

REVIEW ESSAYS

FREEDOM'S CONSCIENCE

WOMEN, GAYS, AND THE CONSTITUTION. By David Richards. Chicago, Illinois: University of Chicago Press, 1998. Pp. 531.

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In his masterful work, *Women, Gays, and the Constitution*, David Richards proposes a moral interpretation of the nineteenth century Reconstruction Amendments. This reading is inspired by "abolitionist" feminism, Richards' name for the philosophy developed by men and women who extended their opposition to slavery into a fight against all forms of racism then existing. Beginning with these feminists, Richards develops an original interpretive methodology. This methodology enables Richards to argue that the stance of the abolitionist outsider provides a moral viewpoint from which to criticize the irrationality and unreasonableness of our basic institutions. The moral viewpoint of this re-centered outsider also allows a legal interpretation of the Reconstruction Amendments expansive enough to fully protect the fundamental rights of women, lesbians, and gay men.

Women, Gays, and the Constitution presents close readings of the lives and philosophies of the abolitionist feminists. Through this examination, Richards argues that we can learn moral courage from these outsiders who refused to shape their consciences to fit the unjust reality that surrounded them. This unjust reality created "moral slavery," a "structural injustice based on the abridgment of basic human rights to a whole class of persons on illegitimate grounds."¹ Because they challenged the moral slavery that society demanded, nineteenth century "abolitionist" feminists exemplify the moral courage needed in constitutional battles today. Indeed, Richards links the abolitionist feminists' opposition of moral slavery to contemporary feminists' and gay and lesbian activists' refusal to accept their own irrational subjugation.

Richards' defense of abolitionist feminism is both a powerful critique of the injustice of treating any of us as less than equal members of the moral community of persons, and a relentless protest against the rationalizations of a political community that attempts to justify that kind of degradation. A challenge to moral slavery allows us to call for solidarity among

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1. DAVID RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION* 458 (1998).

those who have been so oppressed. Because solidarity grows out of a common interest in ending all forms of moral servitude and not out of a simplistic identification among subjugated groups, it can transcend many of the heated debates about the truth of racial, national, ethnic, and gender identity that have recently paralyzed the movements calling for justice in this country. Richards' book thus delivers a crucial message to activists, committed legal reformers, and constitutional scholars.

Let me now turn to the abolitionist feminists who by their lives and writings began the morality tale that, Richards argues, is left to contemporary feminist and gay and lesbian activists to retell and pursue.² I can in the short space of a review only highlight the normative significance that Richards gives to abolitionist feminism. But Richards himself offers an in-depth historical account of both abolitionist and suffrage feminists to bolster his interpretive defense of what is constitutionally at stake in the contemporary demand of feminists, gays, and lesbians for basic rights.

The lives and writings of the Grimke sisters, for Richards, embody the moral power of the abolitionist feminist message. The Grimke sisters, Sarah and Angelica, grew up on a Southern slave-owning plantation.³ Horrified by their first-hand experience with the brutality of slavery, they became early and eloquent members of the abolitionist movement.⁴ Abolitionism was hostile to the entrenched values of the South, which justified slavery as an acceptable moral institution. Indeed, as the abolition movement increased in both size and militancy, many states took legal and illegal measures to suppress it.⁵ Abolitionists had their journals censored, their speeches and meetings interrupted by harassment or outright violence, and their lives threatened, even when they tried to withdraw into the quiet of their own homes.⁶ To be an abolitionist was to risk one's life, just as being a civil rights activist one hundred years later could be life-threatening.

But female abolitionists faced a social ostracism uniquely directed at women who dared to violate the traditional Southern ideology of the

2. The task of current feminist and lesbian and gay activists can be characterized as one of recollective imagination. This is the phrase I coined to describe the relationship between the past and the future in legal interpretation. For a description of this process, see DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* 28-29 (1993). The term is meant to capture how what is recollected in law - the embodied norms and values - is never just "there," but is always represented to us in interpretations. When we seek an account of our legal history we do so in part by reference to how it guides our future conduct because we cannot validate its truth as a purely descriptive manner. Hence, we are re-imagining our legal values and norms when we re-collect them into a new interpretation. Richards' constitutional history, as I interpret him, proceeds through recollective imagination and should be evaluated for its contributions to contemporary dilemmas over sexual freedom.

3. RICHARDS, *supra* note 1, at 62.

4. *Id.* at 88, 92.

5. *Id.* at 34.

6. *Id.*

Southern Lady.⁷ Richards identifies the integral connection between the corruption of public reason embodied in discursive justifications of slavery and misogyny; the repression or outright denial of the abolitionists' prized rights of conscience and speech; and the unfair exclusion of any human being from the moral community of persons. This integral connection generates the paradox of intolerance: "the greater the tradition's vulnerability to independent reasonable criticism, the more likely it is to generate forms of political irrationalism (including scapegoating of outcast dissenters) in order to secure allegiances."⁸

There are, for Richards, two components to the relationship between the denial of equal respect for persons and the corruption of reason. First, the free public debate that lies at the heart of the democratic community was corrupted by the unreasonable and irrational defense employed to rationalize the exclusion of African Americans from the political community. Richards gives a number of examples to illustrate this process. He notes that suspect scientific ideas about the "natural" inferiority of African Americans were allowed into public debate as irrefutable truth, even by supporters of slavery's abolition.⁹ Throughout most of the Civil War, Abraham Lincoln accepted the proposition that, once African Americans were freed from slavery, they would have to be recolonized. The President had clearly been swayed by deeply entrenched views of, and fantasies about, African Americans that reflected the hegemonic opinion of his time. In this he was not alone. Many other opponents of slavery simply took it as the "way of the world" that racism in the form of the defense of white superiority was valid even if slavery was not.¹⁰

Unlike most of their comrades, however, the abolitionist feminists were fierce critics of the colonization movement, attacking the anti-slavery sentiment that continued to endorse openly racist views toward African Americans. Lydia Maria Child, Richards explains, offered a searing and sophisticated critique of racism. To her, racism was a product of the unjust institution of slavery: "We first crush people to the earth, and then claim the right of trampling on them for ever, because they are prostrate."¹¹

Through his discussion of the abolitionist feminists, Richards demonstrates that the identity of the American was "whitened" during debates over slavery. Blacks were by definition other to the American identity—how else could their terrible treatment be justified under the Constitution, which purportedly guaranteed that all men were created equal? To Child, and to the other abolitionists who sided with her, the ideological role of racism was to put unjust institutional racism beyond the reach of public

7. *Id.* at 84.

8. *Id.* at 42.

9. *Id.* at 53, 55.

10. *See id.* at 40-55.

11. *Id.* at 56 (citing LYDIA MARIA CHILD, AN APPEAL IN FAVOR OF AMERICANS CALLED AFRICANS 169 (1968)).

debate by constructing African Americans as less than human.¹² The effectiveness of this ideology in swaying not only President Lincoln, but also the Reconstruction Congress, undermines the legitimacy of the Congress' interpretations of the Reconstruction Amendments. Such interpretations are revealed as products of a public reason corrupted by the racism stemming from slavery.¹³ Richards explains that the abolitionists unmasked the ways in which such racism

enforced its own vision of truth against both the standards of reasonable inquiry and the reasonable capacities of both blacks and whites that might challenge the conception. A conception of political unity, subject to reasonable doubt as to its basis and merits, had unreasonably resolved its own doubts, consistent with the paradox of intolerance, in the irrational racist certitudes of group solidarity on the basis of unjust group subjugation.¹⁴

The second aspect of Richards' analysis of the relationship between the corruption of reason and the denial of equal respect for persons lies in his consideration of equal dignity of persons. Equal dignity of persons was the "cure" for the paradox of intolerance. To recover this dignity, abolitionists returned to Locke's argument that, without toleration, there could be no democracy because there would be no free debate. Free debates need free persons to carry them on. Without that freedom, dissenters would simply be condemned as heretics and their political judgments ridiculed, or worse yet, attacked as treason to the community or nation.¹⁵ In order to reinstate political conditions of toleration, the abolitionists appealed to the social contract, an abstract hypothetical experiment of the imagination that included African Americans as free and equal persons.¹⁶ The need for the Abolitionists' appeal to their particular version of the social contract was tied to the critique. Abstract theory had the ability to root out the irrational prejudice that had infected reason. Any appeal to the actual political morality of white Americans would replicate intolerance because this morality had come to justify itself through a deep acceptance of racism. By appealing to the theory of social contract, abolitionists presented a unique form of the argument that slavery was evil: they explained that slavery, and the intolerance stemming from it, effectively undermined democracy. Intolerance was based on an unjust reduction of some human beings to some "thing" less than a person. Such intolerance contaminated the actual workings of democracy since certain groups were foreclosed from expressing their views in public.

12. RICHARDS, *supra* note 1, at 55-57.

13. *Id.* at 18-22.

14. *Id.* at 59.

15. *Id.* at 38-45.

16. *Id.* at 50-54.

Richards demonstrates that abstract political theory became the much-needed tool of activists working to dismantle a racist society. Richards' own interpretive method, by taking us back to the abolitionists' searing critique of American democracy, provides us with a unique understanding of the role of theory in political movements for justice and legal reform. Richards demonstrates that the justification of theory cannot be made solely in terms of the philosophical consistency of the theory itself. That is, the full justification of a political theory should include its historical rootedness in a particular national history. Such rootedness must include not only the mainstream conventions that dominate a particular historical period, but the movements for social justice that, through their internal criticism¹⁷ of the society's institutions, become its conscience. Despite an insistence on historical context, Richards does not find a political theory justified simply on the basis of its historical grounds in the hegemonic institutions and legal principles of a particular national community. A theory's relevance to a people, due to its historical, political, and cultural familiarity, should be considered an important part of what makes it a reasonable theory, because relevance is what makes actual people able to respond to it morally.

By drawing attention to the ways in which political theory can enlarge our idea of what is reasonably possible, Richards offers us insight into the contemporary significance of the relationship between history and the ideal of reasonableness. He carves out a position that is sensitive to history without being reducible to historicism. But his understanding of the relationship between theory and practice also speaks to one of the oldest debates on the left. Is theory only for the intellectual elite? Is it kept alive only by professional academics? Richards' appeal to the abolitionists answers both questions in the negative. Theory needs the moral insight of the outsiders, and the dissenters and activists need theory in order to remain true to their vision of a society in which all of us are recognized as free and equal persons.

To illustrate the connection between theory and practice, Richards again presents examples from the lives of a number of abolition feminists. When they found themselves ostracized and with no choice but to flee to the North, the Grimke sisters turned to theory. Exiled both literally and figuratively from the moral community of their time, they sought, in their theorizing, the moral community in which they could be included as women.¹⁸ The sisters knew that for women to claim their full standing as persons, so that they could raise their voices as citizens, they would have to claim for themselves the most basic moral right. That right was to lay claim to their own person with full legal rights of conscience, speech, work, and intimate association. In their struggle to speak out against slavery, both

17. For a discussion of Richards' distinction between internal and external criticism, see DAVID RICHARDS, *CONSCIENCE AND THE CONSTITUTION* (1993).

18. RICHARDS, *supra* note 1, at 91.

sisters came to recognize that they were, in Richards' sense, moral slaves.¹⁹ Their enforced servitude was inseparable from the idealization of the Southern Lady. Both sisters had the insight to see the psychosexual dynamics that, in the name of chivalry, oppressed both "white" and "black" women.

Indeed, reading Richards' account of the Grimke sisters' understanding of these psychosexual dynamics deepens the feminist understanding of how race and sexuality were mutually constitutive. The differential articulation of "black" and "white" through the structures of desirability and accessibility gave color to the fundamental splitting that Jacques Lacan has called the psychical fantasy of Woman.²⁰ Under this fantasy, Woman is signified through the fundamental divide of the good and the bad: in the case of the pre-Civil War South, the "white" woman has her virtue intact if her sexuality is denied, and the "black" licentious woman's purported sexuality makes her an object for the taking. African American women could not be raped because they were owned outright. A rape of a white woman, often imagined, or called such, even though it was a consensual relationship with an African American man, became the justification for the most brutal mob violence against African American men: lynching. Thus, the ideology that justified racism was sexualized and turned on a fantasy of white women that necessarily denied them freedom of personality.

The Grimke sisters saw clearly that white women did not come close to enduring the horrifying day to day brutality of slavery. Thus, they did not appeal to the shared experience of women in their call for the abolition of both racism and sexism. They instead argued against the colonized imagination of those forced into servitude, and those who imposed it, on both African Americans and white women.²¹ By identifying the effects of moral slavery instead of calling on identical experiences of oppression, they could make a powerful argument that African American men and women, and white women, were alike subjected to moral servitude. A possible alliance could be made between African American women and white women if white women had the courage to call for an end of all forms of moral slavery. Richards demonstrates that confronting women's moral servitude involved a challenge to the so-called natural division of labor that relegated women to the private realm, a realm that became a prison if any woman tried to escape as the Grimke sisters did. The Grimke sisters understood why the personal had to be political long before the second wave of feminism did. Women's moral servitude was based on the patriarchal definition of their "sex" and the roles of the wife and mother that supposedly went with it. To challenge moral servitude meant to challenge patriarchy.

19. *Id.* at 99.

20. See JACQUES LACAN, *FEMININE SEXUALITY* 47-50 (Juliet Mitchell ed. & Jacqueline Rose ed. & trans., 1983) (defining the psychical fantasy of Woman).

21. RICHARDS, *supra* note 1, at 100.

Richards explains that Harriet Jacobs and Ida Wells-Barnett took this insight into the struggle of African American women against miscegenation laws.²² These laws not only expressed the drive for racial purity promoted by racism, they were deeply involved in the coloration of the psychological fantasy of Woman. Richards points out that even women like Frances Willard, who fought bravely against slavery, could not accept the truth that Wells-Barnett forced into the public view, that many of the so-called rapes for which African American men were lynched were consensual relationships with white women.²³ Willard's racism, combined with her insistence on women's difference, made it impossible for her to imagine white women as sexual creatures free enough to pursue their love beyond the most ferociously imposed conventions. Richards includes a discussion of Harriet Jacobs' frank account of how her own sexual life, crucial to her personal struggle for freedom, and including sexual relationships with white men, scandalized both men and women in the anti-slavery movement.²⁴ Both Wells-Barnett and Jacobs argued that women's sexual freedom and their right to intimate association were crucial to the recognition of women as full members of the moral community of persons, supposedly the basis of American democracy.²⁵

Discussing their stories in combination, Richards shows that the Grimke sisters, Jacobs, and Wells-Barnett all refused to give any validity to theories of their sexual difference that legitimated their standing as any "thing" less than free and equal persons.²⁶ However, he also underlines the ways in which the appeal to women's moral difference as well as to the racism that promoted it—since this moral difference was the providence of white women only—became prominent as suffrage feminists turned away from the abolitionist feminists' analysis of women's moral servitude.²⁷

To illustrate this movement away from the emancipatory potential of the abolitionist feminists, Richards includes a discussion of Elizabeth Stanton. Stanton began her life in feminism in sympathy with the abolitionist feminists.²⁸ But as she experienced the defeat of justice that accompanied the brutal resistance to a true reconstruction of this country, she turned her back on her own principles.²⁹ To win the suffrage became the single goal. In fact, Stanton used overtly racist arguments to justify the need to give white women the vote. If they did not have that right they were being treated as not really white, potentially subjected to out-of-control black

22. *Id.* at 188.

23. *Id.* at 189.

24. *Id.* at 120-124.

25. *Id.* at 224.

26. *Id.* at 262-263.

27. *Id.* at 190.

28. *Id.* at 107.

29. *Id.* at 138.

freed men.³⁰ As Richards powerfully argues, by claiming white feminine virtue as the basis of the right to suffrage, suffrage feminism defeated itself even as it won the limited goal it had set as its target.³¹

Richards draws four normative and critical insights from his historical analysis of the moral significance of abolitionist feminism, and from the moral failure of suffrage feminism in accommodating a racist social reality. First, he gives a new twist to the epistemological privileging of the oppressed, long a crucial part of leftist theory. For him, it is not only that the oppressed have to see beyond the ideology of the majority, in this case that of the so-called scientific basis of women and African Americans' moral inferiority. They also have to engage in a kind of hypothetical experiment of the imagination and by so doing remember what was demanded by a fair society which did not exclude so many from the fully human. To quote Richards:

It is, in my judgment, precisely because abolitionist feminism was, during the period under question, so remarkably critical in the way it was of a pervasive political orthodoxy both of race and gender—and so unsuccessfully at war with the dominant political consensus based on this orthodoxy—that it achieved the kind of enduring critical insights of principle that it did. Its very critical distance from and rights-based dissent to the dominant political consensus constitute the keys to its impartiality and thus to its permanent contribution to our normative understanding of a more principled contemporary interpretation of the Reconstruction Amendments in various domains.³²

Put somewhat differently, in a social world that foreclosed the possibility of their freedom, the abolitionist feminists had to creatively imagine a world beyond moral servitude. This kind of hypothetical experiment of the imagination can still, one hundred years later, provide insight into what women, gays, lesbians, and people of color can demand in the name of justice. What they share is a condition of moral servitude, not the identical experience of oppression. Under this analysis it is unnecessary to decide who is more oppressed. The wrong done is moral servitude imposed.

The second relevant normative insight that Richards draws from the abolitionists is that abolitionist feminists did not turn to any theory of Woman in order to make their call to freedom. Instead, all such identities reflecting the exclusionary ideology which justified treating women and African Americans as less than persons were challenged. The moral right they demanded was precisely the right to be free from the so-called essential identities that marked them as less worthy than white men to pursue

30. *Id.*

31. *See id.* at 199-287 (Chapter 5) (discussing Stanton's capitulation of her earlier principles).

32. *Id.* at 32.

their lives in all aspects, including both sex and work, as they saw fit. Again, to quote Richards:

Their struggle, expressing the demands of moral personality, transforms their own identities as much as that of the larger constitutional culture The struggle for identity, as we have studied it, must be understood in terms of the distinctive arguments of rights-based justice central to each person's sense of integrity, the sense in which, for example, gay and lesbian identity is literally defined and renegotiated by the self-respecting claims of basic rights and the reasonable criticism thus made against the traditional force of one's unspeakable moral slavery.³³

The connection Richards makes between the struggle for freedom and the problems of exclusionary identities is a much-needed addition to the now paralyzed debates about the value of "identity politics."

Richards next argues that the abolitionist feminists were right in their insistence on sexual freedom. Indeed, for Richards, suffrage feminism faltered because it fell prey to what he calls the "Wollstonecraft repudiation."³⁴ Richards names the Wollstonecraft repudiation after the rejection by suffrage feminists of the ideas of Mary Wollstonecraft, a brilliant advocate of women's rights at the time of the French Revolution.³⁵ Wollstonecraft spurned the conventional limitations on women's sexuality, and refused to deny the intense psychic suffering and cruelty she endured as a result of nonconformance to standards of proper female decorum. She openly admitted to affairs and had an illegitimate baby.³⁶ The brilliance of her writing was buried under charges of wantonness and insanity.³⁷ It was easier to call a woman a crazy whore than to recognize that she was right, particularly when she was calling for an end to straight men's sexual privilege. The Wollstonecraft repudiation, as Richards defines it, is the refusal of women's right to claim their own sexuality as part of a legitimate feminist struggle for legal reform. The repudiation is an attempt at "passing," and I would argue, is inseparable from the psychic fantasy of Woman. Indeed, the repudiation is of the "bad girls," including the "bad girl" in oneself. The corresponding assertion that one is a "good girl" seeks to prove to the establishment that feminism is acceptable because it does not challenge the entire structure of gender hierarchy. Richards carefully describes how destructive the Wollstonecraft repudiation was to suffrage feminism.³⁸ In addition, Richards shows that women like Emma Goldman and Victoria

33. *Id.* at 463-464.

34. *Id.* at 71.

35. For a survey of Wollstonecraft's works, see MARY WOLLSTONECRAFT, *THE WORKS OF MARY WOLLSTONECRAFT* (Janet Todd & Marilyn Butler eds., 1989).

36. RICHARDS, *supra* note 1, at 156.

37. *Id.* at 73, 156.

38. *Id.* at 172.

Woodhull were condemned by suffrage feminism because they demanded that feminism insist on sexual freedom for everyone.³⁹ For Woodhull at least, the demand for sexual freedom also meant a challenge to compulsory heterosexuality.

Richards' fourth normative argument concerns gay and lesbian rights. In this powerful section, Richards uses the abolitionists' insight into how the psychical fantasy of Woman corrupts public reason. In a carefully worked out analysis, Richards shows how the gay man is othered as a "bad woman," worse yet than all those "feminist whores" because he could have been a "real" man.⁴⁰

Drawing on the insight of the poet Walt Whitman, Richards effectively argues that love between men is rendered the worst possible evil because it challenges the entire construction of gender hierarchy with its rigid meanings of the "straight path" that a man must take if he is to deserve his place in the hierarchy.⁴¹ What man would be willing to be "fucked"? That's the fate of women. It is precisely this conflation of fantasies of woman's "sex" as a penetrable object with the act of sodomy that 19th century sexual radical Edward Carpenter used to explain the strength of the hold of homophobia on the public imagination. This homophobia reduced love between men to a sexual act rather than respecting this love as a relationship.⁴² Drawing on Whitman's and Carpenter's insight, Richards connects abolitionist feminism with the struggle for gay rights.⁴³ In order to demand their freedom as persons, both movements must challenge the psychical fantasy of Woman. There is a possibility of solidarity between feminism and gay rights' advocates that does not appeal to a simple story of identity and oppression, but instead commonly opposes a symbolic ordering of rigid gender identifications and the appropriate sexualities that reinforce them.⁴⁴

Although Richards has less to say about lesbians than he does about the structure of homophobia endured by gay men, he is relentless in his demands for the rights of both gay men and lesbians. He interprets the constitutional significance of the abolitionists' critique of racism, and their claim for moral right, as the legal demand for a different reading of both the Thirteenth and the Fourteenth Amendments.⁴⁵ The Thirteenth Amendment condemns moral slavery, defined as the abridgment of the basic rights of conscience, speech, work, and intimate association, based on the illegitimate grounds of the irrational prejudice that, because of race or sex, some people can be treated as less than free and equal persons.⁴⁶ The

39. *Id.* at 156.

40. *Id.* at 294-297.

41. *Id.* at 297-310.

42. *Id.* at 324.

43. *Id.* at 346-354.

44. *Id.* at 353-354.

45. *Id.* at 15.

46. *Id.* at 263.

prohibition of moral slavery becomes Richards' "hermeneutic pivot," used to clarify "the proper interpretation of structurally related principles of the Fourteenth Amendment."⁴⁷ According to Richards, the two principles of the Fourteenth Amendment that remain of special interpretive concern are "the nationalization of the protection of basic human rights against both the state and national governments," and the "guarantee of equal protection of the laws" so that those rights attend all persons.⁴⁸ For Richards, what has been nationalized is exactly the prohibition of moral slavery. Richards also interprets equal protection of the laws through an appeal to the pivotal prohibition of moral slavery. On his interpretation, the guarantee of equal protection of the law demands "that all forms of political power must be reasonably justifiable to all persons in terms of both equal respect for their basic human rights and the pursuit of acceptable public purposes of justice and the common good."⁴⁹

In addition, Richards rejects both of the current interpretations of suspect class analysis—immutability and political powerlessness—which have floundered before the demand that women, gays, and lesbians be recognized as suspect classes.⁵⁰ For Richards, suspect class analysis should be "a demanding constitutional suspicion . . . of the enforcement through public law of cultural stereotypes that rest on a history of moral slavery."⁵¹

Richards shows that once gays and lesbians are treated as a suspect class under constitutional law as he formulates it, the glaring wrong—of all the forms of discrimination gays and lesbians continue to endure in all of those aspects of life that matter most to people—becomes exposed and finally made available for legal correction. Again, following the analysis he attributes to the abolitionists, Richards forcefully argues that the denial of the right to marriage for gays and lesbians tramples any meaningful interpretation of the right to conscience.⁵² This intolerance corrupts public reason and debate in a form similar to that imposed by the attempt to silence the abolitionist movement and to legitimate the public's irrational investment in racism. One need only turn to the often irrational debates in Congress over the Defense of Marriage Act to see how right Richards is to draw a connection between homophobia and the corruption of the democratic process.⁵³ Through his interpretation of the Reconstruction Amendments, Richards offers a convincing argument that gays and lesbians—and

47. *Id.* at 3.

48. *Id.* at 3-4.

49. *Id.* at 4.

50. *Id.* at 267-268.

51. *Id.* at 459.

52. *Id.* at 357.

53. *See, e.g.,* Testimony of Congressman Steve Largent Before the Senate Comm. on the Judiciary on the Defense of Marriage Act, July 11, 1996, *available in* 1996 WL 10829445, at *6,

If our law determines that homosexual marriage is permitted, the law is actually declaring to society and to our children that homosexual marriage is desirable and

I would add all other forms of sexuate being⁵⁴—should be accorded full standing as free and equal persons with all the fundamental rights that attend the recognition of personhood.

Richards' argument sometimes conflates moral and legal rights. This conflation has the potential of undermining the full moral power of Richards' demand for justice for women, gays, and lesbians, as well as making his analysis an easy prey for critiques of "rights" talk. Following Kant, I would argue that the moral right to claim one's person is the basis of all legal rights.⁵⁵ Rights accrue to persons. The wrong in moral slavery is that it denies to persons the status of personhood, attributing positive characteristics to them that purportedly render them unworthy of that status. A prohibition of moral slavery means that no one may be denied their freedom to claim their own person, the ability to postulate themselves as an end in themselves. It was Kant's great insight that human freedom cannot be disproved by theoretical reason.⁵⁶ As a result, the denial of that freedom is only rarely, very rarely indeed, ever going to be reasonable. Richards' searing critique of contemporary legal principle is moral, in that it appeals to the right in which personality is based. But it is also legal, in that it provides a test for the legitimacy of any legal system that incorporates a system of subjective right: the test of abolishing moral slavery.

The difference between the moral right to personality and legal rights becomes particularly important in any analysis of the politics of the second wave of feminism, including Richards' careful analysis of the legal victories of that movement. The battles for women's legal rights have often been won at the expense of the moral right to free personality that Richards so brilliantly defends. Legal victories, and the strategies to achieve them, often involve moral compromise with the "real" world. No one was clearer about this than Emma Goldman, who tried to stay on the side of moral right, often by defying the law. Goldman certainly would have been perplexed by her designation by Richards as a rights-based feminist, at least if we mean by a rights-based feminist one who turns toward the existing legal system of the time for the achievement of either freedom or equality. But

good. I've always tried to live my life with love and tolerance toward individuals. Unfortunately, the practice of homosexuality is not healthy and is actually destructive to individuals. I do not want my children to falsely believe that homosexuality espouses what is chaste, desirable and good in our society.

54. I use the term "sexuate being" to indicate that all human beings are sexual creatures who must orient themselves to their sexuality. This "must" of orientation, however, does not imply that sex be given the form of gender identity, as we now understand gender identity to in turn dictate appropriate love and sexual objects. See DRUCILLA CORNELL, *AT THE HEART OF FREEDOM* 34-37 (1998) (discussing human beings as sexuate beings).

55. See IMMANUEL KANT, *On the Common Saying: 'This May Be True in Theory But it does not Apply in Practice'*, in *POLITICAL WRITINGS* 74-75 (H.B. Nisbet trans. & Hans Reiss ed., 2d ed. 1991) (describing the principles of the lawful state).

56. See *id.*

she could certainly be said to be one who would have approved of Richards' conception of moral right.

In part because he sometimes conflates moral and legal right, Richards tends to idealize the second wave of feminism, particularly as it has been translated into a platform for legal reform. However, a classic example of the Wollstonecraft repudiation within the second wave of feminism has been the failure of many feminists to understand that their fight is integrally related to the struggles of gays and lesbians. Indeed, some feminist lawyers argued that, for the purposes of Title VII and the Constitution, sex should mean gender even though interpreting sex narrowly meant the exclusion of gays and lesbians from the reach of antidiscrimination law. Some feminists thought that they had to pass into the mainstream in order to achieve certain legal victories, but to some degree, that meant an acceptance of the confines of compulsory heterosexuality. Whoever a "good girl" is, it is clear that she is not a lesbian and she is not "black."

It is time that feminists, particularly white feminists in the legal academy, publicly recognize the wrong in this Wollstonecraft repudiation, and insist that all of us as sexuate beings have the equal right to free ourselves from moral servitude. Richards' book is a call to be unflagging in our fight against all forms of moral servitude. As an out gay man long before it was safe to be so, Richards has for over twenty-five years served us well as freedom's conscience.