

1991

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Brenda Cossman

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Recommended Citation

Brenda Cossman, *Book Review: Where Is Somewhere in Between? A Review of Zillah Eisenstein's The Female Body and the Law*, 9 *LAW & INEQ.* 575 (1991).

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**Where Is Somewhere in Between?
A Review of Zillah Eisenstein's
*The Female Body and the Law***

The Female Body and the Law

by Zillah Eisenstein*

(Berkeley: University of California Press, 1988)

Reviewed by Brenda Cossman**

I. Introduction

In her recent book, *The Female Body and the Law*,¹ Zillah Eisenstein has entered the debate of sameness and difference. She argues that this debate over the competing approaches to the legal regulation of gender difference has been structured by a phallogocratic discourse, that is, a discourse that privileges the male body. Her work is situated, albeit somewhat uncomfortably, within what has become known as the third stage of feminist scholarship.² Unlike the first stage, with its emphasis on sameness and formal equality, and the second stage, with its emphasis on difference and substantive equality, the third stage has come to reject this very preoccupation with sameness and difference, which has done no more than reinforce the white, middle-class male as the unstated norm.³ Eisenstein finds in the deconstruction and discourse theories of poststructuralism a way to decenter the phallus and a way out of the dilemma of difference.⁴ She then calls for a radically

* Professor of Politics, Ithaca College, Assistant Professor, Osgoode Hall School of Law; B.A. 1982, Queen's University; 1986, L.L.B. University of Toronto; L.L.M. 1988, Harvard Law School.

** Assistant Professor, Osgoode Hall Law School

I would like to thank Judy Fudge and Mary Jane Mossman for their comments on an earlier draft of this paper.

1. Zillah Eisenstein, *The Female Body and the Law* (1988)[hereinafter *The Female Body*].

2. Martha Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 Harv. C.R.-C.L. L. Rev. 1, 2 (1989).

3. Minow, *supra* note 2, at 3; see Joan W. Scott, *Deconstructing Equality-Versus-Difference*, 14 Feminist Stud. 33 (1988).

4. For a discussion of the dilemma of difference, see the following by Martha Minow: *Engendering Difference*, 101 Harv. L. Rev. 10 (1987); *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 Law & Contemp. Probs. 157 (1985); *When Difference Has Its Home: Group Homes for the Mentally*

egalitarian conception of equality, a conception that begins from a recognition of plurality and difference and a reconstruction of the legal language of sexual equality, based on the pregnant body.

Eisenstein's task of deconstructing the complex and competing discourses of sexual difference and sexual inequality of the American political scene during the Reagan administration is ambitious. Her analysis of the reassertion of the discourses of sexual difference by the Reagan state, to justify and legitimize sexual inequality in general and by the Reagan-appointed courts in particular, is illuminating. However, as a strategy for transcendence, as a way out of the trappings of sameness and difference, Eisenstein's most recent work is less useful. Paradoxically, *The Female Body* is limited by the very methodological claims which she relies on to provide the way out of the dilemmas. Eisenstein situates her analysis at a multiplicity of "in betweens": somewhere in between materialism and idealism, between similarity and difference, between poststructuralism and socialist feminism. While urging us to move beyond the limitations of our traditional perspectives which are plagued by such dualisms and to make connections as yet unmade, we are left wondering at the end of *The Female Body* just where somewhere in between might be.

II. Between Poststructuralism and Socialist Feminism

The Female Body begins with an articulation of its methodological and theoretical assumptions. Eisenstein's point of departure is her claim to adopt a methodology that "questions the validity of distinguishing between materialism and idealism."⁵ Her emphasis is on the extent to which the material or real is constructed in and through language.

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 The realms of concrete fact 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, relocates power in a place *somewhere in between* the real and ideal: between truth and closure and truths and openness.⁶

While beginning by challenging a fundamental and arbitrary

Retarded, Equal Protection and Legal Treatment of Difference, 22 Harv. C.R.-C.L. L. Rev. 111 (1987).

5. Eisenstein, *supra* note 1, at 6.

6. *Id.* at 7-8 (original emphasis).

dualism in modernist thought and suggesting that the material and the ideal ought instead to be seen as a continuum, as mutually constituting and constituted in discourse, Eisenstein does not develop her understanding of the relationship other than stating it to be situated "somewhere in between."⁷ By glossing over the interstices of materialism and idealism, by simply positing a "somewhere in between" without considering the dilemmas and contradictions in this relationship, an awkward tension is created.

This tension between materialism and idealism is representative of a deeper tension in *The Female Body* between Eisenstein's socialist feminism and the influence of poststructuralism on her ideas. This poststructuralist influence is most evident in Eisenstein's understanding of discourse, power, and the decentered state. In elaborating on her use of the term "discourse," Eisenstein acknowledges Michel Foucault's influence, at the same time as she distinguishes her use of the term from his.⁸

While agreeing with Foucault's analysis of the dispersion of power through discourse, Eisenstein takes issue with what she argues is Foucault's abandonment of any notion of centralized power. In criticizing his emphasis on the dispersion of power, Eisenstein writes: "The problem with this emphasis on disparate sites of power is that it privileges diversity, discontinuity, and difference while it silences unity, continuity, and similarity We need instead a method that focuses on the relationship between similarity and difference, unity and specificity, coherence and incoherence."⁹

She argues that her conception of dispersed power is distinct from Foucault's pluralistic approach in her belief that "concentrations of power remain within the dispersion."¹⁰ This understand-

7. *Id.* at 8.

8. *Id.* at 10-19, referring to the following of Foucault's works: *History, Discourse, and Discontinuity*, 20 *Salmagundi* 225 (1972); *The Archaeology of Knowledge and the Discourse on Language* (1972); *Truth and Power*, in Michel Foucault: *Power, Truth and Strategy* (1979) and in *Power/Knowledge* (1980); and 1 *The History of Sexuality* (1978).

Eisenstein describes her understanding of discourse, quoting the work of Catherine Belsey:

"A *discourse* is a domain of language-use, a particular way of talking (and writing and thinking). A discourse involves certain shared assumptions which appear in the formulations that characterize it." Discourse focuses on the importance of context within meaning and the open-texturedness of reality. There can be multiple standpoints, multiple truths, multiple sites of power/knowledge.

Eisenstein, *supra* note 1, at 11 (quoting Catherine Belsey, *Critical Practice* 5 (1980)) (original emphasis).

9. Eisenstein, *supra* note 1, at 18.

10. *Id.* at 15.

ing of power is central to her theory of the state.

In her view, "the dispersion of power through and in discourse operates within concentrated forms of power that discourses about the state establish."¹¹ According to Eisenstein, "power has many centers, that it is sometimes disorganized and contradictory, that there is no set location from which power emanates. This is not to say that there is not a state in which power is concentrated or that all power sites are equally significant."¹²

Although power is not centralized within the state, she argues, rather insightfully, that the "relations of power are sometimes concentrated there, even if in contradictory and conflictual ways. I criticize Foucault not for decentering the state but for not reconnecting the dispersions he illuminates to the hierarchical system(s) of power(s) represented through the discourses of the state."¹³

Eisenstein can be seen to be engaged in the project of limiting the decentralizing and, ultimately, depoliticizing implications of Foucault's analysis.¹⁴ While committed to retaining her socialist feminist theory of the state, Eisenstein believes that Foucault's insights on the workings of power can contribute to her understanding of the complex and contradictory ways in which power is concentrated in and exercised by the state. In her view, the meeting ground of her socialist feminism and her poststructuralist influence are the discourses of the state and, particularly, legal discourses as an authorized discourse of the state. Law is thereby situated at this somewhere in between. It is not a unity concentration of power, but rather "a dispersed, heterogeneous expression of power relations that is related to state activity yet does not necessarily center power within the state."¹⁵

The construction of this middle ground between patriarchal social relations and phallographic discourses, between the material and the ideal, between socialist feminism and poststructuralism, wherein she situates law and her own analysis of legal discourses remains problematic. The possibility of this somewhere in be-

11. *Id.* at 12.

12. *Id.* at 16.

13. *Id.* at 18-19.

14. Foucault's deconstruction of the subject, for example, has been argued to undermine the notion of human agency necessary for political action and resistance. For a general discussion, see Jeffrey Weeks, *Uses and Abuses of Michel Foucault*, in *Ideas from France: The Legacy of French Theory* (1989). For a discussion of the implications in a feminist context, see Michele Barrett & Rosalind Coward, *Letter from Michele Barrett and Rosalind Coward*, 7 *m/f* (1982); and Michele Barrett, *The Concept of Difference*, 26 *Feminist Rev.* 29 (1987).

15. Eisenstein, *supra* note 1, at 20.

tween remains assumed rather than explored, and the tensions created by these juxtapositions are not fully explored. The question that remains unanswered is whether the decentralizing implications of Foucault's analysis and the more general depoliticizing implications of poststructuralism can be limited. The relationship between feminism and postmodernism is by no means unproblematic. The poststructuralist challenge to basic modernist assumptions—of subjectivity, of rationality, of knowledge—has been seen by many feminist scholars to threaten the very possibility of feminist theory or practice.¹⁶ The virtual negation of the self through the deconstruction of subjectivity leads feminists such as Linda Alcoff to ask, "How can we ground a feminist politics that deconstructs the female subject?"¹⁷ Without a notion of self, or of women, there is no human agency, nor a subject of liberation.¹⁸ The challenge to notions of objectivity and truth through the deconstruction of modernist metanarratives leads other feminists to ask how feminism can make any normative claims.¹⁹ Without a

16. For a general discussion of the relationship between feminism and postmodernism, see Leslie Wahl Rabine, *A Feminist Politics of Non-Identity*, 14 *Feminist Stud.* 11 (1988); Scott, *supra* note 3; Mary Poovey, *Feminism and Deconstruction*, 14 *Feminist Stud.* 51 (1988); Barbara Christian, *The Race for Theory*, 14 *Feminist Stud.* 67 (1988); Jana Sawicki, *Foucault and Feminism*, 1 *Hypatia* 23 (1986); Luisa Muraro, *On Conflicts and Differences Among Women*, 2 *Hypatia* 139 (1987); Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 *Signs* 621-43 (1987); Sandra Harding, *The Science Question in Feminism* (1986); Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy*, in *Feminism/Postmodernism* (Linda J. Nicholson ed. 1990); Linda Alcoff, *Cultural Feminism Versus Post-Structuralism*, 13 *Signs* 405 (1988); Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 *Syracuse L. Rev.* 1129 (1987).

17. Alcoff, *supra* note 16.

18. See Daryl McGowan Tress, *Comment*, 14 *Signs* 196, 197 (1988):

Without the possibility of a coherent self, liberation becomes impossible. There is no one who persists, who remembers, whose experience and suffering counts; there is no one to emancipate. Without the possibility of stable meaning, insight and self-understanding become trivial, irrelevant. There is nothing worth understanding; personal meaning and values fluctuate, will not hold, and cannot be trusted. Without the primacy of reason and intelligence, injustice can flourish unrestrained.

19. See Judith Newton & Nancy Hoffman, *Preface*, 14 *Feminist Stud.* 3 (1988) (quoting Rabine, *supra* note 16, at 11):

As part of a political movement, for example, feminists find it necessary to take "yes-or-no positions on specific issues and to communicate them as unambiguously as possible" Of what ultimate use to feminism, then, is a philosophical program which is characterized by insistence on the arbitrary nature of all constructions of the "real," which adopts the strategy of "undecidability" to avoid the "metaphysical nature" of taking yes-or-no positions, which questions the agency behind change and our ability to know whether change is desirable, which insists that oppressive structures must be endlessly deconstructed, and

grounding of knowledge, there is no way to make normative claims against oppression and for liberation.

Eisenstein does not sufficiently explore this relationship between poststructuralism and feminism. While she recognizes, for example, the challenge presented to notions of objectivity and truth, her response to the dilemma is largely conclusory. She writes:

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.²⁰

Rather than undermining the possibility of a feminist theory or practice, this alternative conception of knowledge can, in her view, provide a basis for it: "If we recognize the changing nature of knowledge, discourse, and politics, we operate politically but self critically. Deconstruction in this sense can lay the basis for a radical democratic and feminist politics based in the open-texturedness of new understandings of power."²¹ Her response is, in effect, to assert that the epistemological critique does not impede her ability to argue in favor of a particular normative vision.

There is little or no analysis of how we might reach this conclusion. While we may agree with her conclusion that the critique of objectivity need not lead us to "pure subjectivity or nihilism" and that we can still make partial and open-ended normative claims, Eisenstein's own faith in its possibility is of little comfort to those of us concerned with responding to critics who argue that this epistemological position would result in the equal validity of all positions. The difficult question of why all truths are not equal, of how we might argue that some truths are more equal than others, remains unresolved.

The basis for a more rigorous response to this dilemma arguably is found within Eisenstein's analysis. She recognizes an important distinction between her approach to dispersed power and partial truths and a liberal pluralist approach, in so far as the latter assumes that equality underlines "power relationships," whereas her vision "recognizes inequality in the hierarchical dis-

whose relentlessly ahistorical tendencies in some cases render it incapable even of accounting for the changes we know have taken place.

20. Eisenstein, *supra* note 1, at 23-24.

21. *Id.* at 24.

persion of power.”²² The recognition of power in the construction of normative discourses may be an important factor in our ability to avoid the dangers of pluralism and to make normative claims and political strategies. She, however, does not explore the potential of this distinction in relation to the epistemological dilemma.

The absence of any basis for distinguishing among a plurality of normative claims in *The Female Body* presents more than an abstract epistemological dilemma. Indeed, as I will attempt to argue below, this dilemma ultimately comes back to haunt the very normative arguments which Eisenstein attempts to make in her reconstruction of the discourses of sexual difference and sexual equality.

III. Between Difference and Similarity

The question of difference is fundamental to Eisenstein's analysis. Substantively, her focus is on the deconstruction and reconceptualization of existing discourses of sexual equality and sexual difference that transcend the dilemmas of difference. Her approach to this reconceptualization is based on an affirmation of difference, that is, of the pregnant body. Methodologically, her focus is also on difference. She argues for “a method that makes difference (meaning diversity) rather than similarity (unity) its starting point” and thus “allows for a radical pluralism.”²³

In her view, this connection between difference and similarity underlies her notion of “sex class”:

Sex class identifies all females as women, but the process through which this is done differs among women, very much in accordance with their color or economic class, or sexual preference. These differences are silenced when sex class and individual women are treated as a homogeneous category. The recognition of women as a sex class—treatment “like a woman”—and the continuity it assumes about women's experience is both necessary to a feminist critique and in part an inaccurate accounting of the diversity of women's lives.²⁴

While arguing that sex class lies somewhere in between difference and similarity, the discussion of sex class throughout *The Female Body* suggests that this somewhere is located closer to similarity than difference. Despite her claim to a method of difference, the similarity among women is given priority over their differences in so far as it is their similarity that constitutes women as sex class.²⁵

22. *Id.* at 15-16.

23. *Id.* at 36.

24. *Id.* at 37.

25. *Id.* at 37-38, 55, 222-23.

Eisenstein has attempted to respond to the critique of essentialism and universalism of her notion of sex class in the writings of "Third World feminists."²⁶ While she agrees with the demand of women of color such as Chandra Mohanty to avoid "a false sense of commonality" among women and of the need to "place discussions of women's lives locally and contextually,"²⁷ Eisenstein insists on the continued need to acknowledge similarities across differences and to understand how the dominant phallographic discourse constructs women as a unity:

Phallographic discourses treat women as a unity, although they have diverse ways of doing so. To the extent that discourse crisscrosses the "real" and the "ideal" and establishes someplace in between, the oneness of woman is a partial truth. Phallographic discourses construct the "reality" that women constitute a sex class; by doing so they define all women as the same. But women are affected differently because power is dispersed and is not a unity.²⁸

Her methodological approach to difference closely parallels her approach to power. She is concerned with approaches that "[privilege] diversity, discontinuity, and difference while it silences unity, continuity, and similarity."²⁹ Instead, Eisenstein advocates "a method that focuses on the relation between similarity and difference, unity and specificity, coherence and incoherence."³⁰ Just as the recognition of dispersed sites of power need not negate a recognition of concentrations or unities of power, so, she argues, the recognition of difference need not negate a recognition of simi-

26. *Id.* at 39. "Third World feminists" is the term used by Eisenstein to refer to the following: bell hooks, *Ain't I a Woman: Black Women and Feminism* (1981); bell hooks, *From Margin to Center* (1984); Gloria T. Hull, Patricia Bell Scott & Barbara Smith, *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave* (1982); Gloria I. Joseph & Jill Lewis, *Common Differences: Conflicts in Black and White Feminist Perspectives* (1981); Audre Lorde, *Sister Outsider* (1984); and Cherrie Moraga & Gloria Anzaldua, *This Bridge Called My Back* (1981).

I believe that the term "Third World feminist" misrepresents the unity of these writings, which include black women, Asian women, First Nations women, and Latino women from within both the so-called "First" and "Third" worlds. I prefer to use the phrase "women of color" to refer to, as Marlee Kline has, "the unity of non-white women as a political phenomenon against the oppression of white supremacy and racism, recognizing, at the same time, that the particular experiences of non-white women are far from monolithic." Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 *Harv. Women's L.J.* 115, 116 n.3 (1989). I recognize, at the same time, the racism implicit in the phrase as it "establish[es] white as the norm against which other skin colors are distinguished." *Id.* at 116.

27. Eisenstein, *supra* note 1, at 39-40; Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 12-13 *boundary 2* 337 (1984).

28. Eisenstein, *supra* note 1, at 41.

29. *Id.* at 18.

30. *Id.*

larity. Paradoxically, the relationship between power and difference is at times obscured; by focusing on the question of sameness and difference in the writings of women of color, Eisenstein misses much of the critical edge of their writings. The writings of women of color are not only about difference; they are about power and about challenging the power of white feminists who have defined feminism, sexual difference, and women in their own image.³¹

Furthermore, in discussing difference and its invisibility, her subsequent focus is primarily on the dominant phallocratic discourse. While she begins her discussion with a stated concern for expanding the notion of sex class to embrace a multiplicity of differences among women, her focus on legal discourse diverts her attention from the extent to which the critique of women of color is directed at feminist discourses and practices.

The phallocratic standard in Western industrial societies is the white, middle-class male. The types black, Chicana, Indian woman differ from this standard differently from each other and differently from white women. A white woman is "less than"; she is *not* a man. A black woman is "less than"; she is *not* white, and she is *not* a man.³²

By asserting that "[p]hallocratic discourses construct the 'reality' that women constitute a sex class; by doing so they define all women as the same,"³³ the powerful message of women of color is further obscured.

Women are not all the same, not in their subjective experiences and not in their construction within dominant discourses. Not only does her methodological starting point of affirming difference obscure the underlying relationships of power, but the very plurality of difference on which she ostensibly insists becomes invisible in her analysis. For example, in discussing the construction of the female body and the pregnant body in and through legal discourse, Eisenstein marginalizes racial and class differences by insisting on the fundamental sameness of women, on "[t]he unique aspect of the female body—its capacity for childbearing—makes women a sex class, even though differences exist among them."³⁴

While Eisenstein cautions us that the female body/pregnant body is "not uniform in kind or meaning," the example she in-

31. Barrett, *supra* note 15, at 35 ("to speak, for example, of gender, class or race as 'sites of difference'—on a relatively common formulation in contemporary theory—is at the same time to occlude the fact that these sites of difference are also sites of power"). See also hooks, *supra* note 26; Lorde, *supra* note 26.

32. Eisenstein, *supra* note 1, at 40 (original emphasis).

33. *Id.* at 41.

34. *Id.* at 222.

vokes further obscures the relationship between power and difference: "A middle-class, black, pregnant woman's body is not one and the same as a working-class, white, pregnant woman's body."³⁵

While Eisenstein is attempting to illustrate how race and class, among other differences, influence the meaning of pregnancy, her particular example obscures more than it clarifies. This is the only example directly invoking race; in the others, there is neither "white" nor "black" used in the description and the underlying assumption thus remains white.³⁶ While the statement is on one level a truism, the bodies are different and the question of why they are different is not addressed. And why is the only example directly invoking race intersected with middle-class? Without negating the experience of black, middle-class women, we have to ask why middle-class is intersected with black? What becomes of the reality of racial oppression, of the reality of economic oppression, violence, and poverty in the lives of black women? The reality of these women's lives, of their racial and class oppression, is rendered invisible.

Moreover, Eisenstein does not interrogate the implications of the meaning of pregnancy in black women's lives. What are the meanings of a black, pregnant woman and of black, pregnant women in a racist society? Are these women, according to the dominant and racist discourse, to be "protected" like their white counterparts? Is the fetus a black woman is carrying deemed as valuable by this discourse as its white counterpart? Is her pregnant/non-pregnant status relevant in the manner in which she is constructed by this discourse?³⁷ The failure to interrogate these

35. *Id.* at 222. Her other examples of the non-homogeneity of the pregnant body are:

The pregnant body of a woman in her midthirties is not identical to the pregnant body of a woman in her early twenties. A welfare woman's pregnant body may not be the same as an upper-middle-class woman's pregnant body, or a diabetic's pregnant body, or an inseminated lesbian's pregnant body, or a surrogate mother's pregnant body.

Id. at 222-23.

36. See Elizabeth Spellmen, *The Inessential Women* 104 (1988) ("To talk about gender differences where race and class are constants is to talk about gender differences in the context of class and race similarity; but far from freeing us from the context of race and class, keeping them constant means they are constantly there.").

37. See Rosalind Pollack Petchesky, *Abortion and Woman's Choice* (Revised ed. 1990) (noting black women's historically specific experience of child bearing and sexuality and the racism of the antiabortionist movement); Patricia J. Williams, *On Being the Object of Property*, 14 *Signs* 5, 16 (1989):

And thus, in the twistedness of our brave new world, when blacks have been thrust out of the market and it is white children who are bought and sold, black babies have become "worthless" currency to adoption agents—"surplus" in the salvage heaps of Harlem hospitals.

questions, among others, leaves white women at the center of Eisenstein's analysis.

This obscuring of the relationship between power and difference leaves Eisenstein's methodology as an affirmation of a list of differences, not an analysis of oppression. Moreover, her insistence on the fundamental sameness that transcends difference obscures even the recognition of difference. Paradoxically, while continuing to insist on the primacy of sex class, Eisenstein's analysis has lost its attentiveness to the material relationships of power in which her socialist feminism ostensibly is based. We are left with an analysis neither of difference nor of power.

The failure to follow through on the implications of her own analysis is evident throughout Eisenstein's discussion of difference and attempt to deconstruct the dilemmas of difference. While Eisenstein purports to reject the dualistic construction of the sameness/difference debate, arguing that both approaches remain constructed in relation to a male standard, much of her analysis remains firmly rooted within the parameters of this debate.³⁸ For example, while Eisenstein is critical of the differences approach and the problem of protectionist legislation based on the recognition of difference, her strategy of a radical reconceptualization of the discourse of sexual equality that decenters the phallus in favor of the pregnant body is in effect one based on the affirmation of difference. Her insistence on the need to affirm difference leaves Eisenstein's analysis situated within the very duality of sameness and difference that she claims to reject.

Eisenstein's discussion of nondiscrimination doctrine is an example of the extent to which her analysis remains within the existing legal discourses of sameness and difference. She criticizes various pieces of equality legislation, such as the Equal Pay Act (1963), Title VII of the Civil Rights Act (1964), the recent Economic Equity Bill, the Fourteenth Amendment, and the Equal Rights Amendment, for failing to distinguish between equality and sex equality. According to Eisenstein, these acts "mandate nondiscrimination but do not recognize the need for sex-specific law in order to establish equality. Recognition of women, of their specificity and of their uniqueness is needed to create sex equality. Nondiscrimination is necessary but not sufficient."³⁹

38. Eisenstein, *supra* note 1, at 210. For a discussion of this sameness/difference debate, see Lucinda M. Finley, *Transcending Equality Theory*, 86 Colum. L. Rev. 1118 (1986); Scott, *supra* note 3; Minow, *supra* note 4; Catharine A. MacKinnon, *Difference and Dominance*, in *Feminism Unmodified* (1987); Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 Yale L.J. 1373 (1986).

39. Eisenstein, *supra* note 1, at 210.

With regard to the Fourteenth Amendment in particular, she writes: "The clause is progressive, as far as it goes, but it does not go far enough: nondiscrimination assumes that women must be treated as like men, so it remains an insufficient guide The doctrine of nondiscrimination cannot address the uniqueness of the female body."⁴⁰

This rejection of the concept of nondiscrimination as incapable of accommodating sexual difference implies an acceptance of the construction of the meaning of nondiscrimination within legal discourses. Rather than questioning the problematic construction of nondiscrimination, wherein equality means sameness, and arguing for a more expansive understanding, Eisenstein seems to accept the prevailing construction of nondiscrimination as somehow absolute in concluding that "nondiscrimination is necessary but not sufficient."⁴¹ While developing her understanding of the competing discourses of sexual equality and sexual difference within law throughout *The Female Body*, Eisenstein fails to apply these insights to her discussion of nondiscrimination.

Moreover, while echoing the conclusions of her earlier work, Eisenstein has fundamentally deradicalized her previous understanding of equality before the law as "necessary but insufficient."⁴² In her early works, "necessary but insufficient" represented the limitations of legal discourse and of law in struggling against patriarchal and capitalist social relations. In *The Female Body*, Eisenstein has reevaluated law and legal discourse as a site of struggle. In so doing, she has developed a more sophisticated analysis of the competing discourses of sexual equality and sexual difference. However, in taking the arena of discourse more seriously, *The Female Body* leaves us without a sense of the limitations of law in social change which was found in her earlier works. Notwithstanding her efforts to deconstruct legal discourse, her focus on law as an authorized discourse of the state and on the need for a radical reconstruction of the discourses of sexual equality has reified the role of law in feminist struggles for social change. This reification of law may in part count for the difficulties her analysis encounters in attempting to transcend the dilemma of difference.⁴³

40. *Id.* at 211.

41. *Id.* at 210 (emphasis omitted).

42. *Id.* at 211; Eisenstein, *Feminism and Sexual Equality* (1984).

43. See Carol Smart, *Feminism and the Power of Law* (1989). Smart argues that the "quest for a feminist jurisprudence," including the focus on the sameness/difference debate, "preserves law's place in the hierarchy of discourses which maintains that law has access to truth and justice. It encourages a 'turning to law' for solutions, it fetishizes law rather than deconstructing it". *Id.* at 88-89. In Smart's view, feminist political strategy ought to attempt to "de-centre law". *Id.* at 88.

Eisenstein's analysis is riddled with paradox. She affirms difference at the same time as she rejects the dualistic construction of the sameness/difference debate. While paradox may be an important component of our strategies for transcending our dilemmas, Eisenstein's perhaps inadvertent willingness to rely on paradox does little to comfort those of us concerned with formulating strategies, legal or otherwise, to transcend the dilemmas and the relationships of oppression that produce the dilemmas. While her deconstruction of the discourses of equality and difference are insightful, her attempt at reconstructing a radically egalitarian, pluralistic conception of equality remains an elusive ideal. We are left wondering how a normative approach to sexual equality can be reconstructed on a foundation of pluralism. In her concluding passages, Eisenstein recognizes the danger inherent in this affirmation of difference and pluralism: the danger that the language of difference may well be appropriated by neo-conservatives and the danger that the language of pluralism may well validate their claims.⁴⁴ And she is, once again, unable to provide any comfort. The failure to resolve the tensions between her socialist feminism and the more recent poststructuralist influence continues to haunt her analysis by way of strategy to resist the power of this alternative discourse.

Eisenstein's analysis is somewhere in between socialist feminism with its commitment to materialism and poststructuralism with its commitment to discourse. As she does not describe the relationship between materialism and poststructuralism, however, Eisenstein is unable to provide us with much guidance about political strategies. She tells us little about when and if we ought to rely on legal discourse, how to frame our arguments, or how to mitigate our damages. Somewhere in between is a precarious space from which to engage in political struggle or to evaluate our ability to use law to advance our struggles. She tells us only that for the moment there is "no place else to be."⁴⁵ If there really is

44. Eisenstein, *supra* note 1, at 221. See Barrett, *supra* note 15, at 32 (quoting Gayatri Chakravorty Spivak as quoted in Elaine Showalter, Shooting the Rapids: Feminist Criticism in the Mainstream, 8 *Oxford Literary Rev.* 13 (1986)) (original emphasis):

Yet pluralism may appear to solve problems within feminism, but does not necessarily strengthen feminism in relation to the world in general. As Gayatri Chakravorty Spivak has noted, pluralism is traditionally "the method employed by the *central* authorities to neutralize opposition by seeming to accept it. The gesture of pluralism on the part of the *marginal* can only mean capitulation to the centre."

45. Eisenstein, *supra* note 1, at 224.

no place else to be, then we had better figure out where this somewhere in between really is.