ARTICLES

QUEER DISPUTE RESOLUTION

*Daniel Del Gobbo**

"What if we sought to supplant the language of '*I am*'—with its defensive closure on identity, its insistence on the fixity of position, its equation of social with moral positioning—with the language of '*I want this for us*'?"

—Wendy Brown[1]

"It would thus be a mistake to assume that desire is simply liberatory and that an indifferent desire will always be radical. If anything, the most characteristic feature of desire is that one cannot know what it will do."

—Madhavi Menon[2]

I. Introduction

In Anglo-American legal discourse, the juridical subject of dispute resolution has traditionally been conceived as a bearer of rights or a bearer of interests: *rights*, in the model of liberal legalism that regards adjudication (i.e. court and tribunal processes) to be the preferred means of resolving disputes in the adversarial tradition; or *interests*, in an alternative or complementary model that regards consensual dispute resolution (i.e. negotiated and mediated

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[1] Wendy Brown, States of Injury: Power and Freedom in Late Modernity 75 (1995).

[2] Madhavi Menon, Indifference to Difference: On Queer Universalism 20 (2015).

settlement processes)[3] to be the preferred means of resolving disputes in the non-adversarial tradition. This article explores the ethical implications of reframing the bearer of interests as a bearer of desires.

This is more than just semantics. Reconceiving the juridical subject as a bearer of desires invokes a trend in progressive social theory that has centered the concept of desire in its critique of the liberal "humanist" subject.[4] This critique has yet to be fully explored in the legal scholarship. One of the most productive lines of argument in this tradition is derived from queer theory—in particular, a strand of post-identitarian thinking in queer theory that regards sexual desire as something that is disruptive of ontology regardless of gender or sexual identity. This strand of thinking raises important questions in this context. Is it possible to theorize juridical subjectivity in terms of sexual subjectivity? What follows from such an effort to "queer" the constitution of the juridical subject, independent from its politicized identity as a bearer of rights in liberal legalism? Could this theory teach us something about the ethics of rights and interests-based dispute resolution processes?[5]

Queer theory has found interdisciplinary application in many areas of law but relatively few, regrettably, in the dispute resolution field.[6] This may be unsurprising for a number of reasons, but it seems most apparent that any attempt to integrate these two subjects—to inaugurate a standalone legal theory of "queer dispute

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[3] The terms "consensual dispute resolution" or "settlement" are used throughout this paper instead of "alternative dispute resolution" or its abbreviation "ADR," which term is more common in the dispute resolution literature, because the latter is generally understood to include certain non-consensual trial alternatives (e.g., arbitration, in which the parties consent to the process but not the outcomes) in its definition.

[4] *See infra* note 49. To be clear, many queer theorists have refused to recognize sexual desire without more as the basis for emancipatory politics. As Michel Foucault taught us, sexual desire produces the interiority of the sexual subject that it claims to reflect. This helps to explain why sexual desire has tended to invoke the oppressive discourses of medico-scientific expertise and institutional authority, among others, which continue to bear down on LGBTQ2 people and others. *See infra* note 70. Accounting for this tendency, Foucault and many of his followers in queer theory have tended to focus on the ethical potential of sexual pleasure instead of desire.

[5] I am not the first legal scholar to trouble the constitution of the juridical subject. Notably, Martha Fineman centers the concept of vulnerability, rather than desire, in theorizing a new subject to challenge liberal ideas about social policy and law. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 19 (2008).

[6] For prior applications of queer theory in the negotiation field, see Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis*, 13 TEX. J. WOMEN & L. 169 (2003–2004); Daniel Del Gobbo, *The Feminist Negotiator's Dilemma*, 33 OHIO ST. J. ON DISP. RESOL. 1 (2018).

resolution," as my title suggests, that operates autonomously from feminist legal theories of negotiation and mediation—would be inevitably riven by paradox and contradiction. Queer theory hangs its hook on critiquing whatever purports itself to be settled or resolved. The term "queer" implies something that is irrational, transgressive, open-ended, and new—something that has no fixed legal or regulatory ambitions yet promises for the theoretical revival of a radical and critical politics.[7] Often, but not always, it has something to do with sexuality. The term "dispute resolution" implies just the opposite—something that is highly normative and pragmatic without having a necessary politics; something that is linear and progressive in its form; something that is intended to be stable, conclusive, and legally enforceable in its outcomes.[8] It is not thought, at least conventionally, to have anything to do with sexuality.[9]

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[7] The term "queer" defines itself by its indefinability. *Compare* Judith Butler, *Critically Queer*, 1 GLQ 17, 18 (1993) ("The term 'queer' emerges as an interpellation that raises the question of the status of force and opposition, of stability and variability, within performativity. The term 'queer' has operated as one linguistic practice whose purpose has been the shaming of the subject it names or, rather, the producing of a subject through that shaming interpellation. 'Queer' derives its force precisely through the repeated invocation by which it has become linked to accusation, pathologization, insult."), *with* José Esteban Muñoz, Cruising Utopia: The Then and There of Queer Futurity 1 (2009) ("Queerness is not yet here. Queerness is an ideality. Put another way, we are not yet queer. We may never touch queerness, but we can feel it as the warm illumination of a horizon imbued with potentiality. We have never been queer, yet queerness exists for us as an ideality that can be distilled from the past and used to imagine a future."). As Suzanna Danuta Walters explains, "[m]any would argue that this indeterminacy—this inability to ascertain a precise definition and framework for the term *queer*—is precisely what gives it its power: *queer* is many things to many people, irreducible, undefinable, enigmatic, winking at us as it flouts convention: the perfect postmodern trope, a term for the times, the epitome of knowing ambiguity." *See* Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 Signs 830, 837 (1996).

[8] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 767 (1984) ("The literature of negotiation presents a stylized linear ritual of struggle—planned concessions after high first offers, leading to a compromise point along a linear field of pre-established 'commitment and resistance' points.").

[9] Janet Halley captures the broader point that I am trying to make about the seeming incommensurability of queer theory and legal studies. Janet Halley, *Paranoia, Feminism, Law: Reflections on the Possibilities for Queer Legal Studies*, *in* New Directions in Law and Literature 123 (Elizabeth S. Anker & Bernadette Meyler eds., 2017) ("Why has queer theory been so productive in the humanities and so scarce in law schools? Surely one reason is that the constellation of hyperrational styles currently expanding in the legal professoriate—neoliberal and center-left instrumentalisms and neoformalism, primarily, but also ostensibly theory-free legal history, combined with the aspiration for law that it, itself, is and should be rational—form very unreceptive ground for an intellectual and political project so attentive to, and often so appreciative of, the irrational forces in human life."). *See also* Adam Romero, *Methodological Descriptions: 'Feminist' and 'Queer' Legal Theories*, *in* Feminist and Queer Legal Theory:

This view of negotiation and mediation, at least, is almost entirely wrong. I will argue that theorizing about the juridical subject through the lens of desire encourages us to think about the practice of settlement non-instrumentally, not unlike sexuality itself, which reveals the practice of settlement to be resistant to the liberal legal imperatives of politicized identity. This is what makes settlement a fitting analogue for the trope of sexual freedom in queer theory, which opens up a pressing line of criticism about legal policy initiatives that have sought to limit, and in some cases categorically ban, the use of consensual dispute resolution over the interests of the parties themselves. At the same time, however, the trope of sexual freedom raises difficult questions about the ethics of desire given the risk that consent to sex and settlement may be induced by coercive force. Appreciating this risk helps us to understand the proper role of law in regulating the conduct of sex and settlement, or at least to understand the role of law as something deeply fraught with uncertainty.

The article is organized as follows. Part II traces the conceptual shift in legal theory from thinking about the juridical subject as a bearer of rights to a bearer of interests. This provides the necessary context for my reframing the bearer of interests as a bearer of desires. Part III begins to explore the implications of this move, drawing on what I call the "ethic of positivity" in parts of queer theory that celebrates the potential for sexual desires to transcend identity categories. This theory suggests that the ethical promise of settlement derives from the potential of the subject's interests to reach outside the bounds of liberal legalism and articulate a field of justice that is more substantive, pleasurable, and new. Part IV pushes this claim to its limit by underscoring the fact that some people report their lived experiences of sexuality as unwanted and therefore potentially harmful. This suggests that the ethical promise of settlement derives from a collaborative process that respects the other's autonomy, what I call the "ethic of mutuality" in parts of queer theory. Finally, the article concludes by suggesting that these two ethics come together, necessarily albeit problematically, in the legal doctrine of consent. One of our tasks ahead should be to continue refining the legal doctrine so that it strikes an appropriate balance between these ethical imperatives in law. Throughout the article, I will illustrate these points by reference to a case study of two separating spouses negotiating the terms of their divorce,

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INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 247–55 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

which should help to ground my contributions in a practical legal context.

My argument begins and ends with the proviso that so much of queer theory prides itself on its contingency, on its general resistance to totalizing "grand narratives" of sexual experience that purport to speak beyond our relative subject positions within the richness and diversity of human experience. This article cannot pretend to offer anything more than that—my subjective view on these issues, only—in the hopes of asking more difficult questions and expanding the theoretical terrain of the dispute resolution field that has been critically undertheorized to date.[10] To my knowledge, there have been few, if any, prior attempts to bring legal theories of sex and settlement into conversation with one another or recalibrate the progressive politics of negotiation and mediation in this way. I hope that my initiative breaks the boundary of these fields wide open.

II. Juridical Subjects: The Shift from Rights to Interests

The juridical subject of dispute resolution has traditionally been conceived as the rational and self-interested subject of liberal political philosophy.[11] This capacity for reason is what entitles us to a host of fundamental rights to self-determination that protect us from the risk of undue interference in our public and private lives.[12] On this theory, rights claims are assertions of an ethical priority that is determined by the formal law to take precedence

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[10] The legal scholarship on negotiation and mediation is undertheorized, particularly as it relates to the potential role of gender and sexuality as a social determinant of settlement processes and outcomes. *See* Del Gobbo, *supra* note 6 (surveying feminist approaches to gender in principled negotiation studies).

[11] Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 Denv. U. L. Rev. 437, 472 (1988–1989).

[12] A genealogy of the right to self-determination in liberal legal theory is beyond the scope of this article, but for accounts of its theoretical underpinnings, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 Yale L.J. 16, 32–44 (1913) (characterizing freedom from undue interference by others as implying a structure of corresponding privileges and duties in which the parties conduct themselves in rightful relation to one another); Isaiah Berlin, Four Essays on Liberty 122–45 (1969) (introducing the concept of "negative liberty" as freedom from interference by other persons); Joel Fineberg, *Autonomy*, *in* The Inner Citadel: Essays on Individual Autonomy (John Christman ed., 1989); Philip Pettit, Republicanism: A Theory of Freedom and Government (1999); Philip Pettit, On the Peoples' Terms: A Republican Theory and Model of Democracy (2013)

over others. Here, the term "formal" law is used descriptively, not normatively. The formal legal system encompasses the full range of judicial and quasi-judicial processes administered by courts and tribunals for the adjudication of rights claims in an adversarial framework. While the elements of "formality" will depend on the specific context, these processes are typically characterized by state recognition, constitutional or statutory grants of authority, official control and accountability mechanisms, and systems of standardizing and regulating the legal procedure. Accordingly, rights claims make demands on the state and use formal, state-based structures to generate support for the validation of their claims. It follows that the pursuit of justice has been traditionally linked with the notion of zealous advocacy of rights claims in an adjudicative framework, where the "truth" of the matter should emerge as the stronger argument wins the day in court and cannot be compromised under the rule of law.[13] Collectively, these assumptions form the basis of what is known as "liberal legalism," which includes a belief in the primacy of rights-based adjudication that is reinforced by the structure of the adversarial system.[14]

Research on access to justice in the United States and Canada has tended to focus on two dimensions: procedural justice (what Julie Macfarlane calls "justice as process") and substantive justice

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(defining the republican theory of freedom as the absence of others' power to interfere with our lives).

13 JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 49–54 (2008) (arguing that the "default to rights" and adjudicative decision-making is a core belief of the legal profession); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Practice*, 1 BERKELEY WOMEN'S L.J. 39, 51 (1985) (tracing the origins of the adversarial legal system to what Carol Gilligan theorized as a gendered male "ethic of rights" as opposed to a gendered female "ethic of care").

14 There have been numerous critiques of liberal legalism in the critical legal scholarship, including many that address issues of gender and sexuality, but a few have been especially instructive in my writing this article. *See* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989) [hereinafter Nedelsky, *Reconceiving Autonomy*]; Jennifer Nedelsky, *Reconceiving Rights as Relationship*, *in* 1 REVIEW OF CONSTITUTIONAL STUDIES 1 (1993); MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 55 (1999); Wendy Brown & Janet Halley, *Introduction*, *in* LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 77 (2003); Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 400–01 (2005); Rosemary Hunter & Sharon Cowan, *Introduction*, *in* CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY 1 (Rosemary Hunter & Sharon Cowan eds., 2007); Rosemary Hunter, *Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism*, *in* THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 13 (Margaret Davies & Vanessa Munro eds., 2013); JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION (2018).

(what Macfarlane calls "justice as outcomes").[15] Procedural justice is achieved by the use of consistent processes to resolve disputes, which are reflected by formal rules of legal and administrative procedure that establish the contours of fairness in courts and tribunals with respect to such issues as standing, notice requirements, filing deadlines, and terms of appearance.[16] This reveals a commitment to the rules themselves as a source of justice—specifically, the fair administration of competing rights claims in liberal legalism—regardless of the merits of the decisions that are ultimately reached, which are the indicators of substantive justice.[17]

There may be perfect overlap between the procedural administration of rights claims and the substantive merits of decisions. At least ostensibly, rights claims have met the needs of many juridical subjects for whom substantive justice means the same thing as procedural justice. Consider the impassioned litigant who wants nothing else but the chance to plead their case before a judge, who wants to feel the certainty and finality—and the personal vindication, should they win—that is supposed to come from the trial experience alone. For the impassioned litigant, substantive justice might literally mean the process of having their "day in court," regardless of the risks of ultimately losing their case in the end.

Rights claims have been historically empowering by aiding in the development of many individuals and groups' consciousness around their congealed, politicized identities as rights holders—whether as citizens, victims, oppressed peoples, or some other. The term "identity politics" refers to a "rights-claiming focus of balkanized groups organized to pressure the legal and electoral systems for inclusion and redress."[18] Charles Taylor has theorized identity politics as a form of the "politics of recognition," in which "the demand for recognition . . . is given urgency by the supposed links between recognition and identity, where this latter term designates something like a person's understanding of who they are, of their fundamental defining characteristics as a human being."[19] For lib-

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15 MACFARLANE, *supra* note 13, at 54–59; Trevor C.W. Farrow, *What is Access to Justice?*, 51 OSGOODE HALL L.J. 957, 970–72 (2014); Faisal Bhabha, A Chance at Justice: Mediation at the Human Rights Tribunal of Ontario 1 (copy on file with author).

16 MACFARLANE, *supra* note 13, at 54–59.

17 *Id.*

18 LISA DUGGAN, THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY, at xviii (2003).

19 Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994). According to Taylor, "we can see how much an original identity needs and is vulnerable to the recognition given or withheld by signifi-

eral legal scholars and others, the politics of recognition has translated into an easy justification for the liberal legalism of rights. On this view, minority identities produce the substantive injustice that historically marginalized groups experience as minorities. Formal laws and policies that enforce minority rights respect minority identities and therefore reduce, if not correct substantive injustice altogether.[20]

By my assessment, there are at least three interrelated assumptions that currently underpin the liberal legalism of rights.[21] The first assumption is that substantive justice is a concept generally inseparable from the law, and specifically from state law, such that some critics have argued there can be no substantive justice outside the formal legal system, and outside rights-based adjudication in particular. The second assumption is that fidelity to the rules laid down by our formal institutions is the highest ethical virtue, such that some critics have claimed that additional or alternative rules established with the parties' consent, whether in negotiation, mediation, or otherwise, are a poor guarantor of substantive justice. The third assumption is that procedural justice is an optimal means of achieving substantive justice in most, if not all cases, given that some critics have appeared unwilling to analyze the distributional consequences of the formal legal system in the parties' public and private lives.

Contrary to popular wisdom, all of these assumptions are false. This may sound heretical because the ideology of "more law" and "more rights" is pervasive in our legal culture, but I think this ideology misses the crucial point. Inevitably, the concept of substantive justice, and the promise of our legal and administrative state to provide it for every subject, will create highly differentiated expectations among differently situated people.[22] Context is everything. As Faisal Bhabha has argued, it can be extremely difficult, if not impossible, to identify the objective indicators of substantive

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cant others," such that the failure to recognize identity "can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being." *Id.* at 25, 36.

20 For more on the links between the politics of recognition and the liberal legalism of rights, see K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994); BROWN, *supra* note 1; Brown & Halley, *supra* note 14; KELLY OLIVER, WITNESSING: BEYOND RECOGNITION (2011).

21 *See* Roderick A. Macdonald, *Access to Justice and Law Reform*, 10 WINDSOR Y.B. ACCESS TO JUST. 287, 304 (1990) (explicating five theoretical beliefs that drive the agenda of contemporary access to justice law reform).

22 *See* KERRY RITTICH, *Out in the World: Multi-Level Governance for Gender Equality*, *in* FEMINISMS OF DISCONTENT: GLOBAL CONTESTATIONS 55 (Ashleigh Barnes ed., 2015).

justice in the absence of widespread definitional consensus about what that substance looks like in a plural society.[23] In my view, it should be incumbent on the state to accommodate the situation of subjects whose political aspirations, material living conditions, or subjective "sense of justice," as Bhabha puts it, fall outside the parameters of the procedural justice paradigm.[24] This is the primary innovation of consensual dispute resolution. It helps to remedy the deficiencies of liberal legalism by reframing the juridical subject from a bearer of rights to a bearer of interests.

Consensual dispute resolution is an interests-based practice.[25] It encompasses a range of settlement processes in which the parties attempt to identify their underlying interests, find their interests in common, and assist them in crafting a resolution beyond what a court or tribunal might order in the adjudication of rights claims.[26] In this way, settlement is proactive instead of reactive, looking forward rather than back. It seeks to resolve disputes by building a consensus about the parties' future conduct rather than assigning responsibility for events in the past, at least as its principal objective.[27] Beyond this high-level summary, it is probably foolhardy to attempt a comprehensive typology of settlement because the number of accepted types has multiplied since its initial theorization and institutionalization over forty years ago.[28] In the case of mediation alone, there is facilitative mediation, evaluative mediation, transformative mediation, bureaucratic mediation, open or closed mediation, activist or accountable mediation, community mediation, pragmatic mediation, narrative mediation, humanistic mediation, and authority-based mediation, among other types of practice.[29] These types can be multiplied further, as theorists and

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23 Bhabha, *supra* note 15, at 3. This issue is arguably made more pressing by the political urgency of our human rights and equality guarantees. Bhabha, *supra* note 15, at 10–11. And the issue may be especially problematic in light of the legal imperative to enforce "trans-substantive" civil procedures in the United States and Canada, or baseline rules which apply identically, objectively, and universally from one case to the next irrespective of the contexts in which those cases arise. *See generally* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. Rev. 1191 (2013).

24 Bhabha, *supra* note 15, at 13.

25 *See* Menkel-Meadow, *supra* note 8, at 801–04.

26 *Id.* at 758; Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Pitfalls*, 2 Law & Ineq. 21, 26–27 (1984); Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict 8 (Rev. ed., 2005).

27 Silbey & Sarat, *supra* note 11, at 452–53.

28 For an attempt at a typology, see Trevor C.W. Farrow, Civil Justice, Privatization, Democracy 7 (2014) ("Figure 1.1").

29 *See* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 Negot. J. 217, 228–30 (1995) (book review). For a

practitioners have proposed a number of specific and hybrid forms to be applied in various circumstances.

Consensual dispute resolution processes are generally unified by Carrie Menkel-Meadow's formulation of the two structural components of interests-based negotiation. The structural components are: (1) identifying the parties' underlying interests as distinct from their rights; and (2) brainstorming creative options, first by attempting to satisfy those interests directly, and second by attempting to "expand the pie" of available resources before dividing it.[30] Menkel-Meadow's first idea is that through a more contextual process, the parties are able to craft solutions to their disputes that are specifically tailored to their interests.[31] She explains that from the subject's perspective, there is a potentially broad range of social, cultural, economic, and legal interests that may not be fully satisfied by the vindication of rights claims.[32] There may be reputational investments. There may be emotional reparations for harm done. There may be drives to maximize power, to gain fame, to obtain help, or to connect with other people. Court and tribunal decisions cannot guarantee that the parties will find closure, offenders will be rehabilitated, or communities will change for the better. Menkel-Meadow's second idea is that by exchanging information and seeking to "expand the pie" of available resources, the parties can brainstorm more creative solutions and generate value in a dispute that achieves better results for themselves and encourages positive outcomes to meet both their interests.[33]

Consider the example of two separating spouses from Robert Mnookin and Lewis Kornhauser's pioneering article, "Bargaining

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classic description of the range of mediator orientations and activities, see Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 16–48 (1996).

30 Menkel-Meadow, *supra* note 8, at 840. Menkel-Meadow's formulation builds on Roger Fisher and William Ury's original statement of the four precepts of "principled negotiation," which helped to found the contemporary study of consensual dispute resolution in Canadian and American law schools; ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 10–11 (3d ed. 2011). For a recent survey of feminist perspectives on principled negotiation, see Del Gobbo, *supra* note 6.

31 Menkel-Meadow, *supra* note 8, at 840.

32 These can include social interests (e.g., maintaining ongoing relationships), cultural interests (e.g., responding to community pressures), economic interests (e.g., maximizing efficiency, minimizing transaction costs), legal interests (e.g., obtaining concessions), psychological interests (e.g., feeling validation, averting risk), and political interests (e.g., affecting transformative change). *Id.* at 801–04. *See also* Riskin, *supra* note 29, at 19–21.

33 Menkel-Meadow, *supra* note 8, at 840; Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 316 (1971).

in the Shadow of the Law: The Case of Divorce."[34] Assume that the "tender years doctrine," as it was historically applied in family law, continues to provide that mothers have the presumptive right to sole custody of minor children in cases of marriage breakdown. Assume further that mandatory spousal support and child support guidelines provide that mothers will receive a determinate share of the family's economic resources upon the marriage breakdown. Mnookin and Kornhauser explain that the spouses' interests in resolving the issues of custody and support may vary widely from person-to-person in this legal context.[35] One can easily imagine a father who offers to pay support well beyond what a court is likely to order at trial because the father wants to foster an ongoing relationship with the mother and provide for the future well-being of their children through a joint custody arrangement. The mother might accept the father's offer because she believes the responsibility of sole custody would be unduly taxing on her finances and potentially disruptive of her future dating life, say, regardless of any claim to custodial advantage that she might have under the tender years doctrine.[36] According to Menkel-Meadow, it should be possible for the mother and father to share information, identify their underlying interests in common, and negotiate a joint custody agreement that leads to mutually beneficial outcomes through consensual dispute resolution. These outcomes might not have been possible had the spouses simply accepted the result that a court would impose through rights-based adjudication.

Menkel-Meadow traces the intellectual origins of consensual dispute resolution to the political theory of Jürgen Habermas, which enshrines the negotiation process as central to the proper functioning of liberal democracy.[37] According to Habermas, "the

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34 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

35 *Id.* at 967.

36 This example is modified from Mnookin and Kornhauser's text. *Id.* at 969.

37 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE OF LAW AND DEMOCRACY (William Rehg trans., 1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS], *cited by* Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 5, 29–30 (2000). *See also* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOL. 1: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) [hereinafter HABERMAS, THE THEORY OF COMMUNICATIVE ACTION]. For works that explore these intellectual origins further, see David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1 (1999); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV.

modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."[38] Citizens reach this understanding through the exercise of communicative action, in which the subjects express their interests and attempt to reach a negotiated consensus over the terms of their political relationship.[39] Where the subjects cannot agree on the substantive outcomes, they should at least agree on the procedure of deliberation itself, an aspiration to the perfectibility of what Habermas calls "ideal speech conditions" in which the subjects make decisions that are mutually acceptable within their community.[40] For Habermas, this grounds a vision of access to justice reform that strives toward enabling the process of meaningful citizenship, which necessarily involves the subjects in the "organized perception, articulation, and assertion of their own interests" as potentially distinct from their rights at formal law.[41]

This theory acknowledges the fact that while subjects may ask for formal legal relief through findings of liability or guilt, this relief will often be a proxy for the subjects' underlying interests that may or may not be easily translatable into rights claims or achieved by the adversarial system.[42] The structure of the formal law is generally inflexible. To the extent that subjects frame their rights claims in terms of an established cause of action (a tort, a contract claim, a property matter, or a criminal charge), courts and tribunals can only understand their claims and craft a remedy within the limits of their jurisdiction as prescribed by law, usually an award of monetary damages, a temporary restraining order, or a criminal charge and conviction.[43] Moreover, the structure of liberal legal-

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63 (2002); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004–2005); Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407 (2009).

38 HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 37, at 449. This idea reflects the liberal view of Locke, Kant, Mill, and other theorists that citizens are severally possessed with the rational agency and ability to take control of their own lives and make conscious, moral decisions about what is right. *See* Frank I. Michelman, *Democracy and Positive Liberty*, 21 BOSTON REV. 3 (1996).

39 HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, *supra* note 37, at 85–86, 88–90, 104–05.

40 HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 37, at 22.

41 *Id.* at 411.

42 *See* Menkel-Meadow, *supra* note 8, at 795; Silbey & Sarat, *supra* note 11, at 483; FARROW, *supra* note 28, at 212.

43 *See* Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2203 n.33 (2000); Angela Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL'Y 37, 46 (2011).

ism shifts decision-making authority away from the subjects and towards the state and state-affiliated actors, who are charged with administering procedural justice in the collective good.[44] As a result, the extent of the subjects' participation in court and tribunal processes may be limited to answering the investigator or fact-finder's questions about the events of the case.[45] They often lack the opportunity to tell their own story in their own words, let alone retain any decisional power over the consequences that other parties should face as "authors of the law" in the Habermasian sense.[46]

Collectively, this means that what adjudicative processes generally do not and often cannot do—and what consensual processes, by contrast, are expressly designed to do—is look behind the formality of rights claims and deliver on the true meaning of the subjects' interests. As Susan Silbey and Austin Sarat put it in a classic statement, the parties to legal disputes are subjects "constituted as bearer[s] of desires or preferences who [are] forced, when dealing with judicial institutions, to speak a 'foreign language' instead of the more natural language of interests."[47] Shifting the conceptual focus from rights to interests transforms the juridical field from the terrain of vertical decision-making to horizontal bargaining, where a potentially wide range of mutually acceptable outcomes may be negotiated.

This much is well-known and generally uncontroversial in legal theory, yet this slippage by Silbey and Sarat between the terminology of "interests" and "desires" raises an important question. On a fundamental level, the study of juridical subjectivity as a form of legal consciousness is a critical inquiry into the processes of interpretation through which the subjects construct, maintain, and reproduce structures of meaning in the dispute resolution field.[48]

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44 The therapeutic jurisprudence literature shows that there are benefits to increased party participation in the formal justice system. *See generally* Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. Rev. 33 (2000); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 Am. Crim. L. Rev. 1541 (2003); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 Am. Crim. L. Rev. 1617 (2003); Edna Erez, Michael Kilchling, & Jo-Anne Wemmers eds., Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives (2011).

45 For an illustration of these limitations in the sexual violence context, see Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 Temple L. Rev. 701, 718 (2017).

46 *Id*.

47 Silbey & Sarat, *supra* note 11, at 483.

48 Susan S. Silbey, *After Legal Consciousness*, 1 Ann. Rev. L. & Soc. Sci. 323, 334 (2005). *See also* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 1850–1940, 3 Res. L. & Soc. 3, 6, 23 (1980) (theo-

Traditionally, these structures of meaning have sounded in the language of rights and interests. These are concepts that emerge out of, even as they continue to shape contested ideological struggles over the terms of legality, the morality of rulemaking, and the ethics of settlement in liberal democracy. What if it were possible to incite a slight shift in the character of these debates? What if it were possible to reframe the juridical subject as a bearer of interests, to the extent that the subject's interests are more critically and productively framed as the subject's *desires*?

At first blush, the ethical register of desire would seem to invoke the long-standing critique of the liberal "humanist" enlightenment subject in progressive social theory, which has centered the role of desire as a means of deconstruction.[49] Notably, Wendy Brown has called on us to open the rational, autonomous, "solipsistic" self to relationality in light of the constitutive limitations of politicized identity in late modern democracy, including the liberal legalism of rights.[50] According to Brown, the liberal legalism of rights may be responsible for foreclosing the freedom of minority groups instead of protecting it. Brown explains that when minority groups invoke narratives of innocence and injury in the process of rights claiming, we run the risk of performing, circulating, and thereby perpetuating our own feelings of subjugation in reality.[51] Rights claiming may be responsible for reconstituting the historical fact of minority groups' wounding, creating a sense of stuckness in the past through affective economies of victimhood.[52] Calls for the legal protection of minority rights by the state may therefore be "wounded attachments."[53] Brown asks: "[W]hat kind of political

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rizing "legal consciousness" as the frame of reference which organizes the legal profession at a particular moment in time, including the basis upon which disputes will be argued and the criteria by which those disputes will be resolved).

49 Many contemporary progressive social theorists have placed desire at the centre of their theorizing, including writers working in the traditions of psychoanalysis and the Frankfurt School, particularly Theodor Adorno and Herbert Marcuse. *See* HERBERT MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD (1955); THEODOR ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002). Interestingly, Jürgen Habermas is a notable exception within the Frankfurt School, although his work has been taken up by dispute resolution scholars as it relates to communicative action and deliberative democracy. *See supra* notes 37–41 AND ACCOMPANYING TEXT. FOR A MORE GENERAL DISCUSSION ABOUT THE ROLE OF DESIRE WITHIN PROGRESSIVE SOCIAL THEORY, SEE MARI RUTI, FROM LEVINAS TO LACAN: SELF, OTHER, ETHICS 125 (2015).

50 BROWN, *supra* note 1.

51 *Id.* at 66.

52 *See* Sara Ahmed, *Affective Economies*, 79 SOC. TEXT 117 (2004).

53 BROWN, *supra* note 1, at xii, 52.

recognition can identity-based claims seek—and what kind can they be counted on to want—that will not resubordinate a subject itself historically subjugated through identity, through categories such as race or gender that emerged and circulated as terms of power to enact subordination?"[54]

I am asking similar questions with respect to dispute resolution. What kinds of legal institutions and procedures have the potential to transcend the constitutive limitations of politicized identity, including the liberal legalism of rights? Riffing on this theme in the opening quote, Brown suggests that we should explore the creative possibilities of "supplant[ing] the language of '*I am*'—with its defensive closure on identity, its insistence on the fixity of position, its equation of social with moral positioning"—with the language of "*I want this for us*."[55] What could it mean, ethically speaking, to supplant the language of "I am" with the language of "I want," or more precisely "*I desire*," as a matter of law?

This article is my first attempt at answering these questions. As I explain in the next section, I am interested in exploring the creative possibilities of applying a strand of post-identitarian thinking in queer theory regards the mutability of sexual desire, in particular, as something that unsettles the formulation of gender and sexual identity as a fixed ideological position. There have been innumerable critiques of the ideology underpinning the liberal legalism of rights in critical legal scholarship, but relatively few have borrowed insights from queer theory to challenge the ethical foundations of its core beliefs. In my view, this suggests a new way of theorizing about juridical subjectivity in terms of sexual subjectivity, which suggests an instructive line of inquiry about the ethics of sex and settlement in law that concludes, as Brown suggests, with an appeal to relationality.

III. Wanting Subjects: The Shift from Interests to Desires

Since its historical inception, one of the central preoccupations of queer theory has been to explore how sexuality is articulated across identity and desire. Notably, Eve Kosofsky Sedgwick argues that we should suspend our understanding of gender identity as a social determinant of sexual orientation. Sedgwick explains that

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[54] *Id.* at 55.

[55] *Id.* at 75.

the ontology of sexual orientation is a diacritical distinction, such that the terms "heterosexual" and "homosexual" should be understood as designating nothing more than the absence of characteristics implied by the other.[56] Accordingly, our reading of these terms to signify the gender of our sexual object-choice must be vulnerable to deconstruction. This was a path-breaking move because it effectively rendered sexuality as a domain in which traditionally gendered expressions of sexual desire—both heterosexual desire ("opposite-sex") and homosexual desire ("same-sex")—became capable of signifying multiply in a dizzying, dazzling array of sexual practices.[57] This amounts to what has now become a trite point in queer theory that sexual desires may be unique, highly differentiated between people, and become fixated on a wide range of object-choices which cannot be made to signify anything "real" or "essential" about the body.[58]

Sedgwick's theory is responding, at once, to historical arguments originating in parts of radical feminism and lesbian/gay studies about the role of law, and specifically the liberal legalism of rights, as a tool of sexual governance in liberal democracy.[59] While these arguments are primarily concerned for the welfare of different classes of sexual subjects—women and lesbians and gay men,

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56 EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 31, 34–35 (1990). *See also* JUDITH BUTLER, GENDER TROUBLE 22–23 (1990).

57 *Id.* at 26–27 ("If, for instance, many people who self-identify as gay experience the gender of their sexual object-choice, or some other proto-form of individual gay identity, as the most immutable and immemorial component of individual being, I can see no ground for either subordinating this perception to or privileging it over that of other self-identified gay people whose experience of identity or object-choice has seemed to themselves to come relatively late or even to be discretionary."). *See also* EVE KOSOFSKY SEDGWICK, TENDENCIES 8 (1993) (arguing that disaggregating sex and gender means that the constituent elements of the subject's sexual identity cannot be made to signify in a single way); Butler, *supra* note 7, at 28.

58 SEDGWICK, *supra* note 56, at 34–35. This theory recognizes desires that attach to sexual object choices which transcend gender identification (see the reference in SEDGWICK, *id.*, to the eroticism of the "mouth, anus, breasts, feet"), which track lines of individual difference other than gender (see the reference in SEDGWICK, *id.*, to the dimensions "human/animal, adult/child, singular/plural, autoerotic/alloerotic"), and which spring primarily from the situational or affective context instead of the subject (see the reference in SEDGWICK, *id.*, to the contexts "orgasmic/non-orgasmic, non-commercial/commercial, using bodies only/using manufactured objects, in private/in public, spontaneous/scripted").

59 The first argument was derived from parts of radical feminism that viewed women's sexual subordination as the primary basis for gender difference and structural inequality. *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982). The second argument was derived from parts of lesbian/gay studies that relied on minoritizing discourses of gender or sexual identity as their means of strategic organization against sexual hierarchy. *See* Notes, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

respectively—they have the same basic structure. At a high level, these arguments attempt to underscore the differences that separate women and lesbians and gay men as distinct groups of people on account of their "real" gender and sexual identity, which is a minority status that relegates members of these groups to a position of formal or substantive inequality in society.[60] This reasoning presumes that the "reality" of gender and sexual identity is either unchangeable in fact or changeable only at an unacceptable personal cost—what is known in constitutional law parlance as actually or constructively "immutable"—on the theory that gender and sexual identity are biologically determined, socially constructed, or otherwise psychologically predictable across the subject class.[61] It follows that members of these groups should be entitled to formal and substantive equality rights under the formal law, which require the recognition of the state to protect these rights from undue intrusion by others and realize the full potential of their equality guarantee.[62]

Sedgwick's argument poses a challenge to this kind of reasoning. By troubling the nominative categories of "women" and "lesbians and gay men," Sedgwick helped to inaugurate a strand of poststructuralist and psychoanalytic thinking in queer theory that is powerfully subversive of the liberal legalism of rights. The basic idea is that the mutability of sexual desire undermines the onto-

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[60] SEDGWICK, *supra* note 56, at 85–90. Nancy Fraser argues that these minoritizing arguments represented an historical shift in the grammar of political claims from the economic to the cultural, which has resulted in stalled progress toward the goal of redistribution. NANCY FRASER, FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS 161–62 (2013).

[61] In Canadian law, these arguments are reflected by into the notion that sex and sexual orientation are immutable characteristics and therefore protected grounds of discrimination under section 15(1) of the *Charter of Rights and Freedoms*. As Peter Hogg writes, "[The enumerated and analogous grounds] are not voluntarily chosen by individuals, but are an involuntary inheritance. They describe what a person is rather than what a person does." PETER HOGG, CONSTITUTIONAL LAW OF CANADA 55 (2011). For more on the identity/activity distinction in constitutional equality law, see generally Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915 (1988–1989); Diane S. Meier, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. C.R. & SOC. JUST. 147 (2008).

[62] By so characterizing the liberal legalism of rights and critiquing the politics of identity and recognition, I should not be taken as saying that they are necessarily ill-advised as a matter of strategy in all cases. As Sara Ahmed responds to attacks on identity politics within progressive social theory, "some have to find voices because others are given voices; some have to assert their particulars because others have their particulars given a general expression." SARA AHMED, WILLFUL SUBJECTS 160 (2014).

logical foundation of politicized identity.[63] Madhavi Menon explains:

> Desire is that which in every instance hollows out ontology. Whether it is libidinal desire for someone who falls outside the bounds of what we consider "our" sexuality, or a longing that stretches beyond the borders of our politics, desire does not respect limits. It is restless and non-unifying. It keeps moving, which is why it disables ontological fixes. And it is indifferent, which is why it is politically incorrect. Desire is surprising because it can erupt at the most unexpected moments and in the most inconvenient circumstances. Perhaps most important, desire cannot suture bodies onto identities; it fails to arrest its metonymic slide with the fiction of a unified self.[64]

Indeed, it might be said that one of the organizing features of this strand of thinking from Sedgwick to Menon—to the extent that any strand of thinking in queer theory is organizable at all—is

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[63] For works that exemplify this post-identitarian strand of thinking in queer theory as it applies to the liberal legalism of rights, see, for example, Brown & Halley, *supra* note 14; SHANE PHELAN ED., PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES (1997); Katharine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Brenda Cossman, *Lesbians, Gay Men, and the Charter*, 40 OSGOODE HALL L.J. 223 (2002); David Valentine, *'I Went to Bed With My Own Kind Once': The Erasure of Desire in the Name of Identity*, *in* THE TRANSGENDER STUDIES READER (Susan Stryker & Stephen Whittle eds., 2006); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006); Tucker Culbertson & Jack Jackson, *Proper Objects, Different Subjects, and Juridical Horizons in Radical Legal Critique*, *in* FINEMAN, JACKSON, & ROMERO EDS., *supra* note 9; DAVID L. ENG, THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY (2010); YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY, AND THE SOCIAL CONSTRUCTION OF DESIRE (2011). I would distinguish this strand of thinking from works in queer theory that focus on lesbian and gay sexual practices specifically. *See, e.g.*, HEATHER LOVE, FEELING BACKWARD: LOSS AND THE POLITICS OF QUEER HISTORY (2007); TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009); LEO BERSANI, IS THE RECTUM A GRAVE? AND OTHER ESSAYS (2010).

[64] MENON, *supra* note 2, at 16. For complementary takes, see Franke, *id.* at 207 ("Desire is not subject to cleaning up, to being purged of its nasty, perilous dimensions, full of contradictions and complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation. These aspects of desire have been marginalized, if not vanquished, from feminist legal theorizing about women's sexuality."); Valentine, *id.* at 407, 417 ("Looking at what people say about what they desire, who they desire, and how they act upon those desires can highlight for us the political nature of desire and the ways such yearnings are shaped by the identity categories through which they are forced to speak if they wish to get a hearing. Such a focus can enable us to look more closely at the seemingly neutral categories of 'gender' and 'sexuality,' and complicate the relationship between them. And, most usefully, it requires us to not simply assume that desire is self-evidently explained by the categories 'gender' and 'sexuality' in using them to talk about the complexity of erotic lives.").

the post-identitarian impulse that this passage demonstrates.[65] By "post-identitarian," I mean that this theory attempts to translate the mobility, the irreducibility, and the enigmatic quality of sexual desire into a new form of political ordering, the signifier "queer," which may retain linguistic power as a gender or sexual identity for some people, but should be equally thought of as a marker for when identity dissolves into sexual practice.[66]

Sexual desire has tended to carry a particular ethical valence in post-identitarian queer theory that originates in the struggle for sexual liberation.[67] Accounting for the historical marginalization of LGBTQ2 people in the United States and Canada, one of the ethics of queer life has been to celebrate the plurality of non-normative sexual desires as equally worthy of respect, needing critical attention, and having potentially liberatory effects on the structures of homophobia and heterosexism in society.[68] I would summarize this principle as the "ethic of positivity" in queer theory.

Above all, the ethic of positivity is centered on the need to affirm the pleasure, the uncertainty, the potential risk, and the overarching human value of sexuality for its ability to transgress the boundaries of politicized identity, no matter how offensive or detestable to others.[69] At the same time, the ethic is centered on the need to critique the tenets of conservative sexual morality—in particular, the notions of social respectability, medico-scientific expertise, and institutional authority that have made LGBTQ2 people appear sick, unclean, abnormal, shameful, and illegal throughout history, whether through the forces of state regulation or biopolitical control that have sought to discipline sexual subjects

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65 *See* Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7, 51 (2004) (suggesting that the critique of identity may be the definitional feature of queer theoretical work). Ian Halley also writes as Janet Halley.

66 *See* Butler, *supra* note 7, at 21 ("Indeed, the term 'queer' itself has been precisely the discursive rallying point for younger lesbians and gay men and, in yet other contexts, for bisexuals and straights for whom the term expresses an affiliation with anti-homophobic politics.").

67 I say that sexual desire has "tended" to carry this ethical valence to account for the contributions of writers like Lee Edelman in the so-called "anti-social" or "anti-relational" school of post-identitarian queer theory, who regard sexuality in terms of its association with exploded limits, self-shattering, destructiveness, and the death drive. For these writers, the political program of queer theory—to the extent that it should have a political program at all—is more complex and ambivalent than the simple celebration of non-normative sex. *See* LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE (2004).

68 *See* MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999).

69 Halley, *supra* note 65, at 50 (suggesting that queer theory may have originated from the need to articulate a sex affirmative response to forms of cultural moralism).

into productive citizens.[70] To be "sex-positive" in post-identitarian queer theory, then, is to be highly skeptical of, if not categorically opposed to any hegemonic definitions of what Gayle Rubin calls "good sex" that should be celebrated, promoted, authorized, and legitimized at the expense of "bad sex."[71] Rather, the ethic of positivity affirms the ethical promise of desire, as Mari Ruti puts it, that derives from its "stubborn loyalty to its objects, including ones that we are told are socially inappropriate."[72]

How might this theory apply to the dispute resolution field? Settlement is like sex—that is, once we reframe the juridical subject from a bearer of interests to a bearer of desires.[73] At first, the shift from interests to desires might seem to be inapposite because

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[70] As Michael Warner explains, it is imperative to insist that "any vision of sexual justice begin by considering the unrecognized dignity of these [sexual] outcasts, the ways of living they represent, and the hierarchies of abjection that make them secondary, invisible, or deviant." WARNER, *supra* note 68, at 89. Of course, these hierarchies of abjection have also helped to underwrite non-normative sexuality into existence by classifying it in this way. *See* Michel Foucault, *The History of Sexuality, Volume I*, THE FOUCAULT READER 301–29 (Paul Rabinow ed., 2010) (presenting his foundational critique of the "repressive hypothesis").

[71] Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* CULTURE, SOCIETY, AND SEXUALITY: A READER 159–60 (Richard Parker & Peter Aggleton eds., 1999).

[72] MARI RUTI, THE ETHICS OF OPTING OUT: QUEER THEORY'S DEFIANT SUBJECTS 102 (2017). For Ruti, the ethical potential of desire is derived in Jacques Lacan's ethics of psychoanalysis, which finds value in desires that fixate on specific objects we understand to be socially inappropriate, in acts of queer sexuality that pierce the normative "symbolic order," to use Lacan's term, despite the pressures of state regulation and biopolitical control to replicate forms of normative sociality. RUTI, *id.*, at 46–49. This challenges Lee Edelman's understanding of Lacan, which is prevalent among queer theorists of the "anti-social" or "anti-relational" school, that the tendency of desire to fixate on specific objects and therefore become hijacked by normative sociality is what signifies its ethical failure. *See* EDELMAN, *supra* note 67. To be clear, Ruti never claims that all forms of socially inappropriate desire are intrinsically ethical—for instance, she argues elsewhere that certain forms of pornography may reproduce elements of the heteropatriarchal order in harmful ways—but simply that they hold ethical promise by their non-normativity. RUTI, *id.*, at 194. For Ruti's thoughts on heteroporn, see MARI RUTI, PENIS ENVY AND OTHER BAD FEELINGS: THE EMOTIONAL COSTS OF EVERYDAY LIFE (2018).

[73] I am not the first person to theorize a contractual basis for sexual relationships or a sexual basis for contractual relationships. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1028 nn.100–02 (1985); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986); Donald Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1802–03 (1992); James T. McHugh, *Interpreting the "Sexual Contract" in Pennsylvania: The Motivations and Legacy of Commonwealth of Pennsylvania v. Robert A. Berkowitz*, 60 ALB. L. REV. 1677, 1686 (1997); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 70 (2003); Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013); Kelly Jo Popkin, *Meeting of the Minds and Bodies: Contract Law and the Mutuality of Sexual Exchanges*, 6 DEPAUL J. WOMEN, GENDER & L. 1 (2017). To my knowledge, there have been few, if any prior attempts to theorize a sexual basis for consensual dispute resolution theory and practice as I have in this essay.

the analogy between sex and settlement is obviously imperfect.[74] Among other reasons, there has been a tendency in legal studies to reduce consensual dispute resolution to a paradigm based on a crude version of liberal economic theory. On this view, the process of self-interest maximization should be the primary means of satisfying the subject's economic interests, which are assumed, at once, to be rational, predictable, and unchanging throughout the settlement process.[75] These interests would appear to contrast with the methodology of desire, which is irrational, unpredictable, and at least potentially changing in its sexual object-choices as most queer theorists understand it. However, this conventional opposition between interests and desires is simplistic and, in many cases, plainly wrong because it fails to recognize that the subject's interests may be irrational, unpredictable, and changing throughout the settlement process as well.[76]

The subject's interests, reconceived in this model as desires, are the only terms of engagement for consensual dispute resolution. The practice of settlement, not unlike the practice of sexuality, is constituted by the mutual interplay of the parties' wants and desires in reaching a negotiated agreement over new and potentially pleasurable terms that may or may not come to pass.[77] The subject's interests may be unique, highly differentiated between people, and become fixated on a wide range of object-choices in resolving disputes, which may or may not signify anything "real" or "essential" about the parties' constructed identities as rights holders or the ethical priority of their respective entitlements at formal law. The subject's interests may be prone to change in the negotiation on account of the other parties' stimulating behaviour, intervening events in the parties' lives, and the parties' affective responses to the bargaining environment, which may or may not

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74 *See, e.g.*, Spence, *supra* note 73, at 75–78 (exploring the limitations of an analogy between contract and sex).

75 For a similar critique of this tendency in legal studies, see Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 65–66 (2009).

76 As Gabriella Blum and Robert Mnookin have argued, "through the process of negotiation people's priorities and interests can sometimes change and evolve." However, "people may overlook or underestimate this possibility." Gabriella R. Blum & Robert H. Mnookin, *When Not to Negotiate*, *in* THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 108 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

77 In this model, the process of reaching a negotiated agreement figures as the orgasmic aim in queer theory, which I would think suggests an entirely new meaning of "getting to yes"—with apologies, as needed, to Roger Fisher and William Ury for the queer joke.

have a rational basis.[78] All that matters is that the settlement process *feels good*—socially, culturally, economically, legally—or that it feels better in the moment, at least, than an adjudicative process which would distribute pleasure and danger in a less satisfying way.[79] This suggests that one of the organizing features of consensual dispute resolution is the post-identitarian impulse that its legal theory demonstrates.

This post-identitarian impulse is borne out in legal pedagogy. As shown by Roger Fisher and William Ury's *Getting to Yes*, it is a truism that negotiators should "focus on interests, not positions."[80] Fisher and Ury explain: "The basic problem in negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears. . . . Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to decide."[81] The principle can be traced to the historical opposition between rights and interests in legal theory, which is reflected by the historical opposition between "distributive" and "integrative" bargaining in negotiation and mediation studies.[82]

Distributive bargaining is a strategy in which the parties attempt to distribute a finite amount of resources by taking positions and claiming entitlements, typically through a series of threats, bluffs, reciprocal concessions, and other forms of legal argumentation in a competitive process. The standard view is that appealing to the formal law, and specifically to rights claims based in identity, may be a useful tactic in distributive bargaining because its process and outcomes tend to replicate the binary structure of "right/no right" decision-making, to use Hohfeldian terms, which is charac-

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78 *See* FISHER ET AL., *supra* note 30, at 160 ("Much—perhaps most—behavior in the world is not very rational. . . . Negotiators are people first. We often act impulsively or react without careful thought, especially when we are angry, afraid, or frustrated. And we all know people who seem just plain irrational no matter the situation.").

79 *See* CAROLE S. VANCE, PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (1984).

80 "Focus on interests, not positions" is one of the four basic precepts of principled negotiation that are explained in *Getting to Yes*. *See* FISHER ET AL., *supra* note 30, at 10–11.

81 *Id.* at 40–41.

82 The historical opposition between rights and interests in legal theory maps onto historical debates in the feminist "sex wars" from the late 1970s to early 1990s about the roles of agency and coercion in determining the content of women's erotic lives. *See* Daniel Del Gobbo, *The Return of the Sex Wars: Contesting Rights and Interests in Campus Sexual Violence Reform, in* CRITICAL CONVERSATIONS ABOUT SEXUAL VIOLENCE ON UNIVERSITY CAMPUSES: NEW CHALLENGES, NOVEL SOLUTIONS (Diane Crocker, Joanne Minaker & Amanda Nelund eds., 2019) [under assessment].

teristic of rights-based adjudication in the liberal legal system.[83] There is a "fixed pie" of resources to be divided under law. What one party gains, the other party must lose.[84]

Integrative bargaining, by contrast, is the same basic strategy that Menkel-Meadow defines above in which the parties attempt to identify their underlying interests and brainstorm creative options to "expand the pie" of available resources in a more collaborative process.[85] It follows that strong assertions of identity may be inessential to the proper function of integrative bargaining, which is a strategy expressly designed, if not always explicitly undertaken for the purpose of looking beyond the binary structure of "right/no right" to find something that feels better for both.[86] Strong assertions of identity may even be counterproductive to the kind of experimentation and free play of desires that is possible outside the formal law, once the shackles of the parties' psychic attachments to identity and need for political recognition have been removed.

Recall our example of the two separating spouses from Mnookin and Kornhauser. The mother was willing to concede parenting time in order to obtain financial support from the father *regardless* of the mother's potential claims to sole custody, crucially, which derived in her constructed identity as a mother under the tender years doctrine. The mother's interests signified nothing "real" or "essential" about the mother's correspondence with the sex-based stereotype, reflected by the law itself, that mothers should remain the primary caregivers of their minor children in the event of marriage breakdown. These interests would appear to be compatible with the father's interests in fostering an ongoing relationship with the mother and providing for children's well-being through a joint custody arrangement. It follows that the spouses would likely benefit from an integrative bargaining process in this case because the mother and father could exchange information about their personal preferences and reach an agreement on joint custody that pleased them both.[87] One can easily imagine that the mother's interests might change in the negotiation, however, if the

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83 *See generally* Hohfeld, *supra* note 12.

84 For more on distributive and integrative bargaining, see generally FISHER ET AL., *supra* note 30; Menkel-Meadow, *supra* note 8; Colleen M. Hanycz, *Introduction to the Negotiation Process Model*, *in* THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION (Colleen M. Hanycz, Trevor C.W. Farrow & Frederick H. Zemans eds., 2008).

85 FISHER ET AL., *supra* note 30 and accompanying text.

86 *See supra* note 84.

87 Credit to Joe Fischel for making the perfectly queer observation that under my lights, the mother and father, while separated and presumably not having sex any longer, are having sex

father adopted a particularly aggressive tone or the children expressed a clear preference for living with the mother. There may be no single, straightforward, or even logical reason for the change in interests. It might be strategically advisable or simply feel better for the parties to reassess their interests and recalibrate their approach to the negotiation in such a case.[88]

I would extend the analogy between settlement and sex one step further. Consensual dispute resolution is an "alternative dispute resolution" practice in relation to the liberal legalism of rights, not unlike how consensual sex between LGBTQ2 people is a non-normative sexual practice in relation to mainstream sexual culture. As an "alternative" legal form, consensual dispute resolution has been historically marginalized by liberal legal scholars who have sought to limit and altogether ban its use in certain classes of cases altogether, not unlike how the practice of consensual sex between LGBTQ2 people has been historically marginalized in law and society.[89] Many of these efforts to limit or ban consensual dispute resolution have turned on the classic liberal concern that the "public" value of rights claims should override the parties' "private" interests in resolving disputes through a consensual process, although legal scholars may characterize that value differently in making this assessment.[90]

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again through the settlement process at least. Statement by Joseph Fischel (personal email correspondence on Dec. 25, 2018).

88 Consider the mother's bargaining strategy if she became primarily interested in obtaining more parenting time rather than less. She might obviously choose to proceed otherwise, but the traditional view in this case is that the mother would likely benefit from a distributive bargaining process in which the mother claimed her presumptive "right" to sole custody and the father's corresponding "no right" under the tender years doctrine. This strategy could very well lead to an agreement that replicated the parties' expected outcome at trial because the negotiation would have transformed, in effect, into a zero-sum game in which one party, the father, must leave the negotiation with his preferences unsatisfied by law.

89 Canadian law prohibited homosexual acts between consenting adults until 1968. *See* Criminal Law Amendment Act, S.C. 1968–69, c. 38, s 7.

90 The practice of consensual dispute resolution has been variously critiqued by legal scholars of all stripes. For seminal arguments that replicate forms of this so-called "social change" critique of consensual dispute resolution, see, for example, THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE (Richard Abel ed., 1982); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Rifkin, *supra* note 26; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form*

Most famously, Owen Fiss argues in his seminal article *Against Settlement* that consensual dispute resolution should not be made available on a wholesale or indiscriminate basis in light of the public purpose of court judgments to recognize and interpret the rights embodied in authoritative legal texts, the importance of which will transcend the terms of any private agreement between parties.[91] Fiss is careful to explain that parties should never be compelled to litigate, but simply that "when parties settle, society gets less than what appears, and for a price it does not know it is paying."[92] This effectively restates one of the primary justifications for the liberal legalism of rights. That is, rights are the vanguard of procedural justice in the collective good, which the state is morally obligated to enforce in the wake of neoliberal pressure to replace the state with self-interested market actors who might "settle," as the term implies, for something less than what the law requires.[93] As Fiss puts it, "civil litigation is an institutional arrangement for using

Dispute Ideology, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670 (2001).

For an example of a ban on the use of consensual dispute resolution that is currently in force, see *Programs and Services*, PROVINCE OF NOVA SCOTIA, https://novascotia.ca/just/RJ/program.asp (last visited Nov. 10, 2018) (providing a moratorium on the referral of sexual assault cases to the province's restorative justice program unless the defendant has been found guilty); Amanda Nelund, *Policy Conflict: Women's Groups and Institutionalized Restorative Justice*, 26 CRIM. JUST. POL'Y REV. 65 (2015) (tracing the origins of the moratorium on the use of restorative justice in sexual assault cases in Nova Scotia to radical feminist advocacy).

For an example of a similar ban that is no longer in force, see Russlynn Ali, U.S. Dep't of Educ., Dear Colleague Letter 8 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (prohibiting the use of mediation by U.S. colleges and universities in resolving complaints of campus sexual assault under Title IX). This guidance to schools was rescinded in September 2017. *See* Candice Jackson, U.S. Dep't of Educ., Dear Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf. For the text of Title IX, see 20 U.S.C. §§ 1681–1688 (1988) and its implementing regulations, 34 C.F.R. §106. I have argued elsewhere that such efforts to limit the availability of consensual dispute resolution in campus sexual violence cases may be traced to radical feminism, contributing to what I call the "return of the sex wars" at colleges and universities. Del Gobbo, *supra* note 82.

91 Fiss, *supra* note 90, at 1075. The influence of *Against Settlement* is confirmed by reports that it is one of the most cited American law review articles of all time, and the single most cited article that relates primarily to "legal ethics and the legal profession." *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489, 1501 (2012). For more recent updates on Fiss's argument, see, for example, Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution*, 88 KENTUCKY L. REV. 183 (2000); Eric S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945 (2010); FARROW, *supra* note 28.

92 Fiss, *supra* note 90, at 1085.

93 *See generally* Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

state power to bring a recalcitrant reality closer to our chosen ideals."[94]

I would think the ethic of positivity would be highly skeptical of, if not categorically opposed to any institutional arrangement for using state power to bring the desires of the subject closer to anyone else's chosen ideals. Queer sexuality is recalcitrant by its nature. Its ability to resist collective control may be precisely what gives it its ethical significance.[95] And yet, Fiss would appear to privilege the collective's authority to such an extent that it should override the subject's authority over the legitimacy of their own interests, which become sexually "perverse" when they challenge the orthodoxy of the liberal legalism of rights. Imagine telling the mother in our example that the mere fact of her presumptive right to sole custody under the tender years doctrine, which she has never asserted in court, should override her countervailing interests in obtaining more financial support and conceding parenting time to the father because the state has effectively substituted its personal preferences for her own. In this way, the case "against settlement" may be read as judicial paternalism that is effectively operating as a form of conservative sexual morality. Adjudication is "good process" and settlement is "bad process," like good sex and bad sex, in which the privileging of rights over interests in liberal legal theory is a homophobic and heterosexist distinction that undermines the dignity of individuals whose choices fall outside the procedural justice paradigm.[96] This is the ethical promise of settlement. It articulates a field of substantive justice that is stubbornly desired by the subject despite, and perhaps because of, the pressures of normative sociality that would seek to repress it.[97]

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94 Fiss, *supra* note 90, at 1089. Fiss has made the same basic argument about the primacy of right-based adjudication over interests-based dispute resolution elsewhere. *See* Owen M. Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982).

95 As Mari Ruti explains, "desire in its unshackled form—eros as the kind of drive that resists collective control—is one of the most antinormative forces under the sun." RUTI, *supra* note 72, at 23.

96 Rubin, *supra* note 71.

97 For another application of the ethic of positivity to critique the tenets of liberal legalism, see Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 163 (2014) ("Sex positivity may also highlight some of the limits of criminal law in preventing rape. This is because sex positivity requires a more honest conversation about how individuals think about and engage in sex and how assumptions about sex and sexuality contribute to the problem of rape. Such a conversation must include an analysis of the deeper social, cultural, and economic drivers of rape."). For more general arguments in favour of an affirmative legal theory of sexual desire, see Franke, *supra* note 63; Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847 (2004).

To be clear, what I find most problematic about the case "against settlement" is its attempt to wield the institutional power of the state to enforce its vision of the public's values unilaterally from the top-down, at the expense of the subject's own private and potentially queer interests in resolving their disputes through a consensual process, which interests are presumptively delegitimized *despite being mutually held by the parties to the process*.[98] I am less offended by the basic premise that there needs to be some public constraint on the exercise of private interests in sex and settlement. Otherwise, we might live in a world in which those interests would be entirely free to roam and potentially hurt other people. This raises difficult questions in light of my critique of liberal legalism above. What are the ethical limits of non-normative sexual desire? Should the ethic of positivity be applied to prevent *any* attempt at regulating sex or settlement as ethically suspect from a queer theoretical perspective?

The trouble with this conception becomes apparent, I think, once we try and extend its reasoning to the "hard case" of sexual harm. As I explain in the next section, there is an ethical tension in queer theory here, which suggests that the ethic of positivity requires an important qualification that helps us to understand the proper role of law—and specifically, the legal doctrine of consent—as a moderating force in our social lives.

IV. Harmful Subjects: The Shift from Desires to Rights and Back Again

Queer theory, and post-identitarian queer theory in particular, has had an ethically vexed and at times incoherent response to the issue of sexual harm. There are at least two competing tendencies within queer theory that are relevant to this issue. The first tendency is a long-standing, pro-sex opposition to conservative moralistic approaches to sexual regulation that are primarily or exclusively harm-based. The second tendency is a "left" political commitment to promoting substantive egalitarianism by reducing the incidence of violence, both sexual and otherwise, which is suffered by LGBTQ2 people and other historically marginalized groups in the real world.

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[98] Likewise, what I find most problematic about the case "against queer sex" is its attempt to wield the institutional power of the state to enforce its vision of the public's values unilaterally from the top-down by punishing LGBTQ2 people's interests in having consensual sex.

As we have seen, there is a strand of thinking in post-identitarian queer theory that is deeply resistant to normative claims that anyone's sexuality is intrinsically harmful, exploitative, morally bankrupt, or otherwise requiring social transformation to meet the demands of other people.[99] It begins with the ethic of positivity's strong and principled affirmation of non-normative sexual desire. The ethic would seem to hold firm in situations where the subject's sexual preferences may reproduce the tropes of gender hierarchy, for instance, in rape fantasies, sadomasochistic sex, or violent pornography, say, even where those preferences threaten to harm the self or others by intermingling feelings of pleasure with pain, abjection, disgust, and expulsion, whether on a consensual basis or not.

There may be good reasons for supporting this ethical stance. Recent history has shown that many claims of sexual harm are overdetermined and overdrawn, often motivated by fear, homophobia, racial animus, and other social and cultural biases about non-normative sex. These claims have lent themselves to criminal prohibitions and other law enforcement strategies that continue to actively and disproportionately target LGBTQ2 people and other historically marginalized groups in the carceral state.[100] Additionally, many of these claims have replicated the forms of respectability politics by advancing an image of the more socially-acceptable, law-abiding, model "queer" citizen that is highly exclusionary of non-normative sexual identities and experiences. This image has helped to substantiate, in turn, a fundamentally conservative sexual morality that privileges homonormative gays and lesbians at the expense of the most vulnerable members of LGBTQ2 communities, particularly those who dwell at the intersection of multiple systems of oppression.[101] And finally, it may be extremely difficult, if not impossible for many claimants to "know" the "reality" of sexual harm—and for law and policymakers to reg-

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[99] For a survey of recent arguments in queer theory, many of which may be said to embrace the politics of anti-normativity, including anti-"left" political normativity, in the wake of the neoliberal imperatives of futurism and progress, see RUTI, *supra* note 72, at 13–43.

[100] *See supra* note 98 and accompanying text. For illustrations of this charge, see BRENDA COSSMAN ET AL., BAD ATTITUDES ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE *Butler* Decision (1997); UMMNI KHAN, VICARIOUS KINKS: S/M IN THE SOCIO-LEGAL IMAGINARY (2014).

[101] *See* Cossman, *supra* note 63, at 247–48 ("The new legal subject is a familialized subject. The new lesbian and gay subject lives in a monogamous and respectable relationship with responsibilities of mutual care and commitment. . . . The new legal subject is not the erotically charged subject of the gay bars and bathhouses who remains a sexual outlaw. The inclusion of gay and lesbian subjects into law is being regulated at its margins to ensure that the "others"—the sexually promiscuous, sexually public, and sexually non-monogamous—remain outlaws.").

ulate sexuality on the basis of that "reality"—so long as we recognize that sexual pleasure sometimes takes the form of danger.[102] According to Janet Halley, the more ethically positive and post-identitarian approach is to understand claims of sexual harm discursively, as relating to an ever-shifting circuit of representational states of being, as "*effects* in a sexual semiosis that is pervasively riven with paradox and knowable only through the murky epistemes of desire and politics."[103]

At the same time, Halley suggests that most of queer theory, including post-identitarian queer theory, wants to be politically engaged toward the "left."[104] Writing with Wendy Brown, Halley offers the following definition of left oriented projects: "Left analysis takes its bearing from what it conceives the liberal formulation of justice to elide, as well as from a different version of justice itself. Thus, a left political orientation begins with a critique—not necessarily a rejection—of liberalism itself as well as an explicit focus on the *social powers* producing and stratifying subjects that liberalism largely ignores."[105]

I have observed that this left political focus supports a broad range of normative commitments within parts of queer theory, including the promotion of substantive egalitarianism through the transformation of social structures—gender hierarchy, capitalist accumulation, white supremacy, the military industrial complex, settler colonialism, *etc.*—which produce systemic inequality and foster the conditions for violence to occur in the real world. Some left queer theorists simply assume that claims of sexual harm are true in their work, while some others provide a detailed account of how and why these claims are true, but without necessarily prescribing, in either case, what should be done about it in any concrete sense.[106] Yet some other left queer theorists purport to do just that, to prescribe a concrete program in law or policy to redress the fact of sexual harm, but with a wary eye, typically, to the risk of

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102 Halley, *supra* note 65, at 37–38; VANCE, *supra* note 79.

103 Halley, *supra* note 65, at 38 (emphasis in original).

104 *Id.* at 52–53.

105 Brown & Halley, *supra* note 14, at 6 (emphasis in original).

106 It is almost as if clandestine normativity resides behind every seemingly non-normative stance. RUTI, *supra* note 72, at 39. Consider, for example, how Leo Bersani simply assumes the baseline fact of social inequality to be true in his work. BERSANI, *supra* note 63, at 28 ("While it is undeniably right to speak . . . of the ideologically organizing force of sexuality, it is quite another thing to suggest . . . that sexual inequalities are predominantly, perhaps exclusively, displaced social inequalities."). However, Bersani explains at much greater length why the baseline fact of sexual inequality is true, particularly as it relates to gay men and other people living with HIV/AIDS, earlier in the same essay.

cooptation by the social structures that it is trying to resist. Faced with the complexity of post-identitarian views, Halley suggests that all of this work may invoke what Duncan Kennedy has described as "decisionism" in the legal context.[107] That is an analytic matrix in which left queer theorists are forced to make decisions that are consistent with their broader left political instincts, often unwillingly or begrudgingly, without "knowing" how their decisions will play out with any certainty in light of the ethical tension in queer theory that remains.[108]

I think that we might summarize the issue in ethical tension as this. *If the subject's sexual desires can become fixated on a wide range of object-choices, it follows that this can include choices to harm other people against their will. This harm would contradict the mission of substantive egalitarianism*. Menon raises a similar issue in the opening quote: "It would thus be a mistake to assume that desire is simply liberatory and that an indifferent desire will always be radical. If anything, the most characteristic feature of desire is that one cannot know what it will do."[109] Accordingly, Menon argues that sexual desire cannot be used to support an ontological notion of gender and sexual identity.[110] Desire is always moving, which explains why it is irrationally indifferent to the reality of sexual harm. It can underwrite politics on the left—consider measures that promote a more democratically hedonic sexual culture, like comprehensive sex education[111]—just as easily as it can underwrite politics on the right—consider arguments in favour of same-sex marriage that celebrate the respectability of white, mo-

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107 Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1161–69 (2001), *cited in* Halley, *supra* note 65, at 38.

108 *Id*.

109 MENON, *supra* note 2.

110 The origins of the idea that sexual desire is an objectifying power which deprives the object of its subjectivity may be traced to Kant. *See* Barbara Herman, *Could it be Worth Thinking About Kant on Sex and Marriage?*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY (Louise Antony & Charlotte Witt eds., 1993); NUSSBAUM, *supra* note 14, at 224 ("The [Kantian] idea seems to be that sexual desire and pleasure cause very acute forms of sensation in a person's own body; that these sensations drive out, for a time, all other thoughts, including the thoughts of respect for humanity that are characteristic of the moral attitude to persons."). Nussbaum suggests that Kant may have overstated his argument on this point because certain kinds of sexual objectification and surrender may be meaningful expressions of sexual autonomy for women. NUSSBAUM, *supra* note 14, at 231.

111 JOSEPH J. FISCHEL, SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE 169 (2019). *See also* ALFRED VERNACCHIO, FOR GOODNESS SEX: CHANGING THE WAY WE TALK TO TEENS ABOUT SEXUALITY, VALUES, AND HEALTH (2014).

nogamous, gay male love.[112] In Menon's view, "it is precisely this unpredictability that makes it impossible to harness desire for prescriptive use," whether on the left or the right, in any kind of reliable or consistent way.[113]

While the task of harnessing our desires may be impossible, I am not yet convinced that it is strategically inadvisable to try. On a personal level, this is where my left political outrage about the truth of sexual harm feels more urgent, somehow, than the radical appeal of deconstructing the "truth" of sexual harm in the name of the ethic of positivity alone. For all of its transgressive premises, I fear that some post-identitarian queer work done under the banner of positivity has fallen into the epistemic trap of doing what Robin West and other feminist legal theorists have criticized Halley's own work for doing.[114] That is "assuming no harm" as an interpretive construct, or perhaps more accurately assuming that sexual harm is speculative, immaterial, worth celebrating for its own sake, or articulable in no other way than the missed opportunity for pleasure, notwithstanding the evidence of many historically marginalized groups, particularly women, who continue to report their lived experiences of sexual harm as unwanted and profoundly damaging.[115] This is not to say that I agree with West's criticism of Halley's work in particular or believe it should be leveled against queer theory as a whole,[116] but simply that it helps to support my view of the limits of the ethic of positivity from a left political perspective. There must be something in ethics, external to the self, which can act as a check on the potential violences of desire in the social world.

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112 For critiques of queer respectability politics in the context of same-sex marriage debates, see, for example, WARNER, *supra* note 70, at 81; MUÑOZ, *supra* note 7, at 20; ENG, *supra* note 63, at 26–31; RUTI, *supra* note 72, at 13–27.

113 MENON, *supra* note 2, at 19.

114 *See generally* Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006); Mary Anne Franks, *What's Left of Pleasure?*, 30 HARV. J.L. & GENDER 257 (2007); Shannon Gilreath, *A Feminist Agenda for Gay Men (Or: Catharine MacKinnon and the Invention of a Sex-Based Hope)*, 35 LAW & INEQ. 289 (2017).

115 West, *id.*, at 4; Franks, *id.*, at 263; Gilreath, *id*., at 294.

116 Robin West, Shannon Gilreath, Marc Spindelman, and other writers have criticized what they understand to be the conceptual underpinnings of "queer theory" in several articles. *See, e.g.*, West, *supra* notes 14 and 114; Gilreath, *id.*, Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER L. 1 (2004); Marc Spindelman, *Sexuality's Law*, 24 COLUM. J. GENDER L. 87 (2013) [hereinafter Spindelman, *Sexuality's Law*]. These efforts reduce queer theory to a caricature of principles, which may or may not be demonstrated by the work of a limited number of theorists, most often Janet Halley and Vicki Schultz, whom these writers cite as representative of the field. These efforts also fail to capture the incredible range of theoretical work, both inside and outside of the legal academy, which may be considered "queer." *See infra* note 117.

Consider the alternative. It would mean that the ethic of positivity should apply absolutely, as a kind of solipsistic relativism which finds value in sexual conduct that harms other people against their will—most notably, rape—so long as that conduct is stubbornly desired by the subject.[117] Such forms of acute, highly-visible, and unwilling traumatization may be the hardest type of "hard case" for the ethic of positivity to understand and reconcile on its own.[118] Even Rubin admitted as much in her critique of good sex and bad sex, which was levelled at forms of hierarchical valuation, crucially, within the ambit of consensual sex alone.[119] Rubin writes that "rape law," unlike sodomy law, "is based on the assumption, correct in my view, that heterosexual activity may be freely chosen or forcibly coerced. One has the legal right to engage in heterosexual behaviour *so long as it . . . is agreeable to both parties*."[120] I think this means that sexual desires are not intrinsically ethical prior to or beyond social regulation, and that they only be-

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117 Marc Spindelman calls this view the "ideology of sexual freedom," which he believes to characterize much of contemporary queer theory and queer life. Spindelman suggests that the pervasiveness of this ideology in legal culture has led to seriously injurious and deadly consequences for gay male sexuality in the form of HIV/AIDS. Spindelman, *Sexuality's Law*, *supra* note 116. Spindelman's claims are unpersuasive, among other reasons, because they figure HIV/AIDS in a fearful, regressive, and panicky way. *See* JOSEPH J. FISCHEL, SEX AND HARM IN THE AGE OF CONSENT 209–12 (2016). On the level of ethics, Spindelman's position rehearses a critique of what is known as subjective ethical relativism or "subjectivism," although Spindelman never explicitly frames his argument in this particular light. Subjective ethical relativism may be distinguished from conventional ethical relativism or "conventionalism," which holds that moral principles are justified not by virtue of their acceptance by the individual subject (the solipsistic position), but by virtue of their cultural acceptance. *See generally* JOHN LADD, ETHICAL RELATIVISM (1973); PAUL K. MOSER & THOMAS L. CARSON EDS., MORAL RELATIVISM: A READER (2001).

118 I expect that some queer theorists may disagree with this point on account of their treatment of sexual abjection as more than something which needs to be described, but something which needs to be *achieved* by the self and others as an ethical counter to the impossible demands of autonomy under neoliberalism. I believe that Jack Halberstam's promotion of female self-cutting as a means to achieve "female unbecoming" in the wake of heteropatriarchy may be classified as such, a position that I find troubling. *See* JUDITH HALBERSTAM, THE QUEER ART OF FAILURE 135 (2011). To be clear, I believe the ethical calculus is different in cases that feature more acute forms of sexual harm (e.g., rape) and cases that feature more quotidian forms of harm (e.g., the "bad feelings" of affect theory as a reality of biopower). Both may be subject to legal regulation, although it is more difficult to conceive what a sex-positive law that protects against the latter might look like.

119 Rubin does not resist the regulation of non-consensual sex as "bad sex." Rubin, *supra* note 71, at 165 ("My discussion of sex law does not apply to laws against sexual coercion, sexual assault, or rape. It does pertain to the myriad prohibitions on consensual sex and the 'status' offences such as statutory rape.").

120 Rubin, *supra* note 71, at 168. Rubin's position is not uncontested within queer theory. *See* FISCHEL, *supra* note 117, at 41–47.

come ethical once they are instrumentalized in a manner that respects the desires of the other.

If this reasoning is correct, then I understand it to refine historical and prevailing arguments that settlement, likewise, is an intrinsically ethical practice. This includes arguments from political theory that settlement can provide increased access to justice,[121] arguments from cultural feminist theory that settlement can transform the masculinist nature of the adversarial system for the better,[122] and arguments from economic theory that settlement can facilitate the more efficient distribution of resources between the parties as necessary facts.[123] Again, the alternative would mean that the ethic of positivity should apply absolutely to condemn *any* attempts at regulating negotiation behavior as ethically "negative," likely homophobic and heterosexist, and therefore potentially problematic from a queer theoretical perspective. It would mean that settlement, like sex, would always be psychically or politically good. This cannot be right because the practice of settlement can harm other people against their will.

Let us return to the example of the two separating spouses. One can easily imagine a father, unfortunately, who routinely abuses the mother and pressures her to agree on joint custody terms under conditions of extreme duress, regardless of any harm to the mother or their children, in order to satisfy his primary interest in maintaining "coercive control" over her.[124] The father's conduct is made possible in this case because consensual dispute resolution may fall outside the reach of public scrutiny by lawyers and judges who are charged with maintaining formal equality of stature between the parties in a courtroom setting.[125] As these

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121 *See generally* FARROW, *supra* note 28, at 212–18.

122 *See, e.g.*, Menkel-Meadow, *supra* note 13. For a critique of cultural feminist arguments about the role of gender in principled negotiation, see Del Gobbo, *supra* note 6.

123 *See generally* FARROW, *supra* note 28, at 203–12. Roger Fisher and William Ury make a similar point in *Getting to Yes*, which they explicitly characterize as a "book on how to do well in a negotiation," not a "sermon on the morality of right and wrong." The authors continue: "We do not suggest that you should be good for the sake of being good (nor do we discourage it)." FISHER ET AL., *supra* note 30, at 154.

124 *See* Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty* at 7, http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf (defining "coercive control" as "an ongoing pattern of domination by which male abusive partners, primarily interweave physical and sexual violation with intimidation, sexual degradation, isolation, and control. The primary outcome of coercive control is condition of entrapment that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity.").

125 Delgado et al., *supra* note 90, at 1388–89. I should not be taken as saying that power imbalances between the parties cannot be exacerbated in court and tribunal processes as well,

processes are typically private, less rigidly structured, and may proceed unobserved by legal officials, consensual dispute resolution can be practiced in ways that exacerbate existing power imbalances between the parties. This can render certain parties more vulnerable to harm and exploitation than others.[126] If the ethic of positivity applied absolutely to condemn any attempts at regulating negotiation behavior, then this principle would release the father from any ethical responsibility for inducing the mother to settle on terms against her will, notwithstanding any violation of the mother's autonomy as an embodied moral agent, so long as these actions were stubbornly desired by the father. This would violate fundamental principles in a liberal society. Certainly, I think that settlement *may* be an ethical practice, but only once the subject's interests are similarly instrumentalized, like sex, in a manner that respects the interests of the other.[127]

This reasoning supports what I am calling the "ethic of mutuality" in parts of left queer theory. At a minimum, the ethic of mutuality holds that the parties to sex and settlement must respect the others' autonomy as embodied moral agents to express their desires relatively freely and without undue interference throughout.[128] This ethic has necessary implications for legal theory more

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including in intimate partner violence cases, with extremely harmful consequences. Power imbalances may be exacerbated despite—and sometimes because of—the continuous involvement of lawyers and judges in courtroom settings. A principled inquiry into whether certain kinds of legal processes are better or worse at power balancing than other kinds of legal processes is beyond the scope of this essay.

126 *See infra* notes 131 and 135. For arguments against the use of consensual dispute resolution in intimate partner violence cases, see, for example, Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 96–99 (2001); Susan Landrum, *The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 438–41 (2011).

127 The contrary idea is reflected by Hans Kelsen's theory of legal positivism, where he argued that "the law is a coercive apparatus having in and of itself no political or ethical value, a coercive apparatus whose value depends, rather, on ends that transcend the law *qua* means." HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 31 (Paulson & Paulson trans., 1997), translation of the first edition of REINE RECHTSLEHRE (1934).

128 This owes a credit of inspiration to Carlos Ball, who theorized a similar ethic of mutuality as requiring "respect and concern" for the other as part of what he calls a "gay and lesbian sexual ethic." For Ball, the ethic of mutuality operates alongside gay and lesbian sexual ethics of "openness" and "pleasure." BALL, *supra* note 12, at 208–12. *See also* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 836–38 (1988) (arguing for a mutuality standard in the law of consent to sex). I am not the first person to propose something resembling an ethic of mutuality in the dispute resolution context, as Jonathan Cohen may have done so most explicitly in his calls for an "ethic of respect" in legal negotiation practice, albeit without engaging with feminist and queer theories of sexuality or

broadly, given that the practices of sex and settlement are situated within a socio-cultural framework that is imbricated with formal legal norms.[129] Most apparently, the ethic may have a natural relationship, paradoxically, with the liberal legalism of rights. Chief among them is the right to self-determination, which implies a range of procedural justice and substantive justice guarantees that currently find elaboration—for better or for worse—in the legal doctrine of consent.

The basic principles of consent are similar in the sex and settlement contexts.[130] At a high level of generality, the parties must voluntarily agree on any process that is chosen and any conclusion that is reached for the arrangement to be legal. The parties should be provided with any relevant information necessary to make informed decisions for themselves. And crucially, there must be an approximate balance of power between the parties at all times because otherwise it may be impossible to maintain the integrity of the process, prevent bad faith and unconscionable agreements, and keep the parties safe.[131] As a matter of law at least, consent to sex

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attempting to respond to critiques of consent as I have. Jonathan R. Cohen, *The Ethics of Respect in Negotiation*, 18 NEGOT. J. 115 (2002).

129 *See* Rubin, *supra* note 71, at 165 (describing the law as an instrument of sexual stratification); BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 15–17 (2007) (tracing the role of law and legal discourse in modes of sexual governance).

130 As I say, the basic principles of the legal doctrine of consent are similar in the sex and settlement contexts, but not the same. For expositions of the doctrine, see *infra* note 131; Spence, *supra* note 73, at 70–78 (exploring similarities and differences between contract and sex as well as between unlawful contract and rape). There is considerable disagreement in the literature about the precise meaning of consent to sex. *See* Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016).

131 In the context of sexuality, the criminal law provides that no consent to sexual activity is obtained when "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority." *See* Criminal Code, R.S.C. 1985, c. C-46, s 273.1(2)(c). *See also* Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395 (2012). For expositions of the theory behind this doctrine, see generally DAVID ARCHARD, SEXUAL CONSENT (1998); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003); Elaine Craig, *Capacity to Consent to Sexual Risk*, 17 NEW CRIM. L. REV. 103 (2014); FISCHEL, *supra* note 117.

In the context of settlement, the common law doctrines of bad faith, undue influence, unconscionability, and duress are intended to prevent one party from taking improper advantage of another party in contractual relations, typically through the exercise of power imbalance. *See Bhasin v. Hrynew*, 3 S.C.R. 494 (2014), paras. 43–44. For expositions of the theory behind this doctrine, see generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Jacqueline M. Nolan-Haley, *Informed Consent in Media-*

and settlement is possible to achieve and the ethic of mutuality may be satisfied when these baseline requirements are met.

Now, I realize that consent is an imperfect solution to the ethical quandary. Most of post-identitarian queer theory, like nearly all of post-structuralist theory, has despised the "myth" of individual autonomy as a signifier of neoliberal subjectivity.[132] The most ubiquitous criticism is that the notion of autonomy presupposes the undifferentiated, rational, and self-maximizing actor of liberal political philosophy, which is an historical abstraction that has clearly eluded the grasp of many precariously situated, flesh-and-blood subjects.[133] As Joseph Fischel puts it, this historical abstraction has arguably been lived by nobody.[134] Accounting for this fact, the critical legal scholarship is rife with critiques of consent as a liberal autonomy-based conception.[135]

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tion: A Guiding Principle for Truly Educated Decisionmaking, 74 NOTRE DAME L. REV. 775 (1999); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002); Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELBOURNE U. L. REV. 179 (2005); Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT (Franklin G. Miller & Alan Wertheimer eds., 2010).

132 RUTI, *supra* note 72, at 9.

133 *Id. See also* Nedelsky, *Reconceiving Autonomy*, *supra* note 14, at 8–10; SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS 161–68, 170 (1992); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 238 (2004).

134 Statement by Joseph Fischel (personal email correspondence on Dec. 25, 2018).

135 For critiques of consent in the context of sexuality, see, for example, Popkin, *supra* note 73; WERTHEIMER, *supra* note 131; Martha Nussbaum, *Objectification*, 24 PHILOSOPHY AND PUBLIC AFFAIRS 249 (1995); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998); NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY (1998); JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY (2005); Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935 (2005) (book review); Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515 (2006); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013); Robin West, *Sex, Law and Consent, in* MILLER & WERTHEIMER EDS., *supra* note 131; Tanya Palmer, *Distinguishing Sex from Sexual Violation: Consent, Negotiation, and Freedom to Negotiate*, *in* CONSENT: DOMESTIC AND COMPARATIVE PERSPECTIVES (Alan Reed et al. eds., 2017); Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. L. EDUC. 804 (2017). There is a metacritique of this scholarship for reducing sexual autonomy to sexual consent, which arguably renders large classes of individuals, notably persons with disabilities, unfit and ineligible to exercise sexual autonomy or sexual consent. *See* Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 482 (2016).

For critiques of consent in the context of settlement, see, for example, Fiss, *supra* note 90; Delgado et al., *supra* note 90, at 1403–04; Grillo, *supra* note 90, at 1605–07; Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49, 50 (2002).

The strongest critique of consent may be found in parts of radical feminism,[136] critical legal studies,[137] and queer theory[138] which understand the forces of male dominance, capitalism, and homonormativity, respectively, to operate structurally, such that the reality of the subordinated subject's position is one of pervasive powerlessness to the systems that oppress them. The argument goes something like this. In many liberal discourses, consent is treated as equivalent to the subject's individual freedom to choose mutually desirable, reciprocal social relations on terms of formal equality.[139] However, consent routinely coexists with various forms of physical and non-physical coercion that renders the subject's consent meaningless in practice when acquiescence to the agreement is the only realistic option for survival or, even more troublingly, the product of "false consciousness."[140] This means that the subject's claims to consent are untrustworthy if they eroticize and recapitulate these structures of domination in society, in which consent would function, in effect, as a form of official legal cover for a wide range of intrinsically harmful activity.[141]

One of my problems with this argument is that it suggests a one-way, top-down transfer of structural power. I expect that whenever one party appears to occupy a more dominant position than another, it may be tempting to assume that structural power dynamics allow the more dominant party to fully control the exchange and render the weaker party a passive and debilitated "vic-

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136 *See, e.g.*, MacKinnon, *supra* note 59; Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]; Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431 (2016).

137 *See, e.g.*, Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1983); Dalton, *supra* note 73; Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

138 *See, e.g.*, Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, *in* BROWN & HALLEY EDS., *supra* note 14; Leticia Sabsay, *The Ruse of Sexual Freedom: Neoliberalism, Self-Ownership, and Commercial Sex*, *in* GLOBAL JUSTICE AND DESIRE: QUEERING ECONOMY (Nikita Dhawan et al. eds., 2015); FISCHEL, *supra* note 117.

139 *See, e.g.*, MACKINNON, FEMINISM UNMODIFIED, *supra* note 136, at 32–34.

140 *See, e.g.*, *id.* at 7.

141 *See, e.g.*, *id.* at 54. *See also* Catharine A. MacKinnon, *Rape: On Coercion and Consent*, *in* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 136.

tim" through the exercise of coercive force.[142] This view may be supported by the facts of some cases—as I have intimated above, cases of intimate partner violence in which one partner exerts "coercive control" over the other might fall into this category—but I would argue that this view is also being "paranoid" about the methodologies of structural power by reading against the fact that power operates in more complex, diffuse, and potentially productive ways than vertical hierarchy alone.[143] Fischel makes a similar point: "Status and power . . . are not synonyms. Power inequality can in no simple way be inferred from status difference, and sex and desire scramble any orderly accounting of who is dependent on whom, or who is vulnerable."[144] There is no single site of domination that reduces any subject, even the most precariously situated subject, to the victimhood of their theorized position as a necessary fact. As Michel Foucault has theorized, power operates simultaneously on both the vertical and horizontal planes, through the exercise of coercive force, biopolitical control, and other technologies of normalization which capacitate all of our desires, albeit differentially, in an ongoing process of becoming.[145] This means that the effects of structural power may be inadequate for understanding the possibilities of human agency under conditions of constraint.

We can illustrate these possibilities by reference to the legal realist concept of "background rules." The concept was propagated by Mnookin and Kornhauser's path-breaking description of "bargaining in the shadow of the law," which captures the insight that differently interested parties will negotiate agreements in polycentric decision-making contexts that are informed by the parties' interface with relevant rules, standards, and conditions looming in the background.[146] Duncan Kennedy explains it clearly:

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142 According to radical feminist theory, this passive and debilitated "victim" is also rendered female or feminine by the exercise of structural power. *See, e.g.*, Mary Anne Franks, *How to Feel Like a Woman, or Why Punishment is a Drag*, 61 UCLA L. REV. 566 (2014) (explaining that according to Catharine MacKinnon's theory, sexual assault between men entails the "feminization" of the male victim).

143 *See* Eve Kosofsky Sedgwick, *Paranoid Reading and Reparative Reading, or, You're So Paranoid You Probably Think This Introduction is About You*, *in* NOVEL GAZING: QUEER READINGS IN FICTION (Eve Kosofsky Sedgwick ed., 1997).

144 FISCHEL, *supra* note 111, at 209, n.28 (emphasis removed).

145 MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27 (Alan Sheridan trans., 1977) ("There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not pre-suppose and constitute at the same time power relations.").

146 Mnookin & Kornhauser, *supra* note 34. For the origins of this insight, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (iden-

> [W]e do not assume that the legal system as a whole deliberately decrees one thing or another. . . . Rather, we conceptualize the network [of formal and informal regulations] as providing background rules that constitute the actors, by granting them all kinds of powers under all kinds of limitations, and then regulating interactions between actors by banning and permitting, encouraging and discouraging particular tactics of particular actors in particular circumstances.[147]

Mnookin and Kornhauser apply this theory to the case of divorce, where issues of custody and support are negotiated in the shadow of the "best interests of the child" standard and no longer the tender years doctrine as these issues once were. Reconsider our example of the two separating spouses in light of this change. Mnookin and Kornhauser explain that because the "best interests of the child" standard is a discretionary standard and not a black letter rule, the mother and father have very little guidance as to which spouse's rights will prevail in court.[148] To borrow a term from *Getting to Yes*, because the spouses may feel that their "best alternatives to a negotiated agreement" or BATNAs have been weakened or made less predictable by a formal legal process in which the outcomes cannot be determined *a priori*, they consent to a settlement based on their calculations of the expected outcomes of the bargaining process instead.[149] These calculations are based on a number of relational factors, including the spouses' interests in resolving the dispute, the bargaining endowments created by relative strength of their BATNAs, the spouses' ability to absorb transaction costs, individual attitudes toward risk and uncertainty, and the spouses' strategic negotiation behavior.[150] These relational factors will operate against the backdrop of the "best interests of the child" standard and other relevant background rules in the

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tifying the background rules that help to explain labourers' wages under *laissez-faire* economics); Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 323–44 (1973) (arguing that the state is implicated in the outcomes of settlements by using force to ensure obedience with background rules). For more general elucidations of this theory, see Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 328 (1991); Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. HUM. RTS. 403, 443–48 (2010); Janet Halley, *Distribution and Decision: Assessing Governance Feminism*, *in* HALLEY ET AL., *supra* note 14, at 259–62.

147 Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis*, 4 J.L. SOC'Y 71, 80 (2002).

148 Mnookin & Kornhauser, *supra* note 34, at 955–56.

149 FISHER ET AL., *supra* note 30, at 97–106.

150 Mnookin & Kornhauser, *supra* note 34, at 966–73.

spouses' lives, which will vary from family-to-family depending on the circumstances.[151] As a negotiation tactic, the spouses might try to leverage or even break these background rules if it advances their bargaining strategy in a given moment.[152]

Consider the mother who provides an anonymous tip to social security administrators that they should investigate the father for making a fraudulent insurance claim. Consider the mother who leaves her job and stops paying the monthly bills, which plunges the family into debt and requires the father to work overtime in order to compensate for her lost income. Consider the mother who applies for affordable housing on a special priority basis as a person fleeing from intimate partner violence, which leaves the father with the sole responsibility for keeping up the matrimonial home, cooking his own meals, and filling his own prescriptions. Consider the mother who threatens to withdraw her family class visa sponsorship so that the father's immigration status will run out and he will be deported from the country. Consider the mother who calls the police or obtains a restraining order against the father, which prevents him from renewing his professional license or conducting his business in good standing. As these examples illustrate, the relevant background rules in a given family law case may be incredibly wide-ranging. They can include labour and employment conditions, net property division, criminal procedures, access to healthcare, landlord and tenant law, social security, access to educational programs, immigration policy, and legal and professional ethics, to name a few possibilities.[153]

The resulting image that emerges is a more complex picture of juridical subjectivity in action. Power emanates from both the foreground and background rules, from sources of explicit and implicit normativity which structure the parties' incentives and bargaining

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151 *Id.*

152 Halley, *supra* note 146, at 261 (arguing that classic liberal analysis leaves out the possibility that some or all of the players in a legal struggle may break the rules).

153 Commenting on the similarly myriad ways that she believes power to have operated in the context of a relationship between a female graduate student and male university professor, Laura Kipnis claims: "[E]verything I learned about this relationship . . . throws into question all easy assumptions about institutional roles alone determining who has more power in romantic entanglements. . . . [I]t is a well-known fact that if you're in two relationships simultaneously . . . you alter the balance of power in your favor. It's a well-known fact that whoever's more in love has less power. Youth and attractiveness may also offset the weight of institutional standing and higher degrees; so do calculations about who's more likely to end things. LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS 94 (2017). I am less convinced than Kipnis that certain of these propositions are "well-known facts" in all cases, but her general point remains.

endowments relative to one another. If one spouse attempts to exert power over the other spouse, this effort will almost always bring with it some, however limited constraints on the spouse's ability to do so.[154] Both spouses can have at least some impact on the exchange because all of their choices will be enabled and constrained by the other's ability to exert counter-power, albeit differentially again, on account of the effects of state regulation and biopolitical control which inform *both* of their desires and render *both* of them susceptible to mitigating influence in light of the universal failure of unmitigated freedom.[155] This ability to exert counter-power is necessary for the spouses to restrict the terms of others' access within the structural constraints that are incumbent upon both of them, which suggests the possibility, at least, of finding shared interests on which to build common ground.

None of this is to say, of course, that consensual sex and settlement take place on terms of perfect equality. As I have said, the parties should respect the others' autonomy to express their desires "relatively" freely and without "undue" interference throughout the negotiation process. There is no such thing as a purely independent agreement, undelineated by the effects of structural power which inform all of our choices from the bedroom to the boardroom, typically along the lines of identity and difference, in systemically unequal ways. Transforming these structures must remain our priority.[156] But I am unwilling to concede the argument that because these effects of power constitute all human knowledge, the legal imaginary of choice as an ontological condition of our subjectivity is a false consciousness.[157] If the struggle for sexual liberation has taught us anything, it should be possible to theorize the collective impacts of coercion without assuming that individuals are incapable of freedom or moralizing about how that freedom should be used.

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154 The basic legal realist insight that every transaction, even in a free market, contains elements of both coercion and counter-coercion comes from Robert Hale. *See* Hale, *supra* note 146, at 472–73 (explaining how and why "workers can as a rule exert sufficient counter-coercion to limit materially the governing power of the owners").

155 For another take on the universal failure of unmitigated sexual freedom, see MENON, *supra* note 2.

156 *See* Halley, *supra* note 146, at 257 (criticizing liberal legal approaches to formal equality in which the state intervenes to correct an unlawful exercise of coercive force by one party over another, but takes for granted the baseline distribution of life choices between the parties which remains substantively unequal absent the force).

157 MACKINNON, FEMINISM UNMODIFIED, *supra* note 136, at 7.

Fischel argues that aspirations for autonomy can reject the historical abstraction of the liberal subject without abandoning the conceit of sexual liberation altogether.[158] There may be several ways to think about this,[159] but Fischel suggests that "sexual autonomy need not assume that we all come to the table—or bed—as unencumbered free agents. Instead, it can attempt to recognize differentiated relations of dependence, and to theorize acceptable and unacceptable forms of interference in the realm of sexual decision making, without prescribing what good sex should look like."[160] This invokes an aspiration that Jennifer Nedelsky and other feminist philosophers have theorized as "relational autonomy," which is autonomy that must be developed and sustained through social relations of care and dependency by which we are mutually constituted.[161] According to Nedelsky, one of the key components of relational autonomy is the "capacity to engage in the ongoing, interactive creation of our selves."[162] This refers to the capacity to express our desires in new, surprising, and potentially generative ways through a process that Fischel describes as "codetermination," changing the terms of our subjectivity, in effect, without disavowing the fact of our enmeshment in the social.[163] Fischel's approach does not aspire to the ideal of unmitigated freedom or perfect equality, but the expectation, simply, that we can plan for the existence and trajectory of our personal relationships within the constraints of our community.[164]

This theory has immediate implications for law reform.[165] Sharon Cowan explains that "consent is a concept which we can fill

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158 *See generally* FISCHEL, *supra* note 117; Fischel & O'Connell, *supra* note 135.

159 A comprehensive account of theoretical perspectives that attempt to strike this balance is beyond the scope of this essay. For alternative formulations to the one that I have suggested here, see, for example, SCHULHOFER, *supra* note 131; Abrams, *supra* note 133; FINEMAN, *supra* note 133.

160 FISCHEL, *supra* note 117, at 96. *See also* ELAINE CRAIG, TROUBLING SEX: TOWARDS A LEGAL THEORY OF SEXUAL INTEGRITY 72–73 (2012).

161 Nedelsky, *Reconceiving Autonomy*, *supra* note 14, at 10–11. *See also* CATRIONA MACKENZIE & NATALIE STOLJAR EDS., RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (2000); MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS (2003); JENNIFER NEDELSKY, LAW'S RELATIONS (2011) [hereinafter NEDELSKY, LAW'S RELATIONS].

162 NEDELSKY, LAW'S RELATIONS, *supra* note 161, at 45, 48.

163 Fischel & O'Connell, *supra* note 135, at 471.

164 *Id.*

165 The legal scholarship exploring the implications of relational theory on issues in law reform is vast. For more general applications, see NEDELSKY, LAW'S RELATIONS, *supra* note 161; Jennifer J. Llewellyn, *Restorative Justice: Thinking Relationally about Justice*, *in* BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY & HEALTH LAW AND POLICY (Jocelyn Downie

with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice, and communication."[166] What relations, and legal regulations of those relations, will enable everyone to participate most freely and equally in the creative refashioning of consensual life? What kinds of changes are required in society before we can place more trust in consent as a legal and ethical marker for human flourishing? How might our capacity for relational autonomy be enhanced by restructuring the foreground and background rules under which consent is given? How can we refurbish the law of consent to better promote our capabilities to codetermine the practices of sex and settlement?[167]

While I cannot pretend to "know" the answer to these questions with any certainty as a queer theorist, I feel resigned to take the following "decisionist" position in the absence of a better, more workable standard in law.[168] One of our principal tasks should be to continue refining the legal doctrine of consent to sex and settlement such that it reflects the ethic of positivity on the one hand by retaining the flexibility, the idiosyncrasy, the open-endedness, and the potential pleasurableness of sex and settlement as much as possible, and that it reflects the ethic of mutuality on the other hand by empowering everyone to pursue their interests in sex and settlement on more systemically equal terms against a backstop of

& Jennifer J. Llewellyn eds., 2012); Bruce Archibald, *Restorative Justice and the Rule of Law: Rethinking Due Process through a Relational Theory of Rights* (2013), https://ojs.library.dal.ca/KNOWSL/article/view/4745; Gan, *supra* note 73.

166 Sharon Cowan, *"Freedom and Capacity to Make a Choice": A Feminist Analysis of Consent in the Criminal Law of Rape*, *in* SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 53 (Vanessa E. Munro & Carl F. Stychin eds., 2007).

167 FISCHEL, *supra* note 111, at 146 (theorizing sexual autonomy as the "capability to codetermine sexual relations").

168 Other feminist and queer theorists would appear to feel similarly resigned to adopting and trying to refine the consent standard in their anti-violence work as I do, while continuing to explore ways of potentially moving beyond the consent paradigm. *See, e.g.*, FISCHEL, *supra* note 111, at 151 (offering affirmative consent as the "least crappy standard to adjudicate sexual assault" because it best indexes sexual autonomy once it is reconstructed in light of relational theory); Ann Cahill, *Why Theory Matters: Using Philosophical Resources to Develop University Practices and Policies Regarding Sexual Violence*, *in* SEXUAL VIOLENCE AT CANADIAN UNIVERSITIES: ACTIVISM, INSTITUTIONAL RESPONSES, AND STRATEGIES FOR CHANGE 283 (Elizabeth Quinlan et al. eds., 2017) (arguing in support of affirmative consent standards in campus sexual violence law and policy, despite her critiques of consent based in feminist philosophy, because "the fact of the matter is that consent remains a coin of the realm").

rights.[169] That is, one of our principal tasks should be to *negotiate* between these ethical imperatives through the exercise of communicative action, as Habermas describes, in the hopes of reaching a consensus about the legal doctrine that feels good, ethically-speaking, or at least feels better than what we have now, in a process that respects the legitimacy of both sides.[170] Crucially, this means that any standards we agree to impose on our conduct should be properly understood as relational, historically contingent, and constantly subjected to democratic deliberation—not unlike the practices of sex and settlement themselves—instead of metaphysically grounded in abstract reason.[171] While this process is ongoing, our focus should remain on issues in legal and institutional policy design about how to promote measures that improve the social, cultural, economic, and legal conditions under which consent to sex and settlement is given. These measures should enhance our capacity for creative interaction and thereby transform the culture that produces systemic inequality in our society.[172]

V. Conclusion

Queer theory seldom lends itself to easy solutions. This case is no different. Theorizing about juridical subjectivity through the lens of desire reveals the practice of settlement to be resistant to the liberal imperatives of self-identification, rationality, and progress. This is what makes the practice so pleasurable for some, providing a forum for the subject to express their personal and deeply felt interests as distinct from their rights, to engage in potentially liberatory acts of rebellion from the strict rules of civil procedure and the trappings of the formal law. This is also what makes the practice so dangerous for others, rendering the subject

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169 For more granular efforts to revise the legal doctrine of consent in light of relational theory, see Fischel, *supra* note 111; Cowan, *supra* note 166; Jonathan Herring, *Relational Autonomy and Consent*, *in* Consent: Domestic and Comparative Perspectives (Alan Reed et al. eds., 2017).

170 *See supra* notes 37–41 and accompanying text.

171 This conclusion is inspired by Habermasian feminist philosophers who have argued that it should be possible to envision a set of normative ethics that are relationally constituted by the process of democratic deliberation instead of grounded in abstract reason. *See, e.g.*, Amy Allen, The Politics of Our Selves: Power, Autonomy, and Gender in Contemporary Critical Theory (2008); Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalizing World (2010); Nancy Fraser, *What's Critical About Critical Theory? The Case of Habermas and Gender*, *in* Fraser, supra note 60.

172 Nedelsky, Law's Relations, *supra* note 161, at 31, 45, 74–75, 166.

vulnerable to the potential violences of desire in an unstructured and loosely regulated environment, outside the reach, potentially, of public scrutiny and challenge by the courts. This gives rise to an ethical tension in queer theory between the ethic of positivity and the ethic of mutuality.

In the end, I have argued that consent may be the only way to strike the appropriate balance between these ethical imperatives in law, but it is only my first offer. We may have to take positions, as I have in this article, without knowing that our positions are correct and without knowing that our positions have even helped the constituencies we are trying to serve, but hoping, at least, that we will have made an honest and critically-engaged attempt at compromise. This should only improve the substance of our recommendations in the end because negotiation is not a struggle that should constrain our equality seeking, but a process that can expand our imaginative possibility and transformative reach if we conduct ourselves responsibly. In my view, that is what "queer dispute resolution" looks like.