

SEXIST IMPLICATIONS OF LAW'S FIDELITY
TO SCIENCE AND REASON

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ABSTRACT

The central thesis concerns rationality, scientificity, and sexism in criminal law, and egalitarianism in constitutional law. It is proposed that sexism in criminal law results from the rationalistic and scientific biases of criminal law practice and discourse.

Rationality bears an historical, cultural, and epistemological association with masculinity. Psychoanalytic theory and clinical observation reveals that (at least within patriarchal society) the process of childhood 'separation', whereby male children effectively begin to identify with their fathers and to distance themselves emotionally from their mothers, entails a form of rejection of the values of empathy, nurturance, caring, and attachment commonly associated with motherhood and femininity. The sociological detachment of the father from the mother and the child becomes synonymous with masculinity, and this kind of masculine detachment is idealized and reflected in the privilege which our culture pays to the categorical and epistemological divisiveness of rationality. On the other hand, the emotional attachment which the mother displays for her children and the father becomes synonymous with irrationality or mere sensuality, and this dimension of human life is undervalued or perceived as something which must be tamed and controlled. This thesis proposes that criminal law attempts to

ensure that female sexuality is always kept under control.

Religion and science play comparable roles in the cultural denigration of female sensuality to the extent that both institutions pay greater respect to the creative powers of the human mind than to the procreative implications of the female body. Law is complicit in this hierarchical arrangement insofar as it purports to derive its moral authority ultimately from the will of the heavenly father while at the same time attempting to avoid the sight of the earthly female body in any way but through a scientific lens.

Criminal law practice follows traditional scientific forms of fact-finding (e.g. the empirical method) and it purports to arrive at objective truth through the adversarial method of litigation. Its standard of proof is "proof beyond a reasonable doubt" or Cartesian certainty. Criminal law discourse purports to be rational to the extent that its rhetorical legitimacy depends on a self-perceived internal, doctrinal logic. Moreover, criminal law discourse privileges rationality insofar as it routinely employs normative tests involving "reasonable persons" or "reasonableness".

Criminal law also helps to preserve a sexist status quo through the way it regulates indecency and pornography. Law has tended to treat pornography as a matter of morality, not as a form of sexual politics or as a misogynistic social practice. And pornographic culpability becomes determined by privileged scientific paradigms (e.g. causality) and scientific standards of

proof (certainty).

Another way in which law interprets female sexuality in a scientific way is its application of egalitarian doctrine to constitutional issues involving sex discrimination. Here the law treats human sexuality in general as a mathematical problem, or as a matter of quantitative analysis. This categorical approach has tended to be phallogentric in the sense that it typically has focussed on the male sex organ as the proper reference for defining, measuring, and determining sexual difference - and ultimately sexual discrimination.

Law is patriarchal by definition but our acculturated association of masculinity and paternity with rationality may well be contingent. Law reform that would liberate women from male domination depends therefore on the possibility of a reduction in laws which purport to regulate human sexuality, and a culture-wide recognition of the distorting tendencies of scientific thinking and methodology. The Supreme Court of Canada *Butler* decision may be seen as a legal catalyst toward the latter kind of recognition but more is obviously needed, such as a greater feminine self-awareness among men and an increased presence of women and mothers in traditional political positions.

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INTRODUCTION

This thesis concerns the issue of sexual discrimination in Canadian criminal and constitutional law. In its broadest form it states that legal egalitarianism is wrongheaded when it is applied to issues of human sexuality. In its more precise form it attempts to compare legal discourse with scientific discourse according to the inherently rationalistic bias which each discourse shares. This bias, I will argue, prevents either discourse from being able to appreciate female sexuality from a female point of view. Accordingly, it is *sexist*.

The central problem which I pose is the possibility of overcoming sexism *in law, through law*. Specifically, this paper will focus on linguistic, doctrinal, and procedural issues associated with certain areas of criminal law, such as pornography, sexual assault, obscenity, and indecency. I will argue that the language of these areas of criminal law, like the language of law in general, is overtly scientific and typically patrophallic. It is scientific insofar as it relies heavily on classic scientific dichotomies such as subject/object, cause/effect, similarity/difference, and mind/body, and because it employs scientific standards of proof, such as "proof beyond a reasonable doubt", which amounts essentially to Cartesian certainty. It is patrophallic (as opposed to matrophallic) to the extent that the use of scientific language and method has not only rendered criminal law an historically powerful discourse, but a discourse

and *praxis* which has tended to privilege male sexual interests.

Borrowing insights from some modern and contemporary psychoanalytic theorists, certain streams of feminist thought, and Friedrich Nietzsche's critique of ascetism in *On the Genealogy of Morals*,¹ I will propose that current criminal laws pertaining to human sexuality are devised predominantly with the male sex drive in mind. In this respect I will postulate that the primary focus of these laws is the regulation of male desire. This primary *focus*, however, must be distinguished from what could properly be called the primary *effect* of these laws, which is the regulation of female sexuality, especially as this is expressed and experienced through the female body. Thus, I will attempt to demonstrate that, whereas the letter of the criminal law relating to morals and sexual offences often purports to exhibit profound respect for the female anatomy, the female body, female autonomy, and the security of women's lives in general, the practice or application of this area of law typically results in the denigration of women's bodies, the devaluation of female autonomy, and the diminution of women's liberty.

This above trend is consonant, I will argue, with an undue emphasis which our modern, post-Enlightenment, civilized society places on science, especially scientific language and empirical data-gathering methods, as well as cognitive experience and rationality. The privilege which our culture attributes to

¹ Friedrich Nietzsche, *On the Genealogy of Morals*, in *On the Genealogy of Morals and Ecce Homo*, trans. Walter Kaufmann (New York: Random House Inc., 1967).

rationality underlies our political commitment to constitutional equality and our many attempts to cure or to solve a great variety of social problems through egalitarian analyses. Moreover, I will argue that this *faith* in reason has a moral corollary in the implicit puritanism of modern legal thinking. As I will attempt to demonstrate, this legal puritanism functions on a cultural level as a kind of psychic analgesic or neurotic reaction to the biological dictates of the human body. That is to say, the very enterprise of law involves a significant degree of physiological sublimation or displacement among the members of society that law attempts to regulate, for law and order entail a redirection of sexual desires and physiological impulses away from individual persons towards conceptual abstractions or ideals, such as brotherly love, truth, justice, equality and decency. Like any narcotic or form of sublimation, however, the ideals associated with science and law must inevitably succumb to the recurring demands of the human body. Unfortunately, when this has occurred throughout the modern Western world, women's bodily demands have been denigrated to meet the demands of the male body.

In the course of my argument I will rely heavily on certain *scientific* observations that lend support to the notion that physiological differences between men and women play a significant role in shaping sexual, political, and social relations.² For

² Indeed, I will not pretend throughout my thesis to have the capacity to subvert or to overcome scientific discourse. To the extent that I do not hold my thesis out as a work of fiction, or as a work of art, but rather as an exercise in scholasticism and research, I openly concede the 'scientific' constraints of my

example, I will take notice that men display distinctive behavioural tendencies emanating from the production of testosterone within their bodies, and that these tendencies bear strongly upon their psychological, emotional and sexual life. It is not particularly important to my thesis if all men admit to this or not, or whether the so-called 'object' of male desire belongs to the same or to the opposite sex. Indeed, it is central to my thesis to suggest that many men prefer to deny or to repress the sociological implications of their bodies, and certainly the mere fact that someone either denies or admits the truth of an

endeavour. Indeed, I accept my own (and any other academics') inability to transcend oppositional thought, and so my critique of oppositional discourse in law is founded in oppositional terms. I rely heavily on the very oppositions, such as mind/body, subject/object, which form the 'subject' or 'object' of my criticism.

Moreover, I rely significantly on biological discourse throughout this thesis, although I am fully aware that the explanatory privilege which I attribute to this discourse may engender criticism that I am somehow "essentialist". For what it is worth (and I am not prepared in this thesis to enter into a protracted debate on the topic) the mere fact that my thesis relies in large part on so-called "essentialist" or biological arguments, and less on "anti-essentialist" arguments, should not be seen as necessarily problematic from a scholarly point of view. I recognize some of the *political* implications of privileging certain essentialist insights, as will be made clear in the course of my thesis, but I am not prepared to abandon these insights for the sake of upholding a particular political ideal or appearing 'politically correct'. Thus, for example, when my thesis addresses the epistemological implications of motherhood and fatherhood I *infer* that some women have an essentially different epistemological perspective than men, based on my academic research into the nature of mothering and my personal, conversational experiences with women. And again, based on these textual and oral discursive experiences I construct a critique of scientific discourse in criminal law, but again, in doing so I do not pretend that I can somehow supercede the epistemological constraints of that discourse.

allegation certainly does not determine the truth of that allegation.

I will also postulate that some women, at least most pregnant women and mothers, form a distinctive psychological and emotional attachment for their offspring or children, and that this experience translates into a kind of erotic and moral relationship with others that cannot be experienced by men. I will propose further that women and men are sufficiently distinct in terms of their respective physiologies and anatomies that heterosexuality is necessarily political, and that epistemological inter-subjectivity as between the sexes is ultimately impossible except at the level of metaphor or discourse.

In Chapter 1 I will introduce and discuss the notion of "false differentiation" as coined by Jessica Benjamin in "The Bonds of Love: Rational Violence and Erotic Domination".³ As we will see, false differentiation explains the way cognitive experience, via its rational discourses, tends to *objectify* human experience and therefore to diminish the importance of *subjectivity* in that experience. I will discuss Benjamin's concept of "false differentiation" against a backdrop of Freudian psychoanalytic theory in order to provide a theoretical framework for analysing the broader, sociological role of parental authority in early

³ Jessica Benjamin, "The Bonds of Love: Rational Violence and Erotic Domination" in H. Eisenstein and A. Jardine, eds., *The Future of Difference* (New Brunswick: Rutgers University Press, 1985) 41 [hereinafter "Rational Violence and Erotic Domination"]. See also Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York, N.Y.: Pantheon Books, 1988) [hereinafter *The Bonds of Love*].

childhood development. Whereas Freud saw the early development of female and male sexuality in essentially hierarchical or inegalitarian terms, Benjamin argues that 'erotic domination' by men over women is ultimately acculturated, and certainly not historically necessary. It is contingent upon the privilege which Western culture attributes to rationality and clarity at the expense of contradiction or paradox. She recognizes that the central epistemological principle behind rationality is to separate and divide (for example, masculine subjects from feminine objects) but she argues for the possibility of inter-subjective communication between the sexes based on her clinical observations of early childhood development.

In support of the argument that woman's subjectivity or woman's point of view has been excluded from the historical discourses which inform our understanding of human sexuality I will turn to Jacques Lacan's insight that the *phallogentric* nature of discourse itself precludes man's ability to understand female sexuality from a woman's point of view.⁴ In this respect I consider Lacan's analysis of the *phallogentricity* of language similar to Benjamin's analysis of rationality. Both thinkers suggest that rational discourse circumscribes female sexuality according to male point of view. Lacan's analysis goes one step beyond Benjamin's for our purposes, however, because it directly

⁴ See Jacques Lacan, *Le Seminaire livre XX: Encore* (Éditions du Seuil, 1975); Jacques Lacan, "The Signification of the Phallus", in *Écrits*, trans. Alan Sheridan (New York, N.Y.: Tavistock Publications Limited, 1977) 281.

links the language of law to the phallocentricity of discourse in general. Indeed, Lacan and other contemporary psychoanalytic theorists that I will introduce in Chapter 1 attempt to explain how law and legal discourse necessarily reflect a historical pre-occupation with the male sex organ, as well as a patriarchal social order.

In Chapter 2 I will attempt to connect the purported rationality of criminal law discourse and method and the inherent rationality of scientific discourse and method in a way which explains the tendency of criminal law to 'falsely' differentiate in precisely the way Benjamin imagines. For this purpose I will refer to the work of Evelyn Fox Keller, which makes a connection between masculinity and the historical privilege which Western society has attributed to scientific discourse. This connection explains how women tend to be excluded from participation in traditionally scientific endeavours. To the extent that I will argue that law is precisely one such kind of scientific endeavour (and here I will rely on some work of Carol Smart), I will then attempt to demonstrate how women come to be excluded from participation in many facets of law. Specifically, I will look at one area of criminal law as illustrative of the way in which women are not only excluded from the societal self-protection which criminal law purports to afford, but how women themselves become psychologically and physically denigrated by the scientific methodologies and rationalist doctrines of criminal law. One of the issues that arises with respect to the latter theme is the relation between

scientific methodology and moral puritanism. I will therefore address the proposition that reliance on scientific method generally, as a means of determining issues of human sexuality, tends to reflect a moral puritanism which is primarily concerned to *control*, if not to *tame*, the sensual implications of the female body.

In Chapter 3 I will address the issue of egalitarianism in constitutional jurisprudence, as this has been developed in a contemporary Canadian criminal law context. As we will see, constitutional egalitarianism in Canada relies predominantly on the metaphorical opposition similarity/difference. I will propose that egalitarianism is essentially a *mathematical* metaphor and that the similarity/difference opposition is essentially scientific insofar as it ultimately entails *quantitative* analysis. To the extent that certain sociological problems associated with human sexuality cannot be resolved by mathematical means or quantitative analysis, I will argue that egalitarianism is an inappropriate conceptual tool for addressing these problems. Indeed, I will go further and suggest, based on the analytic framework established in the preceding chapters, that the application of egalitarian doctrine in matters of human sexuality effectively entrenches the existing social hierarchy between men and women (that is, by rendering them 'more or less' equal) and invariably leads to subtle forms of pornography and possibly misogyny.

One possible way of overcoming this tendency in law is to displace the importance of equality as a jurisprudential tool in

favor of *liberty* or autonomy. One could attempt to dislocate the importance which constitutional law places on the intellect (for clearly equality is an intellectual construct) and emphasize instead the physical nature of human being. Thus, to the extent that there is nothing inherently scientific or rationalistic about human physiology, an argument can be made that women may fare better where courts address sexual issues from the point of view of physical inviolability, as opposed to equality. At least women's bodies would not necessarily be measured here against male bodies - that is, as being more or less the same or different, and possibly inferior.

In Chapter 4 I will focus my attention on the way law traditionally has perceived female bodies and again, I will link this perception to law's marriage with science. I will argue that the scientific bent of law tends to objectify women physically, or more figuratively, to decapitate or dismember women, and that it therefore contributes to a culture-wide "pornographic imagination". This phenomenon has been exacerbated by Canadian anti-obscenity (or anti-pornography) law, I will argue, because of the strict scientific standard of proof (Cartesian certainty) that this law generally requires. Until very recently Canadian law has been unwilling to prohibit the publication of pornography without empirical evidence of a strict causal connection between physical harm to women and children and pornographic publication. Since the Supreme Court of Canada has stepped back somewhat from its fervent scientificity, however, I will contend that women stand a

better chance of overcoming the physical oppression of pornography and of what Benjamin refers to as 'erotic domination'. One of the key conceptual elements for discussion in this respect will be the function of representation or epistemological mediacy in scientific discourse and methodology, as opposed to the function of presentation or epistemological immediacy in non-scientific discourse. For women will not be able to transcend their pornographic representation in male terms where the criminal law cannot overcome its methodological and doctrinal predilections for the objectified image of women in society in favor of the non-objectified touch, smell, and sound of women.

In the final analysis, in my academic and critical capacity I have tried to resist the temptation "to prefer the shiny new theory to the fully cognized experience."⁵ Although I will ground much of my analysis of sexual equality litigation in modern and contemporary psychoanalytic theory, one need not stray too far from judicial precedent to observe the patrophallic bias of much legal discourse. I will not pretend that that bias is something that can be overcome easily. For women to make even *modest* gains with respect to overcoming this male bias in law they will have to enter into a dialogue with men, which means participating to some degree in that same bias. However, they must also be allowed the opportunity to introduce a distinctly female bias or female point of view into legal discourse and legal proceedings. The onus is on

⁵ Allan Bloom, *The Closing of the American Mind* (New York, N.Y.: Simon & Schuster Inc., 1987) at 254.

the court, however, to make an effort to recognize the inherent dignity of the female body and in some cases the maternal possibilities associated with the female womb, genitalia, and breasts. By ascribing greater significance to the female anatomy the court may be able to offset its historical phallocentrism. In the end the courts and the male defendants of desire must embrace human animality in general - that is, the bodily dictates of T. S. Eliot's "[b]irth, and copulation, and death"⁶ -and relinquish its grasp on the mind or the idea, for the body is ultimately what governs human desire, the ultimate law of human relationships. At least reason suggests that a less formal or theoretical approach to resolving sexual issues through criminal law could indirectly benefit men by relieving them of the fear and anxiety which underlies their repressive, phallogentric, Cartesian standard of proof, and it might directly benefit women complainants and litigants by ensuring not only that their needs are seen and understood - that is, visually and intellectually - but that their desires are also effectively *felt* and *heard*.⁷

⁶ T.S. Eliot, *Sweeney Agonistes: Fragments of an Aristophanic Melodrama* (London: Faber and Faber, 1932).

⁷ By emphasizing the merely logical implications of my thesis here I do not want to appear to have ignored the various kinds of physical and mental oppression that women have experienced as an integral part of their broader, historical encounter with law. As will be made in the first chapter of my thesis, I attribute various kinds and degrees of female oppression precisely to the broader historic role of patriarchy within Western culture. But for precisely this reason I consider it wrongheaded to criticize the logic of my thesis by reference to our patriarchal past. The kinds of possibilities for law reform that I contemplate in this thesis are clearly dependent upon the plausibility of overcoming patriarchy, and this would require a variety of social reforms,

CHAPTER 1 - FALSE DIFFERENTIATION AND EROTIC DOMINATION

Let us begin this chapter by briefly recalling some of the pioneer psychoanalytic observations of Sigmund Freud. In particular, let us draw our attention to a stage of infant and early childhood psychological development which, since Freud, has come to be known loosely as the Oedipal phase. For Freud, early childhood psychological and emotional development normally entails a process of human "individuation" whereby male and female children acquire a genderized sense of "self". This differs according to the early recognition among the two sexes of their unique sexual organs.⁸ The young male child, according to Freud, develops a

such as an increased presence of women in the law (as lawyers, judges, legislators, politicians), an effective, practical, culture-wide reevaluation of the relative values of science and art for everyday living, and possibly some degree of economic restructuring.

⁸ The term "individuation" was coined in the context of Freudian psychoanalytic theory by Margaret Mahler in Mahler, Margaret S., Fred Pine, and Anni Bergman, *The Psychological Birth of the Human Infant* (New York: Basic Books, 1975). It refers to the process of psychic differentiation whereby young children acquire a sense of "self" according to two competing drives. The theory states basically that the young child is driven by early, painful experiences of "separation" from the mother, to return to a primal state of "oneness" or "narcissistic bliss" that psychoanalytic theory associates with pre-natal and neo-natal stages of cognition. This pull toward a reunion with the mother must compete simultaneously, however, with a pull away from the mother, based on the young child's desire to be autonomous. The dynamic interplay between both of these forces describes a process of *differentiation* or *self-understanding* whereby the "self" becomes defined negatively, as somehow other than or distinguished from the mother and the affects of her immediate environment. The self also becomes defined positively, as somehow autonomous and inherently complete. Psychoanalytic theory describes the former mode of differentiation as *separation* and the latter mode of differentiation as *individuation*.

psychological fear of castration - a "castration complex" - based on an early visual and sensual awareness of his own genitals, his understanding of the castrating form of approbation which could attend his personal manipulation of his genitals (for example, should he be detected masturbating), and his early observation of female genitalia.⁹ It is the absence of a penis as being somehow attached to or connected to the female pubic region that confirms in the mind of the young male child the real possibility of his own castration.¹⁰ Freud postulates that, as a result of this fear, there are two possible avenues of behaviour open to the male child, and these are conditioned by the Oedipus complex. The child can either attempt to achieve omnipotence (literally, that is, to preserve the erotic and biological functions associated with his penis) by replacing the erotic role of the father *vis-a-vis* the mother in the family situation and thereby make himself the exclusive object of his mother's love, or he can replace the erotic role of the mother *vis-a-vis* the father and thereby become the exclusive object of the father's love and affection.¹¹ Either choice, however, entails the loss of the child's penis.¹²

⁹ Freud, "The Dissolution of the Oedipus Complex", in Vol. 19 of *The Standard Edition to the Complete Works of Sigmund Freud*, ed James Strachey (London: Hogarth Press, 1960-1974) 173 at 175-176 [hereinafter Freud cited to *Standard Edition* unless otherwise indicated].

¹⁰ Freud, *ibid.* at 176.

¹¹ Freud, *ibid.* at 176.

¹² Figuratively speaking, at least, the male child either loses his penis inside the mother should he become her love-object and thus her partner in sexual intercourse. Likewise, should the

According to Freud, in response to the threat of castration the male child normally tends to "identify" with his father, in the sense that he begins to emulate the authoritative and masculine behaviour that he observes in his father - especially as regards his father's behaviour toward his mother - and accordingly he distances himself from the mother.¹³

This general observation by Freud has two significant implications for our current discussion. First, the observation that male children identify with their fathers and not with their mothers as a routine part of psychological and behavioural development (at least within a confined patriarchal setting) reveals that male processes of self-understanding and self-worth entail genderization.¹⁴ That is to say, these processes involve

male child replace the mother as the father's love-object the erotic utility associated with the child's penis disappears.

¹³ Freud, *ibid.* at 176. See also Freud, "The Ego and the Id", in Volume 19 of the *Standard Edition*, *ibid.* 12 at 32; and Freud, "Group Psychology and the Analysis of the Ego", in Vol. 18 of the *Standard Edition*, *ibid.* at 105.

¹⁴ The issue of genderization must not be confused with the issue of sexuality or what is commonly referred to as sexual preference or sexual orientation. Genderization refers to the tendency among both young male and female children to adopt either a masculine archetypal figure (such as the father) or a feminine archetypal figure (such as the mother), respectively, as the object of their ego-ideal. The "ego-ideal" is Freudian terminology for the ideal object of a child's love and affection. It is a character (with genderized character traits) that children tend to idolize and to emulate: see S. Freud, "Group Psychology and the Analysis of the Ego", *ibid.*, and J.C. Smith, *Psychoanalytic Roots of Patriarchy (The Neurotic Foundations of Social Order)* (New York: New York University Press, 1990) at 46-47, 103-105 [hereinafter *Neurotic Foundations*]. A child will likely adopt more than one ego-ideal as he or she matures, and to the extent that it may become difficult to identify a predominant gender or core gender identity of any person at any given stage of his or her life, it is

the preference for an acculturated definition of masculinity (paternalistic) over an acculturated definition of femininity (maternalistic). Thus Freud says, relating the gradual identification of the boy with the father to the gradual dissolution of the desire to unite erotically with the mother, that "the dissolution of the Oedipus complex would consolidate the masculinity in a boy's character."¹⁵

Second, the tendency among male children to emulate and to 'idealize'¹⁶ the image of their fathers affects their own sense of morality. In effect, by adopting and accepting the behaviour of

possible to observe "gender ambiguity" among some individuals. For a discussion of gender ambiguity in males see R. Stoller, *Presentations of Gender* (New Haven, Conn.: Yale University Press, 1985).

The question of one's sexuality or sexual orientation is not necessarily linked to the genderization process, except insofar as the development of gender identity (masculine and feminine selves) is rooted in one's sexuality: see J.C. Smith, *Neurotic Foundations*, *ibid.* at 147. In other words, individuals acquire both feminine and masculine selves by virtue of the fact that they are sexual beings, but their predominant gender or core gender identity does not depend on the fact of their being male or female. One can be a heterosexual male and adopt a feminine archetypal figure as the dominant object of his ego-ideal. We might refer to this person as an effeminate, heterosexual male. Likewise, one can be a homosexual female and adopt a masculine archetypal figure as the dominant object of her ego-ideal. This woman might appear 'macho', in contrast to the effeminate, heterosexual male.

¹⁵ Freud, "The Ego and the Id", *ibid.* at 32.

¹⁶ Freud explains how the decision by the young male to emulate and identify with the father requires the male child to overcome his pre-natal and infantile affection for his mother and instead substitute the image of the father as the 'ideal' object of his love: see Freud, "The Ego and the Id", *ibid.* at 31-32; see also Freud, "Group Psychology and the Analysis of the Ego", *ibid.* at 105, where he states that "[a] little boy will exhibit a special interest in his father; he would like to grow up like him and be like him, and take his place everywhere. We may simply say that he takes his father as his ideal."

the father as 'ideal', Freud proposes that male children also incorporate their father's moral beliefs and sensibilities into their own behaviour and self-understanding. This is the natural function of what Freud refers to as the 'super-ego'.¹⁷ Basically, the super-ego in Freudian psychoanalysis functions as the voice of *conscience* or as "*an unconscious sense of guilt*"¹⁸ which is acquired among all children in the early stages of childrearing. It is assumed, in this sense, that an essential function of parenthood is to prohibit children from fulfilling certain desires and wishes,¹⁹ and that the various forms of authority on which parents rely for this purpose are historically and culturally determined morays, entrenched through the auspices of religion, education, literature, and law. For Freud, the natural consequence of prohibiting children from freely acting upon their erotic impulses involves their own psychological internalization of acculturated moral imperatives, which then exhibits itself outwardly in various forms of repressive behaviour and instinctual sublimation. Chasseguet-Smirgel elaborates upon Freud's theory of the super-ego as the inner voice of *conscience* associated with one's sense of guilt, by referring to it as the "paternal law".²⁰

¹⁷ See generally Freud, Part III of "The Ego and the Id", entitled "The Ego and the Super Ego", *ibid.* at 28.

¹⁸ Freud, *ibid.* at 35.

¹⁹ For example, in classic Freudian psychoanalytic theory it is the father who intervenes between the male child and the object of that child's love - namely, the mother - and in this sense the father represents an obstacle to the child's incestuous desires.

²⁰ Chasseguet-Smirgel, "Feminine Sexuality: An Interview with

She states that

[it] is important to consider that if we speak of "law" in terms of psychoanalysis, we refer to the postoeidipal superego, which is based mainly on the internalization of the incest barrier. This is why it is also important to consider that what comes directly from the mother is mainly a set range of rules.²¹

Of course, where the male child adopts the father-figure as his 'ideal' it is precisely because the child prefers the authority and image of dominance which he associates with the father's behaviour and the father's relatively superior position within the household, to the perceived inferiority or submissiveness on the part of the mother. This means that the male child in such a situation necessarily develops a paternalistic or patrophallic moral sensibility. Freud would appear to recognize this phenomenon, at least implicitly, when he states,

Clearly the repression of the Oedipus complex was no easy task. The children's parents, and especially his father, were perceived as the obstacle to a realization of his Oedipus wishes; so his infantile ego fortified itself for the carrying out of the repression by erecting this same obstacle within itself. It borrowed strength to do this, so to speak, from the father, and this loan was an extremely momentous act. The super-ego retains the character of the father, while the more powerful Oedipus complex was and the more rapidly it succumbed to repression (under the influence of authority, religious teaching, schooling and reading), the stricter will be the domination of the super-ego over the ego later on--in the form of conscience or perhaps of an unconscious sense

Janine Chasseguet-Smirgel" in M. Honey and J. Broughton, eds., (1985) 72 *The Psychoanalytic Review* 527 at 543.

²¹ Chasseguet-Smirgel, *ibid*.

of guilt.²²

To the extent that the proper function of the super-ego appears to depend on the issue of "identification" and the process of genderization, the question remains as to how the super-ego might shape one's moral sensibility where the child chooses not to identify with the father, but rather with the mother. Freud eventually recognized that young women did not "individuate" according to the same patterns as young men.²³ This is because, for Freud, women are not burdened by the fear of castration which accompanies the male child's awareness of and fascination for his penis. Rather, the early or infantile recognition among female children that their genitalia are unlike that of male children leads them to infer, as Freud explains, "that at some earlier date [they] had possessed an equally large organ and had then lost it by castration."²⁴ At this early stage of female psychic development

²² Freud, "The Ego and the Id", *supra*, note 18 at 34-35.

²³ See, for example, Freud, "The Dissolution of the Oedipus Complex", *ibid.* at 177-179; and Freud, "Some Psychical Consequences of the Anatomical Distinction between the Sexes", in Vol. 19 of the *Standard Edition*, *ibid.* at 248.

²⁴ Freud, "The Dissolution of the Oedipus Complex", *ibid.* at 178. Note that in "The Dissolution of the Oedipus Complex" Freud observed that young women understood the absence of a penis to be a "ground for inferiority" (*ibid.* at 178). Freud has been criticized in this respect, however, for modelling his analysis of female psychology essentially in negative terms - that is, in terms of what women "don't have" or what they "lack": see Carol Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982) at 6-7. See also J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 100.

Janine Chasseguet-Smirgel has modified Freudian psychoanalytic theory somewhat by postulating an "innate knowledge of genitality; that is, of the difference between the sexes" among both sexes,

then, castration is already an "accomplished fact" for women, and "the fear of castration being thus excluded in the little girl," Freud says, "a powerful motive also drops out for the setting-up of a super-ego and for the breaking-off of the infantile genital organization."²⁵ According to Freud, the moral sense acquired by the female child is less complicated than that acquired by the male child insofar as it is not conditioned upon a radical choice between feminine and masculine objects of the ego ideal.²⁶ This is what Freud means when he states that "[t]he girl's Oedipus complex is much simpler than that of the small bearer of the penis; in my experience, it seldom goes beyond the taking of her mother's place and the adopting of a feminine attitude towards her father."²⁷ As a result of this 'much simpler' kind of Oedipal

that places equal emphasis on the woman's genitalia as the male's genitalia in the psychic development of children, as well as an early, omnipotent "maternal imago" which both male and female infants both fear and revere. In *Sexuality and Mind* she writes that "[t]he need to detach oneself from the primal omnipotent mother by denying her faculties, her organs and her specifically feminine features, and by investing in the father seems to be a need both sexes share": J. Chasseguet-Smirgel, *Sexuality and Mind: The Role of the Father and the Mother in the Psyche* (New York: New York University Press, 1976) at 25.

²⁵ Freud, "The Dissolution of the Oedipal Complex", *ibid.* at 178.

²⁶ Without going into detail on this issue (as it is problematic to an extent which is beyond the scope of this thesis) Freud postulates that one of the psychological tendencies resulting from the female child's sense of "accomplished" castration is that she merely transforms the pre-existent desire to have a penis into a wish to bear the father a child: see Freud, "The Dissolution of the Oedipus Complex", *ibid.* at 179.

²⁷ Freud, "The Dissolution of the Oedipus complex", *ibid.* at 178. Again, Chasseguet-Smirgel displaces the importance that Freud places on the fear of castration in early childhood psychic

complex Freud observed that women tend to engage in different forms of instinctual sublimation than those observed among males.²⁸

The psychoanalytic research of Nancy Chodorow is particularly important as regards the issue of the different moral sensibilities which derive from pre-Oedipal and Oedipal processes of self-

development in favor of a deeper fear of engulfment (originating prior to Freud's Oedipal phase) among both male and female children generally. She argues that young girls at this pre-Oedipal stage do not envy a penis so much as they figuratively construct and attach a penis to an omnipotent maternal figure because the resulting image is less frightening than that of a mother without a penis. In her words, "one of the motives that leads to the creation of an image of the phallic mother is that it is *less* terrible and *less* dangerous than an *engulfing* mother. That is, the idea of being penetrated by a penis is less invading than that of a deep and greedy womb. This is similar to the process of creating a phobia. Instead of having a mother who is dangerous everywhere, in every part of her body in an unlimited way, the child focuses the danger on a specific organ, the penis - an organ that can be castrated. I believe that the phallic mother is a defense against an engulfing, 'without limits,' image of the mother": Interview with Chasseguet-Smirgel, "Feminine Sexuality", *supra*, note 20 at 542.

For her part, Hélène Cixous denies that women undergo anything like an Oedipal complex at all. She argues that, to the extent that the Oedipal complex is conditioned on the *physical* possession of a penis and the attendant male "castration complex", that neurotic responses to "engulfment anxiety" among females (such as that suggested by Chasseguet-Smirgel) are qualitatively non-Oedipal: see, for example, H. Cixous, "Castration or Decapitation?" (Autumn 1981) 7:1 *Signs: Journal of Women in Culture and Society* 41 at 45-46.

²⁸ See Freud, "The Dissolution of the Oedipus Complex", *ibid.* at 179, where he describes female "aim-inhibited trends" as being "of an affectionate kind". It is noteworthy in this respect that some contemporary psychoanalytic theorists contend that women are ultimately less intensely *neurotic* than men: see, for example, Hélène Cixous, "The Laugh of the Medusa", trans. K. Cohen and P. Cohen, in Patricia Bizzell and Bruce Herzberg, eds., *The Rhetorical Tradition: readings from classical times to the present* (Boston: Bedford Books of St. Martin's Press, 1990) 1232. As well, J.C. Smith suggests that women's neurotic needs do not generally entail *pathological* forms of behaviour among women, whereas a correlation of this kind can be made in respect of men: *Neurotic Foundations*, *supra*, note 14 at 221.

understanding.²⁹ She interprets the tendency among male children to identify with the father as entailing a kind of moral repudiation of the mother, in the sense that the drive among male children to become independent of the mother requires that they ignore or disrespect her specific concerns and needs. In effect, Chodorow contends that the process of individuation among male children necessarily requires that they devalue their mothers' 'subjectivity' and in turn treat them as 'objects'. The morality which the young male develops in turn relies on a pronounced understanding of "difference" and detachment - that is, of the difference between himself as independent and autonomous and the mother as dependent and less than complete. On the other hand, because the young female child tends not to identify with the father, but rather retains her original identification with the mother, the above theory suggests that females do not acquire an overly pronounced sense of "difference" as part of their broader moral development. Young girls expect to be *like* their mothers, and hence their own drive for autonomy or independence depends heavily on an understanding of "similarity" or assimilation, and attachment.³⁰

²⁹ See generally N. Chodorow, "Gender, Relation, and Difference in Psychoanalytic Perspective", in *The Future of Difference*, *supra*, note 3; and N. Chodorow, *Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

³⁰ See also Robin West, "Jurisprudence and Gender" (1988) 55 *U. Chi. L. R.* 1. Invariably the problem arises as to the effect of parental role-reversal, shared parenting, or single parenting on the genderization process and the psychological association of certain traditional roles with certain archetypal figures. The

question may be asked, for example, as to the likelihood or inevitability that a female child raised by a single mother will ultimately "identify" with her mother as a servile and submissive maternal figure. Lynne Segal asks, "[do] all women carry out their social roles exactly as they are meant to do? And, if they do, is it true that daughters inevitably follow in their footsteps?": see L. Segal, *Is the Future Female?* (London, Eng.: Virago Press Ltd., 1987) at 149. Although I would concede from personal observation that some women conduct their lives in ways which appear contrary to our cultural stereotype of femininity - of maternity, servility, solicitousness, or submissiveness - it is somewhat beyond the scope of this thesis to argue that parental role-reversal or single parenthood, or even homosexual parenthood, would in and of itself have a sufficient impact on the collective psyche of future generations to undermine the historical link between paternalism and female subordination that Benjamin and Chodorow observe. Segal suggests the possibility that women's servility and solicitousness is not so much a function of female children adopting traditional 'maternal' social roles and postures as it is a product of women's general historical, social underprivilege, and as it reflects the nature of mothering itself. She says that "[it] is well known that those with less social power and confidence are more likely to develop a greater attentiveness, watchfulness, and desire to please in their relations with others", and that "by far the most important factor in determining what is seen as women's distinctive sensibilities would seem to me to be the nature of mothering itself, rather than the fact that it is women who mother: L. Segal, *ibid.* at 148-49.

I must say that I have difficulty with Segal's critique of Chodorow for two reasons. First, and I will touch upon this point in Chapter 4 of this thesis, it is highly problematic to suggest that women's political oppression and lack of 'confidence' can be divorced from the political undervaluation of motherhood in patriarchal society. Second, it is highly contentious to propose that 'the nature of mothering itself' can be meaningfully disassociated from 'the fact that it is women who mother'. In support of this point I will quote Allan Bloom as saying, "[the] peculiar attachment of mothers for their children existed, and in some degree still exists, whether it was the product of nature or nurture. That fathers should have exactly the same kind of attachment is much less evident. We can insist on it, but if nature does not cooperate, all our efforts will have been in vain. Biology forces women to take maternity leaves. Law can enjoin men to take paternity leaves, but it cannot make them have the desired sentiments. Only the rankest ideologue could fail to see the difference between the two kinds of leave, and the contrived and somewhat ridiculous character of the latter. Law may prescribe that the male nipples be made equal to the female ones, but they still will not give milk": A. Bloom, *Closing of the American Mind*, *supra*, note 5 at 130-31.

To the extent, however, that the archetypal images of mothers and motherhood which young children acquire and perceive involve maternal dependency and subordination to the will of the father, young girls will also develop an acculturated sense of *inferiority* as part of their normal process of individuation. Jessica Benjamin explains that most theories of psychological development reflect the fact that

becoming like the mother, as girls do, will probably mean the sacrifice of independent subjectivity or selfhood. It will mean subordination to others and their needs. To the extent that she does individuate, the girl has largely to identify with her father, with the male posture of emphatic differences, for the mother is not an independent figure. Generally, however, the female posture is the opposite of the male - merging at the expense of individuality. The small girl's experience is often that she develops continuity and sameness at the expense of difference and independence. For her the injunction is: I must be like she who serves and cares for me. The temptation to be undifferentiated, to deemphasize boundaries, is reinforced for her as an appropriate form of subjectivity. She becomes all too able to recognize the other's subjectivity, but--like mother--does not expect to be treated as an independent subject herself. Women's own denial of their subjectivity corresponds to the perception of the mother. She becomes in her own mind object, instrument, earth mother. Thus she serves men as their Other, their counterpart, the side of themselves they repress.³¹

Benjamin's observation is crucial for our purposes insofar as she understands the dynamic interplay between mother-figures and father-figures in the psychological development of male and female children as leading ultimately to various forms of "rational

³¹ Jessica Benjamin, "Rational Violence and Erotic Domination", *supra*, note 3 at 44.

violence" exercised by men upon women. For Benjamin, the tendency among male children to identify with their father and to separate from their mother is "rational" to the extent that such a tendency relies on a cognitive or discursive awareness of "difference". Indeed, on a purely cognitive level, the ability to differentiate between objects of experience belongs to a rational capacity which every human being possesses to the extent that he or she can be said to be conscious.³² Benjamin goes further, however, and argues that the development of rational faculties in human beings historically has entailed a moral component insofar as the objectification of experience and the objectified world of that

³² Perhaps the most important argument that can be made for this proposition is located in Immanuel Kant's *Critique of Pure Reason*, trans. J. M. D. Micklejohn (New York and London: The Colonial Press, 1900). In this work Kant divides human knowledge or experience into at least two distinct modes, sensory and cognitive. Sensory knowledge originates in what Kant refers to as the 'faculty of intuition'. This faculty operates chronologically prior to the faculty of understanding. It allows human beings to receive external sensory stimuli and in turn to experience physical sensations as spatial-temporally defined. Cognitive knowledge, on the other hand, depends on the existence and dynamics of the 'faculty of understanding'. This faculty contains a limited number of categories of pure reason, such as unity, plurality, totality, reality, negation, limitation, and cause and dependence (effect). According to Kant, these various categories interact with one another logically and react empirically to the sensory input from the faculty of intuition. The effect of all of this is a form of human experience which is quantified, differentiated, enumerated - in short, objectified. In other words, the synthetic operation of the categories of reason transforms the pre-cognitive, sensory awareness that we associate with undifferentiated physical sensations (such as the feeling of pain resulting from placing a hand on a hot burner or a bare foot on a hot tarmac, or the feeling of nausea resulting from the smell of decaying flesh) into an intellectual perception of objects. And it is this categorical experience of the world, or the cognitive perception of objects which ultimately, for Kant, constitutes the proper definition of human consciousness.

experience has involved the denial and suppression of female subjectivity. Thus she claims that

Differentiation which occurs without any appreciation of the mother's subjectivity is perfectly consonant with the development of rational faculties. In fact it seems to expedite it. The individual is quite able *cognitively* to distinguish self from other. The person knows that he or she is physically and mentally distinct and able to perform, socially, as if other persons were subjects. But at the deepest level of feeling there is not a sharp and clear sense, that vibrant aliveness, of knowing that I am I and you are you. Rationally or cognitively, the distinction is clear; emotionally and unconsciously the other person is simply experienced as the projection of a mental image....This inability to experience others as real, and concomitantly the self as real, is well known to clinicians today. The feeling of unreality is a result of one-sided or (as I think of it) "false differentiation." Rationality as a substitute for recognition threatens to destroy the sense of reality and selfhood it was supposed to create.³³

For Benjamin, "one-sided" differentiation in the genderization process of children is "false" in the sense that it is not inevitable. In this respect she takes issue with Freud's basic postulate that the primary or underlying desire among children is to merge or reunite erotically with their mother. According to Benjamin, the primary emotional and psychological relationship between a mother and her children is one of "mutual recognition".³⁴ Just as the young infant seeks self-recognition from its mother through the articulation of his or her desires and the acting out of various deeds (perhaps demanded by the mother), the mother seeks

³³ Benjamin, "Rational Violence and Erotic Domination", *supra*, note 3 at 46.

³⁴ Benjamin, *The Bonds of Love*, *supra*, note 3 at 21-23.

in turn to be recognized for her attention and attunement to the demands and deeds of the child.

According to Benjamin, it is crucial to acknowledge the "reciprocal attunement to one another's gestures"³⁵ - that is, between mother and child - if one expects to be able to overcome the "false differentiation" and erotic domination that ultimately define heterosexual practices between adults on a broader social scale. As she says, "early experiences of mutual recognition already pre-figure the dynamics of erotic life",³⁶ and "[r]eciprocal attunement to one another's gestures pre-figures adult erotic play".³⁷ In other words, there is nothing inherently hierarchical or oppressive about early, sensual, maternal relations that would explain the eventual acceptance of sexist and misogynist social practices among both adult men and women. The problem, therefore, according to Benjamin, consists in the privilege which our Western culture has accorded to the father-figure in pre-figuring adult sexual relations, and by implication, "the denial of recognition" in our culture "of the original other, the mother who is reduced to an object."³⁸

We have already discussed how, according to Freud, the acculturated authoritarian and dominant figure of the father within the immediate family context plays a significant role in

³⁵ Benjamin, *ibid.* at 27.

³⁶ Benjamin, *ibid.* at 29.

³⁷ Benjamin, *ibid.* at 27.

³⁸ Benjamin, *ibid.* at 220.

determining not only the young child's choice of gender, but also his and her perceptions of the relative political and sexual status of men and women generally. Benjamin does not appear to take issue with Freud on this point but she resists the suggestion that, despite the burden of neurosis which the male must carry as a result of his identification with the father, women remain somehow 'inferior' to men in social terms. From a psychological and logical point of view she observes the factual or real mutual dependency between men and women, declaring that

"[e]ach gender plays a part in a polarized whole. But neither attains true independence. For even the male posture of attaining independence by denying the mother is a defensive stance: the overemphasis on boundaries between me and not-me means that selfhood is defined negatively as separateness from others."³⁹

Jacques Lacan has added another level of analysis to Benjamin's observation that one of the central driving forces behind child and adult sexual relations is the need for self-recognition. This level of inquiry is important for understanding the nature of the tension or conflict between men and women that appears to have persisted throughout the better part of human history. For Lacan, the demand for recognition that an infant or young child exhibits in respect of its mother (or any 'other' for that matter) necessarily remains unfulfilled to the extent that it must be articulated.⁴⁰ The act of articulation, or the practice

³⁹ Benjamin, *ibid.* at 45.

⁴⁰ Jacques Lacan, *Écrits*, *supra*, note 4 at 284-287.

of speech and writing, necessarily 'alienates' the subject of the demand (the infant's pre-discursive sense of 'self') from the message of the demand as interpreted by the listener or observer (the mother). The listener can only respond to the demand as articulated in speech or writing, not as a need felt by the author or orator. According to Lacan, this eternally recurring gap or residual between what the child demands and the incomplete satisfaction of his or her needs constitutes *desire*.⁴¹

The significance of Lacanian desire for our purposes is that it postulates the impossibility of mutual recognition or inter-subjective communication among the sexes except at the level of discourse or metaphor.⁴² It says that symbolic representation of needs precludes the possibility of recognizing the 'self' in the 'other'. Indeed, despite Benjamin's optimism about the inter-subjective possibilities of reciprocal attunement, Lacan says neither the mother's needs can be recognized through the behaviour of the child, nor can the child's needs be met through the behaviour of the mother, so long as those needs are communicated in

⁴¹ Lacan, *ibid.* at 286 and 311.

⁴² See Hélène Cixous's "Castration or Decapitation?", *supra*, note 27 at 46: She says here that "[the] phallus, in Lacanian parlance also called the 'transcendental signifier,' transcendental precisely as primary organizer of the structure of subjectivity, is what, for psychoanalysis, inscribes its effects, its effects of castration and resistance to castration and hence the very organization of language, as unconscious relations, and so it is the phallus that is said to constitute the a priori condition of all symbolic functioning. This has important implications as far as the body is concerned: the body is not sexed, does not recognize itself as, say, female or male without having gone through the castration complex."

speech (and at a later stage of cognitive development, in writing).⁴³

Moreover, and more importantly, Lacan points out that the dominant symbols of communication throughout human history are disproportionately centered around the male sex organ.⁴⁴ Assuming, that is, that the meaning or referent of any particular historical discourse can be traced to a pre-discursive need to articulate oneself or a conscious demand for recognition, Lacan is saying that the chosen mode of articulation has predominantly centered around the symbolic role or figure of the male penis in male psychic life.⁴⁵ This would suggest that the various ways in which human beings have become accustomed to expressing their needs are privileged or biased in favor of male sexual interests.

According to J. C. Smith, the practice and institution of law is precisely one such form of collective neurotic expression which has its roots in male sexuality (male sexual self-interest or

⁴³ Lacan, *supra*, note 4 at 285-86.

⁴⁴ Lacan, *ibid*.

⁴⁵ Lynne Segal elaborates on this point in the following terms; "[within] language, Lacan had affirmed the pre-eminent and essential role of the phallus (as symbolic of but from distinct from the biological organ, the penis) in the social construction of subjectivity: masculinity and femininity. Within patriarchal culture the child can only see itself represented through a sexual differentiation where the phallus is the privileged signifier, and the symbol of the power and law of the father, of patriarchy itself. The phallus is the privileged signifier because it is only with reference to the phallus, the possession or lack of the phallus, that the subject can take up an identity as a sexed being. And it is only in taking up an identity as a sexed being that the child can enter as a subject into language, into the symbolic order": L. Segal, *Is the Future Female?*, *supra*, note 30 at 123.

desire).⁴⁶ Like Lacan, Professor Smith traces the origin and development of law to the will of the Father ("family, royal, or heavenly")⁴⁷ and the symbolic privilege which nearly three millenia of human history and culture has afforded the male sex organ *vis-a-vis* the female reproductive organs.⁴⁸ This vast temporal period is marked by both an ideological and practical subordination of woman's interests to male sexual prerogatives. Beginning with religion and the Heavenly father figure, and continuing through kingship and the "divine right of kings" (or royal-father figures) until the present day common law (and secular father-figures), Smith observes how the exercise of the paternal will has always constituted law, and that this law has reflected the values of patriarchy which entails the proprietary and hence physical

⁴⁶ See generally J. C. Smith, *Neurotic Foundations*, *supra*, note 14.

⁴⁷ Smith, *ibid.* at 280 and 282-287.

⁴⁸ The notion of a "symbol" within Lacanian discourse bears a technical significance which I do not intend to employ for my own purposes. Lacan's notion of "symbol" relates to the practice among various ancient tribes or kinships of giving gifts to men who would newly introduce themselves to a particular kinship and engage in the commerce or exchange of women with that kinship. The giving of a gift was "symbolic" in the sense that the gift itself was typically useless, and in the sense that the act of giving the gift entailed the male recipient's formal entry into the matrimonial legal regime of the gift-giving kinship: see Lacan, *ibid.* at 61-65.

For my part, unless otherwise specified, I will use the words "symbol" and "symbolic" in a fairly broad and non-technical sense. In effect I will treat symbols as hermeneutically vested signs, whether these are constituted by words and pictures, or images composed from physical materials, or simple physical gestures. To the extent that any image, imprint, gesture, or structure has a referent or meaning according to some other image, imprint, gesture, or structure, it is symbolic on my terms.

dominion over women.⁴⁹ According to Smith, the penis or the male phallic symbol is central to the continuation of patriarchal society insofar as the physiological and psychological implications of the male penis determine the exercise of the paternal will. As he says,

The biologically and hormonally induced need of the human male for constant reoccurring sexual satisfaction, and the capacity of the female to give or deny it creates the analogue of a master-slave relationship in terms of this power...The morality of patriarchy robs the female of the will to power and turns a capacity to deny sexual satisfaction into a duty to provide it.⁵⁰

⁴⁹ See Smith, *Neurotic Foundations*, *supra*, note 14 at 280-288. See also J. C. Smith, "The Sexuality of Politics: Psychoanalysis, Postmodernism, and Feminism" (Faculty of Law, University of British Columbia, 1992) [unpublished] at 7.

Lacan also observes how law has served to entrench male, paternalistic authority within society through the practice of assigning a male person's surname to newborn children. This occurs in two stages. First, to the extent that there may well be an issue of paternity with respect to the birth of the child, the act of giving the child a man's name is equivalent to creating a "father" for that child. Second, by assigning a "father" to a child proprietorial dominion over the child is removed from a woman and placed in the hands of a man. That is to say, whatever legal authority a woman might be entitled to exercise over the child, by virtue of the fact that she gave birth to him or her, is subsequently lost in favor of the legal authority that a man acquires by becoming a father: see Lacan, *Écrits*, *supra*, note 4 at 66-67. Mary O'Brien elaborates upon the patriarchal implications of the issue of paternity when she says, "[to] suggest that men in general are indifferent to paternity is to make nonsense of centuries of strenuous masculine activity to negate the uncertainty of fatherhood, activity of which the institution of marriage is only the most obvious example": M. O'Brien, *The Politics of Reproduction* (Boston, Mass.: Routledge & Kegan Paul, 1981) at 49.

⁵⁰ J. C. Smith, "The Sexuality of Politics", *ibid.* at 6. In anticipation of the criticism that Professor Smith's reference to "the biologically and hormonally induced need of the human male for constant reoccurring sexual satisfaction" sounds "essentialist" - that is, that it relies on a view of men and women as somehow *essentially* or *naturally* different in certain respects (beyond the purely visible anatomical differences) - it is important to note that Professor Smith's observation appears to bear much *scientific*

Smith cites legal and religious texts from many traditions - Indian, Hindu, Buddhist, Judaeo-Christian and Islamic - as evidence of the overwhelming implication of law in the sexual oppression of women by men.⁵¹ For Smith, however, the law is not contingent in this respect. To the extent that the law reflects the will of the Father, and the Father is defined as a man who exercises authority over women,⁵² Smith argues that the law must necessarily entail a hierarchical social ordering between the sexes.⁵³ In Chapter 4 of this essay we will observe how Smith relates legal discourse in particular to the proliferation of pornography across North American and Western European culture. For the moment, however,

scrutiny. A recent article in *The Economist* states that "[it] is perverse to deny the connection between testosterone and innate male aggressiveness": "Nature or Nurture? Old Chestnut, new thoughts" *The Economist* (December 26 1992 -January 8 1993) Vol. 325, at 34.

It is also important to note that the production of testosterone in males does not in and of itself dictate whether men will be homosexual or heterosexual, although this latter distinction appears to be at least partially conditioned by biology. *The Economist* article states that "[t]he brain of a fetus is altered by the child's genes, by its and its mother's hormones and, after birth, by its learning. Many of the changes are permanent; so far as the adult is concerned, they are all 'nature', though many are not genetic. For example, the human brain is feminine unless acted upon by male hormones during two bursts--one in the womb and another at puberty. The hormone is nurture, in the sense that it can be altered by injections or drugs taken by the mother. But it is nature in the sense that it is a product of the body's biology": "Nature or Nurture?", *ibid.* at 36. See also C. Burr, "Homosexuality and Biology" *The Atlantic* (March 1993) 47.

⁵¹ See J. C. Smith, *Neurotic Foundations*, *supra*, note 14 at 288-291; see also J. C. Smith, "The Sexuality of Politics", *supra*, note 49 at 6 and 8.

⁵² See J. C. Smith, "The Sexuality of Politics", *ibid.* at 7.

⁵³ J. C. Smith, *Neurotic Foundations*, *supra*, note 14 at 291.

Smith's broader argument is relevant because it supports Benjamin's observation that, within the patriarchal family setting, women are bound to be treated as inferior to men. Benjamin blames this engendered sense of female inferiority on the divisive tendencies of rationality, at least insofar as this acquired form of knowledge (cognition) intrudes upon neo-natal and early infantile forms of knowledge (recognition). Smith blames our acculturated disrespect for women on the law, especially as its operation is profoundly attached to the dictates of male desire. In the next chapter I will attempt to combine Smith's thesis with Benjamin's thesis by suggesting that the language of law is intimately related the language of rationality. This synthesis may enable us to understand in more detail the nature of law's relation to female subjugation.

CHAPTER 2 - THE RATIONALITY OF LAW AND SCIENCE

Rational thought is interpretation according to a scheme which we cannot escape.

Friedrich Nietzsche, *The Will to Power*

...a theory or a politics that cannot cope with contradiction, that denies the irrational, that tries to sanitize the erotic, fantastic components of human life cannot visualize an authentic end to domination but can only vacate the field.

Jessica Benjamin, *The Bonds of Love*

In her essay, "The History of Mainstream Legal Thought", Elizabeth Mensch remarks that "[routinely], the justificatory language of law parades as the unquestionable embodiment of Reason and Universal Truth."⁵⁴ Certainly, the common law notion of *ratio decendi* implies that the judicial decision-making process considers itself to be inherently rational, and to the extent that case law carries varying degrees of *authority* within the parameters of legal discourse and practice, the common law would appear to represent "the unquestionable embodiment of Reason." As for its claim to Universal Truth, this is amplified through law's historical

⁵⁴ Elizabeth Mensch, "The History of Mainstream Legal Thought", in the Revised Edition of *The Politics of Law: A Progressive Critique*, ed. David Kairys (New York, N. Y.: Pantheon Books, 1982) 13.

association with the *logos* and the will of the heavenly Father,⁵⁵ and reflected in the common law processes of litigation, whereby opposing or *adversarial* claims to truth and knowledge are tried and tested in court with a view to discerning an ultimate, or single truth. Indeed, it is not uncommon for a Crown prosecutor to be reminded in private or public that criminal proceedings against an accused person are not about 'winning or losing' but rather about discerning the truth behind the Crown's accusation.

In this chapter I will address both the issue of the theological underpinnings of legal discourse and the issue of the rationalistic pretences of legal methodology (at the level of both case-by-case decision-making and general litigation procedure). The former issue will lead us to a consideration of the broader moral basis behind much legal discourse, which I will argue is highly puritan and therefore denigrative of human sexuality. The latter will lead us to an appreciation of the way law entrenches Cartesian epistemology and thereby transforms disruptive, personal and social chaos into an objectified, coherent and orderly, but nonetheless distorted, view of human nature. I will address these broader implications of law's claim to rationality for human sexuality in the next chapter. For the moment, however, let me simply concentrate on the issue of legal methodology and its theoretical pretension to rationality and objectivity. I will follow this discussion with an analysis of the moral overtones of

⁵⁵ See J. C. Smith, "The Sexuality of Politics", *supra*, note 49 at 7. He says here that "[the] will of the father is the law, and the proclamation of the will is a production of the mind."

law.

In her work *Feminism and the Power of Law*⁵⁶ Carol Smart outlines how the adversarial procedure of criminal law in the United Kingdom resembles the so-called scientific or empirical method in practice, and how both practices become powerful based on their historical claims to objective truth. Beyond the more mundane points of comparison that I would suggest, such as the initial formulation of a hypothesis or the accusation of guilt, and the assessment of different kinds of data or evidence (oral, written, physical, circumstantial) according to various self-imposed standards (relevancy) and tests (reasonable person, community standards), Smart observes that legal method is integrally related to "a binary system of logic".⁵⁷ She says that "the binary system of logic refers to the way in which we think in oppositional terms. For example active/passive, truth/lie, culture/nature, rationality/emotionality, man/woman."⁵⁸ For her part Smart is particularly concerned about the way law has applied certain binary opposites to rape cases in a way that has tended to render woman's experience of sex personally and legally irrelevant. She notes in particular that the pair of opposites consent/non-consent have traditionally determined the guilt/innocence of an

⁵⁶ C. Smart, *Feminism and the Power of Law* (London and New York: Routledge, 1989).

⁵⁷ Smart, *ibid.* at 33.

⁵⁸ Smart, *ibid.*

alleged rapist.⁵⁹ This has proved detrimental to female victims of sexual assault, she argues, because "the consent/non-consent dyad is completely irrelevant to women's experience of sex."⁶⁰ Smart explains that "[neither] begins to approach the complexity of a woman's position when she is being sexually propositioned or abused."⁶¹

Smart's analysis in the above respect is particularly germane to recent developments in Canadian sexual assault law reform. With the enactment of Bill C-49 the Parliament of Canada has made the issue of consent an essential element of sexual assault law. It is no longer merely a *fact* to be considered in assessing the culpability of an accused sexual assaulter. Although this development does not explicitly address Smart's concern that the consent/non-consent dichotomy is inappropriate in the context of sexual assault, the Canadian Bill is somewhat novel in that it removes the pre-existing defence of mistake of fact (as to whether or not the complainant consented) where the accused "did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."⁶² It responds partially to Smart's concern because it places an onus on

⁵⁹ This is also true in Canadian criminal law, which makes consent an essential element of sexual assault.

⁶⁰ Smart, *supra*, note 56 at 33.

⁶¹ Smart, *ibid.*

⁶² See the *Criminal Code*, R.S.C. 1985, c.C-46, s.273, as am. "An Act to Amend the Criminal Code (sexual assault)", 1992, C.38, s.1.

persons seeking to engage in sexual activities with others to make a reasonable effort to ascertain whether they are agreeable or not in respect of those activities. It removes the onus on the victim to establish non-consent and places the onus on the accused to prove consent. This shift in onus may properly be seen as a victory for victims of sexual assault who feel doubly victimized by the need at times to convince a court of law that their experience with respect to the consensual nature of the act in question is somehow more credible than that of the accused.

Despite the apparent benefit of the sexual assault reform to women⁶³ I suspect that the new law will continue to be problematic for women not simply because it retains the binary consent/non-consent framework for determining sexual assault issues but because it erects a standard for criminal culpability around a notion of "reasonableness" that may not necessarily accord with precisely what Smart refers to as "women's experience of sex." Indeed, one of the central conceptual dichotomies of scientific discourse is that of subject/object. Smart omits express reference to this dichotomy in her list of oppositional terms but it is clearly relevant both to scientific methodology and criminal procedure. As I have already suggested, at least two of the hallmarks of scientific discourse and methodology are its claim to objectivity - if not ultimately to *objective* truth - and its assumption of

⁶³ Although I would readily concede that women are not the only victims of sexual assault I am nonetheless limiting my analysis of the scientific implications of law to female victimization.

rationality. The use of standards (of measurement) and abstract formulas by the scientific community at large attests to its belief that scientific knowledge can be applied universally and shared among all rational beings. In this broad sense, science purports to be objective and pretends to be rational.

Likewise, law pretends to be objective through the logical application of legal doctrine and legal standards or norms to particular fact-situations. Moreover, law *privileges* objectivity to the extent that it uses so-called "objective" tests to a far greater degree than "subjective" tests in the determination of legal and factual issues. Certainly much of classic tort law doctrine such as "duty of care" and "reasonable foreseeability", as well as contract law doctrine revolves around the notion of a "reasonable" or "ordinary person", and criminal law is becoming increasingly preoccupied with objective modes of proof.⁶⁴ And the fact that objectivity in these respects is synonymous with reasonableness further suggests that *reasonableness* or *rationality* generally holds a privileged place in legal discourse, and indeed, in legal *reasoning*.⁶⁵

⁶⁴ See, for example, the recent proposals by the Canadian Bar Association and the House of Commons Standing Committee on Justice and the Solicitor General concerning a recodification of the general principles of Canadian criminal law.

⁶⁵ My point here is simply to question the fact that reasonableness is never measured in law against a *standard of unreasonableness* or a *norm of irrationality*. The law simply does not determine legal issues by reference to the question, what would the unreasonable or irrational person do, although I readily concede that by implication and comparison to the "reasonable person" people are often deemed to be unreasonable. The problem with treating rationality as a valid legal norm is that irrational

The relevance of this broad comparison between legal method and discourse and scientific method and discourse to the discussion at hand is that the privilege which both law and science attribute to objectivity reflects an acculturated form of genderization or *sexism*. As Evelyn Fox Keller writes,

Science bears the imprint of its genderization not only in the ways it is used but in the description of reality it offers....Having divided the world into two parts--the knower (mind) and the knowable (nature)--scientific ideology goes on to prescribe a very specific relation between the two. It prescribes the interrelations which can consummate this union, that is, which can lead to knowledge. Not only are mind and nature assigned gender, but in characterizing scientific and objective thought as masculine, the very activity by which the knower can acquire knowledge is also genderized. The relation specified between knower and known is one of distance and separation. It is that between a subject and an object radically divided, which is to say, no worldly relation. Simply put, nature is objectified. Bacon's "chaste and lawful" marriage is consummated through reason rather than feeling, through "observation" rather than "immediate" sensory experience. The modes of intercourse are defined so as to ensure emotional and physical inviolability for the subject. Concurrent with the division of the world into subject and object is, accordingly, a division of the forms of knowledge into "subjective" and "objective". The scientific mind is set apart from what is to be known, that is, from nature, and its autonomy--and hence reciprocal autonomy of the object--is guaranteed (or so it has been traditionally assumed) by setting apart its modes of knowing from those in which that dichotomy is threatened. In the process, the characterization of both the scientific mind and its modes of access to knowledge as masculine is indeed significant. Masculine here connotes, as it so often does, autonomy, separation, and distance. It connotes a radical rejection of any commingling of subject and object, which are, it now appears, quite consistently

behaviour in certain legal contexts then becomes seen as *abnormal*, and as possibly *deviant*, if not *undesirable*. But I can imagine legal contexts where legally defined irrational behaviour (perhaps involving different kinds of impassioned, political protest) could be desirable as a matter of improving societal health generally and especially relations between men and women.

identified as male and female.⁶⁶

Keller's argument regarding the genderization of science, and objective and subjective forms of knowledge, relies upon the same kinds of observation that Jessica Benjamin makes in respect to her notion of rationalized violence and erotic domination.⁶⁷ The central concern of both thinkers is that within a patriarchal culture early childhood emotional and cognitive maturation involves radical processes of individuation and separation that result in a cognitive diminution of women. Relying on some basic Freudian psychoanalysis, Keller's own analysis is instructive because it explains how, prior to the process of individuation and separation, the epistemological bond between mother and child is undelineated or undifferentiated.⁶⁸ Insofar as the child lacks a sense of

⁶⁶ Evelyn Fox Keller, *Reflections on Gender and Science* (New Haven and London: Yale University Press, 1985) at 79.

⁶⁷ See J. Benjamin, "Rational Violence and Erotic Domination", *supra*, note 3 at 46. See also C. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) at 121-122. MacKinnon echoes Keller's view that scientific discourse has become the dominant discourse throughout history in her statement that the "male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality....What is objectively known corresponds to the world and can be verified by being pointed to (as science does) because the world itself is controlled from the same point of view."

⁶⁸ It is important to note here that Mary O'Brien relies on this observation to support a distinction between what might be called 'masculine' and 'feminine' modes of knowledge: see M. O'Brien, *The Politics of Reproduction*, *supra*, note 49 at 149-150. For her, traditionally masculine modes of knowledge (for example, scientific forms of knowledge) involve an element of *mediacy*. I would argue that this element is evident wherever we use physical tools or scientific instruments, or wherever we use intellectual

"self" apart from its purely sensual, reflexive and affective relationship with its mother, the mother figure constitutes "the first and most primitive subject".⁶⁹ However, Keller notes, at precisely that stage where the child either decides to identify with the father or mother, or to separate from the mother, the mother becomes "the first object."⁷⁰ As we have already observed, at least the male child identifies with the father because he appears more powerful and independent than the mother, and even where the female identifies with the mother, she is objectified as being somehow dependent and servile. For Keller, the privilege of radical dualism as an epistemological model in patriarchal society is reflected precisely in the figure and role of the father in early childhood development. She states that, at least within the context of the so-called Oedipal stage, "[it] is the father who comes to stand for individuation and differentiation".⁷¹ Thus, Keller is ultimately proposing that, to the extent that scientific discourse is generally premised on radical dichotomies of subject/object, cause/effect, and mind/body (or culture/nature), the infantile impression of the mother as non-dichotomized, acting in conjunction with the childhood association of the father with

tools such as concepts, categorizations, and discourses, to understand the world around us. On the other hand, traditionally feminine modes of knowledge would appear to be *immediate* in the sense that they are either primarily sensual, or affective, or immediately tactile.

⁶⁹ Keller, *ibid.* at 86.

⁷⁰ Keller, *ibid.*

⁷¹ Keller, *ibid.*

separation and distantiation, has translated on a cultural level into a genderized epistemology.⁷² Cognitive experience, rationality, and science become masculine by virtue of their association with the father-figure, and non-cognitive experience, sensuality, and possibly irrationality become feminine by virtue of their association with the mother-figure.⁷³

If Keller and Benjamin are correct in proposing that the privilege which our society accords cognitive experience in general - that is, objective modes of knowing and seeing - tends to devalue not only female subjectivity but maternity as well, then it would

⁷² Keller, *ibid.* at 87.

⁷³ Again, the crux of genderization appears to lie in the role that feminine and masculine archetypes play in determining the contents of the human unconscious. J. C. Smith defines the archetypes of father and mother as "structural aspects of information, which are stored in the unconscious but shape information at the conscious level": Smith, *Neurotic Foundations*, *supra*, note 14 at 146. These archetypes affect individual and collective psychic development, Professor Smith explains (paraphrasing the work of Erich Neumann), insofar as "the individual psyche passes through archetypal phases or stages of development which follow a pattern to be found in the evolution of human consciousness": Smith, *ibid.* at 137. To the extent that one can imagine the possibility of a radical shift in the structural material of the human unconsciousness (which would depend empirically on the transcendence of patriarchal culture) it is possible to imagine a reversal of our patriarchal association of cognitive or intellectual endeavour with masculinity and non-cognitive or sensual experience with femininity. This possibility is important for some feminists who believe that the patriarchal structure of the contents of the unconscious renders women powerless. See, for example, H. Cixous, "Castration or Decapitation?", *supra*, note 27 at 47. She observes here that our most prominent archetypal character or 'figure' of femininity is the *hysteric*, in stark opposition to our acculturated masculine father-figure the *analyst*, and she states that "without the hysteric, there's no father...without the hysteric, no master, no analyst, no analysis! She's the *unorganizable* feminine construct, whose power of producing the other is a power that never returns to her."

seem important for women to question the tendency in law toward objectivity.⁷⁴ So-called 'objective' determinations of reasonableness, according to the logic of these two thinkers, will invariably be tainted by patriarchal values and a denigration of female sexuality. Indeed, without some kind of culture-wide sexual revolution even a gender-neutral "reasonable person" will be predominantly masculine or male-oriented, simply by virtue of our acculturated association of rationality with masculinity. But I will address this concern in the next chapter. At this point I would like to turn my attention to the moral aspect of law's radical dualism or epistemological bias in favor of the will of the Father (over the love of the Mother). Despite the slender possibility of overcoming a deep-rooted cultural predilection for scientific solutions, the epistemological bias of radical dualism in law nevertheless carries with it moral overtones which serve to perpetuate and ensure the legalized subordination of women to men.

In his *On the Genealogy of Morals*⁷⁵ Nietzsche stipulates that rational thought or critical analysis under the guise of science plays a similar role in the perpetuation of hierarchical social arrangements as the "ascetic ideal" of the priest.⁷⁶ Indeed,

⁷⁴ At least that is my concern with respect to various areas of criminal law, such as sexual assault and pornography, which pertain directly to issues of female autonomy and liberty.

⁷⁵ Friedrich Nietzsche, *On the Genealogy of Morals*, *supra*, note 1.

⁷⁶ Nietzsche discusses the ascetic ideal in the context of a broader discussion about the contemplative dispositions of priests, philosophers, artists, and scientists. He claims that "[the] three great slogans of the ascetic ideal are familiar: poverty, humility,

Nietzsche goes so far as to say that in the modern world science is "the latest and most noble form" of the ascetic ideal.⁷⁷ The proliferation of scientific discourse and activity throughout the

and chastity": Nietzsche, *ibid.*, at Section 8. For Nietzsche, the contemplative manner of existence associated with the figure of the priest specifically focusses on matters of "purity" and "impurity", and "health" and "sickness", which ultimately relate to matters of human sensuality and sexuality: *ibid.*, First Essay at Section 6. The "ascetic ideal" of the priest therefore becomes a kind of religious-moral interpretation or meaning of "life" as pure and painless, asensual and atemporal, and godly and heavenly, which the priest employs as a routine part of his professional vocation: *ibid.*, Third Essay at Sections 10 and 11.

Nietzsche is critical of the priestly vocation for many reasons. One of these reasons is especially germane to my thesis. Nietzsche recognizes that throughout history there has always been political inequality between distinct socio-economic classes of individuals. The politically oppressed classes can be recognized, Nietzsche stipulates, by the general sense of discontentment that they share and by the resentment that they display toward the politically dominant classes. For Nietzsche, the 'evil' of the priests consists in his ability to convince the discontents that they are personally responsible for their own sense of discontentment and discomfiture. It is the priest, that is, that makes these people feel guilty in a religious-moral sense for their own oppressive situation. The priest then exploits this sense of guilt insofar as he prescribes various cures or activities for pain and suffering which require a profound excitation of the senses (such as repentance, contrition, and redemption): Nietzsche, *ibid.*, Third Essay at Section 21. The inevitable result of such a prescription, according to Nietzsche, is never an improvement in physiological and psychological health, but on the contrary, an increase in the previous degree of sickness. This is because, for Nietzsche, an excitation of the senses among the physically inhibited always entails an increased sense of guilt, which Nietzsche associates with ill health generally. In his words, "one need only ask psychiatrists what happens to patients who are methodically subjected to the torments of repentance, states of contrition, and fits of redemption. One should also consult history: wherever the ascetic priest has prevailed with this treatment, sickness has spread in depth and breadth with astonishing speed. What has always constituted its "success"? A shattered nervous system added to any existing illness -- and this on the largest as on the smallest scale, in individuals as in masses": Nietzsche, *ibid.*, Third Essay at Section 21.

⁷⁷ Nietzsche, *ibid.*, Third Essay at Section 23.

modern world becomes simply another sign of physiological discomfort and cultural discontentment. In this case Nietzsche suggests that the attempt to conceal one's physiological displeasure through science is a deep-seated physiological reaction to the false sense of "petty pleasure" or happiness that we have inherited from the protestant work ethic and Judaeo-Christian religious doctrine. He says

science today is a *hiding place* for every kind of discontent, disbelief, gnawing worm, *despectio sui*, bad conscience -- it is the unrest of the *lack* of ideals, the suffering from the *lack* of any great love, the discontent in the face of involuntary contentment.⁷⁸

In effect, Nietzsche views the scientist as being ultimately inhibited or "constrained" in the same way as the ascetic priest because both the scientist and the priest share a common *faith* in a "metaphysical value" or an "absolute value of truth".⁷⁹ Whereas the priest posits the figure of God as that absolute value, the scientist dogmatically posits objective truth. Yet for Nietzsche both forms of therapy must ultimately result in an increased degeneration or sickening of the very people for whom they were purportedly intended to cure. This is because the very activity of positing a transcendental goal and pursuing an abstract ideal involves a diminution of one's animality and a blunting of one's instincts, and for Nietzsche the act of taming human sensuality necessarily entails physiological regress or decay.

⁷⁸ Nietzsche, *ibid.* Third Essay at Section 23.

⁷⁹ Nietzsche, *ibid.* Third Essay at Sections 24 and 25.

The relevance of Nietzsche's anti-scientific polemic (for our purposes) is that it furthers an explanation for the tendency of law to inflict puritanical values upon individuals whose behaviour appears to conflict with those values. We have already observed how legal method and discourse, because of their emphasis on rationality and objectivity, reflects a cultural bias in favor of a paternal will and a patriarchal social order. The mother or maternal figure is physically subordinated to the intellectual dictates of the father within this patriarchal setting.⁸⁰ This means that the female body is socially devalued except at the level of an abstraction, image or object. Thus her breasts, her womb, and her genitalia have no inherent value in a patriarchal society except as a vessel for male pleasure and as a means for procreation or reproduction. The tendency of law therefore to enforce rationalistic and puritannical moral standards in court bears a special importance to women's lives because it is precisely *real, live* women's bodies and female sensual expression that the paternal, 'ascetic' will sets over and against itself as the proper matter for regulation⁸¹ - that is, as the radical 'other', as

⁸⁰ J. C. Smith makes a similar observation when he states that "[by] placing concepts over conception (females conceive, but males have concepts), mind over body, culture over nature, and above all, man over woman, the male denies his true identity as a biped primate which has evolved a brain big enough to store and process information in unique ways. He views himself as god, hero, king, and patriarch. Women are devalued because their unique role in the reproductive process is devalued": Smith, *Neurotic Foundations*, *supra*, note 14 at 199.

⁸¹ By referring to women's bodies as the proper matter for regulation within a patriarchal setting I am not suggesting that the common law has ever purported to restrict the physical liberty

'subjective', as contrary to itself, as offensive, and as possibly criminal.

Anna Clark has documented the course of rape trials throughout eighteenth and nineteenth century England in her *Women's Silence, Men's Violence*.⁸² In this work she reveals how the criminal law at the time was able to exploit the Judae-Christian emphasis on female chastity in a way which entailed the effective regulation of female physical liberty. For example, she states that "[magistrates], judges and journalists dealing with rape cases began to introduce the idea that rape imperilled women's safety in the evening streets" so, "while men could travel freely, 'respectable' women would be safe only at home."⁸³ In turn, she remarks, "[these] notions helped enforce the burgeoning bourgeois ideology of separate spheres: that women belonged in the domestic sphere of the home, nurturant but sheltered, while men braved the hurly-burly of the marketplace and the streets."⁸⁴

and expression of women in an obvious or explicit way. In terms of the black-letter of the law I am prepared to concede contrary; namely, that the common law has more or less purported to regulate the conduct of men: see Smith, *Neurotic Foundations*, supra, note 14 at 289. However, borrowing from some Canadian case law, as well as the psychoanalytic observations and theories of Freud, Smith, and Lacan, I will argue that the law is tacitly concerned to regulate female sexuality in a way that enables men to control their erotic needs and sexual desires. Female sexuality becomes effectively regulated in this sense as a function of the purported regulation of male sexuality.

⁸² Anna Clark, *Women's Silence, Men's Violence* (London and New York: Pandora, 1987).

⁸³ Clark, *ibid.* at 3.

⁸⁴ Clark, *ibid.*

Furthermore, Clark observes how the applicability of rape law to male assailants in eighteenth century England was conditional on the proprietary value which was attached to married women by virtue of the fact that, under a patriarchal legal regime, these women were the legal property of their husbands. She explains that, because rape law was effectively related to the institution of marriage, rape law became irrelevant in situations where a married woman's chastity became sullied and the fidelity of the marital relationship became damaged (for example, should a woman be found out to have engaged in extra-marital sexual intercourse, either wilfully or against her will).⁸⁵ If women wanted legal protection from rape then they were encouraged not only to stay at home (to avoid the dangers of the public streets) but also to confine their sexual behaviour to activities with their husbands. It is in this way that British rape law had the effect of regulating female conduct, despite the fact that it was devised primarily to protect women from male conduct. Clark states further in this regard,

the notion of female sexuality as a thing, or as property, encourages men to believe they have a right to 'obtain' female sexuality: by paying for sex, as in prostitution or traditional marriage; by defrauding them as in seduction; or taking it by force, as in rape. If a woman did not behave in a chaste manner, she became fair game to any man.⁸⁶

In *Feminism and the Power of Law* Carol Smart further relates

⁸⁵ Clark, *ibid.* at 7.

⁸⁶ Clark, *ibid.*

the moral puritanism of Victorian England and the general importance of medical knowledge at that time to the discriminatory application of British criminal laws against women. In reference to a recent study by Judith Walkowitz concerning prostitution in Victorian England Smart states that

The main contribution of this research for an understanding of law [is] that it provides a more profound understanding of how medical knowledge and legal discourse formed an alliance to regulate behaviours which were interpreted as injurious to public and individual health (moral and social). The significance of women's bodies, and the reasons why female rather than male bodies became problematic are clearly linked to gender domination, but also to *the religious discourse of the moral crusades, superstition and medical knowledge about woman's reproductive functions, the Victorian association of sex with disgust and guilt, and the maintenance of male military morale.*⁸⁷

Perhaps one of the best Canadian examples of the chaste marriage between puritan morality and law, as reflected in the tendency of law to view human nature through a scientific lens, is illustrated in the case *R. v. Jacob*.⁸⁸ Slightly over a year ago a 19-year-old female university student was arrested for walking bare-breasted down a main street in the city of Guelph, Ontario. She was charged with committing an indecent act pursuant to s.171(1)(a) of the *Criminal Code*.⁸⁹ Some of the circumstances surrounding the offence were that Ms. Jacob was seen walking bare-

⁸⁷ C. Smart, *supra*, note 56 at 94 (my emphasis).

⁸⁸ *R. v. Jacob* (17 January 1992), Guelph, O.J. No. 165 (Ont. Court of Justice).

⁸⁹ *Criminal Code*, R.S.C. 1985 c.C-46, s.171(1)(a).

breasted from the hours of 5:00 PM and 7:00 PM by various residents of Guelph, both male and female, young and old, that Ms. Jacob refused to wear her shirt when requested to do so by various police officers, that young children pointed out Ms. Jacob's nudity to their parents, that some young males retrieved binoculars for the occasion while other, older males, made rude comments. Of course, it should also be noted that the outdoor temperature in Guelph on the day in question was slightly higher than 30 degrees celsius.

Ms. Jacob challenged the allegation of indecency on two grounds. First, she testified at trial that her primary motivation for walking bare-breasted on the day in question concerned the unusually high temperature. In his written judgment, Judge Payne paraphrased Ms. Jacob's testimony in the above respect as saying "that it was a hot day and that she felt that she would be cooler if she moved about the city without her shirt on".⁹⁰ Second, Ms. Jacob argued that she had a constitutional right to walk bare-breasted in public pursuant to section 15 of the Canadian *Charter of Rights and Freedoms*.⁹¹ In Judge Payne's words, Miss Jacob conceded that "since men were apparently allowed to [walk topless in public], she felt that her equality before the law permitted her to do the same."⁹² I will discuss this constitutional argument in the next chapter.

⁹⁰ *R. v. Jacob*, *supra*, note 88 at 2.

⁹¹ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

⁹² *R. v. Jacob*, *ibid*.

The *Jacob* case is crucial to our present discussion on at least two levels. On the first level, as we will see, the judicial interpretation of indecency as applied to the facts of *Jacob* reflect the same kind of "false differentiation" that we discussed in Chapter 1. Relying on this notion I will attempt to show how the effect of the juristic objectification of women in this case is extremely deleterious to the lives of women and the health of our society as a whole. On the second level, the judicial analysis and circumstantial evidence of the case discloses a remarkable societal fear of women and female sexuality, especially when it is presented non-objectively as autonomous, independent, liberated and powerful. I will argue that this fear translates in political-legal terms to a highly patriarchal and indeed, *misogynistic*, society.

To begin our discussion of "false differentiation" then, it is important to observe how Judge Payne's approach to the issue of the constitutionality of s.171(1)(a) immediately relegates the significance of Ms. Jacob's personal desires in the circumstances to the background of the judicial analysis. He places at the foreground of this analysis a discussion of "the community standard of tolerance" with respect to certain kinds of so-called indecent behaviour.⁹³ In effect, Judge Payne quickly robs Ms. Jacob of her 'subjectivity' and replaces that with an objective representation - namely, the image of Ms. Jacob's naked upper body, and more specifically her breasts, as *these are perceived by various members of the public*. Moreover, by ascribing little weight to Ms. Jacob's

⁹³ *R. v. Jacob, ibid.* at 2.

rationale for her behaviour in favor of an objective test such as "community standards" (and ultimately an overall objective approach involving community standards, statutory interpretation, and legal precedent), Judge Payne effectively alienates Ms. Jacob from the very community in which she otherwise participates, and which is now relied upon to determine her criminal culpability.⁹⁴

Judge Payne then proceeds to review various kinds of evidence purporting to inform the local community standards test with respect to issues of indecency and public nudity. He also reviews case law concerning *Criminal Code* indecency provisions but fails to arrive at any kind of judicial consensus regarding a cogent methodology or precise standard for determining the issue of decency in the case at bar.⁹⁵ Despite this failure he insists that

⁹⁴ In this respect my problem with the community standards test for both obscenity and indecency is precisely that which the Fraser Committee identified in the *Report of the Special Committee on Pornography and Prostitution* (Ottawa, Ont.: Department of Justice Working Paper, 1985), namely, that an objective determination for intolerance (that is, for what might properly be considered a matter of personal aesthetics or 'subjective' taste) is inappropriate for deciding criminality: see also J. L. Lowman, M. A. Jackson, T. S. Palys, and S. Gavigan, eds., *Regulating Sex* (Burnaby, B.C.: School of Criminology, Simon Fraser University, 1986) at 135.

⁹⁵ It is important to note here that in the course of his analysis Judge Payne cites two Canadian cases which expressly contemplate the efficacy of a subjective approach to determining issues of indecency and obscenity. First he cites the case of *R. v. Hecker* (1980), 58 C.C.C. (2d) 66 (Yukon Terr. Ct.). In this case Chief Judge Stuart appears torn between the theoretical need for an objective approach to determining "community standards" and the practical impossibility of approaching this same issue with any genuine sense of objectivity. Thus, at page 68 of *Hecker* Chief Judge Stuart concedes that "[i]n the absence of any evidence and even in the face of evidence, the personal experiences of the Judge unavoidably compose part of the mix producing the assessment of general community standards. The hypocrisy of depicting as

It is important...to consider the exposure of the female breasts in the context of definitions as enunciated by various levels of the court to determine whether the act constitutes an indecent act within the meaning of the

objective this process of determining and applying community standards can be somewhat redressed by attending to the admonition of Judge Kierans and the guide-lines recommended by Freedman J.A."

The admonition of Judge Kierans concerns precisely the inevitable autobiographical bias which any judge must bring to bear on questions of "reasonableness", "objectivity", and "community standards": see the judgment of Kierans D.C.J. in *Re Regina and Provincial News Co. Ltd.* (1973), 18 C.C.C. (2d) 202 at 203-204, [1974] 5 W.W.R. 289 at 289-90 [hereinafter *Provincial News Co. Ltd.* cited to C.C.C.]. And the guidelines recommended by Freedman J.A. stipulate that "objective" standards of obscenity should reflect the "general average of community thinking and feeling", and that community standards generally should be measured from a contemporary, Canadian point of view: see the dissenting judgment of Freedman J.A. in *R. v. Dominion News & Gifts (1962) Ltd.*, [1963] 2 C.C.C. 103 at 116-17, 40 C.R. 109 at 126-27, 42 W.W.R. 65.

The quoted dicta of Judge Kierans is especially remarkable for our purposes because it suggests the possibility that, in certain circumstances, the only way for a judge to resolve the issue of "community standards" is to appeal to his or her "instincts": see *Provincial News Co. Ltd.*, *ibid.* at 204.

The second case which Judge Payne cites with respect to the issue of indecency and the method for determining it is *R. v. Bennett* (1976), 29 C.C.C. (2d) 403. Justice Hutcheon says at page 403 of this case, "[d]epending upon the manner in which it is done and the circumstances of place, time and setting, I am of the view that the act of removing all clothing and standing naked is capable of constituting an indecent act contrary to s.169 (now s.173), that is to say an act that could be said to be in extremely bad taste. *Whether the conduct in a particular case is or is not indecent is a matter for the learned Judge who hears the evidence*" (my emphasis).

Both *Hecker* and *Bennett* are significant because they challenge the very basis of the highly cherished jurisprudential belief in objective authority, and consequently they belie the hypocrisy of judges who purport to authorize or legitimate their determinations by appealing to such objective standards. Indeed, by conceding the ultimately subjective basis for determining matters of morality, these judges place themselves epistemologically in precisely the same position as Ms. Jacob. That is, they place themselves beyond the scope of "community standards" and rest their knowledge on personal experience or even, as we have seen, "instinct". The only difference between the judges' position and Ms. Jacob's position in the immediate respect is that, *in their public capacities as judges*, the judges' knowledge carries the weight of authority.

*Criminal Code.*⁹⁶

Indeed, if only as a token gesture of judicial neutrality at this point the law zealously pursues 'objective' forms of authority, or the gospel according to past Fathers.

The case law informs Judge Payne that he is somewhat free to mould the community standards to his own personal experience. However, he does not put forward a definition of "indecenty". Rather, he turns his attention to some clinical exhibits and proceeds to examine the essential nature and function of female breasts from a purely scientific point of view. It is fair to say that at this stage of analysis Judge Payne is engaged in another form of objectification of women. Clearly, by attempting to derive a legal standard of indecenty from a clinical analysis of female physiology, Judge Payne must momentarily exclude from consideration all non-physiological aspects of womanhood that could possibly help to make that standard more intelligent or inclusive. Thus, he quotes various excerpts from popular medical books and treatises and discovers among other things that female breasts serve a "primary" function in the production and delivery of milk to human infants" and that female breasts are accordingly equipped with nipples, which "are amply supplied with nerve endings and blood vessels" and bear minute "oil glands" to lubricate and protect the

⁹⁶ *R. v. Jacob*, *supra*, note 88 at 8.

breast during breast-feeding;⁹⁷ that breasts are a "uniquely feminine" part of women;⁹⁸ and that female breast stimulation can be the source of intense pleasure for women,⁹⁹ which suggests to him that "the female breast is a secondary sexual gland".¹⁰⁰

For our purposes it is necessary to focus on this last mentioned scientific discovery. For it is the overtly sexual or erotic aspect of female breasts that Judge Payne is ultimately concerned to conceal from public view, and it is this same aspect that Judge Payne effectively suppresses or demeans as part of the justificatory rhetoric of his final decision. Yet I want to argue that it is the precisely the erotic aspect of female breasts that should not be suppressed or considered *secondary* by the court in assessing the legality of certain kinds of human behaviour. To do so is to deny that human beings are *primarily* sexual and sensual beings, and only *secondarily* rational beings, and this kind of denial produces various forms and scales of personal and societal pathology, as Nietzsche's critique of the "ascetic ideal" suggests.

⁹⁷ Bobbie Hasselbring, Sadja Greenwood, M.D., and Michael Castleman, *The Medical Self-Care Book of Women's Health* [publisher, year, and page number not supplied in written judgment].

⁹⁸ Bobbie Hasselbring, Sadja Greenwood, M.D., and Michael Castleman, *The Medical Self-Care Book of Women's Health*, *ibid.*

⁹⁹ See Judge Payne's references at pages 9 and 10 of his written judgment to Hasselbring, Greenwood, and Castleman, *ibid.*; Dr. Alfred C. Kinsey et al., *Sexual Behaviour in the Human Female*, the Institute for Sex Research, Indiana University (Philadelphia: Saunders, 1953); and *Every Woman's Health, The Complete Guide to Body and Mind*, by 15 women doctors, ed. Henene MacLean, 4th ed. (New York: Prentice Hall, 1985).

¹⁰⁰ *R. v. Jacob*, *supra*, note 88 at 10.

Thus, Judge Payne quotes from the famous Kinsey report on *Sexual Behaviour in the Human Female* as stating that

Males, and particularly American males, may find considerable psychological stimulation in touching and manipulating the female breast. Many males are more aroused erotically by observing female breasts, or by touching them, than they are by the sight of or manual contacts with female genitalia. In actuality, many females are not particularly stimulated by such breast manipulations, but some of them are aroused. A female may even reach orgasm as a result of such contacts.¹⁰¹

From this observation Judge Payne concludes that "the female breast constitutes a very personal and responsive part of the female anatomy and is a part of the female body that is sexually stimulating to men, both by sight and touch, and is not therefore a part of the body that ought to be flagrantly exposed to public view."¹⁰²

This conclusion regarding the "sexually stimulating" nature of the female breast is pivotal to my thesis because it suggests two possible justifications or rationales for Judge Payne's final decision to uphold Ms. Jacob's conviction. One of these reveals Judge Payne to be less concerned with precluding harm against women than precluding harm against men. The other suggests that Judge Payne is not ultimately concerned to protect either men or women from physical harm, but rather to enforce a Victorian moral code which denigrates female sensuality but esteems an image of women as the reproductive property of men.

¹⁰¹ *R. v. Jacob, ibid.*; see Dr. Kinsey, *Sexual Behaviour in the Human Female, ibid.*

¹⁰² *R. v. Jacob, ibid.*

The problem is that Judge Payne seems to equivocate as regards the interest he is seeking to protect by denying Ms. Jacob the right to walk bare breasted in public. Is he attempting to preclude the possibility of a certain kind of sensual and psychological stimulation (or harm) among men?¹⁰³ If so, why? Is it because men could not control their behaviour resulting from such erotic stimulation?¹⁰⁴ Or is Judge Payne not concerned to protect male interests exclusively, but rather to protect broader "community" interests by delineating the scope of "decent" behaviour in general?¹⁰⁵ In the final analysis Judge Payne

¹⁰³ This rationale is suggested by the dicta of Judge Stuart in *R. v. Hecker*, *supra*, note 95 at 68, cited with approval by Judge Payne in *Jacob*, *ibid.* at 7. Judge Stuart states that "The harm prevented in rendering illegal, indecent acts consisting of physical violence, is self-evident. The harm prevented in rendering illegal, indecent acts *invoking psychological violence* is less obvious, but often no less important."

¹⁰⁴ This argument is implicit in Judge Payne's subsequent reference to the history of Canadian assault legislation. In this context he remarks that "the penalties were potentially more severe [where a man was charged with touching a woman's chest] and was clear that the law was attempting to protect this part of the female anatomy from molestation": see *R. v. Jacob*, *ibid.* at 14.

This argument is made explicit in the context of obscenity litigation involving the sale of pornographic videos in the recent case *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.) at 485. In this case Justice Sopinka declared that "[the] courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."

¹⁰⁵ This argument could be supported by reference to Judge Payne's subsequent review of American jurisprudence regarding "indecent" or "obscenity" legislation. In response to the question "[does] the statute protect legitimate government interests?" Judge Payne confirms that in Canada, "protecting the public sensibilities in a legitimate government interest": see *R.*

appears to be primarily concerned with the broader community interest, yet the rationale he employs to secure this interest is highly troublesome. I would argue that this predicament is almost *predictable*, given the overtly scientific methodology which Judge Payne employs to render his decision. I would also contend that Judge Payne's logic ultimately reflects a broader, societal fear or anxiety regarding human sensuality, or what might be called *erotophobia*.¹⁰⁶ Unfortunately, it also reflects a deeply-rooted pathology and an acutely invidious form of misogyny.¹⁰⁷ Judge

v. Jacob, *ibid.* at 16.

¹⁰⁶ For a general discussion of this concept see Sara Diamond, "Childhood's End: Some Comments on Pornography and the Fraser Committee", in *Regulating Sex*, *supra*, note 94 at 173.

¹⁰⁷ At this point in my own analysis it would appear fruitful to refer to J.C. Smith's analysis of male sexual dependency and repression in *Neurotic Foundations*, *supra*, note 14. Smith's treatment of this issue is significant because it lends thoughtful, theoretical support to some of the underlying concerns of Judge Payne regarding sexual or biological difference, and simultaneously provides a possible explanation of the misogynistic result of Judge Payne's analysis. Professor Smith states that "[w]hile there is little evidence of any difference between males and females in the intensity of the sexual response, there is persuasive evidence that there is a difference in triggering mechanisms between the two sexes. Females tend to become sexually excited more by tactile stimuli and thought processes, while males are more likely to be aroused by visual stimuli. The male proclivity for pictorial pornography would seem to support this conclusion....If nature has programmed the male to be sexually excited by the sight of the contours of the female breasts and buttocks, then it follows that females are able to exercise a great deal more control over their own sexual arousal, or absence of it, than males. Therefore, males are frequently in the position of being involuntarily aroused, and at the same time are dependant on some other person or persons for satisfaction of their sexual drive. It should not surprise us that this could result in frustration and both conscious and unconscious hostility against women, who both trigger the arousal and control the means of satisfaction. The biological imperatives of reproduction function differently for males than for females. The emotional and sexual attraction that the female holds for the male

Payne states that

The essence of the matter here, as I see it, is that anyone who thinks that the male breast and the female breast are the same thing is not living in the real world. The female breast in its physiological components and its role in the sexual life of the female and male partner, and in the nurturing of children places this part of the anatomy, as far as I'm concerned, in the community standard to be a part of the anatomy that should not be exposed gratuitously and continuously in public places and *the rights of other members of the community not to be presented with this spectacle and offended by it ought to be recognized.*¹⁰⁸

This statement is especially worrisome because Judge Payne appears to recognize on the one hand the inherent physiological and erotic value of the female breast, but on the other hand he views the image of the female breast as somehow morally repugnant or offensive. Suddenly, without explanation, the plain sight of a woman's bare breasts in the most mundane of contexts - an image of breasts, that is, *unbound and unconstrained* by a bra or t-shirt, in the midst of usual pedestrian traffic on an sweltering summer day - is legally translated by Judge Payne not only into a form of "spectacle", but as an "offensive" form of spectacle, the performance of which consists in a violation of some amorphous, vague and imaginary "right" among the local community. In this respect, Judge Payne's overly scientific confrontation with Ms. Jacob's upper body resembles that of Jonathan Swift's miniature Brobdingnag adventurer, whose close, physical encounter with a

has resulted in a sense of dependency and bondage of the male to the female which contributes to misogyny and gynophobia": Smith, *Neurotic Foundations*, *supra*, note 14 at 180-81.

¹⁰⁸ R. v. Jacob, *supra*, note 88 at 13 (my emphasis).

female breast (which appears magnified or gigantic from the point of view of tiny Gulliver) causes a greater sense of "disgust" than beauty or wonder.¹⁰⁹ But Swift's encounter with science is both an illuminating parody and a serious polemic. So how, in all seriousness, does the unmediated image of a woman's naked breasts in contemporary North American society become an illegal "spectacle"?¹¹⁰ The sight of women's naked breasts and genitalia

¹⁰⁹ See Jonathan Swift, *Gulliver's Travels* (New York, N.Y.: The New American Library of World Literature, Inc., 1960) at 104.

¹¹⁰ In *The Politics of Reproduction* Mary O'Brien states that "[breasts] have been sometimes flaunted, sometimes flattened, understood as sensual tit-bits rather than purposeful instruments of nurture...Menstruation, ovulation, and pregnancy represent the integrative potency of all women, which may terrify men, but the history of male supremacy is a great deal more than male psychological response to ignorance, terror and envy of the womb": M. O'Brien, *The Politics of Reproduction*, *supra*, note 49 at 51. O'Brien suggests that some men's disapprobation and denigration of women's reproductive organs is part of a logical or dialectical response to the sense of 'alienation' that men feel from natural processes of procreation. Beginning with the dissemination of the male seed into the female's uterus, O'Brien traces the alienation of that seed to the uncertainty among men as regards fatherhood or paternity (thereby echoing Lacan), through the neurotic institution of patriarchal legal regimes (thereby echoing J.C. Smith), and ultimately culminating in the cultural overestimation of "intellectual creativity" at the expense of physical procreativity or female labour (thereby echoing Nietzsche's critique of the scientist or "theoretical man" in *On the Genealogy of Morals*, *supra*): see O'Brien, *ibid.* at pp. 56-57, 75-76, 131-132.

With respect to the issue of gynophobia specifically, O'Brien suggests a logical connection between the fact of female menstruation and male repulsion in the face of female genitalia. She says that "women's ability to bleed without injury is regarded as her own magic; quite a black magic, too, clearly contributing to the occult threat which femininity poses to masculinity": O'Brien, *ibid.* at 151. Furthermore, she remarks that "[existentially], blood, which is the harbinger of new life for women, is the harbinger of violent death for men": O'Brien, *ibid.* at 151. To the extent that men (and women) can be observed to fear death, O'Brien explains, it is then natural for them to react to this fear by denigrating the factual importance of female blood and the symbolic importance of the female womb and genitalia: O'Brien,

is certainly not outlawed in other public forms, such as strip bars and pornographic literature and movies, which are readily available and accessible to the public across North America. And since when does the plain, uneroticized image of a woman's bare breasts - an image, that is, unadorned by fine lace or silk fabric, or unglamorized by special advertising techniques, such as air-brushing and artificial lighting - become "offensive" to the common sense of morality or decency?

Clearly our medicalized, sanitized, genderized "community standards" of decency, as well as our widely-tolerated misogyny, are not historical novelties. This level of acculturated sexism has dominated the better course of recorded history. It can at least be found wherever, as Jessica Benjamin and Evelyn Fox Keller suggest, the process of human self-understanding depends upon a physiological and psychological identification with the so-called omnipotent 'father-figure', and a physiological and psychological separation from the 'mother-figure'. Indeed, Judge Payne's analysis of the moral worth of the image of women's naked breasts

ibid. at 151.

For his part, J. C. Smith links this fear or neurotic obsession with death, gynophobia, and the denigration of female breasts (matriarchal fertility symbols: see Smith, *Neurotic Foundations*, *supra*, note 14 at 265), among some males to an acculturated denial among human beings generally of their "animality". According to Smith, "animality" comprehends the biological processes of birth, copulation, and death, and the psychological denial or suppression of this animality means that "women are devalued because their unique role in the reproductive process is devalued": Smith, *Neurotic Foundations*, *ibid.* at 199. Smith further explains that "[we] wish to devalue and deny reproduction with its entailment of enslavement to sexual desire, and its inevitable consequence--death": Smith, *ibid.*

is a perfect illustration of what Benjamin refers to as a "rationalized" form of "erotic domination". It is rationalized in many ways, but most noticeably in the way that it differentiates the male breast from the female breast according to their relative erotic aspects.¹¹¹ For our purposes it is not the mere fact that Judge Payne draws upon a classic binary opposition such as similarity/difference that should be of concern. He is correct to recognize a visible difference and to appreciate that this visual difference has important sociological implications.¹¹² What should be of concern here is the way Judge Payne uses the obvious physical distinction to rationalize his decision to deny Ms. Jacob (and hence women in general) the freedom to bare her breasts in a public setting. Although he purports to rely on the notion that public exposure of female breasts is offensive to "public sensibilities" in general, and that the protection of such "sensibilities" is a legitimate government interest,¹¹³ Judge Payne cannot avoid determining the ultimate issue according to a distinctly male norm - namely, the penis. That is to say, Judge Payne assumes correctly that some males are likely to be aroused by the sight of female breasts, and that the nature and conditions of

¹¹¹ Even this proposition appears uncertain to Judge Payne in the final analysis, for he ultimately decides to resolve the equality issue by extending the application of the indecency provision to male breasts, based on American expert testimony that "male and female breasts are physiological similar except for lactation capabilities": *R. v. Jacob, supra*, note 88 at 16-17.

¹¹² I will elaborate on this point in Chapter 4 of this thesis.

¹¹³ *R. v. Jacob, supra*, note 88 at 16.

this arousal may lead some men to commit violent acts against women. And to the extent that Judge Payne seems concerned to prevent the commission of violent acts by some men (and perhaps women) against women in this context it is important that he have the greater physiological implications of man's (and in some cases women's) exposure to the image of women's breasts in mind. However, by *implicitly* drawing attention to the penis as the primary locus of erotic stimulation among men, in such a way as to ultimately deny women the liberty of baring their breasts for whatever reason, Judge Payne effectively circumscribes women's bodies according to a uniquely male, phallogentric norm.

In the next chapter I will attempt to demonstrate how the kind of phallogentric logic that underlies the *Jacob* decision pervades much of our criminal and constitutional jurisprudence in the areas of obscenity, pornography, and sexual assault. In particular I will argue that phallogentrism in law is generally conditioned on a combined evolutionary and acculturated tension between the sexes as reflected in the patriarchal structure of our society, and that it is not therefore simply a contingent product of individual male and female judges or lawyers.¹¹⁴

¹¹⁴ Obviously, however, the combined efforts of individual judges and lawyers can be highly instrumental in relieving precisely the kind of sexual tension which I am arguing is at stake in *Jacob*. On March 1, 1993, a female judge sitting at the Provincial Division of the Ontario Court of Justice acquitted five women charged with performing an indecent act under s.171(1)(a) of the *Criminal Code*. The women were arrested for participating *bare-breasted* at an outdoor political rally in Kitchener, Ontario, a year following Gwen Jacob's conviction. It is interesting for our purposes that the presiding Judge Katie McGowan appeared to base her decision to acquit the women partially on 'expert

CHAPTER 3 - PHALLOCENTRISM AND EGALITARIANISM IN LAW

As was mentioned in the last chapter, part of Ms. Jacob's defence with respect to her indecency charge/conviction consisted of a constitutional challenge pursuant to section 15(1) of the Canadian *Charter of Rights and Freedoms*.¹¹⁵ This challenge failed although the reasons for its defeat are not entirely clear from Judge Payne's written judgment. One possible explanation is that the equality argument failed at that stage of analysis where Judge Payne decided to consider the governmental or state interest with respect to the harm sought to be avoided through the enactment and enforcement of the *Criminal Code* provision in question.¹¹⁶ Here

testimony' relating to community standards of tolerance and partially on evidence which emphasized the political (as opposed to moral?) nature of the women's behaviour: see Kevin Griffin, "Top-free 'equality' applauded, panned" *The Vancouver Sun* (2 March 1993) A3. I am one who certainly applauds Judge McGowan's decision and her recognition of the political importance of the women's behaviour but, like Judy Rebick of the National Action Committee on the Status of Women, I am disappointed that Judge McGowan relied on the community standards test instead of engaging in a more protracted or critical inquiry into the historical "double standard" or discriminatory application of s.171(1)(a) within the context of public nudity: see Griffin, *ibid.*; and "Women look for end to 'double standard' on breasts in topless case" *The Vancouver Sun* (1 March 1993) A4. As Rebick has suggested, a critical inquiry by Judge McGowan as to why the indecency law has been targeted especially at women, combined with the acquittal of the women in Kitchener, could stand as a more powerful legal precedent than that which is contained in Judge McGowan's judgment: see Griffin, *ibid.*

¹¹⁵ Section 15(1) of the *Charter* reads: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

¹¹⁶ *R. v. Jacob*, *supra*, note 88 at 14-17.

Judge Payne appeared to concede that a law which applied in certain circumstances to women only, but not men, purely on the basis of sex, could be considered *prima facie* unconstitutional. In this respect he considered various American cases addressing the issue of gender bias or "gender classification" with respect to public nudity offences. These cases tend to support the notion that male and female breasts are not entirely similar so legislators may legitimately take into consideration specific differences for specific purposes. On the basis of this consideration Judge Payne appears to conclude that, where a discriminatory application of the law constitutes a reasonable or "non-arbitrary" means of addressing a "legitimate governmental interest" (such as the "protection of public sensibilities" in *Jacob*), the law in question can nevertheless be deemed constitutional.¹¹⁷

¹¹⁷ *R. v. Jacob*, *supra*, note 88 at 16. In effect, Judge Payne appears to apply the classic Canadian "proportionality" test, as enunciated in *R. v. Oakes* (1986), 50 C.R. (3d) 1, 24 C.C.C. (3d) 321 (S.C.C.), to the indecency provision in question. For our purposes, it is not necessary to elaborate on this test, except to say that it only applies at that stage of analysis where the court has found a law to be in violation of an existing *Charter* right or freedom. Once a *Charter* violation is found the Court then proceeds to measure the "reasonableness" of the violation - that is, in terms of its consistency with the articulated principles of freedom and democracy under section 1 of the *Charter*. This stage of analysis requires the Court to consider the legislative purpose of the impugned provision, and to determine whether that purpose is sufficiently important from the point of view of the principles of a "free and democratic society" to warrant overriding an otherwise particular constitutional right or freedom. If it is not then the provision will be deemed unconstitutional. If it is, however, the Court must then proceed to ask whether the means that the legislature has chosen to effect its purpose bear any internal, 'rational connection' or logical relationship to that purpose, and whether, in the end, these means are 'proportional' to that purpose. The 'proportionality' aspect of the test requires basically that the chosen legislative means do not involve a

The problem with the above logic is that Judge Payne ultimately concludes that s.171(1)(a) of the *Criminal Code* does not violate section 15 of the *Charter*. Judge Payne's express reference to the "reasonableness" of the gender bias in *Jacob* might lead one to infer that he accepts the *prima facie* unconstitutionality of s.171(1)(a) of the *Criminal Code*, but is prepared to justify the *Charter* violation according to section 1 of the *Charter*. This inference is problematic, however, because Judge Payne ultimately concludes that s.171(1)(a) does not offend section 15 of the *Charter*.¹¹⁸ This suggests an alternative explanation for Judge Payne's decision to uphold Ms. Jacob's conviction - namely, that Judge Payne is not really interested in legitimating the gender bias with respect to s.171(1)(a) in the end, but rather to ensure that women, as well as men, are not permitted to walk bare breasted in a public setting.¹¹⁹ However, this explanation is highly troublesome in light of Judge Payne's concerted attention at an earlier stage of his analysis to the significant differences between men and women's breasts. I have already quoted him as

greater degree of constitutional harm than the specific harm sought to be avoided by the provision in question, and that the application of the provision in question impacts as minimally as possible on the guaranteed right or freedom.

¹¹⁸ *R. v. Jacob*, *supra*, note 88 at 17.

¹¹⁹ I have already pointed out in Chapter 3 how Judge Payne seems to rely on American expert testimony in the end as a basis for concluding that male breasts are similar to female breasts in all respects except for "lactation capabilities". It is this conclusion that appears to enable Judge Payne to find ultimately that s.171(1)(a) of the Canadian *Criminal Code* does not necessarily have a discriminatory application, and can therefore be seen to be consistent with s.15 of the *Charter*.

saying that "[the] essence of the matter here, as I see it, is that anyone who thinks that the male breast and the female breast are the same thing is not living in the real world."¹²⁰

Thus, the heart of the matter appears to consist in Judge Payne's attention to physiological *difference* - not *similarity* - and the implications of such difference for community morals and social order. As a conceptual device for resolving equality issues, attention to difference is not entirely novel in Canadian jurisprudence. It is consistent with a recent trend among Canadian judges to treat so-called 'similarly situated' persons alike and 'differently situated' persons unlike (or differently) for the purposes of section 15 analysis.¹²¹ For our purposes the similarity/difference approach to equality litigation is important

¹²⁰ R. v. Jacob, *supra*, note 88 at 13 (my emphasis).

¹²¹ See, for example, the classic dicta of Her Honourable Justice McLachlin in *Law Society of British Columbia v. Andrews*, [1986] 2 B.C.L.R. (2d) 305 (C.A.) at 311. As per McLachlin, J.A.: "In my view, the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are 'similarly situated be similarly treated' and, conversely, that persons who are 'differently situated be differently treated'." (footnotes omitted).

It is noteworthy that since Madame Justice McLachlin (as she is now) applied the similarity/difference model of equality analysis in *Andrews* the Supreme Court of Canada has departed from this type of equality analysis and has proposed a new test which focusses on the discriminatory impact of the law in question: see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.). For my part I am not prepared to undertake an analysis of this Supreme Court of Canada decision and others following it, although I appreciate that these analyses could be peripherally instructive to my thesis. My ultimate concern with respect to constitutional equality analysis is that egalitarian discourse in general is founded on political assumptions and beliefs that are not necessarily consonant with insights derived from other historically prominent discourses.

because it provides a further example of the rationalistic bias of law generally. The *difference* approach to determining sexual equality issues is particularly troublesome because it reinforces the historically *masculine* epistemological bias in law which I have argued in Chapters 1 and 2 ignores female sensuality and sexuality. Just as Carol Smart is concerned about the way particular oppositional terms or dyads such as consent/non-consent tend to ignore certain facets of human experience, I am concerned about the way the similarity/difference dyad operates in law to distort the essential, political tension which exists between many men and women, and ultimately to denigrate female sexuality.

The *Jacob* case clearly stands as one example of the way physiological differences between men and women can be applied in the context of sexual equality analysis, in a manner which demeans the full sensual expression of the female body. This tendency may also be observed in the recent Supreme Court of Canada case, *R. v. Nguyen*.¹²² In this case the court was asked to determine the constitutionality of a Canadian *Criminal Code* provision which made it a criminal offence for a person in a position of trust or authority in respect of a young person to touch, directly or indirectly, any part of the body of the young person for a sexual purpose, or to invite a young person to behave similarly with respect to any other person (including the person who so

¹²² *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332 [hereinafter *Nguyen* cited to C.C.C.].

invites).¹²³ One of the constitutional arguments raised by the defence was that s.146(1) of the *Criminal Code* violated the male appellant's equality right pursuant to section 15(1) and section 28 of the *Charter* because the scope of behaviour contemplated by the wording of the s.146(1) precluded the possibility of its application to female persons.¹²⁴ Specifically, the appellants argued that "only men may be charged under the provision" and "only females may be complainants."¹²⁵

For her part, Madame Justice Wilson (as she was then) proclaimed that both equality provisions of the *Charter* did not preclude the Parliament of Canada from enacting an offence that, as a matter of biological fact, can only be committed by one sex.¹²⁶ In essence, she adopted the very same logic with respect to the sexual difference aspect of the argument that Judge Payne applied in *Jacob*. This says that, given the particular purpose of any piece of legislation, a legislature may be justified in differentiating between the sexes on biological or physiological grounds. As per Madame Justice Wilson, "there are certain biological realities that one cannot ignore and that may

¹²³ See *Criminal Code*, R.S.C. 1970, c.C-34, s.146(1).

¹²⁴ Section 28 of the *Charter* reads, "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

¹²⁵ As per Madame Justice Wilson, *Nguyen, supra*, note 122 at 178.

¹²⁶ *R. v. Nguyen, ibid.* at 179, 180, and 182.

legitimately shape the definition of particular offences."¹²⁷ The particular biological difference that Madame Justice Wilson has in mind is the fact that men bear a penis and women do not.¹²⁸ Although she appears to concede that this difference does not necessarily preclude the possibility that women could touch a male child for a sexual purpose or invite similar behaviour from a male child, she nonetheless points out that the *Criminal Code* contemplates only penile penetration of the human body as the proper basis for an offence under s.146(1).¹²⁹ To the extent that women cannot penetrate men, therefore, in the same way that the law imagines, Madame Justice Wilson agrees that the biological difference in question is highly relevant to a determination of the constitutional equality issue. In her words,

given that only men may be the penetrators, it is absurd to suggest that the provision discriminates against males because it does not include women in the category of potential offenders as it is to suggest that a provision that prohibits self-induced abortion is discriminatory because it does not include men among the potential class of offenders.¹³⁰

¹²⁷ *Nguyen, ibid.* at 179.

¹²⁸ As per Madame Justice Wilson at p.180 of *Nguyen, ibid.*, "I think it clear that only males over a certain age are in fact capable of penetrating another person, at least in the sense of the term penetration that the Code is concerned with."

¹²⁹ Madame Justice Wilson draws this conclusion at p.180 of *Nguyen, ibid.*, by reference to the definition of sexual intercourse in s.3(6) of the *Criminal Code*. This section reads, "For the purposes of this Act, sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted."

¹³⁰ *Nguyen, ibid.* at 180.

What is most important for our purposes about Madame Justice Wilson's analysis of s.146(1) is that it reveals the highly heterosexist and *phallocentric* nature of criminal law relating to human sexuality. Indeed, notwithstanding the empirical likelihood that more men than women violate the kinds of trust or power relations envisioned by s.146(1), there are likely many people across Canada who could imagine applications under s.146(1) which would involve not only non-penile acts of touching a young male person's body by a female person in authority, *but also non-penile acts of touching a young person's body by a person in authority who belongs to the same sex as the young person (whether both parties are male or female)*. Clearly, most human beings of both sexes possess physiological attributes (such as hands, fingers, feet, toes, and tongues) which can be used to touch a person's body, *and for a sexual purpose*. So on a purely theoretical level, if the *rationale* behind s.146(1)(a) is not primarily concerned with the dissemination or *alienation* of the male seed, then it becomes difficult to explain the law's exclusive focus on the male penis.

Madame Justice Wilson's phallocentric approach to the constitutional equality issue in *Nguyen* is troubling because it reflects precisely what Jessica Benjamin terms "false differentiation". That is to say, implicit in her emphasis on the anatomical differences between men and women is a widely-held - indeed acculturated - predilection to regard certain forms of sexual penetration as belonging to the physiological prerogative of

the male sex organ.¹³¹ And by failing to consider the penetrative possibilities associated with the female body *in toto* (which is a direct result of focussing on the male penis as the *central* means for sexual touching) Madame Justice Wilson disregards an essential, *real* physiological aspect of women's lives - one which bears no necessary relationship to their ability or desire to engage in traditional heterosexual courses of conduct.

In the final analysis the phallocentrism of Madame Justice Wilson's equality analysis in *Nguyen* is not dissimilar from that of Judge Payne in *Jacob*. The only difference between the biological difference arguments in *Nguyen* and *Jacob*, at least for the purposes

¹³¹ Zillah Eisenstein points out that this kind of phallocentrism has posed serious impediments for women in the United States of America who have sought certain kinds of employee benefits or disability insurance payments arising from the fact of their pregnancy. By treating the male possession of the phallus as the norm in the context of equality analysis (such as the similarly situated test), Eisenstein contends that American courts have been able to treat pregnant women differently than non-pregnant men and women. More precisely, Eisenstein observes that American courts have been able to avoid finding that laws which deny certain benefits or entitlements to pregnant women but *ceterus paribus* provide these benefits to men and non-pregnant women, are discriminatory according to sex, by treating the fact of pregnancy (and hence interpreting the womb and women's genitalia and breasts) as sufficiently abnormal or inferior - and at any rate 'different' - to warrant differential treatment in the application of the relevant laws: see Z. Eisenstein, *The Female Body and the Law* (Berkeley and Los Angeles, Ca.: University of California Press, 1988) at 66-67, 99-108.

Eisenstein's concern is that differentiating men from women on the basis of anatomical distinction alone is limited and tends to be sexist in favor of men. Catharine MacKinnon would appear to share this concern as it relates to issues of pregnancy and the workplace. In her *Sexual Harassment of Working Women* she remarks that "[differential] treatment by sex with respect to pregnancy is impossible because no pregnant men exist to whom we can be compared": see C. MacKinnon, *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press, 1979), p.111.

of equality analysis, is that the former *explicitly* draws the law's attention to the penis and the latter *implicitly* draws the law's attention to the penis. In any event, the full implications of female sensuality and sexuality *for women* are relegated to the margins of the text and the image of the male penis becomes the dominant legal concern. But this situation is not necessary. There are legal possibilities for resolving sexual conflict beyond similarity/difference analysis, which tends to divide men from women in a way which precludes mutual recognition between sexual 'selves' and entrenches pre-existent images of women as inferior and somehow dependent on male forms of authority and protection.

One possibility is simply to displace the importance of similarity/difference language in cases involving human sexuality, as the Supreme Court of Canada did in *Andrews*¹³² and *R. v. Turpin*.¹³³ The other possibility is simply to reject egalitarian discourse in such matters altogether and perhaps to replace it with another discourse. I prefer the latter avenue for legal and social reform. I have attempted to demonstrate how similarity/difference analysis is part of a broader rationalistic bias in law which, because of our acculturated genderization of reason and rationality as masculine, tends naturally to obfuscate the full significance of female sexuality and maternity in determining the shape of the social order. My primary concern in this respect is that

¹³² See *Andrews*, *supra*, note 121.

¹³³ See *R. v. Turpin* (1987), 22 O.A.C. 261, 36 C.C.C. (3d) 289, 60 C.R. (3d), *aff'd* but criticism of the similarly situated test in [1989] 1 S.C.R. 1296.

similarity/difference analysis necessarily categorizes and classifies human experience along scientific or mathematical lines. Individuals and groups of individuals become comparable as 'more or less' the same, or they become distinguishable as 'more or less' different. Various units of measurement are employed to detect similarities and differences along various points of comparison. And based on the degrees of difference and similarity that quantitative analysis discovers, scientific discourse is able to treat men and women as more or less equal. But human sexuality is hardly categorical and therefore it is not amenable to egalitarian interpretation, despite what s.15 of the *Charter suggests*. Unlike apples and oranges, which cannot be added or subtracted in terms of their specific composition but which can at least be compared or contrasted in terms of their genetic composition (for example, as fruit in contrast to vegetables), sexual relations between human beings cannot be analyzed specifically or generically. This is because the nature of erotic attraction or desire among human beings is highly *particular*.¹³⁴ It varies along all traditional "class" lines, including sex, age, colour, race, mental and physical ability, and any other 'analogous' grounds that our courts might want to consider.

As my limited analysis of legal egalitarianism has attempted to show, therefore, the privileged ruler - the male sex organ - is not necessarily the best measuring stick for resolving or

¹³⁴ See Sigmund Freud, *Civilization and its Discontents* trans. J. Strachey (New York: W. W. Norton & Company, Inc., 1961) at 58, 64-65.

determining issues involving human sexuality. Formal equality cannot effectively address the practical dynamics of human sexuality, nor can substantive equality begin to unravel the invisible, intangible, personal sources of passion, conflict and antagonism that define erotic life in general. Friedrich Nietzsche has observed that

"Equality", as a certain factual increase in similarity, which merely finds expression in the theory of "equal rights," is an essential feature of decline. The cleavage between man and man, status and status, the plurality of types, the will to be oneself, to stand out--what I call the *pathos of distance*, that is characteristic of every strong age. The strength to withstand tension, the width of the tensions between extremes, becomes ever smaller today; finally, the extremes themselves become blurred to the point of similarity.¹³⁵

On another occasion Nietzsche applies this general anti-egalitarian polemic to the specific issue which I am addressing in this chapter, stating that

To blunder over the fundamental problem of 'man and woman', to deny here the most abysmal antagonism and the necessity of an eternally hostile tension, perhaps to dream here of equal rights, equal education, equal claims and duties: this is a *typical* sign of shallow-mindedness, and a thinker who has proved himself to be shallow on this dangerous point - shallow of instinct! - may be regarded as suspect in general, more, as betrayed, as found out: he will probably be too 'short' for all the fundamental questions of life, those of life in the

¹³⁵ F. Nietzsche, *The Twilight of the Idols*, Section 37, in *The Portable Nietzsche*, ed. and trans. Walter Kaufmann, 2nd ed. (New York: The Viking Press, Inc., 1968) at p.540.

future too, incapable of any depth.¹³⁶

Nietzsche's insights are important for my purposes because they suggest the natural necessity or biological imperative of some degree of sexual conflict between men and women, and at the same time they suggest the inappropriateness of egalitarianism as a model for alleviating that conflict with any effectiveness. I am not prepared to accept the proposition that sexual relations between individuals and among classes of individuals must be "eternally hostile", but I have tried to demonstrate thus far how sexual relations between human beings must invariably involve some level of "tension", "politics", and possibly "antagonism". We have already observed in Chapter 1 that Professor Smith recognizes something like Nietzsche's "most abysmal antagonism" between men and women and the necessity of an eternal tension between them, based on his understanding of certain physiological differences between men and women.¹³⁷ Furthermore, we have seen how this natural tension has become *hostile* with the historical advent of patriarchal legal regimes. At least to the extent that, as Professor Smith argues, women are legally controlled and politically oppressed by men although men are sexually dependent on women, based on the continual production and store of testosterone in males and the physical capacity of women to deny men sexual

¹³⁶ Nietzsche, *Beyond Good and Evil*, trans. R. J. Hollingdale (New York: Penguin Books, 1973), Section 238 at p.147.

¹³⁷ See Chapter 1, pp.31-32.

satisfaction,¹³⁸ it is not difficult to understand how the two sexes could come to resent one another over the course of history in a profoundly hostile way. Thus, Professor Smith says, "[t]he pathological need of males to dominate females stems from a deep-seated unconscious hostility toward women which ranges from a mere resentment or fear of the feminine to hatred. An unconscious misogyny and gynophobia appears to be a part of the psyche of the male of the species."¹³⁹

Given the significant role that extra-rational considerations such as the body and human instinct play in the determination of sexual relations I therefore prefer to abandon both similarity/difference analysis and egalitarian discourse as an adequate means of addressing the various kinds of physical and mental oppression that some women experience in patriarchal society. After all, the kinds of problems that the law purports to address through sexual assault, anti-pornography, obscenity and, as we have seen, indecency legislation, ultimately concern violations of physical integrity, sensual autonomy, and sexual liberty, not equality.¹⁴⁰ Thus it would seem more fruitful in the present

¹³⁸ See J. C. Smith, "The Sexuality of Politics", *supra*, note 49 at 6.

¹³⁹ J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 172.

¹⁴⁰ Indeed, I am sufficiently presumptuous in the immediate respect to assume that 'equality' is not necessarily what all feminists desire in the long run. Rather, I assume that many feminists, classical and radical alike, are primarily interested in emancipating themselves from the legal, political, social, and rhetorical constraints of a male-dominated world, and only secondarily interested in the issue of whether this new-found freedom will require or entail some form of equality. In this

respect to direct the law's attention away from the intellectual pretensions associated with the male phallic measure and scientific thinking in general, and to turn it toward the physical implications of the female body.

Both the image and the reality of the female body throughout history has had profound implications for the shape of society and the development of law. Certain biological and social evolutionary theories depend on the major role which the female body has played in conditioning male behaviour. Sigmund Freud, for example, points out that when men and women became bi-peds, female breasts became routinely visible to males for the first time.¹⁴¹ This meant for Freud that male sexual interests began to rely primarily on the

respect I take solace in Wendy Williams' observation that "[the] goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender": W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," (1984-85) 13 *New York University Review of Law and Social Change* 325 at 331.

Furthermore, I must add that if some kinds of feminism, even the most radical, are seeking a "sexual revolution" of sorts, then I wholeheartedly embrace their battle. But this must be waged under "the banner of freedom" - freedom, that is, from "convention" and from "patriarchy" - not the banner of "equality": see Bloom, *supra*, note 5 at 98-100. For ultimately, the desire for equality will interfere with the goal of freedom: see, for example, J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 344-45. Allan Bloom's paraphrase of Friedrich Nietzsche is particularly apt in this regard. He says "[e]galitarianism means conformism, because it gives power to the sterile who can only make use of old values, other men's ready-made values, which are not alive and to which their promoters are not committed. Egalitarianism is founded on reason, which denies creativity": A. Bloom, *supra*, note 5 at 201.

¹⁴¹ S. Freud, *Civilizations and Its Discontents*, *supra*, note 134 at 54.

visual perception of female breasts as a source of routine or constant sexual arousal, and that sexual inclinations associated with olfactori stimuli emanating from the female pubic region diminished. Prior to this moment of human evolution, Freud postulates, male sexual interests were aroused only intermittently or periodically, in accordance with the female menstrual cycle. The shift from periodic male sexual excitement to constant male sexual excitement then had a significant affect on pre-existing social arrangements.¹⁴² It meant that sexual gratification became a much higher priority in the daily life or psychical economy of males than it was previously,¹⁴³ and it also meant that odours emanating from or nearby the female genital region become morally repugnant to man.¹⁴⁴

Freud argues that, in order to accommodate this newly heightened sexual sensitivity, men sought to ensure that females were always nearby or 'available' for sexual purposes. Hence the traditional image of the patriarchal family developed from this male sexual dependancy upon females. Freud elaborates as follows:

¹⁴² Freud, *ibid.* at 54 (Author's footnote). See also J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 181; and J.C. Smith, "The Sexuality of Politics", *supra*, note 49 at 5-6.

¹⁴³ It is perhaps important to note that the advent of the erect posture among *homo erectus* did not effectively alter the level or constancy of sexual intensity among females. At least according to classic evolutionary theory, the perpetuation of the species would require that the female be less sexually 'frustrated' than the male, both in terms of the frequency and intensity of her sexual desires: see J.C. Smith, "The Sexuality of Politics", *supra*, note 49 at 5.

¹⁴⁴ S. Freud, *Civilization and Its Discontents*, *supra*, note 134 at 62-63.

One may suppose that the founding of families was connected with the fact that a moment came when the need for genital satisfaction no longer made its appearance like a guest who drops in suddenly, and, after his departure, is heard of no more for a long time, but instead took up its quarters as permanent lodger. When this happened, the male acquired a motive for keeping the female, or, speaking more generally, his sexual objects, near him....¹⁴⁵

Moreover, the fact that a woman has a womb and breasts which are capable of producing milk reinforces her symbolic primacy over men within the context of early childhood processes of self-understanding and societal development in general. As Professor Smith says,

The relationship of the mother to her child needs no mythic legitimization. The child comes from her womb and she has nurtured it with her body. Men have no similar relationship to children. The mere fact of fertilization bears no comparison. The father's authority must be culturally created. The mother has a natural link to the children of her body for which there is no counterpart for the male. In order for the father to have authority over the children he must make them his own by owning their mother. She must become his wife. Thus, the ownership of women is fundamental to all patriarchal hierarchical social order."¹⁴⁶

¹⁴⁵ Freud, *ibid.* at 53.

¹⁴⁶ J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 288. See also J.C. Smith, "The Sexuality of Politics", *supra*, where he makes the same point from an overtly biological point of view. At page 6 of this essay he writes, "The primary form of the species has meaning in and of itself--the being which reproduces. The survival of the species, that is the perpetuation of the genetic code, is the only consistent pattern to be found in life forms. The being which reproduces requires no legitimation--no definition--no word. Women and mothers are primary and therefore are 'real'. Maleness is secondary, and requires legitimation--definition--conceptualization."

Both J.C. Smith's and Sigmund Freud's observations support the notion that the female body plays a crucial role in shaping sexual and societal relations between and among men and women. Unfortunately that role is hardly recognized in patriarchal society, except subconsciously or subliminally, and only consciously as an inverted and objectified figure of male law and dominion. It is important, therefore, if women and their bodies are to be emancipated from the objectifying and appropriating tendencies of law, to find ways in which law can reflect the symbolic primacy of women over men.

Madame Justice Wilson suggested one way of subverting phallocentrism and egalitarianism in favor of a legal recognition of the inherent dignity of women and their bodies in *Nguyen*. Although she found that s.146(1) of the *Criminal Code* constitutes a lawful violation of section 15 of the *Charter*, because it recognizes pertinent anatomical differences between males and females, she ultimately found that s.146(1) constitutes an unlawful violation of section 7 of the *Charter*.¹⁴⁷ This is because, in her opinion, the *Charter* right to "life, liberty, and security of the person" encompasses a legal respect for the human mind and body *in toto* which transcends the kinds of arbitrary classifications and distinctions associated with equality analysis. As she says,

the government will not be able to justify an infringement of s.7 under s.1 of the *Charter* on the basis

¹⁴⁷ Section 7 of the *Charter* reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

that because of an individual's sex he or she is not entitled to the same degree of Charter protection as other persons or tha because of his or her sex the Charter violation is less serious. The justification for the infringement of a Charter right will have to be linked to considerations other than the sex of the party that has established an infringement of his or her Charter right....There will, of course, be sex-related factors that may legitimately enter into a proportionality analysis conducted under s.1 of the Charter. But such factors will have to be linked to the sex of persons other than the accused, e.g., the fact that the victim can become pregnant.¹⁴⁸

In effect, Madame Justice Wilson displaces the significance of categorical similarities and differences among human beings where the issue of individual autonomy and freedom arises. Moreover, in the instant case, she explicitly draws the public's attention to the female body as a focal point for legal analysis. Indeed, she momentarily transcends her earlier phallocentrism and pays explicit respect to the female genitalia and womb as a proper area of legal concern.

Of course, Madame Justice Wilson was instrumental in bringing the pregnant body to the forefront of judicial analysis in *R. v. Morgentaler*.¹⁴⁹ In this case she was faced with the task of interpreting section 7 of the *Charter* insofar as it was relevant to the issue of women's ability to obtain a lawful abortion under existing criminal law. One of the particular questions which Madame Justice Wilson addressed in this context was whether section

¹⁴⁸ *Nguyen, supra*, note 122 at 182.

¹⁴⁹ *Morgentaler, Smoling and Scott v. The Queen* (1988), 62 C.R. (3d) 1, 37 C.C.C. (3d) 449 [hereinafter *Morgentaler* cited to C.C.C.].

7 of the *Charter* extended to women "the right of control over their own bodies?"¹⁵⁰ She responded affirmatively, noting that "the right to 'security of the person' under s.7 of the *Charter* protects both the physical and psychological integrity of the individual", such that any law which places the decision-making power with respect to the accessibility of abortion outside of the individual pregnant woman necessarily constitutes "a direct interference" with that woman's "physical 'person'".¹⁵¹

Madame Justice Wilson's decision in the above respect is important insofar as it purports to recognize the inherent dignity of women's bodies. What is more significant for our purposes, however, is the fact that Madame Justice Wilson expressly points out the limits of phallocentrism and expressly links this to the objectifying processes of cognition which we discussed in Chapter 1. Thus, in reference to the physical and psychological "dilemma" that an unwanted pregnancy poses for women in general, Madame Justice Wilson declares,

...It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate

¹⁵⁰ *Morgentaler, ibid.* at 555.

¹⁵¹ *Morgentaler, ibid.* at 556. Of course, Madame Justice Wilson also indicated in this context that at a certain stage of pregnancy or fetal development the state may have a legal interest in protecting the fetus. Although this observation clearly places political limits on the physical and psychological integrity that Madame Justice Wilson attributes to women, it is interesting for our purposes that it is effectively the *scientific* breakdown of fetal development and gestation into three periods (trimesters) that gives rhetorical validity to the limitation on women's bodily freedom that Madame Justice Wilson contemplates.

to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.¹⁵²

The "subjective elements of the female psyche" are precisely the kinds of "women's needs and aspirations"¹⁵³ which can never be disassociated from the demands of their bodies, but which the law has traditionally concealed, excluded, and silenced through rationalistic processes of objectification, assimilation, and differentiation. This is not to say that there are subjective elements of the *male* psyche that are intricately related to male physiology but that are not explicitly recognized in law. On the contrary, as we have seen in Chapter 1, the institution of law and patriarchy is significantly conditioned on the neurotic dictates of male phallic desire. And it is *precisely* because of the neurotic nature of this desire that law tends to castrate women or, as Professor Smith states, "[rob] the female of the will to power and [turn] a capacity to deny sexual satisfaction into a duty to provide it."¹⁵⁴

Madame Justice Wilson states that "women's needs and aspirations are only now being translated into protected rights."¹⁵⁵ This statement acknowledging law's historical practice of "false differentiation" aptly echoes Jessica Benjamin's

¹⁵² Morgentaler, *ibid.* at 555.

¹⁵³ Morgentaler, *ibid.* at 555.

¹⁵⁴ Smith, "The Sexuality of Politics", *supra*, note 49 at 6.

¹⁵⁵ Morgentaler, *supra*, note 149 at 555.

observation that

[it] must be acknowledged that we have only just begun to think about the mother as a subject in her own right, principally because of contemporary feminism, which made us aware of the disastrous results for women of being reduced to the mere extensions of a two-month-old.¹⁵⁶

Clearly, a law which removes from women the decision-making ability with respect to pregnancy and reproduction is as equally castrating to women as a law which denies women the freedom *not to conceal* their breasts if they prefer otherwise. Perhaps Ms. Jacob would have fared better in court, therefore, if she challenged the *Criminal Code* indecency provision on the basis of s.7 of the *Charter* as interpreted by Madame Justice Wilson in *Morgentaler*. In both cases the argument would be that women are being denied a significant degree of physical and mental autonomy and this kind of oppression goes straight to the heart of section 7 of the *Charter*.

Various feminist writers and thinkers have called into question the ability of law to transcend its paternalism, phallocentrism and rationalism, and to recognize the female body as other than a mere symbol of maternity, irrationality, and possibly wantonness. In her feminist critique of law Zillah Eisenstein has suggested that "[the] potential of woman's body to exist outside phallocratic discourse is lost" already, so "it is impossible to exist completely outside this discourse".¹⁵⁷ And borrowing from insights of contemporary psychoanalytic theory and practice, Jane

¹⁵⁶ Benjamin, *Bonds of Love*, *supra*, note 3 at 23.

¹⁵⁷ Eisenstein, *supra*, note 131 at 81.

Gallop has argued that any attempt by women to rewrite human history from a distinctly female, if not heterosexual female, perspective¹⁵⁸ - in effect, to displace the story (will) of the Father by altering the terms of reference, for example, from production to *reproduction* - must necessarily efface, veil, or cloud the very kinds of experiences that women claim to be unique to women.¹⁵⁹ She writes that "[t]he obligation to reproduce - the daughter's [feminists'] obligation to reproduce the mother, the mother's story - is a more difficult obstacle than even the Father's Law, an obstacle that necessarily intrudes even into the lovely, liberated space of women among themselves."¹⁶⁰

I would readily concede that the obstacle to women's liberty posed by the primacy of the male phallic symbol and reason throughout Western history and culture is theoretically insurmountable. If, as Jessica Benjamin (and Immanuel Kant before her) has argued, cognitive experience is inherently rationalistic, then any argument which women and/or men advance in favor of women's liberty will necessarily be conditioned by the categories of reason. Indeed, to the extent that it is impossible, as Eisenstein suggests, for women to recognize and define themselves

¹⁵⁸ For Gallop, human history has been written from a distinctively male, *homosexual* point of view, only in the technical sense that female sexuality has been effectively excluded from the epistemological ambit of the male, phallogocentric, discursive tradition: see J. Gallop, *The Daughter's Seduction: Feminism and Psychoanalysis* (Ithaca, N.Y.: Cornell University Press, 1982).

¹⁵⁹ See J. Gallop, *ibid.* at 74.

¹⁶⁰ Gallop, *ibid.* at 113.

outside of the masculine, rationalistic discourses of law, medicine, politics, and science, etc., it becomes questionable whether the female body can ever be emancipated from the constraints of phallogentrism. That is to say, it becomes questionable whether the female body can ultimately acquire any kind of meaning unconditioned by the mediating tendencies of rationality and objectivity (cognitive experience). As Carol Smart observes, "behind the legal text is the presumption that it is the written form of a rational will. In other words, the text always already occupies a space inside rationality and objectivity."¹⁶¹ For this reason Sue Gallop warns about placing too much emphasis on the female body, figuratively and practically, as the final solution for overcoming the patriarchal nature of law. She states that

It is no answer, no sure-fire solution to have women rather than men assume the position of power. Women are not so essentially and immutably 'body' that they are eternally and dependably unrepresentable. In a certain dialectical moment, a certain here and now, the assumption of power by women may crack the impassive, neuter mask of power. But were women to assume power, the representation of power would inevitably alter so as to reassimilate the contradiction, to suture the chink. Perhaps the conflict is always between body - as the inadequate name of some uncommanded diversity of drives and contradictions - and Power, between body and Law, between body and Phallus, even between body and Body. The second term in each pair is a finished, fixed representation. The first that which falls short of that representation.¹⁶²

¹⁶¹ C. Smart, "Law's Power, the Sexed Body, and Feminist Discourse", (1990) 17 *Journal of Law and Society* 194 at 197.

¹⁶² Gallop, *supra*, note 158 at 120-121.

Notwithstanding Gallop's warning about the inevitable 'representation of power' through discursive symbols and other acculturated modes of communication it has been the purpose of this chapter - this 'here and now' - to emphasize the importance of cracking the neuter mask of power called law. By redirecting the law's attention away from the mathematical constraints of egalitarian analysis toward the inherent dignity of the female body, Madame Justice Wilson has demonstrated that the law can have a liberating impact on women's lives. In light of the historical efforts of this woman 'in a position of power' I am at least willing to risk the possibility that a 'reassimilation of the contradiction' could translate into a modest increase in female autonomy, and I would ultimately agree with Zillah Eisenstein that "much is to be lost if we give up trying to imagine the female body outside discourse".¹⁶³

In the next chapter I will attempt to apply some of the observations of contemporary feminists such as Carol Smart, Zillah Eisenstein, Jessica Benjamin, Sue Gallop, Madame Justice Wilson, and J. C. Smith to the problem of pornography in contemporary North America. This problem, I will argue, goes straight to the heart of what Gallop refers to as "the representation of power" and what Benjamin refers to as "erotic domination". To the extent that law has played an important historical role in the preservation of pornography throughout society it is worth attempting to look at law in order to gain a broader understanding of the implications of

¹⁶³ Z. Eisenstein, *supra*, note 131 at 81.

pornography for society. I will endeavour in particular to reveal how obscenity or anti-pornography law reflects a heterosexual, phallogentric, pornographic imagination, which cannot be dissociated from the primacy which our society places on intellect (or mind) over sensuality (or body).

CHAPTER 4 - LEGAL REASONING AND THE PORNOGRAPHIC IMAGINATION

As we observed in Chapter 1, the fact that women throughout history have become victimized predominantly by the religious origins of the law is not a mere coincidence. J. C. Smith has pointed out that the law serves an inherently dual function when it comes to the issue of male self-interest or domination. On the one hand, law reflects the monotheistic notion that the will of the heavenly father has dominion over the creatures of the earth and authority over earthly desire. In metaphysical terms this means that the institution of law reflects a hierarchical ordering of mind or *logos* over body or matter. In biological terms this means that law reflects a hierarchical ordering of reason or intellect over instinct or sensuality. In sociological terms this means that law reflects a hierarchical relationship between, father, mother, and children, whereby the father exercises authority over both his wife and his children.

Moreover, law reflects the pornographic imagination of men, which tends to view women as somehow less than human - that is, as somehow lacking an independent will that we associate with human agency. Susan Griffin argues that the culturally pervasive pornographic mind derives from humankind's "fear of bodily knowledge, and a desire to silence eros."¹⁶⁴ Paraphrasing Griffin, Elizabeth Sheehy remarks that "[what] this imagination

¹⁶⁴ See the Prologue of S. Griffin, *Pornography and Silence: Culture's Revenge Against Nature* (New York: Harper and Row, 1981).

constructs is a world which is essentially false, but manageable and controllable."¹⁶⁵ We have seen how the 'false' image of women as inferior or dependent is formed in the mind of both men and women at an early phase of childhood. This occurs as part of the process of genderization insofar as that process depends on the objectifying tendencies of human cognition and the alienating or distorting nature of language in general. And Professor Smith has described how man's historical endeavours to control and manage women through law and politics derives from his sexual dependency on women (at least as far as heterosexual males are concerned) and his neurotic recognition that women naturally possess and control the means for sexual satisfaction.

We have also seen in Chapter 2 how Nietzsche relates the historical intrusion of 'ascetic ideals' across Western civilization to a cultural predilection for science and objectivity and a heightened sense of guilt among modern men and women in respect of bodily and sexual matters. For Nietzsche, however, our

¹⁶⁵ E. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias", (1989) 21:3 *Ottawa Law Review* 741 at 756. It is important to note, of course, that Griffin intends that the pornographic mind constructs an image of women and female sexuality which is controllable and manageable from the male point of view. For Griffin, most pornographic imagery involving men and women constitutes a superficial reversal of the true nature of human sexuality (or at least heterosexuality). Thus, for example, she recalls the stereotypical pornographic image of "a woman driven to the point of madness out of the desire to put a man's penis in her mouth", combined with the image of a heroic man who is able to "coolly grant or deny her frantic infant desire": S. Griffin, *ibid.* at 61. This combination of images, she observes, constitutes a reversal of the overwhelming urge among infant children to suckle their mother's breasts and the power of the mother to withhold her breasts from the child.

acculturated puritanism and rationalism has had a disproportionately deliterious effect on women's lives. Thus he says, on the subject of "female chastity", that

[there] is something quite amazing and monstrous about the education of upper-class women. What could be more paradoxical? All the world is agreed that they are to be brought up as ignorant as possible of erotic matters, and that one has to imbue their souls with a profound sense of shame in such matters until the merest suggestion of such things triggers the most extreme impatience and flight. The "honor" of women really comes into play only here: what else would one not forgive them? But here they are supposed to remain ignorant even in their hearts; they are supposed to have neither eyes nor ears, nor words, nor thoughts for this--their "evil"; and mere knowledge is considered evil. And then to be hurled, as by a gruesome lightning bolt, into reality and knowledge, by marriage--precisely by the man they love and esteem most! To catch love and shame in a contradiction and to be forced to experience at the same time delight, surrender, duty, pity, terror, and who knows what else, in the face of the unexpected neighborliness of god and beast!¹⁶⁶

Nietzsche links the public and private oppression of women here to the historical friendship ("neighborliness") of religion ("god") and male desire or sexual instinct ("beast"). In essence, Nietzsche describes an acculturated form of female castration which is intimately linked to patriarchal social institutions such as marriage. Women are portrayed here as devoid of their senses and their ability to communicate in respect of "erotic matters". Professor Smith elaborates on this picture from a psychoanalytic perspective as follows:

Religion and pornography together constitute the

¹⁶⁶ Nietzsche, *The Gay Science*, trans. by Walter Kaufmann (New York: Random House Inc., 1974), Book Two, Section 71 at pp.127-128.

boundaries of Oedipal patriphallic sexuality, and it is law which makes the link. The phallus, with its structure of mind-logos and body-penis dualism requires the law to mediate the polar tensions. The father and his law is the midpoint between the penis and the logos. The father, being created in the image of God, is pure mind or spirit trapped in the physical body with its penis which drives him through desire. Thus the phallus is the logos--father--penis the structure of which is institutionally manifested in religion--law--pornography.¹⁶⁷

According to Professor Smith, religion and pornography are two sides of the same coin in that, as aesthetic mediums and social practices, they tend to castrate women.¹⁶⁸ That is to say, in imagery and deed they deny women the power of natural generation that was once associated with the female breasts and reproductive organs. Instead, religion has made the heavenly father the creative center of the universe and woman the mere handmaid to that creation. Likewise pornography tends to denigrate the creative power associated with women's anatomy by representing women as mindless objects or body-parts of male dominion.¹⁶⁹

¹⁶⁷ J. C. Smith, "The Sexuality of Politics", *supra*, note 49 at 7-8. Professor Smith explains here that "[the] logos, pure mind and spirit is opposed to the flesh and animal body which seduces the mind through the pull of desire. The higher law denounces and disparages sexual pleasure as it contaminates and defiles pure mind and brings the spirit down the level of the body."

¹⁶⁸ J.C. Smith, *ibid.* at 8.

¹⁶⁹ This is suggested by Justice Gonthier's own analysis of pornography in *R. v. Butler*, *supra*, note 104 at 513 and 517, where he refers to the "loss of humanity" associated with certain pornographic depictions of human sexuality.

For my part I am willing to argue that not all forms of pornography, and not all pornographic imagery is necessarily denigrative of women and damaging to women's self-image. In particular, it is arguable that some lesbian pornography symbolically presents a powerful, if not liberated view of women. I use the word 'liberated' loosely, in the sense that women's

To the extent that science bears a comparable function to religion, in that both endeavours elevate the status of the mind, the spirit, or the will, and simultaneously disparage the pleasures and pains of the body, it is plausible to replace Professor Smith's "religion - law - pornography" triad with a more secular version, such as "science - law - pornography". Catharine MacKinnon suggests the feasibility of such a connection in her *Toward A Feminist Theory of the State*. She observes that

In the Western philosophical tradition, method has sought authority: how to produce an account of knowledge which is certain, which ends speculation and precludes skepticism, which has power that no one else can as powerfully contest....Its history is the history of an attempt to exert such power over reality as comes from methodological hegemony over the means of knowing, validating only those ways of proceeding which advance the project of producing what it regards as requisite certainty. Objectivity has been its answer, its standard, its holy grail."¹⁷⁰

Although MacKinnon is not particularly interested in the above statement with legal method it is not difficult to recognize how

sexual pleasure or pain as depicted in lesbian love-making is not necessarily defined by reference to the image of the male penis, and likewise, women's sexual identity is not determined by the presence of a dominant male figure. Moreover, by taking the image of women's naked bodies outside of the context of male dominion and heterosexuality, women's bodily identity becomes effectively liberated from the constraints of patriarchal ideology, which attempts to define female sexuality exclusively in terms of pregnancy, family, and heterosexuality. I believe this is what Zillah Eisenstein means when she says "[some] forms of pornography have a positive effect in depicting sex as not necessarily tied to pregnancy, marriage, or heterosexuality. Pornography can help to create a multiplicity of sexual imagery that enhances women's equality by differentiating the female body from the mother's body": Z. Eisenstein, *supra*, note 126 at 173.

¹⁷⁰ C. MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 106-07.

legal reasoning, fact-finding, and evidentiary rules all interact to constitute "authority" so that, in the end, like the scientist's "account of knowledge which is certain", the judge's or jury's finding is equally certain, or at least in criminal law determinative "beyond a reasonable doubt". And like scientific method, the adversarial process of criminal law and the many objective tests which are employed therein are devised ultimately to "end speculation" and to "preclude skepticism".

The element of pornography involved in this marriage between law and science is introduced where the central means for empirical verification becomes visual representation or, as MacKinnon correctly describes it, "visual objectification". She argues that "[pornography] connects the centrality of visual objectification to both male sexual arousal and the male models of knowledge and verification, objectivity with objectification."¹⁷¹ We have already seen how Freud marks an evolutionary shift in patterns and intensity of male sexual desire to the advent of *homo erectus* and the routine visibility of the contours of female breasts. What MacKinnon contributes to this observation is that optical perception entails objectification, and that visual objectification leads to anatomical fetishism and epistemological dismemberment. She says that "fixation on dismembered body parts (the breast man,

¹⁷¹ C. MacKinnon, *Toward A Feminist Theory of the State*, *ibid.* at 138. See also MacKinnon's remark that "visual metaphors for knowing have been prioritized as a method of verification, giving visual objectification, as in pornography, particular potency": MacKinnon, *ibid.* at 114-15 (endnotes omitted).

the leg man) evokes fetishism"¹⁷² and recalls thereby the fetishized effect of the microscopic approach to "indecent" that we saw in *Jacob*.

Anatomical fetishism is not in itself necessarily pornographic but it becomes so when, as MacKinnon suggests, not only women's body parts become the object of male fetishes, but women's perceived "sexual desirability" becomes fetishized. Thus she says, referring to certain kinds of pornographic representation or the kind of eroticism that attends scientific methodology, that

[o]bjectification makes supremacist sexuality a material reality of women's lives, not just a psychological, attitudinal, or ideological one. It obliterates the mind/matter distinction that such a division is premised upon. Like the value of a commodity, women's sexual desirability is fetishized: it is made to appear a quality of the object itself, spontaneous and inherent, independent of the social relation that creates it, uncontrolled by the force that requires it.¹⁷³

For MacKinnon, objectification entails commodification and diminution of human agency. It commodifies in a similar way to that which Lacan explores in his discussion of the symbolic exchanges of early kinship societies (because it exploits women commercially), and it alienates in precisely the way he understands the distorting tendencies of linguistic expression. That is to say, one cannot be an object - of admiration, of desire, of consumption, of anything - and at the same time have their own

¹⁷² C. MacKinnon, *Towards A Feminist Theory of the State*, *ibid.* at 110.

¹⁷³ C. MacKinnon, *Toward a Feminist Theory of the State*, *ibid.* at 123.

needs fulfilled through an other individual. Language, including the subject/object distinction, necessarily alienates the 'subject' who has needs from the satiation of his or her needs, and leaves that subject with an ever-recurring 'desire'. The sexual objectification of women operates therefore only at the level of language, discourse, image, symbol, or representation, and to the extent that men (and/or women in some cases) can be said to desire women in the Lacanian sense, such desire can only be conditioned on an eroticized (and fetishized) image of women. Thus, MacKinnon appreciates that

Pornography participates in its audience's eroticism because it creates an accessible sexual object, the possession and consumption of which is male sexuality, to be consumed and possessed as which is female sexuality. In this sense, sex in life is no less mediated than it is in art. Men have sex with their image of a woman. Escalating explicitness, "exceeding the bounds of candor," is the aesthetic of pornography not because the materials depict objectified sex but because they create the experience of a sexuality which is itself objectified. It is not that life and art imitate each other; in sexuality, they are each other.¹⁷⁴

Law has played a crucial role in the pornographic objectification of female sexuality in two important respects. The first of these has to do with the way law has traditionally defined and understood pornography. Pornography has typically been regarded in law as involving some kind of representation, whether literary or pictorial, and this has been legislated as an offence against morals or taste under the rubric "obscenity". The second

¹⁷⁴ MacKinnon, *Toward A Feminist Theory of the State*, *ibid.* at 199.

has to do with the nature of scientific method itself. As MacKinnon has already observed, the 'Western philosophical tradition' has tended to aspire to "certainty" and to preclude the possibility of "doubt". For MacKinnon, the paradigmatic Western philosopher in this sense is René Descartes, who relied heavily on the notion of causality as the methodological and conceptual basis for attaining his own epistemological certainty (methodological doubt).¹⁷⁵ As we will see, the rhetorical privilege which criminal law has ascribed to "causality" and proof "beyond a reasonable doubt" has possibly blinded the court to the harm to women which is involved in the pornographic imagination.

Professor Smith points out that North American anti-pornography legislation has been particularly instrumental in preserving a male-governed, sexist *status quo* by categorizing certain kinds of pornography in moralistic language, such as "obscenity".¹⁷⁶ He says that

¹⁷⁵ See generally, for example, René Descartes, *Meditations on First Philosophy* (with Selections from the *Objections and Replies*), trans. John Cottingham (Cambridge, Eng.: Cambridge University Press, 1986); and René Descartes, *Discourse on Method*, trans. John Veitch (La Salle, Ill.: The Open Court Publishing Company, 1899).

¹⁷⁶ Likewise Catharine MacKinnon traces the origin of the legal validation of pornography to American obscenity law: see C. MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 200-01. She argues that by misconstruing the pictorial denigration and physical subjugation of women as a matter of liberal morality - of public good versus private interest - rather than as an effective form of political oppression of women by men, obscenity law has historically encouraged a certain degree of interpretative subjectivity. Where the subjects who have been placed in charge of interpreting such matters of taste are predominantly male (as, for example, is the case with American juristic history), MacKinnon suggests that pornographic issues will be interpreted to suit male interests.

[r]ather than viewing [pornography] as wrong because it denigrates women and perpetuates a false male stereotype of the female, pornography is suppressed, to the degree that it is suppressed at all, as "obscene". It is categorized as obscenity because it has to do with sex. The repression of sexuality, particularly characteristic of the Judaeo-Christian tradition, is the product of the psychic conflict between the sexual nature which is part of our animality, and our desire to be pure of mind, free of the biological dictates of the body.¹⁷⁷

Professor Smith's argument lends support to Andrea Dworkin's contention that

"[w]hat is at stake in obscenity law is always erection: under what conditions, in what circumstances, how, by whom, by what materials men want it produced in themselves. Men have made this public policy. Why they want to regulate their own erections through law is a question of endless importance to feminists.... Arguments among men notwithstanding, high culture is phallogocentric. It is also, using the civilized criteria of jurisprudence, not infrequently obscene".¹⁷⁸

Both Smith and Dworkin come extremely close in their critique of obscenity law to recognizing the role of Nietzsche's ascetic priest in the development of civilization or "high-culture". The institution of anti-obscenity legislation throughout history has enabled men in general to appear morally pure (from a Judaeo-

It may be noteworthy that, although Canadian law treats the publication and dissemination of pornographic material as a criminal offence, it nonetheless interprets the crime as one of an offence against morals: see s.163(8) of the Canadian *Criminal Code*, R.S.C. 1985, c.C-46.

¹⁷⁷ J.C. Smith, *Neurotic Foundations*, *supra*, note 14 at 203.

¹⁷⁸ A. Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," (1985) 8 *Harvard Women's Law Journal* 1 at 8-9.

Christian perspective) and at the same time has provided them with a kind of sexual release valve. In the last respect the regulation of male erections has been necessary to ensure a semblance of male sexual control and order, one of the most significant costs of civilization.¹⁷⁹

Recent Canadian criminal law has seen a modest transformation of this distinctly ascetic treatment of pornography according to a less moralistic understanding of "obscenity". In *R. v. Butler*¹⁸⁰ the Supreme Court of Canada reviewed sociological and psychological evidence which tended to suggest a causal correlation between the publication and dissemination of pornographic materials and a degree of risk of harm to women and children. In light of this evidence the court saw fit to construe the standard test for "obscenity"¹⁸¹ in the context of pornographic imagery in extra-moral terms. Speaking on behalf of the majority in *Butler*, the Honourable Justice Sopinka stated that,

[a]mong other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation....This type of material would, apparently, fail the community

¹⁷⁹ See Sigmund Freud's *Civilization and Its Discontents*, *supra*, note 134 at 51: "Sublimation of instinct is an especially conspicuous feature of cultural development; it is what makes it possible for higher psychical activities, scientific, artistic, or ideological, to play such an important part in civilized life."

¹⁸⁰ *R. v. Butler*, *supra*, note 104.

¹⁸¹ I have discussed the so-called "community standard of tolerance" in Chapter 2. Without going into an elaborate analysis of this test it is useful to note that it is the same test that is applied in the context of "indecent" analysis as "obscenity" analysis.

standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.¹⁸²

Justice Sopinka's dicta is relevant to our purposes in two important respects. First, one gets the distinct impression, based on the abovementioned concern for the prevention of harm to women,¹⁸³ that Justice Sopinka's decision to uphold the constitutionality of the anti-pornography provision in question is not founded in some readily identifiable, ascetic, form of self-interest. He does not appear to be in favor of the suppression of certain types of pornographic material as a matter of male class interest, or as a form of physiological denial or inhibition, so much as a matter of genuine respect for female autonomy. This view of his logic is also supported by his comparison of the anti-pornography provision in question with Canadian anti-hate law.¹⁸⁴

¹⁸² *R. v. Butler*, *supra*, note 104 at 479.

¹⁸³ Justice Sopinka also makes it clear at page 508 of *Butler*, *ibid*, that he is concerned with the *prevention* of violence against women as opposed to the mere treatment or consolation of women who have already been violently abused in society.

¹⁸⁴ See, for example, *R. v. Butler*, *ibid*. at 496 and 501. Although the final determination of the central legal issues in *Butler* do not appear to hinge on this analogy it is nonetheless very important for some of the theoretical analyses of pornography at stake in this chapter. Specifically, some feminist writers have suggested that the censorship of pornography effectively raises its literary, pictorial or graphic content to the status of politico-sexual truth: see, for example, Annette Kuhn, *The Power of the Image* (London, Eng.: Routledge & Kegan Paul, 1985). The argument

And, to the extent that he is prepared to criminalize public material which spreads a message of hatred against women, Justice Sopinka appears to be non-misogynistic, unlike Judge Payne in *Jacob*.

Second, to the extent that Justice Sopinka is prepared to determine the issue of the community standard of tolerance with respect to the meaning of "obscenity" and "undue exploitation", without conclusive data or exact proof that the dissemination and consumption of pornographic materials causes misogynistic behaviour, he temporarily displays a peculiarly non-scientific attitude toward judicial decision-making.¹⁸⁵ Indeed, his non-positivistic determination is peculiar both in the sense that it is historically rare¹⁸⁶ and in the sense that it seems at odds with

says basically that, by legally curtailing access to pornographic publication the public acquires the perception that pornographic literature reflects some kind of forbidden 'truth' or carnal knowledge that must not be disclosed, for fear that it might corrupt or falsify the dominant puritan values of the day. If this argument was to hold sway, then it would be difficult to advocate the public suppression of pornography from both feminist and libertarian perspectives. However, by comparing anti-pornography legislation with anti-hate literature, Justice Sopinka is implying that the central 'evil' of pornography is not necessarily its claim to truth, however directly or indirectly that claim might be perceived by a consuming public, but rather the sentiment of misogyny that it purportedly fosters among its readership and general audience. Censorship becomes justified on these terms not as a matter of the suppression of true or false expression, but as a means for preventing hateful attitudes and beliefs, and possibly violent acts, against women.

¹⁸⁵ What I am referring to here as Justice Sopinka's express anti-scientific attitude is echoed by Justice Gonthier in the same case: see *R. v. Butler*, *ibid.* at 524.

¹⁸⁶ Although rare, Justice Sopinka's approach to the issue of the rational connection between Parliament's decision to criminalize certain kinds of pornography and the harm it is seeking

the general positivistic, scientific methodology of most judicial determinations over the course of common law history. At least to the extent that it eschews the need for a strict causal relationship in favor of securing obvious women's interests it represents a novel attempt at overcoming law's historical phallocentrism. That is to say, insofar as it is prepared momentarily to abandon or to displace one of Western civilization's most powerful concepts,¹⁸⁷ the Supreme Court of Canada makes a

to prevent thereby is not entirely unprecedented. He cites the case of *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 994, as enabling judicial determinations of legislative reasonableness between method and purpose (object), based on the amount of relevant evidence which is made available to Parliament, and which informs its decision to legislate one way or another with respect to a particular problem. Where the evidence at hand tends ultimately to support a reasonable conclusion in the mind of Parliament that a rational connection exists between the harm sought to be prevented by the legislation in question and the kind of activity or behaviour which the legislation in question purports to prohibit or regulate, the judiciary may rely on that reasonable apprehension as sufficient authority for its own determinations as to legislative reasonableness.

¹⁸⁷ Without arguing the point in any detail it is important to appreciate how the notion of causality has played a crucial role in the historical development of theology or religion (creation theory) and science. In his *An Enquiry Concerning Human Understanding* David Hume remarks that "[all] reasonings concerning matter of fact seem to be founded on the relation of Cause and Effect": D. Hume, *An Inquiry Concerning Human Understanding* in *David Hume, The Philosophical Works*, Vol. 4, ed. by T. H. Green and T. H. Grose (GmbH., Darmstadt: Scientia Verlag Aalen, 1964) at 24. David Hume has criticized various kinds of arguments for the existence of god precisely because they presume some kind of ultimate or original cause. Hume's response is simply to propose that the world may not be caused, and that it may not, therefore, be an effect, but that it might simply be. Like Nietzsche, he rejects the validity of any analogy or correspondence between the operations of the human mind (including its propensity to view the world causally) and the operations of the so-called 'natural' world. Referring to the 'natural' tendency of the intellect to make causal inferences he remarks, "allowing that we were to take the operations of one part of nature upon another for the

rare and voluntary sacrifice of its own power.¹⁸⁸ It relinquishes its Cartesian desire for scientific certainty based on scientific methodology and makes a decision clouded in reasonable doubt. It embraces a mild form of Humean scepticism and, in accepting the inherently, physically harmful nature of some forms of pornography, it demonstrates an exceptional vulnerability - a preference, that is, for epistemological immediacy (or tactile perception) over epistemological mediacy (or cognitive, intellectual, and visual perception). The importance of this gesture for feminist thinking

foundation of our judgment concerning the *origin* of the whole (which never can be admitted), yet why select so minute, so weak, so bounded a principle as the reason and design of animals is found to be upon this planet? What peculiar privilege has this little agitation of the brain which we call *thought*, that we must thus make it the model of the whole universe? Our partiality in our own favour does indeed present it on all occasions; but sound philosophy ought carefully to guard against so natural an illusion: D. Hume, *Dialogues Concerning Natural Religion*, in *Hume Selections*, ed. Charles W. Hendel, Jr. (New York, N.Y.: Charles Scribner's Sons, 1927) at 308-309. See also F. Nietzsche, *Beyond Good and Evil*, *supra*, note 136 at 33 (Part I, Section 21).

Science has been equally seduced by causal inference and causal metaphor to the extent that it prefers to substitute anthropomorphic creation stories for the world, and indeed the cosmos, for non-anthropomorphic causal explanations, such as the Big Bang theory. But even on a more mundane, earthly level where, as Hume suggests, science endeavours to explain "extraordinary phenomena, such as earthquakes, pestilence, and prodigies of any kind", he concedes that "philosophers, who carry their scrutiny a little farther, immediately perceive, that, even in the most familiar events, the energy of the cause is as unintelligible as in the most unusual, and that we only learn by experience the frequent CONJUNCTION of objects, without being ever able to comprehend anything like CONNEXION between them": Hume, *An Inquiry Concerning Human Understanding*, *ibid.* at 58. The kinds of illusory "necessary connexions" which Hume addresses barely touch on the plethora of causal explanations upon which science routinely relies, from gravitational pull in Newtonian physics to criminogenics in social science theory.

¹⁸⁸ See Zillah Eisenstein, *supra*, note 131 at 28-29.

and politics cannot be understated.¹⁸⁹ It opens the door, albeit slightly, for the introduction of a distinctly non-patrophallic perspective or attitude into law. As Catharine MacKinnon states,

Feminism does not appropriate an existing method--such as scientific method--and apply it to a different sphere of society to reveal its preexisting political aspect....As its own kind of social analysis, within yet outside the male paradigm, as women's lives are, feminist method has a distinctive theory of the relation between method and truth, the individual and her social surroundings, the presence and place of the natural and spiritual in culture and society, and social being and causality itself [my emphasis]. Having been objectified as sexual beings while stigmatized as ruled by subjective passions, women reject the distinction between knowing subject and known object--the division between subjective and objective postures--as the means to comprehend social life. Disaffected from objectivity, having been its prey, but excluded from its world through relegation to subjective inwardness, women's interest lies in overthrowing *the distinction itself*. A feminism that seeks only to affirm subjectivity as the equal of objectivity, or to create for itself a subject rather than an object status, seeks to overturn hierarchy while

¹⁸⁹ According to the contemporary French feminist philosopher Julia Kristeva it is crucial to the task of overcoming male suppression and female oppression, or even restricting the socio-political influence of male-dominance to any degree, that the many institutional powers of the patriarchal state (such as law, religion, education and their dominant discourses) recognize, introduce and effectively incorporate maternalistic values. She points out that even paternalistic institutions exercise a maternalistic function in the end so that, for example, the epistemological totalitarianism of law (that is, its claim to objectivity and certainty based on precedent and its acquired authority) must ultimately concede its own pretentiousness. In her words, "[how] true it is also that these powers lean, in the end, on those modern totalities that are mothers who 'create' and who become 'responsible', bosses, officials. But, I think that, on the other hand, the maternal function can be an apprenticeship of modesty and of a permanent calling into question; and if a woman lives maternity and her artist's work thus, far from being a totalizing Mother-Goddess, she is rather a locus of vulnerability, of calling into question of oneself and of languages": J. Kristeva, "L'Autre du sexe", trans. by J. Gallop, in *The Daughter's Seduction*, *supra*, note 158 at 122-123.

leaving difference, the difference hierarchy has created, intact.¹⁹⁰

By steering the law's attention away from the strict methodological dictates of Cartesian rationalism, such as cause and effect and other binary or oppositional modes of analysis, toward the harm that *women and their bodies* may suffer through pornographic publication and distribution, Justice Sopinka momentarily subverts the centrality of scientific paradigms in favor of women's uniquely non-scientific concerns - namely, the inviolability and integrity of their bodies.¹⁹¹ The majority decision in *Butler* to determine the issue in this manner addresses one of the central problems that some feminists have identified with modern approaches to pornography analysis. One feminist scholar has noted,

The...problem is that concentration [on] the 'effects' of pornography at the behavioural level tends to deflect feminist analysis away from other types of 'effects' at an ideological level such as ways in which pornography contributes to the organization of the everyday viewing of women as a 'desirable commodity' to be enjoyed by men. The search for 'hard' empirical evidence operates to narrow not only the definition of 'the problem' but also the theoretical framework and the range of possible

¹⁹⁰ C. MacKinnon, *Toward a Feminist Theory of the State*, *supra*, note 67 at 120-121.

¹⁹¹ By referring to women's concern for their bodily inviolability as "uniquely non-scientific" I am not suggesting that women's concern in this respect and man's concern for bodily integrity are somehow different. I am merely suggesting that anyone's concern with personal bodily autonomy is "uniquely non-scientific" in that it is not grounded in reason. That is, it cannot be explained away, especially in terms of cause and effect.

feminist strategies that might be employed.¹⁹²

Despite what I consider to be a minor legal triumph for women concerned with the misogynistic implications of pornographic representation there are some self-proclaimed feminists who would prefer to permit unqualified pornographic expression according to the libertarian tenets of the *Charter*. Thelma McCormack, for example, who is currently director of the Centre for Feminist Research at York University, rejects the political use of anti-pornography regulation among some women as further entrenching women's imagined inferiority and dependency on a paternalistic state.¹⁹³ While I have painted a picture of law and patriarchal society which gives Ms. McCormack every reason to distrust the effectiveness of anti-pornography legislation (in terms of its ability to protect women from offences against their morals and their bodies) it is nonetheless unfortunate that she remains

¹⁹² R. Eckersley, "Wither the feminist campaign? An evaluation of feminist critiques of pornography", (1987) 15:2 *International Journal of the Sociology of Law* 149 at 163. See also C. MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 123. MacKinnon makes a similar, but more general point here when she states "[women] have the opposite problem from Descartes. The objective world is not a reflection of women's subjectivity, if indeed women--subjected, defined by subjectivism, and not having been permitted to be a subject--can be said to possess a subjectivity. Epistemologically speaking, women know the male world is out there because it hits them in the face. No matter how they think about it, try to think it out of existence or into a different shape, it remains independently real, keeps forcing them into certain molds."

¹⁹³ T. McCormack, "Must We Censor Pornography? Civil Liberties and Feminist Jurisprudence", in D. Schneiderman (ed.), *Freedom of Expression and the Charter* (Toronto: Thomson, 1991) 180.

committed to the ideals of Cartesian certainty and scientific method.¹⁹⁴ Her scientific comment in this respect belies her allegiance to our acculturated paternalism and it appears to overshadow her appreciation of the full sociological implications of pornographic expression. Speaking on the recent *Butler* decision and the relevance of the anti-pornography provision in the *Criminal Code* to the formal guarantee of freedom of expression under the *Canadian Charter*, as well as the relevance of that same provision to women's lives in general, she declared, "[f]ar from helping us to achieve equality or reduce inequality, the prohibition of pornography infantilizes us."¹⁹⁵ By way of elaboration she maintained that

The prohibition of obscenity in the *Criminal Code* satisfies the urge to get even but accomplishes nothing in the struggle for equality and reinforces the dependency of women on a patriarchal state.¹⁹⁶

This comment is at best confusing and at worst astonishing. It is confusing because it assumes that women have a desire to 'get even' or to obtain equality which is *not* conditional somehow on their self-image or self-portrait in a patriarchal state. If MacKinnon is right, women's real and intellectual sense of dependency on men is profoundly related to the submissive and denigrative image of

¹⁹⁴ See Clayton Ruby's "Fifth Column: Law and Society", in *The Globe and Mail* (1 December 1992) A20.

¹⁹⁵ Ruby, *ibid.*

¹⁹⁶ Ruby, *ibid.*

women which men observe in pornographic literature and magazines. Women's passivity, dependency, and *infantilization* (lack of agency, intellectual vacuity) as portrayed in many forms of pornography and lived as an acceptable form of social practice is a logical product of patriarchy. Whether this form of social practice is common to matriarchal societies is arguable. However, referring to our patriarchal social order, MacKinnon states, "[i]n a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act."¹⁹⁷ So it is clearly problematic to speak, as Ms. McCormack does, as if gender equality could exist alongside constitutionally protected pornographic expression or publication. This proposition brings us to what is astonishing about Ms. McCormack's comment - namely, that it appears to divorce the issue of women's social or political 'infantilization' from the issue of pornographic publication. To the extent that the pornographic production and publication requires in many cases the physical infantilization of women it is difficult to accept the notion that women's dignity somehow depends on women giving men legitimate political expression to such an infantile image of women.¹⁹⁸ Indeed, according to MacKinnon, pornography is part of

¹⁹⁷ MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 204.

¹⁹⁸ This argument has been raised by some anti-censorship feminists who prefer to combat the social implications of misogynistic, pornographic film publication, for example, by encouraging private enterprise to publish or to screen so called "woman-positive, woman-produced" films: see L. Steele, "A Capital Idea: Gendering in the Mass Media", in *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 58 at 75. Although this suggestion adroitly addresses the libertarian, free-speech concern

a "process that gives sexuality its male supremacist meaning" and "is therefore the process through which gender inequality becomes socially real".¹⁹⁹ And in reference to the typical pornographic image of woman as passive, receptive, and sexually available MacKinnon states,

The vulnerability of women's projected sexual availability is victimization. The acting that women are allowed is asking to be acted upon. Play conforms to scripted roles, fantasy expresses ideology not exemption from it, and admiration of physical beauty becomes objectification....The experience of the (overwhelmingly) male audiences who consume pornography is therefore not fantasy or simulation or catharsis but sexual reality: the level of reality on which sex itself largely operates. To understand this does not require noticing that women in pornography are real women to whom something real is being done. It does not even require inquiring into the systematic infliction of pornographic sexuality upon women, although it helps. The aesthetic of pornography itself, the way it provides what those who consume it want, is itself the evidence. Pornography turns a woman into a thing to be acquired and used.²⁰⁰

at the heart of the Butler decision, for example, it nonetheless assumes that "woman-positive" films will entice a sufficiently broad audience (male and female), and therefore engender a sufficient societal impact to counter-act the deliterious implications of 'man-positive, women-negative' pornography. Ironically, one way in which "woman-positive" films could reach a sufficiently wide audience to have the desired counter-effect (that is, from a feminist point of view) would be to incorporate such films in the core public education curricula. This is 'ironic', I say, because it requires that anti-censorship feminists become dependent on a paternalistic state in precisely the way that they are critical of pro-censorship feminists.

¹⁹⁹ MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 198.

²⁰⁰ MacKinnon, *Toward A Feminist Theory of the State*, *supra*, note 67 at 198-99 (footnotes omitted).

If one accepts MacKinnon's argument that pornographic publication plays a significant role in ensuring sexual inequality on a social scale then it is not difficult to conclude that Ms. McCormack is simply *wrong* to say that the prohibition of obscenity in the Canadian *Criminal Code* (and as interpreted in *Butler*) "accomplishes nothing in the struggle for equality and reinforces the dependency of women on a patriarchal state."²⁰¹ Although, as I have already suggested in Chapter 3, I am not sure that women or feminists want any kind of *equality with men* (real, social, substantial or formal) as much as they want *real independence from male forms of political and social control*, at least the fulfillment of the latter goal depends upon a transformation in the way men view women in all aspects of social life. And this latter goal would not appear to be advanced by entrenching the constitutional right to publish images of women as mindless objects

²⁰¹ I must note here that I am aware that, since *Butler*, it has been primarily *lesbian* literature ranging from pornography, through romance novels, to academic treatises concerning lesbian sexuality, that has been the target of Canadian anti-obscenity law enforcement agencies. I see this situation as clearly unfortunate, especially in light of my earlier suggestion that exclusively lesbian pornography or erotica liberates women from a self-image or self-representation which is focussed on the male penis, and which typically involves male domination and violence. However, there is nothing inherently discriminatory about the *Butler* decision which mandates the oppression of pro-lesbian literature (except perhaps where that literature involves depictions of sadism, but then in theory the scope of the *Butler* decision applies equally to depictions of heterosexual sadism), and one can only make efforts to ensure that homophobic attitudes become absent from future judicial determinations involving the legality of homosexual literature.

for the satisfaction of male prurient interests.²⁰²

It is probably safe to say that within the entire common law system, scientific methodology and rationality provide the norm for judicial determination. For nowhere in the common law tradition does a judge pretend to determine a legal issue irrationally, or without appeal to some culturally validated test (whether subjective or objective) or normative system. Even Justice Sopinka's decision to overlook the inexactitude or *uncertainty* of the causal relationship between pornography and violence against

²⁰² Admittedly, there are some female writers and producers of pornography who see anti-pornography regulation as a restriction not only of women's freedom of expression but particularly women's freedom of sexual expression: see, for example, S. Tisdale, "Talk Dirty to Me [:] A woman's taste for pornography", *Harper's Magazine* (February 1992) 37 at 44-45.

Tisdale's argument is especially interesting for our purposes because it suggests that women's subjectivity - the kind that Madame Justice Wilson discusses in *Morgentaler* and the kind that I have explored in the context of the *Jacob* case - depends upon women's ability to express themselves in ways that they deem important (for example, through erotica or pornography). I cannot disagree with this argument, and it is certainly consistent with my general critique of the sexual exclusivity of patriarchy - that is, that patriarchy is a social institution which is contingent upon the denial to women of an effective historical and political voice. Nonetheless I retain my concern that the publicized message of much heterosexual pornography and erotica (unlike the message conveyed by the behaviour of Ms. Jacob) is female inferiority and male-domination across various social strata. Where that message is varied, for example, so that the male actor is portrayed, in Professor Smith's words, as the "supplicant" for female sexual satisfaction (*Neurotic Foundations*, *supra*, note 14 at 179) or the "consort" to the female (*ibid.* at 235, 261), it is conceivable that pornographic publication would not have a deliterious impact on either women's or men's lives. However, the central concern here must be that whatever the act of sexual expression might be, that it does not in and of itself promote hatred or sadism against either sex, and it should be careful in this respect not to over-evaluate or fetishize particular body parts to the point of diminishing or devaluating the personal needs and desires which are so intimately linked to the body.

women is ultimately grounded in an abundance of empirical data and "social science evidence"²⁰³ which is carefully weighed and tested, sifted and selected, and then found to be reliable for the purposes at hand. In this respect, Justice Sopinka's predilection for empirical evidence and objective analyses concerning questions of obscenity is no different in the end than Judge Payne's predilection for scientific analyses of female 'anatomy' and 'sexuality' as being somehow appropriate for determining issues of indecency. Justice Sopinka makes a momentary grand gesture but in the final analysis simply draws the magnifying glass further away from the relevant subject (or object) matter.

²⁰³ *R. v. Butler, supra*, note 104 at 502.

CONCLUSION

Following Evelyn Fox Keller's suggestion that the radical dichotomy between subject and object describes "no worldly relation",²⁰⁴ it is perhaps time to accept scientific models as having limited application to issues of human sexuality. This is not to suggest that certain scientific metaphors cannot bear a reformative or pragmatic function in law as well as in other culturally dominant discourses. But one must continually ask whether rational distinctions are necessarily suited to the practical demands of human freedom and autonomy and the irrational desires of the human anatomy? For my purposes I have taken the scientific discourses of psychoanalysis and biology very seriously. As I have already stated, as an academic it is difficult if not impossible *not* to think and argue scientifically. But this limitation does not necessarily pose a conceptual or methodological problem for my thesis in the end. I believe that the discourses of biology and psychoanalysis, as well as those of certain kinds of feminism, can be applied in the legal arena in a way which can assist in the reduction of male violence against women in general. Indeed, these discourses enable one to interpret Judge Payne's paternalistic approach to the issue of male violence against women in *Jacob* as pathological, not simply as *wrong* or *unfortunate*. They also help to understand the kind of community ethos portrayed

²⁰⁴ Keller, *Reflections on Gender and Science*, *supra*, note 66 at 79.

throughout his judgment as physiologically inhibited and psychologically unhealthy, and possibly intellectually biased in favor of chauvinistic religious doctrines. At least they allow us to question the health and sanity of a legal regime whose self-proclaimed standards of moral taste and decency does not permit women to overcome the oppressive sensation of 30 degree celsius weather by removing their shirts, but which simultaneously acquiesces in the private commodification and public representation of dismembered, mindless women.

Although the dominant pairs of conceptual opposites which I have utilized are clearly steeped in scientific metaphor, they do not necessarily have to become the *norm* for judicial analysis. I have suggested that more respect could be paid by the courts to female physiology, and I have attempted to show how this can be done within our preexisting legal conceptual framework. Madame Justice Wilson (as she was then) has done her part in this respect by subverting the importance of institutionalized equality in *Nguyen* and by emphasizing the inviolability of women's bodies in *Morgentaler*. And the Honourable Justice Sopinka has done his part in rejecting the need for strict causality in *Butler*. By stressing the need for a collective effort on the part of the judiciary to recognize the profound societal implications of the female body, however, I do not mean to say that less respect should be given to male physiology. The historical problem of violence against women and our acculturated misogyny does not depend on the balancing of some kind of bodily equation, although it will likely depend on the

practical "feminizability" of men in general,²⁰⁵ and an increased presence of female judges, lawyers, and politicians and legislators throughout our society. If and when this situation occurs, so that women acquire an effective political voice, I would expect that the law might overcome its rhetorical concern for objectivity and instead recognize the reformative potential of limited judicial discretion and unsuppressed personal expression. For it is within the context of this post-paternalistic, post-pornographic legal order that I imagine the potential benefits to women and men of a pronounced return to subjectivity in law. In this hypothetical, futuristic context there is at least no reason to fear that the legitimate exercise of a male or female judge's personal desire will entail the same degree of oppression that many women have experienced at the hands of an all-male legal institution. Even here, the crux of the matter will consist in the possibility for mutual recognition between and across both sexes that sexual tension, frustration, and possibly antagonism - in short, sexual politics - is not necessarily amenable to law or order. For the role of criminal law in the present context is very limited. It must not attempt or purport to control human sexuality so much as it should encourage the free expression of it, *short, of course, of involving physical and psychological harm to non-consenting or non-willing individuals.* By gradually unloading itself of its

²⁰⁵ I have borrowed this expression from Ann Scales, who employed it in a Faculty Seminar entitled "The Iconography of Oppression", at the Faculty of Law, University of British of Columbia, on March 4, 1993.

puritanical pretences and its scientific claims to objectivity the strong arm of the criminal law may in turn acquire sufficient flexibility to meet the ever-fluctuating demands of an increasingly visible and tangible pluralistic society.

BIBLIOGRAPHY

- Benjamin, Jessica. "The Bonds of Love: Rational Violence and Erotic Domination." In *The Future of Difference*, eds. Hester Eisenstein and Alice Jardine. New Brunswick: Rutgers University Press, 1985.
- Benjamin, Jessica. *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination*. New York: Pantheon Books, 1988.
- Bloom, Allan. *The Closing of the American Mind*. New York: Simon & Schuster Inc., 1987.
- Chasseguet-Smirgel, Janine. "Feminine Sexuality: An Interview with Janine Chasseguet-Smirgel." *The Psychoanalytic Review*, eds. Margaret Honey and John Broughton, 72:4 (1985): 527.
- Chasseguet-Smirgel, Janine. *Sexuality and Mind: The Role of the Father and the Mother in the Psyche*. New York: New York University Press, 1976.
- Chodorow, Nancy. "Gender, Relation, and Difference." In *The Future of Difference*, eds. Hester Eisenstein and Alice Jardine. New Brunswick: Rutgers University Press, 1985.
- Chodorow, Nancy. *Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*. Berkeley: University of California Press, 1978.
- Cixous, Hélène. "Castration or Decapitation?" *Signs: Journal of Women in Culture and Society* 7:1 (1981): 41.
- Cixous, Hélène. "The Laugh of the Medusa," trans. K. Cohen and P. Cohen, in *The Rhetorical Tradition: readings from classical times to the present*, eds. Patricia Bizzell and Bruce Herzberg. Boston: Bedford Books of St. Martin's Press, 1990.
- Clark, Anna. *Women's Silence, Men's Violence*. London and England: Pandora, 1987.
- Descartes, René. *Meditations on First Philosophy (with Selections from Objections and Replies)*, trans. John Cottingham. Cambridge, Eng.: Cambridge University Press, 1986.
- Descartes, René. *Discourse on Method*, trans. John Vietch. La Salle, Ill.: The Open Court Publishing Company, 1899.
- Dworkin, Andrea. "Against the Male Flood: Censorship, Pornography, and Equality." *Harvard Women's Law Journal* 1 (1985): 1.

- Eckersly, R. "Wither the feminist campaign? An evaluation of feminist critiques of pornography." *International Journal of the Sociology of Law* 15:2 (1987): 149.
- Eisenstein, Zillah. *The Female Body and the Law*. Berkeley and Los Angeles: University of California Press, 1988.
- Eliot, T.S. *Sweeney Agonistes: Fragments of an Aristophanic Melodrama*. London: Faber and Faber, 1932.
- Fraser Committee. *Report of the Special Committee on Pornography and Prostitution*. Ottawa: Department of Justice Working Paper, 1985.
- Freud, Sigmund. *The Standard Edition to the Complete Works of Sigmund Freud*. 24 vols. Ed. James Strachey. London: Hogarth Press, 1960-1974.
- Freud, Sigmund. *Civilization and Its Discontents*, trans. James Strachey. New York: W. W. Norton & Company, Inc., 1961.
- Gallop, Jane. *The Daughter's Seduction: Feminism and Psychoanalysis*. Ithaca, N.Y.: Cornell University Press, 1982.
- Gilligan, Carol. *In a Different Voice*. Cambridge, Mass.: Harvard University Press, 1982.
- Griffin, Susan. *Pornography and Silence: Culture's Revenge Against Nature*. New York: Harper and Row, 1981.
- House of Commons, Canada. *Minutes of Proceedings and Evidence of Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General*. November 26, 1992. Ottawa: Queen's Printer.
- Hume, David. *An Inquiry Concerning Human Understanding*. In David Hume, *The Philosophical Works*, ed. T. H. Green and T. H. Grose. GmbH., Darmstadt: Scientia Verlag Aalen, 1964.
- Hume, David. *Dialogues Concerning Natural Religion*. In Hume *Selections*, ed. Charles W. Hendel, Jr. New York: Charles Scribner's Sons, 1927.
- Jackson, M. A., Palys, T. S., and Gavigan, S. *Regulating Sex*. Burnaby, B.C.: School of Criminology, Simon Frazer University, 1986.
- Kant, Immanuel. *Critique of Pure Reason*, trans. J. M. D. Micklejohn. New York and London: The Colonial Press, 1900.

- Keller, Evelyn Fox. *Reflections on Gender and Science*. New Haven and London: Yale University Press, 1985.
- Kuhn, Annette. *The Power of the Image*. London, Eng.: Routledge & Kegan Paul, 1985.
- Lacan, Jacques. *Le Seminaire livre XX: Encore*. Éditions du Seuil, 1975.
- Lacan, Jacques. *Écrits*. Trans. Alan Sheridan. New York: Tavistock Publications Limited, 1977.
- MacKinnon, Catharine. *Toward A Feminist Theory of the State*. Cambridge, Mass.: Harvard University Press, 1989.
- MacKinnon, Catharine. *Sexual Harassment of Working Women*. New Haven, Conn.: Yale University Press, 1979.
- Mahler, Margaret S., Fred Pine and Anni Bergmann. *The Psychological Birth of the Human Infant*. New York: Basic Books, 1975.
- McCormack, Thelma. "Must We Censor Pornography? Civil Liberties and Feminist Jurisprudence." In *Freedom of Expression and the Charter*, ed. D. Schneiderman. Toronto: Thomson, 1991.
- Mensch, Elizabeth. "The History of Mainstream Legal Thought." In *The Politics of Law: A Progressive Critique*, rev. ed. David Kairys. New York: Pantheon Books, 1982.
- "Nature or Nurture?" *The Economist* 325 (Dec. 1992 - Jan. 1993): 34.
- Nietzsche, Friedrich. *On the Genealogy of Morals*, in *On the Genealogy of Morals and Ecce Homo*. Trans. Walter Kaufmann. New York: Random House Inc., 1967.
- Nietzsche, Friedrich. *The Portable Nietzsche*, ed. and trans. Walter Kaufmann. New York: Viking Press, 1968.
- Nietzsche, Friedrich. *Beyond Good and Evil*, trans. R. J. Hollingdale. New York: Penguin Books, 1973.
- Nietzsche, Friedrich. *The Gay of Science*, trans. Walter Kaufmann. New York: Random House, Inc., 1974.
- O'Brien, Mary. *The Politics of Reproduction*. Boston, Mass.: Routledge & Kegan Paul, 1981.
- Segal, Lynne. *Is the Future Female?* London: Virago Press Ltd., 1987.

- Sheehy, Elizabeth. "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" *Ottawa Law Review* 21:3 (1989): 741.
- Smith, J. C. *Psychoanalytic Roots of Patriarchy (Neurotic Foundations of Social Order)*. New York: New York University Press, 1990.
- Smith, J.C. *Legal Obligation*. Toronto and Buffalo: University of Toronto Press, 1976.
- Smith, J.C. "The Sexuality of Politics: Psychoanalysis, Postmodernism, and Feminism." Unpublished, Faculty of Law, University of British Columbia, 1992.
- Smart, Carol. *Feminism and the Power of Law*. London and New York: Routledge, 1989.
- Smart, Carol. "Law's Power, the Sexed Body, and Feminist Discourse." *Journal of Law and Society* 17 (1990): 194.
- Steele, L. "A Capital Idea: Gendering in the Mass Media." In *Women Against Censorship*. Vancouver: Douglas & McIntyre, 1985.
- Stoller, R. *Presentations of Gender*. New Haven, Conn.: Yale University Press, 1985.
- Swift, Jonathan. *Gulliver's Travels*. New York: The New American Library of World Literature, Inc., 1960.
- Tisdale, S. "Talk Dirty to Me: A woman's taste for pornography." In *Harper's Magazine* 37 (1992): 37.
- West, Robin. "Jurisprudence and Gender." *U. Chi. L. Rev.* 55 (1988): 1.
- Williams, Wendy. "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate." *New York University Review of Law and Social Change* 13 (1984-85): 325.