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RETHINKING INTERNATIONAL WOMEN'S HUMAN RIGHTS THROUGH EVE SEDGWICK

DARREN ROSENBLUM*

Thanks to Janet Halley and Jeannie Suk for organizing this amazing workshop. Since the death of Eve Kosofsky Sedgwick, I have wanted to honor her memory, and this panel is the perfect venue. Sedgwick's foundational understandings of sexuality, gender, and identity set the stage for much of my work and that of those I admire.

My own work looks at how the state regulates gender in the "public" sphere.[1] I attempt to challenge the tensions and intersections among international and comparative notions of equality and identity.[2] Group identity constructions vary across cultural lines and conflict with liberal notions of universalist constitutionalism and equality.[3] My current work, *Unsex CEDAW: What's Wrong with Women's Rights*,[4] continues the exploration of identity in focusing on an interrogation of the term "women" as deployed by international law in the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW"). I argue that the centrality of this identitarian category of "women" in international law delegitimizes the gender concerns of other groups: transgender people, men of all types, and women whose rights do not relate to a victim-based identity. I conclude that CEDAW should not focus on women, but rather should attend to the non-identitarian categories of "sex" or "gender." Given that this is where my

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[1] Elsewhere I have examined extensively and pulled apart the public-private dichotomy. *See, e.g.*, Darren Rosenblum, *Feminizing Capital: The Economic Imperative for Women's Corporate Leadership*, 7 BERKELEY BUS. L.J. (forthcoming 2009) (arguing that Norway's Corporate Board Quota, which sets a floor of forty percent for either gender on publicly-listed corporate boards of directors, serves as a model for a symbiosis between public and private sectors).

[2] Fourteen years ago, I began a line of inquiry related to identity with a queer interrogation of "lesbian and gay" identity. *See* Darren Rosenblum, Queer Intersectionality and the Failure of Lesbian and Gay "Victories," 4 L. & SEXUALITY 83 (1994).

[3] *See* Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Equality Remedies*, 76 FORDHAM L.REV. 2873 (2008). In particular, I have closely examined France's Parity Law, which requires that political parties name women as half of their candidates for public office. *See* Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L.REV. 1119 (2006). I have also examined Brazil's Quota Law, which requires thirty percent of political parties be comprised of women. *See* Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007). Norway's Corporate Board Quota served as the subject of a separate Article. *See* Rosenblum, *supra* note 1.

[4] Darren Rosenblum, *Unsex CEDAW: What's Wrong with Women's Rights* (Aug. 23, 2009) (unpublished manuscript, on file with author).

current thinking resides, this Panel's focus on the "Affective Family" for me necessarily draws my attention to the ways that the "public" space constructs the family. Sedgwick and Freud both provide lenses through which to understand the family in all its private and public richness.[5] In particular, Sedgwick's lighthearted genderfuck theory is a delicacy for legal scholars—if legal scholarship has a unifying ethos it is a faith in the work/play binary and a near complete investment in the former category. For example, Sedgwick quotes Bette Midler's nightclub act use of a Sophie Tucker joke: "My fella said to me, Sophie, the problem with you is, you've got no tits, plus your pussy's too tight. I told him Harry, get off my back."[6]

Reading Sedgwick reminds us that play and playfulness allow us to engage in a freer legal analysis. Freud's scientific dissection of masochistic fantasies plays the perfect straight-laced foil to Sedgwick. Reading both essays made me rethink my consideration of international women's human rights ("IWHR") law.

FREUD AND SEDGWICK ON MASOCHISM

Before getting to IWHR, I begin with a quick summary of the two essays. Freud's interpretation of masochism creates a taxonomy of at least three distinct beating fantasies that a child may experience: 1) my father is beating the (meaning, another) child; 2) I am being beaten by my father; 3) a child is being beaten—and I am watching.[7]

The first phase of these fantasies is a sadistic revenge fantasy, "completely represented by the phrase: '*My father is beating the child.*'"[8] Modify that—Freud says it's about "'[m]y father is beating the child—*whom I hate.*'"[9] The second phase shifts this external scene to the child's own body, as the child develops the masochistic desire to be beaten. The second phase is thus represented by the phrase, "'*I am being beaten by my father.*'" This statement, Freud points out, is "unmistakably masochistic."[10] This phase is the most important but never becomes conscious. "It is a construction of analysis, but it is no less a necessity on that account."[11] Thus the child desires the beating but never becomes aware of this longing.

This masochistic fantasy revolves around one of Freud's crucial contributions to Western thought—the power of the subconscious. The third phase involves the sadistic observation of several children watching yet an-

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[5] EVE KOSOFSKY SEDGWICK, *A Poem is Being Written, in* TENDENCIES 177 (1993); SIGMUND FREUD, "A Child is Being Beaten," in FREUD ON WOMEN: A READER 215 (Elizabeth Young-Bruehl ed., 1990).

[6] SEDGWICK, *supra* note 5, at 196.

[7] FREUD, *supra* note 5.

[8] *Id.* at 222.

[9] *Id.*

[10] *Id.* at 223.

[11] *Id.*

HeinOnline -- 33 Harv. J.L. & Gender 350 2010

other child being beaten. It is an extension of the first phase, but draws on the eroticism of the second phase, and has a "strong and unambiguous sexual excitement attached to it, and so provides a means for masturbatory satisfaction."[12]

Freud embellishes his definition of masochism. He asserts that beyond the passivity in the child's beating fantasy, another characteristic affixes to masochism "unpleasure . . . a bewildering accompaniment to the satisfaction of an instinct."[13] For Freud, the "transformation of sadism into masochism" follows from a "sense of guilt which takes part in the act of repression," satisfied by the beating.[14] The repression of this fantasy makes the genital organization unconscious and forces a regression to an earlier sadistic-anal stage. Most importantly, it "transforms the sadism of this state into masochism, which is passive and again in a certain sense narcissistic."[15] At the same time, in the masochistic fantasy, "being beaten also stands for being loved (in a genital sense)."[16] Freud's contribution to the understanding of this phenomenon cannot be underestimated: he raised the centrality of the subconscious, the involvement of core elements of a child's development in these fantasies, and the role of guilt and indeed love in them.

Sedgwick's essay diligently avoids the scientific objectivity of Freud with theory, her own poetry, and some mischievousness, all in the first person. When she discusses masochism, there is no doubt it is her own. She draws a direct parallel between poetry and punishment:

> The lyric poem, known to the child as such by its beat and by a principle of severe economy (the exactitude with which the frame held the figure)—the lyric poem was both the spanked body, my own body or another one like it for me to watch or punish, and at the same time the very spanking, the rhythmic hand whether hard or subtle of authority itself. What child wouldn't be ravenous for dominion in this place? Among the powers to be won was the power to brazen, to conceal, to savage, to adorn, or to abstract the body of one's own humiliation; or to perhaps most wonderful, to *identify with* it, creating with painful love and care, but in a temporality miraculously compressed by the elegancies of language, the distance across which this body in punishment could be endowed with an aura of meaning and attraction—across which, in short, the *compelled* body could be *chosen*.[17]

Sedgwick here subverts Freud's presumption that masochism arises only below the radar of self-awareness. She goes to the core of the narcissism in

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[12] *Id.*
[13] *Id.* at 231.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 235.
[17] SEDGWICK, *supra* note 5, at 184.

masochism—the craving to be "chosen." Masochism also liberates Sedgwick from presumptions of gender normativity. She constantly reaches for a sex and sexual identities beyond the biological assignment of womanhood. In addition to the play on anal eroticism of the Sophie Tucker joke, she refers to herself as a gay man, a comment that suggests a feminism beyond fetishizing women's identity.[18]

In short, for Sedgwick, masochism empowers the subversive, the queer, the explicitly anal-erotic side of her identity. Feminists reading Sedgwick cannot avoid thinking that one's sexuality and gender identity may not fit neatly into rote, Left-centered equality visions. Jungian psychology explains the elusiveness of these egalitarian visions of sexuality. Jungian psychologist Robert Johnson argues in his book, *Owning Your Own Shadow*, that embracing one's dark side yields positive achievements.[19] Sedgwick's essay embodies this understanding of the relationship between the positive and negative aspects of our lives.

THE VICTIM'S CENTRALITY IN INTERNATIONAL WOMEN'S HUMAN RIGHTS

On their face, theories of masochism would have no link whatsoever to IWHR. Individuals with sexual freedom engage in masochistic sexual practices. In contrast, IWHR attempts to guarantee rights to women who pur-

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[18] Sedgwick says:

> In among the many ways I do identify as a woman, the identification as a gay person is a firmly male one, identification "as" a gay man; and in among its tortuous and alienating paths are knit the relations, for me, of telling and of knowing. (Perhaps I should say that it is not to me as a feminist that this intensively loaded male identification is most an embarrassment; no woman becomes less a woman through any amount of "male identification," to the extent that femaleness is always (though always differently) to be looked for *in* the tortuousness, in the strangeness of the figure made between the flatly gendered definition from an outside view and the always more or less crooked stiles to be surveyed from an inner. A male-identified woman, even if there could thoroughly be such a thing, would still be a real kind of woman just as (though no doubt more inalterably than) an assimilated Jew is a real kind of Jew: more protected in some ways, more vulnerable in others, than those whose paths of identification have been different, but as fully of the essence of the thing.)

Id. at 209–10.

[19] ROBERT A. JOHNSON, OWNING YOUR OWN SHADOW (1993). Jung believes every human mind has elements of rationality and logic as well as a complimentary sense of unstructured intuition. CARL G. JUNG, PSYCHOLOGICAL TYPES (1971); see also Sam Joyner, *A Planetary Survey of Feminist Jurisprudence: If Men are from Mars and Women are from Venus, Where Do Lawyers Come From?*, 33 TULSA L.J. 1019, 1021 (1998) (citing Jung). Neither side is superior and some people's minds are in balance (which is considered the healthiest type of personality). The rational and logical capacities are traditionally associated with men and the feeling side is traditionally associated with women. Although the logical capacity is more dominant in men and the intuitive capacity is more dominant in women, "the distinction does not always fall along gender lines." *Id.* at 1022.

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portedly have little or no sexual freedom. Indeed, it's a big gulf, but let's cross it.

Several scholars have explored the centrality of framing women as victims in IWHR. Dianne Otto most eloquently points to CEDAW's reference to prostitution as an example of the importance of the victim subject in CEDAW. The CEDAW provision calling for the "suppression . . . of the exploitation of prostitution of women" exemplifies the vulnerable female representation's presence in the document.[20] By not acknowledging any "right" to sex work, CEDAW characterizes " . . . *all* prostitution as 'exploitation,'" and *all* sex workers as in need of protection from those who exploit them.[21] Positing that women are sexualized victims relies on the currency of (MacKinnon-style[22]) essentialist notions of both sex and culture in the IWHR arena.[23]

IWHR's emphasis on the victim subject overlooks multi-layered experiences that take into account perspectives of class, race, religion, ethnicity, and/or sexual orientation.[24] This posture marginalizes and disempowers women in the developing world.[25] These women victim subjects need states to

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[20] Dianne Otto, *Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law, in* INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105, 118–19 (Doris Buss & Ambreena Manji eds., 2005).

[21] *Id.* at 119 (emphasis added).

[22] Catharine MacKinnon's scholarship attempts to demonstrate how the legal system is fundamentally opposed to women's interests and designed to perpetuate male dominance. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). Her "work centers on the domination of women in the sexual sphere, highlighting rape, sexual harassment, and pornography." MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 45 (2d ed., Aspen Publishers 2003). MacKinnon asserts that "the sexual use and abuse of women is the principal mechanism by which women's subordination is perpetuated." *Id.* During the 1990s, Mackinnon worked to mobilize people against the mass rapes of thousands of Muslim and Croatian girls and women by the Serbian military, who used rape as a tactic of "ethnic cleansing." *See* Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994). "MacKinnon was enraged that the rapes were not recognized as violations of human rights, even though convincing legal arguments could be made that they constituted crimes against humanity, war crimes, and other violations of international law." CHAMALLAS, *supra,* at 112. MacKinnon saw the rapes as "a sexual tactic designed to achieve political ends." *Id.*

[23] *See* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002). Essentialism is the "fixing of certain attributes to women" that are "considered to be shared by all women . . . ." *Id.* at 7. Sedgwick's point discussed in footnote 18, *supra,* points to ways in which essentialism remains subject to complexity even within its own terms. Kapur also posits that women's "experiences of gender oppression cannot be extricated from their experiences of racial oppression because they occur simultaneously." *Id.* at 8. Catharine MacKinnon played a crucial role in establishing the meaning of sex and rape in international law. *See* Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993); *see also* Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940 (2006).

[24] Kapur, *supra* note 23, at 8.

[25] *Id.* at 6; *see also* Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 UTAH L.REV. 287, 290 (1997). Lama

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protect them, opening the door to their moral regulation.[26] This moral regulation can serve to imprison women in a second wave sexual paradigm. In this recreated attic reverberating with yellow wallpaper, it is not men's perception of women's hysteria that traps them, but women's own obsession with victimhood.[27]

Janet Halley's Injury Triad clarifies the preeminence of victimhood in IWHR. The Injury Triad is "female injury + female innocence + male immunity."[28] The combination of the self-perception of constitutional innocence and a presumption of male guilt leads some feminists to draw significant policy conclusions from circumstances that involve a great deal more nuance. We could say that the Injury Triad explains the lack of self-consciousness within women's human rights efforts.

Some feminists object to this argument by noting that women are indeed often victims, that in violence between sexes, they are far more likely to be victims, and that their victimization surpasses that of men. I do not deny that this may be the case. The point here, as supported by Kapur, Otto, and Halley, is that the victim frame—the representation even of victimized women this way—empties women of their agency.

MIGHT SEDGWICK'S MASOCHISM LIBERATE THE VICTIM SUBJECT?

The victim subject in IWHR finds herself trapped in a set of presumptions about her sexual agency. It's a very second-wave affair in which women engage with sexuality through their victim status rather than despite it. Karen Engle's work on rape as a war crime in Bosnia rejects Catharine MacKinnon's presumptions about sexuality in war.[29] Janet Halley, in *Rape at Rome*, charges the international women's movement with a punitive criminalizing thrust.[30] Both move beyond the victim subject.

Abu-Odeh notes in her article the connection between a crime of "passion" in the "West" and "honor" killings in the "East." *Id.* Abu-Odeh exposes the "deep similarities between the internal tensions within each legal system as to what constitutes a killing of women that is legally tolerated (either fully or partially), and that these tensions, although sometimes defined differently, have been surprisingly resolved in the same way." *Id.*

[26] Abu-Odeh, *supra* note 25, at 293.

[27] *See generally* CHARLOTTE PERKINS GILLMAN, THE YELLOW WALLPAPER (1899).

[28] JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 324 (2006).

[29] *See* Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005). In this piece, Engle embraces agency as a fundamental theoretical commitment for international law purposes. *Id.* She critiques Catharine MacKinnon's legal construction of rape as a war crime. *Id.* at 780. Engle posits that such an approach to rape achieves the goals of international law but robs sexual agency from the very women it purports to protect. *Id.*

[30] *See generally* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008).

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The key word in this move is agency. Dianne Otto's critique of women's movement constructions of women's sexuality points to the need for more theoretical investment in agency.[31] Third-wave feminist visions of sexuality involve much more liberating visions of women's sexual potentialities.[32] If women's sexual agency is what's missing in IWHR, how does masochism have the potential to reintroduce it?

For Sedgwick, masochism provides a rich form of empowerment. She luxuriates in it, drawing not only horror but also pleasure from fantasies of spanking and other punishment.[33] Her masochistic eros is far from self-effacing or self-erasing; it places her at the center of the scenarios envisioned. This erotic imaginary involves subversive sexual practices outside of Gayle Rubin's "Charmed Circle,"[34] practices that disturb bourgeois sexual normativity. Here we see the power in disturbing an equality-driven feminist sexuality. Sedgwick's choices have implications in the legal domain.

Masochists have a tight relationship with the law—particularly contract law, as Gilles Deleuze explores in his *Presentation of Sacher-Masoch: The Cold and the Cruel*.[35] Deleuze offers a close analysis of the founding text of masochism, *Venus in Furs*, written in 1870 by Leopold Von Sacher-Masoch.[36] *Venus in Furs* describes a man, Severin von Kusiemski, who requests to be the slave of a woman, Wanda, of whom he is enamored.[37] He encourages her to treat him in progressively more degrading ways.[38] As Deleuze says, "le sadique a besoin des institutions, mais le masochiste, de relations contractuelles."[39] In a rough translation, the sadist needs institu-

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[31] *See* Otto, *supra* note 20, at 106.

[32] *See, e.g.*, Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007).

[33] *See* SEDGWICK, *supra* note 5, at 180 (stating that while "we were always spanked, in a careful orchestration of spontaneity and pageantry, 'simply' over the parental lap, the spanking in my imagination . . . has always occurred over a table scaled precisely to the trunk of the child, framing it with a closeness and immobilizing exactitude").

[34] Gayle Rubin, *Thinking Sex: Notes for a Racial Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1984).

[35] Gilles Deleuze, *Coldness and Cruelty*, *in* MASOCHISM: COLDNESS AND CRUELTY AND VENUS IN FURS 8 (Jean McNeil trans., 1991).

[36] L. Sacher-Masoch, *Venus in Furs*, *in* MASOCHISM: COLDNESS AND CRUELTY AND VENUS IN FURS 143 (Jean McNeil trans., 1991).

[37] *Id.*

[38] At the end of the book, Wanda meets a man to whom she would like to submit and offers Severin to be used by her new lover, who whips him. Severin leaves Wanda. The book closes by stating:

> [W]oman, as nature made her and as she attracts men currently, is the enemy of men and can only be for him a slave or a tyrant, but never a companion. She cannot be that until she will equal him in rights and she will deserve it by her education and work. For now, we only have one choice: to be the hammer or the anvil. . . . Of which the moral of the story: he who lets himself get whipped deserves to be whipped.

Id. at 271.

[39] Deleuze, *supra* note 35, at 20.

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tions, but the masochist [depends on] contractual relations. The masochist defines the punishment and secures it through contractual agreement. Deleuze's discussion of the juridical spirit of masochism exposes the narcissism in masochism[40]—both Freud and Sedgwick insist that masochism is about being chosen. The difference between the two is that for Freud it's a diagnosis, observed by the doctor but passing only in the subconscious of the patient; for Sedgwick, being "chosen" is a form of resistance and empowerment. Sedgwick's choice reflects Deleuze's contractual interpretation of masochism.

IWHR resolutely frames women as victims and indeed foregrounds women's victimhood as if it were the only route to legal rights. In so doing, it trades in the wrong kind of suffering, one in which women are placed on the "bottom" without choosing. Like masochism, this suffering involves "a willingness or tendency to subject oneself to unpleasant or trying experiences,"[41] but not the deriving of pleasure from such deprivation. By contrast, Sedgwick's masochism, or even Deleuze's masochism, would involve agreeing to be at the receiving end of punishment, and enjoying it. Sedgwick's masochism involves agency—she contemplates the spankings and then eroticizes them.[42] Sedgwick's masochism involves some *jouissance*—the enjoyment of the perverse pleasure in suffering.

For IWHR, adherence to this victim status as the source of rights is another form of enslavement, but not one that involves pleasure. Were IWHR to surmount victimhood's primacy in women's sexual identity, it would liberate the rights discourse. The masochist position would then be to frame women as not victims.[43] In a counterintuitive way, embracing Sedgwick's masochism may, in some material sense, liberate women.

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[40] *Id.* at 30.

[41] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1223 (4th ed. 2000) (defining masochism).

[42] For a discussion of agency in spanking, see generally Ummni Khan, *A Woman's Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, 18 L. & Sexuality 79 (2009).

[43] Note that here I am not speaking about masochism literally as a sexual practice, but rather its role in a gendered imaginary. Janet Halley discusses sadism and masochism as they figure in *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993):

> Once we really do admit masochism into our vocabulary of sexual pleasures, we make it hard to know that any particular social outcome involving sexuality broadly conceived is a cost or a benefit, a good or a bad. Even there, we must—constantly, existentially, pragmatically, and in uncertainty—decide.

HALLEY, *supra* note 28, at 363.

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