label and began to name older feminists, not men or society in general, as the stumbling block to success for the women's movement. For the most part, the third wave has been defined by reference to the age of its participants – i.e., those who came into a political consciousness in the 1980s and 1990s.[35] The next section provides an overview of the writings and writers who responded to or adopted Walker's third-wave label.

B. Major Writings of Third-Wave Feminism

In the roughly ten years following the Thomas confirmation hearings, several academic and popular books echoed, responded to or expanded Walker's call for a new role for young women within the feminist movement. The first of these books was Naomi Wolf's popular text *Fire with Fire: The New Female Power and*

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[32] *Id.* Walker's exhortation echoes Aristophanes' Lysistrata, whose anti-war strategy involved withholding sexual congress from men. She exhorted that it "[d]oesn't matter what they threaten to do – even if they try to set fire to the place – they won't make us open the gates except on our own terms." ARISTOPHANES, LYSISTRATA, 189 (Alan Sommerstein trans., Penguin Books 1973).

[33] Walker, *supra* note 28, at 86-87. Some scholars have noted that Walker's "use of the word 'I' highlights the third-wave's focus on individualism, but also its reluctance to speak in an assumed - and potentially false - solidarity." Gilley, *supra* note 6, at 189. *See also* ASTRID HENRY, NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM 43 (2004) ("In calling for a new wave, Walker does not speak in a collective voice . . . . An early expression of what was to become a common theme within third-wave discourse, Walker's essay does not attempt to speak in the name of other women."). Generally speaking, the "wave" image is used to "denote continuity of movement containing swells and troughs rather than discrete, isolated periods of political involvement." Gilley, *supra* note 6, at 188.

[34] The phrase may have its intellectual origins in Alvin Toffler's classic socio-scientific text, THE THIRD WAVE, in which he argues that history can be broken into three waves: the first being agrarian, the second being industrial and the third being information-oriented. *See* ALVIN TOFFLER, THE THIRD WAVE 20-21 (1980). "The Third Wave" was also the intended title of a volume of feminist essays on race relations to be published by the Kitchen Table Press. This book, to be called THE THIRD WAVE: FEMINIST PERSPECTIVES ON RACISM, was never published, but "the phrase survived, albeit largely without common knowledge of its antiracist roots." Gilley, *supra* note 6, at 189. Some writers locate the origins of third-wave feminism in the "Riot Grrrl" movement of the same period. *See, e.g.,* Lisa B. Rundle, *Grrrls, Grrrls, Grrls,* 19 HERIZONS NO. 1, June 22, 2005, at __("The punk-rockin', hard-talkin' ladies [associated with Riot Grrrls] claimed the stage, screamed about the realities of their lives, threw 'look pretty' way off the priority list and revolutionized young women's relationships to the powerful world of popular music.").

[35] Gilley, *supra* note 6, at 188. *See* HEYWOOD & DRAKE, *supra* note 5, at 4 (defining third-wave feminists as those born between 1963 and 1973). *See also* DIFFERENT WAVELENGTHS, *supra* note 8, at xvi ("I feel feminist but do not fit into a second (i.e., starting in the 1960s and 1970s and continuing into the backlash 1980s) or third-wave (i.e., argued by some as beginning in the 1990s) description. I am barely a baby boomer and too young for the second wave, and not quite a member of Generation X, making me too old for the third wave.").

How It Will Change the 21st Century, published in 1993.[36] In that book, Wolf rejects a "victim feminism" that claims men are responsible for women's problems. She embraces instead a "power feminism" in which women seize power that they, just like men, naturally desire.[37] Variations on Wolf's brand of feminism were advocated by other authors, as well, who gave it various names including "babe feminism"[38] or "do-me feminism."[39] Writing in this vein, Katie Roiphe, for example, claimed that date-rape was an overreported phenomenon, a false claim advanced frequently by college-age women who had sexual intercourse with a man and later regretted it.[40] Some scholars categorize Wolf and Roiphe third-wave feminists.[41]

In 1995, two volumes of personal essays appeared that became a model for much of the third-wave writing that has followed. The first of those volumes,

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[36] WOLF, *supra* note 22. In her bibliographic essay, librarian Jennifer Gilley lists three texts as "precursors to the third-wave body of literature:" SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991); ANGRY WOMEN (Andrea Juno & V. Vale eds., 1991); PAULA KAMEN, FEMINIST FATALE: VOICES FROM THE TWENTYSOMETHING GENERATION EXPLORE THE FUTURE OF THE WOMEN'S MOVEMENT (1991). Gilley, *supra* note 6, at 187.

[37] WOLF, *supra* note 22, at xvii ("'[V]ictim feminism' . . . casts women as sexually pure and mystically nurturing, and stresses the evil done to these 'good' women as a way to petition for their rights. The other, which I call 'power feminism,' sees women as human beings—sexual, individual, no better or worse than their male counterparts—and lays claim to equality simply because women are entitled to it." That power feminism was later criticized as "not a 'new school' in feminism, but rather a very old school imbedded in whiteness, privilege, 'beauty,' and consumerism of which the mainstream media has always been in favor." Senna, *To Be Real, in* TO BE REAL, *supra* note 11, at 17.

[38] Anna Quindlen, *And Now, Babe Feminism, in* "BAD GIRLS"/"GOOD GIRLS": WOMEN, SEX, AND POWER IN THE NINETIES, *supra* note 1, at 3-5 ("[C]hange is far from over; there's still plenty to do, and much of it will be working with our male friends . . . It's babe feminism – we're young, we're fun and we do what we want in bed – and it has a shorter shelf life than the feminism of sisterhood. I've been a babe, and I've been a sister. Sister lasts longer.").

[39] Tad Friend, *Yes,* ESQUIRE, Feb. 1994, at 48. Quindlen has described these women as having "an agenda heavy on sex when and how they want it, with no guilt, no regrets." Anna Quindlen, *And Now, Babe Feminism, in* "BAD GIRLS"/"GOOD GIRLS": WOMEN, SEX, AND POWER IN THE NINETIES, *supra* note 1, at 3-4. *But see* Maureen Dowd, *How To Snag 2000 Men*, N.Y. TIMES, July 2, 1997, at A23 ("Now we have bimbo feminism, giving intellectual pretensions to a world where the highest ideal is to acknowledge your inner slut. I am woman, see me strip.").

[40] KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS [__] (1994). Roiphe's denunciation of "victim feminism" is echoed by Camille Paglia: "… we cannot have this scenario being projected of male rapaciousness and brutality and female victimage. We have got to make women realize that they are responsible, that sexuality is something that belongs to them. They have an enormous power in their sexuality. It's up to them to use it correctly and to be wise about where they go and what they do." CAMILLE PAGLIA, SEX, ART & AMERICAN CULTURE 267 (1992). Wolf, Roiphe and Paglia are highly influential on third-wave feminist writing insofar as "[n]early every third-wave book critically engages and debunks as reactionary or anti-feminist all three of these writers; yet their construction of a rigid, self-righteous victim feminism versus a fun and liberating power feminism is a caricatured version of themes that resonate in much of third-wave writing." Gilley, *supra* note 6, at 188.

[41] *See* Gilley, *supra* note 6.

edited by Rebecca Walker herself, is entitled *To Be Real: Telling the Truth and Changing the Face of Feminism*.[42] In Walker's words, the essays are intended to be "personal, honest and record a transformative journey taken."[43] That journey is one of reconciling one's politics and sometimes contradictory lives and practices.[44] The volume's essays range from an account of "How Does a Supermodel Do Feminism?"[45] to discussions of male sexuality,[46] marriage,[47] the internet,[48] hip-hop music[49] and racial identity.[50] In *To Be Real*, men and women describe their personal experiences of a "new feminism," one that Walker claims is:

> ... like a welcome sign to my generation of young women, allowing us to at once differentiate ourselves from our feminist mothers and at the same time achieve mainstream power in our careers and love lives. It allows us the self-righteousness of being political activists without the economic sacrifice or social marginalization that has so often come along with that role. It is a feminism no longer on the defensive, without a fun, playful aesthetic that acknowledges the erotic and narcissistic pleasure women receive from beautifying themselves, a pleasure not to be denied.[51]

The "fun, playful" third-wave feminist who likes beauty and power serves as the antidote to the socially-marginalized activist of the preceding generation. One third-wave feminist offers that the third wave of feminism is so different from its predecessors that, "Maybe a national billboard campaign needs to be launched. We need giant signs above every campus and freeway that read: 'Hey America! Don't be afraid of the word 'feminist'! It doesn't mean man-hating or being humorless! There is a new thing called 'third wave' feminism that will open the door so you can embrace politics by being who you are!'"[52] From its origins,

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[42] Walker, TO BE REAL, *supra* note 11.

[43] *Id.* at xxxviii.

[44] *Id.* (As an editor, Walker says that, "I wanted to know more about how people reconciled aspects of their lives that they felt ashamed of with politics they believed in. I especially wanted to hear experiences of people attempting to live their lives envisioning or experiencing identities beyond those inscribed on them by the surrounding culture.").

[45] *See* Walker, *How Does a Supermodel Do Feminism? An Interview with Veronica Webb, in* TO BE REAL, *supra* note 11, at 209.

[46] *See* Jason Shultz, *Getting Off on Feminism*, *in* TO BE REAL, *supra* note 11, at 107.

[47] *See* Jennifer Allyn & David Allyn, *Identity Politics, in* TO BE REAL, *supra* note 11, at 143.

[48] *See* Mocha Jean Herrup, *Virtual Identity*, *in* TO BE REAL, *supra* note 11, at 239.

[49] See Eisa Davis, *Sexism and the Art of Feminist Hip-Hop Maintenance, in* TO BE REAL, *supra* note 11, at 127.

[50] Senna, *To Be Real, in* TO BE REAL, *supra* note 11, at 17.

[51] *Id. at* 16.

[52] Kristina Sheryl Wong, *Pranks and Fake Porn: Doing Feminist My Way, in* CATCHING A WAVE, *supra* note 4, at 296.

third-wave feminism itself principally by reference to its difference from the feminism that preceded it. Parts III and IV of this article questions the accuracy of that self-description.

The second volume of personal essays published in 1995 is *Listen Up: Voices From the Next Feminist Generation*.[53] *Listen Up* is similar to Walker's *To Be Real*[54] in that its essays are largely personal. Unlike *To Be Real*, however, *Listen Up* has an explicit pedagogical aim. In the Forward, the *Listen Up* editors, two professors, explain that they compiled the text in response to requests from students in their women's studies courses for "voices similar to their own [that] were never heard. They [the students] wanted to hear from others deeply concerned about the same issues, others of their own generation, scholars other than those widely anthologized, and voices generated from a greater diversity of backgrounds."[55] The editors state their "hope that this volume both validates and challenges students and offers others new ways of understanding how younger women see themselves in the world in the twenty-first century."[56] *Listen Up* includes essays on "Hip Hop Feminism: From Butches to Queens and the Varied Experiences in Between,"[57] "On the Complications of Negotiating Dyke Femininity,"[58] and "Developing a Feminism Identity: A Father's Role."[59] The essays address the importance of making feminism inclusive by recognizing the relationship between women's oppression and economics,[60] increasing awareness of the complexity of racial identity,[61] and building coalitions across racial and ethnic groups.[62] As in *To Be Real*, in *Listen Up* the reader learns that the new

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[53] LISTEN UP: VOICES FROM THE NEXT FEMINIST GENERATION (Barbara Findlen ed., 1995).

[54] Walker, *supra* note 11.

[55] Barbara Findlen, *Introduction* to LISTEN UP, *supra* note 53, at xiii.

[56] *Id*.

[57] Denise Cooper, *Hip Hop Feminism: From Butches to Queens and the Varied Experiences in Between, in* VOICES OF A NEW GENERATION: A FEMINIST ANTHOLOGY 53 (Sarah Weir & Constance Faulkner eds., 2004).

[58] Wendy Somerson, *On the Complications of Negotiating Dyke Femininity, in* VOICES OF A NEW GENERATION, *supra* note 57, at 59.

[59] Cara Ann Thoresen, *Developing a Feminism Identity: A Father's Role, in* VOICES OF A NEW GENERATION, *supra* note 57, at 83.

[60] One author calls for the creation of "an economic paradigm in which the experience of oppression and the struggle for liberation lead to a reevaluation of priorities within our communities and at the global level." Brenda Aníbarro, *Mujerista Economics: The Creation of a New Economic Paradigm, in* LISTEN UP, *supra* note 53, at 3.

[61] Monica McCallum, *Seeing in Color*, *in* VOICES OF A NEW GENERATION, *supra* note 57, at 30.

[62] Camellia Phillips, *Taking a Stand on Stolen Ground: The Need for Feminist Movements to Support American Indian Sovereignty, in* VOICES OF A NEW GENERATION, *supra* note 57, at 128. Coalition-building is not original to the third-wave; second-wave feminists did and do recognize its importance, as well. *See, e.g.,* Mari J. Matsuda, *Merit Badges for the Revolution*, MS., Sept.-

generation of feminism embraces beauty and the power of women's sexuality.[63] From these pages, one learns that third-wave feminists might advocate for women's equality with men, but they intend to do so while also celebrating women's differences from men.[64]

Two years after *To Be Real* and *Listen Up*, a third volume of essays on third-wave feminism appeared in 1997. The professor-editors of *Third Wave Agenda: Being Feminist, Doing Feminism*[65] claim that their volume "picks up" where *Listen Up* and *To Be Real* "left off" by "[f]using the confessional mode of earlier popular feminism with the more analytic mode that has predominated in the academy since the 1980s."[66] The essays of *Third Wave Agenda* "give an emotional life and a personal stake sometimes missing from academic writing, while maintaining an analytic focus."[67] By 1997, then, Rebecca Walker's proclamation of a third wave of feminism[68] was being taken seriously by academics who sought to integrate the personal story-telling of young women[69] with formal studies of feminist and cultural theories.[70] As in *To Be Real* and *Listen Up*, *Third Wave Agenda* portrays third-wave feminism as "a movement that contains elements of second wave critique of beauty culture, sexual abuse, and power structures while it also acknowledges and makes use of the pleasure, danger, and defining power of those structures."[71] These themes were explored

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Oct. 1997, at 94 ("[I]t is clear to me that we can't fight racism, homophobia, poverty, and patriarchy as separate battles.").

[63] *See, e.g.,* Rebecca Walker, *Lusting for Freedom*, *in* LISTEN UP, *supra* note 53, at 20 ("Sex can also be power because knowledge is power, and because yeah, as a girl, you can make it do different things: I can give it to you, and I can take it away. This sex is me, you can say. It is mine, take it."); bell hooks, *Beauty Laid Bare*, *in* TO BE REAL, *supra* note 11, at 164 ("Beauty can be and is present in our lives irrespective of our class status. Learning to see and appreciate the presence of beauty is an act of resistance in a culture of domination.").

[64] *See, e.g.,* Daisy Hernandez, *Bringing Feminism a la Casa, in* Listen Up, *supra* note 53, at 209-211.

[65] THIRD WAVE AGENDA, *supra* note 5.

[66] Heywood & Drake, *Introduction* to THIRD WAVE AGENDA, *supra* note 5, at 2.

[67] *Id.* For a critical perspective on THIRD WAVE AGENDA, *see* Barbara Ryan, *In the Canon's Mouth: Dispatches from the Culture Wars*, NWSA J., 12:1 (Mar. 22, 2000) (Heywood & Drake "speak of anger as a difference for their generation (the older generation is characterized by exhilaration and fatigue). This is puzzling because anger was prevalent in the early years, and contemporary feminists have often been faulted for it."). According to Barbara Ryan, third-wave authors "often feel the need to frame things in the wider vision they have (i.e., that was lacking among older feminists)." *Id.*

[68] *See supra* text accompanying notes 27-33.

[69] Several minor anthologies adopted personal story-telling as a vehicle for defining third-wave feminism. *See* COLONIZE THIS! YOUNG WOMEN OF COLOR ON TODAY'S FEMINISM (Daisy Hernandez & Bushra Rehman eds., 2002).

[70] THIRD WAVE AGENDA'S personal story telling and academic framework was also adopted by the editors of CATCHING A WAVE, *supra* note 4.

[71] THIRD WAVE AGENDA, *supra* note 5, at 3.

further in two academic journals, *Hypatia*[72] and *Signs: A Journal of Women in Culture and Society*,[73] which devoted entire issues in 1997 to young women and feminism. By 1997, third-wave feminism was being articulated as in formal, theoretical and academic terms.[74]

In 2000, the trend toward academic study of third-wave feminism relaxed somewhat with the publication of *Manifesta: Young Women, Feminism and the Future*. This book, written by Jennifer Baumgardner and Jennifer Richards, two young activists/writers,[75] is perhaps the most widely-quoted third-wave feminist text. In it, Baumgardner and Richards attempt to define feminism[76] and articulate formal goals for contemporary feminism.[77] Their thirteen-point "manifesta," or agenda for young feminists, includes reproductive rights,[78] equal access to health care,[79] making workplaces "responsive to an individual's wants, needs, and talents"[80] and passing an Equal Rights Amendment.[81] Baumgardner and Richards explain that for the women of the third wave, feminism "is like fluoride. We scarcely notice that we have it - it's simply in the water . . . . The only problem is that, while on a personal level feminism is everywhere, like fluoride, on a political level the movement is more like nitrogen: ubiquitous and inert."[82] For

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[72] 12 HYPATIA NO. 3, Summer 1997.

[73] SIGNS, Spring 1998.

[74] Among the first full-length academic treatments of third-wave feminism are HENRY, NOT MY MOTHER'S SISTER, *supra* note 33, at 43 and DIFFERENT WAVELENGTHS, *supra* note 8. In 1999, two volumes appeared. The first was THE BUST GUIDE TO THE NEW GIRL ORDER, representing outstanding essays from the first six years of the publication of *Bust*, which started as a zine but then became a glossy magazine. THE BUST GUIDE TO THE NEW GIRL ORDER (Marcelle Karp & Debbie Stoller eds., 1999). That volume started off with the editors exhortation, "Wake up and smell the lipgloss ladies: The New Girl Order has arrived!" *Id.* at xv. The second volume from that year was WHEN CHICKENHEADS COME HOME TO ROOST: A HIP-HOP FEMINIST BREAKS IT DOWN (Joan Morgan ed., 1999). I leave these out of the main text discussion because they are not texts that future writers respond to explicitly. Nevertheless their themes are important and echoed by later third-wave feminist authors. For criticism of THE BUST GUIDE TO THE NEW GIRL ORDER, see Jessica Reaves, *The BUST Guide to the New Girl Order*, Ms., Aug.-Sept. 1999, at 92 (reviewing THE BUST GUIDE TO THE NEW GIRL ORDER calling it "unpleasantly glib" and full of "haphazard observations and first-hand accounts").

[75] BAUMGARDNER & RICHARDS, *supra* note 7.

[76] "[F]eminism has three components. It is a *movement*, meaning a group working to accomplish specific goals. Those *goals* are social and political change - implying that one must be engaged with the government and laws, as well as social practices and beliefs. And implicit in these goals is *access* to sufficient information to enable women to make responsible choices" (emphasis in original). *Id.* at 56.

[77] *Id*. at 278.

[78] *Id.* at 279. *See infra* Part IV.A.

[79] *Id.* at 280.

[80] *Id*.

[81] *Id.* at 281.

[82] *Id.* at 17-18.

Baumgardner and Richards, the problem with feminism, then, is that women simultaneously take it for granted and dismiss it for lacking vitality.[83] Third-wave texts that followed *Manifesta* explore this tension between ubiquity and inertia. Young writers attempt to define and reinvigorate young women's relationship to feminism through a variety of themes such as young women's sexual attitudes,[84] marriage,[85] motherhood,[86] Jewish identity,[87] Asian identity,[88] and the role of women of color in the feminist movement,[89] among other topics.[90] Additional books and articles on third-wave feminism are certain to follow.

C. Principal Ideas of Third-Wave Feminism

From a survey of the major extant third-wave feminist texts, six central third-wave feminist themes or concerns emerge: (1) dissatisfaction with earlier feminists; (2) the multiple nature of personal identity; (3) the joy of embracing traditional feminine appearance and attributes; (4) the centrality of sexual pleasure and sexual self-awareness; (5) the obstacles to economic empowerment; and (6) the social and cultural impact of media and technology.[91] This section explores in detail each of these themes.

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[83] As one commentator describes it, third-wave women have grown up in an era "knowing about feminist and benefiting from its gains, such as Title IX access to sports program, entrance to higher education, and access to reproductive health care. Many third-wave writers talk about how their feminist mothers or fathers gave them the sense of entitlement that made them feel feminist struggle might no longer be necessary. This prevailing notion led to the idea that we are in a post-feminist age." Gilley, *supra* note 6, at 188.

[84] PAULA KAMEN, HER WAY: YOUNG WOMEN REMAKE THE SEXUAL REVOLUTION (2000).

[85] YOUNG WIVES' TALES: NEW ADVENTURES IN LOVE AND PARTNERSHIP (Jill Corral & Lisa Miya-Jervis eds., 2001).

[86] BREEDER: REAL-LIFE STORIES FROM THE NEW GENERATION OF MOTHERS (Ariel Gore & Bee Lavender eds., 2001).

[87] YENTL'S REVENGE: THE NEXT WAVE OF JEWISH FEMINISM (Danya Ruttenberg ed., 2001).

[88] YELL-OH GIRLS! EMERGING VOICES EXPLORE CULTURE, IDENTITY, AND GROWING UP ASIAN AMERICAN (Vickie Nam ed., 2001)

[89] *See, e.g.,* COLONIZE THIS!, *supra* note 69.

[90] *See e.g.,* LESLIE HEYWOOD & SHARI L. DWORKIN, BUILT TO WIN: THE FEMALE ATHLETE AS CULTURAL ICON (2003); WITHOUT A NET: THE FEMALE EXPERIENCE OF GROWING UP WORKING CLASS (Michelle Tea, ed., 2003); WOMEN WHO EAT: A NEW GENERATION ON THE GLORY OF FOOD (Leslie Miller ed., 2003); BODY OUTLAWS: REWRITING THE RULE OF BEAUTY AND BODY IMAGE (Ophira Edut ed., 2003); THE FIRE THIS TIME: YOUNG ACTIVISTS AND THE NEW FEMINISM (Vivien Laborton and Dawn Lundy eds., 2004); NAOMI ZACK, INCLUSIVE FEMINISM: A THIRD-WAVE THEORY OF WOMEN'S COMMONALITY (2005); THIRD-WAVE FEMINISM: A CRITICAL EXPLORATION (Stacy Gillis et al. eds., 2005).

[91] This interest in media and technology has been overlooked or ignored by Women's Studies professors who mention third-wave feminism in their courses. *See, e.g.,* Third-Wave Feminism, http://www.rci.rutgers.edu/~jemjones/Thirdwaveoutline.html (last visited June 1, 2006) (link from home page for Rutgers University course on Women, Culture and Society, Spring 2006, taught by Professor Jennifer M. Jones).

1. *Dissatisfaction with Earlier Feminists*

Third-wave feminists are dissatisfied with earlier feminists and the movement they have created.[92] Young women perceive older feminists as being unwilling to relinquish control of leadership positions to younger feminists,[93] revealing in some sense the emptiness of a feminist process that values collaboration and "coming to voice."[94] Young women are frustrated by being told that they lack the necessary activism and leadership characteristics to take on positions of responsibility at mainstream feminist organizations.[95] Interestingly, though, at the same time that third-wave feminists assert their own frustration with having few or no feminist leadership positions,[96] they reject the same observation if made by outsiders: "[T]he fact that no one in our generation is yet considered to be a feminist 'queenpin' is the product of ageism in the media and movement; young women, apart from a few easy-to-control tokens, are not given credit for the leadership they are already showing."[97] Third-wave feminists further critique

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[92] On women's relationship to men, Catharine MacKinnon has remarked that "The measure of closeness often seemed to be the measure of the oppression." CATHARINE A. MACKINNON, *Consciousness Raising*, *in* TOWARD A FEMINIST THEORY OF THE STATE 86, 94 (1989). Third-wave complaints appear to be directed mostly at their "oppressive" foremothers, perhaps indicating the closeness of the relationship.

[93] *See, e.g.,* Sara Boonin, *Please - Stop Thinking About Tomorrow: Building a Feminist Movement on College Campuses for Today*, *in* CATCHING A WAVE, *supra* note 4, at 149 ("Older mentors must be willing to share experience and knowledge while welcoming the input and co-leadership of younger feminists."). At least one feminist writer suggests that this reluctance to share power is a problem of liberal women's organizations, not conservative ones. *See* Gilman, *supra* note 22, at 61. Of the conservative Independent Women's Forum, Gilman notes that "the women of the IWF … have been supremely welcoming to younger women, accepting them, allowing them their own opinions, training them, grooming them for power, and pushing them into the spotlight. With all due respect to my older sisters, the second wave has by and large not done this with the third-wave …. [W]e have not been courted or trusted with positions of great visibility to the extent that young conservative women have." *Id.*

[94] *See, e.g.,* CATHARINE A. MACKINNON, *Consciousness Raising*, *in* TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 92, at 94.

[95] As one third-wave feminist laments, "Unfortunately, most of the books that have been published about feminism in this generation have tried to convince readers that young women are somehow lacking in activism and are even antagonistic to the feminists who came before them. This was counter to what I saw every day . . . . [F]eminism is out there - manifesting itself in indivdiual people's lives, and often in the loves of people who don't even know they're living it." MANIFESTA, *supra* note 7, at xxvii.

[96] Gilman suggests that liberal feminists borrow some techniques from conservative women's organizations like the Independent Women's Forum: "Maybe what we need are some "on-call" girls. Some fabulous media sluts of our own. Why not forge an arsenal of well-coached sharpies who know how to stand and deliver in front of a camera in eight seconds? Why not welcome younger women into the fold without making them pass some political correctness litmus test? Why not set aside identity politics and infighting and focus on our bigger adversaries?" Gilman, *supra* note 22, at 69.

[97] *Id.* at 36. On leadership, Baumgardner and Richards say, "[T]rue leaders, after all, aren't waiting for the media or anyone else to anoint them. They are identifying problems and

second-wave feminists for "focusing…on little girls (specifically their self-esteem) rather than tackling the challenge of working with young-adult women."[98] This focus on positive self esteem for young girls is, according to third-wave feminists, an avoidance technique used by second-wave feminists unable or unwilling to confront a growing generational divide in feminism.[99]

Third-wave feminists also decry the lack of diversity in the second wave of feminism. If first- and second-wave feminism sought an accretion of rights and power to women as a group, third-wave feminism seeks recognition for the individual. As one writer explains, third-wave feminism in part "is a response by women of color and others who felt homogenized by a movement defined by the goals of middle-class, white women."[100] Their writing is motivated by a desire to "introduce some of the ideas of woman of color feminism to women who have thought feminism is just a philosophy about white men and women and has nothing to do with our communities [of color]."[101] One young woman explains her personal evolution in thinking about feminism by explaining that "I have felt that the feminism I am 'inheriting' doesn't represent me or my life."[102] Young women are reluctant to identify with the stereotype of the second-wave feminist, instead claiming to create "a joyful culture that makes being an adult woman who calls herself a feminist seem thrilling, sexy and creative (rather than scary, backbiting, or a one-way ticket to bitterness and the poorhouse)."[103]

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mobilizing people to participate in the vision for change – even if the media and funders don't recognize them as leaders." CATCHING A WAVE, *supra* note 4, at 163.

[98] MANIFESTA, *supra* note 7, at 49.

[99] *See, e.g.,* MANIFESTA, *supra* note 7, at 49 ("Some Second Wave women are leaping over the Third-Wave altogether, and focusing on little girls (specifically their self-esteem) rather than tackling the challenge of working with young-adult women."). On the difficulties facing girls of high school age, see for example Christine Doza & Jennifer Kornreich, [Untitled], *in* MS., May 1995, at 37-42 ("High school is the single most dangerous place for a girl to be. Once we hit 13 or 14 we realize that in this world the men we are associated with, not our own actions, make us who we are . . . Male teachers treat girls like property, like victims, like last-class citizens and noone seems to care."). *See generally* ROSALIND WISEMAN, QUEEN BEES & WANNABEES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYFRIENDS & OTHER REALITIES OF ADOLESCENCE (2002).

[100] Wong, *supra* note 52, at 295 (summarizing description of third-wave feminism given by professor in whose class the author was guest lecturing). This third-wave claim is ahistorical, insofar as it is not unique to third-wave feminism. Many second-wave feminists also have engaged and do engage in a vigorous critique of feminist activism and theory as essentialist. *See, e.g.,* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Tina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (and Other –Isms), in* STEPHANIE WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 85-102 (N.Y. Univ. Press 1996) (1991); Berta Esperanza Hernandez-Truyol, *Las Olvidadas – Gendered In Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 354 (1998).

[101] Rehman & Hernandez, *Introduction* to COLONIZE THIS!, *supra* note 69, at xxvii.

[102] Baumgardner & Pollit, *Afterword* to CATCHING A WAVE, *supra* note 4, at 309.

[103] MANIFESTA, *supra* note 7, at xx.

2. *Multiple Nature of Personal Identity*

Third-wave writers are divided on the utility of "woman" as a category. On the one hand, third-wave writers are demonstrably aware of discrimination against women and call for an end to double standards in sexual heath and awareness,[104] continued availability of birth control[105] and more recognition traditionally "female" roles such as caretaking.[106] On the other hand, some third-wave writers claim that their brand of feminism "recognizes that the differences among women are as substantial as the differences between women and men: the category of 'woman' is no longer the identity worth examining."[107] In this analysis, categories such as gender and race lack "meaning and resonance."[108]

As a theoretical move, stripping gender of its meaning allows third-wave feminists to take a broad approach to defining women's issues: "[t]hird wavers, who came of age in the late twentieth century and after . . . [are] not concerned simply with 'women's issues' but with a broad range of interlocking topics . . . ranging from protests of the World Economic Forum and welfare reform to activism on behalf of independent media outlets."[109] Theoretically, though, if they reject gender as a category that can unify women, third-wave feminists are left with only a generational label: "In rejecting a notion of collective sisterhood, but without adopting another mode - familial or otherwise - to supplant it, [third-wave feminists] remain within the mother-daughter relationship, albeit as only children to a controlling 'mother' feminism. 'Sisterhood is powerful' has seemingly been replaced by a new slogan: 'Daughterhood is powerful.'"[110] As a theoretical movement, third-wave feminism then appears devoid of substance and looks no different than other movement organized around youth.

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[104] Item Four on the "Thirteen Point Agenda" advocated by Baumgardner & Richards is "To bring down the double standard in sex and sexual health, and foster male responsibility and assertiveness in the following areas: achieving freedom from STDs; more fairly dividing the burden of family planning as well as responsibilities such as child care; and eliminating violence against women." *Id.* at 279.

[105] Item Three on the "Thirteen Point Agenda" is "To make explicit that the fight for reproductive rights must include birth control." *Id.* at 279.

[106] Item Eleven on the "Thirteen Point Agenda" is "To make the workplace responsive to an individual's wants, needs, talents. This include valuing (monetarily) stay-at-home parents, aiding employees who want to spend more time with family and continue to work . . . . " *Id.* at 280.

[107] Dicker & Piepmeier, *Introduction* to CATCHING A WAVE, *supra* note 4, at 9.

[108] Senna, *supra* note 37, at 15.

[109] CATCHING A WAVE, *supra* note 4, at 10. It is not clear, however, that anti-globalism activists share the third-wave view of its relationship to feminism: "Third-wave feminists have started talking about a new script for sexuality, but I have heard little talk of the price of patriarchy in polities and in our organizations and communities. The anti-globalization movement has raised some of these issues through anti-authoritarian organizing, yet its spokespeople give no credit to its origins in feminism." Judy Rebick, *Roses and Revolution*, 18 HERIZONS NO. 1, June 22, 2004, at 5.

[110] Astrid Henry, *Feminism's Family Problem: Feminist Generations and the Mother-Daughter Trope*, in CATCHING A WAVE, *supra* note 4, at 218.

3. *Joy of Embracing Traditional Feminine Appearance and Attributes*

Third-wave feminists embrace make-up, feminine styles of dress and traditional "girlie" behaviors. If the second wave's famous slogan, "the personal is political," turned every personal grooming decision into a political one,[111] then third-wave feminists have made no decision political. Academic articles have been written, for example, explaining how it is possible to wear thong underwear and still be a feminist since "[f]eminism isn't about what choice you make but the freedom to make that choice."[112] Similarly, traditionally female activities like knitting and cooking can become sources of positive self-image for women.[113]

In celebrating the traditional aspects of femininity, however, at least some third-wave feminists do so self-consciously and with tongue in cheek to explore the contours of gender identity. For example, one young woman describes her primary identification with a male gender role, albeit within the context of playful femininity:

> It open up a variety of doors, different things I can do because I can still access the 'girly' parts of feminine identification, only I'm doing it from a campy, gay-boy perspective rather than the traditionally feminine one. So it puts a very different spin on, you know – if I want to wear makeup or I want to dress up femme, I'm

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[111] With tongue-in-cheek style, Katha Pollit refers to the decision to shave one's legs as "that old perennial" illustration of how the personal is political. Pollitt & Baumgardner, *supra* note 4, at 319. Although Pollit can make light of the second-wave slogan, she also insists on its usefulness of the next generation of feminists: "One distinction I think doesn't get made often enough or clearly enough, however, is between choices that may be a little sexist in origin (shaving one's legs – that old perennial!) but are basically harmless and choices that have serious implications for the course of one's life and for the lives of others. 'You go, girl!' is a good slogan. But it's not the only thing women need to hear. They also need to hear, from time to time, that old, infuriating saying of the hairy-legged ancients: the personal is political." *Id.*

[112] Jennifer Baumgardner & Amy Richards, *The Number One Question About Feminism*, 29 FEMINIST STUD. 450 (2003).

[113] Gilley, *supra* note 6, at 190. *See also* Ana Marie Cox et al., *Masculinity Without Men: Women Reconciling Feminism and Male-Identification, in* THIRD WAVE AGENDA, *supra* note 5, at 181 (third-wave feminists reject the "debilitating way in which we've thought about" the feminine). As one writer explains that "[c]rocheting and cooking and the like aren't only about making pot holders and a lentil stew, but are about creating a culture outside of the mainstream . . . .Crafts can be a way to express yourself even if culture doesn't support that." Jennifer O'Connor, *Riot Prrrls: Cast of Your Stereotypes*, 19 HERIZONS NO. 1, June 22, 2005 (acknowledging that "this idea of honoring the work done in the home is nothing new" and echoes second-wave efforts to value women's home labor). Third-wave feminist author Kristin Rowe-Finkbeiner says that, through crafts, "[t]he third-wave is showing again that there's no one way to be a feminist and that yes, we can succeed and do well in the professional workforce – and that fight isn't finished – but at the same time we're not pigeonholed into all of us being one type of woman." *Id.* (quoting Kristin Rowe-Finkbeiner). Plus, she adds, "I think there is a lot of potential in all this women's culture – because it mostly is women . . . I think the community aspect of it is really ripe with possibility for talking about other issues besides crafting, and I think that there are possibilities for all different sorts of movements there." *Id.*

> being like a gay man in drag, rather than identifying with a traditional, feminine culture.[114]

One third-wave feminist proclaims her pleasure at "participating in male culture, and enjoying it, and implicitly rejecting conventional feminine culture, and rejecting a sense of feminine identity that I found really constricting growing up. For me, then, it's partly a kind of negative identity, in the sense that it's not so much that I want to be male-identified, it's that I don't want to be feminine-identified in the kinds of ways that I've learned about it."[115]

Third-wave feminists are also aware that traditional feminine appearance may increase their vulnerability to harassment by men. One graduate student explains that she used to wear dresses to class, but when a professor repeatedly sexually harassed her, "[e]ssentially, I said to myself, "Oh, this is what's gonna happen if a play the 'femme' role. Men will feel free to do this to me.' It wasn't funny anymore …."[116] Female attire can make one feel sexy, but vulnerability comes with that sexiness.

Third-wave feminists have an ambivalent relationship to the second-wave feminists who would celebrate women's different voice and women's ways of knowing.[117] Female attributes may be wonderful according to some second wave feminists;[118] third-wave feminists celebrate feminine-identification at the same time that they associate it with weakness.

4. *Centrality of Sexual Pleasure and Sexual Self-Awareness*

Third-wave feminists advocate sexual awareness for girls and women who should take charge of their own sexual satisfaction. Rebecca Walker, for example, writes of the need for sex education for girls in her essay *Lusting for*

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[114] Ana Marie Cox et al., *Masculinity Without Men: Women Reconciling Feminism and Male-Identification, in* THIRD WAVE AGENDA, *supra* note 5, at 180-181.

[115] *Id.* at 180. Catharine MacKinnon might read this reluctance to identify with women as the ultimate evidence of how insidious sexism is. On black women's identification with black men, MacKinnon says, "I sense here that people feel more dignity in being part of any group that includes men than in being part of a group that includes that ultimate reduction of the notion of oppression . . . the white woman . . . . How the white woman is imagined and constructed and treated becomes a particularly sensitive indicator of the degree to which women, as such, are despised." Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?* 4 YALE J.L. & FEMINISM 13, 21-22 (1991).

[116] Ana Marie Cox et al., *Masculinity Without Men: Women Reconciling Feminism and Male-Identification, in* THIRD WAVE AGENDA, *supra* note 5, at 184.

[117] *See, e.g.,* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Gilligan's study has been the subject of significant criticism. *See, e.g.,* Linda K. Kerber et al., *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986); Judy Auerbach et al., *Commentary, On Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149 (1985); Debra Nails, *Social Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983); John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983).

[118] *See, e.g.,*

Freedom.[119] She says that, "The question is not whether young women are going to have sex, for this is far beyond any parental or societal control. The question is rather, what do young women need to make sex a dynamic, affirming, safe and pleasurable part of our lives?"[120] And those needs evolve as women age and mature. One young feminist explains her decision to open a sex-toy business as motivated by an "urgency to create models of female sexual agency – to make feminism relevant to women's lives . . . . Offering women the opportunity to shop for sex toys, to make their sexual desire primary, is an example of sex-positive feminism at work."[121] Third-wave feminism celebrates the centrality of sexual pleasure and the woman who knows how to achieve it.

5. *Obstacles to Economic Empowerment*

When looking beyond purely personal satisfaction to larger economic and social issues, third-wave feminists tend to look broadly at causes of inequality. The lack of opportunities for meaningful employment is a predominant theme in third-wave feminist writing. Third-wave writers pointedly critique second-wave feminists:

> Second wave feminism helped bring about professional self-sufficiency for women, and their work paved the way for new feminisms, such as that being constructed by young women of the post-baby boom generation. But postmodernism and the new global economy have brought on concerns about the homogeneity of the so-called bourgeois white feminism of the second wave . . . . [T]o what extent must feminism revamp itself in the wake of the new global economy? What can we learn from second wave feminism as we face an economy driven by profits, with workers edged out by technology and global competition?[122]

In third-wave feminism, women's economic empowerment is recognized as an historically familiar issue, but it is articulated as facing a unique twenty-first century challenge in a globalized era.[123] Third-wave feminist commitment to the

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[119] Rebecca Walker, *Lusting for Freedom*, *in* LISTEN UP, *supra* note 53, at 19.

[120] *Id.* at 23.

[121] Sarah Smith, *A Cock of One's Own: Getting a Firm Grip on Feminist Sexual Power, in* JANE SEXES IT UP: TRUE CONFESSIONS OF FEMINIST DESIRE 302 (Merri Lisa Johnson ed., 2002).

[122] Michelle Sidler, *Living in McJobdom: Third-wave Feminism and Class Inequity, in* THIRD WAVE AGENDA, *supra* note 5, at 27. One scholar criticizes Michelle Sidler's perspective as ahistorical: "[T]here is talk of the economic disparity facing the generation of twentysomethings. This seems to be a major complaint. But I wonder how many people in the past were not economically disadvanted in their twenties. Michelle Sidler argues that the problem is not longer patriarchy, but capitalism, with a new playing field of class instability. Here I find a lack of historical perspective. Early contemporary feminists spent a lot of time critiquing capitalism; and does anyone really thing patriarchy has ended?" Barbara Ryan, *In the Canon's Mouth: Dispatches from the Culture Wars*, 12 NWSA J. NO. 1, Mar. 22, 2000, at __.

[123] MANIFESTA, *supra* note 7, at 20-21 ("We have inherited strategies to fight . . . the wage gap, and the pink-collar ghetto of low-wage women's work from the Second Wave, which

study and improvement of women's economic position, however, remains somewhat elusive.[124] Although economic equality issues appear on lists of third-wave feminist concerns,[125] they remain largely unexamined in third-wave writings (which tend toward the personal narrative).[126]

6. *Social and Cultural Impact of Media and Technology*

Third-wave feminists focus much critical attention on popular culture and its meaning. They dissect television shows[127] and music[128] in particular for meaning and implication. Media-savvy is described by third-wave feminists Leslie Heywood and Jennifer Drake as "a key to political struggle."[129] Jennifer Pozner, another third-wave writer, asserts that "[c]ontrol of the media is the single most important issue of our time."[130] This is because all people rely on the media for information about our government and society and because the media informs our personal preferences and tastes.[131]

Third-wave feminists acknowledge the particular role that the media has played in presenting a particular image of feminism. On one level, some third-wave writers seem to subscribe to the belief that second-wave feminism is "puritanical, repressive and homogeneous" even as they acknowledge that "such a picture is a distortion that relies on a reductive rendering of an incredibly varied

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identified these issues. Together, we are still working on the. And we have modern problems of our own. Prominent third-wave issues include . . . globalization.").

[124] *But see* Conference on Gender Equality, Tax Policies, and Tax Reform in Comparative Perspective, The Levy Economics Institute of Bard College (May 17-18, 2006).

[125] CATCHING A WAVE, *supra* note 4, at 6.

[126] *See, e.g., infra* Part I.D.1.

[127] *See, e.g.,* Jennifer Reed, *Roseanne: A "Killer Bitch" for Generation X, in* THIRD WAVE AGENDA, *supra* note 5, at 122.

[128] *See, e.g.,* Melissa Klein, *Duality and Redefinition: Young Feminism and the Alternative Music Community, in* THIRD WAVE AGENDA, *supra* note 5, at 207; Jen Smith, *Doin' It for the Ladies – Youth Feminism: Cultural Productions/Cultural Activism, in* THIRD WAVE AGENDA, *supra* note 5, at 226; Jeff Niesel, *Hip-Hop Matters: Rewriting the Sexual Politics of Rap Music, in* THIRD WAVE AGENDA, *supra* note 5, at 239; Gwendolyn D. Pough, *Love Feminism, but Where's My Hip Hop?: Shaping a Black Feminist Identity, in* COLONIZE THIS! *supra* note 69, at 85; Kristina Gray, *I Sold My Soul to Rock and Roll, in* COLONIZE THIS! *supra* note 69, at 257; Shani Jamila, *Can I Get a Witness? Testimony From a Hip Hop Feminist, in* COLONIZE THIS! *supra* note 69, at 382; Eisa Davis, *Sexism and the Art of Feminist Hip-Hop Maintenance, in* TO BE REAL, *supra* note 11, at 127; Denise Cooper, *Hip Hop Feminism: From Bitches to Queens and the Varied Experiences in Between, in* VOICES OF A NEW GENERATION, *supra* note 57, at 59.

[129] Leslie Heywood & Jennifer Drake, *We Learn America Like a Script: Activism in the Third-wave; or, Enough Phantoms of Nothing, in* THIRD WAVE AGENDA, *supra* note 5, at 51.

[130] Jennifer L. Pozner, *The Big Lie: False Feminist Death Syndrome, Profit, and the Media, in* CATCHING A WAVE, *supra* note 4, at 37.

[131] *Id.* at 37.

social movement."[132] Third-wave feminists admit that their understanding of the feminism of the 1970s and 1980s is distorted, but nevertheless accept that distortion as a powerful cultural force for today's feminism.

D. Principal Methods of Third-Wave Feminism

Just as media-awareness is an important theme of third-wave feminist writing, it is incorporated into third-wave feminist methods, as well. The principal methods of third-wave feminism are (1) personal story-telling; (2) coalition-building; and (3) harnessing and interpreting media. The first two methods are familiar from the second-wave of feminism and its aftermath, but sustained engagement with the internet, television and music is unique to the third wave.

1. *Telling Personal Stories*

Ever since consciousness-raising was adapted from socialist organizers,[133] women's accounts of their own lives have formed the backbone of much feminist thought and political action. Throughout the second wave, these consciousness-raising groups were a primary means of feminist networking. In these groups, "[w]omen's lives are discussed in all their momentous triviality, that is, as they are lived through. The technique explores the social world each woman inhabits through her speaking of it, through comparison with other women's experiences, and through women's experiences of each other in the group itself."[134]

Third-wave feminists have continued the consciousness-raising tradition. The editors of one prominent collection of third-wave writings even claims that the book's structure embodies 1970s-style consciousness raising, insofar as the essays are "grouped in a way that mirrors the process of consciousness-raising itself. We decided to use this organizational pattern as a way first to highlight the social inequalities in the world today then to politicize our readers to take action. Because these inequalities are so often obscured, the first step to a feminist consciousness is to recognize the status of women in the world."[135] The personal

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[132] Dicker & Piepmeier, *Introduction* to CATCHING A WAVE, *supra* note 107, at 16.

[133] *See* FEMINIST JURISPRUDENCE, *supra* note 5, at 22 (consciousness raising "had originally been used to organize the poor by encouraging them to talk about their problems with each other in order to see the systemic social causes of their oppression and the need for political solutions").

[134] MacKinnon, *Consciousness Raising*, *in* TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 92, at 86. MacKinnon has explained the purposes of consciousness-raising in these terms:

> The point of the process was not so much that hitherto-undisclosed facts were unearthed or that denied perceptions were collaborated or even that reality was tested, although all these happened. If was not only that silence was broken and that speak occurred. The point was, and is, that this process moved the reference point for truth and thereby the definition of reality as such. Consciousness raising alters the terms of validation by creating community through a process that redefines what counts as verification. This process gives both content and form to women's point of view.

Id. at 87.

[135] Dicker & Piepmeier, *Introduction* to CATCHING A WAVE, *supra* note 107, at 5.

stories of third-wave feminists are compelling and allow the reader to identify with any one or more of the authors. Through the process of identification, a reader can label her own concerns as belonging to a larger group of political issues. This "personal frontier" is the main occupation of third-wave feminists.[136]

Third-wave feminism's reliance on story-telling is one of its greatest strengths and its greatest weaknesses. The story-telling is appealing because it draws the reader in and helps to personalize feminism, an explicit aim of third-wave feminism.[137] Yet story-telling at times seems to comprise the entirety of third-wave feminism. At least in one third-wave author's view, "[A]s a third waver, there is no need for radical action or strategy to support the movement. Militant action is not needed to promote the third wave; instead, the experiences of young women construct the third wave."[138] But if experience "constructs" the third wave, then third-wave feminism is nothing more than a collection of individual stories. Narrative collections do not translate easily into political strategies or legal theories. In this way, if third-wave feminism seems more like a literary form than a social movement or a basis for enriching feminist jurisprudence.[139]

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[136] In her dialogue with Katha Pollit that forms the Afterword to *Catching a Wave,* Jennifer Baumgardner says that, "I guess I'm sensing that the personal frontier is where my generation is doing most of its work (I see the easy in the book – al about culture and TV and hip-hop and porn) and that is important work. Just as important as the law-changing/tenure/first-woman-president stuff, because how we conduct our personal lives (what speaks to us, what we value) represents us directly – that is why the personal is political." Pollitt & Baumgardner, *supra* note 4, at 316.

Although third-wave feminists use personal stories to distinguish their "brand" of feminism from what came before, personal story-telling itself has a rich history within legal thought. Critical legal scholars employ story-telling devices to reveal power structures and imbalances embedded in the law. S*ee, e.g.,* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991). For a CLS critique of rights-talk, see for example Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984). Critical race theorists, and critical race feminists in particular, have adapted this technique to explore ways in which critical scholarship (including feminist theories) fails to take into account the experiences of women and men of color with the law. *See, e.g.,* PATRICIA J. WILLIAMS, OPEN HOUSE: OF FAMILY, FRIENDS, FOOD, PIANO LESSONS AND THE SEARCH FOR A ROOM OF MY OWN (2004); Pamela D. Bridgewater, *Transforming Silence: The Personal, Political, and Pedagogical Prism of Abortion Narrative, in* CRITICAL RACE FEMINISM: A READER 149-156 (Adrien Katherine Wing ed., 2d ed. 2003); ANITA L. ALLEN, ACCOUNTABILITY FOR PRIVATE LIFE (2003) (describing a family member's personal experience of drug use in context of larger discussion of the morality of drug use).

[137] One third-wave text, LISTEN UP, was written in response to demands from students for stories that resembled their own. *See supra* note 53 and accompanying text.

[138] Roxanne Harde & Erin Harde, *Voices and Visions: A Mother and Daughter Discuss Coming to Feminism and Being Feminist, in* CATCHING A WAVE, *supra* note 4, at 119.

[139] Some scholars critically link third-wave feminists' emphasis on the individual with larger economic conditions: "It's not just a coincidence that the marketable, media-friendly, Third-Wave feminist emphasis on individual action dovetails nicely with our capitalist economy's prescription for success. We live and work within an economy that rewards greed. If you want to succeed in this economy, you have to be selfish." Angie Manzano, *Charlie's Angels: Free-Market Feminism*, 30 OFF OUR BACKS, Dec. 31, 2000, at 11.

2. *Building Coalitions*

Coalition-building is one of the principal methods employed by third-wave feminists. On the one hand, third-wave feminism's goals are defined by and must operate in "a world of global capitalism and information technology, postmodernism and post colonialism and environmental degradation."[140] For that reason, third-wave feminists often focus on "making feminism as inviting as possible to a broad range of people."[141] Alliances between like-minded people become incredibly important in the struggle to achieve any goal.[142] On the other hand, one of the possible dangers of making feminism palatable to as many people as possible is the risk of "emptying feminism of its political content."[143] If "[c]oalition politics is replacing definitional politics,"[144] then it is possible that third-wave feminism has limited independent meaning; perhaps it does not even advocate a woman-specific agenda.

3. *Interpreting and Harnessing Media*

For the most part, third-wave feminists tend to use popular formats (over, say, academic ones) to disseminate their message. This seems motivated at least in part by a desire to "be a part of the culture they critique."[145] It also arises out of familiarity with technology and media. Third-wave feminists use the media itself to explore the media's themes. For example, one woman explains that she uses video to investigate ideas of "exoticism, marginality and homophobia," and that her video work helps her understand "the link between media activism, representation, and creative expression."[146]

If third-wave feminists were initially known for do-it-yourself fan magazines in the 1990s,[147] the 'zines of that era gave way to websites in the twenty-first

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[140] Dicker & Piepmeier, *Introduction* to CATCHING A WAVE, *supra* note 107, at 10.

[141] *Id*. at 18.

[142] Alliance, rather than inflexible group membership, is a third-wave method. *See, e.g.,* Emi Koyama, *Transfeminist Manifesto*, *in* CATCHING A WAVE, *supra* note 4, at 257 ("Transfeminism asserts that it is futile to debate intellectually who is and is not included in the category 'woman'' instead we must act - now - and build alliances.").

[143] Dicker & Piepmeier, *Introduction* to CATCHING A WAVE, *supra* note 107, at 18.

[144] Gilley, *supra* note 6, at 191.

[145] *Id*. at 191. "Third-wavers . . . are not interested in being confined to academic, nor do they feel that academic feminism givens them the freedom to theorize in new ways. For this reason, third-wave writings have been published by popular presses, and uses witty titles and catchy graphics whenever possible to draw in the average reader." *Id.*

[146] Jocelyn Taylor, *Testimony of a Naked Woman, in* TO BE REAL, *supra* note 11, at 220. Interestingly, Taylor traces the origins of her interest in the power of video to her activism as part of ACT-UP, the AIDS Coalition to Unleash Power. That group used camcorders and recording equipment to "document demonstrations and to protect protesting civilians from dirty dealings by the police." *Id.* at 220.

[147] *See, e.g.,* [ ].

century.[148] Young feminists, including those who identify as part of the third wave and those who do not, use personal blogs,[149] organization websites[150] and other web pages[151] to disseminate their particular messages. Interestingly, these messages may or may not appear overtly feminist. Many third-wave feminists subscribe to the belief that "feminist politics can be shared with the world if it [sic] is carefully disguised in the mass media."[152]

Consider, for example, *Big Bad Chinese Mama*,[153] a website created by Kristina Sheryl Wong, an Asian-American artist and activist. Wong uses her website as a way to communicate complex ideas about feminism in a subtle and playful ways. This cite is meant to be a spoof of mail-order brides and internet pornography. The homepage proclaims:

> Inside are contained the "demure lotus blossoms," the "geishas," the "oriental sluts" -- whatever you had imagined in your

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[148] Self-published feminist zines were employed by women in the early 1990s who began to protest sexism in the punk music scene. These women called themselves "Riot Grrrls." *See* Gilley, *supra* note 6, at 190. The phrase is considered to be a "spontaneous young-feminist reclamation of the word 'girl' . . . at least partially derived from a phrase of encouragement popularized by young American black women in the late 1980s; 'You go guuuuurl!'" Edna Kaeh Garrison, *U.S. Feminism - Grrrl Style! Youth (Sub) Cultures and the Technologics of the Third Wave,* 26 FEMINIST STUD. 141 (2000). The Riot Grrrls made photocopies of their own work that they distributed at music venues. Gilley, *supra* note 6, at 191. For examples of contemporary feminist on-line publishing, see for example, Trivia: Voices of Feminism, http://www.triviavoices.net (literary journal) (last visited June 1, 2006).

[149] *See, e.g.,* Third-Wave Foundation, http://www.thirdwavefoundation.org (last visited June 1, 2006). The Third-Wave Foundation is "a feminist, activist foundation working nationally to support young women 15 to 30. Through financial resources, public education, and relationship building, Third-Wave helps support and strengthen young women and their allies working for gender, racial, social, and economic justice." Mission Statement, at http://www.thirdwavefoundation.org/about/mission.html (last visited June 1, 2006).

[150] *See, e.g.,* Feminist Blogs, "a community of weblogs by self-identified feminists, women's liberationists, womanists, and pro-feminist men." Feminist Blogs, http://feministblogs.org/about (last visited June 1, 2006); FeministCampus.org: World's Largest Pro-Choice Student Network, http://www.feministcampus.org/default.asp (last visited June 1, 2006); Women's Edge Coalition, http://www.womensedge.org/pages/aboutus/index.jsp (organization that does "focused, practical advocacy to make sure that U.S. international trade and assistance programs create economic opportunities and self-sufficiency for women and their families worldwide") (last visited June 1, 2006); Welcome to Women are Dreamers Too!, http://www.wadt.org/ ("WADT Inc.- Fulton Micro Enterprise Council is a 501 (c) 3 charitable organization, helping victims of Domestic Violence transcend poverty through micro-enterprise training") (last visited June 1, 2006).

[151] *See, e.g.,* The F Word: Contemporary UK Feminism, http://www.thefword.org.uk/ (last visited M June 1, 2006); Sexing the Political: A Journal of Third Wave Feminists on Sexuality, http://www.sexingthepolitical.org/ (last visited June 1, 2006).

[152] Wong, *supra* note 52, at 296. For an example of third-wave feminism's interest in cultural analysis, see Angie Manzano's discussion of the movie Charlie's Angels. Manzano, *supra* note 139, at 10 (Charlie's Angels as presenting a brand of feminism that is "watered down, it's easy to sell, and it leaves you feeling empty.").

[153] Welcome to the Home of the Big Bad Chinese Mama!, http://www.bigbadchinesemama.com (last visited June 1, 2006).

> patriarchal, colonialist longings. These women will take you by storm (and will kick your ass). Yeah, you've seen mail order bride sites before, you may have even surfed over to an Asian porn site, but never in your wildest culturally commodifying sick sexual desires, have you been schooled by women (womyn) like this!
>
> So, go ahead Mr. Smartypants. Come on in! After all, us "Orientals" are known for our hospitality and genteel demeanor. We aim to please...[154]

Because of the internet's ability to reach the broadest range of people, Wong uses the internet, rather than traditional art shows or art publications, to explore stereotypes of Asian-American women.[155] She asks her friends and classmates to pose as fake "brides" and then posts spoofs of ads for Asian mail-order wives. The women come from a variety of backgrounds and choose the way they are represented.[156] Wong and her collaborators also prank call massage parlors and post the recordings of the calls to the website.[157] These recordings are intended to give visitors to the website "a glimpse of the sex industry as well as the male, eurocentric values it caters to and works under....I also want to show it is ok to laugh at certain injustices instead of feeling constantly offended and disempowered by them."[158] Wong is honest about the ways in which she uses technology to disseminate her message to a perhaps unsuspecting audience She says that she deliberately structures her website so that when people search for pornography, they will be directed to her site.[159]

The technology of the internet makes it an appealing vehicle for feminist activism. The web is accessible around the clock to a global audience[160] and has the potential to reach people who might not have access or choose to access other

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[154] *Id.*

[155] Wong, *supra* note 52, at 299. Wong explains, "Art has the potential to be more broadly accessible than other forms of communication . . . . While live performance and literature can play a role in a cultural critique, the demographics of their audiences limit their potential. When people participate in an Asian-American-themed event, they generally are already interested in Asian American issues. I wanted to reach people who had neither an existing interest in nor a concern for Asian American women and their politics." *Id.*

[156] *Id.* at 302.

[157] Big Bad Chinese Mama!: Pranks, *supra note 153, at* http://www.bigbadchinesemama.com/pranks.html (last visited June 1, 2006).

[158] Wong, *supra* note 52, at 303.

[159] *Id.* at 304 ("I sought traffic in unorthodox ways because I wanted to get hits from people who were not familiar with Asian American women's issues. I cut and pasted a meta-tag from a porn site into my site so that when people search words for porn, they would lead to my site.").

[160] On the accessibility of the internet, Wong says that having a website initially made her feel "vulnerable because visitors could access and interpret my thoughts and images whenever they wanted. However, it was liberating to have this presence on the Web because all the work is accessible twenty-four hours a day, and this approach is not as exhausting as day-to-day activism. It was exciting to know that my words and ideas can be found even when I was sleeping." Wong, *supra* note 52, at 305.

feminist resources. For example, the "Ask Amy" page of the website feminist.com[161] gives information for rape survivors, women who believe they have been a victim of discrimination, those suffering from eating disorders, people who want to start their own businesses and students doing reports on women's history.[162] The web has the ability reach more people than any traditional print media can. Wong, for one, recognizes the ability of the internet to disseminate feminist messages ("even when I am sleeping").[163] Yet third-wave feminists do not grapple seriously with the internet's ability to disseminate pornographic – and sometimes brutally so – images of women and children.[164]

The same technology that is beloved by third-wave feminists has altered the way in which Americans consume pornography. When the film *Deep Throat* was released in 1972, people went to the movie theater to see it.[165] Then, when the videocassette recorder became widely available in the 1980s, people were able to go to a store and rent a pornographic video that they could view in their own home.[166] Now, it is no longer necessary to even leave home to watch pornographic movies. The consumption of pornography has been entirely privatized. An estimated 66.5% of American homes has cable television, and a significant percentage of these homes has access to adult channels like *Playboy* and *Spice*.[167] And television is just one source of pornographic material in homes in an era where discovering one's father's *Playboy* seems quaint.[168] More than

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[161] Feminist.com, http://www.feminst.com/askamy/ (last visited June 1, 2006).

[162] Feminist.com, *Ask Amy*, http://www.feminist.com/askamy/most/ (last visited June 1, 2006).

[163] *See* Wong, *supra* note 52.

[164] On legal issues related to sting operations that seek to catch adults who use the internet to prey on children, *see, e.g.,* Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 478 (2003-2004).

[165] Not just men went to the film: "Lots of rising young executives, as well as the usual middle-aged settled ones, took their respectively appropriately annexed women to see it." CATHARINE A. MACKINNON, *Linda's Life and Andrea's Work*, *in* FEMINISM UNMODIFIED, *supra* note 17, at 128.

[166] Adult Video News estimates that 759 pornographic videos were rented in 2001. Dave Cummings, *Alive and Well in 2001*, AVN INSIDER, *available at* http://www.avninsider.com/stories/healthoftheindustry.html.

[167] Nat'l Cable & Telecomm. Ass'n 2005 Mid-Year Industry Overview, *citing* Nielsen Media Research (May 2005). http://www.ncta.com/industry_overview/ CableMid-YearOverview05FINAL.pdf. An estimated 69% of households with cable television of premium access. *Id. citing* Kagan Research LLC (2004). *See also* Marc Gunther, *Why a la Carte Cable TV is a Nutty Idea*,http://money.cnn.com/2006/02/13/magazines/fortune/pluggedin_fortune/index.htm (last visited June 1, 2006) (claiming that 72 million people subscribe to cable television). Of course cable providers are not the only ones who benefit from providing adult films over the television. Hotel chains derive up to 70% of their room-based profits from pay-per-view adult films that are purchased by an estimated 50% of their guests. Steve Kroft, *60 Minutes: Porn in the USA* (CBS News television broadcast Nov. 2003). *See* also Hofmeister, *supra* note __ (claiming that 50% of all movies purchased in hotel rooms are pornographic).

[168] There are an estimated 35.3 million high-speed internet lines to homes and small businesses. Federal Communications Commission High-Speed Services for Internet Access:

half of American homes have internet access[169] and adult content comprises an estimated 2.1% of all content on the web. [170] One company estimates that a full 61% of all websites are sexual in nature.[171] Popular internet search engine companies report that "sex" is the most frequently searched term and that "pornography" is the fourth-most searched for term.[172]

Consumers of internet-based pornography do not necessarily conform to the stereotype of the lonely, social misfit who searches for pictures of naked women. According to surveys, between 66% and 77% of those who visit adult sites are male and up to 33% are female.[173] The average internet consumer of pornography is forty-one years old and has an annual income of $60,000.[174] An estimated forty six percent of visitors to adult internet sites are married.[175] Furthermore the consumption of pornography has become so normalized that 44% of U.S. workers with internet access admit to accessing adult content at work during one month in 2004.[176]

People report subjectively that they feel negatively impacted by pornography. For example, on account of a partner's use of pornography, 42% of adults surveyed report that they feel insecure and 41% report that they feel less attractive.[177] 80% of visitors to sex sites self-report that their pursuit of adult content on the internet negatively impacts their employment or personal life.[178]

Status as of Dec. 31, 2004, at 3 (July 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/ Reports/FCC-State_Link/IAD/hspd0705.pdf.

[169] Nat'l Telecomm. & Info. Admin., A Nation Online: How Americans are Expanding Their Use of the Internet, *available at* http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf.

[170] Daniel Orr & Josephine Ferrigno-Stack, *Childproofing on the World Wide Web: A Survey of Adult Webservers*, 41 JURIMETRICS J. 465, 467 (2001) (finding that "adult content is not as prevalent online as is frequently believed"). *But see* Marty Rimm, Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Dowloaded 8.5 Million Times by Consumers in Over 2000 Cities, Forty Countries, Provinces and Territories, 83 Geo. L.J. 1849, 1867 (1995) (claiming 83.5% of images in internet news groups are pornographic). For criticism of Rimm's research methods, see Donna L. Hoffman & Thomas P. Novack, A Detailed Analysis of the Conceptual, Logical, and Methodological Flaws in the Article "Marketing Pornography on the Information Superhighway," *available at* http://ecommerce. vanderbilt.edu/novak/rimm.review.html (July 2, 1995).

[171] [MSNBC Survey 2000].

[172] [Alexa Research Report]

[173] *See, e.g.,* Forrester Research Report 2001 (77% of adult site visitors are male); Internet Filter Review (33% of adult site visitors are female);

[174] Forrester Research Report 2001 **[confirm].**

[175] Forrester Research Report 2001 **[confirm].**

[176] BUSINESS WEEK (May, 2004) (reporting results of ComScore Networks survey) **[get Business Week and ComScore survey]**.

[177] Mark A. Yarhouse, Marriage Related Research, Christian Counseling Today, Vol 12, No. 1 (2004) **[insert evaluative comment about source].**

[178] MSNBC.com survey 2000 **[get and evaluate].**

Some report newly-found problems with sex addiction, after seeing adult content on the internet.[179]

Apart from any challenges in evaluating with precision the extent of the on-line pornography industry, these statistics indicate at a minimum that pornography is widely available and widely consumed. Yet third-wave feminists seem uninterested in the scope and prevalence of pornography. Unlike second-wave feminists before them, third-wave feminists do not define pornography as a legal problem per se. Part II will provide historical background on the "sex wars" of feminism's second wave to provide a context for a discussion of third-wave writings on pornography in Part III.

II. THE SEX WARS OF THE SECOND WAVE

A. *Pornography is a Feminist Issue*

In the early 1980's, feminist lawyer and law professor Catharine MacKinnon joined with author Andrea Dworkin to introduce anti-pornography legislation in Minneapolis, Minnesota[180] and Indianapolis, Indiana.[181] Both proposed laws sought to define pornography as a violation of civil rights,[182] and came to stand

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[179] Statement of Al Cooper, a therapist at San Jose Marital Services and Sexuality Center, San Jose, CA, reported in MSNBC.com survey 2000 **[I think] [get and evaluate].**

[180] MINNEAPOLIS, MINN., CODE § 139.10 (amending MINNEAPOLIS, MINN., CODE TIT. 7, CH. 139 relating to Civil Rights: In General).

[181] *See* INDIANAPOLIS, IND., CODE § 16 (1984). The ordinance was based on legislation proposed by MacKinnon and Dworkin. *See* Model Anti-Pornography Civil-Rights Ordinance, *in* ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 138 (1988) [hereinafter the Model Anti-Pornography Ordinance].

[182] The ordinance provided individuals or groups of individuals to bring a variety of claims for injury relating to "pornography," defined as:

> the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following:
>
> a. women are presented dehumanized as sexual objects, things or commodities; or
>
> b. women are presented as sexual objects who enjoy humiliation or pain; or
>
> c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or
>
> d. women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
>
> e. women are presented in postures or positions of sexual submission, servility, or display; or
>
> f. women's body parts--including but not limited to vaginas, breasts, or buttocks--are exhibited such that women are reduced to those parts; or
>
> g. women are presented as being penetrated by objects or animals; or

for a type of feminism known as "dominance feminism."[183] Generally speaking, dominance feminism focuses on how differences between men and women are coded as inequality[184] and how the legal system institutionalizes that inequality.[185] Although dominance feminism has had a substantial impact on academic and popular thought,[186] it has not translated successfully into laws against pornography.[187] The Minneapolis city council adopted the MacKinnon-Dworkin legislation, but the mayor later vetoed it.[188] Similarly, Indianapolis adopted the

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> h. women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

See Model Anti-Pornography Ordinance § 2(1). The possible causes of action are as follows:

> 1. Coercion into pornography. It is sex discrimination to coerce, intimidate, or fraudulently induce (hereafter, "coerce") any person into performing for pornography ....
>
> 2. Forcing pornography on a person. It is sex discrimination to force pornography on a person in any place of employment, education, home, or any public place ....
>
> 3. Assault or physical attack due to pornography. It is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography ....
>
> 4. Defamation through pornography. It is sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image, and/or recognizable personal likeness ....
>
> 5. Trafficking in pornography. It is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs ....

Model Anti-Pornography Ordinance § 3.

[183] *See, e.g.,* FEMINIST JURISPRUDENCE, *supra* note 5, at 105-118, and CHAMALLAS, *supra* note 9, at 18-19.

[184] *See* CHAMALLAS, *supra* note 9, at 18-19 (describing dominance feminism as "a critique of liberalism, including liberal feminism. They [dominance theorists] argued that rather than increasing women's power, well-established concepts such as privacy, objectivity, and individual rights actually operated to legitimate the status quo. This more radical brand of feminist theory called for a major transformation of the law to eradicate the domination of women as a class").

[185] *Id.* at 19 ("A principle project of radical feminism as applied to law described how the legal system had failed to protect women's bodily integrity."). *See also* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in* FEMINISM UNMODIFIED, *supra* note 17, at 40 ("The dominance approach centers on the most sex-differential abuses of women as a gender, abuses that sex equality law in its difference garb could not confront.").

[186] *See, e.g.,* Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223 (1986).

[187] *But see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57 (1986) (recognizing sexual harassment as a type of legal harm).

[188] *See* DWORKIN & MACKINNON, *supra* note 181, at 95. After a different form of the ordinance was introduced and passed by the city council, the mayor of Minneapolis vetoed the legislation a second time. *Id.*

legislation but a court subsequently declared it to be unconstitutional.[189] The remainder of this Part describes the philosophical arguments made by MacKinnon and Dworkin against pornography and examines the counterclaims of MacKinnon's and Dworkin's critics.

B. *Dominance Feminism and Pornography's Harms*

In her 1987 book, *Pornography: Men Possessing Women*, Andrea Dworkin makes two principal arguments against pornography. First, she claims that pornography sexualizes violence against women.

> In the system of male sexual domination explicated in pornography, there is no way out, no redemption: not through desire, not through reproduction. The woman's sex is appropriated, her body is possessed, she is used and she is despised: the pornography does it and the pornography provides it. The power of men in pornography is imperial power …. [M]en are the army; penises and their symbolic representations are the weapons; terror is the means; violence is the so-called sex.[190]

In Dworkin's analysis, pornography is not merely a visual image; it is a "system"[191] of men's "domination"[192] of women. It is actual and cultural violence that men do to women. Dworkin's second claim is that pornography encourages men to be sexually violent[193] and that women are the principal victims of this

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[189] *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). *See also* Village Books v. City of Bellingham, No. 88-1470 (W.D.Wash. Feb. 9, 1989) (declaring a similar law unconstitutional). Canadian Supreme Court upheld an obscenity law on the grounds that it threatened equality between men and women. Butler v. Regina, [1992] 1 S.C.R. 452. In that case, Mr. Justice Sopinka opined:

> [I]f true equality between male and female persons is to be achieved, we cannot ignore the threat of equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self worth and acceptance."

Id.

[190] ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 223 (1981)

[191] *Id.*

[192] *Id.*

[193] There have been several studies that have attempted to measure the relationship between exposure to sexual images and aggression. *See, e.g.,* Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMMC'N RES. 258 (1995) (finding that "consumption of material depicting nonviolent sexual activity increases aggressive behavior, and that media depictions of violent sexual activity generates more aggression that those of nonviolent sexual activity"); Mike Allen et al., *Exposure to Pornography and Acceptance of Rape Myths*, 45 J. OF COMMC'N 5, 19 (1995) (reporting that "exposure to pornography, at least in experimental settings, increases the acceptance of rape myths"). Laboratory studies have been criticized as bearing limited or no predictive value with respect to actual human behavior. *See, e.g.,* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105

violence.[194] She says that male identity is tied to violence[195] and that pornography reveals the extent of this tie: "Pornography reveals that male pleasure is inextricably tied to victimizing, hurting and exploiting, that sexual fun and sexual passion in the privacy of the male imagination are inseparable from the brutality of male history."[196] For Dworkin, pornography can never be just an image; it is a means by which men exploit women.

Like Dworkin, MacKinnon sees women as sexual victims of men. She describes sexuality as something that happens to women, not something that women are genuinely capable of embracing for their own personal fulfillment:

> Pornography…eroticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that "the truth about sex" or just a mirror of reality. Through this process pornography constructs what a woman is as what men want from sex. That is what pornography means.[197]

To the extent that any particular woman would suggest that she enjoys certain sexual practices, MacKinnon would question the extent to which these desires are authentic:

> All women live in sexual objectification the way fish live in water . . . Women seem to cope with sexual abuse principally by denial of fear . . . Women who are compromised, cajoled, pressured, tricked, blackmailed, or outright forced into sex (or pornography) often respond to the unspeakable humiliation, coupled with a sense of having lost some irreplaceable integrity, by claiming that sexuality as their own. Faced with no alternatives, the strategy to acquire self-respect and pride is: I chose it.[198]

COLUM. L. REV. 1635, 1665 (2005); EDWARD DONNERSTEIN et al., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 72 (1987); Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography,* 79 VA. L. REV. 1099, 1182 (1993); William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1491 (1987); R. Green & E. Donnerstein, AGGRESSION: THEORETICAL AND EMPIRICAL RESEARCH 31 (1983).

[194] DWORKIN, *supra* note 190, at 51.

[195] *Id.*

[196] *Id.* at 69. For other of Dworkin's important writings about pornography, *see* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 9 (1985); Andrea Dworkin, *Pornography's "Exquisite Volunteers*," MS., Mar. 1981, at 66; Andrea Dworkin, *Pornography: The New Terrorism*, 8 N.Y.U. L & SOC. CHANGE 215, 216 (1978-1979); Andrea Dworkin, *Pornography's Part in Sexual Violence*, L.A. TIMES, May 26, 1981, at C5.

[197] CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED, *supra* note 17, at 178.

[198] CATHARINE A. MACKINNON, *Not a Moral Issue, in* FEMINISM UNMODIFIED, *supra* note 17, at 149-150.

She does not believe, then, that a woman ever chooses freely to participate in pornography. To MacKinnon, pornography is one more way in which women's inequality is reinforced by men, culture and the media. She claims that pornography is a form of sex discrimination "because of its role in creating and maintaining sex as a basis for discrimination."[199] It "eroticizes hierarchy, it sexualizes inequality."[200]

C. *Liberal Feminism and Censorship's Harms*

In 1984, a group of women organized as the Feminist Anti-Censorship Task Force (FACT) in response to the MacKinnon-Dworkin anti-pornography ordinances.[201] In the litigation over the Indianapolis ordinance, FACT filed an amicus brief asserting that the ordinance was unconstitutional.[202] First, FACT argued, the statute was void for vagueness under the First Amendment.[203] Second, because pornography was a special type of political speech, it should be protected.[204] Third, the law perpetrated impermissible gender stereotypes that would lead to a "sexual double standard."[205] Specifically, "[b]y defining sexually explicit images of women as subordinating and degrading to them,"[206] and by claiming "hair-trigger male susceptibility to violent imagery,"[207] women become "vulnerable to exploitation" and lose ability to contract for sexual and non-sexual relationships on a free and independent basis.[208] FACT's constitutional claims about pornography as protected speech are grounded in an overall suspicion about government censorship. As Ellen Willis opined, "In a male supremacist society, the only obscenity law that will not be used against women is no law at all." [209]

Apart from constitutional grounds, women who oppose anti-pornography legislation also resist it on the grounds that prohibitions on pornography could "make a lot of women ashamed of their sexual feelings and afraid to be honest

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[199] CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights and Speech, in* FEMINISM UNMODIFIED, *supra* note 17, at 178.

[200] *Id.* at 172.

[201] *See, e.g.,* STROSSEN, *supra* note 20, at 32.

[202] Brief for Feminist Anti-Censorship Task Force, et al., as Amici Curiae Supporting Petitioner, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *reprinted in* 21 U. MICH. J.L. REF. 76 (1987-88) [hereinafter FACT Brief].

[203] FACT Brief, *supra* note 202, at 106-102.

[204] *Id*. at 120.

[205] *Id.* at 103-105.

[206] *Id.* at 129.

[207] *Id.* at 130.

[208] *Id.* at 131-132.

[209] Ellen Willis, *Feminism, Moralism, and Pornography, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 466 (Ann Snitow et al. eds., 1983).

about them."[210] In this analysis, opponents of the Mackinnon-Dworkin anti-pornography ordinance construe pornography as reflective of women's unrevealed sexual desires, if not their stated practices. If women are able to explore their sexuality with honesty and without judgment (with pornography somehow reflecting or informing that sexuality), then condemning pornography is to condemn women as well. Thus some second-wave feminists and their allies came to see the anti-pornography ordinances as a type of negative judgment of women.[211] Such a judgment is especially undesirable in a feminist framework that is built on believing women's own accounts of their experiences[212] and increasing women's "pleasure and joy," not their misery.[213] This emphasis on personal pleasure and the desire to be free from a particular normative view of "correct" social practices is a theme that dominates third-wave feminist writings.[214] The next Part examines and critiques third-wave feminist writing about pornography.

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[210] *Id.* at 461.

[211] *See, e.g.,* Abrams, *supra* note 15, at 311 ("The judgmental stance of dominance theorists toward sexuality under present conditions and their comparative silence on the question of affirmative sexual images also risked reanimating Victorian norms that made sex shameful, particularly for women."). *See also* Amber Hollibaugh, *Desire for the Future: Radical Hope in Passion and Pleasure*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 401-403 (Carole S. Vance ed., 2d ed. 1992).

[212] *See generally* CATHARINE A. MACKINNON, *Consciousness Raising*, *in* TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 92 (describing consciousness raising groups in the 1970s in which "[w]omen's lives are discussed in all their momentous triviality, that is, as they are lived through. The technique explores the social world each woman inhabits through her speaking of it, through comparison with other women's experiences, and through women's experiences of each other in the group itself.").

[213] Amber Hollibaugh, *Desire for the Future: Radical Hope in Passion and Pleasure*, *in* PLEASURE AND DANGER, *supra* note 211, at 24.

[214] There is a certain way in which third-wave feminism itself can be seen as an intellectual response to the so-called "sex wars" of the second wave. Kathryn Abrams, for example, credits Camille Paglia, Katie Roiphe and Naomi Wolf, among others, as having "reanimated the sex wars themes" with work that critiques state regulation and the portrayal of women as victims. Abrams, *supra* note 15, at 305. Third-wave feminists respond to the themes these authors raise. *See* discussion *infra* Part III C. It may be appropriate to include in this list of authors who influenced the formation of the third-wave Rene Denfeld (THE NEW VICTORIANS, 1995) and Christina Hoff Sommers (WHO STOLE FEMINISM, 1994). On the importance of Denfeld's and Hoff's work to the development of arguments against "victim" feminism, see generally Alyson M. Cole, *"There Are No Victims in this Class": On Female Suffering and Anti-Victim Feminism*, 11 NAT'L WOMEN'S STUD. ASS'N J., 1, Mar. 22, 1999 (saying that Denfeld, Sommers, Paglia, Roiphe and Wolf "were the first to set the parameters of the critique of" victim feminism and "provide its most influential specimens"). Anti-victim themes also recur in PROFESSING FEMINISM: CAUTIONARY TALES FROM THE STRANGE WORLD OF WOMEN'S STUDIES (Daphne Patai & Noretta Koertge eds., 1994); ELIZABETH FOX-GENOVESE, "FEMINISM IS NOT THE STORY OF MY LIFE:" HOW TODAY'S FEMINIST ELITE HAS LOST TOUCH WITH THE REAL CONCERNS OF WOMEN (1996); ELLEN KLEIN, FEMINISM UNDER FIRE (1996); and KAREN LEHRMAN, THE LIPSTICK PROVISION: WOMEN, SEX AND POWER IN THE REAL WORLD (1997).

III. THE THIRD WAVE TAKES ON PORNOGRAPHY

This Part explores third-wave writings on pornography as a way of illuminating third-wave feminist themes and methods. Because pornography was and is a divisive issue within feminism, third-wave writings on the subject also highlight the salient differences between second- and third-wave feminism. Third-wave writings on pornography are frank[215] and daring.[216] They celebrate a bold[217] and sophisticated[218] female sexuality. For the most part, young feminists seem to approach pornography from any one or more (or some combination) of four distinct perspectives: (A) pornography is a form of sexual expression;[219] (B) pornography is a type of performance subject to multiple interpretations by both its actors and consumers;[220] (C) pornography is a non-unique way in which women are sexually and economically exploited;[221] and (D) pornography is a healthy part of an overall sex-positive agenda.[222] Although no third-wave author situates pornography within the context of the larger feminist debate, third-wave writers implicitly reject the harms-based approach advocated by Catharine MacKinnon and Andrea Dworkin.[223] At the same time, however, to the extent that they embrace pornography, third-wave writers do not respond to second-wave feminist arguments about free speech, either. Third-wave feminists for the most part appear unconcerned with the broad social effects of readily-available pornography and, notwithstanding their overall media-savvy, have yet to grapple

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[215] *See, e.g.,* Merri Lisa Johnson, *Pearl Necklace: The Politics of Masturbation Fantasies, in* JANE SEXES IT UP, *supra* note 121, at 311-326 (female author's description of self-stimulation while imagining herself as a fellated man as a way to "acknowledge the way U.S. culture shapes my fantasies into scenes of dominating women, displacing my orgasm onto the male sex organ, and simultaneously to guard my right to fantasize freely, to come at whatever cost"). On the masturbation emphasis in third-wave writing, Jennifer Baumgardner says that she wishes "the Girlie feminists . . . would organize as well as they womanize." MANIFESTA, *supra* note 7, at xx.

[216] *See, e.g.,* Shannon Bell, *Liquid Fire: Female Ejaculation & Fast Feminism, in* JANE SEXES IT UP, *supra* note 121, at 327-345 (explicit description of author's evening at a sex club ending in her own display of female ejaculation).

[217] *See, e.g.,* Gwendolyn D. Pugh, *Do the Ladies Run This…? Some Thoughts on Hip-Hop Feminism, in* CATCHING A WAVE, *supra* note 4, at 232-244 ("What would happen if we had feminist MCs moving millions toward a critique of gender that motivated them toward change?").

[218] *See, e.g.,* Katherine Frank, *Stripping, Starving and the Politics of Ambiguous Pleasure, in* JANE SEXES IT UP, *supra* note 121, at 171-206, 202 (asking, "Who owns the signs of femininity? Those of us who employ those signs in daily practice for pleasure, for security, as part of our jobs? Men? Women?").

[219] *See infra* Part III.A.

[220] *See infra* Part III.B.

[221] *See infra* Part III.C.

[222] *See infra* Part III.D.

[223] *See supra* Part II.B.

seriously with the power of the internet to transform the way pornography is produced, distributed and consumed.

A. Pornography as Sexual Expression

In her essay, *Giving It Up: Orgasm, Fear, and Femaleness*, Donna Minkowitz reveals the sources of her sexual arousal as masturbation, reading real-life stories of rape and torture and viewing pornography.[224] In Minkowitz's view, these are equally valid ways of connecting with one's sexual feelings. In describing masturbation, Minkowitz says that "When I touch myself, I am waving a red flag at a bull. Forcing, soothing and seducing myself through this nightmare might be the most macho thing I have ever done."[225] The "nightmare" in Minkowitz's analysis is the process of connecting with one's sexual and sometimes out-of-control feelings, being turned "into an animal being I don't recognize."[226] For Minkowitz, masturbation is "macho" insofar as it requires a certain willingness – what she calls "full-bodied bravery"[227] -- to acknowledge and explore one's own sexuality. In other words, a woman acts "macho" when she touches herself and becomes willing to seek personal pleasure when historically, "[m]en, church, state, and art have told us for centuries that we're disgusting when we get out of control – bestial, dirty as only the body can be dirty."[228] For Minkowitz, "forcing, soothing and seducing"[229] the sexual self is an act of rebellion against traditional rules for acceptable female behavior.

After describing her masturbation experiences, Minkowitz immediately asks, "How can women give it up enough to let someone see us writhe, claw, moan and beg, the bitches in heat we've fought forever not to become?"[230] Her language is provocative but her meaning is not clear. At one level, by "giving it up," Minkowitz appears to mean sexual arousal. She asks how can women become *aroused enough* (that is, adequately) to actualize their sexual selves in the way that Minkowitz does through masturbation. In this reading, Minkowitz's reference to "bitches in heat" may be a self-conscious wink at the reader, an intentional use of animal imagery to describe women's historically unexpressed sexual desire.[231]

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[224] Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 77-79, 80, 84.

[225] *Id.* at 77-85, 80.

[226] *Id*. at 80.

[227] *Id*. at 79.

[228] *Id*. at 79.

[229] *Id.* at 77-85, 80.

[230] Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 77-85, 79.

[231] Minkowitz also describes masturbation as a form of self-induced temporary insanity (or self-induced dehumanizing): "I understand why nineteenth-century doctors warned that masturbators would go mad or revert to a more primitive life-form, and why the religious right still believes this. When Dr. James Dobson of Focus on the Family warns that sexual liberation

At another level, though, Minkowitz uses the phrase "give it up" in a sense more consistent with common slang, i.e., a woman's yielding sexual access to her body.[232] If this is the sense in which Minkowitz uses the phrase, then her question may be how can women engage in *enough* (that is, sufficient) sexual intimacy so as to reveal one's authentic self ("the bitches in heat we've fought forever not to become"[233]) to another person.[234]

A third possible formulation of Minkowitz's question is *how* (that is, by what methods) can women "give it up," whether that means to become aroused adequately or often enough. To that question, Minkowitz's writing offers an unexpected answer: through violent sexual images. Minkowitz reports feeling sexually stimulated by reading about rape and torture: "Is it horrible to say that reading about real-world rape and torture sometimes turns me on? Some accounts make me sick, some make me angry, and still others make me sick, angry, and aroused at the same time. On some occasions, arousal is the only emotion I feel. Is that inhuman of me?"[235] Minkowitz explains that reading about violence is not consistently negative (making her sick or angry)[236] or consistently positive (making her aroused);[237] she reports a range of responses.[238]

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will provoke an epidemic of rape, "cross-species fetuses," and even serial murder, he could be speaking straight out of my fears." *Id.* at 80.

[232] In modern slang, the phrase typically means: (1) "to give in to one's sexual urges in a quick manner; usually referring to females;" (2) "have sex;" (3) "give sex to." *See* Urban Dictionary, http://www.urbandictionary.com/define.php?term=give+it+up (last visited June 1, 2006).

[233] Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 77-85, 79.

[234] Minkowitz describes the physical connection of sexual intimacy as accompanied by "the equally discomfiting demand for emotional connection." *Id*. at 81.

[235] *Id.* at 79. Writing in the Foreword to the volume, Gloria Steinem says that Minkowitz's "explanation of being sexually excited by account of prison attacks and the rape with a baseball bat of a retarded girl . . . makes me as sorrowful as reading about a gay person, someone who is Jewish, or a person of color who finds homophobic, anti-Semitic, or racist violence to be a sexual turn-on." Gloria Steinem, *Foreword* to TO BE REAL, *supra* note 11, at xxi. Steinem attempts to blunt this criticism of Minkowitz by saying that Minkowitz's essay "warns us against making others feel criticized for conditions they didn't create." *Id*. Yet Minkowitz's essay does not in fact sound that warning. Although Minkowitz asks rhetorically, "Is that inhuman of me?" her essay is confident and defiant; she does not reveal any particular fear of being criticized. Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 79. If anyone criticizes, it is Steinem who seems to do so by implying Minkowitz is unaware of the sexist cultural context that informs Minkowitz's fantasies. *See* Steinem at xxi.

[236] Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 79.

[237] *Id.*

[238] She then interrogates this link between arousal and violence:

> But why would arousal feel like torture to begin with? When I first began exploring my own obstreperous numbness, I thought I might have been sexually abused as a child. Now I conjecture it may have more to do with a less dramatic occurrence: getting hit. Whenever I remember a fist coming down on me, I

In addition to reading accounts of sexual violence, Minkowitz holds out consumption of pornography as a possible means by which women may be able to confront and possibly decouple the relationship she perceives between sexual arousal and violence.[239] Minkowitz ascribes to pornography a harmless role in sexual fantasy and explicitly rejects any connection between the consumption of pornography and violence against women.[240] Commenting on Catharine

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> sense myself losing control of my own body, feeling things happen to its surfaces and vitals that I have no ability to order and no capacity to stop. To have another person make you experience pain against your will is to experience enormous helplessness: even if we can't control anything else in the world, we can usually control our own bodies, and losing that control to another person can make you feel like you have lost everything, lost utterly, ceased, in a way, to be a human being.

Id. at 77-85, 81-82.

Being hit as a child made Minkowitz feel like she had no control over the "surfaces and vitals" of her own body. *Id.* Minkowitz thus experiences in sexual pleasure the same sense of loss of bodily control that she had when being hit as a child. She feels unable to "order" or "stop" her sexual response. *Id.* at 77-85, 81-82. Sexual pleasure is painful: "The first time my girlfriend goes down on me, it feels almost like pain. But it is not pain. It is – too much. Being in need and out of control like this feels all wrong. It's as though an insect stung me there, or maybe I broke something. This can't be a natural feeling. I can't imagine voluntarily repeating this." Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 79-80. Because of the loss of control over one's own body, Minkowitz's feelings of sexual excitement are frightening at the same time that they are pleasurable. Feelings of pleasure coexist with feelings of threat: "One lover told me, 'When you come, you put your hands in fists.' I'm not surprised that my need for defense is so great at a time when forces I can't control are turning me into an animal being I don't recognize." *Id.* at 80. For Minkowitz, being hit and being sexual both amount to a loss of control over one's own body.

In the context of her childhood experience, Minkowitz equates violence with loss control with a loss of humanity, the feeling that one has "ceased, in a way, to be a human being." *Id.* Similarly, sexual pleasure is associated with a loss of control and corresponding loss of humanity insofar as one is "turned into an animal being." *Id.* at 80. Although in Minkowitz's analysis, all people have the capacity to feel sexual arousal, and thus experience a loss of humanity, she acknowledges that women are uniquely subject to violence. The fact that all women "grow up under the shadow of the rapist looming just beyond our ken – or his alter ego, the lover who will break us to his will" means that women experience a real "anguish of closeness . . . whether the entity closing in threatens with coercion or compatibility." *Id.* at 82. Thus women lose control of their own bodies and humanity in response to both sexual stimulation and violence. Because women in particular experience acts of intimacy as acts of violence, the link between the two are inextricable. *See* Donna Minkowitz, *Giving It Up: Orgasm, Fear, and Femaleness, in* TO BE REAL, *supra* note 11, at 82 ("I remember my ex-lover Julia . . . . And I call to mind another lover, Ellen, inexplicably becoming angrier than I'd ever seen anybody be in bed. She'd been transported, she explained later, and was confusing me with the man who raped her.").

[239] *See id.*

[240] *See id*. at 83-84. At least one other third-wave writer views pornography as an appropriate outlet for sexual frustration. Freya Johnson describes a situation in which she was kissing another woman in a heterosexual bar and she was approached by a man who was aroused by this sight: "[A]ll these straight men were staring at us. They couldn't believe what they were seeing, and I was totally enjoying the fact that they were watching us and seeing this, and this one guy came up to us and he said, 'Oh my God, I can't believe this,' and he was totally going off, and I'm like, 'What's the matter – you're just so turned on you don't know what to do with yourself, or what?' I mean it's not something I would ever say generally, but I was sort of performing, enjoying the fact that they were watching us. And he said, 'Yeah, something like that,' and I'm all, 'Go rent a video,' you know, just completely over the top." Ana Marie Cox et al., *Masculinity Without Men: Women*

MacKinnon's suggestion that Serbian soldiers were influenced by pornography to mass-rape Bosnian women,[241] Minkowitz rejects the notion that pornography dehumanizes the consumer.[242] She says instead that pornography humanizes the consumer by allowing him or her to embrace sexual fantasies:

> [T]here is a difference between feeling and action that MacKinnon fails to see: namely, the difference between getting turned on by images of domination, and getting turned on by such images and then raping people. And the difference between me and those Serbian prison guards is that although I may have similar sexual responses [to pornography], I am not going to rape or brutalize anyone. Through letting myself experience orgasm and S/M, I've learned that I can trust myself to feel whatever desires I have. Faced with temptation, I do not become that fictive beast whose conduct has no limits.[243]

Minkowitz draws a bright line between feeling (arousal in viewing pornography) and action (rape).[244] She acknowledges that she and the Serbian soldiers might have similar arousal responses to pornography, and even suggests some

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Reconciling Feminism and Male-Identification, in THIRD WAVE AGENDA, *supra* note 5, at 187-188 (quoting Freya Johnson). Johnson's suggestion is that the aroused man could and should relieve his sexual frustration through the consumption of pornography. *Id.* Interestingly, Johnson, like Minkowitz, articulates use of pornography as a way of avoiding or at least minimizing violence against women. She acknowledges that "[P]art of feminism is trying to refute this idea of 'Oh, you were asking for it.' So, in a sense, we are kind of performing that by 'asking for it.' And reserving the right to be furious if anything were to happen. But it's still really dangerous." *Id.* at 188. This perspective is criticized by a friend of Johnson's who says that two women kissing in a straight bar is too provocative: "[Y]ou *do* play into those rape fantasies by acting like a porno move. And if at some level you are actually consciously saying, 'Come on, fucker, rape me' – men *are* picking up on it . . . We're talking about erasing the question 'Are you going to rape me?' and I worry that certain kinds of power feminism run the risk of replacing that question with 'You won't rape me, 'cause I'll rape you first in one way or another." *Id.* at 190 (quoting Annalee Newitz).

[241] *See* Catharine MacKinnon, *Turning Rape Into Pornography: Postmodern Genocide*, MS., July-Aug. 1993, at 28 ("When pornography is . . . normal, a whole population of men is primed to dehumanize women and to enjoy inflicting assault sexually . . . . Pornography is the perfect preparation - motivator and instruction manual in one - for . . . sexual atrocities.").

[242] Minkowitz rejects the notion that "[b]ecause these men have let go their humanness enough to fantasize about having sex with animals, about women having sex with animals…they have turned into uncontrollable rape-beast whose ethics are the ethics of the jungle." Minkowitz, *supra* note 224, at 77-85, 83.

[243] Minkowitz, *supra* note 224, at 77-85, 84. This cathartic view of pornography is shared by scholars who believe that pornography "may allow partial relief of unfulfilled or unrealizable desires." C. Crepault & M. Couture, *Men's Erotic Fantasies*, 9 ARCHIVES SEX. BEHAV. 565, 566 (1980).

[244] Rebecca Walker rejects a relationship between violence in the media and violence in everyday life as a false tenet of second-wave feminism. Walker, *Introduction* to TO BE REAL, *supra* note 11, at xxx-xxxi ("[I]f I didn't think violence on TV translated into real-life violence, if I didn't believe in the essential goodness of women's culture, I thought I might be perceived as betraying 'The Movement' rather than celebrating it.").

understanding of the "temptation"[245] to "become that fictive beast."[246] But for Minkowitz, arousal does not necessarily translate to violence because of her openness to her own feelings.[247] It is the experience of sexual feelings in all forms, she suggests, that is the key to maintaining a moral compass.[248] Minkowitz therefore implies that Serbian soldiers raped Bosnian women because they had excess of sexual desire, not a particular desire to brutalize women.[249] But viewing rape as the product of excess desire, or the result of not fully experiencing sexual feelings, is to adopt the point of view of the male consumers of pornography, not the women who were raped by them. Minkowitz's focus on the sexual arousal felt by viewers of pornography allows her to ignore the rapes that followed its consumption, at least by Serbian soldiers. By framing pornography as a source of sexual satisfaction, not one of the many conditions contributing to women's inequality,[250] Minkowitz then can adopt an implicitly anti-censorship view. She concludes her article with the warning that "[w]hatever humanness is, it is not about smothering the bundle of emotions society has called 'the beast' that dwells inside us."[251]

Although Minkowitz disagrees with MacKinnon's connecting pornography and violence, Minkowitz implicitly acknowledges, as MacKinnon does explicitly, that sex and violence are intertwined.[252] Yet third-wave writings in general would

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[245] Minkowitz, *supra* note 224, at 77-85, 84.

[246] *Id.*

[247] *Id.*

[248] Minkowitz explains women's reluctance for intimacy as motivated by a concern over losing one's moral focus: "That is why our identity is an identity of incoherence, and why it's so hard to give it up to the other's mouth or her hand or just the universe watching as you lose control by yourself. Losing control of our sexual feelings can be so devastating that we fear we'll lose something even more central to us: our moral integrity." *Id.* at 83.

[249] On the similarity between the mental mechanisms underlying rape and those underlying sexual arousal, see Craig T. Palmer et al., *"Is It Sex Yet?" Theoretical and Practical Implications of the Debate Over Rapists' Motives*, 39 JURIMETRICS J. 271, 272-73 (1999). *See also* Randy Thornill & Craig Palmer, WHY MEN RAPE, WHY WOMEN SUFFER: RAPE, EVOLUTION, AND THE SOCIATL SCIENCES (1999) ("sexual motivation is necessary for rape to occur"). Catharine MacKinnon frames rape as a problem not of male biology, but of their desire to dominate women. MacKinnon says, "When we ask whether rape, sexual harassment, and pornography are questions of violence or questions of sexuality, it helps to ask, to whom? What is the perspective of those who are involved, whose experience it is – to rape or to have been raped, to consume pornography or to be consumed through it. As to what these things *mean* socially, it is important whether they are about sexuality to women and men or whether they are instead about 'violence,' – or whether violence and sexuality can be distinguished in that way, as they are lived out." CATHARINE A. MACKINNON, *Sex and Violence, in* FEMINISM UNMODIFIED, *supra* note 17, at 87, 85-92.

[250] Minkowitz incorrectly reads MacKinnon to suggest that "if people ever get the sexual satisfaction we really want [through pornography], we will not be able to stop ourselves by taking it by force." Minkowitz, *supra* note 224, at 84.

[251] Minkowitz, *supra* note 224, at 77-85, 85.

[252] MacKinnon critiques the cultural tendency to treat sex and violence as wholly separate:

> The mutual exclusivity of sex and violence is preserved in the face of this evidence [that men experience violence as sex] by immunizing as "sex"

suggest that sexual violence does not constitute women's experience. The third wave portrays a woman who is sexually independent and confident[253] and simultaneously aware of "that doubtful sexual naif still crouching inside many grown women."[254] Where MacKinnon sees heterosexuality as "the predominant social arrangement that fuses this sexuality of abuse and objectification with gender in intercourse, with attendant trauma, torture, and dehumanization, organizes women's pleasure so as to give us a stake in our own subordination,"[255] third-wave feminists conceive of heterosexuality as an identity more easily resisted.[256]

B. Pornography as Performance

In their essay, *Porn Power: Sex, Violence, and the Meaning of Images in 1980s Feminism*, Kegan Doyle and Dany Lacombe, two self-described "pro-porn feminists,"[257] argue against the categorical condemnation of pornography[258] on the grounds that some women enjoy viewing pornography[259] and that consumers of pornography play an active role in its interpretation.[260] Doyle's and Lacombe's

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> whatever causes a sexual response and by stigmatizing questioning it as repressive, knowing that what is thereby exempted includes humiliation and brutality and molestation and murder as well as rape by any definition.

CATHARINE A. MACKINNON, *Introduction* to FEMINISM UNMODIFIED, *supra* note 17, at 6.

[253] One writer describes the third-wave feminist as having a "smart-ass take no-shit anarcha-orgasmic feminist persona." Merri Lisa Johnson, *Jane Hocus, Jane Focus: An Introduction*, *in* JANE SEXES IT UP, *supra* note 121, at 3.

[254] *Id.* at 11.

[255] CATHARINE A. MACKINNON, *Introduction* to FEMINISM UNMODIFIED, *supra* note 17, at 7.

[256] As Rebecca Walker explains, third-wave feminists "fear that identity will dictate and regulate our lives, instantaneously pitting us against someone, forcing us to choose inflexible and unchanging sides, female against male, black against white, oppressed against oppressor, good against bad." Walker, *Introduction* to TO BE REAL, *supra* note 11, at xxxii. Alternate forms of sexuality and self-identity are celebrated and embraced. *See, e.g.,* Herrup, *supra* note 48, at 240 ("I started to realize that sexual liberation isn't a matter of asserting that a particular sexuality is okay. Liberation has to do with challenging the very forces that categorize sexuality in the first place. That is why in the last year or so I have moved from identity politics to a new domain of ambiguity. 'Accept the ambiguities' has become my personal mantra. I repeat these words not to invoke their action, but to cast their spell and release the magic that comes from engagement with uncertainty.").

[257] Kegan Doyle & Dany Lacombe, *Porn Power: Sex, Violence, and the Meaning of Images in 1980s Feminism, in* "BAD GIRLS"/"GOOD GIRLS": WOMEN, SEX, AND POWER IN THE NINETIES, *supra* note 1, at 189.

[258] Doyle and Lacombe are critical of radical feminists like MacKinnon and Dworkin, but also the anti-censorship forces whose "analysis of mainstream porn was as simplistic as that of radical feminists." *Id.* at 194.

[259] MCELROY, *supra* note 20.

[260] Doyle and Lacombe specifically refer to women's ability to interpret pornography ("[W]omen actively consume mainstream porn – resisting, twisting, and sometimes subverting

analysis is infused with a postmodern sensibility and commitment to believing women's accounts of their own experience.[261]

Doyle and Lacombe explicitly acknowledge the pervasiveness of pornography in contemporary culture.[262] They acknowledge that many people -- men and women -- report that they enjoy pornography.[263] Citing examples of women who derive personal[264] or economic[265] benefit from participation in pornographic films, Doyle and Lacombe claim that they "are endorsing a brand of feminism that subverts mainstream culture from within – or, if nothing else, respects those who enjoy life within that mainstream."[266] Instead of dismissing pornography as categorically bad, the authors accept pornography as omnipresent and the source of stated pleasure for some people.[267] This claim is echoed by those who have worked as nude dancers. As one woman says of her dancing, "I . . . thought I was experimenting with an aspect of my erotic self. There was a part of me that liked performing, liked having a captive audience who would only watch me."[268] Performance is described then as a type of power and self-involvement.[269]

Doyle and Lacombe reject the notion that women are victims of pornography and attribute to them instead a significant role in its interpretation: "We must recognize that women actively consume mainstream porn – resisting, twisting,

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it."). Doyle & Lacombe, *supra* note 257, at 199. Yet their argument about the sophisticated consumer's approach to pornographic material likely would apply to men as well.

[261] In evaluating third-wave writings (not Doyle & Lacombe particularly), one critic says that "the post structuralist, postmodernist language is beyond tedious much of the time." Ryan, *supra* note 67, at 181.

[262] Doyle and Lacombe suggest that pornography has infiltrated aspects of our culture beyond the print and films sources that that traditionally are considered pornographic ("The presence of pornographic codes in genres as different has hard-and soft-core porn, advertisement, Hollywood cinema, and even science makes radical feminists' calls for censorship seem misguided at best, authoritarian at worst.") Doyle & Lacombe, *supra* note 257, at 191.

[263] MCELROY, *supra* note 259.

[264] The authors quote Nina Hartley, a "self-defined feminist porn star," as saying that appearing in pornography 'provides a physically and psychically safe environment for me to live out my exhibitionist fantasies. . . . the medium allows me to explore the theme of celebrating a female sexuality.' Doyle & Lacombe, *supra* note 257, at 198 (quoting Nina Hartley, *Confessions of a Feminist Porno Star*, *in* SEX WORK: WRITING BY WOMEN IN THE SEX INDUSTRY (Delacoste & Alexander eds., 1987)).

[265] The authors also cite to Candida Royalle, an "ex-porn star," as an example of someone who has developed a successful pornographic film company that are "romantic fantasies with an emphasis on heterosexual women's sexuality." *Id.* at 198.

[266] *Id.* at 189.

[267] The authors seem to be reacting, as least in part, to a perception that earlier feminist condemnations of pornography contravened feminist principles: "The grimly ironic truth is that while feminists claim of being silenced, they themselves were silencing others" who had positive experiences in the production of pornography. *Id.* at 197.

[268] Taylor, *supra* note 146, at 222-223.

[269] Jocelyn Taylor says that, "I believed that stripping (even though I was stripping for me) was allowing me to discover more of my own sexual agency." *Id.* at 223.

and sometimes subverting it."[270] In other words, pornography has no fixed meaning but acquires meaning only through the interpretation of the person who views it. This emphasis on the role of the viewer grows out of postmodern theory that questions the existence of a singular text with fixed and independent meaning.[271] In the postmodern world, pornography has only the meaning that the consumer supplies.[272] The authors' claim for a subversive power of the consumer of pornography is a common, if minor, theme in third-wave feminist writings.[273]

At the same time that pornography has no fixed meaning, the postmodern framework of Doyle and Lacombe posits that the images themselves contribute to the formation of women's identities. In interpreting pornography, women both supply their own meaning and become constituted by that meaning. For that reason, pornography by definition cannot falsely portray women's sexuality: "[i]dentity is always provisional, precarious, incessantly in formation." [274] For Doyle and Lacombe, all human desires have been shaped by culture insofar as "[s]ubjects, in fact, are created in and through a multiplicity of social relations, relations which they also reproduce and, at times, transform."[275]

Doyle's and Lacombe's approach to texts is consistent with what political scientist Jane Flax has described as "embeddedness and dependence of the self upon social relations as well as the partiality and historical specificity of this self's

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[270] Doyle & Lacombe, *supra* note 257, at 199.

[271] *See*, *e.g.,* Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 624-626 (1987).

[272] This approach to pornography grows out of feminist film theory from the early 1980s, which highlighted the context in which pornography was made. Doyle & Lacombe, *supra* note 257, at 191-192. ("The feminist understanding of pornography as a way of seeing, a *gaze*, was a more sophisticated approach to sexist imagery than that of radical feminists for two reasons. First, rather than reducing porn to the *truth* of sex (man's violence), it directed our attention to the context of that makes the production and consumption of sexist images possible. . . . Second, it emphasized, at least potentially, the viewer's activity in the production of meaning in pornography.")

[273] *See, e.g.,* Klein, *supra* note 128, at 208 ("Our politics reflects a postmodern focus on contradiction and duality, and reclamation of terms. S-M, pornography, the words *cunt* and *queer* and *pussy* and *girl* – are all things to be reexamined or reclaimed.").

[274] Doyle & Lacombe, *supra* note 257, at 195. The authors further assert that, "to pine for some healthy subjectivity, some pure (ahistorical) self, as do [some second-wave feminists], is naïve and politically disastrous." *Id.*

[275] *Id.* at 195. Third-wave feminists make a similar claim about young women's understanding of feminism itself. While they recognize that they caricature second-wave feminism, that caricature is in some ways unavoidable: "It would be nice to believe the women have a transparent relationship with feminism, but, like everybody else our understanding of feminism is filtered through the media. While we understand that we are operating in the realm of stereotypes, these representations were nevertheless instrumental in forming our ideas of what it would mean to be feminists. Growing up, we internalized these stereotypes, and today we are still negotiating them when we call ourselves feminists." Ana Marie Cox et al., *Masculinity Without Men: Women Reconciling Feminism and Male-Identification, in* THIRD WAVE AGENDA, *supra* note 5, at 179.

existence."[276] Therefore any categorical condemnation of pornography is a condemnation of women themselves, according to Doyle and Lacombe. To them, "[m]ass culture does not simply victimize women, and anybody that claims that it does belittles the vast majority of women, whose desires, fantasies and subjectivities are irretrievably bound up in it."[277] Pornography should be resisted and interpreted, but not eliminated,[278] insofar as censorship, not pornography, poses a more significant threat to women's well-being.[279]

C. Pornography as (Just Another) Exploitation

Third-wave feminists tend to see pornography as one of the many ways that women are subject to "[c]onstant sexual appraisal."[280] That appraisal takes many forms, including sexual harassment on the street and in the work force, as well as sexual abuse.[281] In this sense, third-wave writer Melissa Klein would agree with

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[276] Ana Marie Cox et al., *Masculinity Without Men: Women Reconciling Feminism and Male-Identification, in* THIRD WAVE AGENDA, *supra* note 5, at 624-626. The socially and historically contingent self is in direct opposition to the traditional Enlightenment belief in "[t]he existence of a stable, coherent self" or a fixed meaning for names and language. *Id*. For a feminist application of postmodernist theory to the study of law, *see, e.g.,* Carol Smart, *The Quest for a Feminist Jurisprudence*, *in* FEMINISM AND THE POWER OF LAW 82-89 (1989) (arguing that "[l]aw is not a free-floating entity, it is grounded in patriarchy, as well as in class and ethnic divisions . . . . Law cannot resolve these structures of power, least of all when we recognize that its history and the history of these divisions coincide."). The emphasis on gender as performance is a consistent theme of third-wave feminists:

> One way that the third-wave distinguishes itself from the second wave is through its emphasis on paradox, conflict, multiplicity, and messiness. This generation's feminism is often informed by postmodern, poststructuralist theories of identity; as a result, we are able to see the constructed nature of identity as well as the ways in which gender may be a performance that may be manipulated and politically altered as it is performed. Because this theoretical framework calls into question the very idea of a unified self, it allows for a playful incorporation of performed identities, even when they contradict each other.

Dicker & Piepmeier, *Introduction, supra* note 107, at 16.

[277] Doyle & Lacombe, *supra* note 257, at 199.

[278] "Associated with sexism, pornography can be resisted; equated with men's evil sexuality, it can only be repressed." *Id*. at 192.

[279] *Id*. at 199 ("[I]t is not so much pornography that endangers women but censorship.").

[280] Klein, *supra* note 128, at 218. One third-wave feminist explains her suspicion by says that, "Governmental and local authority as it pertains to women, queers, and Black folk has caused me to develop a healthy disrespect for this nation's generic brand of morality thinly masked by the law." Taylor, *supra* note 146, at 234.

[281] Klein, *supra* note 128, at 218-220. Melissa Klein especially bemoans the lack of meaningful employment opportunities for young people, and "the types of low-paying job in which sexism is an undercurrent." *Id*. at 219. She describes a six-month period of employment as cocktail waitress in which, "I knew that my being hired and the amount of money I would make in a nightclub depended on my ability to look cute and to chat in a friendly, flirtatious manner with drunken men. To accomplish this, I had to endure guys trying to put tips down my shirt and asking if they could lick Jello shooters off my breasts." *Id*. at 219-220. *See also* Sidler, *supra* note

Catharine MacKinnon that "[p]ornography not only teaches the reality of male dominance. It is one way its reality is imposed as well as experience. It is a way of seeing and using women."[282] Klein, like MacKinnon, recognizes what MacKinnon calls "[a]ll the ways in which women are suppressed and subjected – restricted, intruded on, violated, objectified." [283]

Where Klein might disagree with MacKinnon, however, is on the subject of whether women's violation becomes "the meaning and content of femininity."[284] Klein suggests that abuse and harassment do not necessarily define women, or at least not in the way that MacKinnon believes they do. Instead, in Klein's model, women's experiences of intrusion and violation allow them to approach pornography as a potential profit center: "Because young women often feel exploited in the workplace," Melissa Klein says, "we see sex-trade work in less black-and-white terms than older feminists do. We reason that because our bodies are appropriated through looks and comments anyway, we might be better off at least profiting from it."[285] As one woman who worked as a nude dancer further explains, "In an economic system where women face unequal job opportunities, sex-work is one way women can get ahead (maybe even enjoy themselves in the process)."[286]

In Klein's analysis, pornography is a way for women to benefit financially from the inevitable exploitation of women. By describing pornography and other sex-work as ways of "exploiting our exploitation,"[287] Klein extends the third-wave feminist and postmodern sensibilities articulated by Doyle and Lacombe.[288] Pornography is subject to interpretation by not only the viewer,[289] but also by those whom Catharine MacKinnon calls the "pornographed."[290] Thus notwithstanding whatever meaning that a consumer, or even society, might ascribe to a pornographic picture or film, Klein holds out the possibility that it is

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122, at 25-26 (describing her friends' experiences with "McJobs" in which they worked "in part-time or temporary positions with no benefits and no hope of advancement.").

[282] CATHARINE MACKINNON, *Linda's Life and Andrea's Work, in* FEMINISM UNMODIFIED, *supra* note 17, at 129-130.

[283] CATHARINE A. MACKINNON, *Introduction* to FEMINISM UNMODIFIED, *supra* note 17, at 6.

[284] *Id.*

[285] Klein, *supra* note 128, at 220.

[286] Katherine Frank, *Stripping, Starving and the Politics of Ambiguous Pleasure, in* JANE SEXES IT UP, *supra* note 121, at 199.

[287] *Id*. at 220.

[288] *See supra* notes 274-277 and accompanying text.

[289] *Id.*

[290] CATHARINE A. MACKINNON, *Linda's Life and Andrea's Work*, *in* FEMINISM UNMODIFIED, *supra* note 17, at 128 (describing the film *Deep Throat* as one "in which Linda [Marchiano] was pornographed").

the performer, not the consumer (or perhaps in addition to the consumer) who engages in exploitation.[291]

By positing the performer in pornography as the exploiter, not the exploited, third-wave feminism extends and complicates a traditional second-wave feminist critique of pornography. If Catharine MacKinnon claims that pornography "constructs what a woman is as what men want from sex,"[292] Melissa Klein suggests that, at least in some cases, pornography is a woman's way of constructing *herself*. Specifically pornography is the medium through which a woman may exact maximum financial benefit from men by constructing herself as men want her to be. The force of this third-wave perspective on women's agency may depend largely on the circumstances in which pornography is made, and it may not be possible to make general statements about women's agency or lack thereof without further information about who profits from the pornography industry. Yet third-wave feminists themselves also frame sex-work as being contingent on a woman's self-dissemblage:

> Every time I stripped for men I was stripping myself of emotional response. Yeah, I could get off on dancing, on just feeling my body move to the music, but I realize I was marionetting, performing for an audience from which I kept a considerable distance. When I thought my body was being appreciated, it was actually performing for someone else's pleasure. When I thought I was making money, I was trading cold cash for true emotion and feeling. I don't know how long it took me to realize that a Black woman is not likely to find her liberation in a Mafia-owned strip joint.[293]

Notwithstanding the failure by third-wave feminists to contextualize the production or pornography, these writings nevertheless adds value to the feminist conversation about pornography. By conceiving of women as the exploiters, not the exploited,[294] third-wave feminists shift the focus of the pornography critique to differences in power and economics.[295]

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[291] Professor Celine Parrenas Shimizu makes a similar point about Asia Carrere, a pornographic film star who has built an entire business around her own performances. Celine Parrenas Shimizu, Presentation at the Sex for Sale Conference at Yale Law School (Feb. 4, 2006).

[292] CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights and Speech, in* FEMINISM UNMODIFIED, *supra* note 17, at 171.

[293] Taylor, *supra* note 146, at 236.

[294] Katherine Frank, *Stripping, Starving and the Politics of Ambiguous Pleasure, in* JANE SEXES IT UP, *supra* note 121, at 220.

[295] In this sense, third-wave feminism might be particularly receptive to the argument that celebratory gay pornography bears no relationship to exploitative heterosexual pornography. *See, e.g.,* Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995). For a critique of Sherman's analysis, see Bridget J. Crawford, *Gay Does Not Necessarily Mean Good: A Critique of Jeffrey Sherman's Love Speech: The Social Utility of Pornography,"* 5 AM. U. J. GENDER & L. 9 (1996).

D. Pornography as the Praxis of Pleasure

At the same time that third-wave feminists acknowledge the potentially exploiting and exploitative aspects of pornography, third-wave feminists have limited or no affinity for censorship of any kind.[296] Theirs is a "pro-sex" agenda that is more likely "to celebrate female-centered pornography than to censor male-entered porn."[297] One writer explains this as a reaction to the Reagan-Bush era's cuts of arts funding and the withholding of federal funds from exhibits considered by some government officials to be in poor taste.[298]

Third-wave feminists reject the notion that there is a "correct" form of artistic expression. Particularly in the case of art, that which is degrading in some respects can nevertheless be enjoyed. For example, a particular song's lyrics might present women in a negative light, but the same song might have the "fattest, most addictive beats known to humankind."[299] As one writer explains, "I don't fit into a puritanical, dualistic feminism that recognizes only indignant innocence . . . or unenlightened guilt."[300] A pluralistic feminism instead recognizes joy in music with a pleasant beat but unpleasant lyrics, and the possibility that one might genuinely enjoy music that also degrades women.

Because third-wave feminism embraces this pluralistic view, third-wave writers seem reluctant to label any form of sex-work - whether pornography, prostitution or stripping - as entirely "bad" for women. Writing about her experiences as a nude dancer, writer Katherine Frank acknowledges that stripping "reinforces male privilege and entitlement to the detriment of women's practical and emotional investments in their non-stripper bodies."[301] At the same time, however, she sees stripping as a way to "pay the rent" and gain financially.[302] Similarly, in a study of prostitutes in Madison, Wisconsin, Kirsten Pullen

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[296] *See, e.g.,* Klein, *supra* note 128, at 221 (distinguishing "young punk" (third-wave) feminists from " older, Dworkin-MacKinnon feminists").

[297] *Id.* at 221-222.

[298] On the controversy surrounding public funding for the arts, *see, e.g.,* Frank Rich, *Pull the Plug on Brooklyn,* N.Y. TIMES, Oct. 9, 1999, at A17; Linda Greenhouse, *Justices Uphold Decency Test in Awarding Arts Grants, Backing Subjective Judgments*, N.Y. TIMES, June 26, 1998, at A17; Art Winslow, *Swatting at Art,* THE NATION, Oct. 18, 1999, at 5; Lauri Githens, *Museum Exhibit Again Touches Off Debate Over Art with Neither Side Willing to Compromise*, BUFFALO NEWS, Sept. 29, 1999, at A1. *See also* Klein, *supra* note 128, at 221-222 (the third-wave's anticensorship perspective "comes partially from a distaste for the censorship in creative circles that developed during the mid-1980s: the Parents' Music Resource Coalition's record-labeling efforts, the outcry over Robert Mapplethorpe's sexually explicit photographs, and the attempted anti-flag burning amendment.").

[299] Davis, *supra* note 128, at 131.

[300] *Id.* (describing her internal conversation over whether to buy an album with "'positive' messages I already knew nestled into" it or "bluesy misogyny over the fattest, most addictive beats known to humankind").

[301] Katherine Frank, *Stripping, Starving and the Politics of Ambiguous Pleasure, in* JANE SEXES IT UP, *supra* note 121, at 202.

[302] *Id.* at 199.

describes prostitutes' work as "offering adventure, community, and financial rewards,"[303] while at the same time acknowledging that prostitutes themselves feel the need to be secretive about their work, because of the stigma associated with prostitution.[304] Third-wave feminists do not dismiss categorically sex-work, but they recognize it as multi-faceted -- problematic yet profitable to some women.[305]

Notwithstanding the sex-positive tone of third-wave writings on sex-work, there is a way in which third-wave feminists acknowledge how female submission has been fetishized as what is sexy. As Catharine MacKinnon describes, "For the female, subordination is sexualized, in the way that dominance is for the male, as pleasure as well as gender identity, as femininity. Dominance, particularly by men, and submission, principally by women, will be the ruling code through which sexual pleasure is experienced."[306] But for third-wave feminists, the analysis does not stop with the dominance critique. It advocates a potentially subversive role for the so-called dominated female. As Katherine Frank says, "My performance in the strip club . . . reinforces certain stereotypes, ideals and privileges even as it stabilizes and challenges others. As I discipline and adorn my body, then ritually disrobe in front of an audience for money, I obey and disobey norms of femininity, sometimes at intervals, sometimes simultaneously."[307] The transgressive female is one who asserts her right to profit commercially from her own body and to enjoy her own sensuality.[308] For third-wave feminists, pornography is sexual expression, performance, exploitation and pleasure all at the same time. Against this multi-faceted backdrop, the next Part explores the stated goals of third-wave feminism.

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[303] Kirsten Pullen, *Co-Ed Call Girls: The Whore Stigma Is Alive and Well in Madison, Wisconsin, in* JANE SEXES IT UP, *supra* note 121, at 208.

[304] *Id.* at 210 ("The narratives that emerge from my interviews suggest that some women working as prostitutes are caught between the sexual autonomy and financial independence sex work offers, and the stigma attached to whoring, experiencing a degree of newfound freedom but in a necessarily covert form.").

[305] Some feminists rejects the notion that profiting from pornography makes it empowering to women: "No matter how much we would like to use feminism to justify our choices, feminism cannot be interpreted to encompass any risky, self-hating, violent thing a woman does to herself, or takes money for doing, or pays someone to do to her. Feminism does not value women's subordination and women's pain." Amy Winter, *Feminism and the Politics of Appearance*, 34 OFF OUR BACKS, Nov. 1, 2004, at 11-12.

[306] CATHARINE A. MACKINNON, *Introduction* to FEMINISM UNMODIFIED, *supra* note 17, at 7.

[307] Katherine Frank, *Stripping, Starving and the Politics of Ambiguous Pleasure, in* JANE SEXES IT UP, *supra* note 121, at 202.

[308] The extent to which an exotic dancer herself enjoys stereotypical "sexy" behavior is suggested by Katherine Frank's account of her trip with friends to a nightclub: "I had to censor my movements anew. Prancing, tossing my hair, and sensuously caressing my torso and breasts – movements I originally adopted for an audience but which had since become mine, part of the music and the dancing – were recontextualized [outside the strip club] as reckless provocation of the male libido . . . . The strip club, in many ways, is a safe place to disobey." *Id.* at 188-189.

IV. THE THIRD-WAVE FEMINIST AGENDA

A. The Third-Wave Agenda

Third-wave writers Jennifer Baumgardner and Amy Richards designed their thirteen-point agenda, or "manifesta," as a self-consciously foundational document for twenty-first century feminists.[309] Baumgardner's and Richards' preamble begins, "When in the course of thirty years of uninterrupted feminism . . . it becomes evident that a single generation can only go so far, it behooves the next generation to pick up the reins and articulate the plot that will move their cause forward."[310] This language echoes the second-wave Declaration of Sentiments[311] at Seneca Falls in 1848 (which Declaration was itself modeled on the Declaration of Independence).[312] According to Baumgardner and Richards, feminism needs a clear articulation of goals "[i]n order to have a government that responds to the Third-wave [sic], rather than a society by the few for the few."[313] The third-wave "manifesta" nominally contains thirteen agenda items. Several of those items, however, are bundles of related issues.[314] Although Baumgardner and Richards themselves to not break down the agenda items into categories, their substantive goals seem to fall into five subsets: politics, education, health, the economy and law.

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[309] MANIFESTA, *supra* note 7 at 278.

[310] MANIFESTA, *supra* note 7, at 278. The 1848 Declaration of Sentiments began similarly:

> When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decedent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

I HISTORY OF WOMAN SUFFRAGE, 70. *Compare* DECLARATION OF INDEPENDENCE ("When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.").

[311] *See* Declaration of Sentiments, *in* I HISTORY OF WOMAN SUFFRAGE 1881-1922, 70 (Elizabeth Cady Stanton et al., eds., 1985).

[312] The first Women's Rights Convention in United States history was held at Seneca Falls, New York on July 19-20, 1848. This convention typically is considered to mark the beginning of the woman suffrage movement. *See, e.g.,* AILEEN KRADITOR, IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920 1 (1965).

[313] *Id.*

[314] *See, e.g.,* MANIFESTA, *supra* note 7, at 279. The third agenda item, for example, includes several related goals: (a) "[t]o make explicit that the fight for reproductive rights must include birth control;" (b) "the right for poor women and lesbians to have children;" (c) partner adoption for gay couples;" (d) "subsidized fertility treatments for all women who choose them;" (e) "freedom from sterilization abuse;" and (f) "to support the idea that sex can be – and usually is – for pleasure, not procreation." *Id.*

The manifesta's political goals arise out of a perceived third-wave feminist need to become a more coherent political group. Baumgardner and Richards phrase this as a desire to "out unacknowledged feminists . . . so that Generation X can become a visible movement, and, further, a voting block of eighteen- to forty-year-olds."[315] In order to become a more cohesive group, feminists need to acknowledge a common goal of equality and commit to "supporting one another in our efforts to gain the power to make our own choices."[316] In the Baumgardner-Richards framework, political activism is imagined as a bond between oneself and one's community.[317]

The manifesta's educational goals relate mostly to the history of feminism and diversity in self-expression. Baumgardner and Richards proclaim a need to "have access to our intellectual history and women's history; for the classics of radical feminism, and womanism, *mjuerista*, women's liberation and all our roots remain in print; and to have women's history taught to men as well as women as a part of all curricula."[318] Baumgardner and Richards want to "support and increase the visiblility and power of lesbians and bisexual women in the feminist movement,"[319] and emphasize "that there is nothing to be gained – and much to be lost – by downplaying their history."[320] Third-wave feminists want to reach out in particular to young girls,[321] to "liberate" them from "slut-bashing, listless educators, sexual harassment and bullying at school."[322] Absent from the third-wave feminist educational goals are any specific, concrete proposals for how to, say, increase access to early childhood educational programs, diversify admission to higher education or guarantee quality school systems for all children. The manifesta has more strong rhetoric than it does specific proposals.

The manifesta's health action items are access and coverage for health care. Baumgardner and Richards want all people to "have equal access to health care, regardless of income, which includes coverage equivalent to men's and keeping in mind that women use the system more often than men do because of our reproductive capacity."[323] They want to eliminate double standards in "sex and sexual health"[324] and to increase male participation in reducing venereal diseases

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[315] *Id.* at 278 (agenda item 1).

[316] *Id.* at 280 (agenda item 12).

[317] *Id.* at 280 (agenda item 7, "[t]o practice 'autokeonony' ('self in community'): to see activism not as a choice between self and community but as a link between them that creates balance").

[318] *Id.* at 279 (agenda item 5).

[319] *Id.* (agenda item 6).

[320] *Id.*

[321] A perceived emphasis on young girls' self-esteem by second-wave feminists is something that Baumgardner and Richards themselves criticized earlier in their book. *See supra* note 99 and accompanying text.

[322] MANIFESTA, *supra* note 7, at 280 (agenda item 10).

[323] *Id.* at 280 (agenda item 8).

[324] *Id.* at 279 (agenda item 4).

and planning for contraception.[325] But the authors do not specify how to make health care more available or how to increase male participation in disease and pregnancy prevention.

The manifesta's economic goals are similarly amorphous. Apart from a general desire to "make the workplace responsive to an individual's wants, needs, and talents,"[326] the authors do not explain exactly what changes they would like. Without any exploration of how their goals could be achieved, Baumgardner and Richards call for an increase to the minimum wage,[327] greater opportunities for part time work[328] and compensation for parenting activities.[329] But how this is supposed to happen is not immediately obvious. It is not clear, for example, what role third-wave feminists imagine for the government versus private employers.

The Manifesta's goals for the law are more extensive than those in any other category, and yet not any more specific. Given that third-wave feminist writing in general is non-legal in nature, the authors' emphasis on the law is somewhat surprising. Baumgardner's and Richards' list of legal goals mirrors the broad subjects that traditionally have been the source of second-wave concern and action: increasing reproductive freedom,[330] eliminating violence against women,[331] achieving equality in the workforce[332] and securing constitutional guarantees of equality.[333] They also tack on the goals women's participation in the military and an equal rights amendment to the constitution, both of which have been the subject of substantial opposition from many people, including thoughtful feminists.[334] Yet apart from broad goals, Baumgardner and Richards do not specify what they want the law to look like.

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[325] *Id.*

[326] *Id.* at 280 (agenda item 11).

[327] *Id.* ("enacting a minimum wage that would bring a full-time worker with two children over the poverty line").

[328] *Id.* ("aiding employees who want to spend more time with family and continue to work").

[329] *Id.* ("valuing (monetarily) stay-at-home parents").

[330] *Id.* at 270 (agenda item 2: "[t]o safeguard a woman's right to bear or not bear a child, regardless of circumstances" and agenda item 3: "the fight for reproductive rights must include birth control").

[331] *Id.* at 270 (agenda item 4: "eliminating violence against women" and agenda item 10 "[t]o liberate adolescents from . . . violence in all walks of life").

[332] *Id.* at 280 (agenda item 11: "equalizing pay for jobs of comparable worth" and agenda item 9: "[f]or women who so desire to participate in all reaches of the military, including combat, and to enjoy all the benefits (loans, health care, pensions) offered to its members for as long as we continue to have an active military").

[333] *Id.* at 281 (agenda item 12: "[t]o pass the Equal Rights Amendment so that we can have a constitutional foundation of righteousness and equality upon which future women's rights conventions will stand").

[334] For a discussion of feminist arguments against the ERA, see for example Jane Mansbridge, *What Ever Happened to the ERA*, WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE (Sibyl A. Scharzenbach & Patricia Smith eds., 2003).

B. *The Third Wave's Neolegalism*

Third-wave feminist writing hints at a role for law in the ideal society without concretely describing that role. There are several possible reasons for this neolegalism. First it may be that third-wave feminists are not engaged in explicitly legal work, as third-wave writers tend to come from backgrounds in publishing or social activism, but not law per se. Second it may be that third-wave feminists who are trained as lawyers are still at early stages in their careers[335] and are not yet engaged in the type of impact-litigation that commonly is associated with "feminist lawyering." Third it may be that third-wave feminist lawyers are not engaged in feminist lawyering at all. Fourth it may be that third-wave feminists are engaged in legal work on behalf of women, but they are not the ones writing about it in books about third-wave feminism. Fifth third-wave feminists have not yet entered the legal academy in significant numbers, and so there is no third-wave feminist legal scholarship per se.[336] Sixth it may be that the writings of third wave feminists are not well known to or understood by feminist lawyers or scholars. This article attempts to bridge that gap between the non-legal third wave feminist writings and the lawyers and scholars who may be interested in them.

Apart from any other explanation, the lack of third-wave writing about the law seems to arise out of third-wave methodology itself. Because third-wave feminist method – to the extent a single method exists -- relies heavily on the first person narrative,[337] this does not translate easily into action plans and impact litigation. Instead, the ability to bring important litigation on behalf of women remains in the hands of traditional women's rights groups more commonly associated with the

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For a discussion of feminist arguments against women's participating in the military, see for example George Neumayr, *Equality Equals Death*, 37 AMERICAN SPECTATOR NO. 6, July-Aug. 2004, at 50-51; Anat Cohen, Feminist Combats the Army, Feb. 5, 2006, *available at* http://www.boloji.com/wfs5/wfs550.htm.

[335] *See, e.g.*, Min Jin Lee, *Pushing Away the Plate*, *in* TO BE REAL, *supra* note 11, at 89 ("I am a lawyer. I am a lawyer. I am a lawyer. I recite this like a mantra for two interloced purposes: to state affirmatively that I am a female white collar professional nad to justify the negative statement belying my mantra, that I am just a young woman who has no idea what she is doing in this shiny glass building in Manhattan. I start my second diurnal chant, I belong here, I belong here, I belong here."),

[336] *See, e.g.,* Feministlawprofs, http://feministlawprofs.law.sc.edu/ (last visited June 1, 2006) (intended to be a "web log community for feminist law professors"). The professors listed in the blog's right-hand page are those who "self-identify as feminists" and have chosen to be listed there. *See* http://feministlawprofs.law.sc.edu/?cat=2 (last visited June 1, 2006). Of the 62 who are listed, 30 were born in or after 1960; 21 were born in or after 1966; 25 were born between 1963 and 1973. *Id.* Depending on how one defines the third-wave, this means that the blog roll includes either 21 or 25 self-identified feminists who, by virtue of their age, fall into the category of "third-wave feminists." *See, e.g.,* Heywood & Drake, *supra* note 5, at 4 (third-wave feminists are those whose birthdates fall between 1963 and 1973). *Compare supra* note 315 and accompanying text (third-wave voting block to be comprised of eighteen- to forty-year-olds).

[337] *See, e.g., infra* Part I.D.1.

second wave.[338] The next Part attempts to outline in concrete legal terms what a third-wave feminist legal agenda might look like and how it could be achieved.

V. TOWARD A THIRD-WAVE FEMINIST LEGAL THEORY

A. *Third-Wave Feminist Legal Goals*

1. *Internet Regulation*

Regulation of the internet is a hotly contested issue. Consider, for example, the Child Online Protection Act (COPA)[339] enacted in 1998 to criminalize the knowing internet posting "for commercial purposes" of material that is "harmful to minors."[340] When the American Civil Liberties Union and other groups objected to COPA has unconstitutional, the United States Supreme Court agreed, saying that the government had not shown that less restrictive measures were available to prevent minors from accessing internet pornography.[341] Although no third-wave feminist group was represented in the suit or filed any supporting briefs, it can reasonably be expected that third-wave feminists would oppose COPA and any other laws that have the effect of restricting adults' ability to access the internet. They believe that the consumer has an unlimited ability to interpret and give meaning to pornographic images; any governmental attempts to block access to those images would be impermissible.

It is not obvious, however, how third-wave feminists would evaluate legislation, including COPA, that attempts to protect minors from sexually explicit internet content. On the one hand, third-wave feminists seem to take the view that adults cannot stop children from engaging in adult or adult-like activities.[342] According to third-wave feminists, adults should create positive conditions in which children can engage in a variety of sexual activity, not limit that activity. Yet it is not obvious that such analysis should be applied to regulation of children's access to the internet. The third-wave feminist viewpoint fails to take into account the way in which the internet can expose children to extremely violent, degrading and illegal images. It is a means by which children can be lured into harmful illegal activity.[343] The third-wave feminist faith in the consumer's interpretive abilities should not apply to children. Children lack the ability to import multiple levels of meaning and irony to particular images and to safeguard themselves from predatory behavior. For that reason, it would seem appropriate for third-wave feminists to support internet controls designed to protect children.

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[338] *See e.g.,* NOW Legal Defense and Education Fund; Women's Rights Project of the ACLU.

[339] 47 U.S.C. § 231 (1998).

[340] *Id.* at 231(c).

[341] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 657 (2004).

[342] See Rebecca Walker comment about teens having sex.

[343] *See, e.g.,* [NY Times article on boy (Justin) lured into building site].

2. *Domestic Violence*

Every state provides some legal protection for battered women,[344] but the effectiveness of domestic violence laws depend largely on local implementation. Some jurisdictions have a "mandatory prosecution rule" which provides that the decision to bring charges against a batterer is discretionary in the prosecutor, not the victim.[345] This policy has been called "the enlightened approach to domestic violence prosecutions," insofar as it "takes the decision of whether or not to prosecute the batter off the victim's shoulders and puts it where it belongs: in the discretion of the prosecutors whose job it is to enforce society's criminal laws and hold offenders accountable for their crimes."[346] In other words, once a victim has reported domestic violence, she or he loses any ability to control whether the perpetrator is prosecuted. Critics of mandatory prosecution point out that such policies do not necessarily lead to a reduction in domestic violence.[347] Furthermore, critics claims, "mandatory interventions reinforce the battered woman's psychic injury and encourage feelings of guilt, low self-esteem, and dependency . . . [m]andatory interventions may have the ironic effect of realigning the battered woman with the batterer."[348] That is, by taking out of a woman's hands the ultimate decision whether to prosecute her batterer or not, domestic violence laws reduce women's agency. In a mandatory prosecution regime, a woman would not be free, for example, to decide to "ignore" or "overlook" the battering for her own idiosyncratic reasons.

Third-wave feminists' consistent emphasis on the importance of individual choice and preference could be translated into a critique of mandatory domestic violence prosecution policies. If the law takes seriously the notion that women's autonomy and decision-making must be respected, then the law should permit individual women to decline to pursue cases against their batterers. This extension of the third-wave philosophy has a certain egalitarian appeal, but it also fails to recognize that women do not always have equal power in their relationships with men, and that such inequality in power can lead to decisions (such as a decision to stay with a batterer) that may be appropriate in the victim's own judgment. Yet what the victim considers appropriate (or tolerable) may not be tolerable in a society that chooses not to condone violence against women. The third-wave outlook is in this sense at odds with mandatory prosecutions rules' larger statement of social values.

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[344] See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Wiomen: Ana Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

[345] *See, e.g.,* [los angeles county rule].

[346] Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997).

[347] *See, e.g.,* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters; Process, Problems and Effects, in* LEAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 151-157 (N. Zoe Hilton ed., 1983) and Robert C. Davis et al., *The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors*, 44 CRIME & DELIQ. 434, 441 (1998).

[348] Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

3. *Prostitution*

As in the discussion of mandatory domestic violence prosecution, feminist debate about prostitution shows how respect women's autonomy can lead to condonation of practices that disadvantage women. For example, advocates for prostitutes' rights assert that women should have the right to choose their own work and to use their bodies for economic gain. On the other hand, feminist opponents of prostitution view it as a form of contemporary slavery created by poverty, economic pressure, prior sexual abuse, domestic violence and the lack of meaningful employment opportunities for women.[349] Opponents of prostitution believe that calling prostitution "work" leads to a systematic devaluation of women and girls in society.[350]

Third-wave feminists for the most part ignore or gloss over the social and economic conditions that lead to prostitution. They view a woman's decision to engage in prostitution as an economically-savvy way of maximizing her own assets. Third-wave feminists see prostitution, like nude dancing, as just another way of exploiting women's exploitation,[351] or in other words, taking advantage of men's apparent need to sexualize and degrade women. For third-wave feminists, it is the prostitute, not the john who has the morally (and perhaps economically) superior position in the relationship. Yet the voices of the third wave are the voices of privileged women who have the time, education and economic ability to write for publication.[352] As a group, third-wave feminists embrace a "traditional liberal theory, which is committed to autonomy, individualism, and minimal state interference in private choice,"[353] more so than any sustained critique of relations between men and women. This theoretical weakness arises, in large part, from third-wave methodology itself.[354] If the hallmark of third-wave feminism is a self-centered privileging of the individual narrative, then gender subordination

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[349] DORCHEN LEIDHOLDT, PROSTITUTION: A CONTEMPORARY FORM OF SLAVERY (1998), *available at* http//www.uri.edu/artsci/wms/hughes. Leidholdt critiques the distinction between "forced" and "voluntary" prostitution:

> By limiting the pool of people who can be identified as victims while simultaneously protecting large segments of the sex industry, this is the best gift that pimps and traffickers could have received. This distinction creates a vision of prostitution that is freely chosen' a vision that can be maintained only by ignoring all of the social conditions that force women and girls into conditions of sexual exploitation. The proponents of this distinction are sending the following message: "Don't pay attention to the poverty, the familial pressure, the incest she survived, the battering by her boyfriend, the lack of employment options available to her. Just as whether there is a gun pointed at her head or whether she is being overtly deceived. No gun, no deceit; then no problem.

[350] *Id.*

[351] *See infra* note 287 and accompanying text.

[352] *See infra* Part V.B.

[353] Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists and the (Im)Possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, __ (1989-90).

[354] *See infra* Part I.D.1.

and social structures, like prostitution, that reinforce that subordination, remain outside the third-wave analysis.

4. *Reproductive Freedom and Technology*

In 2006 South Dakota's enacted restrictive legislation that prohibits almost all abortions.[355] The statute provides that "no person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being." Violation of the law is a felony.[356] The only exception to the law is action taken by a licensed physician to save a woman's life.[357] Implementation of the law has been delayed;[358] politicians and lawyers expect that the law will be tested in court.[359]

The South Dakota legislation should be the galvanizing force for third-wave feminists. Most third-wave feminists came of age in the post-*Roe* generation, but now that the South Dakota legislation threatens *Roe*, reproductive freedom should become a major political issue for young women. This is consistent with the second agenda item on the "Manifesta" (right after "to out unacknowledged feminists"),[360] which is "to safeguard a woman's right to bear or not to bear a child, regardless of circumstances, including women who are younger than eighteen or impoverished."[361] Because third-wave feminists "advocate activism on a very grassroots scale to support the formal structures for equality," they likely will be involved in public awareness campaigns and local opposition to the legislation. Faced with losing the choice they may have taken for granted, third-wave feminists will need to make reproductive freedom their preeminent legal issue.

Given the importance of the abortion issue, third-wave feminists would do well to concentrate their efforts on it. A related, but less important issue that third-wave feminists have paired with reproductive freedom issue is subsidized fertility treatments and "freedom from sterilization abuse."[362] Third-wave feminists support increased access to all forms of reproductive technology as an

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[355] See Women's Health and Human Life Protection Act, H.B. 1215 § 2, 2006 Leg. Sess. (S.D. 2006) (enacted).

[356] *Id.*

[357] *Id. at* § 4

[358] *See* John Holusha, *South Dakota Governor Signs Abortion Ban*, N.Y. TIMES, Mar. 6, 2006, Washington Section; Stephanie Simon, *Abortion Ban Puts Strategies in Doubt: South Dakota's Test of Roe v. Wade has Both Sides Wondering if They've Moved Too Fast*, L.A. TIMES, Mar. 7, 2006.

[359] *See* Monica Davey, *South Dakota Bans Abortion, Setting Up A Battle*, N.Y. TIMES, Mar. 7, 2006;

[360] MANIFESTA, *supra* note 7, at __.

[361] *Id.*

[362] *Id.*

extension of women's right to make determinations about the composition of their families. They want to make infertility treatments less expensive and more available to women of all races and classes.

5. *Child-Care*

Child-care is expensive; American families with mothers make average monthly child-care payments of an estimated 6.9% of their average monthly family income.[363] But this percentage can vary considerably depending on the geographic location of the family and the type of child-care.[364] A third-wave feminist legal agenda would include child-care issues, given their interest in "mak[ing] the workplace responsive to an individual's wants, needs, and talents."[365] Based on third-wave theory as it currently exists, however, it is not clear what direction third-wave feminists would take. They might advocate for subsidies or support from either employers or the government. If efforts focus on governmental involvement, that may be in the form of government-run child-care centers, government-subsidized child-care centers[366] or tax-benefits.[367] Ultimately, the success of any third-wave advocacy for private or public support for child-care depends on how the issue is framed.[368] A sex-equality argument may be the most powerful, and full discussion and development of such a theory should be explored in future third-wave feminist scholarship.

6. *Sexual Harassment*

Third-wave feminists likely would support efforts to broaden the definition of sexual harassment. Consider, for example, the case of *Miller v. Department of Corrections*.[369] In that case, the plaintiffs alleged sex discrimination and harassment on the grounds of a "sexually hostile" work environment. A male prison warden was sexually involved with three subordinate female employees

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[363] *See* Julia Overturf Johnson, *Who's Minding the Kids? Childcare Arrangements: Winter 2002*, Table 6: Weekly Child Care Payments of Families With Mothers Present and Children Under 15 Years by Selected Characteristics: 1984 to 2002, *available at* http://www.census.gov/prod/2005pubs/p70-101.pdf

[364] Census Bureau, Current Population Reports, Sept. 1995, *What Does It Cost to Mind Our Preschoolers?*, at 4 (expenditures range from 6% to 25% of monthly income).

[365] *Id.*

[366] For historic examples of government-subsidized workplace child-care, see RUTH SIDEL, WOMEN & CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA 119-120 (1986)

[367] *See, e.g,* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); EDWARD J. MCCAFFERY, TAXING WOMEN (1997); Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307 (1998).

[368] The editors of one popular textbook pose this question: "Does it make a difference *why* the government adopts a particular child care policy – that is, whether it is seen as a question of sex equality, as in Sweden; of employment necessity, as in wartime Britain and the United States; or of child welfare?" FEMINIST JURISPRUDENCE, *supra* note 5, at 717.

[369] Miller v. Department of Corrections, 30 Cal.Rptr.3d 797 (2005), reversed in part by 2006 WL 147513 (Cal. App. 3 Dist.) (not officially reported).

(other than the plaintiffs). The employees having affairs with the warden used their sexual relationships with him to advance their own careers. In finding in favor of the plaintiffs' claim of sexual harassment, the California Supreme Court stated that "although isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demeaning message that managers view female employees as 'sexual playthings' or that 'the way for women to get ahead in the workplace is by engaging in sexual conduct.'"[370] Note that the Court found a hostile work environment based largely on the supervisor's conduct with women other than the plaintiff.

Some commentators have expressed concern that the *Miller* decision is non-directive: "Given the vagueness of the *Miller* decision, it is unclear what the standard now is for office romances . . . [T]he court in *Miller* was careful to stress that an isolated instance of paramour favoritism would not, by itself, be a sufficient basis for a sexual harassment claim. Therefore, one employee receiving special treatment from his or her supervisor will probably not be enough to create liability on the part of the employer."[371] But the legacy of Miller is an expanded view of what constitutes a hostile work environment. This should clear the way for third-wave feminists who want to wear fishnets in the boardroom without inspiring comments from their co-workers. The freedom to dress in a sexually provocative way with impunity, although not likely to become a third-wave rallying cry, would underlie any third-wave feminist approach to sexual harassment law. The next section describes the methodology most likely to be employed by third-wave feminist legal theorists.

B. Third-Wave Feminist Legal Methods

Third-wave feminism makes three important contributions to feminist jurisprudence. It emphasizes the importance of women's subjective experience, it rejects rigid gender roles and imagines a powerful role for the internet in coalition-building around women's issues.

Third-wave feminists make a particular argument in favor of hedonism. Robin West has critiqued traditional feminist legal theory as defining "out of existence" the "subjective, hedonic aspects" of women's differences from men and from each other.[372] West further says that "[N]either radical nor liberal legalism –

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[370] 30 Cal. Rptr.3d 797, 811-812 (quoting EEOC Compliance Manual).

[371] California Supreme Court Recognizes a Sexual Harassment Claim By Co-Workers Based on Consensual Paramour Favoritism, *available at* http://www.lw.com/resource/Publications/ClientAlerts/clientAlert.asp?pid=1361. Another scholar criticizes the *Miller* decision as "an example of how courts have expanded the reach of sexual harassment/sex discrimination laws to conduct that may be boorish, but does not involve unequal treatment based on gender." Richard A. Epstein, *Recent Developments in Employment Cases*, SL077 ALI-ABA 195 (2006).

[372] Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L. J. 81 (1987), *reprinted in* 15 WISC. WOMEN'S L.J. 149 (2000). West argues that groups she calls "liberal-legal feminist theorists" (who want more choice for women) and "radical-legal feminist theorists" (who want women to have more power), are too outwardly focused, and "[c]onsequently, and unsurprisingly, neither liberal nor radical feminist legal critics have committed themselves to the task of determining the measure of women's happiness or suffering." *Id.* at 155.

nor their feminist derivatives – aim for happiness or well-being *directly*."[373] Third-wave feminists do. Yet at the same time, third-wave feminists reject West's contention that women act mostly in satisfaction of others' desires. West claims that unlike the classic liberal actor who maximizes the actor's individual happiness, "many women, much of the time, consent to transactions, changes, or situations in the world so as to satisfy not their own desires or to maximize their own pleasure, as liberal legalism and liberal legal feminism both presume, but to maximize the pleasure and satiate the desires of others, and that they do so by virtue of conditions that only women experience."[374] The picture one gets from reading third-wave feminist writing is that these feminists work actively to maximize their own happiness, and, to the extent that they act to maximize a man's happiness, they do so only as the result of a negotiation or a conscious decision that other-satisfaction will lead to self-satisfaction.[375]

Although they embrace Robin's West call for attention to women's "hedonic lives,"[376] third-wave feminists reject the suggestion that women act with a false consciousness.[377] Third-wave feminism values an individual's account of his or her own experience and trusts it as accurate. This emphasis on the first-person narrative may account, at least in part, for third-wave feminists' approach to pornography. In other words, the only narrative that makes it into a book of third-wave feminist writing is the narrative told by the person with enough education, authority and mental and cultural resources to write the account. Those who have been brutalized by the sex trade[378] are not likely to write first-person accounts for popular or academic anthologies edited by those who are not engaged in day-to-day work with these survivors.

Third-wave feminism's interest in and reliance on the internet suggests a rich vehicle for international coalition-building around women's issues. Consider, for example, the story of Mukhtar Mai, the Pakistani woman whose gang rape a village court had sanctioned as punishment for her brother's alleged "crime" of

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[373] *Id.* at 156.

[374] *Id.* at 161-62.

[375] *See, e.g.*, Allyn & Allyn, *supra* note 47, at 144-149 (describing complicated negotiation and thought process pursuant to which a husband and wife both decide to take on a mutually-invented last name, instead of the husband's last name, the wife's last name, a hyphenated version or some variation on more familiar solutions). *See also* Merri *Lisa Johnson, Fuck You & Your Untouchable Face*, *in* JANE SEXES IT UP, *supra* note 121, at 13-50 (author's critical self-evaluation of behavior that yields greater pleasure to her male partner than to her).

[376] West, *supra* note 372, at 149.

[377] Robin West, like Catharine Mackinnon (see *supra* note 198 and accompanying text), believes that women's accounts of their own experience must be approached with some skepticism. West says, for example, that "[a]n injury uniquely sustained by a disempowered group will lack a name, a history and in general a linguistic reality. Consequently, the victim as well as the perpetrator will transform the pain into *something else*, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure." West, *supra* note 372, at 153 (emphasis in original).

[378] *See, e.g.,* Norma Hotaling's website and the women she is trying to help; testimony in MacKinnon/Dworkin book before the Minnesota commission.

sexual relations with a woman outside his own caste.[379] Ms. Mai brought a legal action against her rapist and won a significant damage award that she then donated to local schools.[380] Largely on account of the distribution of Ms. Mai's story through internet sites, listserves and the electronic media, her case became an internationally celebrated cause.[381] Similarly the internet helped rally international opinion in support of Amina Lawal, the woman whom an Islamic religious court in Nigeria sentenced to death by stoning for giving birth to a nonmarital child.[382] Given the general trend of United States feminist legal theory toward interest in international women's issues[383] one can reasonably predict that third-wave feminists will be involved in increased international coalition-building around women's issues.

CONCLUSION

In spite of third-wave feminism's appeal, at this point in its development, third-wave feminism lacks an overall theoretical view of how the law functions. Third-wave feminism is largely a reactive critique that fails to advance its own positivistic view of how certain goals should be accomplished. Third-wave feminists respond to incomplete and distorted images of second-wave feminism. Their indictment of second-wave feminism has led to a significant tension

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[379] Get New York Times article or other press describing situation.

[380] Warren Hoge, *Heeding Pakistani Protest, U.N. Blocks Talk by Rape Victim*, N.Y. TIMES, Jan. 21, 2006, at A4.

[381] Ms. Mai was named as *Glamour* magazine's Woman of the Year for 2005. Dino Hazell, Pakistani Rape Victim Gets American Honor, ABC News (2006). *See generally* Andrea Koppel, *The Pakistani Who Fought Back and Won: Woman Raped for Brother's Transgression is Woman of the Year*, http://www.cnn.com/2005us/11/03/btsc.koppel.

[382] *See, e.g.,* Help Save the Life of Amina Lawal, a Muslim Woman in Nigeria Sentenced to be Stoned to Death for a Pregnancy outside of Marriage –Truthh!, *available at* http://www.truthorfiction.com/rumors/a/aminalawal.htm. At the truthorfiction website, visitors could sign and send an e-mail petition to the Nigerian government. *See also Anger Over Adultery Stoning Case*, Feb. 23, 2004 *available at* http://www.cnn.com/2003/WORLD/africa/09/19/nigeria.stoning/. Ms. Lawal's death sentence was later vacated by the Shariah Court of Appeal in Katsina, Nigeria. *See* Jeff Koinange, Woman Sentenced to Stoning Freed, Feb. 23, 2004 *available at* http://www.cnn.com/2003/WORLD/africa/09/25/nigeria.stoning/. Ms. Lawal's case was so well-known that it was incorporated into the plot of the pilot and first episode of *Commander-in-Chief*, the ABC network television show starring Gina Davis as the first female President of the United States. *See Commander in Chief: Pilot* (ABC television broadcast Sept. 27, 2005). The show was later cancelled due to poor ratings. *See ABC Impeaches Commander in Chief,* May 2, 2006, *available at* http://www,zap2it.com/tv/news/zap-commanderinchiefpulled, 0, 7217400.story (last visited June 2, 2006)

[383] CHAMALLAS, *supra* note 9, at 21 (noting trend in domestic feminist scholarship that attempts "to connect to the growing global feminist movement and to agitate for an expansion of women's rights that is explicitly linked to international human rights. This genre of feminist and critical race feminist scholarship is decidedly less theoretical, grounded in the recognition of the dismal material situation of women worldwide and an urgent desire to address violence against women on a global basis."). *See also* Judy Rebick, *Charting a Map for Humanity*, 19 HERIZONS NO. 1, June 22, 2005 ("a core value of third-wave feminists is that global change is needed for women to achieve equality").

between older and younger feminists. Gloria Steinem, for one, has said that when reading third-wave feminist writings, she feels "like a sitting dog being told to sit."[384] Women on the younger cusp of second-wave feminism, who demographically are not part of the third wave, report that they feel adrift between the competing "waves."[385] And even some younger women, perhaps articulating the most decidedly third-wave stance of all, state that they do not want self-identity as part of a "third-wave" of feminism, because that identification implies a group affiliation or branding that should be rejected in favor of a third-wave embrace of individualism.

So one is left with the sense that third-wave feminism is a helpful elaboration of some of the issues first raised by earlier feminists, but that it is not so decidedly different from what has come before. Third-wave feminism's emphasis on personal pleasure, the fluidity of gender roles, the internet and coalition-building contribute to the feminist conversation, but third-wave feminists have not yet altered the terms and conditions of that conversation. It remains for lawyers and legal theorists to take up the challenge from this generation of young women to develop laws that enhance women's autonomy and well-being.

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[384] Steinem, *supra* note 235, at xxii.

[385] Nancy A. Naples, *Confronting the Future, Learning From the Past: Feminist Praxis in the Twenty-First Century*, *in* DIFFERENT WAVELENTHS, *supra* note 8, at 215, 217.