

## The Politics of Paradox

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**THE POLITICS OF PARADOX:  
A RESPONSE TO WENDY BROWN**

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What role should rights play in feminist efforts to end sexual oppression? The quest for legal rights has been central to feminist political movements in the U.S., as in other countries. It has also been controversial, because it is not clear that the language of rights is adequate to feminist objectives, or how far legal rights improve the lives of women. As Wendy Brown suggests, scepticism about rights is especially appropriate in light of the undesirable, unintended, but seemingly inescapable, consequences of feminist efforts either to use liberal rights on behalf of women, or to embody feminist criticisms of liberalism in rights.<sup>1</sup>

According to Brown, rights language and the quest for legal rights prove paradoxical when oppressed groups try to use them as vehicles of liberation. While rights, she implies, are examples of “that which we cannot not want”, (p. 2) she believes that feminists must explore the paradoxes of rights – or see rights as paradoxes – if we are to understand the constraints and possibilities that our desire for rights creates. In Brown’s view such understanding is particularly important “given the transposition of venue, from the streets to the courtroom, of many social movements over the last two decades”. (p.1) Hence, she wants to know whether rights “inevitably shape as well as claim our desire without gratifying it?” (p.3)

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I would like to thank Melissa Williams for her help with previous drafts of this article. I am just sorry that I lacked the time to submit this version, too, to her care.

<sup>1</sup> Wendy Brown, “Suffering Rights as Paradoxes”, *Constellations: an International Journal of Critical and Democratic Theory*, (Vol. 7, No. 2)

Her conclusion is that they do, because “rights for the systematically subordinated tend to rewrite injuries, inequalities and impediments to freedom.....and rarely articulate or address the conditions producing or formenting that violation”. (p.20) However, because the absence of rights, in her view, leaves the conditions of social stratification and oppression intact, she concludes that from a feminist perspective the limitations of rights do not undermine their desirability. Hence, according to Brown, for feminists and for other movements of the oppressed – at least in liberal constitutional regimes – one is left with rights as paradoxes and the effort to create a politics that uses these paradoxes in an efficacious way.

#### Four Paradoxes of Rights

What are the paradoxes that, on Brown’s view, mean that rights tend to shape and claim our desires without gratifying them? First, the more highly specified rights are as rights for women (or for other oppressed groups), the more likely they are to soften or mitigate oppression while severely constraining efforts to escape it altogether. (p.4) The reason is this: that the more specified the right, the more likely that it will encode a definition of women premised upon their subordinate status. Hence, while the right can work to alleviate subordination, it cannot, in its nature, challenge it. On the contrary, it will fence women into a status as subordinates – to use Brown’s image – and that fence will be the price that women must pay to use the right to improve their situation.

The second paradox is that the effort to specify rights abstractly - or in gender-neutral or gender-blind terms – creates an equally unattractive tradeoff for the oppressed. The more gender-neutral or abstractly a right is framed, the more likely it is to enhance the privilege of men, and eclipse the needs of women as subordinates. (p. 4) Such rights create a formal equality between men and women that coexists with the substantial inequalities of power and privilege between them. In light of the latter, the value of such rights favours men over women, even though formal rights may, indeed, “offer something to all”. (p.5)

Gender-neutral rights, therefore, like gender-specific ones, may well improve the lot of women, or mitigate gender-oppression, but they cannot end such oppression. Indeed, so it seems, it is intrinsic to their nature – rather than a contingent fact about the ways in which they are interpreted and enforced – that they will not end oppression. Hence the first two paradoxes of rights – or the two parts of what can be seen as one, central, paradox: namely, that rights, in their nature, seem incapable of securing for subordinate groups the emancipation that they promise.<sup>2</sup> Brown analyses two other versions of this central paradox, which we may call paradoxes three and four. While the first two paradoxes concern the relationship between women, as members of a subordinate social group, and men, as members of a privileged one, the second set of paradoxes emerge when one focuses on the cleavages amongst women, and then confronts the dilemmas posed by multiple forms of subordination.

Paradox three is that rights designed expressly to reflect the nature of women's suffering tend "to inscribe in the law the experience and discursive truths of some women", thus presenting these as though they were truths for all. (p.7) In their nature, then, such rights can only alleviate some forms of sexual oppression, while leaving other forms intact – or, worse yet, cementing them. Such rights, therefore, inevitably thwart the desire for group liberation that they try to honour and to promote.

Paradox four is the obverse of this: if, to avoid problem three, one tries to define the group interests that rights should protect abstractly, rather than specifically, one will make gender subordination itself so abstract and thin a concept that the particulars of women's inequality and violation will vanish from the content and justification of the right. As a result, the effort to secure a right that all women can use to emancipate themselves will fail, because the details of women's suffering, and the constraints that they face in overcoming it, will appear too particular, too individual, too personal and unique to count as instances of the (group) harms that the right was supposed to remedy. (p.7)

These, then, are the paradoxes that Brown has in mind when she refers to rights as paradoxes. While the substance of Brown's critique of rights is, in many ways, familiar her insistence that these problems with rights are paradoxical is new. Although not persuaded that these problems are as paradoxical as Brown claims, or that seeing rights as paradoxes is as liberating as she implies, I will argue that her article highlights the

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<sup>2</sup> At page 5 Brown refers to "the second paradox" of rights, although at page 6 she suggests that she is concerned simply with two sides of the same paradox. As nothing of substance seems to depend on such

importance of political judgement and strategy to rights discourse and practice. Too often we neglect such questions when thinking about rights, even as we insist that we wish to politicise rights, and the ways in which we describe and analyse them. As Brown shows, this neglect is not benign. So, though I worry that to see rights as paradoxes risks mystifying and reifying them, I will argue that it can help us to think critically about the relationship of law and politics, and imaginatively about the ways we might handle some familiar theoretical and practical problems.

### Rights as Paradoxes

Which features of rights, if any, strike one as paradoxical depends on such things as the following: the assumptions about law and politics that one makes; the motivations one attributes to others; one's familiarity with highly specialised bodies of knowledge and the peculiarities of a particular institution or social context. Thus, while Brown sees something paradoxical about the way in which First Amendment protection of speech threatens the interests of historically marginalised groups in the U. S., Catherine MacKinnon, for instance, tends to believe that such historically replicated patterns of unequal protection are all but inevitable.<sup>3</sup> Hence, while I agree that rights – and feminist politics more generally – have paradoxical features, I am uncertain of the advantages – theoretical or practical – of making these central to feminism in the way that Brown suggests. If the features of rights that one finds paradoxical are, largely, an artifact of one's assumptions about law and politics, than what do feminists gain by concentrating on the former, rather than the latter? To see in the paradoxical features of rights the key

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matters, I will simply refer to these as two different paradoxes of rights.

<sup>3</sup> See, for instance, Catherine A. MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, MA. Harvard University Press, 1989), ch. 11.

to feminist politics is to assume that one knows, already, what women's interests are, and how to pursue them. Yet Brown insists that liberal rights prove paradoxical in part because feminists still have much to learn about the nature and interests of women. Nor is that so surprising, when neither the institutions and rights that define liberal democratic politics, nor feminist organisations and leaders themselves, adequately represent most women.

If, as I think, this is the crux of Brown's argument, then it is important to realise that (1) legal rights provide an avenue through which women seek to define and represent their interests – whether they are successful in doing so or not. Hence, feminist analysis of the ways in which, at present, rights works against women's interests is, itself, a clue, and quite a concrete one, to the ways in which we might reconstruct both the form and substance of existing rights. However, (2), for that strategy to work, it does not help to see rights as paradoxical or, more specifically, to conceive the problems that Brown has identified as paradoxes. Instead, it pays to see them as the more or less predictable result of, and guide to, the forms of inequality in our society – both the ones of which we are already aware, and those of which we have still to learn.

Looked at in this way, there is nothing especially paradoxical about the first two problems that Brown has identified. They are, rather, two sides of the same coin: that liberal conceptions of formal equality are insufficiently attentive to the ways that substantive inequalities amongst individuals can prevent people from seeing each other as equals, or from caring about even those inequalities that they recognise as such. If that is



the case, then the challenge presented by the first two paradoxes of rights is less to discover a new form of rights,<sup>4</sup> than to determine what is necessary to see and treat each other as equals.

As recent debates on the topic reveal, this is not easy to do.<sup>5</sup> It is not easy, because, as Brown recognises, women can have conflicting as well as similar interests, and the former may be no less clues to what it means to be a woman, or what equality for women requires, than are the latter. Consequently, determining what it is for women to be equals requires feminists to construct avenues for both personal and collective forms of choice, self-expression and representation, so that all women have a chance to define their interests in a variety of ways, and a variety of means to discover what their interests are.

Hence, I think it unfortunate that Brown ignores the democratic features – such as they are – of most liberal constitutional regimes, as this depoliticises her critique of rights, by abstracting from the institutions that shape, and aggregate, the interests of women. For example, Brown’s account of the paradoxical features of liberal rights ignores the ways in which, in the U.S., religion cuts across racial differences amongst women, so that women who, otherwise, have much in common support political parties with quite radical differences in their conception of women’s rights. These features of

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<sup>4</sup> Compare Brown’s suggestion, at p.21, that feminists should seek a “form of rights claims [that] have the temerity to sacrifice an absolutist or naturalized status”.

<sup>5</sup> For the latest in one version of this debate, see Stuart White, “The Egalitarian Earnings Subsidy Scheme”, *British Journal of Political Science*, 29, (1999): 601 – 622. See also Nancy Fraser, “After the Family Wage: A Postindustrial Thought Experiment”, reprinted in her *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition*, (New York: Routledge, 1997), ch. 2.

the American political system, and their implications for women, will not vanish because we have discovered some new and improved form of rights. Nor is it possible to politicise rights if we take the peculiarities of American politics for granted. Hence, by ignoring the democratic features of liberal constitutional regimes, Brown reifies rights, in part, by obscuring the differences amongst such regimes, and by overlooking the ways in which political institutions affect both our political choices and legal rights.

In short, to interpret the problems that Brown has identified as instances of paradox is to take a particular perspective on them, implying a set of expectations of what rights can, and should, achieve that have quite radical, if contradictory, implications for feminist politics. On the one hand, to see these features of rights as evidence of paradox suggests a strikingly optimistic assessment of the emancipatory potential of rights – whether because they can challenge authority without displacing it, (p. 19) or because they can embody and emphasise multiple but incommensurable truths. (p.18) Yet, on the other, it seems to reflect a profoundly disillusioned, and disillusioning, conception of women's place in liberal democracies where, absent the ability to discover some wholly new form of rights, (p.21) women are supposedly faced either with rewriting their injuries through rights, or of doing without rights altogether.

Perhaps this is, as Brown believes, an illuminating way to think about rights – or to think about rights in the U.S. Certainly, I would not deny that rights have their paradoxical features, as does feminist politics more generally. But even were it clear, as it is not, that the features of rights she has identified are paradoxical, I am uncertain why

Brown believes that these are the most important features of rights, or what are the conceptual, legal or political stakes in seeing rights as paradoxes. With such uncertainties in mind, I want briefly to examine the ways in which reflection on the discourse and practice of rights might alleviate some of the problems with rights that Brown has identified, and help us to evade others. After all, unless one supposes that there is some better alternative to rights – and, ultimately, Brown’s critique of rights justifies no such conclusion – it matters politically and morally how large an area for feminist efforts one can create with a right, even though rights sometimes disable the very people that they were meant to empower.

### Reinterpreting Legal Rights

The first two paradoxes of rights arise because women cannot repudiate the ideal of equality with men, nor accept that they are the equals of men under current conditions. This means that they can neither give up on a commitment to formal equality of rights – or reject the idea that in their very form, itself, rights should reflect the equality of men and women – nor yet embrace existing ideas about what it is to treat men and women as equals. Put simply, Brown’s paradox reveals the fact that both our notions of formal and substantive equality privilege the interests of men at the expense of women, whenever these interests conflict.

If that is the problem, however, its solution seems to be this: take the cases in which the interests of men and women conflict at present, determine what the results of

such conflict are and why it is – if it is – that the results favour men over women. Then use these findings to reconceive both the forms that equality takes in our society – the ways in which it is represented, institutionalised and embodied, for example – and the substance of these representations, institutions and embodiments.

Formal equality of rights is undermined when ignorance, prejudice and indifference to the interests of one of the parties before a court affect the outcome. Hence the importance of feminist efforts to reconceptualise the “reasonable man” standard of adjudication, of feminist efforts to keep the sexual history of rape plaintiffs out of court and so on. Studies of the selection of jury leaders, and of the way that juries deliberate, may prove significant in this respect as well if, as seems likely, it turns out that these can either reinforce, or undermine, prevailing assumptions about the superior wisdom, competence, truthfulness and justice of men, as opposed to women.<sup>6</sup>

Likewise a commitment to formal equality of rights and legal standing itself provides a justification for challenging unequal access by men and women to competent legal advice not simply in court, but before cases go to court as well. Part of the reason why rights are justified, and why they shouldn't assume, in their very form, that women are inferior to men is, precisely, that women are not. Hence, a commitment to formal equality of rights itself justifies us in challenging conceptions of formal equality that undermine the ability of women to present themselves as the equals of men, and as people no less deserving than men of justice.

There is, of course, no reason to suppose that this critique of formal equality applies only to courts, as opposed to legislatures, and the agencies charged, in our society, with overseeing and enforcing, as well as formulating, enacting and adjudicating the rights of others. In that respect, feminist critiques of the formality of liberal rights can be mobilised not only to challenge conceptions of formal equality that predictably favour the interests of men over women but, also, to connect feminist critiques of legal rights to feminist struggles over political as well as legal representation,<sup>7</sup> the treatment of women by welfare agencies or the EEOC, by doctors and priests as well as by police. As Brown emphasises, it is important for feminists to make these connections if the quest for legal rights is not to overshadow, and undermine, other forms of political mobilization, or to result in what, for women, is a mystifying and disempowering Balkanisation of their rights. (p.15) In these ways, then, it looks as though within the language and discourse of rights as we know it, we may find at least some of the possibilities for reimagining the forms that rights could take, and for reviving our sense of the potentialities, and not just the limits, of feminist politics.

This is not to say that the first set of problems identified by Brown are unimportant, or that it will be easy for feminists to respond to them, even if my hunches on how they might do so are not utterly misconceived. On the contrary, I think that they are, perhaps, more difficult to respond to than Brown's analysis suggests. For the problem is not, as Brown seems to imply, that feminists must choose between abstract rights, with their problems, and concrete rights with theirs; or between formal and

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<sup>6</sup> Lynn Sanders "Against Deliberation", *Political Theory* 25 (1997), especially pp. 360 - 367

substantive equality – but that this is not a choice that feminists can make. All rights have formal as well as substantive dimensions and can, and usually have to be, specified at various levels of abstraction or particularity. Hence, the problems that Brown has identified pervade all rights, and every dimension of formulating, criticising and acting on them. However, because this is so, we can use legal rights to break down forms of oppression that cross institutional boundaries, and apply insights from one site of feminist politics, or law, to another.

Of course, these suggestions for approaching the problems represented by the first set of paradoxes identified by Brown are not without their problems, even understood as parts of, rather than replacements for, other forms of feminist activity. Given the differences between women's interests and situation, for example, it will likely be difficult to determine what formal equality of rights require, because we are uncertain of what it would take for men and women to be substantively equal under present conditions. We may well have problems persuading the powers that be to accept our conceptions of formal equality, precisely because these challenge their conceptions of rights, of law, of politics and of what it is to treat people as equals. In so far as they have the power and authority, and we do not, there is reason to be sceptical that they will willingly meet our challenges rather than ignore, disparage or try to undermine them. But that, unfortunately, is the condition for doing feminist politics. Finally – and this is something that we can do something about – there is the difficulty of recognising when our favoured ideas about what is in women's interests, or what is the best way to achieve

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<sup>7</sup> See, for example, Melissa Williams *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, (Princeton: Princeton University Press, 1998).

these, need to be changed in light of new evidence about the nature and causes of women's subordination, or of the difficulties that we face in overcoming it.

These points, I hope, may help us to think through, and respond to, the second set of problems with rights that Brown describes. These are, essentially, problems that emerge – and, indeed, emerge as paradoxes – for feminists, only when we realise that women can have interests in common that legal rights should reflect, while also having conflicting interests that deserve recognition and protection by rights.

The core of the second set of problems, then, is this: that from a feminist perspective we have no reason to say that the differences amongst women are less important than their similarities; that the conflicts these differences generate are any less illuminating of what it is to be a woman than the points of agreement; or that a women's interests are any less urgent, morally and politically, because they are not the same as those of other women. Hence, feminists cannot assume a priori that a legal right designed with one set of women in mind is adequate for all women, or that securing rights for one set of women benefits, rather than harms, another set.

As Brown shows, this creates real problems in determining what rights feminists should press for, if any, and how to design legal remedies (rights-based or not) for even well-recognised harms. Yet here, too, I think, feminists can find within existing languages and practices of rights at least some of the tools they will need to make progress in dealing with the problems that Brown has identified.

I am not a lawyer, or even a philosopher of law, and so what I say may just reflect ignorance of the law on my part. However, Brown's discussion of sexual harassment law, in conjunction with a recent article on the subject by Jean Cohen,<sup>8</sup> brought home to me the importance of recognising that any important right is, really, a cluster or set of different rights, rather than a single or discrete entity itself. Hence, there is something misleading about thinking of women's rights against sexual harassment as though we are talking about a single right rather than, as Jeremy Waldron puts it, a chain of legal claims.<sup>9</sup> Moreover, the way in which we conventionally group rights – for philosophical, legal, social-scientific or political purposes – is often quite arbitrary. Hence, there is no reason for feminists to suppose that women's rights against sexual harassment are only those that are commonly referred to as such. Both points, I will argue, are important because, so far as I can tell, it is impossible to shoe-horn the harms of sexual harassment into one right, for the purposes of seeking legal remedies for it, if one wants to protect all women from sexual harassment. Not only does the effort to do so quite unnecessarily raise the stakes that we face, as feminists, in defining and specifying our rights but, in addition, it overlooks the limitations of even the best approaches to understanding and combating sexual harassment that we now have.

The idea that sexual harassment is a form of employment discrimination on the basis of sex, and that the law should recognise it as such was, and is, a real triumph for

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<sup>8</sup> Jean L. Cohen, "Privacy, Personal Autonomy and the Law: Sexual Harassment and the Dilemma of Regulating 'Intimacy'", unpublished paper.

<sup>9</sup> Jeremy Waldron, *Liberal Rights: Collected Papers 1981 -1991*, (Cambridge: Cambridge University Press 1993) 211 - 214



U.S. feminists, and an example of how feminists might try to write a feminist analysis of women's situation into law. But as we have discovered, there are at least two problems with the legal rights against sexual harassment that have resulted. The first is that it makes sexual harassment law subject to the vagaries and inadequacies of anti-discrimination law in the U.S.; the second, that it gives employers a quite extraordinary amount of power and discretion over their employees.<sup>10</sup> The two problems are related, because employees, as such, are not a protected category for the purposes of American constitutional law, and employers in the U.S. already have what, from a European perspective, can seem like a truly dazzling power to regulate the work-lives and extra-work activities of their workers.<sup>11</sup>

This, then, is the context in which same-sex charges of sexual harassment arise, and have recently been examined by the Supreme Court.<sup>12</sup> This, then, is the context within which feminists need to decide what attitude they should take, if any, to the idea of treating same-sex harassment as a form of sex discrimination not only for legal but, also, for political and social-theoretical purposes.

As Brown explains, the dilemma for feminists is this: on the one hand, same-sex harassment can be a form of sex discrimination against women, because women can be sexually harassed for being lesbian, or for challenging stereotypes about what women are supposed to "be" and how they are supposed to behave in some other way. On the other

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<sup>10</sup> This is a point that Jean Cohen emphasises, p. 13 *supra*.

<sup>11</sup> For some telling examples of both see Matthew W. Finkin's Kenneth M. Piper Lecture, "Employee Privacy, American Values and the Law", published in *Chicago Kent Law Review* 72 (1996): 222-269.

<sup>12</sup> *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. (1998)

hand, this rationale for treating same-sex sexual harassment as a form of sex discrimination seems just as applicable to men as to women. If the reason to include same-sex sexual harassment of women under the rubric “sex discrimination” is that they are being harassed because their sex creates prejudices against sex with women, then the same seems to be true of men who are sexually harassed by other men who fail to conform to stereotypes of what it is to “be” a man, or to behave in the way that men should behave. However, if protecting homosexual men as well as women is important from a feminist perspective, treating men as victims of sexual harassment seems to undercut what, for feminists, is most radical and attractive about sexual harassment law: its recognition of, and response to, the subordination of women. (pp. 10 – 11)

We seem, then, to be faced with the precisely the second set of paradoxes that Brown has described. Acknowledging the specificity and needs of gay women - particularly important given feminist as well as non-feminist homophobia - seems to undercut the ability to frame rights that protect all women from the depredations of powerful men. But, thinking of this problem, I am struck by how inadequate to the problems of sexual harassment is its conceptualisation in terms of work-place harassment. And this makes me wonder whether feminists are right to engage debate on same-sex harassment on the terms established by American constitutional law, except where this is unavoidable.

For example, treating sexual harassment as workplace discrimination offers nothing to those who are sexually harassed as consumers rather than employees in stores,

or as users, rather than providers, of public services such as transport, health care, employment and welfare services. Yet women may be fully as dependent on these, and as lacking in alternatives to them, as they are dependent on getting and keeping a job in a particular workplace. From a feminist perspective, then, it looks as though the workplace is only one of the places in which women may experience sexual harassment, even harassment that affects their status and opportunities as workers.

Nor is this all: for it is far from evident that the harms of sexual harassment, even in the workplace, are primarily employment related, or adequately conceptualised as harms to the job prospects and working conditions of women. Showing that harms of sexual harassment are, indeed, harms rather than bad-manners, or slights that one should shrug off, is as important to feminist responses to sexual harassment as MacKinnon believes.<sup>13</sup> So, too, is showing that these harms have real consequences for women as workers. However, we need not deny any of that to note that the racism that may motivate a particular case of sexual harassment, or provide some of its content, may be at least as harmful to the woman who suffers it as the contempt and hostility for women that it also reflects.<sup>14</sup> Yet this particular feature of sexual harassment is shortchanged by the employment model.

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<sup>13</sup> Catherine A. MacKinnon, *Sexual Harassment of Working Women*, (New Haven: Yale University Press, 1979) for the classic statement of her views on the subject.

<sup>14</sup> See, for instance, Kimberle Crenshaw, "Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill" in ed. Toni Morrison, *Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality*, (New York: Pantheon Books, 1992), p. 413. Crenshaw notes that it is black women, not white women, who are most likely to prosecute charges of sexual harassment. Though her explanatory suggestion for this strikes me as unlikely, implying as it does that white women consistently confuse sexual harassment with compliments, it certainly looks as

It seems to me, then, that a feminist approach to sexual harassment cannot be bound by existing differences between different bodies of law, and different sources of law, if we are find legal solutions to it that reflect the variety of forms such harassment can take, harms that it imposes, and tools we will need to compensate its victims in the present (so far as this possible) and to prevent these in future. As Brown suggests, while the differences between difference types of law may be well-established legally, they may be quite arbitrary and disempowering from a feminist perspective. So, rather than approach the problem of protecting the victims of same-sex harassment simply through the lens of American constitutional law,<sup>15</sup> it may be worth considering how we might use other legal rights and remedies to meet women's needs.

The implications of this perspective on sexual harassment, then, are these. First, scepticism that women will be profoundly affected by the way that American courts decide cases of same sex harassment amongst men when, so it seems, the courts' rulings on the harassment of women have done relatively little to free women from sexual harassment. Second, a belief that as long as there is only one legal right against sexual harassment that feminists recognise as such, it will be impossible adequately to represent

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though the deficiencies of sexual harassment law cut across, rather than track, distinctions of colour, in ways that Brown neglects.

<sup>15</sup> I should emphasise that I want to supplement, not replace, constitutional rights against sexual harassment. The reason to emphasise the point is that there are those, like Jeffrey Rosen, and Jeffrey Toobin, who believe that tort law should replace constitutional protection - though without any recognition of the need to rid the latter of its unacceptably sexist assumptions. For Rosen's critique of sexual harassment law, see "The End of Privacy", *The New Republic*, (Feb. 16, 1998). For Toobin's see "The Trouble With Sex: Why the Law of Harassment Has Never Worked", *The New Yorker*, (Feb. 9, 1998). For MacKinnon's concerns about tort law, see *Sexual Harassment*, pp. 164 - 174 It is worth noting, however, that at p. 173 she states that "To treat it [i.e. sexual harassment] as a tort is less simply incorrect than inadequate". But unless it is necessary to choose between seeing sexual harassment "as an illicit act, a moral infraction, an outrage to the individual's sensibilities and the society's cherished but un-lived values", and seeing it as "economic coercion, in which material survival is held hostage to sexual submission", it

the interests of women in ending such harassment, or to address the conflicts of interest amongst them that arise. If only one right of sexual harassment exists, the stakes for defining that right become impossibly high, and every alteration in the way that the right is interpreted will tend to assume a significance quite disproportionate to its impact on women's lives. These, in my view, are good reasons for feminists to reconsider such legal rights against assault, extortion and defamation that women have, and to redescribe these, in part, as rights against sexual harassment. The aim would be to revise the content and justification of such rights, with women's interests in ending sexual harassment clearly in mind; and to challenge the false dichotomy that suggests feminists must choose between seeing sexual harassment as boorish behaviour, or as a form of work-place discrimination.

If these ideas are at all convincing, it seems as though the problems that legal rights pose for feminists is less how to define any particular right, or set of rights, than how to determine what women's interests are. Rights are, after all, constantly being redescribed, reinterpreted, reinvented and reincarnated, by feminists as by others. If there is, as I've argued, still much work for feminists to do along these lines, we still face the fact that, for the most part, it is legal rights that define women, and not women who define their rights. I see no simple answer to this problem, legally or politically. However, if we want women to define their legal rights for themselves, and to be capable of defining themselves, in part, through their rights, then we will have to give women a

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looks as though feminists might insist that sexual harassment is tortious, as well as a violation of constitutional rights.

greater choice amongst legal instruments than they now have, and pay more attention to the potential of different bodies of law.

The obvious objection to such a strategy for responding to the problems that Brown has described is that multiplying rights, and breaking down established boundaries between them, trivialises them, and makes the law even more absurd and incoherent than it is already. We hear such complaints every day in the media, from “public intellectuals” and from judges, lawyers, and law professors. We hear this, because it is the rights we most value, despite their limitations, that seem to be the object of these diatribes; the rights in which, and through which, we most recognise our bodies, personalities and circumstances as beings who are oppressed, but want to be liberated, who lack power, but act to empower ourselves. It is not an objection that I take lightly, nor one that feminists can afford to ignore. However, I am inclined to suppose that the difficulties it points to are less significant for women than those which, unfortunately, I lack the legal knowledge even to formulate, or the knowledge of women’s interests to foresee.

### Conclusion

I have outlined the strengths and weaknesses of Brown’s critique of rights, and the ways in which we might use the former to find solutions to the latter. I have done so by emphasising Brown’s claims about our ignorance of women’s interests, and of the significance of this ignorance for the ways in which we think about legal rights. The strengths of Brown’s approach is that it forces us to reconsider the ways that we identify

rights, describe their content and justification, and distinguish their form from their substance. Its weakness is that it trades on, and accepts unquestioningly, ways of identifying, describing and justifying rights that are, themselves, quite formal, legalistic and apolitical. These weaknesses are not inherent to the idea that rights are paradoxical, or to Brown's efforts to redescribe rights as paradoxes. Rather, they seem a reflection of Brown's tendency to separate legal rights from the political context in which they are created, interpreted and used; or to describe that context so abstractly that it erases potentially significant differences between one right and another, one woman and another, and one country and another.

However, if the weaknesses in Brown's critique of rights are not inherent to her larger project, the strengths of her critique of rights does not mean that we must embrace her conception of rights as paradoxes, or adopt the perspective on politics to which this points. Instead, we might adopt Crenshaw's view of rights as the point at which multiple forms of oppression intersect, and treat the intersectionality of rights – whether paradoxical or no – as the key to feminist politics and legal strategy.<sup>16</sup> Or, with MacKinnon, we might think of rights as ways to write feminist theories of women's experience into law, whether or not this exposes the ways in which oppressions diverge or intersect, or what is paradoxical about them when they do so. These are merely two perspectives on rights suggested by recent feminist scholarship.<sup>17</sup> However, feminists

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<sup>16</sup> Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", excerpted in Alison M. Jaggar, ed., *Living With Contradictions: Controversies in Feminist Social Ethics*, (Boulder: Westview Press, 1994), 39 - 52

<sup>17</sup> Others, as Brown notes, include Patricia Williams' *The Alchemy of Race and Rights* (Cambridge, Harvard University Press, 1991) and Drucilla Cornell's *The Imaginary Domain*, (New York, Routledge,

might also look to more traditional ways of describing rights, in order to find out whether the differences between claims, liberties, privileges, immunities and the rest of the Hohfeldian package, illuminate the constraints and opportunities facing women.<sup>18</sup> We might also consider whether the metaphors of rights as side-constraints, trumps and thresholds is not at least as illuminating as the language of paradox, or helpful in thinking about rights as paradoxes.<sup>19</sup> We might, even, abandon the language of rights altogether, as either irrelevant to women's struggles, or an obfuscation of women's interests.<sup>20</sup>

My point, in short, is that we have plenty of ways to describe what rights are, what they do, and what they could be, of which Brown's is merely one more. If none of these is perfect, each has something to offer feminists who reject the idea that we must choose for or against rights, or that legal rights, however desirable and even necessary, are sufficient for the liberation of women. What we lack is any agreement on how to judge these alternatives on their own terms, or as compared to the others. Until we find some solution to this problem, or reach some rough and ready agreement about how we should describe women's interests for various purposes, it seems senseless seriously to debate the proposition that rights are paradoxes, or that they should be seen and treated as such.

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1995). Another example from which I have learned a lot, is Jean Cohen's "Redescribing Privacy: Identity, Difference and the Abortion Controversy", *Columbia Journal of Gender and Law* 3 (1992).

<sup>18</sup> W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reading* (Westport: Greenwood Press, 1923) 35 – 63.

<sup>19</sup> I found Elizabeth Kiss' discussion of the implications of these metaphors particularly helpful. See her wonderful and, as yet, unpublished dissertation: *Marx and Rights: A Contribution to the Defence of Rights as Instruments*, (Oxford D. Phil, 1989).46 – 54.

<sup>20</sup> For a discussion of such views see Elizabeth Kiss, "Alchemy or Fool's Gold? Assessing Feminist Doubts about Rights", *Dissent* (Summer 1995) 342 – 7.



So if what is most novel about Brown's perspective is her attention to the paradoxical features of rights, in the context of current debates about rights it is less the novelty of her claims, than the familiarity of the problems she describes that is most striking. For from her critique of rights, it seems, the problem of liberating women is less to conceive an utterly new form of right, than to decide what women's interests are, and which people, organisations, strategies and rights we should take as representing them, however imperfectly. The problem for feminists is how to address these questions in the theory and practice of politics and, thus, to place political choice and judgement at the heart of our conceptions of rights.

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