The Female Body AND THE LAW

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UNIVERSITY OF CALIFORNIA PRESS
BERKELEY LOS ANGELES LONDON

University of California Press
Berkeley and Los Angeles, California

University of California Press, Ltd.
London, England

Library of Congress Cataloging in Publication Data

Eisenstein, Zillah R.
The female body and the law / Zillah R. Eisenstein.
p. cm.
Includes bibliographical references and index.
ISBN 0-520-06309-0 (alk. paper)
1. Sex discrimination against women—Law and legislation—United States. 2. Women—Legal status, laws, etc.—United States. 3. Body, Human—Law and legislation—United States. 4. Feminism—United States. I. Title.
KF4758.E38 1988
346.7301'34—dc19
[347.306134] 88-27890
CIP

Printed in the United States of America

1 2 3 4 5 6 7 8 9

For my daughter, Sarah, and her father, Richard

Acknowledgments

Many people shared their time and knowledge with me to enable me to write this book. Ruth Milkman provided me with helpful bibliography on protective legislation; Alice Kessler Harris provided me with needed materials on the Sears, Roebuck and Company trial; Isabelle Katz Pinzler was completely generous in providing information on the American Civil Liberties Union position on special legislation. Herma Hill Kay, David Lyons, Richard Stumbar, Isabelle Katz Pinzler, Joan Bertin, and Patty Zimmerman read parts of the manuscript and made important criticisms. Carla Golden and Patty Zimmerman discussed many of the issues in this book with me on our daily runs. Miriam Brody, Mary Fainsod Katzenstein, and Rosalind Pollack Petchesky read the entire manuscript and made invaluable suggestions. Nancy Moore, reference librarian at the Cornell Law Library, gave me endless assistance. My student Sarah Richmond referenced queried footnotes, and my colleague Ken Lehrman located several hard-to-find Supreme Court citations for me. Kathleen Frankovic of CBS/News Polling made poll data easily available to me. Jonathan Plotkin assisted me in figuring out my new computer. Lauren Kenworthy, legislative assistant to Representative Howard Wolpe, obtained data on the Reagan administration social service cutbacks for me, as well as kept me updated on policy changes within the administration. And, as always, I thank my students at Ithaca College, especially those in my "Politics of the Body" seminar.

I also want to thank the staffs of Cornell Infant Care Center and the Ithaca Child Care Center, especially Jane Foti, Mary Ann Ia-

covelli, Rose Spinelli, and Diane Tripodi, for the wonderful care of my infant/toddler daughter. And I thank Lisa White for her help in the domestic realm. I thank my mother, Fannie Price Eisenstein, for everything.

My final thanks go to Donna Freedline for all her secretarial help; Dorothy Owens for her generosity in editing, typing, and retyping the manuscript; my editor, Naomi Schneider, for her earliest inquiries about this project, which helped transform it into a book; and Barbara Ras and Susan M. S. Brown for their final editorial attention.

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Introduction

"Sex equality" is an elusive phrase. Depending on context, it can be vitally significant or virtually meaningless. It categorizes women according to both difference and sameness—indicating that women are either completely determined by their biological sex or entirely free of it—but in both cases men set the standard. In neither instance does the female body displace the silent privileging of the male body. If equality is not to be relegated only to economic or legal uses, we must recognize the specificity of the female body. This refocusing necessarily challenges the idea that treating women like men is equivalent to treating women and men equally.

I will argue here that no Western viewing of sex equality explicitly theorizes the specificity of either the male sex/body or the female sex/body. By focusing on the body, therefore, I intend to reconceptualize the meaning of equality and, with it, the meaning of difference. In particular, my focus reintroduces the pregnant body in order to decenter the privileged position of the male body. This approach contrasts markedly with the dominant discourses, which use pregnancy to differentiate women and subordinate them to men.

I do not mean to imply, of course, that equality requires that everyone is, or should be, pregnant. This implication would be problematic on two counts. First, pregnancy cannot apply as a standard for everyone, especially not for males. Second, it posits the kind of homogeneous view of the body that is the trouble to begin with. The ultimate significance, then, of the pregnant body for developing a theory of sex equality is that it *reminds* us of at

least a *potential* difference between females and males that makes sameness, as the standard for equality, inadequate. In a more general sense, it reminds us of diversity. My refocusing, therefore, does not establish a new homogeneous standard but rather denies the validity of having one at all. If diversity is privileged in and of itself, it undermines any *one* preferred standard.

In Western theory, as in law, the female body is most often assumed to be like the male body when the equality of women and men is being asserted; by the same token, the female body is most often explicitly said to be "different" from the male when the equality of women and men is being denied. In neither locus is the woman both integral and homologous, nor is the male/man ever considered to be the "different" one. Woman is not recognized as both female—as a physical creature whose sex can be biologically categorized—*and* gendered through the culture—as an individual who can be socially categorized. Instead, gender is regarded as biologically determined: the female *is* the woman; the pregnant body *is* the mother and perhaps wife. So being a wo/man or being fe/male is "different" from being a man or a male. It is a lesser variation. The female body is engendered with "difference": sexual (as biological) identity is not specified; and the resulting "equality" both assumes and silently denies the man or male as the standard.

It will help here to explicate the peculiar relationship between sex and gender. For my discussion, "sex" represents the biological female, and "gender" designates the cultural interpretation of what it is to be female. As we shall see, the distinction is problematic. Yet, if we reject received opinion that the two are one and the same, then we must acknowledge both what distinguishes them and what interrelates them. Just as biology is never devoid of its cultural definition and interpretation, so sex itself, as a biological entity, is partly defined in and through culture. And just as biological constitution is never irrelevant to the definition of individual identity, so gender is never completely distanced from biology. Biology is, in part, gendered—which is, in part, culture; and gender is, in part, biological—which is also, in part, cultural. If we accept these premises, then we must realize the pregnant body is never merely that: it is also, in part, gendered as the mother's body. And herein lies the problem. Gender is a mix of both woman's unique biological potential and its cultural reduction to her

determined function. The female as "mother" is constituted of both these meanings, and a third as well. In this third meaning, some of her potential uniqueness is seen as dwelling *within* the engendered biological "part" of her being.

Gender, as an idea, registers the role of society and culture in defining the (biological) "female" as a "woman." The problem arises when this definition of "a woman" is in turn subsumed under "the mother," when culture is supposedly determined by biology rather than constituted as part of it, when culture is not recognized as definitive in interpreting the body. In sum, when the pregnant body is conflated with the "idea" of the mother, we are left with the *en*gendered meaning of sex "difference," which attributes the hierarchical opposition of "woman" and "man" to nature. To recognize that sex and gender are interconnected and that differences between women and men exist is not the same as to accept the *en*gendered definition of "woman" and "man." Rather, this recognition entails the acknowledgment that, considering female bodies and the specific placement of women in society, some women are more different from men than similar to them, and some women are more similar to men than different from them. Recognizing that gender differences exist is a way of acknowledging that biology exists, but gender differences need not be reduced to or determined by biology. Certain gender differences may not be sexually determined at all. In contrast, the supposition of *en*gendered sex "difference," pretending differences between the sexes are natural, not cultural, homogenizes each sex and both genders—ostensibly, this supposition establishes gender on the basis of biology. To presume engendered sex "difference" is to assume that sex and gender are one. And in the engendered view of "difference," differences among women are silenced and difference between men and women privileged; the sameness among women is presumed and the similarity between men and women denied.

Rejecting the engendered form of "difference" allows us, consequently, to refocus attention on the particularities that exist within female bodies and women's lives. This focus in turn allows us to elucidate a fuller meaning of *unen*gendered difference. Each difference becomes a moment on a continuum expressing the specified meaning of commonality, likeness, sameness. Instead of sameness expressing a silent hierarchy of male privilege, it comes to

encompass females *and*—in the plural terms of their common differences—differences of race, economic class, age. We thus pluralize the meaning of difference and reinvent the concept of equality.

The idea of engendered "difference" has historically been used repeatedly to deny women equality with men. Today neoconservatives and New Right antifeminists are actively using the discourse of "difference" to deny women their equality in the public realm as well as in the family. One version of this discourse is also used by revisionist feminists to reject the radically egalitarian commitments of the feminist movement of the 1970s. In spite of these developments—and in some sense because of them—it is important to redirect the discourse on equality toward an egalitarianism that affirms the biological particularity of the female body without endorsing the historical contingencies of its engendered form. Because it is not possible to distinguish sex and gender once and for all, the discussion must remain open and incomplete. At the same time that we criticize the dominance of the phallus—as the symbol of the male body in a social order that privileges the bearer of the penis—we must acknowledge that our criticism remains inside "phallocratic" discourse simply because that discourse is dominant.

In sum, this book is about sex equality—what it means and what it might mean. Accordingly, the book is just as much about sex "difference"—what it means and what it might not have to mean. Ultimately, the book considers the differences of the body and the problem they pose for a notion of equality. As I have stated, I intend to shift the focus away from the phallus and toward the pregnant body. The pregnant body decenters the phallus without centering itself; instead, it allows a heterogeneous viewing of equality that recognizes the particularity of the human body and constructs a notion of diversity that is distinctly compatible with equality.

Given these concerns, this book is also about symbols, language, and power and how they operate in relation to sex "difference," gender "difference," and sex equality. I locate this discussion within liberal law(s), as practiced in Western industrial societies. I view law(s) as an authorized discourse—as a language constituted by a series of symbols that is located in not merely the realm of the "ideal" or the "real" but a place somewhere in between. It is this "in between" that I want to understand and articulate as a realm of

power that is both homogeneous and concentrated, heterogeneous and dispersed; that encourages a mix of diversity rather than a set of dualistic oppositions. Hence, my frequent use throughout of the plural in terms such as "law(s)," "difference(s)," and "body(ies)." Through this practice I attempt to dislocate our identification with homogeneity, unity, and similarity. There is no one body, only bodies, only differences, as well as pluralized conceptions of equality. A note of caution: by pluralizing equality I do not mean to condone the idea of "separate but equal" or that of "separate spheres." To the contrary, I mean to argue that the concept of equality is best reconstructed through a completely pluralized notion of difference(s), one that rejects a politics of inequality and demands a radical egalitarianism.

Chapter One

Politics and/or Deconstruction: Thoughts on Method

My purpose in this chapter is to explain my method and theoretical assumptions about power, my epistemological starting points. I will discuss the role of language in constructing and reflecting relations of power and how language affects the way we think about equality, difference, and gender. Before we can formulate a new theory of sex equality, we need a new method for thinking about the female body and its gendered expression. The process of defining this method began for me as a socialist feminist in the early 1970s, shifted through that decade in response to developments in radical feminist and Third World feminist writing, and takes place now in a critical exploration of deconstruction. My concern here, however, is not to catalog the contributions or specific histories of these politics but to utilize them as I discuss the importance of the body in clarifying the meaning of difference(s).

My method questions the validity of distinguishing between materialism and idealism. If materialism is conceptualized as the study of "real" human beings within societal structures, then these human beings need to be recognized, among other things, as males and females. This recognition involves naming the bodies as male and female along with acknowledging the language that both names and reflects cultural interpretation. These recognitions challenge the neat delineations between idealism (most often identified with liberalism) and materialism (identified with Marxism). With this challenge, oppositions such as biology and history, nature and culture, difference and sameness come under scrutiny as well. Such a radical epistemology—one that denies duality and its hier-

archical, oppositional conception of difference—begins to shift political discourses, which *begin* to shift the relations of power. This epistemology provides a new point of entry for studying law. It identifies law as neither mere superstructure—outside the "real" relations of power (as many Marxists would have it)—nor the structure of power itself (as many liberals hold). Thus, this perspective allows us to rethink the contours of power.

It is difficult to find a starting place to discuss relations of power given the premise that "for humans, language plays a major role in generating reality. Without words to objectify and categorize our sensations and place them in relation to one another, we cannot evolve a tradition of what is real in the world."[1] The scope of "reality" (and with it the realm of the "ideal," against which reality is most often positioned) becomes much less clear. If language helps to constitute the real by describing and naming it, then interpretation contributes to how the real is known.[2] Thus language as an aspect of thought is a part of what is real and does not fit strictly into the oppositional category of ideal. If power belongs to the realm of the real, and the real is partially constituted in and through language, then we need a way of thinking and rethinking the notion of politics (as the activity of power). I do not mean to reduce this notion to a politics of language, or to replace the structural aspects of "reality" with such a notion, but rather to assert that the dualism of the real and the ideal is overdrawn. The realms of concrete facts and nonconcrete ideas do not exist in complete opposition. Instead, they are mixed within a continuum. The recognition of how language is used to name, to represent, to think,

1. Ruth Hubbard, "Have Only Men Evolved?" in *Women Look at Biology Looking at Women*, ed. Ruth Hubbard, Mary Sue Henifin, and Barbara Fried (Cambridge, Mass: Schenkman Publishing, 1979), p. 7.

2. There is a vast quantity of relevant literature, from which I cite only a few titles here: Rosalind Coward and John Ellis, *Language and Materialism: Developments in Semiology and the Theory of the Subject* (Boston: Routledge & Kegan Paul, 1977); Jonathan Culler, *On Deconstruction: Theory and Criticism after Structuralism* (Ithaca, N.Y.: Cornell Univ. Press, 1982); Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: Univ. of Minnesota Press, 1983); Henry Louis Gates, Jr., ed., *"Race," Writing, and Difference* (Chicago: Univ. of Chicago Press, 1985); Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* (Baltimore: Johns Hopkins Univ. Press, 1982); and Elaine Showalter, ed., *The New Feminist Criticism: Essays on Women, Literature, and Theory* (New York: Pantheon Books, 1985).

relocates power in a place *somewhere in between* the real and ideal: between truth and closure and truth*s* and openness.

This place is the realm of discourse, where politics and language, homogeneity and heterogeneity, theory and practice, sex and gender intersect. My use of the term "discourse" recognizes the politics of language as a politics of interpretation of the real, of the multiplicity of truth(s). Language is as real as the thing it describes. It undermines dualism and opposition as a method; it disperses power to the various sites of interpretation. By focusing on discourse(s), we position ourselves between the interpretation and the thing being interpreted. This position is not a middle ground but rather a point historically constituted through opposition, while the dualism is challenged epistemologically.

By focusing on language as political—as being structured in and through a series of hierarchical differences and, therefore, both constituting and reflecting political relations that are defined through difference—we confront the open-textured quality of power. My use of the term "open-textured" points to the relational status of meaning. In other words, a thing is both what it is and what it is *not*, and what a thing is *not* is endless. A woman is not a man, but she is also not a multitude of other things. What she *is* is thus endless as well, because meaning is expressed through the relation of "is" and "is not." The problem here is not the relational meaning of difference but the hierarchical notion of difference that defines woman by what she is not, representing her as lacking. Difference in this instance is set up as a duality: woman is different from man, and this difference is seen as a deficiency because she *is not* man. This construction of difference homogenizes all women as different in the same way, the way they are different from all men, and establishes the duality man/woman. Instead we need to dislodge this opposition and recognize the ground in between. Difference must mean diversity, not homogeneous duality, if we are going to rethink the meaning of sex and gender.

Language represents gender at the same time that it is already a system of differences; it "makes the world intelligible by differentiating between concepts."[3] Language constructs these differences:

3. Catherine Belsey, *Critical Practice* (London: Methuen, 1980), p. 38; all further references to this work, abbreviated as *CP*, will be included in the text.

"Signs are defined by their difference from each other in the network of signs which is the signifying system" (*CP*, p. 40).[4] More directly, words have meaning in relation to other words through their difference: man/woman; reason/passion; fact/value; objective/subjective; real/ideal; white/black. Hierarchy is assumed *in* the difference, so these differences are defined in a relationship that privileges one of the "opposites." It is important to recognize that although one may, as I do, wish to reconstruct the hierarchy (and hence the difference), one cannot fully move outside the structure of dichotomy. The challenge to duality is still (historically) structured by duality. As a result, the space we occupy remains somewhere "in between."

My concern here is not with the nature of language itself but rather with how language partially constitutes political reality—how language constructs, interprets, and reflects political reality. Actually, I am not convinced that there is such a thing as the nature of language, because "words change their meaning from one discourse to another, and conflicting discourses develop even where there is a supposedly common language."[5] Discourses generate meaning rather than manifest preexisting meaning, although meanings often antedate the people who use the language. "A crucial argument concerning discourse is that meanings are to be found only in the concrete forms of differing social and institutional practices: there can be no meaning in 'language.'"[6]

Language is also not neutral. It is always embedded in dis-

And see Ferdinand de Saussure, *Course in General Linguistics*, ed. Charles Bally et al., trans. Wade Baskin (New York: McGraw-Hill, 1966).

4. For a discussion of language as a series of differences, see Jacques Derrida, *Writing and Difference*, trans. Alan Bass (Chicago: Univ. of Chicago Press, 1978); *Dissemination*, trans. Barbara Johnson (Chicago: Univ. of Chicago Press, 1981); and *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins Univ. Press, 1974).

5. Diane Macdonell, *Theories of Discourse: An Introduction* (London: Blackwell, 1986), p. 45.

6. Ibid., p. 12. And see Shoshana Felman, ed., *Literature and Psychoanalysis—The Question of Reading: Otherwise* (Baltimore: Johns Hopkins Univ. Press, 1982); Elizabeth Flynn and Patrocinio Schweickart, eds., *Gender and Reading: Essays on Readers, Texts, and Contexts* (Baltimore: Johns Hopkins Univ. Press, 1986); and Sally McConnell-Ginet, Ruth Borker, and Nelly Furman, eds., *Women and Language in Literature and Society* (New York: Praeger, 1980).

course. It constructs meaning at the same time that it reflects meaning. It sets the limits for what we can see and in some sense think. It defines, as Michel Foucault notes, "the limits and the forms of expressibility: What is it possible to speak of? What has been constituted as the field of discourse?"[7] Which terms disappear, and which become part of ritual, pedagogy, and control? Any discourse puts into play a privileged set of viewpoints; it makes certain thoughts and ideas present, others absent.

The Significance of Discourse

I am very much indebted to Foucault for my use of the term "discourse," but my use is not meant to be an explication of his. His discussion of discourse is neither fully consistent nor all decipherable, and he probably would not accept a generalized theory of discourse to begin with. Nevertheless, I will clarify my use of the term with and against his. Through his decentering of the state, Foucault points us in the direction of a radical pluralist epistemology of power relations. But his theory of the dispersion of power is incomplete; he replaces the notion of concentrated centered power (as in a state theory) with one of heterogeneous and multiple power sites. He does not offer an analysis of the unities that exist or are established through the discourse(s) about power and the state. He does not recognize the significance of the unity or centrality of power as it exists in state formations or engendered forms of sex class; therefore, he leaves us with little understanding of the hierarchical relations that define dispersed sites of power. He gets lost in his own dispersion. But we need not do the same.

My use of the term "discourse" focuses on the politics of language and knowledge—the awareness that power is constructed in and through language, which crisscrosses the realm of "fact" (the real) and "interpretation" (the ideal). Language as discourse transects the splits between objective and subjective, empirical and normative, value free and biased. The process of naming facts destroys these neat dichotomies and uncovers the more complex relationship that Foucault terms "power/knowledge." Language em-

7. Michel Foucault, "History, Discourse, and Discontinuity," *Salmagundi* 20 (Summer–Fall 1972): 234; all further references to this work, abbreviated as "HDD," will be included in the text.