Review Essay

LAW'S PATRIARCHY

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Zillah R. Eisenstein, *The Female Body and the Law*. Berkeley: University of California Press, 1988. 235 pp.

Catharine A. MacKinnon, *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press, 1989. 330 pp. $25.00.

Carol Smart, *Feminism and the Power of Law*. London: Routledge, 1989. 180 pp.

> [T]he principle which regulates existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement . . . it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.
>
> —John Stuart Mill (1986:1)

I. FEMINISTS AND LAW

As John Stuart Mill observed at the beginning of *The Subjection of Women* (1986), law and legal institutions in a number of cultures (if not all) have played a significant role in maintaining systems that subordinate and oppress female human beings, and law continues to do so. The change from status to contract celebrated by Sir Henry Maine left women unaffected for the most part—women who married, which was most women, could not enter contracts and lost their property rights (Kay 1988:191–92; Chused 1983; Backhouse 1988). Law further maintained women's inferior status through its privileging of the rights of husbands and through the laws of inheritance. Democratic revolutions in the United States and France left women disenfranchised, legally and constitutionally excluded from full membership in these "democ-

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racies." Law has defined and regulated women's sexuality through the law of marriage and paternal rights and through the criminalization of fornication, adultery, abortion, and prostitution. For those seeking to end the subordination of women, then, law has been one of the sites of the struggle against that subordination.

Law, however, is not something "out there," unrelated to politics, culture, or power. Thus, feminists concerned about law often frame the issues in terms of law's relation to "patriarchy." Although "patriarchy" technically refers to families ruled by a senior male "patriarch," it more generally refers to the systematic domination and subordination of females by males. While the term runs the risk of reification—blame it on "The Patriarchy"—I do not know of a better term to capture men's cultural, economic, political, and physical domination and devaluation of women. Under patriarchy, men are the model and the embodiment of the fully human; to maintain their status and power, men are entitled to exercise both subtle and violent control over women. Patriarchy is both belief and practice, thought and action. To borrow from Catharine MacKinnon's discussion of dominance under patriarchy (p. 138), the power to define "who does what to whom and gets away with it" belongs to men. As Carol Smart argues (see, e.g., pp. 13, 35), under patriarchy, men define the real and what counts as knowledge.

Carol Smart, Catharine MacKinnon, and Zillah Eisenstein all agree that men have shaped and controlled law as an institution, as a practice, and as a source of meaning in the modern state. Therefore, they each assert, law contains, produces, and reproduces patriarchy. I agree that "masculine" thought and patriarchal assumptions have determined much of the content and shape of law, legal thinking, and judicial and legislative attitudes. For this reason, women who seek to end patriarchy must focus on dismantling its legal form and eradicating its social, political, and economic manifestations both with and without law's help.

Historically in the United States, for example, feminists have attempted to use law as a tool for gaining equality for women. Abigail Adams wrote her husband John, then a member of the Continental Congress, urging him not to "forget the ladies" in building a new nation under the rule of law (Norton 1988); the Seneca Falls conference ended with a declaration calling for equal legal rights for women. Feminists urged that sex as well as race be included in the equal protection clause of the Fourteenth Amendment and campaigned tirelessly for the right to vote. The desire for equal rights did not end when the constitution was amended to allow women to vote; indeed, shortly after the passage of the Nineteenth Amendment, feminists pushed for an equal rights amendment as well. Some version of an equal rights amendment to the Constitution has been introduced in Congress almost yearly since the

1920s.[1] Concern for equal rights and suffrage was hardly confined to the United States. John Stuart Mill published *The Subjection of Women* in England in 1869, arguing that women should have equal legal, social, and economic rights together with the right to vote;[2] women in other Western countries have fought for voting rights and legal reforms (Becker 1990).

In the United States, after a period of relative quiescence, feminist efforts in the 1960s and 1970s produced a number of statutory and judicial reforms as well as administrative regulations to combat sex discrimination and to assist women. Feminist lawyers employed arguments from liberalism's principle of equality and from analogies to race to push for constitutionally recognized equality for women. And after years of finding differential treatment of women constitutionally permissible, the Supreme Court in the early 1970s found that the equal protection clause did prohibit many forms of discrimination on the basis of sex.[3] MacKinnon's formulation of sexual harassment as a cause of action as sex discrimination that violated title VII of the Civil Rights Act not only gave a *name* to this habitual practice (Goodman 1989) but also legitimated women's claims that the practice humiliated, degraded, intimidated, and *injured* them. The EEOC promulgated guidelines on sexual harassment, and the courts have, increasingly, accepted sexual harassment as a legitimate cause of action. Finally, the Supreme Court's decision in *Roe v. Wade* (1973), for all its flaws, made an enormous difference in the material well-being of women's lives.

Feminists not only concentrated on courts; they sought legislative changes as well. Rape reform laws passed in a number of states; some legislatures even went so far as to abolish the "marital rape" exemption, at least from the law-on-the-books. Legislatures also changed state laws governing "domestic" violence. The law of divorce became "no-fault," enabling countless women to exit oppressive marriages. And title VII's prohibition on sex discrimination in the workplace also was an important legislative contribution. While it was southerners, not feminists, who added "sex" to the proposed law that became title VII in order to defeat its passage,[4] leading Catharine MacKinnon to quip that "the law of sex

[1] I say "almost yearly" because after Congress passed the ERA in 1972, there was a hiatus while the states considered adoption—until the amendment failed to receive ratification within the original seven-year time period.

[2] Mill wrote the essay in 1861 (Edwards 1967:322).

[3] The Court indicated classifications by sex would receive scrutiny under the equal protection clause in *Reed v. Reed* (1971), but a clearer indication that sex classifications would receive some special scrutiny emerged in 1973 in the case of *Frontiero v. Richardson* (1973). The exact nature of that scrutiny did not become clear until 1976, when the Court decided *Craig v. Boren* (1976).

[4] There is virtually no legislative history about why Congress *retained* the prohibition against sex discrimination, with an exception for "bona fide occupational qualification," in Title VII's prohibition on employment discrimination against individuals.

equality" is "statutory by joke" (p. 215), title VII became the basis for opening up a number of employment opportunities for women. Further, women began to enter the legal profession in significant numbers, giving some hope that laws grounded in stereotypes and indifferent to the situation of women would soon fall as women gained influence and power in the profession. As the 1970s drew to a close, progress for women through law in the United States and elsewhere seemed possible and real to many feminists.

There were, of course, troubling countertrends to the seemingly abundant achievements of women in the law, but no one seemed discouraged. The Supreme Court's decisions in *Gilbert* (1976) and *Geduldig* (1974), cases involving exclusion of pregnancy from disability insurance coverage that will be forever famous for the legal distinction between "pregnant women and non-pregnant persons" (*Geduldig v. Aiello* 1974:497 n.20), were a setback, but the federal Pregnancy Discrimination Act of 1978 presumably reversed the Court's "mistake." The Court declined to make sex, like race, a "suspect class"; women, after all, were "different," and those differences had to be recognized. The tenacity of the belief in "difference" made all but the most archaic gender-specific legislation a battleground where women in the United States usually lost, as MacKinnon and Eisenstein both observe. The irony of equality and difference created a number of catch-22 decisions: Statutory rape laws punishing males but not females, enacted to protect the chastity and control the sexuality of girls and young women, *not* to protect them from abuse or exploitation, are now justified because females get pregnant and males don't (*Michael M. v. Superior Court* 1981). Congress can reasonably require only men to register for the draft, because women aren't allowed in combat (*Rotsker v. Goldberg* 1981). States may prefer military service veterans in hiring workers without discriminating against women, because giving credit for military service has nothing to do with the military's historic discrimination against women in the armed services (*Personnel Administrator v. Feeney* 1979). Women can be denied guard jobs in prisons because the inmates will rape them, because they are women (*Dothard v. Rawlinson* 1977). And Congress has repeatedly denied Medicaid funding for abortions for poor women, with the Court's approval (see, e.g., *Harris v. McCrae* 1980).

Even given the push for equality generally in the United States, feminists had difficulty obtaining full justice for women, in terms of either formal or substantive equality. The liberal legal feminist strategy of gender blindness not only promoted equal treatment of men and women, but also rendered any legislation designed to make up for widespread effects of discrimination against, or subordination of, women vulnerable to challenge by men as "special treatment." For example, pregnancy leave arguably was "special treatment"; although the Supreme Court upheld a state pregnancy disability leave law, the Court has also emphasized

that states need not make any allowances for pregnancy.[5] Affirmative action, as African Americans know all too well, means "less qualified"; much of the media characterization of the Court's decision in *Johnson v. Transportation Agency* (1987), upholding a challenge to an employer's affirmative action program, was that the Court upheld the promotion of a "less qualified" woman over a man, overlooking the fact that their qualifications were actually quite similar.

By the 1980s, as Zillah Eisenstein's book documents, the political climate in the United States changed. According to Eisenstein, the "Reagan revolution" and its "rearticulation of the patriarchal state" (p. 125) endangered feminist accomplishments. The moral Right and neoconservative control of the government and judiciary sought to put women back in their place—the home, serving a man—through law (pp. 120–32, 152–90). Feminist achievements toward equality under the law were and are deeply threatened, Eisenstein argues. Smart and MacKinnon assert, however, that the law hadn't improved the situation of women all that much *before* neoconservatives and the Right gained political control; law's patriarchy had made most accomplishments ephemeral at best. Rape reform laws in the United States helped some, but the women victims were still often tried instead of the defendants—and were found wanting. And it appears from Smart's discussion that feminists never achieved any meaningful rape reform in the United Kingdom. Additionally, in both countries, women of color weren't believed or taken seriously when they said they were raped. In the United States, studies indicated that divorce reform disadvantaged women both financially and in terms of custody of their children (see, e.g., Weitzman 1986; Fineman 1988). Equal rights became men's/father's rights. Abortion rights were under constant attack in state legislatures, and, as I have already mentioned, were often not a reality for poor women. Fetal rights not only became a rallying cry for anti-abortionists but also became a way of keeping women out of more lucrative traditionally "male" jobs, as Eisenstein notes (pp. 208–9). These developments stalled feminist legal efforts, indicating that legal change would not be instant, easy, or even possible. The loss of ground and progress also demonstrated how, as Smart argues in her book, the discourse of law could always be turned against women. Indeed, the stalling of feminist progress toward political and legal change, combined with the backlash of the 1980s and splits within the feminist community, have led some to speak of a "postfeminist" era.

"At present," Smart writes, "it seems as if feminist 'legal theory' is immobilized in the face of the failure of feminism to affect

[5] Compare *California Federal Savings & Loan Ass'n v. Guerra* (1987) (upholding California mandatory leave law) with *Wimberly v. Labor & Industrial Rel. Com'n* (1987) (upholding refusal to grant unemployment benefits to woman whose job was unavailable after employer-granted maternity leave).

law and the failure of law to transform the quality of women's lives" (p. 5). This hardly seems true given the energy of these three books and the number of productive and imaginative feminist legal writers in this country and elsewhere.[6] But it is true that *feminism* has been in a kind of crisis recently, and to this extent, feminist legal theory is as well. Indeed, Smart, MacKinnon, and Eisenstein's books all reflect the crisis and tensions running through the feminist community. Accordingly, a (very) brief review of the tensions in feminism today may provide a background against which to examine the works being discussed here.

Feminism has been challenged not only by reactionary forces but within feminist circles. Debates and fights have broken out over the "difference/sameness" problem, "cultural" versus "liberal" feminism versus "radical" feminism, and the issues of "essentialism," "contextualism," "foundationalism," and "materialism," as well as over particular issues facing women such as pornography and pregnancy leave. Women of color and lesbian women have criticized the assumptions of the "dominant" strand of feminism—as if any form of feminism were ever dominant—for devaluing and failing to come to terms with feminism's exclusion of their experiences (Crenshaw 1989). And it is true, both historically and now, that many feminists, including me, have been blind to their own racism, heterosexism, and/or narrow assumptions about the effects of class on women's lives. In "legal theory," the most divisive issues have echoed these same themes: As Smart notes, the most visible splits occurred in the heated and hurtful debate over the MacKinnon-Dworkin pornography ordinance, in which charges and countercharges caused feminists personal pain and political damage.

Although feminism and feminist theory need correction and criticism when they fail to recognize the experiences of women and the differences among us, if we fight among ourselves in a damaging way, hurling epithets at each other, patriarchy wins. We run the risk of being distracted from our task of uncovering, opposing, and eliminating patriarchy's power in its many guises, including its legal guise. "Many feminisms"[7] can mean a house divided, the oppressed attacking the oppressed, or careful consideration of situated women, and a rich, full, particularistic description of, and commitment to, bettering the lot of women. Differences over theory and concepts exist, but when differences are strategic, they should *not* be seen as betrayals of feminism. For example, Mill has been relegated to the argument for liberal feminism and criticized for his assumption that only "exceptional women" would

[6] My own failure to keep up with the literature is an example of how much productivity there is; I am loath to "name names," as I would hate to omit contributions because of my own scholarly sloth.

[7] I am grateful to Bob Gordon for this phrase. It also appears in Bender 1988:5.

seek full equality, but the opening quote identifies three issues of continuing concern to feminists in law: the problems of power, the problems of inequality, and the problems of privilege and disability. These multiple sites of oppression call for mutiple approaches and theories.

We cannot afford to lose sight of how much we do agree: Women should not be abused, oppressed, or dominated; women should have full human status and a role in defining what that is; women's voices and language should be heard and attended to. We need to draw on history and experience to guide us in this project as well. And it seems to me that Catharine MacKinnon, Carol Smart, and Zillah Eisenstein's books all contain important contributions to the feminist project, although they represent differing strands of feminist thought applied to law. MacKinnon could be characterized as dealing with the problem of power, Eisenstein with the problem of equality, and Smart with the problem of privilege and disadvantage. Each author says something that seems true, powerful, and useful for understanding where feminism's legal project should go from here; not surprisingly, none can be said to have *the* answer for solving the problem of law's patriarchy.

The books cover many of the same "legal" issues confronting women, including the meaning of "equality," the regulation of abortion and pregnancy, and pornography.[8] Each author gives passing recognition to the effects of class and race but concentrates on women's commonalities and not their differences across race and class. Lesbian women are largely absent from the books; only Smart's text consistently distinguishes "sex" and "(hetero)-sexuality." Eisenstein's book concentrates on the political economy of women's situation; Smart's book ranges over a number of issues; MacKinnon's book concentrates primarily on violence toward women. Perhaps as a result of their understandings of law and gender as well as of their specific academic backgrounds, the authors draw different conclusions about law's relation to feminism. Lawyer-political theorist MacKinnon considers the state and law to be almost synonymous and therefore a major site for feminist struggle and radical change; political scientist Eisenstein sees law as an instrument in reformist political, economic, and social change for women; and sociologist Smart sees law as a patriarchal institution almost impervious to meaningful change by feminists.

MacKinnon, Smart, and Eisenstein all argue that law is deeply gendered, although they differ on what that means. For MacKinnon, patriarchy's engendering of law is rooted in power, specifically male sexual power. Women are unequal because they are

[8] Because of the "revolution" in the United States Supreme Court during the 1989 term, there have been several changes in the politics and law of abortion and equality since these books went to press; the reader should be advised that some of the *particular* discussions of Supreme Court doctrine in the books are dated.

subordinated and dominated by male power. For Eisenstein, the engendering of law is based on the law's discursive privileging of the "phallus," which necessarily creates inequality. For Smart, law is a discipline in which patriarchal power/knowledge defines the legal world. For MacKinnon, "law" and "the state" are inseparable; the state legitimates and incorporates male dominance and the male point of view "in and as law" (p. 238). For Eisenstein, law appears to be a subset of politics; law is "an authorized language of the state" (p. 20), an authoritative "discourse." This authoritative discourse can be used in the liberal legal state to create or subvert full equality for women. For Smart, law is a "claim to power" that "embodies a claim to a superior and unified field of knowledge" and the ability "to impose its definition of events on everyday life" (p. 4). She appears to treat law as a separate, semiautonomous, if not autonomous, discipline.

For all three authors, "woman" is a social construct; "man" is also a social construct, but man's construction is largely treated as immutable and unchangeable. That is, each author appears to assume that men can't or won't battle the social construct of masculinity, because they are advantaged by it and have no incentive to change things. Each author also abandons the "traditional" feminist distinction between "sex" and "gender," recognizing that to some extent the biology of sex is determined by the culture of gender and vice versa. MacKinnon's rejection of the distinction is the most consistent; she uses the words interchangeably, because under her theory gender defines sex and sex defines gender. Eisenstein and Smart, who both rely on postmodern social theory to an extent, also reject "essentialist" notions of "sex," arguing that there is no unmediated and irreducible biological foundation or "essence" to human sexuality. Yet at other times both authors treat sex and gender as separate. Eisenstein, for example, acknowledges that sex and gender determine each other, but argues toward the end of her book that they should be separated as much as possible; Smart appears to rely on a notion of unmediated human sexuality in her critique of using law to regulate pornography.

Each author has a different view of patriarchy's law and what, if anything, feminism can do to change it. Eisenstein, the "liberal" feminist representative, wants to concentrate on women's sameness to men and to use liberalism's commitment to individual human dignity to provide meaningful equality for women. MacKinnon and Smart are "radical" feminists who draw very different conclusions. MacKinnon argues that women are oppressed by and through law; women should use law's power to dismantle their subordination. "A feminist jurisprudence . . . is accountable to women's concrete conditions and to changing them" (p. 249). She appears to be confident that law can be used radically to change the status of women. Smart disagrees that radical change is possible, calling instead for feminists to abandon law reform efforts and

to stand outside law: Feminists should "challenge such an important signifier of masculine power" through continuing critique and "deconstruction" (see, e.g., pp. 2, 165) and resist the "siren call" of law reform. These conclusions rest on the major premises and arguments of the authors, each of which I wish to summarize and critique before drawing my own conclusions about the directions in which we should go.

II. CATHARINE MACKINNON: THE PROBLEM OF POWER

Because Catharine MacKinnon has been one of the most influential feminist legal thinkers over the past decade and a half, I shall begin with *Toward a Feminist Theory of the State*. No one working in the field today can deny the debt to her thought and contribution. Even if feminism has no "canon" in the traditional sense, having avoided "(*the*) grand theory and (*the*) great theorist" and having "no Derridas, Lacans, Foucaults, or Bartheses" (Gagnier 1990:21, 26), MacKinnon's work certainly approaches that status. Indeed, her influence is apparent in both Smart's and Eisenstein's books, as each both rely on her work in some areas and criticize it in others.

Toward a Feminist Theory of the State contains nothing new for those familiar with MacKinnon's writings; indeed, she notes that it is a synthesis of her thought up to the present (p. xiv). Thus, for those already familiar with her writings, the book may seem redundant. On the other hand, because all her arguments have been brought together in one volume and have been tied together in an organized form, the book is an excellent resource. Further, the book elaborates and explains her work. The book, unlike its predecessor, *Feminism Unmodified* (1987), is "theoretical" MacKinnon rather than MacKinnon as speaker/advocate. The difference in structure and emphasis means the book sometimes yields up such sentences as "Gender, in other words, is lived as ontology, not as epistemology" (p. 237). At the same time, much of the book contains MacKinnon's voice in all its rhetorical power and brilliance; her mastery of metaphor and use of aphorism is, at times, stunning. As an example, her cogent critique of the usefulness of postmodern discourse theories argues that "reality" is not just a "discursive practice" or an illusory objectivity: "Epistemologically speaking, women know the male world is out there because it hits them in the face. . . . It has all the indeterminacy of a bridge abutment hit at sixty miles an hour" (p. 123).

Although it is divided into three sections, the book basically contains two major divisions. In the first section, entitled "Feminism and Marxism," MacKinnon effectively examines and critiques the application of Marxist and Millian-liberal political philosophy to feminism. She also criticizes the arguments of a number of feminist political theorists for their reliance on male political phi-

losophers and failure to take sufficient account of the issue of male power. The remainder of the book sets out her vision of feminism and arguments about the source of women's oppression, and that is the argument I summarize here. It is not a gentle argument or an easy one to accept on a first or even second reading; readers, particularly those unfamiliar with MacKinnon's work, may find their own beliefs, attitudes, and assumptions about sex and sexuality threatened and shaken. What she has to say is illuminating, useful, and worth struggling with, however.

Feminism, "radical feminism," or "feminism unmodified" is the only true feminism for MacKinnon; other feminisms are dependent on and determined by masculine visions of politics and reality (p. 117). To uncover true feminism, unmediated by men, requires the use of consciousness raising, listening to women's voices, thoughts, experience, and pain. What you will hear from these voices, according to MacKinnon, is the story of male abuse of females: forced heterosexuality, sexual harassment, rape, child sexual abuse, and battery. If you listen, you will learn that women are objects to men, not human subjects; they are objects of abusive and dominating male power. And that male power is sexual power. Thus, gender oppression through male sexual dominance should be *the* concern of feminism; "all women live in sexual objectification the way fish live in water" (p. 149) in every culture and regardless of their sexual orientation. In every race and class, women are reduced to sexual objects; race and class are subsets of male domination and female subordination. The structure of life, law, and the state under patriarchy is that of authoritarian, almost totalitarian, domination of women by men. Men are the authoritarian rulers, using every form of power to keep women subordinated and oppressed; always in the background of other forms of power such as law and government is coercion by sheer physical force and violence. Although not all men use physical force against women, men "as a group benefit from these same arrangements by which women are deprived" (p. 93). The threat of physical force works to intimidate women, preventing them from asserting their power "not because men are stronger, but because they are willing and able to use their strength with relative social impunity; or not because they use it, but because they do not have to" (ibid.). Finally, "it is not only that men treat women badly, although they often do, but that it is their choice whether or not to do so" (p. 94). MacKinnon's explanation for why men *choose* to treat women so badly is based on her theory of sexuality.

MacKinnon has relentlessly and courageously pursued the theory that the definition and construction of sex/gender is based in sexuality, specifically, aggressive, acquisitive, violent male sexuality. Sex is knowledge and belief, not biology, "ontology," or "Being." "Woman" is the social construct of "man's sexual desire": "Socially, femaleness means femininity, which means attractive-

ness to men, which means sexual attractiveness, which means sexual availability on male terms" (p. 110). Male sexuality therefore defines and determines sex inequality. It does so because it is predatory, violent, dehumanizing, and controlling. According to MacKinnon, there is nothing essentially "biological" about sex—at least nothing essentially biological about *women*—that causes this dominating male sexuality. In criticizing Brownmiller's thesis that it is men's physiological structure that makes them " 'natural predators' " and rapists, for example, MacKinnon remarks that Brownmiller's biological argument fails because "[s]he does not seem to think it necessary to explain why women do not lurk in bushes and forcibly engulf men, an equal biological possibility" (p. 56). And in an ironic aside following excerpts from a female sadist's description of the pleasures of power and domination, MacKinnon notes, "The good news is, it is not biological" (p. 142). "It is one thing to identify women's biology as part of the terrain on which a struggle for dominance is acted out; it is another to identify women's biology as the source of that subordination" (p. 54).

To be a woman is to occupy a *status* rather than a "class." Woman's status is sex object; " 'woman' is defined by what male desire requires for arousal and satisfaction" (p. 131). What males require for arousal and satisfaction is dominance and violence: MacKinnon bases her claim not only on the empirical and narrative evidence of widespread sexual abuse of girls and women, but also on the analysis of pornography she and Andrea Dworkin have done. Indeed, it is her insistence on the reduction of patriarchy to sexual violence and sexual violence to pornography that drives much of her argument. We know that men want dominance and violence *because of* pornography:

> It shows how men see the world. . . . It shows what men want and gives it to them. From the testimony of pornography, what men want is: women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed. Or, to be fair to the soft core, women sexually accessible, have-able, there for them, wanting to be taken and used. (P. 138)

Pornography *is* sex from the male "point of view." And sex from the male point of view is violence. Making a broad claim based on empirical studies finding sexual arousal in men exposed to violent pornography, she argues:

> Male sexuality is apparently activated by violence against women. . . . One question that is raised is whether some form of hierarchy is currently necessary for male sexuality to experience itself. If so, and gender is understood to be a hierarchy, perhaps the sexes are unequal so that men can be sexually aroused . . . or, part of the male interest in keeping women down lies in the fact that it gets men up. (Ibid.)

Thus, battery of women, hatred of women, misogyny, are "a dy-

namic of sexual excitement itself" (p. 147; see also p. 179). While violence and sadism certainly *are* impulses that have been manifested sexually, they are not the *only* impulses, a fact that MacKinnon notes only to cast it aside: "Not that sexuality in life or media never expresses love and affection; only that love and affection are not what is sexualized in this society's actual sexual paradigm *as pornography testifies to it*" (p. 139; emphasis supplied). The confinement to "this society" is a needed one; pornography does little to explain the patriarchy in cultures unfamiliar with Western European and American pornographic materials.[9]

To end male sexual dominance, women must use the law and the state as a means to end sexual domination and subordination by men. Women must seize power over law; feminist politics is to be dedicated to eliminating the practices of legal subordination of women identified through consciousness raising. Law can then be used to ferret out and destroy domination and subordination: The Dworkin-MacKinnon antipornography ordinance serves as such an example of feminist efforts to end the violent domination of women. Andrea Dworkin and MacKinnon drafted and campaigned for enactment of a law that defined some pornography as sex discrimination and gave women injured by pornography a right to sue for injunctions and damages. The city of Indianapolis enacted one antipornography ordinance drafted by Dworkin and MacKinnon; the courts found the ordinance violated the First Amendment (*American Booksellers Ass'n v. Hudnut* 1985). MacKinnon attributes the legal defeat of the ordinance to liberalism's failure to embody an antisubordination notion, First Amendment assumptions "that do not apply to the situation of women" (p. 204), and the hegemony of the male point of view. If pornography were seen for what it is—an issue of sex equality consistent with an antisubordination principle and feminist jurisprudence—the ordinance could and would be law (p. 246–47).

MacKinnon's reliance on sexual abuse of women, its prevalence, and its protection under legal standards to ground her theory is complete. Her focus on, and development of, her theory is attractive both for its stunning simplicity and for its explanatory power, but the absolute nature of a particular vision of sex produces internal and external difficulties. The internal difficulty is readily identifiable in her selective application of consciousness raising. Indeed, it is ironic that MacKinnon considers women's voices in consciousness raising to be trustworthy until it comes to positive descriptions of sexual experiences. While stressing the va-

[9] I do not know if violent pornography exists across cultures; MacKinnon's claim appears to be ahistorical as well. Pornographic pictures and writings have existed for some time in human culture, but I am ignorant of their extent, use, and nature, although I have seen erotic etchings by Rembrandt and scanned *Memoirs of A Woman of Pleasure (Fanny Hill)* over twenty years ago.

lidity of the voices describing sexual *abuse* and its effects, she essentially denies that women's voices can be trusted in the area of sexual *pleasure*. A number of insightful critics, including Patricia Cain (1990), Barbara Flagg (1990), and Robin West (1987) have pointed to this vulnerability of MacKinnon's theory by observing that she has ignored women's felt experiences of pleasure in heterosexual intercourse, in sexual domination or submission (heterosexual or same sex), and in nondominating lesbian and even hetero sex. MacKinnon's response to the criticism that she is selectively inattentive to women's voices of pleasurable experience is to analyze and explain those experiences from a psychological perspective. To avoid or to rebut this criticism without resorting to dismissing these accounts as examples of "false consciousness," she relies on studies of the effects of abuse on, and anecdotes from, survivors and then ties them to her broader claim. Because most women have been sexually abused, MacKinnon asserts, they suffer from posttraumatic stress disorders, repetition compulsions, denial, and repression (pp. 146–54). Women may also go along with heterosexual relations because of fear, which they repress or convert into more pleasant emotions. In response to women who insist that they have exercised some choice in their sexual lives, she states that saying "I chose it" is "a strategy for sanity" (p. 150), not evidence of a subject who exists and chooses or evidence of women's felt pleasures.

While I think psychological defenses do play a part in an individual's perception of "reality," I disagree that these defenses are a dispositive argument against MacKinnon's critics. I agree that all these things can be effects of sexual abuse and use. The devastating consequences of sexual abuse are real and can negatively affect sexual attitudes and experiences, but the picture is not as simple as MacKinnon portrays it to be. Reports from some survivors of abuse, for example, indicate that "sex" in a trusting and loving relationship has been a pleasurable and fulfilling aspect of their lives; they experience sex as wanted, chosen, and not compulsory, not because they are trying to preserve their sanity, but because for them it is "true."

Further, while the effects of sexual abuse are extremely important to understanding the situation of women, I don't think they should be used to discredit what women say if one is claiming that what women say is the basis of one's theory. While "false consciousness" is a political condition that is a given, and denial, repression, and conversion reactions are arguably remediable psychological conditions, they are actually political and psychological explanations for the same phenomenon and thus *both* discredit women's voices about sexuality. Moreover, because defense mechanisms and stress disorders can and do affect everything we experience and perceive, the potential exists for discrediting women's

voices in *any* area of experience, a result that MacKinnon surely does not advocate or want.

Ultimately, several of MacKinnon's other theoretical arguments, powerful as they are, remain only partially persuasive. First, her portrayal of male sexuality appears to be too unidimensional. Second, if men *choose* to dominate women, how can sex/gender be simply "social constructs"—where does the power to choose come from? Third, if women are *only* victims of male sexual violence—and I do not dispute her assertion that many women in the United States have been or will be or are—are we defined solely by our victimhood? If so, where are those who can act against male power? MacKinnon never really answers these questions; indeed, she abandons her psychological explanations for a political solution: she quotes Marx on the development of the proletariat's consciousness, implying by analogy that women as a group will come to the same group awareness (p. 104). Thus, MacKinnon appears to use "group consciousness" as a stand-in for the awakening of individual consciousness. But if women are the group from whom sex is taken and the group that is objectified, reliance on a form of "socialized women's knowing" through consciousness raising maintains an objectivist and social constructivist stance toward women (pp. 101–2). Finally, while MacKinnon's critique of law as it exists is quite good, she does not really develop her argument for her reliance on radical legal change as the solution to women's oppression.

III. ZILLAH EISENSTEIN: THE PROBLEM OF EQUALITY

In contrast to MacKinnon's arguments are those of Zillah Eisenstein's *The Female Body and the Law*. While MacKinnon emphasizes domination and equality based on an antisubordination approach, Eisenstein, a liberal feminist, emphasizes sameness and a kind of "formal" legal equality corrected for the misperception that the model of the individual is male. As does MacKinnon, Eisenstein emphasizes the dangers of the "differences" approach to gender inequality but draws a different conclusion from that danger. Unlike MacKinnon, who emphasizes dominance, Eisenstein emphasizes sameness. After a promising beginning, in which she argues against dichotomies and either/or thinking, she concludes that almost any acknowledgment of "difference" is dangerous for women and thereby maintains the either/or logic she has sought to refute. Because difference is likely to be used politically by the Right to reaffirm gender roles and women's subordination to men, it is a better political strategy for women to insist on their sameness to men. "The sameness model, given law's phallocratic standard, is radical, even if insufficiently so" (p. 107); feminists should reassert that women are "more like males than unlike them" (ibid.). Sameness is not only politically the best strategy,

however; Eisenstein's book suggests that sameness is the theoretically proper ground as well. As a liberal feminist, she is concerned with making it possible for women to enjoy the same freedoms and choices as men in a liberal society.

As sexuality is to patriarchy for MacKinnon, pregnancy is to patriarchal *law* for Eisenstein. Rather than being sexually objectified, women's bodies are "engendered" as pregnant and as "mother." Women's bodies are never recognized as the physical embodiment of diverse, individual human beings; women become gendered constructs. The solution to this difficulty lies in liberalism. Women, argues Eisenstein, are the same as men; feminists should return to the liberal feminist emphasis on sameness to challenge the conservative resurgence of emphasis on difference. She argues that "difference" is always used to disadvantage women; because the referent for sameness is male, the sameness/difference debate is a trap for feminists. "If one looks for difference, that is what one finds"; women will suffer in the comparison (p. 18). It would seem, then, that if we concentrate on looking for sameness, that is what we will find, with the exception of biological reproductive roles. It is true that males and females share many of the same characteristics, but Eisenstein's insistence on sameness, without more, ultimately ends up reaffirming the very model of the human as male she rightly criticizes.

The project of liberalism, according to Eisenstein, is to promote women's equality through law, freeing them "from their engendered difference" (p. 221). Eisenstein's liberalism, properly understood, is a kind of "radical pluralism" in which equality under law should follow Ronald Dworkin's formula of equal treatment and equal concern and respect for individuals (pp. 22, 218–19). Sex discrimination, properly understood, would be "redefined to mean the treatment of an *individual* woman as a member of a sex class that restricts her freedom of choice and self determination" (pp. 221–22). Thus, she appears to subscribe to the liberal notion of human beings as rational, separate agents, rejecting the argument of some feminists that women's bodies and reproductive role distinguish their nature from that of men. In response to feminists who posit that women's bodies are different in significant ways from men's—we menstruate, we lactate, we contain and nurture (or not) potential life—Eisenstein cautions against "essentializing." As soon as we focus on these attributes or physicalities, we will be engendered rather than individuated, and she reminds us that essentializing women's bodies is what "anti-feminists have always done" (p. 93). Eisenstein does recognize that the "difference" of pregnancy is *the* biggest dilemma for liberal feminists who wish to argue that women are just like men in any way that matters and seeks, accordingly, to resolve the problem it presents. Her book is an excellent, if ultimately only partial, attempt to solve the problem from a legal liberal political perspective.

Law, according to Eisenstein, together with the common liberal formula that likes should be treated alike, has not adequately dealt with pregnancy or motherhood. Eisenstein correctly argues that applying legal liberalism's principles of individualism and formal equality to women as well as men has foundered on "sameness" and "difference" because of one unavoidable difference: women can (re)produce life and men cannot. Pregnancy, if nothing else, creates a difference between males and females that cannot be denied or made to go away (yet). This fact means that women are unlike men, and thus far women, rather than men, have been legally disadvantaged by the comparison. Eisenstein attributes this to the "phallocratic interpretations" of law (p. 21). She seeks to distinguish what she terms "phallocratic discourse," which is meant to capture the "realm of language, signs and symbols" of law, from patriarchy, which describes the concrete and actual social embodiments of male privilege (p. 21). Phallocratic discourse makes the penis "the symbolic guarantor of significance, which privileges the male body" (ibid.), which in turn makes law unable "to move beyond the male referent as the standard for sex equality" (p. 42). Thus, law "constructs and mirrors patriarchal social relations through its phallocratic interpretations" (ibid.).

The use of the male referent is both a political and perceptual category error that denies women's full humanity and equal legal, political, and economic status with men. Law, even "[l]iberal democratic law," originated in phallocratic interpretations, and is created, interpreted, and acted upon by men who maintain the privilege of "the phallus" (p. 31). Bodies are "discourses," as are "sex" and "gender." In the "discourse" of the body, law and men see and treat women's bodies as pregnant. In phallocratic discourse pregnant bodies signify "mother," not individuated human beings. All female bodies are seen as at least potentially pregnant, and because pregnant bodies are "engendered," that is, interpreted to be mother's bodies, we have the equation woman=pregnant=mother. Because women can be pregnant, they constitute a "sex class" that homogenizes them across class, race, and ethnicity in phallocratic eyes; their differences are submerged (pp. 222–23).

Precisely *how* women's bodies equal pregnant bodies equal mother came about is unclear. Eisenstein argues that while "until well into the nineteenth century, woman was viewed as a 'vessel of lust,' " she was transformed at some point into "wife-and-mother," an interpretation that remains imposed on her today (p. 83). "Femininity" for Eisenstein is now one and the same with biological motherhood (p. 91), *not* sexuality, as MacKinnon has argued. What the signifier "mother" means is never entirely clear either. It seems to signify that the "proper and natural destiny" for females is to be in the home, out of the public sphere, taking care of husband and children. That is, gender female apparently signifies destined for motherhood and service to children and men. Mother is

emotional, nurturant, obedient to father, nonautonomous, and less than fully human (pp. 108–9). She is the neoconservative/New Right mother-image, the moral Right's Madonna to the liberal feminist's Whore.

Eisenstein is correct in arguing that law in the United States has been incoherent when dealing with pregnancy; recall for a moment the famous distinction between pregnant women and nonpregnant persons. Because no male analog to the pregnant body exists, equality under liberal law as presently constituted becomes an impossibility. As an illustration, Eisenstein notes the difficulties that law and legal feminists have had with pregnancy in the *Cal Fed* case (*California Federal Savings & Loan Ass'n v. Guerra* 1987). Briefly, the case involved a sex discrimination challenge to a California law requiring employers to give female employees up to four months of unpaid maternity disability leave for medical reasons with a right to reinstatement. *Cal Fed* split the feminist legal community into a number of camps. As Eisenstein relates, liberal feminists, including the ACLU and NOW lawyers, fearing "protectionist" legislation and its history of disadvantaging women, opposed the law, because it treated women differently from men (pp. 101–4). The law had to be gender neutral: either men got disability leave in analogous circumstances, or women should get no "special" treatment (Littleton 1987:1298). Another group of feminists argued that equal employment opportunity and the episodic, rather than permanent, nature of pregnancy meant that there was special treatment only for a short time; that treatment did not unduly advantage women and should be allowed (Eisenstein, p. 106; Littleton 1987:1298; Kay 1988:569–70). Eisenstein fails to note a third argument made by Christine Littleton and supported by other feminist lawyers. For this group, pregnancy was *not* "the same as any other disability" as the ACLU argued, nor was it a matter of equal employment opportunity. Those levels of comparison for equality analysis were inappropriate. Rather, the appropriate comparison is whether women have an "equal right" with men to keep their jobs when they have children (Littleton 1987:1299). Ultimately, the Court's opinions reflected the confusion pregnancy creates for dominant legal thought. Six Justices, two writing separately, upheld the California statute on the grounds that it was not preempted by, or inconsistent with, the Pregnancy Discrimination Act; four Justices concluded the statute promoted equal employment opportunity and allowed women, like men, to have children without losing their jobs; three Justices argued in dissent that the legislation *was* "preferential" treatment for pregnancy.

Given this continued legal uncertainty, Eisenstein suggests several strategies for feminists. First, they should concentrate on women's sameness to men. Second, "sex" should be "distinguished" from "gender" and "pregnancy" (a biological condition) from motherhood (an engendered condition). Third, women

should rely on law reform to restructure the political economy of sex and parenting. Eisenstein very much sees the law as influencing behavior, and seems to assume that legislative and judicial change will improve women's status in the United States. Laws that treat pregnancy as a "fact," neither as "special" nor as "different," are our best hope, she claims, until we determine what the ungendered meaning of pregnancy should be. Yet, she acknowledges, sex equality must encompass differences when necessary to prevent "restriction" of women's choices. Making accommodation for "the pregnant body" as needed in the workplace is one such move, but more legislation is required: "We must construct a post-pregnancy policy as well: parental leave, infant care, child day care, child sick-care leave, and so on" (p. 209). Citing legislation in Western European democracies, for example, she urges the enactment of legislation requiring maternity leave with reinstatement, partial wages, and so forth in the United States (pp. 214–15). Beyond pregnancy, she asserts, "we must endorse a sex/gender neutral stance" for parenting and caretaking (p. 215).

Eisenstein's observation that the female body is transformed by patriarchy into a mother's body—the vessel for new life—can be useful in understanding some issues such as "fetal protection policies" in the workplace. Under these policies, all women who cannot prove they are sterile could be excluded from jobs that pose risks of exposure to toxic substances that would affect fetuses if the women were to become pregnant. These policies certainly can be tied to the equation woman=pregnant=mother. But there are other interpretations as well, which Eisenstein recognizes, such as keeping women out of competition for well-paying jobs traditionally held by men. Further, Eisenstein's assumption that the relation of pregnancy to child care can be neatly severed in the context of a cultural, historic, economic, and perhaps even phenomenological link of pregnancy to child care appears facile.[10]

A more central criticism is Eisenstein's peculiar failure to take seriously MacKinnon's claim that female bodies signal heterosexuality and therefore that the sex/gender distinction is false. That is, the female body, or parts of the female body, as sexual signifier, is absent from Eisenstein's theory. The failure to recognize the sexualization of women's bodies leads her to overlook a whole realm of meaning and source of women's inequality. First, sometimes *pregnant* bodies signify "sexuality" and *not* motherhood. Pregnancy itself can be pornographic: A scholar doing research on pornography once mentioned to me that he had found some piece of pornography with the (horrid) title "Pregnant Lesbians in Love." Second, pregnancy signals sexuality, and that in itself has been the subject of laws disadvantaging women. The pregnant woman has obviously

[10] Cf. Wildman 1990 (criticizing MacKinnon for ignoring motherhood and women's relation to children).

been "doing It" with somebody. In *Cleveland Board of Education v. LaFleur* (1974), the school board promulgated a rule requiring pregnant schoolteachers to leave their jobs in their fifth month of pregnancy. The reason for the rule, according to Justice Powell's concurring opinion, was "to keep visibly pregnant teachers out of the sight of schoolchildren" (ibid., p. 653),[11] perhaps because pregnancy signaled sexuality, and teachers were supposed to be asexual. (Presumably, Cleveland schoolchildren had no siblings or pregnant mothers.)

Eisenstein ignores the interpretation and construction of bodies as sexual in other ways as well. Her formula asserts that phallocratic discourse "pits the penis against the pregnant body" (p. 21), not against the female body, as in rape, or even the penis against the vagina, as in the mutilation[12] fear of the Oedipus complex. Thus her formula appears partial at best. Indeed, at one point, she claims that "sexual identity" is independent of the engendered coding of mother (p. 90), ignoring the engendered coding of women as sex objects in pornography. Rather, pornography is a form of liberation from the Right's insistence on maintaining women's status as mothers (p. 165), rather than a discourse of women's bodies as objects. In her discussion of the pornography debate, sex and bodies as constructs and discourses change to unmediated and essential sexual pleasure. "MacKinnon reduces sex to its engendered form" (p. 172), according to Eisenstein, suggesting that sex exists outside an engendered form. That "sex" exists apart from culture is at a minimum a claim that is undeveloped; the separation of sex from other aspects of human existence seems to contradict Eisenstein's reliance throughout her book on the socially constructed meaning of bodies.

Eisenstein argues that sex equality requires sexual freedom for women and extols the gains of the sexual revolution (pp. 154–55). It is important for women to have access to contraception and to be able to explore their own sexuality, but the "sexual revolution" of the 1960s did not revolutionize attitudes to proper sex roles. And her concern for equality, together with her fear of "protectionist" legislation, leads her to make some extraordinary statements about the pornography debate:

> Whereas the claim of woman's "difference" from man is usually used to deny women's right to equality, in this instance the discourse about "difference" is employed to enhance the supposed rights of women. . . . The problem is that the rights being enhanced are rights to protection against violence and aggression rather than rights to equal treatment. (P. 165)

I cannot see what is wrong about asserting rights against vio-

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[11] Powell, J., concurring. See ibid. at 641 n. 9 (majority opinion).

[12] I use the word "mutilation" instead of "castration," because Freud was talking about the absorption/cutting off of the penis, not the scrotum.

lence and aggression and why those "rights" aren't the same as a claim for equality of treatment or, at a minimum, equal concern and respect for women. There are reasons to oppose the pornography ordinance after conscientious consideration, but this does not strike me as one of them. Apparently Eisenstein is firmly committed to a model of primarily "formal" equality, not one based on substantive equality, antisubordination, or anything like it. And this seems to be the case: Antipornography ordinances are "protectionist," emphasizing women's "difference," an emphasis that Eisenstein has opposed throughout the book. Further, because of her reliance on pregnancy as *the* characteristic distortion of phallocentric discourse, she sees pornography as a good: It "can help to create a multiplicity of sexual imagery that enhances women's equality by differentiating the female body from the mother's body" (p. 173).

Finally, I am puzzled that Eisenstein, having carefully set out an argument against privileging one model of the human over another, and privileging one discourse over another, is at such pains to argue that pregnancy ought not to make any difference between males and females, that women are just like men, or close to it, even when they are pregnant. Her argument is ultimately one in which men still define the standard for the human, with some accommodation to the inconvenient fact of pregnancy. Patriarchy still defines the workplace, the economy, the aspirations of "the human." In Littleton's (1987:1295) words, this book at best argues for a symmetrical model of sexual equality which "agrees that differential treatment of biological differences (such as pregnancy, and perhaps breast feeding) is necessary, but argues that cultural or hard-to-classify differences (such as career interests and skills) should be treated under an equal treatment or androgynous model."

Inequality resulting from subordination and devaluation of women's differences created by culture cannot be eradicated easily through "equal treatment," because the foundation for that equal treatment is inequality. Nor will simple treatment of women's difference with "equal concern and respect" do it; the basis of individualist notions masks the power relations that define women's lives. Equal concern and respect could apply to separate spheres as easily as otherwise. The liberal feminist might want further to explore Littleton's "equal acceptance of our differences" notion, in which difference located in the female does not immediately become disadvantage. Ultimately, this may be where Eisenstein wants to go, too. At the end of her book, she speaks of a "radical revision of sexual equality" and a "radical pluralism" which seems very close to equal acceptance of and refusal to disadvantage "difference."

IV. CAROL SMART: THE PROBLEM OF PRIVILEGE AND DISABILITY

Carol Smart's book *Feminism and the Power of Law* resembles MacKinnon's work and evidences her influence in a number of ways. Smart rejects liberal legalism, emphasizes the gendered nature of law and legal discourse, focuses on issues of masculine power, and emphasizes the importance of a feminist critique of law based on women's experience. But if Eisenstein gives too much credit to the ideal of the rule of law in changing women's status, Smart is too negative about law's utility to feminists. Her text is a radical sociologist's critique of feminist efforts to change law. Consistent with radical Marxist sociology, she absolutely rejects law reform as a means for feminists to improve the status of women. Arguing throughout the book that law reform is like trying to tear down the master's house with the master's tools (Lorde 1983:98), she concludes that feminists should resist the "siren call" (p. 160) of law reform because reform is inadvisable, costly, and dangerous for women. Law is power, but feminists must always stand outside and apart from it. While Smart rightly declines to treat law as a monolith, she does emphasize that law is a closed discourse; "in accepting law's terms in order to challenge law, feminism always concedes too much" (p. 5). Feminists should dedicate their energies to continuing criticism of law from the outside.

The book itself is somewhat a grab bag of observations and commentary on law, society, and legal subjects of concern to feminists. The book is loosely held together by the thesis that law is a site of patriarchal power unresponsive to women's claims and concerns, and that law's patriarchy, together with the politics of the moral Right, always co-opts and subverts feminist efforts (see, e.g., p. 46). The chapters provide snapshots of history, statutes, court cases, testimony, interpretation, feminist voices and voices from the right, and criticisms. This somewhat "postmodern" form of the book can exasperate readers unfamiliar with the style, but the book nevertheless contains some very worthwhile points. The chapters range from an examination of the applicability of Foucault's thought to the analysis of law in society to the topics of rape law, the law governing child sexual abuse, feminist jurisprudence, law's control of sex and (re)production, the pornography debate, and a critique of rights. Concentrating on law in the United Kingdom, Smart also draws on feminist legal studies and work in the United States, Canada, and Western Europe. Although it is sometimes unclear which jurisdiction she is referring to in her criticisms, and one can argue that generalizations from one culture's experiences cannot be applied to reach conclusions about another's, the inclusion of a broad range of materials is helpful to a reader unfamiliar with legal feminism beyond her borders.

In the first chapter, "The Power of Law," Smart applies a

Foucauldian social analysis to law as an institution/discipline. According to Smart, law is a discipline that makes its own claim to truth, or power/knowledge. "[L]aw, like science, makes a claim to truth . . . that . . . is indivisible from the exercise of power" (p. 11). Law not only has power in terms of its judgments "but also in its ability to disqualify other knowledge and experience" (ibid.) Law defines the real through the process of disqualification; the disqualification of women's experiences and voices by law and legal method is an exercise of the patriarchal, or what Smart terms the "phallocentric" (p. 27), "power of law" (pp. 32–33).

Smart takes issue with Foucault's analysis of law in three ways. First, Foucault (1979) had seen law as an institution of the past, medicine as the discipline of the present, and power as radically dispersed and a positive force. She disputes Foucault's characterization of law as a "withering" discipline, acknowledging that Foucault did not spend much time analyzing law. Foucault's belief that law was a thing of the past is contradicted by law's expansion of power over every aspect of everyday life; law is hardly a "discipline" diminishing in importance (p. 8). Second, in an insightful modification of Foucault's emphasis on the rise of the so-called disciplining professions of medicine and psychology/psychoanalysis, Smart observes how law, spongelike, often absorbs and takes to itself the influences of these disciplines (pp. 96–97). Examples of this appropriation of what Smart annoyingly terms the " 'psy' discourses" and medicine run throughout the law as it applies to women, from the merger of class, gender, medicine, and economics into legal control of prostitutes in Britain in the nineteenth century (p. 94) to determinations of eligibility for infertility services in the present (pp. 110–12). Finally, Smart correctly observes that Foucault's celebration of the positive aspects of power and its radical dispersion is problematic for women living under the power of patriarchy.

In the following chapters, Smart focuses on particular issues for feminists concerned with law and seeks to demonstrate that law's patriarchy is impervious to women's concerns and voices. She argues throughout that feminist efforts to change law are and will be co-opted either by legal phallocentrism or right wing antifeminism. Her chapter on rape, for example, supports MacKinnon's argument that the law of rape is determined by male definitions of sex: "The whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism)" (p. 35). Citing MacKinnon, Smart argues that the rape trial is a form of pornographic titillation (pp. 39–43). She agrees with MacKinnon that calling rape violence avoids the problem of directly confronting male sexuality but dismisses her argument that rape is a crime of sex, not violence, with the statement that there is "a continuum between (hetero)sex and rape" without explaining what that continuum

might be. Rape becomes a problem of "strategy" for which Smart has no particular answer (p. 44).

Even if rape is a major concern of feminists and is an area where law and legal definitions define the "real," rape reform efforts have not made much difference in that reality. Smart cites the experience of Canadian feminists to demonstrate that attempts to reform the law of rape can open the door to legislation repressing "good sex" as well, including homosexuality and "underage" sex (p. 46).[13] She asserts that in the United Kingdom, any "pro-women demands can be co-opted into more reactionary law and order demands which in turn enhance pro-family, anti-feminist rhetoric which is so powerful in the 1980's," thereby running the risk of "turning into a traditional moral purity campaign" (ibid.). Conceding that feminists cannot simply give up on rape law, ultimately Smart gives no guidance beyond saying law is a discursive field and "must be challenged most fundamentally" (p. 49).

In a similar vein, her discussion of "surrogacy" and pornography illustrates the relation of patriarchal legal assumptions and antifeminist morality and politics. In the United Kingdom, it is now a crime for a mother not married to the father to surrender a child to him at birth in return for compensation. The birth mother, the birth father, and anyone who participates in such arrangements are guilty of a crime. Smart demonstrates that this criminalization of childbearing contracts was based on a visceral and patriarchal moral reaction, including beliefs about who "owns" a woman's womb, proper motherhood, moral standards of human conception, and women's (not men's) adultery (pp. 107–9). Similarly, according to Smart, legal regulation of pornography, which can be seen either as an issue of morals or one of harm, has tended to become an issue of morals. She argues that "the censorship movement is reliant on anti-feminist feeling," that is, viewing women as mothers and wives (p. 130). The pornography debate in England has centered on the criminal law, creating the risk of co-optation of the pornography debate by the moral Right, evidenced by the fact that "the regulation of what is defined as pornographic goes hand-in-hand with measures like restricting sex education in the schools . . . and attempts to reduce the availability of abortion" (p. 130). She cautions, "the tide of censorship is likely to be used against all forms of feminism" (p 130).

Smart argues throughout her book that feminists *must* "resist the temptation that law offers, namely, the promise of a solution" (p. 165). She points to pornography as a clear example of the dangers of that temptation. First, she argues quite correctly, pornography is a complex subject; the "pornographic genre" extends far be-

[13] Smart never explains why "under-age" sex is "good" or why repressing it is "bad"; I assume she is concerned about attempts to control female sexuality through statutory rape laws.

yond sexually explicit and violent films and materials. Second, she argues that even harm-based approaches are faulty. She refers back to the difficulty of establishing lack of consent or coercion in rape trials to refute any confidence that harm resulting from pornography could be proven (p. 131). Third, she notes that criminalizing pornography may increase exploitation because "[i]t might make matters worse for women who work in the skin trade because the conditions of production of pornography might worsen, or the whole enterprise might move to the Third World where safeguards on women's labor are far less extensive" (p. 133).

The MacKinnon-Dworkin ordinance that makes pornography an issue of sex discrimination is more appealing to Smart. But again, resorting to law is problematic. The problem of losing control over the direction of the law

> is inherent in using civil law because those who have the power to exercise it may not be feminist in orientation, but women who represent organizations which are part of the anti-feminist moral right. The practical definition of harm would then come from a combination of moral right claims and judicial attitudes rather than feminist principles. (P. 136)

Smart also asserts that regulating pornography would create the "risk of using a law which could be used against feminism and other forms of political speech"—a classic legal liberal argument. To bolster her opposition to using law to combat pornography, she also argues that the issue is too divisive for feminists, that sex discrimination law has accomplished little, and that lack of agreement "about the harm of pornography" means that feminists should not use law to regulate pornography. She concludes:

> Pornography is an issue which clearly reveals the limits of law in terms of feminist strategy. It reveals that there are major problems in transforming any feminist analysis of women's oppression into a legal practice, as if law were merely an instrument to be utilized by feminist lawyers with the legal skills to draw up the statutes. (Pp. 136–37)

Efforts to create a feminist jurisprudence are also doomed: it is a "false quest," a "trap . . . whereby feminists find they enter into a game whose rules are predetermined by masculine requirements and positivistic tradition" (pp. 67–68). The works of Gilligan and MacKinnon replicate this error. Feminist jurisprudence fails because "it does not de-center law." Instead

> it preserves law's place in the hierarchy of discourses which maintains that law has access to truth and justice. It encourages a "turning to law" for solutions, it fetishizes law rather than deconstructing it. The search for a feminist jurisprudence is generated by a feminist challenge to the power of law as it is presently constituted, but it ends with a positivistic, scientific feminism which seeks to replace one hierarchy of truth with another. (Pp. 88–89)

As a legal feminist scholar, I may be suspect when I say that Smart's absolute rejection of law as a site for feminist efforts is gravely mistaken and separatist. Yet women cannot simply refuse to participate in law and legal discourse: Laws and courts determine child custody, support, access to birth control, and the consequences of marriage, to cite some examples. While I agree with her that changing the law-on-the-books is not the end point, and I also agree that we must maintain a continuing critique of patriarchy's manifestations in law, I dispute her conclusion that the tenacity of patriarchy in law is a reason to abandon efforts to use law to improve the situation of women. We should not be forced into the either/or of reform or revolution. An effort that spans only about twenty years should not be abandoned simply because instant change has not been forthcoming. That feminist achievements in law have been turned against women or have been disappointments means there are no quick fixes, not that there should be no efforts at all. We should abandon neither short-term humanitarian efforts nor long-term goals of changing the law and society totally, as Stanley Cohen (1988) has argued. Revolutions are usually a long time coming; this does not mean they cannot occur.

Indeed, law reform can have an overall positive impact and make a difference: *Roe v. Wade* (1973) has made a major difference in the lives of countless women in the United States. Although in light of the abortion funding cases denying abortions to poor women and given the power of the anti-abortion/pro-life movement in the 1980s, one could argue that the backlash and damage created by *Roe* damaged women more than it helped them, evidence exists to doubt this criticism. Even though *Roe* was a decision that heavily relied on the discourse of medicine instead of notions of women's equality—illustrating the disciplinary absorption that Smart discusses—it became an important symbol and fact to many women. And as a result of *Roe*, the medical technology of abortion improved measurably: Abortions today are safer for women and easier to accomplish than they were in 1973, and women are better off because of it. That we have lost ground as a result of reliance on a court-focused strategy and a failure to develop grass-roots support for women's right to choose does caution against relaxing our guard once law reform has been accomplished; it does not negate the accomplishment that was *Roe*.

Smart speaks of deconstruction as a method for feminists to confront patriarchal law; deconstruction, as in identifying privileged poles in legal thinking and inverting them, can be a very effective strategy using law's own terms. Thus, contrary to her anti-law stance, deconstruction is a method to be used *in* law.[14] Smart

[14] For an example from a feminist perspective, see Dalton 1985:1095–1114 (discussing cohabitation cases and contract law; courts have several possible moves they can use to enforce or deny agreements between unmarried partners).

also criticizes feminist efforts to gain legal rights; that "rights" are both manipulable and atomistic does not negate their importance to those who have not had them.[15] Further, while I agree with Smart that we have not yet created a feminist vision of "law," I disagree that we aren't beginning to form one. MacKinnon, for example, refuses to allow "male" understanding to define her jurisprudence. And law, being neither immutable nor unchanging, may ultimately embody a feminist vision.

V. WHERE WE MIGHT GO FROM HERE

The preceding discussion argues that each of these books sheds light on law and the situation of women, although they differ on what the feminist response should be and, indeed, on the theoretical foundation of feminism. Each author challenges law's patriarchy and demonstrates how it operates to continue women's subordination. Ending women's subordination is the goal of feminists, and while law may present a particularly difficult field of endeavor for women because of its patriarchal assumptions, it is such an important institution in modern society that we must continue our efforts to change its role in the subordination of women. Rather than subscribe to any one author's explanation for women's oppression, I think that recognition of all the explanations is more useful, as the complexity of patriarchy requires complex responses and theories. There are three areas suggested by these books that I think are of particular importance for law and society study and work: the ending of violence against women, exploring the significance of women's (re)productive power, and building and changing the human community in response to feminism's continuing critique of and resistance to patriarchy.

Of the three authors, MacKinnon is primarily concerned with violence and its effects on women. And violence against women seems to be an obvious and appropriate area for legal inquiry and action. One does not have to agree with all MacKinnon's claims or interpretations of the empirical literature on rape, pornography, and so forth to appreciate that the sexual violence men do to women and girls is widespread and horribly damaging to the human personality. Empirically, experientially, quantitatively, and qualitatively, rape and sexualized violence adversely and directly affect millions of women in this culture and indirectly affect millions of others through fear. Rape and sexual abuse happen to lesbians and heterosexuals, girls and old women. MacKinnon ob-

[15] Smart sees some utility in retaining rights language for the abortion debate but advocates the abandonment of rights-based strategies generally (pp. 158–59). She also acknowledges that early feminist efforts to obtain legal rights were important for women in their struggle against male privilege. But she advocates abandonment of rights talk and the formulation of demands on women's terms. For a discussion of the usefulness of rights as progressive tools, see Williams (1987).

serves: "Given that this [violence] is the situation of all women, that one never knows for sure that one is not the next on the list of victims until the moment one dies (and then, who knows) it does not seems exaggerated to say that women are sexual, meaning that women exist, in a context of terror" (p. 150). But sexual abuse is not the only form violence against women takes.

Although MacKinnon argues that "sexuality is violent, so perhaps [violence] is sexual" and that battery treats women as objects and, therefore, in some sense is sexual (p. 179), it seems highly unlikely that misogyny is entirely reducible to sexuality and that its manifestation in beating women is a sexual act. Violence and sex are interrelated and separate; violent sex may be the normal practice in this culture, or it may not be, it may be the norm in other cultures or not, but diminishing, hating, mistreating, hitting, and killing girls and women seems to exist across cultures. In one report by a human rights observer, for example, abuse of females is staggeringly widespread:

> in Bangkok, Thailand, a reported 50 per cent of married women are beaten regularly by their husbands. In the barrios of Quito, Ecuador, 80 per cent of women have been physically abused . . . . [T]here are the less recognized forms of violence. In Nepal, female babies die from neglect because parents value sons over daughters. . . . In India, young brides are murdered by their husbands when parents fail to provide enough dowry. . . . Studies confirm that where the preference for sons is strong, girls receive inferior medical care and education, and less food. (Heise 1989)[16]

Power and control over another human being may have its origins elsewhere than in sexual "desire," including male sexual desire. MacKinnon, in arguing that rape is sex, not violence separate from sex, pithily observes, "If it is violence, why didn't he just hit her?" (p. 134). But if battery is sex, why didn't he just rape her? Violence may come from displaced rage, it may come from a feeling of powerlessness in the world, it may come from fear, it may come from desire to control another person, or a number of other sources. I would also argue that the mistreatment of female human beings cross-culturally cannot be based entirely on male sexuality as defined by Western pornography, although it may be based on the desire of men to maintain power and control over another human being. Men batter and beat women and girls, men starve and control women and girls, without "getting off." And women hate and abuse themselves and their girl children, which doesn't seem "sexual" to me, although the consequences and effects are equally devastating.

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[16] See also Mydans 1988 ("In traditional Bangladesh, women are in effect the property of their fathers or husbands. They receive less education, less food, and poorer health care than their brothers").

Violence against women and girls, whether legally permitted (the marital rape exemption, the (old) British rule of thumb) or legally ignored (the nonprosecution of husbands in "bride-burning" cases in India, failure to prosecute those who rape African American women, and failure to protect battered wives), is terrorism. Treating men in this manner is considered criminal and punishable; terrorism against women and girls should be seen as equally criminal. As skeptical as social science may be of law's ability to change behaviors or stop criminality, it would be morally irresponsible to stop trying to make law listen and respond to female human beings. If it is dangerous to resort to the criminal law, because the moral Right will co-opt feminist efforts or because the patriarchal assumptions of law will be turned against us, we still must use law. If the law doesn't hear women's voices, because it hears only (white) male language and patriarchal terms, then feminists of all colors must inundate the law with the language of women, their lives, their experiences. If we have to create new law, neologisms, new doctrines, and new solutions and sanctions, then we must do it. As long as law approves of, trivializes, or ignores men's violence toward women, it enables the violence to continue.

The second thing that seems of utmost importance is that feminists must come to terms with what the life-giving capacity of women means and should mean. Feminists have often tried to avoid the material and personal implications of pregnancy and childbirth for women, perhaps wishing it would all go away. But only women get pregnant, and most women in the world are pregnant at some point in their lives. It therefore makes utterly no sense to hurl the accusation of "essentialist" at feminists who are trying to explore the issues that pregnancy, childbearing, and childrearing entail *for women*. Eisenstein is absolutely right to begin consideration of the fact of pregnancy, even if I disagree with the conclusions she draws. The capacity to create life is an enormous power; it almost makes women god(esse)s.

Marilyn French has argued that women's life-giving capacity had a role in the creation of patriarchy; patriarchy has been dedicated not only to controlling females as females but also to controlling the means of (re)production (see, e.g., French 1985:111). From what my mother called the "begatitudes" in the Bible, to the discovery that the human sperm contained a fully formed homunculus that was deposited in the "empty vessel" of the woman, to prohibitions on birth control and abortion, men have tried to control human (re)production by denying women a part in it. Many feminists have tended to replicate this denial by insisting that pregnancy has no meaning separate from gendered stereotypes; the move is a "natural" one when one considers that the fact of pregnancy relegates women to subordinate status in the world. On the other hand, failing to explore the existential and phenomeno-

logical meaning of pregnancy and motherhood *to women* means that we continue to adopt a male-focused definition of what it is to be human.

Eisenstein wants to separate (re)production from engendered motherhood; feminists have to think long and hard about the damage this could cause women as well as the potential in this severance. To enable women to participate in the public sphere of work, Eisenstein argues for more day care for the children of women workers. But because day-care workers are overwhelmingly poor women and women of color, having women care for children simply perpetuates the assignment of childrearing to women and replicates the privileged divisions of women that have worked to the detriment of all women. Further, day care does little to restructure a workplace based on a model of an independent male worker. Perhaps to solve the problem of exclusively linking women to child care, Eisenstein argues that parenting should be "ungendered" as well. She advocates having men take on the responsibility of child care and parenting in order to free women to work. Even were this to occur, the workplace would still be structured around the model of independent male workers unless Eisenstein assumes that the workplace will respond quickly to men's changed circumstances. Further, men have to be convinced that this is a human activity worth doing, that it is not "unmanly" to care for and nurture their children. And for many single mothers, there is no man present to convince.

We also must be careful to acknowledge that for many women, identity may be closely tied to child care and nurturing, because that is where they experience recognition of their "specialness" and value. This is not a trivial point. It is difficult to combat socialization and recognition for the role of caretaker and nurturer; these things are essential for children to have. If men and fathers resist taking on these roles, women and mothers will almost inevitably fill the gap. Further, the *values* of caring, nurturing, and protecting ascribed to "mother" ought not to be abandoned or ignored, despite the perversion of those values and their rigid assignment to women in service to women's oppression. Rather, we should seek to expand and transform them in a way that permits us all to have care and nurturance and to care and nurture. We must also work to change the economic structure so that those who have and care for children do not suffer economic hardship as a result. Thus, the short-term and long-term goals of feminism may have to differ; in the short term, many women are going to be unwilling to sacrifice their children to the principle of equality, but with restructuring and redefining of parenting and the workplace, in the long term, the investment we all have in the stereotypical identification of "mother" might diminish and the strength of the values associated with "mother" increase.

Feminists also need to be aware of and concerned about, as

Smart notes, the latest effort to control women's (re)productive capacity in the form of concern for "fetal rights." "Fetal rights" are not confined to the anti-abortion campaign; they are also tied to a campaign to deny women's recent assertions of power and self-sufficiency and to condemn women's moral failings. Because some women deny risks or desperately need their jobs, because some women are addicts and can't get treatment even when they want it,[17] fetal rights advocates have concluded that *all* women cannot be trusted to avoid exposing unborn fetuses to toxic chemicals, illegal drugs, or alcohol, and therefore they must be controlled. The use of "fetal protection policies" to exclude women from male-dominated jobs in the United States, together with the condemnation of the moral turpitude of "drug mothers" and the use of the criminal law to punish them (Teltsch 1990; Lewin 1990) implies, again, a derogation of women's personhood. The tragedy of birth-defective infants *is* a concern, but so is the leap to generalizations about women. Until the Supreme Court decided *UAW v. Johnson Controls* in 1991, fetal protection policies have prevented poor and working-class women from gaining economic power, or have allowed them to gain that power only at the cost of losing their (re)productive power through sterilization.

The Court's recent decision that title VIII and the Pregnancy Discrimination Act prohibit employers from excluding nonsterile women from jobs in *Johnson Controls* (1991) places a legal brake on the exclusion of women from the workplace in the interest of *potential* fetuses, although it is too early to tell what the response of employers will be. The majority opinion, in a victory for liberal feminism, both struck down the particular policy involved and strongly suggested that *no* fetal protection policies that single out women for exclusion would be permissible under a narrow reading of title VII's bona fide occupational qualification exception; if women are just like men in their ability to perform a job's tasks, they cannot be excluded from the job on the basis of "safety" or "cost." Nor can protectionist policies justify denying a woman a choice between her "reproductive role" and her "economic role," because, according to the Court, Congress left the "choice" to women (ibid., p. 4215). The decision has already been attacked by one scholar for endangering potential fetuses and for not insisting on protection for men as well as women from toxics (Rosen 1991) and by a few editorials fretting about employer tort liability for birth defects. Women quickly vanish from view in these criticisms; they remain undifferentiated wombs. At least for the moment, however, efforts to control women's access to jobs in the United States

[17] Teltsch 1990 ("most hospitals that treat addiction discourage low-income pregnant drug or alcohol abusers from seeking care . . . . In New York City, a survey of 78 drug centers found that 87 per cent exclude pregnant users of crack"); Lewin 1990 ("most alcohol and drug treatment programs exclude pregnant women").

via concern for nonexistent, unconceived fetuses have been thwarted.

Feminists should never abandon a concern with law, but they need to recognize, as Smart emphasizes, that law is often unresponsive to feminist concerns and that the law-in-action may thwart their efforts. Therefore, continuing criticism *is* necessary. Law hardly operates in a vacuum, and we must recognize that it influences and is influenced by the human world that constitutes it. In that world, "gender" is a fundamental concept around which religion, morality, politics, law, science, medicine, society, culture, and economics have revolved. Feminists must recognize the influence of all these belief systems, power sites, and discourses in constructing a world divided into "masculine" and "feminine," "male" and "female," a world in which the female still does not count for much, even to many feminists.

Accordingly, feminists who want to create revolutions with law must be cautious. Change from the top down is occasionally possible, of course, but resting on a perceived legal victory, as feminists in the United States did after *Roe*, can be terribly mistaken. And even reformist legal change may be thwarted by other established power arrangements that perpetuate patriarchal structures. For example, women bear primary caretaking responsibility for children and adults as well as participate in wage labor. Eisenstein (pp. 209–16) argues that legislation mandating paid parental and child care leave employment policies, common in Europe, is necessary to ensuring equality for women in the United States. But the politics of neoconservative economics, and the privileging of capitalist employers over employees, as well as patriarchal bias, led President Bush in 1990 to veto a relatively toothless law requiring larger employers to provide employees three months of unpaid "family leave" with a right to reinstatement (Beck 1990:48, 50). Thus, even a relatively modest legal reform failed because of a complex of patriarchal power relations.

CONCLUSION

Women are not only victims, incompetent and incapable of survival, development, courage, and strength. In fact, that women have achieved so much, going unnoticed in daily acts of courage, is impressive and inspiring. Women also have a capacity to victimize and dominate others; estimates are that women account for about half the adults who abuse children in nonsexual ways, and women have enthusiastically supported domination and oppression of different classes and colors of people (hooks 1984). Not all men dominate, and it is especially difficult for men who do not dominate to comprehend that they are advantaged in a world that seems to diminish them or oppress them. Other men do not see themselves as having any power over women at all. Given all this, it is still prob-

ably true that most of us do internalize and reproduce structures and patterns of gendered relating, consciously or not; as Mary Becker (1990) has noted in another context, our investment in heterosexuality alone means that we repress conflict and examination of our attitudes and behaviors. Thus, criticism, examination and revision, and revolution across all dimensions of human practice are necessary. And development of alternatives to the way things are is equally necessary: Criticism alone will not build a world in which women and girls, men and boys, are able to exist free of domination and dominance. Freud, hardly a favorite of feminists, was right when he observed that "love and work" were necessary to human well-being. Women and men, rather than splitting these things, need to share them and practice them.

A final note on the tenacity of patriarchy requires that we recognize that the destabilization created by the feminist critique is deeply threatening to everyone. I can conceive of no revolution more total than that of women and girls throughout the world becoming full human beings, moving past status to contract and beyond. To "admit . . . no power or privilege . . . nor disability" will not be easy; the structures of sex division are deep and endemic. Bringing the two together will mean challenging our deepest beliefs, assumptions, training, practices, and experiences. It will mean that all we think, feel, and were taught to believe is "up for grabs." We must be willing to give up our advantages, habits, and understandings of the world in the face of the terrible groundlessness that entails. Eventually, nothing short of this will do.

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