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Book Review

***1159** THE FEMALE BODY AND THE LAW: ON TRUTH AND LIES

THE FEMALE BODY AND THE LAW. BY ZILLAH R. EISENSTEIN. [FNa] BERKELEY: UNIVERSITY OF CALIFORNIA PRESS, 1988. PP. IX, 235. $25.00

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As a professor, I look for books or articles to assign to my students that are both informative and well-written. Unfortunately, some of the work that I think captures the essence of critical theory is quite difficult to comprehend. [FN1] It is therefore refreshing to find work which represents a critical perspective and works well in the classroom. Zillah Eisenstein's most recent book, The Female Body and the Law, [FN2] is such a work, and I would recommend it highly to feminists and critical scholars for use in the classroom.

Unlike many of the writers in feminist jurisprudence, Eisenstein comes to her enterprise with a background in political science. She has been a prolific writer in the area of feminist theory, having written books such as The Radical Future of Liberal Feminism [FN3] and Feminism and Sexual Equality: Crisis in Liberal America, [FN4] as well as having edited Capitalist Patriarchy and the Case for Socialist Feminism. [FN5] As her writing and thinking have matured, she has made substantial contributions to our understanding of a wide variety of feminist perspectives, ranging from liberal ***1160** feminism to socialist feminism. Rather than emphasizing the differences among the different feminist perspectives and arguing that only one perspective represents the "true"' feminist perspective, she has served an accommodating role in the feminist movement by emphasizing the similarity of various feminist perspectives and the lack of a need to choose among competing theoretical perspectives. [FN6]

Eisenstein's latest book, The Female Body and the Law, is her finest yet. She tries to offer insight into an alternative way to view the legal significance of the female body, getting us out of the trap of adopting either the "special treatment"' or "equal treatment"' perspective. In addition, drawing on her earlier work on liberal feminism, [FN7] she tries to show how we, as feminists, do not have to discard liberal theory entirely in order to maintain a radical feminist perspective. Finally, she offers some clarity on the difficult issue of how to determine "truth."' She says that we should recognize that the world contains multiple and ever-changing truths about any particular issue. Thus, she concludes, we should choose our positions on issues with openness and honesty, recognizing that any position must be open to revision as political-social circumstances change.

As I will discuss, Eisenstein's work has given me fresh insight on how to think about the pregnancy cases--to consider how to describe with certainty and clarity that it is sex-based discrimination when an employer fails to provide pregnancy-related disability or health care benefits. Nevertheless, there are two conclusions in her work which I find troubling.

First, Eisenstein seems to conclude that feminist theory cannot accommodate the possibility that there are any objective truths. I will argue that that statement is implausible logically, but more importantly, it is a wrong account of the possibilities underlying feminist theory. Feminist theory necessarily presumes that there is an objective set of ethics within society upon which feminists can rely in seeking to change the material conditions of women's lives.

Second, Eisenstein seems to conclude that we can avoid difficult theoretical choices in dealing with particular problems--that we do not, for example, have to choose between special treatment or equal treatment perspectives in the pregnancy context or that we do not have to choose between privacy and equality perspectives in the abortion context. Although I think that Eisenstein has offered an important insight--that we do not have to choose consistent theoretical positions across all issues and across all historical moments--I think she has overstated her claim. As I ***1161** will try to show through the use of particular examples, it is often important to struggle with difficult theoretical choices on particular issues; our failure to do so may make us less politically effective. I will suggest that we cannot always reduce the tension between opposing feminist positions by searching for middle grounds; instead, we can reduce the tension by making difficult choices in particular historical circumstances but articulating, as we make these choices, that the opposing perspectives represent important values and that our choices must be constantly open to re-examination. Eisenstein's observation that we should define truth with openness should be receptive to such a claim.

In this essay, I will first discuss Eisenstein's claims about truth and reality. Second, I will discuss Eisenstein's application of her general perspective on truth to how legal scholars and practitioners should think about the female body. Finally, I will discuss how feminists should apply their understanding of truth and reality to feminist argumentation.

I. ON TRUTH AND REALITY

Relying on a critical perspective, Eisenstein adopts a vision of reality that "is neither subjective nor objective.'" [FN8] Reality is a series of discourses, meanings are open rather than closed, and the truth may have multiple and shifting meanings. Truth is part of a discourse about power and specific historical relations. There is no place outside discourse; even the term "discourse'" exists within a theory of knowledge and power that gives it its meaning at a particular time. Rather than talk about "the truth'" as a static, pre-social entity, Eisenstein urges us to talk about multiple, shifting truths that reflect our present historical circumstances.

One common criticism that is made of this perspective is that it leaves us hopelessly relativistic, because we cannot make any assessment about what is better or worse in society. Eisenstein rejects such a criticism:

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 itself as our defense. Although I assume that knowledge (and truth) is plural, I do not allow this assumption to keep me from arguing that society must be organized around a notion of sex equality that recognizes the specificity of the pregnant body from a standpoint of radical pluralism. The assumption of plurality does, though, keep me from bringing closure to the meaning of the pregnant body in ***1162** terms of the meaning of sameness or difference or equality. We must leave meanings open at the same time that we act on them. [FN9]

Thus, truths are not "objective'" because transhistorical, fixed, unitary, statements are impossible.

Eisenstein then applies her perspective to how the law should consider the female body or, more generally, how we should think about sex differences. The significance of the body, like all truth, cannot stand outside society, history, and language. It, too, must be open to multiple and changing meanings. Eisenstein argues that we must view "the body as a capacity rather than a static entity. . . .'" [FN10]

In one of her central attempts to avoid dichotomous thinking, Eisenstein mentions that we must not adopt the "unity'" perspective or the "diversity'" perspective in thinking about the body. She says that "we must recognize both the unity--the concept of the 'body'--and the diversity--actual bodies--as they exist.'" [FN11]

Eisenstein's argument at this point is difficult to understand. She is not saying that we should stop talking about sex differences. Instead, she is trying to adopt a way to talk about sex differences that uses her "radical pluralist methodology.'" [FN12] Under this perspective, she tries not to overstate homogeneity or heterogeneity. For example, she concludes: "We must therefore seek the unities as well as the diversity in difference(s). We need to examine and understand 'different similarities' and 'similar differences." DDD"" [FN13] She argues for a method that "takes both specificity and unity (meaning homogeneity) as its starting point.'" [FN14]

As I will discuss later, I do find her approach helpful in thinking about the female body and pregnancy cases. Nevertheless, I think her claims about truth have fundamental problems which are commonplace within feminist theory and are therefore worthy of some attention.

Eisenstein says that there is no transhistorical, fixed, singular truth which could be called "objective.'" Instead there are multiple truths which we have created through discourse. [FN15] On the level of pure logic, [FN16] it is easy to see that Eisenstein's claim cannot be accurate. In making that statement, she is asserting a transhistorical, fixed truth: There is no objectivity. ***1163** The statement is circular; if her assertion is accurate then her statement is wrong.

One way to preserve Eisenstein's observation is to modify it to mean that there is no transhistorical, fixed truth other than the statement that there is no truth. [FN17] That, at least, is a more workable statement that deserves some response. [FN18]

Even if I reformulate Eisenstein's perspective in that way, I do not find it plausible. As I will discuss below, feminist theory needs to rely on the possibility of multiple objective truths--one of which is not the belief that there are no objective truths. Before turning to why I believe such objective truths are necessary, I will discuss the response to the apparent illogic in her position that Eisenstein does provide.

Eisenstein attempts to counter critiques such as mine by relying on a distinction offered by Linda Gordon: Although there is no objective truth, there are objective lies. [FN19] Furthermore, Gordon suggests that while some history is more accurate than other types of history, no history qualifies as objectively true. [FN20]

Gordon's work, however, does not get us out of the problem that I have identified with Eisenstein's position. To state that "something is wrong'" (an assertion of an objective lie) is to assert a truth. It is a truth about what is a lie. An example may help. A non-feminist might say, "Women are not subordinated.'" I suspect that Linda Gordon and Zillah Eisenstein would say that this statement is wrong--it is an objective lie. Why is this statement wrong? Because we believe that women are subordinated--an objective truth. Our ability to dispute an objective lie also enables us to assert an objective truth, yet Eisenstein denies our ability to come to common understandings concerning objective truths because our perspectives are necessarily subjective.

I would argue that Gordon's statement is wrong because there are both objective lies and objective truths. In fact, the existence of both phenomena is essential to feminist theory. Thus, my response to Eisenstein's (reformulated) claim and my response to her use of Gordon's statements are ***1164** really the same. Both positions are untenable because they claim that there are no objective truths, thereby overlooking the various ways in which feminist theory needs to rely on objective truths.

In order to make my argument about objectivity clearer, I need to offer a distinction between feminist arguments that are (1) a description of reality or (2) a critique of that reality based on a set of ethics. As a legal-political movement, feminist theory needs a way to explain how we can hope to use the courts to improve women's condition in society. That strategy requires us to believe that there is a language and a set of ethics upon which we can rely to improve the conditions of this society. I would suggest that feminism is successful when it is able to ground its claims on universally-held ethics that are an "object-

ive"' part of our reality. If those ethics do not exist, then feminism cannot hope to be successful.

I will now translate this observation into the distinction that I have offered above. Reality, as it is presently constituted, cannot be objective because it must be historically specific rather than transhistorical. We can only describe reality from a particular perspective, such as from that of the condition of a woman, making it difficult for a description of reality to be universally shared. Thus, I agree with Eisenstein and other feminists who say that descriptions of reality cannot be objective.

Nevertheless, we need to be careful not to overstate how much the fact that descriptions of reality are not objective impedes our ability as feminists to move forward politically. Our disagreements with non-feminists, especially those who are women, are not always disagreements over descriptions of reality. For example, Phyllis Schlafly and Catharine MacKinnon might describe reality as containing the same material conditions, such as women's economic dependency on men within marriage. [FN21] Although I would expect that other non-feminists (especially male non-feminists) would not be willing to concede that women are economically dependent on men within marriage, that is not the point of disagreement between Schlafly and MacKinnon. Schlafly and MacKinnon disagree about feminism despite the fact that they may describe the world similarly. Whether descriptions of reality are objective or subjective, therefore, does not necessarily have implications for understanding our disagreements with non-feminists.

The disagreement between Schlafly and MacKinnon emerges at the second step in my distinction--at the step of critique. Schlafly would call life conditions fulfilling or satisfying which MacKinnon would label subordinating. [FN22] The disagreement between MacKinnon and Schlafly, as we ***1165** move from step one--description of reality--to step two--critique--involves a difference in ethics.

The goal of feminist theory, I would suggest, is to convince people that the agreed-upon description of reality is wrong--that it has the name of subordination. It is at this point that I would argue that feminist theory necessarily must turn to a set of objective ethics or aspirations in order to be successful. Only by showing how this present reality stands in conflict with our agreed-upon ethical standards (i.e., a sense of "justice"') can we convince society that that reality is wrong. If no such ethical standards exist, then feminist arguments concerning perspective and power would swing endlessly back and forth. In order to move forward in a lasting way, it would seem necessary for feminist theory to be able to rely upon a universal set of ethical standards.

Let me turn to another example to clarify this argument. The Federalist Society at Tulane Law School recently invited me to debate John Baker, a Professor at Louisiana State University, on the topic of abortion. [FN23] Baker's position was that Louisiana should reinstate its 1855 anti-abortion statute, which made it a criminal offense with a penalty of up to ten years at hard labor for individuals who assist a woman in procuring an abortion. [FN24] The statute contained only one exception--when the woman's life was at risk by continuing the pregnancy.

The initial question that I ask myself in preparing my talk is: What do I think I could say that would possibly move some members of the audience to my position? I realize that my description of reality is probably different than that of many members of the audience. I try to think about abortion from the perspective of the most disadvantaged women in our society--poor, young women who face an unwanted pregnancy and who do not have the financial resources to afford good prenatal care or offer a newborn an adequate home. I realize that these women, like all women, face unacceptable contraceptive options since no form of contraception that women can use is safe and effective. I also wonder about the life conditions that cause these women to face an unwanted pregnancy, because it does not seem plausible to me that any woman would engage in sexual intercourse in order to face an unwanted pregnancy. I also realize that if ***1166** these women choose to take an unwanted pregnancy to term and place the child for adoption, they would have to live with the knowledge that the child may

face a lifetime of living in adoption agencies and foster homes, especially if that child is a member of a racial minority group or handicapped. Although this is the world I see, it may not be the world of which people in my audience are aware. Thus, my first step is to describe reality from my perspective and hope that I can expand the knowledge of my audience to encompass multiple perspectives.

Even if I can expand the perspective on reality of my audience, however, I realize that this expansion may not help me to succeed in the debate. I still need a vehicle through which I can convince others that the imposition of the Louisiana criminal statute would be wrong. At this stage, I try to speak from what I perceive to be the universal ethics that are present in that room. The ethic that I rely on is equal respect. I ask the question whether a society or legislature that respects women's well-being could respond to women's life conditions with a statement like that of the Louisiana legislature. I argue that a society that is anti-abortion because of the value it places on potential life should also respect the well-being of adult women who find themselves facing an unwanted pregnancy. Such a society, I argue, would have to first attempt to change the material conditions which cause women to face unwanted pregnancies. Such material conditions include unsafe and unacceptable contraceptive options as well as coercive, male sexual behavior. A respectful society, I argue, would not place all of the burdens on women and none of the burdens on men. A respectful society would try to make men at least as responsible as women in making informed reproductive decisions. The present regime gives women no societal support during or after their pregnancy through pre-natal care, child care, paid maternity leave, etc., and then tries to impose on women the sanction of the criminal law when they cannot meet the substantial responsibilities of pregnancy; this regime, I argue, is extremely disrespectful to women. Through such an ethical framework, I would hope to reach some of the anti-abortion advocates in the room.

Was my argument successful? I did not poll the audience so I cannot offer an empirical response. However, I can observe that many people came up to me afterwards and said that they considered themselves to be "pro-life"' yet they were moved by what I had said and found that they now had to re-think their positions on the Louisiana legislation. Interestingly, some of those people were women of color who may have been able to agree with my description of reality and then could see the strength of my ethical argument. Thus, even I agree that the fact that there are universally-held ethics does not make our task as feminists easy. We still must face enormous disputes with others over our perspectives on an everchanging reality. But, by recognizing that there are universally shared ***1167** ethics present in the room, we can hope to find a voice with which to speak to an audience.

If I am correct that there are some objective truths, the question becomes one of establishing those truths. Elsewhere, I have argued that feminists need to develop a system of ethics that has applicability to law. [FN25] The ethics that I have suggested--love, compassion, and wisdom--are ones that I think are shared by most major religious traditions and by a broad range of the political spectrum. These ethics can be the foundation for law because of their universal applicability. Such ethics are, in a sense, objective truths about our aspirations for society. If we truly share these ethics, then we might be able to establish that women are subordinated and that subordination is wrong.

When I have tried to present such a theory of knowledge and consciousness, I have been accused by feminists of being an "essentialist"'--one who assumes that humans have innate characteristics--and of not understanding that individuals are socially constructed. [FN26] I think my critics are wrong. The recognition that we are socially constructed leads to the further recognition that we are constructed to share language and certain values with others. It actually makes more sense to assume that there are shared truths in a socially constructed world than in an essentialist world. [FN27] Our task politically is to discover which of those shared truths can be used as a basis for constructing yet a better world. We do not need to look to nature or biology for the source of our feminist values. By applying those values that already exist more universally in society, we can move society in a feminist direction.

If I am correct that we can gain control over our social construction in order to move it in the direction that will further our own well-being, the methodological question is how to sort out the good moves from the bad. The fact that we are socially constructed means that we are constructed to perpetuate our own oppression. It is therefore quite a challenge to break out of that set of shared truths and move towards truths that might benefit our well-being. I would hope that radical feminists would begin to tell us how they know the "truths"' of which they speak so that we can begin to evaluate what processes may lead to the discovery of such "truths."' [FN28]

***1168** Our ability to discern a few truths in a cautious manner should be compatible with Eisenstein's perspective. For example, in discussing the importance of embracing both specificity and unity, she says that such an approach allows us to "focus in between the poles . . . ."' [FN29] She is trying to move beyond bipolar thinking and help us to find a way to embrace both specificity and unity (or difference and sameness). My approach simply widens her embrace. I am suggesting that there is a second scale--between relativism and objectivity. Rather than embrace relativism, I am suggesting that we seek a minimalism which respects specificity and unity while also seeking, in some cases, to embrace an objective truth that is open to revision. Thus, we can say that law is wrong in the way that it has tried to apply the concept of equal respect to women in general, while also saying that at this time we have not reached a consensus on how this concept should be applied to women when they are pregnant.

I suspect that Eisenstein's dismissal of our ability to speak "objectively"' stems from her critique of sexual objectification. Because she disfavors women's so-called objectified treatment by men, like many feminists, she discards the possibility of our ever speaking objectively in a way that does not perpetuate women's subordination. [FN30] What I am suggesting is that feminists do need to criticize objectification in many of the forms in which it is perpetuated, such as in the form of sexual objectification. However, our critique of objectification, like our critique of purported sameness and differences, should not lead us to dismiss the possibility of developing and building upon a universal ethical standard. In each case, we must be cautious and ensure that we have considered the complexity of women's and men's lives in making a particular claim. We may later have to revise our claim in the face of further knowledge. However, feminism needlessly abandons the possibility of developing a set of ethics for assessing the human condition when it discards entirely the possibility of speaking objectively. Rather than assert as true that we cannot speak objectively of any truths, I hope that Eisenstein and other feminists will begin to explore how it is that we know the few truths that we do know as feminists, so that we can begin to expand on this structure of knowledge.

***1169** II. MULTIPLE MEANINGS APPLIED TO THE PREGNANT BODY AND EQUALITY

In recognizing the multiple meanings of social facts, Eisenstein's approach insists that we are affected by law while we also have the strength to resist it. For example, special treatment legislation with respect to pregnancy may reinforce stereotypes about women's "inherent weakness"' and, at the same time, help women to live under more humane conditions. In addition, she would argue that the meanings of pregnancy are not created entirely by law; women can work to change the meaning and significance of being pregnant irrespective of the legal status of pregnancy. [FN31] She suggests that each side of the special treatment/equal treatment debate has made the mistake of not recognizing multiple meanings that can co-exist; each thinks that the only meaning the pregnant body can have is the one created by law. Eisenstein criticizes the view of the ACLU in adopting the equal treatment perspective, which insists that women who are pregnant be treated like other workers who are facing disabilities. The ACLU justifies its position by noting the harm that protective labor legislation has historically imposed on women's position in society. Eisenstein says that the ACLU is wrong to use history to reach that conclusion: Special legislation, she argues, does not "cause"' women to be regarded as different. Women are regarded as different irrespective of whether legislation recognizes that fact. [FN32] Eisenstein says, for example, "It is true that with special protection legislation in place, some employers will think twice about hiring a woman, but many of them will think twice about doing so anyhow."' [FN33] Eisenstein also criticizes the ACLU position for assuming that meaning stays the same over time. Late twenti-

eth century discourse about women differs markedly from that of the late nineteenth century. Thus, we need to understand legislation within contemporary discourse in order to evaluate its impact on women. [FN34]

I think that Eisenstein is correct to suggest that we can recognize multiple meanings and therefore not find it necessary to choose transhistorical theoretical positions. Nevertheless, she overstates her position when she asserts that we can often work successfully within a combined theoretical approach (i.e., difference plus sameness) at a particular time in history. Although combined theoretical approaches may be possible on some issues, they are not successful on all issues; our task as feminists should be to make the difficult historical judgment about which theoretical approach will work best at a particular time.

***1170** A. A Case Study: Abortion

The costs of not sufficiently struggling with and making important theoretical choices about important issues can be seen by examining the abortion issue. Our inability or unwillingness to engage in such a searching inquiry, and, instead, to accept an obvious "compromise'" position may be extremely dangerous to women's well-being. The fact that theoretical inquiries are not possible on a transhistorical basis does not make them impossible or imprudent within a particular historical context.

Eisenstein acknowledges that radical feminists took a liberal path in the courtroom to achieve victories in the abortion context. She suggests that there is no harm in feminists choosing liberal arguments in the courtroom and radical arguments in the political arena. [FN35] I would argue, by contrast, that feminists made the wrong choice in picking liberal pro-choice privacy arguments rather than radical pro-women, equality arguments in litigating the abortion issue. That theoretical decision has had enormous ramifications and should have been considered more fully at the time it was made.

As Eisenstein acknowledges, the argument presented to the Court, and accepted by it in Roe v. Wade, [FN36] was a classic liberal argument for privacy. Women argued for and won the right to "choose'" to have an abortion without state interference. However, the state was not required to take any steps to facilitate the broadening of the private sphere, thereby making that choice more available to all women in society. Thus, in Harris v. McRae, [FN37] the Supreme Court ruled that states need not fund abortions under Medicaid. In the Supreme Court's most recent abortion decision, Webster v. Reproductive Health Services, [FN38] the Court demonstrated further that states may do quite a bit to restrict abortion so long as they do not burden that choice with the force of the criminal laws. [FN39]

***1171** That result, although also criticized by many liberals, can be seen as a consequence of the use of liberal, privacy arguments in the abortion area. We gave the courts the opportunity to broaden the private sphere, thereby leaving abortion decisions a part of women's "privacy,'" yet permitting the state to encumber women's choices in many ways. [FN40] Although this result was not an inevitable result of the choice of the liberal, pro-choice, privacy perspective, it is certainly a result that could be attained easily under that framework. Thus, a judge as clever as Chief Justice Rehnquist did not need to overturn Roe in order to permit the state of Missouri to encumber abortions in Webster and Harris.

Some people might argue that we have retrenched on the abortion issue, not because of the type of argument used, but because of the change in political climate. I would certainly agree that political changes in the composition of the Court had an impact on the retrenchment that has taken place. However, I do not think we can afford to overlook the fact that our choice of doctrine has also played a role.

Justice Marshall has stood alone in recognizing that an equal protection approach is necessary for the Court to deal adequately with the abortion issue. [FN41] Justice Blackmun, the author of the Roe opinion, has never endorsed Marshall's equal protection approach. Until Webster, Blackmun argued that a privacy approach could invalidate the restrictions that legislatures imposed on abortions. In Webster, however, Justice Blackmun seemed to recognize that the privacy approach

could not invalidate all measures which needlessly raise the cost of abortion and thereby make it disproportionately unavailable for poor women. One of the issues in Webster was the constitutionality of pre-viability testing requirements. [FN42] Blackmun found those requirements to be unconstitutional on a technological ground, because many of the required tests were not possible at the stage of gestation at which they were required. Nevertheless, Blackmun acknowledged that he would "see little or no conflict with Roe"' [FN43] if the statute could not be interpreted to require inappropriate viability tests. Thus, Blackmun was unable to protect women's well-being fully under his privacy framework; he needed to rely on a technical argument to conclude that the statute was unconstitutional.

I would like to suggest that the results in Harris and Webster would have been difficult to attain if the original Roe decision had been couched ***1172** in pro-women, equality terms, because the underlying justificatory scheme would have been stronger. Rather than discussing abortion as a right of privacy, it should have been discussed as an issue about the respect which society accords women. Such a framework would require us to consider abortion as a question about what responsibilities society is entitled to impose on each of us: Would a legislature that truly respected women's well-being, as seen from the perspective of women themselves, have been willing to impose these regulations on abortion? [FN44] That approach would be communitarian--asking about our appropriate responsibilities as members of a community--rather than individualistic. Thus, I would argue under such a perspective that society cannot encumber women's decisions to have an abortion at this time, because society does not treat women's reproductive capacity with respect. So long as society fails to provide safe and effective contraception, health insurance to pregnant women, pre- and post-natal care for women and their children, low-cost child care, and rape laws that truly ensure that sexual relations are consensual and mutual, it is not entitled to impose upon women the burden of bringing a fetus to term. Abortion regulations, under such a framework, are problematic not because we want women to be protected in their privacy but because we want society to create an environment in which women are treated with community-based respect. [FN45]

Under this latter approach, I would argue that Harris v. McRae could not have come out the way it did. The plaintiffs in Harris understood this fact and made a strong equality argument, which the Court rejected. [FN46] Similarly, in Webster, women of color and juvenile women filed briefs in which they argued that the cost of abortions had a disparate impact on poor, young women and that they were the group most likely to delay having abortions. [FN47] Therefore, these women would disproportionately incur the added expense of unnecessary viability tests. Because a major reason that poor, young women delayed having abortions was their inability to obtain the necessary funds, this cost-raising measure could be expected to have a substantial impact on their already strained ability to procure an abortion. Thus, instead of talking about privacy doctrine, these women ***1173** talked about how the regulations at issue in Webster jeopardized their lives and health. [FN48]

Some people might respond that the problem with my suggested approach is that it does not provide women with an absolute right to choose an abortion under any historical circumstances. If society treated women and their reproductive capacity with respect, then the state might be able to justify certain restrictions on abortion (not including the use of the criminal law which would be inherently disrespectful). I do not find that result troubling because the restrictions would have to be respectful of women's well-being. If the restrictions were not respectful, they would be unconstitutional.

For example, I could imagine that in a society that respects women's well-being, the legislature might decide to require women who seek abortions to undergo pre- and post-abortion counselling in order to respond to the possibility of post-abortion emotional trauma. Under the privacy approach, feminists might oppose such regulations because they threaten the privacy of women's abortion decisions. Under an equality approach, such regulations could be constitutional if they served women's well-being. The equality approach would recognize that states can sometimes interfere in women's lives to protect their well-being.

We are fooling ourselves if we think that using the privacy approach makes abortion absolutely available to women. It does not. It makes abortion available to privileged women, who can afford the high price that society insists they pay for it. Other women will experience unwanted childbirths or illegal abortions, which are cheaper but endanger their health. I find the equality approach much more satisfying. The "right"' that it creates is created for all women, not simply for privileged women who can afford the purchase price of privacy.

The abortion issue is therefore an example where the choice of perspectives-- liberal privacy theory rather than radical group-based theory--is a distinction with a difference. Eisenstein is wrong to suggest that we can choose one strategy in the court room--liberalism--and another strategy in the streets-- equality. Our perspective in the courtroom affects our strategies in the streets.

Thus, feminists need to be more diligent in ensuring that we are making effective legal arguments on particular issues that will really serve women's well-being. I have no problem with pragmatism. I can imagine ***1174** us concluding after a searching inquiry that the more "liberal"' sameness approach is appropriate in the pregnancy context and that the more "radical"' equality approach is appropriate in the abortion context. No matter which choice we make, however, we must think through its full practical consequences.

B. Some Helpful Insights

Despite these criticisms, I found Eisenstein's work very helpful in contributing to my understanding of how to describe in legal terms why pregnancy-based legislation constitutes sex discrimination. Eisenstein emphasizes the importance of thinking of the body as a capacity, not a static entity, and a capacity that has multiple meanings. In the pregnancy context, the Supreme Court has concluded that pregnancy-based legislation is not sex-based legislation because both women and men can be non-pregnant persons. [FN49] Eisenstein criticizes this result, using a familiar feminist line that the Court's error is its use of the male norm in defining what constitutes sex-based inequality. [FN50]

Although Eisenstein's criticism is appropriate, I think that her perspective suggests an even stronger criticism. The category of non-pregnant persons does include both women and men; however, the Court's error was in not recognizing that women and men are not similarly situated in their non-pregnant status. Nearly all women are affected by pregnancy-based discrimination irrespective of whether they are pregnant, because nearly all women have the capacity to become pregnant. For example, if a state does not provide mandatory pregnancy leave, then a woman may choose to defer or avoid childbirth because childbirth is not feasible for her without the guarantee of pregnancy leave. A man, however, cannot become pregnant and is not affected by the presence or absence of maternity leave in the same way. Pregnancy disability leave is never available to him since he does not face disabilities when his wife or lover becomes pregnant. Admittedly, the inconvenience to his female partner of becoming pregnant may influence his decision whether to agree to a childbearing decision; however, I would suggest that childbearing decisions are not as significant in most men's lives as in most women's lives. Thus, the meaning of being non-pregnant is not the same for women and men due to the interaction between biology and culture. For women, the California disability policy at issue in Geduldig [FN51] impacts them in a sex-specific way irrespective of whether they are or are not pregnant. The Court's error under Eisenstein's theory, then, is failing to examine the comparability ***1175** between women and men who are not pregnant. It did not explore the multiple meanings of the non-pregnant person.

In sum, Eisenstein's work does not make it easier for me to contemplate how to combat sex-based inequalities relating to women's reproductive status. I still may face difficult pragmatic choices between the special treatment and equal treatment approaches. However, her work does provide me with fresh insight into how I need to examine closely both sides of the equality equation--both the side that is supposed to represent difference as well as the side that is supposed to represent sameness-

-to see whether a purported sameness is one when we use a theory of meaning that recognizes multiple and changing truths.

III. TOWARDS A FEMINIST THEORY OF JURISPRUDENCE

Legal argumentation requires us to claim that we are right and our opponent is wrong. Moreover, it has been commonplace for feminists to ask the courts to dictate to the legislature the parameters of what they can do constitutionally. This is often called judicial activism. But how do feminists attain confidence necessary to make such claims, given the feminist critique of consciousness? In order to say that we are right and our opponent is wrong and that, moreover, the courts should dictate right answers to the legislature, it would seem that feminist theory would have to be quite confident of its ability to know the truth.

I would like to suggest, based on Eisenstein's work, that feminists need to learn to make legal arguments in a way that is more sensitive to feminist understandings of truth. Specifically, feminists need to show that they are open to multiple meanings and are open to the possibility that they may be wrong when they make legal arguments. On the other hand, feminists should also learn from their practice that they do believe in some truths. Both openness and an articulation of truth are necessary.

Let me again return to the abortion issue as an example. I have suggested above that the appropriate way, from a radical feminist perspective, to think about the abortion issue is in a communitarian, group-based way. I have said that we should think about whether society has sufficiently demonstrated its respect for women's well-being in the manner in which it restricts abortion. And I have said that I have no problem concluding that society, as presently constituted, does not sufficiently respect women's well-being when it tries to restrict abortion.

Nevertheless, I must recognize that abortion presents multiple meanings, some of which are troubling. Quite simply, as a radical feminist, I believe it is important to value life. Thus, I, like many radical feminists, oppose capital punishment and am both a pacifist and a vegetarian. Given that concern for life, the abortion issue is a very difficult one. Although it is necessary to protect women's lives and well-being by permitting abortion, ***1176** it is also unfortunate that society's disrespect for women must cause the termination of fetal life. The way I think through the abortion issue reflects an openness to the many meanings and values that are present in the abortion controversy. I oppose state regulation of abortion, yet try to maintain an openness on that issue in the event that I have not appropriately considered how the prevalence of abortion may harm the fabric of society.

If feminists were true to Eisenstein's call for openness, I think that feminists would have to talk about abortion in more tentative language, similar to what I have used above. But if you read the briefs filed in abortion cases or the many articles written on the subject by pro-choice feminists, you will not find that openness. [FN52] You rarely, if ever, find a feminist who will even acknowledge that pro-life advocates are right to encourage us to make sure we value life dearly. [FN53] And when I have tried to acknowledge my own openness to the values expressed by pro-life advocates, I have sometimes been told that I am not a "real feminist."DD'

In sum, I wonder if the nature of legal argumentation--which requires us to argue about difficult issues in black and white terms--has caused us, as feminists, to lose the openness to competing views that Eisenstein says is essential to feminist theory. Even if feminists find that they cannot change the way they talk to courts, I hope that we begin to re-examine how we talk to each other. I hope that feminist theory moves in the direction of openness rather than dogmatism.

IV. CONCLUSION

In this essay, I have suggested that we can try to speak the truth to courts but that we need to do so in a radical voice that also recognizes the multiple and open meanings contained in truth. Zillah Eisenstein has assisted me in trying to address this concern; I encourage others to read her book and engage in open dialogue.

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[FNaa] Professor of Law, Tulane University; Visiting Professor of Law, University of Toronto (spring 1990). I would like to thank John Stick and Joan Williams for their helpful comments on a draft of this essay. Joan and I have agreed to disagree about some aspects of Eisenstein's book, and I suggest that the reader read her review of Eisenstein's book which will appear in the Michigan Law Review's annual survey of books relating to the law. Williams, Feminism & Post-Structuralism: Zillah Eisenstein, The Female Body and the Law, 88 MICH. L. REV. (forthcoming 1990).

[FN1]. The works of Roberto Unger, Michel Foucault, Jacques Derrida, Jacques Lacan, and Julia Kristeva come to mind. Some of the difficulty may be attributable to problems of translation, as I have read much of this work in translation from French. See, e.g., J. KRISTEVA, THE KRISTEVA READER (T. Moi ed. 1986); J. KRISTEVA, ABOUT CHINESE WOMEN (1986); R. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

[FN2]. Z. EISENSTEIN, THE FEMALE BODY AND THE LAW (1988) [hereinafter cited by page number only].

[FN3]. Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM (1981) (arguing that liberal feminism is inherently radical and is not pure liberalism).

[FN4]. Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA (1984) (discussing weakness of liberal theory as applied to feminist issues of equality).

[FN5]. CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Z. Eisenstein ed. 1979) (anthology of writings on socialist feminism).

[FN6]. This approach puts her in sharp contrast to Catharine MacKinnon, who consistently argues that radical feminism is the only "true"' feminism. See C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 137 (1987). It also places her in contrast to Alison Jaggar, who purports to survey feminist theory but actually is trying to convince the reader of the merits of a socialist-feminist perspective. See A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983).

[FN7]. See Z. EISENSTEIN, supra note 3.

[FN8]. P. 22.

[FN9]. Pp. 23-24.

[FN10]. P. 29.

[FN11]. P. 31.

[FN12]. P. 35.

[FN13]. Id.

[FN14]. P. 36 (emphasis in original).

[FN15]. P. 22.

[FN16]. If this were only a logical problem, then I might not discuss it. However, I find that this kind of statement impedes my ability to read feminist theory. If there are no truths, then I wonder why I should read a book filled with the asserted truths of another feminist. Of course, I must persist and read because I realize that we are all engaged in a search for truths, despite such disclaimers.

[FN17]. But see S. FISH, DOING WHAT COMES NATURALLY 29 (1989) (arguing that relativistic theory of truth is not contradictory; relativism does not claim "'that there are no foundations, but that whatever foundations there are . . . have been established by persuasion'").

[FN18]. Alternatively, Eisenstein does not mean to make the claim that there are no objective truths. Sophisticated critical analyses apparently do not make that claim. See Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. REV. 429, 488-95 (1987) (discussing "law as indeterminate'" critiques made at various levels of sophistication). Instead, she may be trying to state that legal scholars and others may have overstated our ability to discern objective truth. Much of what has been called objective truth is, on closer examination, not objective truth. There is nothing in Eisenstein's text that would lead me to believe that this is her basic claim. Nevertheless, I acknowledge that other critical scholars make this more sophisticated claim, with which I have no disagreement.

[FN19]. P. 23 (quoting Gordon, What's New in Women's History?, in FEMINIST STUDIES, CRITICAL STUDIES 22 (T. de Lauretis ed. 1986)).

[FN20]. Id.

[FN21]. See C. MACKINNON, supra note 6, at 21-31 (debate with Phyllis Schlafly).

[FN22]. As MacKinnon noted:
She [Schlafly] and I see a similar world, but we portray it differently. We see similar facts but have very different explanations and evaluations of those facts.
We both see substantial differences between the situations of women and of men. She interprets the distinctions as natural or individual. I see them as fundamentally social. She sees them as inevitable or just--or perhaps inevitable therefore just--either as good and to be accepted or as individually overcomeable with enough will and application. I see women's situation as unjust, contingent, and imposed.
Id. at 21.

[FN23]. The debate was labelled a "discussion'" at my request and occurred on October 11, 1989.

[FN24]. LA. REV. STAT. ANN. § 14:87 (West 1986) (declared unconstitutional in Weeks v. Connick, No. 73-469 (E.D. La. Jan. 26, 1976) and its enforcement enjoined in Weeks, No. 73-469 (E.D. La. Feb. 20, 1976)). A motion by Orleans Parish District Attorney Harry Connick to reinstate the statute in light of Webster v. Reproductive Health Servs., 109 S.Ct. 3040 (1989), was denied on January 20, 1990. See Motion Under Federal Rule 60 (B)(5) to Dissolve the Court's Injunction Against Enforcement of L.A. R.S. 14:87, 87.4 and 88, Weeks, 73-469; The Wash. Post, July 11, 1989, at A14.

[FN25]. See Colker, Feminism, Theology, and Abortion: Toward Love, Consciousness and Wisdom, 77 CALIF. L. REV. 1014 (1989).

[FN26]. Such comments were made to me when I presented my work at the University of Wisconsin Feminist Legal Theory Institute as well as in personal correspondence from various feminists, such as Alison Jaggar. In general, I do not think that

Eisenstein and other feminist scholars have appropriately examined the ways that contemporary liberal legal scholars make claims about objectivity. For an excellent discussion of the ways that critical scholars often misunderstand liberal claims about objectivity, see Stick, Can Nihilism Be Pragmatic?, 100 HARV. L. REV. 332, 371 (1986) (arguing that claim to "group objectivity,'" i.e., conformity to norms of justification, is "unexceptional empirical claim true of many discourses'").

[FN27]. I thank John Stick for helping me with this idea.

[FN28]. I have tried to share my own processes in discerning truth with readers by discussing the benefits of meditation and contemplation. See Colker, supra note 25.

[FN29]. P. 36.

[FN30]. Other feminists who more explicitly make the connection between their critique of sexual objectification and objectivity include Catharine MacKinnon and Martha Minow. See, e.g., MacKinnon, Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence, 8 SIGNS 635 (1983); Minow, The Supreme Court 1986 Term--Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987).

[FN31]. See pp. 196-200.

[FN32]. P. 204.

[FN33]. Id.

[FN34]. Pp. 204-05.

[FN35]. Eisenstein recognizes that pro-choice abortion arguments have been liberal arguments, and she further recognizes that privacy arguments do not protect women's well-being without society's commitment to equality. Nevertheless, she refrains from criticizing the privacy strategy, suggesting that we can afford to use that strategy in the courts without undercutting equality arguments elsewhere. P. 188. I would suggest that the seeming success of the privacy arguments in the courts numbed feminists and prevented them from realizing how superficial those rights were. It is interesting that now that abortion seems not to be even minimally protected under privacy doctrine, feminists are showing renewed interest in the politics of abortion and equality-based argument. For example, the November 12, 1989, pro-choice march in Washington, D.C., was labelled "Mobilizing for Womens Lives."DD'

[FN36]. 410 U.S. 113 (1973).

[FN37]. 448 U.S. 297 (1980).

[FN38]. 109 S.Ct. 3040 (1989).

[FN39]. The Supreme Court's decision this year to grant certiorari on abortion cases that do not involve criminal measures suggests that it will soon permit further restrictions on abortion. See Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), cert. granted, 58 U.S.L.W. 3046 (U.S. Aug. 1, 1989) (Nos. 88-1125 & 88-1309) (parental notification); Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), cert. granted sub nom. Ohio v. Akron Center for Reproductive Health, 58 U.S.L.W. 3045-46 (U.S. Aug. 1, 1989) (No. 88-805) (parental notification) 3045-46; Turnock v. Ragsdale, 841 F.2d 1358 (7th Cir. 1988) cert. granted sub nom. 58 U.S.L.W. 3045 (U.S. Aug. 1, 1989) (No. 88-790) (regulation of clinics) (case settled).

[FN40]. For further discussion, see Fudge, The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles, 25 OSGOODE HALL L.J. 485 (1987).

[FN41]. See Harris, 448 U.S. at 341-46 (Marshall, J., dissenting).

[FN42]. The statute specified that a physician, prior to performing an abortion on any woman who he or she has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable'" by performing "such medical examinations and tests as are necessary to make a finding of the [fetus'] gestational age, weight, and lung maturity.'" MO. REV. STAT. § 188.029 (Supp. 1989).

[FN43]. Webster, 109 S.Ct. at 3070 (Blackmun, J., concurring in part, dissenting in part).

[FN44]. Elsewhere, I have called this approach "equality as compassion.'" See Colker, supra note 25. An important aspect of this approach is that we act in a respectful manner toward others--considering their well-being from their perspective. Simone Weil's work has considerably influenced this approach. Weil spent her life trying to treat others from such a perspective. See Teuber, Simone Weil: Equality as Compassion, 43 PHIL. & PHENOMENOLOGICAL RES. 221, 235- 36 (1982).

[FN45]. I discuss this approach more fully in Colker, supra note 25.

[FN46]. The plaintiffs in Harris v. McRae made a class-based equality argument concerning the impact of the statute on the lives of poor women. The same argument could be made in sex-based terms, focusing on the impact on women, particularly poor women.

[FN47]. See Brief Amici Curiae of the National Council of Negro Women, Inc. et al. in Support of Appellees at 695-98, Webster (No. 88-605); Brief of Amici Curiae American Public Health Association, et al. in Support of Appellees at 22-23, Webster (No. 88-605).

[FN48]. See, e.g., Brief Amici Curiae of the National Council of Negro Women, Inc. et al. in Support of Appellees, Webster (No. 88-605). Essentially, they argued that making abortion illegal or restricting abortion simply raises the cost of having an abortion. For poor women, abortion restrictions cause them to: (1) delay having an abortion until they have the necessary financial resources, often causing them to have a second trimester rather than a first trimester abortion; (2) forego having an abortion and undergo the enormous costs of unwanted childbirth; or (3) have an illegal abortion that is cheaper but poses substantial health risks. None of these options protects the lives of women who face unwanted pregnancies and are often poor and young.

[FN49]. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).

[FN50]. Pp. 66-67.

[FN51]. 417 U.S. 484 (1974).

[FN52]. Eisenstein's work does not reflect openness when she discusses abortion, because she never recognizes the plausibility of wanting to protect the valuation of life. She discusses abortion as if women's well-being is all that is at stake. Pp. 184-85.

[FN53]. An exception would be writings by Buddhist feminists in which they favor women's right to choose an abortion but acknowledge that women should undergo a grieving process when they do choose an abortion. See, e.g., Klein, Buddhist

Views on Abortion, 6 SPRING WIND-BUDDHIST CULTURAL F. 166, 170-71 (1986) (special issue on women and Buddhism).

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