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FEMINISM AND POST-STRUCTURALISM

Joan C. Williams*

THE FEMALE BODY AND THE LAW. By Zillah R. Eisenstein. Berkeley: University of California Press. 1988. Pp. x, 235. \$25.

For more than a century feminists have split over the issue of whether women are basically the same as men or basically different. In the early twentieth century, the split played out between supporters of protective labor legislation (pp. 201-10) and their opponents in the National Women's Party.¹ A similar split has emerged in the late twentieth century. "Difference" feminists argue that women are disadvantaged when they are treated like men in the context of such issues as pregnancy leave and divorce. Treating women the same as men, they argue, denies the real and obvious differences.² The most obvious of these is that women get pregnant, but difference feminists do not stop there. Many argue that women are different from men not only in terms of their biology but in terms of their values and their "voice."³

This debate has often raged bitter and has consumed energy that would be better spent working toward widely held feminist goals. Thus it is difficult to exaggerate the importance of Zillah Eisenstein's ambition in *The Female Body and The Law*: to mobilize post-structuralism to move beyond the "sameness-versus-difference" debate.

Eisenstein is one of a number of writers who are shifting the focus of feminist theory. Some influential earlier theorists developed a critique of Western epistemology, arguing that it is in some sense "male."⁴ They argue instead in favor of modernist, contextualized thinking, which they link with the attributes of traditional femininity.⁵ More recently, theorists have turned their attention from the essential-

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1. See S. WARE, *BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL* 77-79 (1981); N. COTT, *THE GROUNDING OF MODERN FEMINISM* 117-42 (1987).

2. See, e.g., Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 *Wis. L. REV.* 789.

3. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). For a listing of some law review articles influenced by Gilligan, see Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797, 803 n.17 (1989).

4. See, e.g., S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* 30-57 (1986); E. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* 80-89 (1985); Keller, *Feminism and Science*, in *FEMINIST THEORY* 113 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1981).

5. E. KELLER, *supra* note 4, at 158-76.

ism of traditional Western thought to the essentialism of feminist thought. Eisenstein's book is part of a broad attack on essentialism in both feminist theory and women's history. An early contribution was historian Nancy Hewitt's influential article, "Beyond the Search for Sisterhood," in which Hewitt questioned the existence of a unitary "women's culture" by pointing out race and class distinctions among American women.⁶

Hewitt's article signaled a major reorientation among American feminists. In 1988, Elizabeth Spellman published *Inessential Woman*, a book-length study of how the dominant strains in feminist thought have privileged the voice of white, middle-class women, marginalizing the voices of other races and classes.⁷ Other anti-essentialists, like Eisenstein, have turned to post-structuralism for help in deconstructing the notion of an abiding, presumably stable set of differences between men and women. Notable contributions include a special issue of *Feminist Studies* devoted to deconstruction⁸ and the recently published collection entitled *Feminism/PostModernism* edited by Linda Nicholson.⁹

Feminists' post-structuralism draws on different elements in post-structuralist theory than did critical legal scholars in the early 1980s.¹⁰ Critical legal scholars focused on the notion that language generally, and the law in particular, yields not determinate meaning but only the "free play" of possible meanings. Thus they argued that doctrine was infinitely manipulable because it is fundamentally indeterminate.¹¹ Feminists focus not on the indeterminacy critique, but on post-structuralism's ability to deconstruct false dichotomies. Eisenstein seeks to deconstruct not only the male/female dichotomy, but also the sameness/difference debate. Here she joins Joan W. Scott, whose insightful analysis suggests ways of integrating these two positions, which traditionally have been considered mutually exclusive.¹²

Eisenstein's insight that post-structuralism can be used to transcend the sameness/difference debate is apt, as is her implicit decision about *how* to end the debate: through respectful integration of each

6. Hewitt, *Beyond the Search for Sisterhood: American Women's History in the 1980s*, 10 Soc. Hist. 299 (1985).

7. E. SPELLMAN, *INESSENTIAL WOMAN* (1988).

8. 14 FEMINIST STUD. No. 1 (Special Iss., Spring 1988).

9. FEMINISM/POSTMODERNISM (L. Nicholson ed. 1990).

10. Pp. 46-47. It is interesting (and perhaps flattering) to see political scientists turning to legal literature when they explore post-structuralist themes. Eisenstein cites primarily the classics of critical legal studies literature. See pp. 43-47.

11. See M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); see also Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989).

12. Scott, *Deconstructing Equality Versus Differences: Or, the Uses of Post-Structuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1988). Scott's essay is an outstanding example of post-structuralist feminist scholarship that avoids the pitfalls noted in the text, *infra* text accompanying notes 23-24.

side's insights, rather than through the triumph of either side in a victory that would by its nature be Pyrrhic, given feminism's goal of sisterhood.

While Eisenstein's book is promising, and her inquiry is rich and suggestive, her book has limitations as an attempt to apply post-structuralism to feminism. I first argue that her approach founders on some familiar shoals of post-structuralism: overly self-conscious language that may unwittingly reinforce the dualisms she intends to challenge. Eisenstein also fails to follow through the full implications of post-structuralism's rejection of absolutes. Once we as feminists reject Truth, and are left only with arguments in favor of our interpretations, we are brought face to face with the need to persuade others to see the world as we do. This stance highlights the limitations of an abstract, allusive post-structuralist approach that is primarily oriented toward academics. I argue that moving beyond sameness and difference involves two separate tasks, each of which requires us to meld theoretical insights with additional information. To move "beyond difference," we need a detailed redescription that helps people recognize the artificiality of the gender verities they "see" at work around them. For this, we need psychological data that allows us to see how a continuum of behavior variation is so consistently interpreted as a male/female dichotomy. *The Female Body* suggests theoretical reasons in favor of continua, instead of dichotomies, but does not sustain a sufficiently detailed redescription to help people see how the world can be reinterpreted without the traditional gender dichotomy.

If *Female Body* is of limited use in moving "beyond difference," it also is of limited use in explaining why treating women "the same" as men has backfired in contexts such as divorce. To analyze why the principle of equal treatment for similarly situated persons has rebounded to the detriment of women, one must highlight the structural constraints that preclude most women from being "similarly situated" to men with respect to work and family roles. Here Eisenstein's prior Marxist work provides guidance on how to move beyond "sameness" to a fundamental challenge to the structure of wage labor.

A. *Eisenstein's Post-Structuralism*

Eisenstein sets out her core post-structuralist analysis in Chapter One. She turns to post-structuralism's critique of the Western tendency to privilege dichotomies over pluralities in order to help transcend the notion of a "natural" dichotomy between men and women.¹³ Her central insight is simple but powerful. In place of the traditional dichotomy between men, characterized by one set of traits, and

13. Chapters 1, 3, and 6, all of which advocate the need to abandon the notion of sexual dichotomy in favor of a plurality of differences, become repetitive at times, particularly since Eisenstein does not give much detail about what the new continuum of differences will look like.

women, characterized by a mutually exclusive set, Eisenstein proposes a "radical pluralist methodology" that critiques difference on the grounds that it "denies variety and applauds homogeneity" (p. 35). "What if there are multiple differences of sex that are completely related to differences of gender rather than a 'difference' of sex established in nature that differentiates all women from all men?" (p. 57).

The basic thrust of Eisenstein's critique is against difference, in keeping with her history as a sameness feminist (p. 85). To her credit, though, she does not stop there, as do many feminist scholars who challenge essentialism. She eschews an unreflective privileging of plurality, in deference to the post-structuralist tenet that there is no one truth, no "privileged text." "It is important," she warns, "not to overstate the heterogeneity of differences to the point of silencing the similarities and unities that exist" (p. 35). Here Eisenstein finds her way back from post-structuralism to her abiding belief, which she formerly expressed in Marxist language, that certain power relationships in our society underlie its apparent malleability and diversity (pp. 18-19).

I admire her attempt to keep both plurality and unity simultaneously in focus. Not many post-structuralists take post-structuralism's anti-essentialist message seriously enough to apply that message to anti-essentialism itself. Yet having set out for herself the hard discipline of self-critique, Eisenstein is less than successful in delineating how to resolve the tension between unity and plurality. She notes that "phallogentrism is multicentered, [and] takes diverse historical, cultural forms" (p. 41). But we need more than this abstract statement to enable us to assess the complex relationships between unity and diversity — and, in particular, to respond to the familiar charge that the diversity masks an underlying unity of patriarchal oppression. Though Eisenstein uses post-structuralism in a fruitful way to articulate the complexity of the program that lies before us, her (post-structuralist) tendency to remain on a high level of abstraction makes her treatment less satisfying than it might be.

Her post-structuralist style has other drawbacks. A key one is her decision to structure her discussion around a central metaphor, pitting "the phallus" against "the pregnant body." What does Eisenstein mean by her persistent references to biology? Initially, I found her terminology confusing; eventually, I concluded that her exhortation to "decenter the phallus" usually referred to the need to abandon the male standard.¹⁴ This is a traditional feminist point, perhaps best expressed in Catharine MacKinnon's biting formulation, as quoted by Eisenstein:

14. Pp. 4, 66. This is particularly true in chapter 2. In chapters 4 and 5, "reconstructing the phallus" refers to conservative efforts to preserve men's traditional advantages and lure (or force) women back into traditional roles. These two ideas seem distinct enough to be treated as separate issues instead of being lumped together with phallic imagery.

"There are two options The first option I call the 'male standard': Women can be the *same* as men. In law, it is called gender neutrality. The other option I call the 'female standard': You can be *different* from men. In law, it is called special protection." Either way, men articulate the standard of assessment. "You can be the same as men, and *then* you will be equal, or you can be different from men, and then you will be *women*."¹⁵

If this is indeed what Eisenstein means, why doesn't she say so? She is not talking about the phallus at all — nor is she talking about the biological difference of pregnancy in her oft-repeated dichotomy between the phallus and the pregnant body. Instead, she discusses a variety of issues, notably that societally valued "objective" modes of human thought are identified as male (p. 24), that male life patterns yield privileged access to money and power (pp. 63, 66-69, 98-116), and that concerns over inappropriate sexual expression often are expressed as the need to control the sexuality of women (pp. 154-74, 184-90). To group these issues under a simple dichotomy between phalluses and pregnant bodies simply serves to reinforce an old mistake. If we as feminists do not want other people to confuse these issues with our biology, we should avoid using the language of biology to talk about them.¹⁶

Eisenstein, of course, understands that these issues concern the structure of society, not of human bodies. She intends to critique, rather than reinforce, the way society traditionally has rationalized differences in social roles by arguing that social differences flow "naturally" from differences in biology. Nonetheless, she comes uncomfortably close to perpetuating the traditional confusion of these issues with biological sex differences.¹⁷

Eisenstein's persistent translations of societal problems into physical terms highlights another risk: that feminists will spend valuable time and energy translating into post-structuralist terminology insights widely expressed and accepted. This is a particular risk in Chapters Two, Four, and Five, in which Eisenstein critiques the male norm implicit in liberal law generally, and in New Right thought in

15. P. 55. Eisenstein is quoting remarks made by MacKinnon in *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 20 (1985) (a transcription of a discussion at the law school of the State University of New York in Buffalo).

16. Eisenstein's terminology may be influenced by the language of French feminism. For example, note her cites to Luce Irigaray. Pp. 32-33, 38, 54. But, as Eisenstein herself notes, underlying Irigaray's language of genitalia is a persuasive essentialism Eisenstein rejects. P. 38.

17. Eisenstein discusses some fascinating material under the rubric of challenging the bright line distinction that feminists traditionally have drawn between sex and gender, notably the insight that it is easier to change natural facts than cultural facts, *see* p. 87, and the insight that due to improvements in nutrition, birth control, and overall health, what it means biologically to be a woman today is extraordinarily different from what it meant before 1900, *see* pp. 92-93. But I do not think she comes to terms with the risks inherent in abandoning feminists' traditional insistence on keeping sex and gender sharply separate.

particular.¹⁸ In Chapter Two, entitled "The Engendered Discourse(s) of Liberal Law(s)," Eisenstein argues that

because law is engendered, that is, structured *through the multiple oppositional layerings embedded in the dualism of man/woman*, it is not able to move beyond the male referent as the standard for sex equality. . . . It is progressive to the degree that it assumes men and women to be the same, and reactionary to the extent that its notion of what is "the same" derives from the phallus. [pp. 42-43]

This is true, but is it new? In earlier work, Eisenstein herself highlighted the extent to which wage labor is premised on the traditional life pattern of males.¹⁹ Feminist lawyers have made points similar to those Eisenstein makes in Chapter Two, notably about the Supreme Court cases involving pregnancy (pp. 66-69) and state court cases involving divorce and custody.²⁰

Chapters Four and Five hold particular interest for lawyers because of the broad range of data they analyze, from court cases to opinion polls (p. 142), books by New Right theorists George Gilder (p. 123) and Midge Decter (p. 119), Ronald Reagan's 1986 State of the Union Address (p. 127), and the statements of Ed Meese (p. 159) and others in the pornography debate (p. 162). These chapters provide a refreshing contrast to the dense formulations that dominate Chapters One and Two. Eisenstein aptly uses these sources to support her argument that "current politics seeks to reestablish the white male as the privileged standard."²¹ Moreover, I found Eisenstein's suggestion that "[p]ornography can help create a multiplicity of sexual imagery that enhances women's equality by differentiating the female body from the mother's body" (p. 173) particularly apt and (dare I say it?) provocative. Finally, Eisenstein develops in considerable depth the intriguing argument that the conservative revolution masks a complex and con-

18. A great strength of chapters 4 and 5 is that Eisenstein combines her discussion of Supreme Court cases with a discussion of the larger realm of political discourse. She includes in her treatment not only cases, but also opinion polls, Reagan administration policies, and the work of neo-conservatives and New Right theorists in the popular quasi-scholarly press. Pp. 120-32, 142-47. I cannot stress strongly enough that Eisenstein's book highlights the narrowness of most legal writing. If we accept the assertion that law is an integral part of political discourse, we need to create the space to consider law along with the kinds of sources Eisenstein mobilizes. But American lawyers have always been better at telling each other we ought to do this than at actually doing it: a parallel is the legal realists' exhortations to use data about society, which never caught on in the way their theoretical statements did. See L. KELMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 229-31 (1986); Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFFALO L. REV.* 195 (1979).

19. Z. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 201-19 (1981).

20. Pp. 67-74. Notable on divorce issues is sociologist Lenore Weitzman's analysis of California trial courts' treatment of divorce cases. L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

21. P. 132. Both chapters 4 and 5 have the same title ("Reconstituting the Phallus"), though each chapter has a different subtitle. Chapter 4 is subtitled "Reaganism and the Politics of Inequality"; chapter 5, "Reaganism and the Courts, Pornography, Affirmative Action, and Abortion."

tradictory consciousness that opens up the possibility for significant change.²²

Other sections of these chapters, however, do not cover much new ground, and at times seem to focus on translating traditional feminist insights into post-structuralist terminology. At times the translation does not seem helpful. One instance is the phallus/pregnant body metaphor, but the point is a more general one. Eisenstein at times adopts post-structuralism's characteristic style of wordplay and self-allusion, as when she notes that "our similarities are similarly different and differently similar."²³ She also engages in terminological debates that may try the patience, as in her extended discussion of patriarchy as opposed to phallogocentric discourse.²⁴ By adopting post-structuralism's focus on terminology and word-play, Eisenstein implicitly adopts its focus on persuading (or at least impressing) other scholars with a highly theoretical focus. For a movement committed to the insight that many alternative (even mutually exclusive) interpretations are potentially valid, post-structuralism often seems oddly unfocused on the need to persuade a broad range of readers. Instead, the premium often appears to be on highly abstract formulations that dramatize their authors' awareness of complex theoretical issues.

To summarize, Eisenstein is right to spot post-structuralism's potential to move us "beyond difference" by suggesting that we reconceptualize the traditional sexual dualism as a larger grid of samenesses and differences among human beings. But post-structuralism, at least as Eisenstein applies it, has notable limitations in helping feminists persuade our society to abandon the notion that men and women are "naturally different." The self-celebratory strain of post-structuralism threatens to distance feminism from one of its traditional strengths: its ability to engage the political mainstream in terminology a broad range of Americans can understand. I urge feminists in their encounter with post-structuralism to employ languages that persuade rather than focusing their energies on developing arcane and at times precious formulations oriented toward other academics.²⁵

22. P. 39. See similar formulation on p. 35 ("different similarities' and 'similar differences'").

23. P. 21. The distinction she draws between patriarchy and phallogocentric discourse may well be too important to be discussed primarily as a terminological issue.

24. Pp. 149-51. However, I find overly optimistic her assertion of a sharp disparity between the views of the American public and the views represented by the conservative discourse that has dominated the 1980s. P. 147.

25. Another stylistic mannerism Eisenstein adopts is the syndrome of writing "books about books," in James Boyle's clever formulation. Some parts of chapter 1 read very much this way, in particular Eisenstein's direct references to the work of other scholars. See, e.g., p. 19 ("I disagree with Michael Walzer's statement that Foucault does not believe . . ."); p. 25 ("Donna Haraway emphasizes this point."); p. 27 ("Anne Fansto-Sterling makes this point nicely."); p. 33 ("Evelyn Fox Keller believes . . ."); p. 33 ("Lowe and Hubbard further specify this method . . ."); p. 33 ("Elaine Showalter articulates this method . . ."). My objection is that this style of writing makes Eisenstein's treatment seem more like a conversation between academic insiders than a

Eisenstein recognizes that the need to persuade is at the center of the intellectual tradition she has chosen. Her shift to discourse theory includes, in good post-modern fashion, a perspective premised on the rejection of absolute truths. In a manner both straightforward and sophisticated, Eisenstein adopts the modernist critique of absolutes while avoiding the relativist conundrum that "all truths are equal":

Without privileging truth, or reality, as self-justificatory (because of their objective status), we are left with making arguments in behalf of our interpretation. . . .

It is only within a standpoint that privileges objectivity and absolutes that relativism and pluralism present a problem. Plurality does not mean that all truths are equal; it merely uncovers the role of power in defining truth. Once truth has been defined, we are free to argue in behalf of our interpretation, but we cannot use the claim to truth as a defense. [p. 23]

Eisenstein is right to insist that feminists must learn how to mobilize the now quite deeply rooted intellectual trends of our era — relativism, disclaimers of privileged viewpoints, and a focus on the relationship between power and claims of truth and objectivity. But she has not come to terms with an important implication of the world without absolutes. If we are left only with arguments in favor of our interpretation, we had better make sure our arguments are persuasive. In this context, both of the traditions Eisenstein has worked within — Marxism and post-structuralism — have significant limitations: Marxism is outside the realm of acceptable rhetorics in mainstream American politics; post-structuralism, as Eisenstein has used it, is too focused on an academic audience.

Eisenstein herself suggests a more fruitful approach when she returns to her notion that liberalism is its own best critic (p. 49).²⁶ We need to reformulate the feminist position in a way that persuades people that it is most consonant with what they already hold as "obviously" true; and, in America, that means liberal rhetoric. In other words, we need to continue the process Eisenstein documented in her best-known prior work, *The Radical Future of Liberal Feminism*, where she traced out the steps by which liberalism's verity that all men are equal was extended to include women.²⁷ The remainder of this review will sketch briefly some promising avenues to help move feminism "beyond sameness" and "beyond difference."

B. *Beyond Difference*

Difference feminists have argued that equality only works where

broad discussion involving themes and issues of wide appeal — which, in my view, is a more accurate way of describing Eisenstein's underlying agenda.

26. She developed this point in a prior work. Z. EISENSTEIN, *supra* note 19, at 214.

27. *Id.* at 89-173.

people are the same, whereas men and women are fundamentally different. Eisenstein points out that an effective strategy to use in deconstructing the abiding verity of sexual difference is to decry dichotomies as simplistic. But she does not give us much specific guidance about how to free ourselves of the deep-seated conviction that women are nurturing, focused on relationships, and contextualized, while men are focused on abstractions, on things rather than people. In a few passages, she does what is easier: she challenges the man/woman dichotomy by pointing out that women are not a homogeneous group.²⁸ This is the traditional approach of "sameness" feminists, but it does not preclude the response that, despite differences *among* women, the differences *between* men and women are more fundamental.

Reaction to my own work (in which I have made parallel attempts to dislodge the naturalness of the dichotomy between men and women)²⁹ suggests that people need vivid illustrations to inspire them to question the interpretation that men act one way and women another. The first step is to empower people to see this as an *interpretation* of behavior, rather than as a simple description of the way things are. Abstract critiques of Truth and of dichotomies do not do the job, perhaps because what is involved is not a conscious intellectual decision to embrace the male/female dichotomy. I sense that a broad range of Americans are not so much recalcitrant as confused. While many Americans *disbelieve* in the male/female dichotomy as an article of faith (they believe instead that men and women are "equal"), they still (believe they) *see* men and women acting differently. The problem is not to convince people that the dichotomous approach is problematic, but to *show* them how it is inaccurate as a description of the behavior of themselves and the people around them. In short, the problem is not one of recalcitrance; it stems instead from a failure of imagination.

We (as feminists) need to challenge an interpretation of men's and women's behavior so powerful that we (as a society) simply cannot imagine another way of looking at things. This is a classic post-structuralist insight if there ever was one, but again, when faced with a fundamental failure of imagination, we need neither abstract formulations nor fancy talk. Instead, we need concrete descriptions that help people recognize the artificiality of the gender verities they "see" all around them.

One promising approach is to use psychological data to break down the notion that men and women "just act differently." The traditional approach of "sameness" feminists was to show that variation among individuals of the same sex is greater than variation be-

28. P. 31. Here Eisenstein joins a well-established critique of difference feminism. For an example influential in the history of women, see Hewitt, *supra* note 6.

29. See Williams, *supra* note 3, at 802-22, 840-43.

tween the sexes.³⁰ Data from these studies dramatizes the contention that humans form a continuum rather than two separate homogeneous, dichotomous groups. More recent studies, designed no doubt with “difference” feminism in mind, challenge the notion that patterned differences between men’s behavior and women’s are attributable to permanent (and perhaps innate) psychological differences. An example is a study of men who “mother,” which found that men exhibit the “nurturing” characteristics commonly associated with women when they play the primary parenting role conventionally assigned to females.³¹ A third type of psychological study shows how people shape their perceptions of males and females to conform with preexisting stereotypes. An example here is a study of newborns that documented how parents selectively interpret identical behavior in newborns as evidence of masculinity or femininity.³²

Psychological studies are one fruitful source to aid people’s failure of imagination in seeing through gender stereotypes. A second source — perhaps more difficult to tap — is “anecdote.” For example, it has been my experience that women tend to interpret whatever they do in the role of mother/housewife as “nurturing.” One friend from a large, ethnic family very focused on food views her role as “nurturing” because she nurses babies, cooks and urges food on older children, and takes care of other physical needs. The children look to her husband for play. She admits she’s not much of a playmate, but views that as stimulation, not nurturing. In my family, by contrast, I am the preferred playmate, and we have always assumed that play is the key to nurturing.

Note that I have broken code. This no longer sounds like a law-review piece. I have slipped into personal reminiscence. But just as minority scholars have begun to ask whether the norms of legal writing are preventing them from saying what they need to say,³³ perhaps feminist writers need to act more on the insight that “the personal is political.” In talking with other writers on feminist issues, I am struck by the extent to which their work, like mine, is autobiographical. Perhaps we need to be more open about this, for two reasons. First, insights from our own lives may be suggestive of fruitful areas for systematic research — for example, we need studies that identify

30. Perhaps the most famous example is the work of Eleanor Maccoby and Carol Jacklin. E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974). Note that this data can be and has been flipped, by feminists of differences. Gilligan cites Maccoby and Jacklin’s evidence that men are more violent than women as support for her notion of differences. C. GILLIGAN, *supra* note 3, at 41.

31. See Risman, *Intimate Relationships from a Microstructural Perspective: Men Who Mother*, 1 *GENDER & SOC.* 6 (1987).

32. Rubin, Provenzano & Luria, *The Eye of the Beholder: Parents’ Views on Sex of Newborns*, 44 *AM. J. ORTHOPSYCHIATRY* 512 (1974).

33. See, e.g., *Legal Storytelling*, 87 *MICH. L. REV.* 2073 (1989).

which characteristics families define as "nurturing" and that explore how women treat the job of mothering. Second, evidence from our own lives may help us as a society to see through the conventional description of women as nurturing and men as not. Particularly promising are studies such as Arlie Hochschild and Anne Machung's *The Second Shift*, which focus on individual couples to paint a vivid picture of gender realities more "objective" than "mere anecdote."³⁴

Psychological studies and anecdote can help us challenge gender verities. The need to challenge people's imaginations with vivid reinterpretations of everyday events means that abstract post-structuralist formulations are of limited utility in helping us move "beyond difference." The second major task for feminists is to move beyond "sameness." In a number of crucial contexts, many women have been disadvantaged as a result of being treated "the same" as men. In divorce law, for example, equal treatment for women has meant loss of the maternal presumption in custody disputes and a lowering of property and support awards.³⁵ Difference feminism also has been fueled by the fact that although women have entered the work force, many have not acted like men once they got there. Instead, they have tended to end up on the "mommy track,"³⁶ in lower-paying, often dead-end jobs.³⁷

Difference advocates have a ready answer for these phenomena. Women don't come out equal when treated the same as men, they argue, because women aren't the same as men. Women are more focused on relationships than men, more nurturing, less ambitious. So it is natural and appropriate that women's participation in the work place should differ from men's: different work place goals are a basic part of women's "different voice."³⁸

This interpretation has proved powerfully persuasive and presents an important challenge to the view that men and women are "basically" the same. One task is to reinterpret why women as a group are not acting like men as a group in the family and the work place. I have argued before that this fact reflects not psychological or biological "differences" but an entrenched system of gender privilege.³⁹

34. A. HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT* (1989).

35. See, e.g., L. WEITZMAN, *supra* note 20, at xi-xiv, 231.

36. See, e.g., A. HOCHSCHILD & A. MACHUNG, *supra* note 32; Ehrlich, *The Mommy Track*, *BUS. WK.*, Mar. 20, 1989, at 126; Kantrowitz, *A Mother's Choice*, *NEWSWEEK*, Mar. 31, 1986, at 46; Lewin, "Mommy Career Track" Sets Off a Furor, *N.Y. Times*, Mar. 8, 1989, at A18, col. 1; Rimers, *Sequencers: Putting Careers on Hold*, *N.Y. Times*, Sept. 23, 1988, at A21, col. 1.

37. See Jackson & Grabski, *Perceptions of Fair Play and the Gender Wage Gap*, 18 *J. APPLIED SOC. PSYCHOLOGY* 606 (1988); see also Cowan, *Women's Gains on the Job: Not Without a Heavy Toll*, *N.Y. Times*, Aug. 21, 1989, at A1, col. 1.

38. *EEOC v. Sears*, 628 F. Supp. 1264 (N.D. Ill. 1986) (offer of proof concerning the testimony of Dr. Rosalind Rosenberg).

39. See Williams, *supra* note 3, at 822-36.

Western wage labor is premised on the notion of an ideal worker with no child-care or housekeeping responsibilities. The shift to modern wage labor, temporally and geographically isolated from family life, occurred simultaneously with the development of the ideology of domesticity, which explained why women were peculiarly suited to stay home and provide domestic services for their wage-laboring husbands. In other words, with the development of modern capitalism, the costs of childrearing and housekeeping were privatized within the modern family.

But mothers (at least in theory) were relieved of the burdens of wage labor as well as its benefits. They, like their husbands, worked only one "shift": in 1890, only 2.5% of married white women worked outside the home.⁴⁰ What has happened now that the majority of mothers have entered the work force?

By 1983, an employed mother in a male-headed household was working an average of nearly fifty percent more hours than the traditional housewife.⁴¹ One study calculated that, as a result of their double shift of wage and domestic labor, working mothers on average work one month of twenty-four-hour days more than their husbands each year.⁴² Working mothers generally have less leisure than their husbands, get less sleep, get sick more often, and show other signs of strain.⁴³ The strain stems from the fact that society continues to deny the inconsistency of two-earner families and a model of the Ideal Worker that assumes a family member is providing child-care and housekeeping services. The costs of this denial are being shifted onto women. Husbands simply are not pulling their weight — one study found that husbands' contribution to household work barely covers the extra work their presence generates.⁴⁴ Another study showed that the husbands of employed women spend only 2.7 more hours on child care per week and 1.8 hours more on housework than do husbands of housewives.⁴⁵ A third study showed that men did twenty percent of the household chores in 1964; by 1981, that percentage had risen a mere ten percentage points.⁴⁶ Nor is the government helping women: as is well known, the United States has been more resistant than virtually any other Western country to bringing child-care costs into the

40. See Williams, *supra* note 3, at 832 & n.150. Fully 51% of black married women were in the labor force in 1970. See L. WEINER, FROM WORKING GIRL TO WORKING MOTHER 89 (1985).

41. Heath & Ciscel, *Patriarchy, Family Structure and the Exploitation of Women's Labor*, 22 J. ECON. ISSUES 781, 787 (1988).

42. A. HOCHSCHILD & A. MACHUNG, *supra* note 34, at 3.

43. See *id.* at 8-10.

44. See Heath & Ciscel, *supra* note 41, at 788.

45. *Id.* at 787.

46. See J. PLECK, WORKING WIVES/WORKING HUSBANDS (1985); Burros, *Women: Out of the House But Not Out of the Kitchen*, N.Y. Times, Feb. 24, 1988, at A1, col. 1.

public sphere.⁴⁷

These choices should be recognized for what they are: choices to make women bear virtually alone the role conflict inherent in a society where both parents work under a system where the demands of parenting and those of wage labor are fundamentally inconsistent.

We can now reinterpret the two phenomena often cited as evidence that women have been disadvantaged by treating them "the same" as men. Premise one: as women have entered the work force, they have not acted like men once they got there. First, the evidence suggests this is not entirely true. Data tantalizingly suggests that women without children act much more like men than women with children.⁴⁸ Women with children do not, because working mothers are not in the same position as working fathers. Working mothers must shoulder domestic duties that society is reluctant to define as "work." But these duties *are* work — demanding and very time-consuming work. The "working mother," without adequate support from her spouse or the government, has two choices: work a double shift, at the cost of her leisure, her sleep, and perhaps her health, or define her wage labor obligation in a way that accommodates her domestic obligations — in other words, go on the mommy track. Thus, women's "choice" is different from men's because they are in a very different situation from men, who can perform as ideal workers confident they can count on women — their wives or the women she hires — to work the "second shift."⁴⁹

Let's proceed to the second premise: women, when treated "the same" as men, end up disadvantaged. Here a crucial context is divorce, and the analysis now is easy. While women are married, they almost invariably contribute childrearing and housework to the family far in excess of that contributed by their husbands.⁵⁰ But, just as that work is invisible inside marriage, it is invisible upon divorce. So when judges make support or property awards, they often ignore completely or seriously undervalue the economic worth of those services.⁵¹ Moreover, child-support awards never (so far as I know) take into account

47. See S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 5 (1983); see also pp. 213-14.

48. Never-married women participate in the labor force at about the same rate as never-married men; with marriage, women's participation rate drops to between 55% and 60%. Hayghe & Harges, *A Profile of Husbands in Today's Labor Market*, MONTHLY LAB. REV., Oct. 1987, at 12; see also Dowd, Work and Family in Restructuring the Workplace 15 (1990) (unpublished manuscript on file with the author). Dowd's study contains a wealth of information on work/family issues.

49. See P. PALMER, DOMESTICITY AND DIRT ix-xiv (1989).

50. See *supra* notes 41, 42, 45.

51. See L. WEITZMAN, *supra* note 20, at 110-214. Some inroads have been made. See Cohen, *What's a Wife Worth?*, 11 FAM. ADVOC. 20 (1988) (wife's work increasingly taken into account in valuing "separate" property for divorce settlement). But see L. WEITZMAN, *supra* note 20, at 52-69 (most divorcing couples have little or no property to divide).

that the custodial parent (the mother ninety percent of the time) is contributing valuable childrearing services, usually at the cost of performing as an "Ideal Worker."⁵² Again, the result that women, when treated "the same" as men, end up disadvantaged reflects not women's "different voice," but their oppression, as society demands work from women and then refuses to acknowledge that women are doing it, or even that it is "work" at all.

To complete this argument about the limitations of sameness, we must return to difference. The argument so far is that a key element of women's "difference" stems from their different roles with respect to parenting and wage labor. Feminists of difference would agree, but tend to link these differences with women's different values. Difference advocates on the right argue that women's difference means they "naturally" end up in different roles.⁵³ Difference feminists on the left tend to argue in favor of transforming the social order so that it expresses "female" rather than "male" values.⁵⁴ But both types of difference feminists agree that women have values different from men.

Two responses are possible. The first concedes for a moment that the different pattern of women's lives results from choices based on values. But why should our society be structured so that anyone who chooses to "parent" in a way more engaged than the traditional fathering role is condemned to the margins of economic life? This seems a singularly undesirable way to run a society, particularly since child specialists (and most parents) agree that a child with two "fathers" is impoverished indeed.⁵⁵ We must ask if it is ethical for society to condemn committed parents to relative poverty. For this is exactly what we have done, as the feminization of poverty makes clear.⁵⁶ One response to the "different voice" argument, then, is that women's choice in favor of active parenting should not be viewed as a rationale for

52. See Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982).

53. George Gilder is an example. G. GILDER, *SEXUAL SUICIDE* (1973). Eisenstein discusses his work at pp. 122-23, and that of other conservatives in chapters 4 and 5.

54. For example, see K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984), and other works cited in Williams, *supra* note 3, at 810-13, 821-22.

55. Pediatricians Benjamin Spock and H. Berry Brazelton and child expert Penelope Leach have taken leading roles in arguing that parents' work roles are inconsistent with the best interests of children. See *Work and Families*, WASH. PARENT, Nov. 1988, at 1, 3, 5 (report of an April 1988 panel discussion in Boston); see also Brazelton, *Stress for Families Today*, INFANT MENTAL HEALTH J., Spring 1988, at 65.

56. The impoverishment of committed parents is hidden as long as families are intact, but emerges as a strong pattern when mothers have to fulfill both the mothering and the worker role, either because of divorce, see L. WEITZMAN, *supra* note 20, at 184-261, or because the mothers are single parents. Almost one in three female-headed households is poor, compared to only about one in 18 male-headed households. See Williams, *supra* note 3, at 826. Three fourths of black families with incomes below the poverty line are headed by women. Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412, 413 (1985).

blocking their access to the best jobs society has to offer.⁵⁷

The second, more radical, response is to deny that women have a different voice at all. Note that this is not a denial that women's life patterns differ from those of men. It is a denial that the difference stems naturally from some underlying difference between men's and women's psyches. Again, the "beyond sameness" argument brings us back to difference. Recall the study examining men who "mother" that found that they exhibited nurturing characteristics commonly associated with women.⁵⁸ The study's author posited that the behavior we associate with mothers is a byproduct not of the psychology of women but of a social (mothering) role.⁵⁹ Is an argument that nurturing is "women's voice" simply a restatement of the fact that women are the parents with primary child-care responsibility, and primary-care parents in this society generally behave (because of our norms of parenting) in a gentle, supportive way?

This analysis reinterprets facts often cited as proof that men and women are naturally different in a way that acknowledges the existence and the implications of gender differences (different social roles based on sex), while challenging the traditional interpretation of these differences as "natural." The analysis brings us back to Eisenstein's book, for my analysis merely follows in Eisenstein's footsteps. In *The Radical Future of Liberal Feminism*, Eisenstein presented an acute analysis of the way the existing construction of the public (economic) and private (family) functioned to privilege men and disadvantage women.⁶⁰ True, *Radical Future* used the language of Marxism, but it did so in a way more useful in moving us "beyond sameness" than the post-structuralist language of *The Female Body and the Law*. The question is how to communicate that the different life patterns of men and women are an integral part of a gendered system of power relations.⁶¹ *Radical Future* suggests that we can use the language of liberalism to show how the current gender system treats mothers unfairly and leads inexorably to inequality.⁶² My analysis tries to act upon Eisenstein's insight that liberalism is its own best critic, by stressing the current system's inconsistency with the liberal norms of fairness and equality. Women work two shifts, they do more housework, more

57. See Williams, *supra* note 3, at 813-22 (discussing EEOC v. Sears, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd.*, 839 F.2d 302 (7th Cir. 1988)).

58. See *supra* note 31 and accompanying text. Note how difficult it is even to talk about these issues because we have built into our language (in the word "mothering") the assumption that people who play a certain child-rearing role will be female.

59. Williams, *supra* note 3, at 8-10.

60. Z. EISENSTEIN, *supra* note 19, at 201-19.

61. The formulation is Catharine MacKinnon's, although she uses it in different contexts. See C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32-42 (1987); C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 92, 101-29, 215-21 (1979).

62. Z. EISENSTEIN, *supra* note 19, at 201-53.

child care, they are sick, run-down . . . but not “oppressed by patriarchal society.” Marxism this explicit loses the ear of most Americans. We need to use liberalism’s language of equality in a way that communicates the fundamental unfairness of the gendered structure of wage labor.

* * * * *

In conclusion, it is difficult to exaggerate the importance of Eisenstein’s ambition to move feminism beyond the “sameness versus difference” debate. Moreover, Eisenstein highlights post-structuralism’s potential to deconstruct the male/female and the sameness/difference dichotomies. Yet ultimately Eisenstein’s metaphor threatens to perpetuate the traditional confusion between biological sex and social gender roles. Her adoption of post-structuralists’ characteristic style at times focuses her attention on formulations oriented toward other academics, instead of on persuading a broad range of Americans. In short, her version of post-structuralism directs her attention away from two central tasks that lie before us. To move “beyond difference,” we must communicate the contingency and artificiality of the gender verities people “see” around them. To move “beyond sameness,” we must show how the current structure of wage labor rests upon an entrenched system of gender privilege.