Nomos and Thanatos (Part B): Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation? Part II

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Feminism may pose the opportunity to conceptualize and nourish another, emancipatory side of power, a side that expands our horizons rather than curtails them, a side that nurtures our personhood rather than stultifies it, a side that fosters care for our inherent human dignity rather than inflaming the festering sores of "anxious privitism" and possessive individualism. Feminism, rather than working within and thereby reproducing the androcentric interpretation/imposition of power, may be able to challenge the very meaning of power itself. Difference, with its substantive emphasis on the ethic of care, may fit with this alternative conception of power.

However, because of her unidimensional conception of power, MacKinnon understands "difference" as "powerlessness" rather than "power to". Although MacKinnon is correct to point out that, historically, the awareness of difference has operated to women's disadvantage, and that women's caring role has been part of their strategy for survival, we must be careful not to make this into an essentialist thesis that difference = domination/subordination. Such an approach ignores the factor of human — particularly male — agency in making this correlation. But, again, what has been socially constructed by males is capable of being (de)reconstructed by females and profeminist males. Difference can be interpreted, codified and understood as being affirmative; the important question is how? MacKinnon, therefore, may have failed to challenge male supremacism at its core. Rather than attempting to reconstruct power, she takes the male interpretation to be the sole interpretation, thereby working within the paradigm, rather than transforming it.

This may also lead her into the dangers of ahistoricism in that her conception of the totalizing dualistic hierarchy of male/female prohibits her from accounting for those women, herself included, who have managed to resist the pervasiveness of patriarchal ideology and who have voiced their opposition. Moreover, historically, some women have had access to power in both its androcentric and expansionist manifestations. Examples can be found not only in law, but also in politics and literature. There is a herstory that cannot be reduced to subordina-

218. The closest she comes to discussing "power to" is her assertions that "female power" is a "contradiction in terms", a "mismomer". Feminism Unmodified at 53.
219. Thus, for example, at one point she posits that she is "existentially amazed" to be speaking at all. Feminism Unmodified at 163.
220. Toril Moi, supra note 2 at 64; Duchen, supra note 81 at 92. Michelle Zimbalist Rosaldo, "Women, Culture and Society: A Theoretical Overview" supra note 4 at 17-42. In politics, see
tion.221 MacKinnon’s conception of power is too all encompassing, it is an understanding which is underdeveloped for the explanatory burden it is required to carry.

Ultimately, I fear that MacKinnon comes perilously close to reductionism by developing a unidimensional explanation that is monolithic, thereby denying differences, important differences, not only

Dorothy Smith, “The Problem of the Main Business”, discussing the power of Chilean women, in the face of circumstances significantly harsher than those which face many North American women; Elizabeth Janeway, Powers of the Weak (1980). Ann Duffy, “Power” supra note 210 discussing the powerful influence of a variety of middle and upper class Canadian Women in the Canadian culture and polity. See also Susan Ostrander in the American context, “Upper-class Women: Class Consciousness as Conduct and Meaning” in Power Structure Research 73-96 (G.W. Domhoff ed. 1980).


221. MacKinnon would possibly portray this discussion as an example of the male response in which “the success of our (women's) survival is used to delegitimize what we have survived to say, our critique”, Feminism Unmodified at 131. Such a criticism would miss the point of my suggestion for I am not claiming that things aren’t bad for women, rather it is that the oppression is not total. Moreover, MacKinnon’s reliance on survival is an inadequate foundation upon which to prioritize her interpretation and critique ... other women who disagree with MacKinnon are also survivors. To disagree is not necessarily to delegitimize.

I think that elements of a better approach are contained, in an earlier claim by MacKinnon that, “... feminism relies on the ultimate possibility of resistance, even though the feminist analysis of the crushing totality of subordination has difficulty accounting for it.” “Toward Feminist Jurisprudence” (1982), 34 Stanford L.Rev. 703, 720. Although she tends to still overplay the domination element, there is an awareness that women have a power to resist.
Devlin: Transformation or Resistance

inter-gender but also intra-gender. It renders “her impervious to the nuances, inconsistencies and ambiguities”\(^{222}\) of social interaction. If we accept MacKinnon’s “metaphysically nearly perfect” approach, how do we explain what Adrienne Rich has described as “the extraordinary will-to-survive in millions of obscure women”,\(^{223}\) that the gynocide has not already taken place, that the Atwoodian dystopia\(^{224}\) is not where we are today. If women have been the victims of such universal and unrelenting domination and misogyny (which is a different claim from pervasive and systemic inequality) then how has womankind survived and, more importantly, how is feminism now able to articulate its critique of male hegemony. How does feminism know? I suggest that, at least in part, this is due to a nascent counterparadigm of power, a resilient, supportive, encouraging, expansive and deviationist subpower that has allowed the community of women to continue despite an extremely adverse political ecology.\(^{225}\)

Finally, not only does her approach run the risk of falsifying the past, more depressing still, it may also foreclose a feminist future. Her approach is pervaded by a politically paralysing negativity, that denies the emancipatory potential of difference, by claiming that we cannot know what women would say or write or do because the foot is on the throat.\(^{226}\) Though metaphorically powerful, and marvellously capturing,

225. A cautious parallel may be drawn here between the position of women in patriarchal society and black slaves in antebellum America. For a long time many scholars emphasized the repression and damage caused to black people by slavery. However, without underplaying or denying the horrendous nature of the system of slavery, black and radical scholars in the 1970’s also highlighted not only the incredible resistance of black people but also the richness and beauty of their culture even in these times. See, for example, Eugene Genovese, *Roll Jordan Roll: The World the Slaves Made* (1974); Herbert Gutman, *The Invisible Fact: Afro-Americans and their Families 1750-1925* (1972).
226. *Feminism Unmodified* at 30. MacKinnon is aware of this to some extent. In concluding an address in honour of two women judges she opines,

> If it seems that this (discussion of feminist loyalties) is not very concrete, I think it is because we have no idea what women as women would have to say. I’m evoking for women a role that we have yet to make, in the name of a voice that, un silenced, might say something that has never been heard.

Unwilling to leave her audience with such an ungraspable thought she concludes,

> I will hazard a little bit about its content. In the legal world of win and lose, where success is measured by other people’s failures, in this world of kicking and getting kicked, I want to say: there is another way. Women who refuse to forget the way women everywhere are treated everyday, who refuse to forget that that is the meaning of being a woman, no matter how secure they might feel in having temporarily escaped it, women as women will find that way, (*Feminism Unmodified* at 77).

MacKinnon wants to speak of how things could be otherwise and yet appears unable to find
in one pithy phrase, the patriarchal nature of contemporary social relations, I think that this may go too far in its relentless rhetorical reductionism.\textsuperscript{227} Rather than being empowering, MacKinnon's may be a jurisprudence of despondence.\textsuperscript{228}

Put differently, how are we to ever know when the foot is off the throat? How are we to know that MacKinnon's articles, speeches, legislation have any more credibility as the authentic, unmodified feminist voice than that of Cixous or Gilligan? By what criteria are feminists to evaluate their praxis if everything they do is a distorted gurgling caused by the rugged heel of masculinist supremacy?\textsuperscript{229} Difference provides the possibility of establishing an affirmative — but fundamentally corrigible, and possibly only transitory — vision which can provide both a concrete alternative standpoint from which to critique masculinist hegemony as well as suggesting a positive direction for feminist practice and theory. Difference provides both a centre of resistance and a potential panorama — severely limited no doubt — to begin the process of transformation. It provides a gap in which to articulate an alternative normative order. Simple critique and negation of everything masculine is not enough ... it is trashing but not reconstructing. Nor is it adequate to say that feminists must wait until they have destroyed masculinist supremacy and gained access to power and then, and only then, will they begin to imagine what otherwise might mean ... feminism, I believe, must build as it goes. In my opinion, feminism must articulate, create and develop alternative — but corrigible — visions and practice that will concretize and tangibly inspire those who seek social transformation. The discourse of difference provides the

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  \item the words. The "content" is frustrating rather than helpful because MacKinnon has already debarred herself from access to the discourse of difference, where at least the words "empathy", "care" or "solidarity" might help.
  \item 227. Toril Moi, supra note 2 at 29.
  \item 228. Indeed, when asked, "how do you maintain hope for future gains [for women]" MacKinnon replied, "I'm more into determination. I am agnostic on the subject of hope." Cited in Karst, "Women's Constitution" supra note 167 at 476, n. 113.
  \item 229. Even more problematic still are McKinnon's suggestions that her feminism is the true feminism, that all others are complicit in collaborative with, male supremacy or, more benevolently, falsely conscious. See pp. 5, 49, 13, 198-205, 216-218. For example, in commenting on the female sexuality debate, she posits, I think that sexual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self annihilation. That is, our subordination is eroticized in and as female, in fact, we get off on it to a degree, if nowhere near as much as men do. This is our stake in this system that is not in our interest, our stake in this system that is killing us. I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest. Such a critique of complicity ... does not come from an individualistic theory. \textit{Feminism Unmodified} at 54.
\end{itemize}

See also "Standards of Sisterhood" Broadside 6 (Dec. 1985/86 vol. 7, no. 3).
opportunity for a politics with substance,\textsuperscript{230} a politics that refuses to succumb to the moral nihilism of our post-modern condition.

If the preceding discussion of resistance and resilience has any validity, it helps to unearth the historically significant ways in which power, in its affirmative manifestations, has proved invaluable for women in general, and for feminism, as a movement, in particular. Moreover, the most recent wave of feminisms has developed a praxis that incorporates at least some values associated with the ethic of care, and is itself a specific materialization of “power to”: consciousness-raising.

There appears to be consensus among feminists that, whatever its weaknesses, consciousness-raising has been of pivotal significance in the emergence of contemporary feminism.\textsuperscript{231} In so far as it provided non-hierarchical, open, supportive fora for women to articulate their experiences of male domination, it allowed women to recognize their communality in isolation, the pervasiveness of patriarchy, and the potential for solidarity among women. It provided the participants with a new and critical understanding of their lives and roles, thereby reinforcing their self-worth, self-esteem and self-respect. As well as being a “therapeutic experience”, consciousness-raising was also a “politicizing agent”\textsuperscript{232} and, as such, it laid the foundation for the transformation from powerlessness to partial empowerment, in large part, through its valorization of their perspective as women. Moreover, building on this foundation of mutuality, it provided support for the newly emergent feminist practices: individual and/or collective, private and/or public. As MacKinnon once opined in her earlier work, “consciousness-raising is (feminism’s) quintessential expression”,\textsuperscript{233} and, I suggest, the praxis it inspires is what makes it a cognate of “power to”.\textsuperscript{234}

\textsuperscript{230} Indeed feminism can certainly learn something from marxism’s failures on this point because at least one reason for the emergence of the totalitarian eastern bloc was the failure of Marx and his successors to develop a conception of post bourgeois society beyond vague predictions of nonalienated human interaction. See “On The Jewish Question: Early Writings of Karl Marx” (1964), T.B. Bottomore (ed.); \textit{The Economic and Philosophical Manuscripts} of 1844.


\textsuperscript{232} McWilliams, \textit{ibid.} note 5 at 164.

\textsuperscript{233} “Agenda”, \textit{supra} note 146 at 535.

\textsuperscript{234} It might be argued by some that consciousness-raising is appropriate for womens groups to communicate independent of the silencing presence of males, but that it is unsuited to a
If we expand our horizons beyond law, and shift our focus from power and politics as they have been traditionally — and narrowly — understood, we can, once again, learn from literature. For example, there has been an influential, radical heritage in literary criticism — traces of which can be detected in Barthes, Kristeva, Benjamin and Stein that suggests an alternative conception of power based upon laughter. A particularly poignant example of this is to be found in Russian literary critic Mikhail Bakhtin's reinterpretation of Rabelais. Bakhtin argues that anger, even when justified, is only one of several possible transformative strategies available to us. He posits that the power of laughter can be just as subversive as anger, and points to the power of the carnival to delegitimize and topple the hierarchy of both church and state, and to obliterate what had appeared to be inevitable differences and to highlight new, mutable ones.

In the same de-ranging vein, some of those who have been the victims of domination and oppression have displayed their resistance by reclaiming, affirming and revalorizing that which has been used to oppress them. For example, feminists, invoking the power of naming, have claimed and reinterpreted “chauvinism”, disconnecting it from its patriotic context, and canonizing it as one of feminism’s pejorative superlatives. Similarly, much of the work of Mary Daly is an attempt to support the traditionally devalued recipients of labels such as “hag”, “spinster”, “witch” and “shrew”. And again, at least in certain, and not necessarily feminist, circles, the use of the generic “he” and “man” are considered inappropriate while “chairperson” and “spokesperson” are accepted as both desirable and normal. Other oppressed communities larger transformative programme. Such an argument assumes that males are incapable of the intersubjective awareness required for such an experience. If, however, one subscribes to modernism, as I do, then there is hope that males can develop such abilities. There is, of course, the logistical problem of making consciousness raising effective on a larger level but it is not clear to me that this has any necessary connection with gender.

235. See for example, The class struggle, which is always present to a historian influenced by Marx, is a fight for the crude and the material things without which no refined and spiritual things could exist. Nevertheless, it is not in the form of the spoils which fall to the victor that the latter make their presence felt in the class struggle. They manifest themselves in this struggle as courage, humour, cunning, and fortitude, Walter Benjamin, Illuminations 254-55 (Hannah Arendt, ed. 1964).


238. See for example, Gyn/Ecology (1979); Wickedery (1987).
have reappropriated and revalorized terms that have been overlaid with oppression. Some blacks now use “sweet nigger” and gays, “faggot”, and lesbians, “dyke”, affirmatively, supportively.

In short, because there are no immutable essences, difference does not necessarily have to be identified with inferior, but rather the relative value will depend upon the circumstances of power — a concept that must be understood expansively, in order to account for important examples of resistance and partial reconstructions.

b) MacKinnon’s Positive Vision: Equality

MacKinnon is fully aware that the critique of male supremacism cannot, on its own, cause the decline of the masculinist empire, nor can it capture the potential of feminism for social transformation. Having rejected the discourse of difference she must articulate her own suggestions for post-patriarchy. Feminism Unmodified suggests that feminist agenda must be located in the discourse and praxis of “equality”.239

Feminism, “as a political movement for civil equality”,240 seeks to “eradicate … gender hierarchy”241 and end “enforced subordination, limited options and social powerlessness — on the basis of sex, among other things”.242 “Equality as anti-domination”,243 is not the “abstract equality of liberalism”,244 is more than a demand for access to the “male world” and “male pursuits”, although this is included.

Feminism seeks to empower women in our own terms. To value what women have always done as well as to allow us to do everything else. We seek not only to be valued as who we are, but to have access to the definition of value itself. In this way our demand for access becomes also a demand for change.245

Thus, for MacKinnon, equality is something much more significant than liberalism’s espousal of equal opportunity, which is itself a structural limitation. Feminism demands to participate in the valorization process itself, to transform rather than merely reform. Equality as anti-domination is not merely the opportunity to be the same as men, thereby maintaining maleness as the essential referent,246 or even to reverse the hierarchy. Rather equality, by enabling women to participate in the valorization process, provides the opportunity to reconstruct the very

239. Feminism Unmodified at 15.
240. Feminism Unmodified at 206.
241. Feminism Unmodified at 22.
242. Feminism Unmodified at 22.
243. Littleton, Reconstructing, supra note 79.
244. Feminism Unmodified at 16.
245. Feminism Unmodified at 22.
246. Feminism Unmodified at 34; see also Minow, “Justice Engendered”, supra note 135.
conditions of human interaction, male-determined conditions of domination and subordination, so that power is no longer identified with dominance.  

The claims that feminism aspires to the transformation of both equality and power are central to MacKinnon’s work, but are unfortunately underdeveloped, mostly because they remain abstractly aspirational and experientially unsituated. Rephrased, how does she propose to transform equality and power relations? No answer is forthcoming. One is tempted to suggest the difference approach, but we are prohibited from such a strategy because difference is a male determined ideology, false-consciousness. But why is equality any less male determined than difference? Surely, it too has been one of the master’s tools premised as it is on maleness being the benchmark.  

As I understand MacKinnon, her response is that equality as anti-domination reconstructs equality to be different from its male conception of “sameness”, it is a transformative vision of equality. But the question remains, how does this reconstruction come about? If “equality”, itself traditionally male, can be remade by feminism, then why cannot “difference” also be a component in the transformational process, disconnected from being complicit in women’s subordination, reconstructed to be pivotal in their emancipation. Indeed, it has the advantage over equality of providing some concrete, specific

247. Feminism Unmodified at 23.

248. This integrative approach is suggested by both Angela Miles supra note 21 and Colleen Sheppard supra note 14. As Sheppard pithily posits, “Equality thus requires the embracing of social diversity” supra note 14 at 200. See also Christine Littleton, who attempts to develop a conception of “equality as acceptance” where difference would be “costless”, so that, difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived out equality of those persons, (Reconstructing supra, note 79 at 1284).

She also points out, however, that she is not celebrating difference (at fn. 79).

249. Moreover, equality itself may not push the challenge far enough. It comes dangerously close to petitioning androcentrism for fairness and justice and as such may ultimately be tied to paternalistic benevolence. Particularly poignant in this light is Canadian feminists’ emphasis upon equality claims. In the course of the patriation process feminists successfully campaigned to have their equal rights entrenched in the Charter. However, the Meech Lake brotherly compact threatens to undercut the feminist successes achieved less than a decade ago. What the male state has granted, equal rights for women, it can also take away. See A.Z. Dobrowolsky, “Meech Lake” (unpublished manuscript); R.A. Samek, “Untrenching Fundamental Rights” (1982), 27 McGill L.J. 755.

250. MacKinnon acknowledges as much, at least in so far as equality means sameness. See Feminism Unmodified at 34. As Ann Scales points out, “In this country, the engine of the struggle for equality has been aristotelian: Equality means to treat like persons alike, and unlike persons unlike” in “The Emergence of Feminist Jurisprudence: An Essay” (1986), 95 Yale L.J. 1373, 1374 (footnote omitted). See also Littleton, “Reconstructing”, Introduction and Part II, supra note 79, for an outline of the concerns about the feminist espousal of equality, given its “phallocentricity”.

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elements which can provide guidance — always corrigible — for the
direction in which the transformation might go.

Although MacKinnon's discussion of equality is disconcertingly under-
developed, we can develop a more specific understanding of her
reconstructive vision if we leave the spheres of jurisprudence and law,
and briefly discuss her reflections on sport. 251 Indeed, the shift of focus
may be more apparent than real for the parallels between male-stream
law and sport may be very strong.

MacKinnon argues that traditional approaches to women in the
athletic community, have been based upon the gender-hierarchy
paradigm, thereby inferiorizing, excluding, and disadvantaging women.
She argues that liberal feminism's demand for equal opportunity and the
termination of sex-role stereotyping is inadequate.

An alternative, "radical feminist analysis" 252 challenges the gender
hierarchy system and, "moves to transform the meaning of athletics, of
sport itself" 253 MacKinnon's view of the radical feminist perspective is
that there is a need for much more than an opportunity "to play with the
boys" 254 for that would still allow the boys to determine the nature,
norms and values of the sport. 255 The radical feminist approach strives
towards the "creation of a new standard, of a new vision of sport," 256 one
that encourages physical self-respect, autonomy, integrity and self-
possessions. As a transformative vision it strives to break with the
repressive stereotypes of femininity and masculinity, to open up new
horizons.

The discussion of the "revaluation of sport" from a feminist
perspective is important, not just for its own sake but also because it is
one of the few occasions when MacKinnon indicates more specifically
what her positive vision may be. It is a rejection of objectification and
subordination in order to allow women to experience their bodies "as if
they are our own" 257 It is a vision of autonomy, integrity, self-worth, and
self-determination. Significantly, as MacKinnon is keen to point out, this
is not the same as femininity, for that serves "the interests of men",
whereas her vision serves the interests of women.

Again the question arises, how are women able to experience and
bring about this revaluation and reconstruction of sport? MacKinnon
writes in the present tense and shares her experience and that of other

251. *Feminism Unmodified* Ch. X, "Women, Self-Possession and Sport".
252. *Feminism Unmodified* at 118.
253. *Feminism Unmodified* at 119.
254. *Feminism Unmodified* at 120.
255. *Feminism Unmodified* at 121.
256. *Feminism Unmodified* at 123.
257. *Feminism Unmodified* at 121.
women, thereby indicating that the radical feminist transformation is already happening, at least in certain limited spheres. However, if the power-hierarchy thesis is to hold, then such feminist "deviations" would be impossible. As an explanatory theory, although providing important insights, the power-hierarchy thesis goes too far. Perhaps it would be better to understand the feminist revaluation of sport as an aspect of "power to", power to affirm women's integrity, power to co-operate, power to have fun. Moreover, if women can remake sport, despite their "learned disability", then why can they not also remake difference, to disconnect it from its negative and subordinating manifestations to be a component in a radically transformative counterparadigm for social interaction. Furthermore, there is nothing in MacKinnon's desiderata of autonomy, integrity, self-worth or self-determination that is necessarily anti-thetical to the ethic of care, for, as I have emphasized, the ethic of care is not self-sacrifice. On the contrary, as Jean Grimshaw points out, it is exactly these sorts of qualities that make "care and an understanding of others" effective, powerful.

c) Reconciling MacKinnon and Gilligan

Within the interdependence of mutual (non-dominant) differences lies that security which enables us to descend into the chaos of knowledge and return with true visions of our future, along with the concomitant power to effect those changes which can bring that future into being. Difference is that raw and powerful connection from which our personal power is forged.

Audre Lorde

A careful reading of MacKinnon provides an opportunity to question just how wide the gap is between her viewpoint and that of Gilligan. Although she clearly favours the equalitarian position on the continuum of equality and difference, at other moments, more interstitially and less developed, she does suggest that women's value structures would be, and are even now, somewhat different from those of men. The discussion of sport is the clearest example.

258. Feminism Unmodified at 120.
259. It may also be worth noting that "self-determination, autonomy, integrity and self-worth" are notoriously nebulous terms, and may not take us far beyond "equality" in the quest for specificity. Moreover, MacKinnon does not tell us in what way these virtues have necessarily avoided the power-hierarchy thesis that determines her work. For example, surely all women politicians would claim that their careers, achievements and agendas are premised upon self-determination, autonomy, dignity and self-worth, but one wonders if MacKinnon would agree that they have avoided patriarchal hegemony?
261. Sister Outsider at 111-112.
262. See infra.
MacKinnon’s point of disagreement with Gilligan is that the latter identifies difference with gender. But this, perhaps, is a misunderstanding of Gilligan’s thesis, which, as I have indicated, is explicit in its rejection not only of biological determinism, but also of the identification of gender with difference. Indeed, recognizing that the debate may be somewhat misplaced, and by shifting focus from the source or form of difference to its substance, we can see that there may be more common ground between MacKinnon and Gilligan than has hitherto been recognized. Indeed, at one point MacKinnon refers to the values articulated by Gilligan that contribute in the ethic of care:

That does not mean that I throw out those values. Those are nice values; everyone should have them. I am not saying that taking these values seriously would not transform discourse, which would be a good thing under any circumstance of gender.263

MacKinnon not only accepts the desirability of such values, but also their potentially transformative potential. Her criticism is that such values are identified with women.264 Gilligan rejects such a reductionism, and says more modestly that some women and some men share both value structures, although not necessarily in equal amounts. My suggestion is that both men and women can contribute to the ethic of care, that we should deprivitize it, and that we ought to consider it a legitimate concern for legal practice and theory.

Having taken the detour through difference, we can begin to work towards an alternative political-moral discourse and practice based upon an ethic of care. Difference may provide a conceptual vantage point that can help us move towards an alternative social structure.265

263. Discourse at 74-75.
264. Discourse at 74-75.
265. Moreover, difference if taken seriously, can allow for a dramatic expansion of autonomy, dignity and empowerment. As Audre Lorde suggests, Difference must not be merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic, Sister Outsider, 111 (1986).

As I have suggested, MacKinnon’s proposition that the dominant ideology of masculinism is a consistent and unified whole is unidimensional. It inhibits her from identifying the nuances, gaps and exceptions to the dominant ideology. Difference is one such nuance or exception in the matrix of patriarchy. However if difference is understood in the biologically or essentialist manner, as sex determined, then difference itself accepts patriarchal dualisms. Difference can be developed as a counterprinciple to the formalistic reductionism of egalitarianism that assumes the white, middle-class male to be “the measure of all things”, Feminism Unmodified at 34.

If difference is understood in its existential, multi-faceted heterogeneity then the nuances and exceptions become the normal, the expected and the accepted. Difference is then recognized to relate not only to gender, but also to race, class, sexual orientation, physical or mental abilities, age, etc.
d) *Alternative locations for the ethic of care*

What is at stake in this transcendence is the negation of the exploiting and repressive values of patriarchal civilization. What is at stake is the negation of the values engendered and reproduced in a society of male domination. And such radical subversion of values can never be the mere by product of new social institutions. It must have its roots in the men and women who built the new institutions.

Herbert Marcuse

As we have seen, the real problem for MacKinnon is not the ideal of the ethic of care, but rather her concern that difference is reduced to women. Gilligan’s work has been heavily criticized for its dangerous propensity to reproduce and legitimize traditional masculinist stereotypes of femininity with its correlative passification and disempowerment of women. However, now that we have a stronger conception of what difference might mean, a substantive vision rather than the insubstantial invocation of otherness, an ideological transvaluation, it may be possible to trace elements of the ethic of care elsewhere than in women’s biology or socially constructed roles. This article does not collapse a political-moral discourse into the biological, for that would be to reproduce patriarchy’s propensity for stereotypical and repressive rolification.

In recent years, an increasing number of male scholars in a variety of disciplines have also been tentatively moving towards the orbit of an ethic of care. For example, in the field of psychology, Joseph Pleck has

The espousal of difference confronts, head on, the oppression of a value-structure that espouses an equality which demands that those who are different become different from that which they are if they wish to be successful. In order that they be socially recognized and valued, it demands the very negation of that which makes them who and what they are. It assumes the legitimacy of structure which is systematically weighted in favour of a particular community by portraying it is “neutral”, “necessary” or “natural” and insisting that people change — deny themselves — to fit, reinforce and ultimately perpetuate the structure. Thus, the community is constructed to fit the elite benefitting structure, rather than the social structure being transformed to facilitate, encourage and empower the plurality of diverse communities that characterize our societies.

In this light, Canada may have a potentially significant advantage over the United States in that Canadians recognize cultural plurality as both desirable and worthy of state support. With regards to ethnicity, Canada encourages the vision of a society as a cultural mosaic, whereas the United States prefers the melting pot. Of course, Canada is still governed by w.a.s.p. oriented persons but the potential is there for alternative developments. Of particular interest here are both the entrenchment of the multicultural provisions in s. 27 Canadian Charter of Rights and Freedoms, (Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11) and Canada’s history of red torism.


been unpacking *The Myth of Masculinity* (1981). In philosophy, Michael Ignatieff has urged us to respond to the *Needs of Strangers* while Larry Blum encouraged us to pursue *Friendship, Altruism and Morality* (1980). Michael Kaufmann has recently edited a collection of essays entitled *Beyond Patriarchy* (1986) which, despite some serious problems, also takes important steps towards an ethic of care. Or, looking back a century we may remember botanist, biologist, anarchist and social theorist, Kropotkin, who challenged Darwin’s vision of “survival of the fittest” with an impressive account of evolution premised upon a vision of *Mutual Aid*.268

Perhaps the most important jurisprudential effort to move towards an ethic of care, yet developed by a male, is that of Roberto Mangabeira Unger in his essay on human personality, *Passion* (1984). Although Unger fails to discuss the issue of gender or difference explicitly in his essay, in my opinion, there is much in *Passion* that correlates with Gilligan’s work. Moreover, his theory of human personality provides access to another pervasive and, I would suggest, inspirational aspect of his work, “Solidarity”, which he characterizes as “love struggling to move beyond the circle of intimacy”.270 When he expands upon solidarity the parallels with Gilligan are palpable, energizing, and encouraging:

The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share in their fate. Solidarity is the social face of love: it is concern with another as a person rather than just respect for him (sic) as a bearer of formally equal rights and duties or admiration for his (sic) gifts and achievements.271

Solidarity, I suggest, is a cognate of the ethic of care.

If we turn our attention to alternative cultures, we realize that anthropologists have consistently identified elements of the ethic of care

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268. Gloria Steinem reminds us that, “some male primates carry and generally ‘mother’ their infants, male lions care for their young... and male penguins literally do everything except give birth, from hatching the eggs to sacrificing their own membranes to feed the new arrivals” in “Erotica v. Pornography” in *Outrageous Acts and Everyday Rebellions* 219, 226 (1983).


in pre-industrial societies. Social anthropologist Colin Turnbull, for example, opines that if we value a "conscious dedication to human relationships affective and effective, the primitive is ahead of us all the way." Margaret Mead claimed that the Arapesh Tribe of the South Seas is a society in which both the males and females pursue lives that are peaceful and co-operative, and where males play an important role in child care.

Even within our own Euro-yanqui societies, there may be traces of the ethic of care, at least intracommunally, especially among those who have been marginalized and subordinated by mainstream society. For example, the extremely poor of Appalachia are characterized by "a person oriented behaviour accompanied by an ideology of levelling". There are indications that "Eskimo", Chicano and Indian children are critical of the dominant culture's lack of care for others and for the earth. Indeed, North American native people in general appear to manifest similar viewpoints. Moreover, scholars who have concentrated their research on black culture have highlighted traits that also dovetail in important ways with the ethic of care. Even game theorists have tentatively identified a connection between an "exploitative" masculinist strategy and feminine "accommodative" strategy and the cultural background of the male players.

273. Male and Female, 76 et seq (1968). She also discusses the Murdagumor in which women are aggressive, belligerent and resistant to pregnancy and nursing. Ibid., Huntington Cairns also draws our attention to other communities which have a high level of social integration and yet lack a coercive state of the kind demanded by Locke's imperative to escape from the state of nature. Legal Philosophy from Plato to Hegel 348 (1967).
274. It is possible to argue that in the light of these suggestions care should be understood as a correlative of conditions of subordination and inequality, and therefore it is undesirable to encourage it. I am reluctant to accept such a proposition for that would be to buy into the dominant culture which too quickly prioritizes the self over the other. I think it is more beneficial to see care in a positive light, as an alternative vision, in spite of oppression, rather than because of it.
279. T.K. Uesugi and W.E. Vinaki, "Strategy in a Feminine Game" (1963), 26 Sociometry 75. See further, K. Ferguson, supra note 43 at 164.
So, perhaps the ethic of care may not be as rare as we have come to believe. Not only are there indications that people of both sexes experience care in their own lives, there are indications that it is already a constitutive, though not necessarily dominant, element in contemporary and alterior social relations, both public and private. Can we expand it?

What I am suggesting is that the dominant ideology of separation and otherness, domination and subordination, sameness and difference, normal and deviant, male and female is only a partially accurate comprehension of the complexity of life and social interaction. It is a deeply structured paradigm that moulds our understandings, criticisms, and visions, but it is a paradigm nonetheless, and therefore, simplistic and repressive. It only functions in so far as it can achieve coherence, but the price of such coherence is the repression of deviations, exclusions, exceptions. However, as Kuhn points out, paradigms change, and they change because the repression of the deviations can no longer be effective.\(^{280}\) The ethic of care, I suggest, is one such deviation, it exists, it is real and it may even be in the ascendency as an “insurrection(al) subjugated knowledge”,\(^{281}\) creating a “crisis” for the dominant ideology. Feminism is at the forefront of this crisis-inducing dynamic. Feminism’s transformative vision highlights the descriptive and normative inadequacies of the dominant ideology and provides us with a very real political opportunity to bring about a paradigm-shift, to de-centre and de-range patriarchy and violence, and to move us closer to a solidarity inspired society, to a society that can resist what for patriarchy has been a thanatical, and increasingly eschatological, imperative. This discussion of the ethic of care allows us to begin to soften the boundaries between masculine and feminine, to access the “other” in each one of us\(^{282}\) and to allow us to remake both our interpersonal and politico-juridical lives.

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282. D. Cornell and A. Thurschwell, “Feminism, Negativity and Intersubjectivity” (1986), 5 Praxis International 486, 447. I cannot emphasize this point strongly enough. My support for the ethic of care is not premised upon a universalistic premise that all women, regardless of historical, class or ethic differences have this talent because of their nurturant or maternal opportunities/abilities. See for example Sara Ruddick, “Maternal Thinking” (1980), 6 Feminist Studies 342. The connection between care and female is contingent, historical and cultural. Care cannot be reduced to maternalism. Both sexes have this capacity, it is part of our human potential. As Jane Flax suggests, “our similarities are even more striking if we compare humans to (say) toads or trees” in “Postmodernism and Gender Relations in Feminist Theory” (1987), 12 Signs 621, 636. Feminism is important not only for its concern for women’s needs but also for its radical rejection of mankind’s dangerous and damaging propensities and espousal of a more caring social ethos, a perspective that is shared by at least some men.

To conjecture further, perhaps one of the reasons why we have such difficulties in recognizing this attribute is because of our training as lawyers, a vocation that is, at once, underpinned and overdetermined by visions of individualism, and an excessive orientation
e) *Beyond Either/Or*

As the oppressed, fighting to be human, take away the oppressors' power to dominate and suppress, they restore to the oppressors the humanity they had lost in the exercise of oppression.

Paulo Friere²⁸³

I hope that it is clear from the foregoing analysis of the two traditions — egalitarianism and gynocentrism — that alone each is inadequate, incapable of providing grounding, support and direction which a progressive feminism requires. Egalitarianism may either overemphasize autonomy and individualism thereby foregoing the importance of human interdependence and the necessity for empathy, or it may challenge masculinist hegemony on only a superficial level, thereby leaving too much of the patriarchal substructure in place. On the other hand, gynocentrism, unless reinforced by equality, may run the risk of either reproducing and capitulating to the traditional repressive stereotypes or of denying the important needs of an individual self. But, as Jean Grimshaw asks, “Why should autonomy not be compatible with a rejection of domination and aggression, with a recognition of human interdependence, and for the need for care of others?”²⁸⁴

There is no *a priori* reason why these two perspectives have to be considered disjunctively or as contradictory. Methodologically, feminists have begun to argue that either/or conceptions reflect a masculinist propensity to conceptualize in authoritarian, separatist and absolutist terms,²⁸⁵ thereby ignoring more holistic, complex and web-like patterns of interdependence. Malist epistemology espouses grand, purist principles resulting in “alienating dichotomies”²⁸⁶ while a feminist epistemology emphasises contextualism, and the plurality of techniques. For feminism, conjunction rather than disjunction, a transcendence of the apparent contradiction, is the better way to go.

Therefore, although equalitarianism and gynocentrism tend to stretch
the feminist cloth in different directions, that does not mean that there
must be two mutually exclusive "cuttings"... the feminist texture is
malleable. In the same way as the woof and the warp run in competing
directions, when the two are interconnected through weaving we are left
with a fabric that is significantly more substantial than the sum of its
parts. Moreover, when further different multicoloured threads are added
the result may be "a tapestry of rich and royal hue". Equality, I suggest,
is essential but not adequate, and may be complemented by a politico-
moral vision premised on the ethic of care. The weave may produce a
cloth with the texture of a "rainbow coalition".

There are, I think, several different ways in which feminists can begin
to weave equalitarianism and difference together in support of the
aspiration to develop a radical transgressive practice. The first two
suggestions are a little more abstract while the third is somewhat more
pragmatic and already underway.

The first proposition comes from the work of Adrienne Rich in her
essay, "Compulsory Heterosexuality and Lesbian Existence". In an
effort to challenge the taken for granted nature of heterosexuality, with its
correlative marginalization and suppression of lesbianism, Rich seeks to
highlight and expand the significance of lesbianism, both historically and
experientially. In support of this project, she develops the concept of a
"lesbian continuum" to explain a wide range of:

- woman-identified experience; not simply the fact that a woman has had or
  consciously desired genital sexual experience with another woman. [Instead we should] expand it to embrace many more forms of primary
  intensity between and among women, including the sharing of a rich inner
  life, the bonding against male tyranny, the giving and receiving of practical
  and political support; if we can also hear in it such associations as
  *marriage resistance* ... we begin to grasp breadths of female history and
  psychology which have lain out of reach as a consequence of limited,
  mostly clinical definitions of 'lesbianism'.

Such an expansive conception of lesbianism is important for two reasons.
First, as the reference to "clinical definitions" makes clear, lesbianism is
not innate, it is socially constructed categorization, usually pejorative.

287. Carole King, *Tapestry*.
288. Iris Marion Young describes the "rainbow coalition" as "an idea of political public which
goes beyond the ideal of civic friendship in which persons unite for a common purpose and
mutual respect. While it includes commitment to equality and mutual respect among
participants, the idea of the rainbow coalition preserves and institutionalizes in its form of
organizational discussion the heterogeneous groups that make it up". See also Fran Olsen's
discussion of "rainbows", *supra* note 8 at 1578.
More important, however, is the subversive aspect of the continuum: its ability to undermine the traditional, exclusive dichotomy of heterosexual or lesbian. The idea of a lesbian continuum opens up the larger possibility — and that is all it is — of escaping polarizing dualities that necessitate either/or choices, to move towards a desired goal by holding on to both ends of the chain at the same time. Interpreted in this light, equalitarianism and difference can be understood as alternative locations on a continuum, potentially reinforcing and mutually interdependent perspectives, in pursuit of the same goal, the transcendence of women’s subordination.

Of course, the idea of a continuum does not resolve the tension between those who prefer equalitarianism and those who advocate difference, but it does indicate that these are alternative emphases in the pursuit of the same dynamic, and it helps to keep the conversation going in times of stress. As a methodological contribution the continuum can be of strategic importance in maintaining feminist solidarity.

The second proposition is inspired by the legal and social theorist, Roberto Mangabeira Unger. Unger posits that every radical social movement must, in its attempt to move from “here” to “there”, develop the fertile terrain between reform and revolution. In his manifesto for socio-legal reconstruction he proposes that such movements must develop a dynamic fusion of internal development and visionary imagination. Put differently, there must be a capacity to work from within, to deviate, expand and remake the familiar and normal into the novel and transcendent, while being simultaneously informed, guided and inspired by a transformative vision. This symbiosis allows a progressive movement to eclipse the false dichotomy of fruitless reform and utopian aspirationalism.

These two movements currently co-exist in the feminist movement. On the one side there exists the potential to internally develop and expand liberalism’s “commitment” to equality, to remake equality into a substantive reality. On the other side, there is the transformative vision of difference, a potential value structure that challenges the hegemony of masculinist liberalism both in the realm of socio-political institutions and also in the dynamic of social interaction, and even human identity.

Unger’s proposal enables feminism to maintain both perspectives, practices and visions. It encourages us to understand feminism as maintaining both equality and difference in a simultaneous, transgressive dynamic, mutually reinforcing rather than exclusively dichotomous or antithetical.

The third inspirational source that can enable feminism to transcend a debilitating struggle is the work of Canadian feminist, activist and scholar, Angela Miles, who has already attempted the weaving process. Through her "integrative feminine principle" she has attempted to knit together both equality and difference into a mutually enriching, complex, politically sensitive and sophisticated feminist strategy that will minimize the dangers of exclusive reliance on either one or the other. Proactively, Miles claims that such a "synthesizing vision of politics" allows feminism to challenge the hegemony of androcentric conceptions of humanity and social interaction.

The integrative feminine principle ... reject(s) ... all the dichotomies of industrial society that shape and limit people's existence. It asserts that men and women are of the same nature but, unlike reformist feminism and early feminist radicalism, it does not do this by insisting that women are just like (as good as) men. Instead it recognizes that although men and women ultimately share the same human existence, in the process of civilization certain human characteristics, capabilities and activities have been labelled feminine and their practice has largely been restricted to women and the female sphere of reproduction and personal relations.

Fully aware that this social construction of gender has resulted in the inferiorization and oppression of women she continues:

The integrative feminine principle provides a value framework and an alternative rationality for feminist radicals' political struggle in that it consciously posits an alternative definition of human nature which is broad enough to include, and value equally, characteristics now seen as, and generally in fact distributed between, male and female.

Thus, within Miles' formulation, the conjunction of equality and difference provides the vital starting point for the reconstruction of social interaction, by espousing the reinvigoration of values that correlate with the ethic of care.

III. Pornography

1) Introduction

The issue of pornography both energises and paralyses feminism. It energises in that it provides a concrete angle through which feminists can highlight the pervasiveness and the patterns of inequality, subordination

292. K. Lahey attempts to develop aspects of Miles project to facilitate a feminist approach to reconstruct tax law with respect to women. "Equality and Specificity" supra note 9.
293. Miles, I.F.P. supra note 21 at 485-486. See also Fran Olsen on a rejection of socially constructed dichotomies, supra note 8.
294. Miles, I.F.P. supra note 21 at 486.
295. Ibid., Feminists are also acutely conscious of the dangers that could be superimposed on their "difference claim" by conservatives such as Phyllis Schafly.
and misogyny in contemporary society. The feminist analysis of the pornographic flood provides a unique opportunity to connect experience, structure and critique. However, this moment of strength is also a possible moment of weakness in that the question of legal regulation has split feminism resulting in debates that have, on occasion, been acrimonious and visceral.296 The question that I wish to raise is a little more wide ranging than most of the discussions to date. My concern is whether the recent impulse by many feminists to seek a solution, in whole or in part, to the very real problem of pornography by recourse to legal remedies297 undermines feminism's transformative vision of an egalitarian, non-hierarchical, non-alienating society. Rephrased, does the legal regulation of pornography fit with the ethic of care, and the injunction not to hurt others?

The decision to discuss feminism and pornography is deliberate and immediate. All too often scholarship functions in the realm of the abstract, toying with conceptual models and utopian visions that lack any solid grounding in the reality of most peoples' existence.298 By introducing the pornography question, we are forced to face up to questions such as: what is the impact of such material on women's lives; is there a possibility of women's objections even being heard, never mind being acted upon; how should pressure groups, and society as a whole, deal with such issues; can legal remedies be developed to deal with such a problem; what are the internal legal barriers to such strategies; are legal remedies, in themselves, appropriate? These are highly political and urgent issues which need to be dealt with. Scholarship which discusses feminism, feminist jurisprudence, law and pornography is committed scholarship, engaged scholarship, political scholarship.299 It rejects the pseudo-scientific objectivity which most legal scholarship claims for itself by making it clear that legal discourse is political discourse; that what we are involved in is in no way distinct from politics, but integral to it.300 Normative questions are the very life blood of law, particularly when law is understood through the prism/speculum of gender.301

298. For a discussion of why it is important for feminism to reject abstraction and concentrate upon contextualism, see Carol Gould, “The Woman Question Philosophy of Liberation and the Liberation of Philosophy” (C. Gould and M. Wartofsky eds. 1976) Women and Philosophy.
299. See MacKinnon, Feminism Unmodified at 1.
2) *A Feminist Critique of Pornography*

Traditionally, the story of pornography has been overdetermined by the constitutionality of anti-pornography legislation, or recent common law developments such as *R. v. Wagner* (1985), 43 C.R. (3d) 319, 37 Alta. L.Rev. (2d) 301 (Q.B.). The politically and logically prior question for feminists — but not for legal fetishists — is whether legal remedies are the most fruitful path to follow. I believe that the constitutional argument can be persuasively argued both ways. It is political predispositions that tilt the balance.

Those who view anti-pornography legislation as constitutionally valid include:


Some of those who would disagree include:

- Alan Dershowitz, “Women’s War on Porn”, Time, August 27th, 1979 at 64.

There are a couple of comments that I would like to make on the strategic significance of constitutionalization of the pornography issue. First, feminist advocates of legal controls on pornography or remedies against pornography must have contemplated the very high likelihood that this would become a constitutional issue. As feminists have pointed out time and again, law is a male-constructed and dominated episteme, discourse and practice, therefore it was predictable that the constitutional twist would occur.

The second issue raised by recourse to law, is the danger of distraction. What started off for feminism as an issue of powerlessness has, through the hegemonic dynamic of legal discourse, been recorded as an issue of constitutionally protected speech, and the correlative miasmic morass of doctrinal arguments that accompany such an encoding. What we find is what Robert Samek has described as metaphenomenalism, a perennial shifting of the locus of the problem, a continual slide to the peripheral. Robert Samek, *The Metaphenomenon* (1981). Not only is this encoding process a distraction, it is also insidious that it is liberal legalism, not feminism, which has a powerful hold over the popular psyche and the appeal to constitutional rights allows the liberals to portray progressive feminism in a negative light ... casting them as totalitarian despots. The constitutional twist, therefore, automatically puts the feminist challenge...
concept of “obscenity” resulting in a conceptualization and discourse in terms of conservatism versus liberalism, “Victorian priggishness” versus sexual liberation, intolerance versus prurience. Thus, until recently, pornography has been understood as morality play rather than an act of political power, phallic power.


Nor should we be confident that this dominant interpretation has now passed. For example, although the U.S. Attorney-General’s Commission on Pornography Final Report, July 1986, does refer to more recent interpretations of pornography, including that expoused by feminists, its overall tone is still staunchly moralistic. Moreover, moralism pervades a recent Canadian proposal to criminalize pornography which it defines as:

- any visual showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity.

(emphasis added)

Bill C-114, An Act to Amend the Criminal Code and Customs Act, 1st Session, 33rd Parl., 1984-85-86, cl. 7. After extensive criticism, this proposal has been withdrawn to be replaced with a somewhat more specific definition. See Bill C-54, An Act to Amend the Criminal Code, 2nd Session, 33rd Parl., 1986-87, s. 1. But this too seems to have lapsed.


In recent years, feminists have retold the story and but now we see pornography as vicious, chilling, horrifying. Pornography has been disconnected from obscenity, and the restraining conceptual hegemony of the moralistic see-saw has been overturned. By articulating the integral connection between gender and power, feminism has gone a long way in providing a deeper understanding of the nature and effects of the pornographic phenomenon. It has named pornography for what it is: a vital constitutive component in the continued existence of the ideology and practice of male supremacism. The sexual revolution of the 'sixties and 'seventies was not a woman's revolution, and therapeutic de-repression has become domination. In short pornography is an exemplary moment of patriarchy.

As I have already indicated there are many different feminist perspectives, and these varying viewpoints have concretized themselves in relation to the pornography debate. What follows is an outline of the most critical feminist approach to pornography, one that sees pornography as having no redeeming qualities from a feminist perspective. Frequently, this is perceived as "the radical feminist" critique of pornography.

However, pornography is part of a broader debate within feminism, what has been called "The feminist sexuality debate". See e.g., (1984-85), 10 Signs 102-135; C. Cohen, "The Feminist Sexuality Debate: Ethics and Politics" (1986), 2 Hypatia 71. Other feminists who claim to be just as radical as the anti-pornography feminists, argue that pornography is not monolithically oppressive, that some women find some pornography to be liberating, and transformative. See in particular, Pleasure and Danger: Exploring Female Sexuality (C. Vance ed. 1984); Powers of Desire, (Ann Snitow et al. eds. 1983); Robin West, "The Feminist Conservative Anti-Pornography Alliance" (1987), 4 A.B.F.R.J. 681; Paula Webster, "Pornography and Pleasure" (1981), 3 Heresies 48. See also Alan Soble, Pornography: Marxism, Feminism and the Future of Sexuality (1986) for a Marxist defence of pornography, that envisions a positive role for pornography in a non-alienated society, pornography as a contribution "to the rich, sensual, sexual lives of communist people" at 108.

307. See for example, Irene Diamond, "Pornography and Repression: A Reconsideration" (1980), 5 Signs 686; A. Dworkin, "Against the Male Flood" (1985), 8 Harvard Women's Law Journal 1, Women Hating 78 (1976); Pornography: Men Pressing Women (1981); S. Griffin, Pornography and Silence (1981); Take Back the Night: Women and Pornography (L. Lederer ed. 1980); Catharine A. MacKinnon, "Not Moral", supra note 301, Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is a politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete (at 322-323). See also Feminism Unmodified, Part III, "Pornography".


308. For a discussion of the power of "naming" see Mary O'Brien, "Feminism and Revolution" in Feminism in Canada, supra note 14 at 251, 259; Scales supra note 179 at 1383, footnote 59; Dworkin, "Male Flood" supra note 307 at 9.


310. MacKinnon goes so far as to posit that, "In a feminist perspective, pornography is the..."
A radical feminist interpretation of pornography operates on several levels of analysis. The first step in a feminist understanding of pornography is to contextualize it, to relate pornography to the formative conditions of domination and subordination which characterize contemporary male/female relations. "The major theme of pornography as a genre is male power, its nature, its magnitude, its use, its meaning." As institution, empire and practice by eulogizing male power and eropto-legitimizing female powerlessness, pornography generates, reflects and reinforces the relations of gender inequality, exploitation, humiliation, degradation, objectification, dehumanization and subjugation that characterize contemporary society. In and of itself, pornography demonstrates men's power in that it captures their controlling ability to make women's bodies say what men want them to say. Feminism understands pornography from the bottom up, from the perspective of its victims, women, "the sexual disappeared" of modern society, not its male entrepreneurs nor its consumers.

By locating pornography in the experiential circumstances of women's lives, by shifting attention from amorphous and indeterminate abstract ideas such as "morality" and "free speech", feminism reconstructs the question of pornography as an issue of equality. Feminism argues that pornography violates women's human and civil rights, it is therefore a form of sex discrimination.

Similarly, Dworkin claims that "At the heart of the female condition is pornography; it is the ideology that is the source of all the rest". Right Wing Women (1983) at 222-223, but see contra, Carol Vance and Ann Barr Snitow, "Toward a Conversation about Sex in Feminism" (1984), 10 Signs 126, 132.

312. "There are more hardcore bookstores than there are McDonalds" in "Pornography: Liberalism or Oppression", Off Our Backs 14, March 1983. See generally, Jacobs, supra note 305; Report of the Special Committee on Pornography and Prostitution in Canada Vol. 1 (1985), passim.
313. Pornography is more than abstract speech; it is a horrifying, perhaps deadly, reality and process for many women. See also MacKinnon, "Not Moral", supra note 337.
314. A. Dworkin, quoted in C. McKinnon, "Pornography as Sex Discrimination" (1986), 4 Law & Inequality 38, at 40 [hereinafter cited as "Discrimination"].
315. Catherine A. MacKinnon, "Discrimination"; "... pornography, not alone but crucially,
Second, concretizing their understanding of power(lessness), feminists argue that pornography is primarily about physical and psychological violence against women, not sex. Violence is pervasive in pornography, both hard and soft core; if one simply looks at it one can see that women are the victims of routinized violence. Often, if the violence is not explicit, it is implied or waiting in the background. Pornography both sanctions and promotes violence against women. It terrorizes. Moreover, quantitatively and qualitatively, it is on the increase.

Third, pornography as violence, through its production and proliferation, directly harms women, individually and as an identifiable group. The harm operates on several different levels.

a) “Models” who are directly involved in the pornography industry are harmed. Many are hurt in the course of the “recruitment” and making institutionalizes a subhuman victimized second class status for women in particular” at 44. See also, “Speech”, supra note 301; Feminism Unmodified at 200-201.

b) “Models” who are directly involved in the pornography industry are harmed. Many are hurt in the course of the “recruitment” and making institutionalizes a subhuman victimized second class status for women in particular” at 44. See also, “Speech”, supra note 301; Feminism Unmodified at 200-201.


It must be made clear, however, that feminism distances itself from moralist objections. It does not seek to repress sexuality nor object to the portrayal of sexual conduct, but seeks to discriminate between pornography (violence) and erotica. It seeks to alter, not eradicate, sexuality! See Gloria Steinem, “Erotica v. Pornography: A Clear and Present Difference”, in Outrageous Acts and Everyday Rebellions 219 (1983). A. Dworkin Pornography 199-200 (1981). See also Ann Garry, “Pornography and Respect for Women” (1976-78), 4 Social Theory and Practice 395; and Irene Diamond supra note 307 at 686.

MacKinnon appears not to agree with this analysis. She claims that this is a liberal position which “trivialize(s) and evade(s) the essence of (the feminist) critique, while seeming to express it”. “Not Moral”, supra note 301 at 343. See also “Linda’s Life and Andrea’s Work” in Feminism Unmodified at 130. As I understand her, she appears to believe that so pervasive is the inequality, hierarchy and domination of contemporary society that it is difficult to distinguish violence from heterosexual sex. See also Dworkin, Intercourse (1987). She suggests that the “violence not sex” critique fails to ask deeper questions of what are women’s identities, independent of that which are created for them by men.


319. The use of the word “model” is both accurate and intentional for in pornography these women are treated as reified objects, not as persons.
such movies, \textsuperscript{320} some have been killed. \textsuperscript{321} The material doesn’t lie . . . the women are hurting when they are “cut, beaten, tied and hung . . .” \textsuperscript{322} Often, pornography is a “recording, not a simulation of real violence”. \textsuperscript{323} The more “fortunate” women who are not physically hurt are reduced to accessible orifices, objects of masculinist gratification, non-persons. There is some evidence of self-hatred among pornographic models. \textsuperscript{324} 

b) Harm is caused to women on whom men attempt to realize their pornographic desires. The pithiest encapsulation of this claim is Robin Morgan’s proposition that “pornography is the theory, and rape is the practice”. \textsuperscript{325} This can be understood as “pornography as text-book”, \textsuperscript{326} men force pornography on women and demand that they do what they see. Pornography educates, instructs and inspires men in the art of “sexual callousness”. \textsuperscript{327} It is claimed that there is a direct causal connection between pornography and violence against women, a causality which “is essentially collective and totalistic and contextual”. \textsuperscript{328} Viewed in this


\textsuperscript{321} Snuff movies exist. See MacKinnon, “Not Moral”, \textit{supra} note 301 at 33 fn. 61. 

\textsuperscript{322} See Baldwin \textit{supra} note 304 at 637. 

\textsuperscript{323} West, “Hedonic Lives” \textit{supra} note 164 at 68. 


\textsuperscript{326} Margaret Baldwin, “The Sexuality of Inequality” \textit{supra} note 304 at 639. 

\textsuperscript{327} Baldwin \textit{ibid.} at 640-641. For example, Brownmiller argues that pornography “promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged” \textit{Against Our Will} 395 (1975). 

\textsuperscript{328} C. MacKinnon, “Not Moral”, \textit{supra} note 301 at 338. See also 323-324. “Speech”, \textit{supra} note at 43-60; \textit{Feminism Unmodified} at 202. Joel Bakan, \textit{supra} note 305. 

This claim stands in stark opposition to the conclusion reached by the 1970 Commission . . . “empirical research . . . has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behaviour among youth or adults”. Report, \textit{supra} note 304 at 139. For a critique, see Diamond, \textit{supra} note 307 at 693-697.

More recently, the \textit{Report on Pornography and Prostitution in Canada}, Vol. 1 (1985) was reluctant but overt in admitting that it, 
is not prepared to state, \textit{solely on the evidence and research it has seen}, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and societies, at 99. But the \textit{Attorney General’s Commission on Pornography, Final Report} (1986) did find such a causal connection at 324.

This has become the most controversial claim and a colossal amount of \textit{laboratory} research has been put into (dis)proving that pornography increases misogyny and sexual callousness. A catalogue of \textit{some} of the studies includes: Baron, “The Aggression-Inhibiting Influence of
light, pornography encourages and legitimizes practices such as sexual harassment, child abuse, assault and rape.

Worse still, women who are exposed to pornography internalize pornography's misogynistic construction of their identity/nature, thus...
undercutting their autonomy, lowering their self image, crushing their potential and permitting the continuance of male domination.\(^{329}\)

c) Women, in general, are harmed because they suffer from a hate propaganda\(^{330}\) which annihilates their dignity and self-respect as human beings, by portraying them as no more than fuckable objects or degrading them as virginal nymphomaniacs who need men to tame them, or beat them. In this perspective, women are whores by nature, nothing more than the sum of their sexual parts. Pornography, contributes in a vitally important way to the continued exploitation and subordination of women as a class, by constructing them as less than human. By desensitizing men to the personhood of women, it helps construct and reinforce women’s lived reality of inequality.\(^{331}\)

These themes are all brought together in the following lengthy quotation by Andrea Dworkin:

> In the United States, pornography is an \$8-billion\ trade in sexual exploitation.

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\(^{(1969)}\) with Report of Commission on Obscenity and Pornography (Washington, D.C., Govt. Printing Office, 1970) which reach diametrically competing conclusions with respect to the impact of the media on violence-inducing behaviour. See Diamond supra note 307 at 691. Beyond this there is the fundamental issue of what qualifies as competent material. Should we accept claims by people who work in women’s shelters and police officers that in their experience pornography and violence are related?


331. There is a fourth harm caused by pornography . . . the harm to men. As Ms. Anthony posits:

> Violent pornography is also harmful to men and lessens the quality of community life . . . It is dangerous for men to have the dehumanized view of sex which results from viewing pornography. It distorts their image of women and debases them as well.

She continues:

> “This type of propaganda portrayed in pornography is equally harmful to men and women.”

Dialogue, in “Colloquium on Violent Pornography” supra note 316, at 191-192.

Although the last sentence clearly goes too far, it must be recognized that pornography is not necessarily good for men just because they like it, or use it voluntarily. If structures are important, then it is not open to us to blithely identify voluntariness with “the good”.

It is women turned into subhumans, beaver, pussy, body parts, genitals exposed, buttocks, breasts, mouths opened and throats penetrated, covered in semen, pissed on, shitted on, hung from light fixtures, tortured, maimed, bleeding, disemboweled, killed.

It is some creature called female, used.

It is scissors poised in the vagina and objects stuck in it, a smile on the woman's face, her tongue hanging out.

It is a woman being fucked by dogs, horses, snakes.

It is every torture in every prison cell in the world, done to women and sold as sexual entertainment.

It is rape and gang rape and anal rape and throat rape: and it is the woman raped, asking for more.

It is the woman in the picture to whom it is really happening and the woman against whom the picture is used, to make them do what the woman in the picture is doing.

It is the power men have over women turned into sexual acts men do to women, because pornography is the power and the act.

It is the conditioning of erection and orgasm in men to the powerlessness of women; our inferiority, humiliation, pain, torment; to us as objects, things or commodities for use in sex as servants.

It sexualizes inequality and in doing so creates discrimination as a sex-based practice.

It permeates the political condition of women in society by being the substance of our inequality however located — in jobs, in education, in marriage, in life.

It is women, kept a sexual underclass, kept available for rape and battery and incest and prostitution.

It is what we are under male domination; it is what we are for under male domination.

It is the heretofore hidden (from us) system of subordination that women have been told is just life.

Under male supremacy, it is the synonym for what being a woman is.

It is access to our bodies as a birthright to men: the grant, the gift, the permission, the license, the proof, the promise, the method, how-to; it is us accessible, no matter what the law pretends to say, no matter what we pretend to say.

It is physical injury and physical humiliation and physical pain: to the women against who it is used after it is made; to the women used to make it.

As words alone, or words and pictures, moving or still, it creates systematic harm to women in the form of discrimination and physical hurt. It creates harm inevitably by its nature because of what it is and what it does. The harm will occur as long as it is made and used. The name of the next victim is unknown, but everything else is known.

Because of it — because it is the subordination of women perfectly achieved — the abuse done to us by any human standard is perceived as using us for what we are by nature: women are whores; women want to be raped; she provoked it; women like to be hurt; she says no but means yes because she wants to be taken against her will which is not really her will because what she wants underneath is to have anything done to her that violates or humiliates or hurts her; she wants it, because she is a
woman, no matter what it is, because she is a woman; that is how women are, what women are, what women are for. This view is institutionally expressed in law. So much for equal protection.

If it were being done to human beings, it would be reckoned an atrocity.
It is being done to women. It is reckoned fun, pleasure, entertainment, sex, somebody’s (not something’s) civil liberty no less.332

3) Feminist Responses to Pornography

Feminists have not limited themselves to merely describing and critiquing the misogynistic nature of pornography. Reflecting their own horror and fear of pornography, and motivated by the lived experience of other women who have been its victims, feminists have developed various strategies of political resistance, extra-legal, illegal, and legal.

Extra-legally, feminists have developed consumer boycott techniques and economic sanctions such as picketing, letter-writing campaigns, petitions and leafletting. On an educational level, they have developed speak-outs, teach-ins, and published information on the producers, distributors, exhibitors and users of pornography. There have been consciousness-raising slide shows and documentaries on the harm caused by pornography.333 Others have suggested the development of a subversive, “alternative literature of arousal”334 or the creation of new types of videos which would break the connection between sex and harm and demonstrate the realizability of egalitarian sexual relationships.335 Many feminists help the victims of pornography through abuse shelters. Still others have participated in illegal “vigilante squads” which have, on

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332. Andrea Dworkin, “Against the Male Flood” (1985), 8 Harvard Women’s Law Journal 1, 10-11. For the legal correlative of such an understanding see the Anti-Pornography Ordinance, Minneapolis Minn., Ordinance amending tit. 7, chs. 139 and 141, Minneapolis Code of Ordinances Relating to Civil Rights (Dec. 30, 1983). For a text, see Feminism Unmodified at 262, footnote 1. I should also note that I do not think Dworkin’s analysis can qualify as a pornographic vignette. See Part A of this article at footnote 24 p. 310.

333. See for example, Not a Love Story.


335. Ann Garry, “Pornography and Respect for Women” (1978), 4 Social Theory and Practice 395; Bette Gordon’s film “Variety” is even more “ambitious” in that it posits that pornography is not a monolithic bloc, that it is potentially subversive and that attempts should be made by women to appropriate its subversive elements to expand women’s sexual freedom. See Gordon “Variety: The Pleasure of Looking”, in Pleasure and Danger: Exploring Female Sexuality 189-203 (C. Vance ed. 1984); but see Geraldine Finn, “Against Sexual Imagery: Alternative or Otherwise” (1986), 12 Parallelogramme, which critiques the whole voyeuristic technique as masculinist.
occasional harassment, ceased to be major impediments to the freedom of speech and association; the occasion, harassed both distributors and exhibitors, as well as perpetrating organized vandalism.

Legally, feminists have been creative in developing common law and statutory policies to both protect women and to try to hit the pornocrats where it hurts. On the criminal plane, there have been calls for more rigorous enforcement of laws on (sexual) assault and battering against both the makers of pornography and men who live out their pornographic desires on women. There have been arguments favouring an expanded conception of obscenity so as to incorporate the feminist interpretation of pornography, with limited success. It has been suggested that there be amendments to the hate literature provisions of the Canadian Criminal Code so as to incorporate pornography and that pornographers be prosecuted under prostitution statutes. There has been support, although qualified by some strong reservations, for new anti-pornography legislation recently introduced by the current Canadian administration, i.e. Bill C-54.

In the United States there has been feminist support for zoning regulations, and the use of public nuisance statutes in an attempt to minimize access to the impact of pornography. Tort law has presented


337. Toronto Area Caucus of Women and the Law, 1984 Recommendations for the Amendment of the Criminal Code, i.e. s. 159. For a discussion and proposed text see K. Lahey, “Charter and Pornography”, supra note 305 at 666.


339. See supra note 305.

340. C. Jacobs, supra note 305. See e.g., Euclid v. Amber Reality Co. 272 U.S. 365 (1926); Young v. American Mini Theatres 427 U.S. 50 (1976); City of Renton v. Playtime Theatres 106 S. Ct. 925 (1986). See also Note “Constitutional Law — First Amendment — Zoning Prohibition”, 12 Seton Hall 311 (1981-82). At the municipal level in Canada there has been a proliferation of by-laws which attempt to regulate obscene material through zoning requirements and by direct regulating the sale of obscene material. For a listing of some of the relevant municipal by-laws, see Mahoney, “Obscenity and Public Policy” (1986), 50 Sask. L.Rev. 75, 100 n 132. Some cases that discuss the operation of these varied by-laws are Red Hot Video Ltd. v. City of Vancouver (1985), 18 C.C.C. (3d) 153 (B.C.C.A.); Re Information Retailers Association (1985), 22 D.L.Rev. (4th) 161 (Ont. C.A.); Re Hamilton Independent Variety (1983), 143 D.L.Rev. (3rd) 498 (Ont. C.A.); Re Shalmark Hotels (1981), 32 O.R. (2d) 129 (Ont. Div. Ct.); Re Nordey Investments (1984), 48 O.R. (2d) 123 (Ont. C.A.).

itself as a potentially rich source of legal remedies including actions based upon infringement of women’s privacy, mental distress, private nuisance, unauthorized sexual portrayals and the controversial anti-pornography ordinances developed by Andrea Dworkin and Catharine A. MacKinnon. There has also been the related claim that pornography infringes Canadian provincial human rights codes. It seems to me that such activities are a tangible manifestation of the “ethic of care” in practice, a significant effort “to apprehend the reality of the other”, and to act upon it.

IV. Feminism and the Turn to Law: Part of the Problem, Part of the Solution

Sometimes you become what you are fighting. Catharine MacKinnon

[while it is] unpleasant to be locked out ... it is worse, perhaps, to be locked in

Virginia Wolf

Pornography has backed women into a corner: through its integral connection with violence it is a threat to the health, safety and even existence of women. Women, if they are to protect themselves from...
these atrocities, to survive, must do something about it. There is no alternative ... it is a matter of life and death. Feminism as the voice and practice of womankind must respond. It cannot abandon women to the pornographers, the rapists, the batterers.

The question is how. It is at this exact point that the anguish dilemma between theory and practice, vision and need, aspiration and immediacy comes into sharp relief. Political necessity dictates do whatever is possible to protect women, and the law presents itself as a potentially important arena for self-defence. Yet, at the same time, a consciousness of the violence that is inscribed within the very idea and practice of contemporary law itself may make resort to law problematic, perhaps even antithetical to a movement that considers the ethic of care to be an important facet of its agenda.

From the earliest days of the women's movement, struggle in the legal arena has been a central component of feminist practice. Recognizing that law is a constitutive element of the polity, feminists have sought to make the law more responsive to women's needs by gaining access to their own property, achieving suffrage, having their reproductive autonomy at least partially recognized, sponsoring changes to rape laws, lobbying for pay equity, and litigation through the highest courts in the land. Furthermore, Canadian feminists have achieved what the E.R.A. movement failed to do: they have had equality provisions enshrined to the Constitution.

Clearly these achievements have not resulted in substantive equality or anything like it, but what they do suggest is that the legal system is flexible enough to respond to women's needs, that progress — in the liberal sense of the word — is being made by women. They suggest that women and feminists are gradually gaining access to the corridors of traditional power, that their demands are being heard, and even acted upon, and that law is a worthwhile arena for social and political activity for women. In the light of such a long history of exclusion,

statistics reflect only reported abuse, and that substantial amounts of sexual and domestic violence are generally agreed to go unreported.

She argues,

Pornography is at the centre of a cycle of abuse that cannot be reached or stopped without reaching or stopping the pornography that is its incentive, product, stimulus and realization,

"Pornography as Sex Discrimination" supra note 314 at 48.

350. So also, must socially conscious and politically responsible men.


353. As Marilyn French points out, "the major problem facing feminists can be easily summed up: there is no clear right way to move". Beyond Power at 484.
marginalization and subordination, such victories are undoubtedly encouraging, even exhilarating. Thus, when pornography becomes a concern for feminists it is inevitable that the quest for legal remedies should become one of the central components of the feminist programme.

The history of feminist jurisprudence, although covering a much shorter time span, broadly maps the development of the feminist legal agenda. Some of the earliest examples of feminist jurisprudence criticised the exclusion of women and issues which were of particular concern to women, from both the law and jurisprudential reflections on the legal system, while simultaneously highlighting the pervasive male biases and assumptions. This “first wave” was followed by what might be described as a “demand for access” scholarship, a filling in of the gaps so as to render the legal system more fair.

A third wave in feminist legal scholarship suggested that the second approach was inadequate in that it did not adequately comprehend the deep structural embeddedness of androcentricity in law, and therefore its ability to resist feminist input. This approach suggested that the feminist critique and reconstruction of law would have to be even more ambitious, and difficult, than had hitherto been realized. It highlighted the epistemologically gendered nature of law itself, that law is a vital part of the power/knowledge/ideology matrix that structures our lived experiences. For example, Catharine MacKinnon’s critique of traditional rape law poignantly highlights the way in which the “neutrality” and “objectivity” of that law is, in reality, premised upon a deeply entrenched male viewpoint, that is, the viewpoint of the rapist or potential rapist, and not women, the victims of rape. She argues that if we were to seriously consider and adopt an understanding of rape that reflects women’s understanding of rape, then the law would be very different.

While I do not wish to cast doubt on the significance of these achievements of feminist practice or theory, nor denigrate their importance, I think that a critical jurisprudence must continue to push forward and point out their potential limitations, and possible dangers. In the spirit of the feminist dynamic already traced in this paper, there must

be a continual critical consciousness of the pervasiveness of andocentrism at every level, with the correlative progressive imperative "to question everything". I will concentrate my reflections first on the theoretical end of the spectrum, and then return to a discussion of the legal remedies proposed by anti-pornography activists.

I am concerned that the feminist emphasis on unpacking the deep structural ideological assumptions of law — the sex of law — has, perhaps, led to the under-emphasis on the "how of law". By the "how of law" I mean the way in which law is made material or relevant in a community, the operational norms of law. The feminist analysis of the ideological significance of law is crucial, but feminism must also be careful to remain conscious that law is more than an ideology, that it is "operationalized" in very specific ways, that contemporary law is a vital mechanism of social control and political domination. As I have suggested in Part A of this essay, it is the subtle interplay of violence and ideology, not their disjunction, that accounts for the genius of law. Consequently, if violence is an androcentric quality, or the product of a male dominated society unable to reconcile the tension between "self" and "other", then the bias of law may be even more deeply embedded than even the most progressive feminist insights have already uncovered. The feminist critique and reconstruction must, therefore, not only unravel and rework the politically partisan nature of law, it must develop visions of the very operation of law itself, and confront the problematic relationship between care, control and coercion. A feminist jurisprudence must invoke its critical ability to take a "double look" at law, for the patriarchal unconscious may be even more deeply entrenched than we have yet understood.

To elaborate, it is not simply the instrumental problem of how to make traditionally sexist laws, legal institutions and legal actors respond to the needs of women, although this is important, but the more fundamental dilemma of maintaining feminist visions and aspirations while at the same time moving from "here" to "there". Put differently, if the purpose

358. S. Brownmiller, Against Our Wills (1975).
359. See for example, Peggy MacIntosh, "Feeling Like a Fraud" (1985) (unpublished manuscript, Wellesley College) for a fruitful discussion of feminist's ability to critically "double vision" concepts, ideologies and practices;

We need a double vision [double consciousness] both of what the dominant culture stands for and what we lower caste people who are undervalued can develop in the way of a critique of the dominant culture, Ibid., at 8 and 15.
360. I should point out that my aim is not to further impose burdens on those who are already denied equality, to make their life even more oppressive and demanding. I also believe that men should be incorporating the ethic of care in their law-making, my point here is to ask "at what price access" and "on whose terms?"
of feminism is, at least in part, to challenge domination to create a society founded upon and structured by desiderata such as the preservation of relations, “the ability to apprehend the reality of others”, a rejection of violence and the avoidance of harm then recourse to contemporary law, and all the violent baggage and underpinnings that go along with it appears to contradict the long term goal, perhaps “recreat(ing) the patterns of oppression that feminism arose to combat”. Even if law is a powerful political tool, feminists must confront the difficult and profoundly disturbing question of whether they are, at bottom, merely substituting an agenda that is itself lamentably imbricated with violence for that of a male agenda, and not a feminist reconstruction of law. Would it be a feminist mimicry of male discourse and practice, not a transformative alternative? Does it run the risk of being a capitulation to, not a rejection of, patriarchal lore, lure and law? Contemporary law, understood simply as an instrument of social engineering, may be an anathema to some of the basic tenets of feminism. Legal fetishism may be more deeply entrenched in the popular and legal psyches than we had ever imagined or feared.

361. Scales, supra note 179 at 1382; Sheila Rowbotham, Woman’s Estate (1973); Mary Daly, Beyond God the Father (1973).
362. Jean Grimshaw, Ch. 7, supra note 44.
364. MacKinnon is aware of this in her earlier work. “The law sees and treats women in the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, the substantive policies.” “Feminist Jurisprudence”, supra note 209 at 644 [emphasis added.] However, like most critical legal scholars, she tends to emphasize the ideological significance of law — in this case embedded maleness — at the expense of the coercive/violent aspects. Consequently, her transformative vision is pitched at the ideological level, which is no doubt crucial, but again partial.
365. Ferguson, supra note 43 at 203.
366. Sandra Gilbert, Introduction to Newly Born Woman at xi.
368. By attempting to highlight embeddedness of violence of law and the potential connections with patriarchy, I am here attempting to continue the feminist project of consciousness-raising, to illuminate the structures of domination as they exist both externally and internally, consciously and unconsciously. See further MacKinnon, “Agenda” supra note 146 at 519-520.

Again, in light of the feminist emphasis of contextualism, I think it is appropriate to remember who is speaking when we discuss legal remedies. We are lawyers. Despite our counterhegemonic aspirations, our radicalism and our feminism, we are also lawyers who conceive of the world through a legalistic grid and who incorporate that perspective in everything we do, even if, as MacKinnon says, “we are feminists first”. I fear that law and legal discourse are magnetic and imperialistic, colonizing our creative imaginations and constraining
Nor can these dilemmas be resolved by attempting to distinguish between means and ends because, as history demonstrates, once one begins to adopt a certain methodology that has an ineluctable impact on the consequences. Means and ends, methods and outcomes, processes and goals coexist in a symbiotic relationship. As Cheryl Cohen comments in the context of “sexuality”,

I think a political movement that uses any means to its end is doomed to achieve an undesirable end. A feminist political praxis that uses any means to tear down patriarchy may find that the practices it advocates ultimately construct the personalities of the next generations. If feminists advocate sexual practices which, when removed from a context of caring, can become objectifying and dehumanizing, they may thereby be responsible for an experimentalism with desire that sets not limits and gives no guidelines for constructive and healthy relations between persons. They may succeed in escaping from patriarchal constructions of sexuality, but they may also thereby destroy the human caring and responsibility that give us hope for a better world. I think ethics is essential to all politics but particularly in the traumatic transition to an unknown future.

We can concretize and contextualize these reflections through a brief review of some of the legal strategies suggested by feminists to deal with pornography. Proposals grounded in the criminal law sanction are the most obviously problematic in so far as there is a clear invocation of the repressive and punitive powers of the state, in support of feminist’s preferred agenda. The feminist challenge only goes so far as to change the object of state imposed violence, not the nature of law itself. As such, it reflects the concerns of the “demand for access approach”, the “second wave” of feminist jurisprudence.

Do the civil law remedies, those which are tortious or human rights based, avoid this same problem? Do they attempt something that is more transgressive or transformative? An analysis of the anti-pornography ordinances may prove to be particularly useful at this point.

our emancipatory potentials by the shackles of seeking solutions to politico-social problems through law. I am frightened by the thought that the pervasiveness of legal ideology may be so deeply engrained that nothing seems possible without the invocation of its sanctifying blessing through violence. Equalitarianism, if prioritized, may result in “an equality of dehumanization”. (Herbert Marcuse, Counter-Revolution and Revolt 75 (1972)).

Similar concerns about the tension-ridden relationship between feminism and legalism, particularly as “legalist loyalties” may tend to trump the feminist methodology of consciousness-raising, have been voiced by Robin West, “Hedonic Lives”, supra note 164 at 44-45.

369. For a critique of means and ends thinking as malist alienating dichotomies, see A. Miles, “I.F.P.”, supra note 21 at 482, “IF”, ibid. at 59-60.

Andrea Dworkin and Catharine MacKinnon, encouraged by the admittedly limited successes of judicial response to actions based upon sexual harassment, have developed the anti-pornography ordinance that would allow women to pursue civil remedies against the pornocrats. In so far as such an approach does not invoke the criminal law remedy it does not call on the coercive power of the state. Indeed, MacKinnon sees this argument as being the main reason why the ordinance is neither prior-restraint nor censorship. She is at pains to point out that the ordinance is different from obscenity legislation.\(^371\) Moreover, the ordinances attempt to rework the evaluative criteria of law in so far as they attempt to materialize in legal terms the harmful significance which women attach to pornography. Viewed in this light, such proposals encompass some of the concerns of the “third wave” of feminist jurisprudence.

However, despite the important step forward that such ordinances achieve, they still fail to come to terms with the concern of what might be called the “fourth wave” of feminist jurisprudence, the inquiry into the way in which legal norms are operationalized. MacKinnon has, on many occasions, reiterated the claim that the ordinances do not invoke the power of the state, rather they empower women. However, such a dichotomous view is difficult to maintain, and cannot be justified on the basis of the formalistic distinction between civil and criminal law. The ordinances were lobbied for and achieved or defeated through statist fora, municipal governments and/or courts. Although the plaintiff in cases is intended to be a private person, the channels through which the action must go — human rights commissions, courts — are statist institutions.\(^372\) The process of empowering women, therefore, does not take place in the absence of the state, but rather through the state.

This attempt to highlight the continued influence of the state should not be interpreted as being libertarian or anti-statist, for the state must be central in any project of transformation. Rather, it is simply a reminder

\(^371\) See e.g. Feminist Unmodified at 140.
\(^372\) More recently MacKinnon has withdrawn from her earlier view that the ordinances do not empower the state to admit, “It does not empower the state in the direct way that an obscenity law does” “Discourse”, at 34. The key word here, of course, is “direct”, and again, later, she posits that “we have the audacity to think that we might be able to use the state to help (empower women)”. Ibid. at 72. Thus MacKinnon’s concerns about the state are very different than my own. Her main concern is emphasizing the non-statist nature of the legislation is to distinguish the ordinance so as not to be open to accusations of prior restraint, censorship or the danger of the legislation backfiring. She does not deal with the concern of the violence of law. On the contrary, on one occasion she suggests that it may be “worth considering” the use of the United States federal criminal law power, in appropriate circumstances. “Speech”, supra note 301 at 61, footnote 44.
that so pervasive and multifaceted is the structure of the state in post-industrial, patriarchal society that is difficult to evade its influence. My main point is narrower, however. The reason why civil law remedies — specific performance or damages — are attractive in the first place is because they might just be enforced against the producers or consumers of pornography. But the enforcement of civil remedies is completely dependent upon the coercive apparatus of state, in the same way as the criminal law power. Consequently, the ordinances, although innovative and creative, are also overdetermined by the threat and potential actualization of violence and, in their own way, although perhaps at a later stage, reinforce women’s dependency on the normalization of violence. The cycle is difficult to break.

None of this is to say that feminism is internally debarrled from recourse to law in all circumstances. I am not so utopian or naive as to believe that by avoiding or ignoring law it will simply wither away, or that recourse to law is not a necessary step in any political movement. I am neither advocating an abandonment of law nor “counselling abdication of the state altogether”. Nor am I saying that women should not use violence to defend themselves against male violence. Rather, I am suggesting that feminists be very wary of the seeming potential of law for it is also quicksand that could silently but effectively bury the emancipatory impulse that motivates so much of feminism. Rephrased, if the ethic of care is a constitutive element of contemporary feminism, its “injunction not to hurt others” would suggest that there is a prima facie presumption against legal remedies, while the burden of proof is on those who support legal remedies to demonstrate that the returns are worth the risk.


Although I am no pacifist, I would certainly prefer if people did not know how to kill. Having said that, and to be more gender specific, I think that there clearly are circumstances in which it may be appropriate for women to do violence to men, and even kill them. The obvious example is women who are subject to seriously abusive relationships. And I think that it is appropriate for feminists to defend these women from the prosecutorial violence of the state. My objection is to the uncritical reinforcement of the violence of modern law. Direct action by women is less of a problem for me because, like abortions, such actions are hardly taken lightly, and is unlike the violence of the law which, as Cover has pointed out, is structured so as to minimize our resistance to violence.
375. By risk I mean several different things. First there is risk articulated in this paper, the risk of foregoing an important aspect of the feminist vision. Second there is the political risk that such legislation will backfire, hurting the women’s movement rather than helping it. Third, there is the risk that strategies of legal regulation may be unduly divisive of the women’s movement at the expense of a strategy the precedents for which are hardly encouraging.
I am not saying that feminists should not pursue legal remedies to the problem of pornography. That would be to say too much, it would be too judgemental, too authoritarian, too despotic. I do not "know" what feminists know; pornography does not, cannot, impact my life the way it does women's lives. But it seems to me that the question posed by pornography and the appropriate feminist response creates a moment of "crisis and transition" for feminist theory and praxis. In their attempts to effectively deal with the pornographic assault, feminists may take the opportunity to respond in ways that are innovative and transgressive, motivated by an awareness of interconnectedness and inspired by an ethic of care that continues to "apprehend the reality of the other". Or, feminists may take recourse to "the cycle of repetition that has extended across generations a cold loneliness" concretized in the impersonalized corpus of a determinatively repressive law. That choice is one that must be made by women and feminists, as a community, not by another.

V) Conclusion

To be without a conclusion or destination, is not, however, to be without purpose.

Elizabeth Meese

It has been widely recognized that, even taken in their best light, women's progress through law has been a "mixed bag" and even reactionary. MacKinnon herself is acutely conscious of the paucity of success in achieving equality through legal remedies.

The abortion right, framed as a right to privacy rather than a right to sex equality, was recognized, only to be taken almost immediately from women who have least access to it ... women are poor and their pay is at least as far from being sex-equal as it was before the passage of legislation guaranteeing pay equality by law. Women are more and more losing custody of their children, in part because of legal reforms feminists helped put in place. The rape rate is increasing significantly, while the conviction rate for rape is not, in spite of legal changes feminists fought for and won over the last decade ...

*Feminism Unmodified* at 1 (footnotes omitted).


377. I would attach one important proviso to my concerns. As should be clear my primary concern is law's disregard of our common humanity as persons. If law is used against non-humans, "legal persons" as we rather euphemistically call "corporations", then many of my concerns are less important. Corporations are not sentient, and within my value structure are less important than people. But again, that should not be interpreted *carte blanche*, a formalistic approach cannot be adopted. Many corporate bodies are simply real persons acknowledged to have a particular legal status. Others are large empires distinct from the people who stand behind them. I am more comfortable if the contextual approach is adopted, to distinguish between those who could be subject to the violence of law, and those who should not.


Imagination: ... “not merely for changing institutions but for human relationships; not merely for equal rights, but for a new kind of being”
Adrienne Rich

I have covered a great deal of ground in this essay. Through a discussion of subjugated knowledges, in the spirit of a jurisprudential archeological dig, and motivated by the feminist preference for transdisciplinary research and reflection, I have attempted to unearth at least one of the foundations of our received jurisprudential tradition. The exposition of law’s antifactual nature, in turn, opened up an interrogative space in which to investigate some hitherto unquestioned assumptions that provide the mortar for the edifice. Through an extensive discussion of some of the tensions of contemporary feminism, I suggested the possibility of an alternative juridical construct, one that transcends and displaces the thanatic impulse that has underpinned patriarchal society and plagued the dominant jurisprudential tradition. But I do not offer a tidy conclusion, for the invocation of closure usually obscures and excludes more than it enlightens or resolves. Moreover, the centrality which feminism and modernism afford to openness sits uncomfortably with the traditional legal quest for right answers.

However, in order to be as clear as possible, it may be useful if I attempt to forestall some possible misinterpretations. For many women, and perhaps some men, this paper may be problematic, accommodating, deradicalizing, condescending, arrogant, offensive, or perhaps even insulting. Some may understand it as setting up feminism as either glorificationally redemptive or vindictively retributive, a jurisprudential twist to the madonna/whore stereotype, or the double-standard, yet again. Others may interpret my support of the ethic of care as an attempt to modernize the “cult of pure womanhood” or as hopelessly sentimentalized, romantic or naive. Some may interpret it as the product of the “abstract refuges of academia”, turning “women into a field or an idea or a subspeciality, an artifact of one theoretical approach or another”. It may well be construed as a “magical approach to social change ... (a) ‘let’s pretend’ strategy (that) is idealist and elitist both”.

Others, less benignly, may see it as the blame-the-victim strategy, thinly

383. Feminism Unmodified at 216.
384. Feminism Unmodified at 219.
disguised. At the bottom such responses are probably based in a belief that the article and myself manifest "virtually no commitment to change" caught up in a "conception of politics as fantasy and entertainment". Others may characterize my reflections as either oblivious to, or trivializing of, the oppression of women, an effort to deny them recourse to one of the few remedies they may have available to challenge patriarchy.

I want to resist such criticisms. The purpose of this paper is not negation, rather it is an attempt to contribute to the feminist demand for constant conversation from the perspective of what might be called a "feminist-positive" male. As the celtic triptych in Part A might suggest, my commitment to change is fundamental, and it is that which leads me to ask the questions I have asked, posit the dilemmas I have posed, and suggest the suggestions I have made. Emphatically, to problematize is not to stymie. Rather, it is to continue the feminist critical dynamic, to locate and challenge patriarchy and domination in all their forms and to raise the possibility of their transcendence. This is not masculinist ventriloquism. I am not speaking for women. I am attempting to speak with women about opportunities, aspirations and visions which some have claimed to be a central component of their agenda. My question asks whether the legal tools, unless radically refurbished, can deconstruct the master’s house?

I suggest that law can be a vital terrain in the process of emancipating women, but only if remade in a fundamentally different way. Like a magnet in a force field I am drawn towards the practical suggestions that MacKinnon and other feminists have made in an effort to access the tools of law; yet, simultaneously, law appears to stay the same, except that the constituency has changed. Such a

386. Feminism Unmodified at 216.
387. Feminism Unmodified at 221.
389. Sean Mullarkey, “Can a Man Be a Feminist” (Paper for “Legal Status Based on Sex”, Dalhousie University) (Spring 1988).
390. Without slipping into the danger of believing that thinking is doing, Karl Barth posits that, “transformation of thought is the key to the problem of ethics, for it is the place where the turning about takes place by which [we] are directed to new behaviour”. The Epistle to the Romans 438 (1933).
392. As Robin West says in a different context, We must begin to make good on our promise to change the discourse with our presence, instead of simply changing ourselves to fit the discourse. “Hedonic Lives” supra note 164 at 10.
viewpoint, I think, comes dangerously close to seeing the law as neutral and capturable, if only the right strategies could be developed. It reminds me of legal realism's aspirations for social engineering through law. As such, it ignores the traditions, values, and elements imbricated within the very structure of contemporary law, a central value being violence.\textsuperscript{393} The critique and renovation envisioned by such a practice are partial rather than transformative, perhaps even more of the same. Traditional power not only corrupts, it deradicalizes alternative power structures. Feminism does provide a unique opportunity for the actual reconstitution of law, not just its reworking. Speculation, imagination and hope, on their own, cannot make things otherwise, but without them it is difficult to know where to go.

My fear is that it may be possible to detect a pincer movement confronting feminism. If it is true that pornography's proliferation and increasing violence is due, in part, to a reaction against feminism,\textsuperscript{394} then feminism's attempt to take refuge in and seek remedies through the law may be reinforcing the modus operandi of patriarchal society rather than

\textsuperscript{393} On occasion, MacKinnon does explicitly articulate concerns about the nature of law, but once again her comments are underdeveloped, and do not fit with the more instrumentalist approach which characterizes most of Feminism Unmodified. For example, The law — like the hunt, warfare and religion — has been a male sphere. The qualities and values of these pursuits have defined the male role and public life. They have defined what power means. [Feminism Unmodified at 26.]

She continues,

The feminist question for the future of women’s rights is: if we acquire and use these forms of power, including economics (the modern equivalent of the hunt), the use of physical force (of which war is a form), and the tools of law (the secular religion) will we use them differently. [Feminism Unmodified at 26.]

This comment is important, I think. MacKinnon draws the analogy between religion and law rather than force and law. This suggests that MacKinnon understands law more in the context of its educative, ideological manifestations, rather than its coercive elements. This interpretation that MacKinnon primarily understands law as ideological is reinforced later when she discusses the educative effect of law in relation to pornography. [Feminism Unmodified at 131, 223.]

This view is problematic. It is insufficiently cognizant of the coercive role of law, with its built-in hierarchy, domination and subordination. It ignores the possibility that although the ideological function of law may be dominant, its coercive function is determinative. Law certainly does educate, but it is an education reinforced by violence, or the threat of violence, an education based on fear, terror. Remember Plato. In turning to the law to fight hierarchy, there is a very real danger of simply replacing one hierarchical relationship with another, adding momentum to an already eschatological spiral.

Only once in her most recent work does she recognize the fundamentally coercive nature of the law, when she opines, "law being a form of combat". [Feminism Unmodified at 75.]

challenging it. Pathological pornography terrifies women, thereby limiting the feminist agenda to a politics of fear, rather than a politics of hope. Patriarchal society will only allow feminism a very limited defence mechanism, one which is circumscribed by a masculinist ideology. Thus between them, pornography and law, aggressor and defender, they encircle the radical transgressive potential of feminism, terrorize it and disempower it. By offering it as a potentially helpful defence mechanism, law — as it is currently constituted — may lead feminism to forgo too quickly its transformative, jurisgenerative potential, adopting a policy of resistance at the price of partial incorporation.