

## Feminism, Critical Social Theory and Law

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# Feminism, Critical Social Theory and Law

Robin West†

Critical social theory has revolutionized the way that critical legal scholars and, to a lesser extent, mainstream legal scholars think of the most fundamental categories of legal theory. By contrast, social theory has proven to be far more controversial among feminist legal theorists. Indeed, the critical and postmodern turn in contemporary progressive social theory might well turn out to be as divisive to the feminist legal theory of the 1990s as the pornography and sexuality debates have been to feminist practice in the 1980s.

This article tries to explain and defend the lack of enthusiasm among at least some feminist legal theorists for the great transformative ideas of Michel Foucault, Roberto Unger, poststructuralists, postmodernists and other critical social theorists that have so energized critical legal thought. I will urge that the four central ideas of critical social theory proven to be of most interest to critical legal theorists—ideas that center around the nature of power, of knowledge, of morality and of the self—will not be helpful even to our understanding of patriarchy, and will frustrate rather than further our attempts to end it.

## I. POWER

The first and most defining tenet of critical social theory is, to quote Foucault, that “power comes from everywhere.”<sup>1</sup> It immediately follows that power is not, for the most part, occasional, censorial and repressive. Nor are its primary manifestations censorship and repression, as an excessively juridical view of power had taught both legal and social scholars of earlier generations to believe.<sup>2</sup> Rather, according to the critical social theorists, the repressive form is just one form that power might take. Whatever may have been the case historically, in modern times power far more typically takes a positive, inventive and creative form, the conse-

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<sup>1</sup> Michel Foucault, *Discipline and Punish*, translated by Alan Sheridan (Vintage Books, 1979).

<sup>2</sup> *Id.*

quences of which are not censorship, silence or oppression, but rather a multiplicity of positive social inventions. These inventions include knowledge, the concept of knowledge, the liberal self and the idea of objectivity. Foucault puts the point this way:

The individual is no doubt the fictitious atom of an 'ideological' representation of society; but he is also a reality fabricated by this specific technology of power that I have called 'discipline'. *We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.*<sup>3</sup>

Foucault's quintessentially social and critical directive—to "cease once and for all to describe the effects of power in negative terms"—has become a unifying methodological commitment of the critical legal studies movement. Indeed, the claim seems tailor-made for the study of law. Following Foucault's mandate, critical legal scholars collectively have taught all of us to think of the productivity rather than the negativity of legal power. They have taught us to see not only our legal institutions and legal outcomes, but also (and more centrally) our legal imaginative constructs and legal knowledge as the inventions and products of a positive political will and *not* as the reflection of a deep social or biological logic, as the accommodation of discrete interests or as the working out of a necessitarian historical pattern.<sup>4</sup> Largely due to Foucault's influence, the critical legal academy has taught us to think of law as a form of knowledge that is *both* a product of politics and itself a political force which in turn generates other forms of knowledge. To the credit of the critical legal studies movement, we have indeed, to a considerable degree, "quit thinking of legal power in negative terms," and the result has been an increasingly sophisticated understanding of the positive, constructed inventions of law

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<sup>3</sup> Id at 194.

<sup>4</sup> Thus, critical legal scholars reject the liberal and mainstream view of law as the product of a competition of "social interests," as well as the Marxist's contention that law is the necessary consequence of class struggle situated at a particular moment in a determined history. See, for example, Robert W. Gordon, *Critical Legal Histories*, 36 Stan L Rev 57, 71-116 (1984); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 Yale L J 1017, 1024-36 (1981); David Kairys, ed, *The Politics of Law* (Pantheon, 1982); Mark Kelman, *A Guide to Critical Legal Studies* 213-33 (Harvard University Press, 1987).

and legal ideology.

Is Foucault's suggestion, though,—that we should “quit talking about power in negative terms”—something feminist legal scholars should heed? Is its underlying assumption—that modern power is creative and productive rather than negative and censorial—as true of modern *patriarchal* power as it seems to be of *legal* power? It is not at all obvious that it is. It certainly does not follow logically from any of the particularized inquiries critical social theorists have made into the various forms of social, legal, intellectual or economic power of the modern era that their general claim will be true of *patriarchal* power as well. It may be, in other words, that a profoundly negative, censorial, patriarchal power lies behind the positing and creative forms of modern social and legal power which are the subject of critical legal and social analysis. If so, we should hardly expect male critical legal or social theorists to see this, or to adjust their theory accordingly. But more importantly, if modern patriarchal power is different in this way from other forms of modern social power, then while feminist legal theorists may be well advised to “quit thinking of legal power in negative terms,” it would be disastrous if we unwittingly generalized from Foucault's suggestion and quit thinking of *patriarchal* power in negative terms.

I want to urge, even plead, that we turn down the Foucaultian invitation to think of power in primarily positive terms. My reason is very simple: Women's experiences of patriarchal power, told and retold in feminist texts, are profoundly unlike anything imagined in Foucault's philosophies. Unlike the institutional “disciplines” that are the subject of Foucault's histories of the workings of power, and unlike the ideological and imaginative forms of power reflected in the legal ideologies, processes and decisions that are the subject of study for the critical legal studies movement,<sup>5</sup> patriarchal power is experienced by modern women as intensely non-discursive, as utterly unimaginative, as profoundly negating, and, in short, as frighteningly and pervasively *violent*.<sup>6</sup> So long as this is the case—so long as the experience of violence, and not the experience of discursive productivity, is central to the female experience

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<sup>5</sup> Foucault's studies of power have focused on the disciplines instilled by such institutions as hospitals, penal systems and schools. The critical legal scholars have, in a roughly parallel manner, focused on the disciplines instilled by legal institutions, ideology and doctrine.

<sup>6</sup> See Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987); Susan Brownmiller, *Against Our Will* 1-5 (Simon and Schuster, 1975); Diana E. H. Russell, *Rape in Marriage* (Macmillan, 1982).

of patriarchal control—then no matter how appropriate it may be for the study of legal history and legal ideology, Foucault's appeal to "cease talking about power in negative terms" is of little use to feminism.

This is not to say that patriarchy does not have its positive, productive side, or that we could not study it. We could look at the "discursive truths" patriarchy has manufactured in its struggle to maintain itself. We could look, as some postmodern feminists want us to do, at patriarchy's discourses of gender<sup>7</sup> and study the "truths" produced by patriarchy about women: "truths" about women's inferiority, women's nature, men's culture, men's superiority, and so on. We could endlessly deconstruct, to take a legal example, Supreme Court sex discrimination doctrine so as to cull out and then reverse its "suppressed differences."<sup>8</sup> All of this might well be important work. If, however, it comes to exhaust the feminist agenda—even the feminist theoretical agenda—it will surely distort the object of its own study.

If feminist legal theorists want to understand, much less challenge, patriarchal power, we need to come to grips with its utterly non-discursive and silencing violence. Particularly if we want to understand it from women's point of view, we must not focus obsessively on its talkative, pontificating and no doubt internally contradictory blabber.<sup>9</sup> To understand patriarchy we do indeed need archaeologies, but not of the positive creations of power—not of the "discourses" and "selves" patriarchy has produced, created or invented. We need archaeologies of the discourses patriarchy has silenced, of the selves it has not allowed to be, of the subjectivities it has denied, of what it has forbidden and what it has destroyed.

Beyond simply bettering our understanding of patriarchy, there are also political reasons feminist legal theorists should keep our focus on patriarchal violence, rather than patriarchal constructs. The first of these reasons is decidedly local. It is extremely difficult, as feminists inside and outside of law know, to communi-

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<sup>7</sup> For an introduction to the postmodern feminist literature, see Sandra Harding and Merill B. Hintikka, eds, *Discovering Reality* (D. Reidel, 1983); Sandra Harding, *The Instability of the Analytical Categories of Feminist Theory*, 11 *Signs* 645 (1986); Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 *Signs* 621 (1987).

<sup>8</sup> See Frances Olsen, *Feminism, Post-Modernism and Critical Legal Studies*, unpublished manuscript on file with author; Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv L Rev* 1497 (1983).

<sup>9</sup> Olsen describes the contradictions very well, and from a feminist perspective, in *Feminism, Post-Modernism and Critical Legal Studies*.

cate to men, including critical legal scholars, the defining role that sexual violence and the fears of sexual violence play in women's and girls' lives. The reason for this, I suspect, is to some degree self-interest. To be blunt, it is almost impossible *not* to blind oneself to the violence in the world of which you are an indirect if not direct beneficiary, and most men do indeed benefit, at least in the short run, from the sexual violence from which many women fear or suffer.<sup>10</sup>

In addition to the psychic and political motives for denying the centrality of violence to women's oppression, critical legal scholars increasingly resort to a decidedly hip philosophical and intellectual justification for their selective blindness. If the central insights of social theory hold for patriarchal power as they seem to hold for legal power, they argue, then to understand patriarchy, as well as to understand law, we should be examining what it has invented rather than what it has destroyed. Why talk about something as banal as violence, when there are so many "social constructs" to deconstruct? Social theory, in short, has become yet another excuse for men to blind themselves to the violence of patriarchy, the destructivity of misogyny and the absolute moral imperative for positive legal intervention on behalf of women. For this reason if for no other, we need to resist the false comparison between legal and patriarchal power that the univocality of social theory invites.

There is another reason why Foucault's mandate is peculiarly inapposite to the concerns of feminism. At least since the English legal positivists began focusing on force, sanction and legal violence as the defining core of legal power, it has been the positive power of legal *discourse*, rather than the negative power of legal violence, which has been least visible. Hence, it is appropriately the submerged positive effects of legal discourse, rather than the more visible impact of legal violence, that the critical legal scholars, following Foucault, now highlight. With respect to patriarchal power, though, the situation is the reverse. In patriarchy, it is the negative, negating violence, rather than the positive discourse, which is privatized, muffled, denied and invisible. We therefore should be highlighting the effects of the invisible violence against

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<sup>10</sup> The danger of sexual violence renders women vulnerable and more likely to accede to the pressures of relatively "safe" men. This is what is meant by the phrase "male protection racket." For a further exploration of this, see Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis Women's L J* 81 (1987).

women, rather than the relatively visible discourse. The discursive, positive impact of "stereotyping" magazines, fairy tales, school lessons, and so on, is gradually becoming more visible in this culture. It is the censorial, negative power of patriarchal violence that is still so adamantly denied. Thus, the invisibility and privacy of sexual violence is to patriarchy much as the invisibility of discursive power is to legalism.

The most important reason, however, that feminist legal theorists should resist critical legal scholars' tendency to conflate forms of power into one "inventive, creative mode," is that if we indulge in this conflation, we will bypass a significant opportunity to diminish concretely the violence women do in fact suffer. For it is distinctively *because* of this central *difference* between law and patriarchy that law becomes a tool with which patriarchal power can be resisted. Put another way, it is because of the difference between legal and patriarchal power that law, with all its positivity—its socially constructed rights and its ideological, imaginative and institutional inventions—is a potent weapon against the destructivity and negativity of patriarchy.<sup>11</sup> Patriarchy is, in both a philosophical and to some degree literal sense, ill-legal: Its destructive, negating, censorial violence is paradoxically both facilitated by but also contrary to the constructive, positive, creative and inventive essence of legality. There is no question but that we can and should use the instrumental inventiveness of the law to counter the damage of patriarchal violence.

The situation of feminist legal theorists is concededly complicated. While as feminists we need to be attuned to the violence and negativity of patriarchy, as legal theorists we must also be attuned to the positivity and creativity of law in precisely the way the critical legal scholars have urged. In fact, we must do *both* if we are to understand the incredible endurance of patriarchy within as well as outside of legal culture. Just as we need understandings of the brutal and silencing power of patriarchy, we also need to understand what it is that legal discourse has positively created or invented to *facilitate* the radically contrasting negativity and destructiveness of patriarchal violence. We need to understand, for example, how, through "privacy rights," constitutional guaran-

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<sup>11</sup> For an example of the power of law as a weapon against the power of patriarchy, see Catharine A. MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979). For a contrary view of law's ability to address sexual violence adequately, see the critique of feminist legal reform in Susan Estrich, *Real Rape* (Harvard University Press, 1987).

tees,<sup>12</sup> the private/public distinction and a host of other mechanisms, law, as well as other forms of social power, create a safe haven in which patriarchal domestic violence, for example, proceeds unabated and largely unnoticed—even by progressive men. We need to understand the “marital rape exemption” both from a legalistic viewpoint of what it creates and the raped woman’s viewpoint of what it destroys.<sup>13</sup> We need to understand how, and if, the constitutional protection of (some) pornography creates a positive legal space within which the negativity of patriarchal power is unleashed.<sup>14</sup> We need to understand, that is, not how these legal constructs “invent” us—because they don’t—but rather, how they create zones of protection within which patriarchal violence is freed to destroy us. What legal power distinctly “creates” that is of interest to feminists is space into which the law’s ordinary protections against violence will not be allowed to penetrate. Feminists working in and thinking about law are uniquely positioned to provide this understanding. We numb ourselves to it, however, if we are unwilling to confront the violence that is at the core of patriarchal power.

## II. KNOWLEDGE

The second tenet of critical social theory (immediately implied by the first) is that we create—we do not discover—objects of knowledge, and we do so discursively.<sup>15</sup> Through discourse, according to critical social theory, things and objects, as well as concepts and ideas, are manufactured, invented, made and remade. By now it may be superfluous to note that this central Foucaultian insight has radically transformed not only our understanding of legal power, but also, and perhaps more centrally, our understanding of legal knowledge. The critical legal scholars’ relentless focus on legal texts, their commitment to deconstructive methodologies, their use of interpretation as both method and object of inquiry and their embrace of legal pragmatism all stem, directly or indirectly, from

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<sup>12</sup> Patriarchal power is protected by the constitutional guarantee of free speech and, to a lesser extent, constitutional guarantees of privacy. See generally MacKinnon, *Feminism Unmodified* (cited in note 6).

<sup>13</sup> We have a great deal of feminist legal scholarship concerning the former, but very little concerning the latter. The noteworthy exception is Russell, *Rape in Marriage* (cited in note 6).

<sup>14</sup> See MacKinnon, *Feminism Unmodified* at 127-213, 221-26 (cited in note 6).

<sup>15</sup> This is the central claim that unifies Foucault’s work. See, for example, *The Order of Things* (Random House, 1970); *Discipline and Punish* (cited in note 1); 1 *The History of Sexuality*, translated by Robert Hurley (Vintage Books, 1980).



the Foucaultian mandate to focus on knowledge, rather than violence, as the primary product of power. Critical legal scholars have taught all of us to take our legal texts, legal discourses, and legal doctrines—and the contradictions they seem to contain—very seriously indeed. In short, the critical social theorists' focus on knowledge and discourse as political products of power has opened up our understanding of the "politics of legal texts," and has cleared the way for an understanding of the productivity of power.

I want to pose the same question with respect to knowledge that I asked above regarding power: Is social theory's focus on knowledge, texts and discourses a helpful focus for feminism? First, is the implicit claim—that knowledge and discourse are the paradigmatic products of modern forms of power—as true of *patriarchal* power as it is of *legal* power? It is a close question but the answer, I believe, might be no. While patriarchy has no doubt produced massive amounts of discourse, and massive numbers of "truths" about men and women's nature, patriarchy has not, for the most part, produced this discourse *from women* at all. Patriarchy has mostly produced silence from women, and it is for precisely that reason that feminists not yet taken by social theory have theorized so extensively about women's silence rather than women's discourse.<sup>16</sup> Much of our feminist work both in and outside of law is beginning to show that silence is and has been to modern women's lives what Foucault has argued that knowledge and discourse are and have been to modern men's: the major product of the most significant power that shapes us. So long as silence rather than discourse remains the primary product of modern patriarchy, then whatever else it has going for it, the social theorist's focus on discourse and speech is an entirely misguided entry into the study of modern women's lives. We ought instead study the production of silence.

Let me give some examples of what might be revealed, and what has been revealed, by the feminist study of women's silence as the primary product of modern patriarchy. First, both Adrienne Rich<sup>17</sup> and Andrea Dworkin<sup>18</sup> have written extensively on the silence produced by both government and market censorship, particularly of lesbian writers and speakers. Ellen Bass,<sup>19</sup> Louise Thorn-

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<sup>16</sup> See authorities cited in note 22.

<sup>17</sup> Adrienne Rich, *On Lies, Secrets, and Silence* (W.W. Norton & Company, 1979).

<sup>18</sup> Andrea Dworkin, *Intercourse* (The Free Press, 1987).

<sup>19</sup> Ellen Bass and Louise Thornton, eds, *I Never Told Anyone* (Harper & Row, 1983).

ton,<sup>20</sup> Lillian Rush<sup>21</sup> and many others have probed the silence produced by the double injury of sexual abuse and violence, followed by the societal non-responsiveness toward that abuse.<sup>22</sup> Other feminists have written on the modern silence produced by flattened female self-esteem and lack of entitlement,<sup>23</sup> by our lingering status as primary caretaker of the young,<sup>24</sup> by our "help-mate" role<sup>25</sup> and by our continuing exclusion from professional, academic, literary and artistic life.<sup>26</sup>

One remarkable study of modern women's silence requires more than a mention. Intending to write a book on women's literary contributions over the last century, Tillie Olsen instead found herself overwhelmed by the silence, and wrote a book entitled, simply, *Silences*.<sup>27</sup> In marked contrast to Foucault's deservedly heralded attempts to explain the masculine verbosity of modernity, Olsen attempts to explain not verbosity, but the relative silence of women over roughly the same time period. Why is it, she asks, that women have produced only "one out of twelve" of the world's modern literary classics?

Olsen's analysis attributes women's creative silence not to our differing biology, but to our differing history. Her brief summation of that history makes powerfully clear why feminists should heed neither the social theorist's command to cease talking of power in negative terms, nor his command to focus on knowledge, rather than silence, as its major product:

Evidently unknown to or dismissed by . . . [those who regard biology as that which blunts female creativity] . . . [is] *the other determining difference—not biology—between male and female in the centuries after; the differing past of women—that should be part of every human consciousness . . . . Unclean; taboo. The Devil's*

<sup>20</sup> Id.

<sup>21</sup> Florence Rush, *Best Kept Secret: Sexual Abuse of Children* (McGraw-Hill Paperback Service, 1981).

<sup>22</sup> The titles alone of these works speak volumes: Florence Rush writes of the silence around child sexual abuse in *Best Kept Secret* (cited in note 21); Ellen Bass and Louise Thornton treat the same subject in *I Never Told Anyone* (cited in note 19); an early and important study on domestic violence is Erin Pizzey, *Scream Quietly or the Neighbors Will Hear* (Enslow Publishers, 1978).

<sup>23</sup> Linda Tschirhart Sanford and Mary Ellen Donovan, *Women and Self Esteem* (Doubleday, 1984).

<sup>24</sup> Tillie Olsen, *Silences* (Delacorte Press, 1978).

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

Gateway. The three steps behind; the girl babies drowned in the river . . . . Buried alive with the lord, burned alive on the funeral pyre, burned as witch at the stake. Stoned to death for adultery. Beaten, raped. Bartered. Bought and sold. Concubinage, prostitution, white slavery. The hunt, the sexual prey, . . . Purdah, the veil of Islam, domestic confinement. Illiterate. Denied vision. Excluded, excluded, excluded from council, ritual, activity, learning, language . . . .

Neither was the man created for the woman but the woman for the man . . . . The Jewish male morning prayer: thank God I was not born a woman. Silence in holy places, seated apart, or not permitted entrance at all; castration of boys because women too profane to sing in church.

And for the comparative handful of women born into the privileged class; being, not doing; man does, woman is; . . . . Isolated. Cabin'd, cribb'd, confin'd; the private sphere. Bound feet: corseted, cosseted, bedecked; denied one's body. Powerlessness. Fear of rape, male strength. Fear of aging . . . .

Vicarious living, infantilization, trivialization . . . . Shut up, you're only a girl. O Elizabeth, why couldn't you have been born a boy? For twentieth century woman: roles, discontinuities, part-self, part-time; conflict; imposed "guilt"; "a man can give full energy to his profession, a woman cannot."<sup>28</sup>

If this is women's history, another question remains: What "produces" *modern* women's silence? There are surely many causes, as there are many silences. The psychologists Belenky, Clinchy, Goldberger and Taule argue in *Women's Ways of Knowing*<sup>29</sup> that for many modern women, retreating into the numbing world of silence is not only an occasional decision or strategy, but also a full-fledged epistemic "way of knowing."<sup>30</sup> This silence-as-a-way-of-knowing, the authors maintain, is commonly "produced" in modern women (far more numerous, one suspects, than assumed by Belenky and her colleagues) who have known abusive and vio-

<sup>28</sup> Id at 25-27 (emphasis in original).

<sup>29</sup> Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger and Jill Mat-tuck Taule, *Women's Ways of Knowing* (Basic Books, 1986).

<sup>30</sup> Id at 23-24.

lent childhoods.<sup>31</sup> When it becomes a way of knowing, silence leads to passivity in the face of violence in adult life as well. Thus, trying to explain why she stayed with a batterer for ten years, one woman respondent in the study recalled her own voicelessness:

You know, I used to only hear his words, and his words kept coming out of my mouth. He had me thinking that I didn't know anything. But now, you know, I realize I'm not so dumb . . . . And my own words are coming out of my mouth now.<sup>32</sup>

Another woman, Ann, also explained her imprisonment in a violent childhood in terms of her experience of what the researchers came to call being "deaf and dumb"; without voice, and without understanding:

I could never understand what they were talking about. My schooling was very limited. I didn't learn anything. I would just sit there and let people ramble on about something I didn't understand and would say, Yup, yup. I would be too embarrassed to ask, What do you really mean? . . . . I had trouble talking. If I tried to explain something and someone told me that it was wrong, I'd burst into tears over it. I'd just fall apart.<sup>33</sup>

It is not only overt violence, however, that produces the silence of modern women. The more subtle coercion of an alien and hostile "dialogue" can have the same effect. Very contemporary and relatively privileged women law students, for example, apparently opt for or are pushed toward silence in very contemporary law school classrooms, and in significantly greater numbers than are men. Thus, at the other end of the economic and social spectrum from Ann, quoted above, a woman student at Yale Law School describes her experience in the classroom in language strikingly similar to Ann's. Like Ann, this Yale law student was also "deaf and dumb" in the classroom:

I felt unable to keep up with the class and terrified of being exposed to the rest of the class as unable to match them . . . . I was very, very quiet, very reserved . . . . I basically felt inadequate in all classroom settings, unable to make comments or to project myself into the conversa-

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<sup>31</sup> *Id.* at 32-34.

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.* at 23.

tion, often unable to think as quickly as I thought others did, to come up with insightful or relevant things to say, . . . and focusing always on what was previously said and trying to understand it rather than sitting back and playing with ideas in a reckless way. The recklessness, the casual "well let's look at it this way, let's spin it around and look at it from this angle" stance that others seemed to achieve—I just couldn't. So my first weeks I was really in shock . . . I felt like I was missing some gene or protein. Everyone else could spew forth arguments which I couldn't do.<sup>34</sup>

Modern women's silence is often a product of a profound sense of lack of entitlement. Indeed, the massive production of "unentitled silence" regarding female sexual violation stands in marked contrast to the near-manic production of a "discourse" on male sexual pleasure so carefully documented by Foucault.<sup>35</sup> As Florence Rush asks:

Why is it that children who have been molested, sexually abused, or even raped rarely or never tell? They never tell for the same reason that anyone who has been helplessly shamed and humiliated, and who is without protection or validation of personal integrity, prefers silence. Like the woman who has been raped, the violated child may not be believed (she fantasized or made up the story), her injury may be minimized (there's no harm done, so let's forget the whole thing), and she may even be held accountable for the crime (the kid really asked for it).<sup>36</sup>

Modern women's silence is also a product of conflicting demands on our time and energy: Women are silent because we do not have the time, the atomistic self-possession, the luxury or the rooms of our own in which to speak. In marked contrast to the postmodern social theorist's certitude that language, speech and discourse generate all else, women know that there is a non-lingual domestic world of human needs that compel fulfillment—a world of bodies, of babies, of babies sucking milk, of babies' shit, of ba-

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<sup>34</sup> Catherine Weiss and Louise Melling, *The Legal Education of Twenty Women*, 40 *Stan L. Rev.* 1299, 1333 (1988).

<sup>35</sup> Foucault, 1 *The History of Sexuality* at 45-49, 53-73 (cited in note 15).

<sup>36</sup> Florence Rush, *Foreword*, in Bass and Thornton, eds, *I Never Told Anyone* 13 (cited in note 19).

bies' sleeplessness, of children, of children's needs, of children's appetites—lurking beneath. We know about this non-discursive world because we live there. It is not always a pleasant place. There are too many dishes in that world, too much laundry, too many children, too many cares, too many problems. Without more help—a great deal of help—there is just too much of this non-lingual, demanding domestic world for women even to begin to make the numbers that concern Tillie Olsen better than one in twelve. In *Silences*, for example, Olsen quotes from Harriet Beecher Stowe:

Our children are just coming to the age when everything depends on my efforts. *Can* I lawfully divide my attention by literary efforts? . . . All last winter I felt the need of some place where I could go and be quiet and satisfied. I could not there [the dining room], for there was all the setting of tables, and clearing up of tables, and dressing and washing of children, and everything else going on . . . . Then if I came into the parlor where you were, I felt as if I were interrupting you, and you know you sometimes thought so, too . . . .<sup>37</sup>

Olsen explains Stowe's relative silence thus:

[S]he became more and more habituated to rapid, un-ripened (usually made-to-order) work. The book she wanted to write "to make this whole nation feel what an accursed thing slavery is" waited and waited. "As long as the baby sleeps with me nights I can't do much at anything, but I will do it at last," she vowed in a letter. There was "many a night weeping, the baby sleeping beside me, as I thought of the slave mothers whose babes were torn from them," but nothing was translated onto paper.

Stowe was thirty-nine before she got to *Uncle Tom's Cabin*—at last. She wrote it in magazine serial installments—in between—when weary with teaching the children and tending the baby and buying provisions and mending and darning; much of it on the kitchen table as the younger Harriet Beecher Stowe had, when trying to get writing done fourteen years before.<sup>38</sup>

Finally, modern women's silence is produced by our silence:

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<sup>37</sup> Olsen, *Silences* at 204-05 (cited in note 24).

<sup>38</sup> *Id.* at 205-06.

The consequence of our silence is its own perpetuation. Masculine discourse dominates the conversational space, thus generating male social constructs that in turn further women's silence. As Sallyanne Payton describes the cycle:

For centuries now, women's voices and women's realities have been entombed in silence. Think about it: all of the official versions of reality . . . are made by men. It is male perceptions, male feelings, male patterns of behavior, masculine preferences and needs, that account for everything from the shapes of buildings to the shapes of careers. Male patterning . . . is implicit in much of this culture, but largely by default, there being no female patterning to challenge it. I confess that I do not know what that female patterning might look like; but I am quite certain that we will never know until the female voices in this society succeed in telling stories about female realities . . . .<sup>39</sup>

A central passage from Foucault's magnificent and unfinished postmodern treatise, *The History of Sexuality*,<sup>40</sup> starkly and unwittingly highlights the contrasting roles of silence and discourse in women's and men's lives, and how attention to one but not the other has distorted the critical social and legal theorists' understanding of both. Foucault set out in that treatise to show that sexuality, far from being a pre-given, natural activity or biological state that social forces either repress or free, is instead a social construction produced by "discourses on sexuality" which are themselves produced by modern forms of social power. Foucault's most recurrent image, or metaphor, for this production of discourses on sexuality is a true story about a nineteenth century half-wit who fondles a young girl and is consequently arrested. Foucault's interest is in what happens next. Far from having his pre-given sexuality "repressed" or "driven underground," Foucault argues that the half-wit is forced to speak and speak and speak—literally for the rest of his life and metaphorically for centuries—of his own sexuality. He speaks of his sexual pleasures first to the constabulary, then to the judiciary, then to the priesthood, then to the medical community, and finally to the psychoanalytic

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<sup>39</sup> Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning from the Legal Mind*, 18 Ind L Rev 629, 641 (1985).

<sup>40</sup> Foucault, 1 *The History of Sexuality* (cited in note 15).

and psychiatric establishment.<sup>41</sup> The half-wit became

the object not only of a collective intolerance, but of a judicial action, a medical intervention, a careful clinical examination, and an entire theoretical elaboration. The thing to note is that they went so far as to measure the brainspan, study the facial bone structure, and inspect for possible signs of degenerescence the anatomy of this personage who up to that moment had been an integral part of village life; that they made him talk; that they questioned him concerning his thoughts, inclinations, habits, sensations, and opinions. And then, acquitting him of any crime, they decided finally to make him into a pure object of medicine and knowledge—an object to be shut away till the end of his life in the hospital at Mareville, but also one to be made known to the world of learning through a detailed analysis . . . . So it was that our society . . . assembled around these timeless gestures, these barely furtive pleasures between simple-minded adults and alert children, a whole machinery for speechifying, analyzing, and investigating.<sup>42</sup>

In the twentieth century, Foucault continues, the half-wit is still speaking: We speak of the “unspeakable” subject—sex—more than absolutely anything else. This is the irony which consumed Foucault, and which he explores so forcefully in his history.<sup>43</sup> This quintessentially modern, relentless production of juridical, moral, psychological, theological, medical and psychiatric discourses on the supposedly unmentionable subject of sex, Foucault argues, is what has given “sexuality” both its form and its content, making it, so to speak, a part of an “inner truth” about the “nature of man.” As Foucault recounts the lesson he draws from the tale:

Since the eighteenth century, sex has not ceased to provoke a kind of generalized discursive erethism. And these discourses on sex did not multiply apart from or against power, but in the very space and as the means of its exercise. Incitements to speak were orchestrated from all quarters . . . . Sex was driven out of hiding and constrained to lead a discursive existence. From the singular imperialism that compels everyone to transform their

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<sup>41</sup> Id at 31-36.

<sup>42</sup> Id at 31-32.

<sup>43</sup> Id at 53-73.



sexuality into a perpetual discourse, to the manifold mechanisms which, in the areas of economy, pedagogy, medicine, and justice, incite, extract, distribute, and institutionalize the sexual discourse, an immense verbosity is what our civilization has required and organized. Surely no other type of society has ever accumulated—and in such a relatively short space of time—a similar quantity of discourses concerned with sex. It may well be that we talk about sex more than anything else . . . . It is possible that where sex is concerned, the most long-winded, the most impatient of societies is our own . . . . What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*.<sup>44</sup>

It is indeed a great irony that we talk so much about an unspeakable subject. But there is a greater irony revealed by Foucault's story: With all the attention given to "discourses," neither the French officials, nor Foucault himself, nor the vast majority of social and legal critics he has influenced, have yet heard scarcely a word from the child who was molested in this eerie scene or from the millions of children who have been molested since. Foucault, sadly, for all his close attention to detail, did not seem to *notice* the contrast between the speechifying and speechified half-wit and the entirely, utterly silent child.<sup>45</sup> "We" may "talk about sex more than anything else,"<sup>46</sup> as Foucault says, so long as "we" means "men," but we have yet to end the silence of the child, and to a lesser degree, of women, from whom sex is taken, as an "inconsequential matter of course,"<sup>47</sup> as from an object or, indeed, as from property. While we discourse endlessly on the *pleasure* of sex so central to masculine sexuality—whether to condemn it, censor it, praise it, analyze it, understand it, rechannel it, repress it or simply indulge it—we still speak almost not at all of the violence of sex so central to childhood and femininity. This constitutes a huge omission in our understanding of both the "discourses" we have

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<sup>44</sup> Id at 32-35 (emphasis in original).

<sup>45</sup> Foucault *has* noticed and analyzed the silence of others, particularly the silence produced by the break in discourse between modernity and the madman. See Michel Foucault, *Madness and Civilization* x-xi (Vintage Books, 1982). I am indebted to Jennifer Goldstein (Chicago, Class of 1989) for this insight.

<sup>46</sup> Foucault, 1 *The History of Sexuality* at 33 (cited in note 15).

<sup>47</sup> Id at 31.

produced and of sexuality, postmodern or otherwise, and a gross injustice to women and children. Surely we need to understand not only the speaking (male) sexuality and its possessor, the subjective (male) self created by all of our discourse on sexuality, but also the silence of the objective (female) being, also "created" by both the sexualized discourse and the patriarchal power behind it. We need, in other words, to understand the modern societal inclination to keep the "alert children" silent, no less than the modern need to make the adult speak.

This inattentiveness to silence is not only a massive injustice, but it also distorts understanding. At least in part because of his characteristic selective attention to discourse and inattentiveness to silence, Foucault unwittingly commits himself in this passage to a profoundly partial and hence false account of sexual pleasure. Thus, at various points in his argument, Foucault refers to the "inconsequential bucolic pleasures,"<sup>48</sup> "barely furtive pleasures,"<sup>49</sup> "timeless gestures,"<sup>50</sup> and "bodies and pleasures"<sup>51</sup> that are transformed and reified into "discourses of sexuality." The implicit argument seems to be that societal power has transformed bare pleasures into "discourses," which have in turn constructed "sexuality" as one of its objects. But is it true, as Foucault suggests, that it is "pleasures" that are societally transformed, and are they transformed into "discourse"? Is it as true of the "alert child" as it is of the half-wit? Or, is this Foucauldian "truth" about how "natural-pleasure-is-transformed-into-socially-constructed-sexuality" only maintainable because of the alert child's silence? Is it, for the "alert children" and for many adult women as well, not *pleasure* at all, but something very different that is transformed, and is that *very different thing* that is transformed, transformed not into discourse, but rather into silence? What would the "alert child" have said, if she, rather than he, had been the one to transform into discourse that "timeless gesture," that "barely furtive pleasure," that transpired between herself and the half-witted adult?

If we had listened, analyzed, and speechified the experience of the alert child in that French village, rather than the experience of the half-witted adult, a radically different picture of what Foucault calls these "inconsequential pleasures" from which "sexuality" is derived might have emerged. There are, of course, any number of

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<sup>48</sup> Id at 31.

<sup>49</sup> Id at 32.

<sup>50</sup> Id at 32.

<sup>51</sup> Id at 159.

possible stories the alert child might have told. All of those stories are different from the adult's, and all of them have been viciously repressed during the same era that so energetically produced sexualized adult discourse. First, it is possible that behind all the discourse—the analyzing, categorizing and speechifying—lay not pleasure, but violence, abuse and terror for the silent child. The significance of this cannot be overstated. Maybe, if we had listened to the child rather than the half-wit, we might have had an account of “furtive violence” to analyze, categorize, speechify, medicalize, theologize, philosophize, psychologize and agonize over, rather than an account of “furtive pleasure.” Maybe, for example, what the half-wit felt as an “inconsequential pleasure” was, for the alert child, similar to Jill Morgan's experience of “furtive moments” with her father, recounted in *I Never Told Anyone*:

It began for me the summer I was four years old . . . . He would . . . call me in from play in order to undress me in the empty house and then, with hurried injunctions not to tell mama, send me out to play again. His hands undressing me this time were harsh and angry; his voice was abrupt and vicious. I was frightened and questioned him. With a harsh slap, he silenced me . . . . With no words and no warning, he spread my legs and entered me dry. My screams started the dog barking. I must have passed out . . . . My memories here are sketchy. I really don't even remember the pain yet. When he was through with me, he dropped me on the floor like a discarded dishrag. Then with belt in hand he began beating me. When the belt stopped its endless rise and fall, he took me in the bedroom, re-dressed me in the same play clothes, and put me into my bed with a strict injunction to stay there . . . .<sup>52</sup>

Why, with all the speechifying to which Foucault attests, do we only have this story from the half-wit's point of view? Why, with all the speechifying, do we still have only half the story? Maybe the “alert” child's attempts to be heard were met with a nineteenth century version of the resistance Morgan encountered:

I told adults of the horror I was enduring, but NO ONE listened, . . . . Or they believed that my parents were such pillars of the community that they could not be guilty of

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<sup>52</sup> Bass and Thornton, eds, *I Never Told Anyone* at 108 (cited in note 19).

the crime. Later, therapists referred to Oedipal fantasies instead of listening to what I was saying.<sup>53</sup>

Other stories, less violent, are also possible. Perhaps, as Foucault's telling of the story seems to suggest, the alert child did not really feel violated, frightened or scared. Perhaps her story would have been somewhat like Jean Monroe's, also told, with self-admitted fear and trepidation, in *I Never Told Anyone*:

I go to the garage to get my bike and he is there, working in his lighted corner. I know I am trapped. "Honey, come back here a minute." I slide between him and the car fender and when he asks I lift my T-shirt. He touches them and I smile when he looks at my face. I must show him it is all right with me. But I don't like it. They are larger and more embarrassing, cold puckering the skin around the nipples. He is funny, breathless and giggly, different from his usual stern self. But it's not hurting me, and if I object, it will hurt him. He would see then that I know it is wrong. I couldn't bear for him to think that . . . . "Remember," he says, his huge finger over and over the protruding nipple, "remember, this is just between you and me. Don't tell anyone. Especially mama." He likes to take his thing out of his pants for me to look at it. He seems to love it. "Isn't it nice?" . . . . I hate it most in the winter when the air is cold and shrivels the skin. I'm embarrassed. But he says they are beautiful. Never tell, honey. I love you. I never will, daddy, I promise. They are getting so big. You are beautiful.<sup>54</sup>

How, I wonder, did the "alert child" feel about the incident? How would she feel about the adults in her world, who she could not tell, for fear of hurting daddy—or the half-wit? Maybe, like Jean Monroe, she felt not fear, but a chilling confusion, a sense of denial, of betrayed trust and a lingering feeling that her *own* feelings—the pleasure, or the lack of pleasure, or the embarrassment, or the "not liking it"—just *don't count* in the face of the overpowering imperative of the half-wit's "inconsequential pleasure." Monroe recalls:

It is all so complex and I distrust, I guess, my own accounting of it. For instance, I have often maintained that

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<sup>53</sup> Id at 107.

<sup>54</sup> Id at 93-96.

I was not very hurt by the experience . . . . As an adult I've always been very happy sexually. Somehow I got an affirmative sense of my own personal sexual power from my father . . . . [But m]ake no mistake about this. I DID NOT ENJOY IT!<sup>66</sup>

Just as it is not yet time for feminists to “quit talking of power in negative terms,” so also it is not yet time to focus on discourse, rather than silence, as the primary product of patriarchy, if for no other reason than that to do so would be to break faith with the “alert children” who for so long have been unable to break the silence that surrounds their sexual violation. Of course, we need to do other things as well. Most important, we need to *tell* stories, and give voice to the stories of others. We need to give descriptions of the world that reflect our lives rather than distort them; we need to recategorize the world, we need to invent new vocabularies, we need to make up new legal categories, we need to find new poetic metaphors and new literary allusions. When we do these things, it may *become* true that we have created a world—a reality—out of our social experience. But so long as it is true, to paraphrase Adrienne Rich, that naming is power and silence is oppression, and so long as women and children remain overwhelmingly silent in the name of overpowering violence, if we want to understand the contours of our oppression, we will have to come to grips with our forced, coerced or collaborative silence, and not (only) with their developed and contradictory and oppressive discursive practices. And when we understand women’s silence, we will have a better understanding not only of patriarchy, but of men’s discourse, of men’s discursive practices and of masculine subjectivity as well.

### III. MORALITY

The third tenet of critical social theory influencing legal studies is that since “all is politics,” the moral or political transformative goal of the politically committed theorist can only be a society marked by a greater democratization of power than presently exists. As our social constraints—entrenched hierarchies and social roles—are comprised of the unrecognized, falsely assumed to be necessary, gellings of political institutions and imaginations, so our freedom consists in our capacity first to recognize those constraints as contingent rather than necessary, and then to break them. The

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<sup>66</sup> Id at 90.

critic's utopia, then, is a world in which the power to break free of the false necessity created by institutional and imaginative constructs is as widely distributed as possible. For the critical social theorist, power and its distributions exhaust the moral universe, just as they exhaust the story of our past. Roberto Unger's moral vision is in this regard representative of critical legal scholarship and of critical social thought generally:

The guiding theme of the program of social reconstruction is the attempt to imagine institutional arrangements and social practices that can advance the radical project beyond the point to which contemporary forms of governmental and economic organization have carried it. By the . . . project of the modernist visionary I mean the attempt to realize the many forms of individual or collective empowerment that result from our relative success in disengaging our practical and passionate dealings from the restrictive influence of entrenched social roles and hierarchies . . . . The program suggests how our contemporary formative contexts might be disentrained, . . . how they might be more fully opened to challenge in the midst of our routine conflicts and therefore also how they might undermine or prevent rigid forms of social division and hierarchy . . . . The weakening of the influence of this prewritten social script is to be valued not only negatively, as an occasion for a broader range of choice, but affirmatively for the forms of empowerment it makes possible.<sup>56</sup>

Unger also urges the "denaturalization" of society, which is synonymous with the emancipation of society from social roles girded by false claims of necessity:

[D]ifferent institutional arrangements reflect varying degrees of advance in the denaturalization of society. Society becomes denaturalized to the extent that its formative practices and preconceptions are open to effective challenge in the midst of ordinary social activity . . . . The concept of denaturalization or of emancipation from false necessity includes the idea of a weakening of rigid roles and hierarchies. It therefore also refers to the development of forms of production, exchange, and passionate

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<sup>56</sup> Roberto Mangabeira Unger, *False Necessity* 9 (Cambridge University Press, 1987).

attachment that are less marked by such rankings and divisions . . . . I use the term negative capability to suggest the variety of forms of empowerment that denaturalization makes possible.<sup>57</sup>

There are three problems with this vision from a feminist point of view. First, it is simply not true—it is *emphatically* not true—as many women know and as some feminists have distinctively theorized,<sup>58</sup> that oppressive “power” in *any* of its manifestations is the necessary consequence of inequality and hierarchy, and that the end of hierarchy is therefore the necessary root of morality: Women of *all* cultures routinely, although not always, respond to their utterly unequal and hierarchic relationships with their infants and children with nurturance, care and love, rather than power, narcissism and the imposition for the sake of ego-gratification of the stronger’s will upon the weaker’s fate. The nurturant response the infant engenders in the mother seeks the fulfillment of the needs of the weaker party; it does not seek to recreate or reinvent the weak in the image desired by the strong.<sup>59</sup> From a truly woman- and child-centered perspective, the bare fact of physical inequality takes on an entirely different hue from that projected by modern social theory: The physically unequal mother in *all* cultures typically breast feeds and protects, rather than bullies or browbeats, the vulnerable infant and child. The powerful mother nurtures so as to give life and create growth in the weak. She does not impose so as to inscribe her will.

These simple, utterly unremarkable physical facts of life are of tremendous (and tremendously neglected) import, not only to feminist legal theory, but to legal theory generally. For it is these straightforward but overlooked experiences—experiences of breast feeding, nurturing, caring for and loving the weak so as to make the weak healthy—that could ultimately form the foundation of a feminist, maternalist (and humanist) moral theory<sup>60</sup>—and therefore a legal theory<sup>61</sup>—which is grounded neither in the Enlighten-

<sup>57</sup> Id at 164.

<sup>58</sup> See Sara Ruddick, *Maternal Thinking*, 6 *Feminist Studies* 342 (1980); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *S Cal L Rev* 1877 (1988).

<sup>59</sup> See Nel Noddings, *Caring*, especially 59-78 (University of California Press, 1984).

<sup>60</sup> See authorities cited in note 58; Eva Feder Kittay and Diana T. Meyers, eds, *Women and Moral Theory* (Rowman & Littlefield, 1987); Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982); Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, 1978).

<sup>61</sup> See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's*

ment ideals of rationality and objectivity, nor in a post-enlightenment glorification of power, but instead in an intersubjective sensitivity to the needs of others. If feminists are right to theorize and women are right to experience a respectful, nurturant, caring response that aims to promote rather than dominate the interest and well-being of the weaker "other" as one possible product of hierarchical relations, then the Ungerian descriptive claim that a dominating, positing and delimiting power is the only product of hierarchy, and the moral claim that the destruction of hierarchy is the only intelligible political goal, are simply wrong. If we are right to trust our nurturant response within the natural inequality of the mother-infant relationship, then we are also right to suspect that hierarchic relationships such as parent-child, teacher-student, judge-litigant and legislator-constituent could and should be infused *neither* with false claims of equality, objectivity or a distanced and alienating respect, nor with levers by which the hierarchy can be smashed. Rather, those relationships can be infused, simply, with care.

The experience of nurturance—the experience of caring-for and being cared for—and the possibility of a morality of care premised on those experiences are as precluded by Unger's utopia of democratized power as by the liberal legalist's utopia of principled reason or the economic legalist's utopia of egotistic rationality. To put the point starkly, the Ungerian ideal is a world in which contexts are there to be shattered—not understood, appreciated, interpenetrated or infused with an ethic of care.<sup>62</sup> It is a world in which "nature" is there to be denigrated, conquered, transcended and exploited, and it is a world in which passion creates not the basis of a moral life, but hierarchical ties to be broken. We should be extremely wary of any utopian strategies, including Ungerian and leftist ones, that definitionally exclude the emotional and subjective root of many women's, and more than a few men's, aspirational and moral lives.

The second and related problem with Unger's view of political morality, from a feminist perspective, is its relentless focus on discourse. According to Unger as well as most other critical social theorists, our ideals are not only reflected in, but *embodied* in our uttered imaginings.<sup>63</sup> There is no transcendent or natural ideal

*Lawyering Process*, 1 Berkeley Women's L J 39 (1985); Resnik, *On the Bias* (cited in note 58); Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988).

<sup>62</sup> This commitment is starkly made in Unger, *False Necessity* (cited in note 56).

<sup>63</sup> *Id.*



state toward which we ought work. There are, rather, only competing discursive formulae of where we ought go, and if women are to contribute to progress toward a better world, then the way to do so is clear: We must contribute to the dialogue.<sup>64</sup>

In one sense, this admonition is clearly right: Of course women must break their silence and contribute to the dialogue. In another sense, however, the imperative to limit our sense of the ideal to that which is expressed or expressive runs the risk of simply flatly denying the reality of many women's distinctive experiences of moral life. For many women, moral inclinations are neither reflected nor embodied in our modern discursive practices—any of them. We feel them instead to be rooted in our earliest, pre-verbal experiences of being loved and nurtured. If, as a culture, we were to centralize *this* natural experience, we might develop a radically different picture of public moral life. We might conclude that morality is grounded in the experience of being cared for in symbiosis with a protective and nurturant other, rather than in our later experiences of disciplined, disciplining and verbose authority. We might conclude that moral ideals and moral inclinations derive from the quiet love of the mother, rather than from the discursive guidance of the father. We might conclude that the root of moral life and moral experience is profoundly non- and pre-verbal. We might, then, decide that when we utter our idealized imaginings, we ought be acutely aware of their non- and pre-verbal origins. In other words, we need to understand the possibility that our moral inclinations are rooted not in our uttered “principles” of any sort, but rather, in distinctively life-giving and entirely non-verbal feelings and actions. We will not do so if we acquiesce to the Ungerian insistence that we focus our idealistic and historical gaze on the verbal spheres of our “denaturalized” existence.

There is one final problem. Feminists and feminist legal theorists must be the first to object to false claims of natural necessity. However, we should also be extremely wary of the profound devaluation of nature, the denial of the significance of the natural realm and the disregard and contempt for natural constraints and natural truths that play such a dominant role in Unger's critique of traditional morality, just as we should be wary of his glorification of cultural and societal empowerment. The social and critical legal scholar's renunciation of the “natural”—particularly in the moral sphere—sounds far more like a continuation than a repudiation of

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<sup>64</sup> I discuss this in West, *The Feminist Silence*, 1 Cardozo J of Law and Lit (1989) (forthcoming).

the profoundly destructive urge to banish, control and deny the existence of a natural world. That urge is hardly distinctively postmodern, or even modern. It characterizes the history of patriarchal culture, at least from the Renaissance to the present. The oppression of women and the exploitation of nature have been constant companions in the story of patriarchy; by correlation, as numerous feminists have insisted, respect for nature and respect for women must play convergent roles in the story of our mutual liberation.<sup>65</sup>

If feminist legal theorists are to share in the healing of the world, we will have to do two things that will distinguish our work sharply from the postmodern and poststructuralist work of critical legal scholars. First, we will have to encounter patriarchy willingly, even aggressively, in its most violent, negative, denying, oppressive, censorial mode. Second, we will have to remember, remain true to and draw upon, the naturalism and quietness that have always been central to what has been and is still most admirable about women's moral lives. There is surely no way to know with any certainty whether women have a privileged access to a way of life that is more nurturant, more connected, more natural, more loving and thereby more moral than the principled lives which both men and women presently pursue in the public sphere, including the legal sphere of legal practice, theory and pedagogy. But it does seem that whether by reason of sociological role, psychological upbringing or biology, women are *closer* to such a life: If it is but a memory, then for women it is a more vivid memory; if it is a utopian dream, then for women it is a dream we have never fully denied and from which we routinely draw sustenance and guidance. For those of us (men and women) for whom principled, reasoned morality has come to seem but a thinly veiled excuse for cruelty, and for whom the Ungerian glorification of democratized power is depressingly more of the same, the suggestion that women—and therefore, the human community—can and should respond in a more nurturant, caring and natural way to the needs of those who are weaker, is both more and less than a “contestable, empirical claim”: It is, rather, in the nature of a promise. It is one promise, among others, that the human community can be reconstituted in a way that will salvage the planet as well as save the species. We should explore it, and test it against our hearts' challenges. We should not allow it to be censored. Least of all should we self-cen-

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<sup>65</sup> See Bass and Thornton, *I Never Told Anyone* at 42-43 (cited in note 19); Evelyn Fox Keller, *Reflections on Gender and Science* (Yale University Press, 1985).

sor it because it runs afoul of a Nietzschean power-ideology now fashionable among critical legal scholars. That ideology not only threatens to silence once again what is most distinctive in our voice, but is also itself steeped, far more than the liberal theory against which it defines itself, in a covert and overt contempt for women, feminism, nature, the natural realm and the feminine. We should be wary of it; we should not embrace it.

#### IV. THE SELF

The last area of significance for feminist legal theory concerns the social theorist's distinctive critique of the self. The social-theoretic view of the self breaks down into two separate claims. The first and relatively modest claim of the postmodern social theorist is that the particular "self" familiar to modern, liberal society—arbitrarily desirous, sated by pleasure, sovereign over one's own subjectivity, knowledgeable of the objective world through reason and of the subjective world through introspection and confession—is the recent, particular and contingent invention of the institutions and ideologies of liberal society.<sup>66</sup> The social theorist argues that this purportedly universal "liberal self" is in fact the invention of a particular set of powers that have dominated in a relatively modern era. This claim has played a large and entirely healthy role in the critical legal studies movement, particularly in critical deconstructions of economic legalism—the branch of liberalism itself most heavily dependent upon a liberal conception of the self and its relations to the objects of its knowledge, acquisition and discourse.<sup>67</sup>

The structure if not the substance of the social theorist's attack on the liberal self has also played a role in feminist legal theory, which has developed a critique parallel to that of the social theorists. According to the feminist critique, the "self" of economic and liberal legalism not only reflects a particular society, place and time, but also, is particular in yet another way: It reflects the particular experiences of the male gender. The experience of "selfhood," for women, is very different from the experience of the desiring, rational, egotistic self relied upon by economic and liberal legal analysts. This is true even of women in the same culture, time and place. The liberal self, then, is a gendered as well as cultural

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<sup>66</sup> See Foucault, *Discipline and Punish* (cited in note 1) and 1 *The History of Sexuality* (cited in note 15).

<sup>67</sup> See Kelman, *A Guide to Critical Legal Studies* at 112-13 (cited in note 4).

construct.

Feminists have explored several explanations for the difference between women and men's experience of self in liberal societies, only three of which I'll mention here. First, as Catharine MacKinnon insists in many different contexts,<sup>68</sup> and as I have argued elsewhere, it may be the case that a deep and thoroughly justified fear of acquisitive, violent male sexuality mars a woman's self-possession early in her development, rendering her what I have called a "giving self,"<sup>69</sup> ready to give, and to identify herself as one who gives, rather than endure the pain and fear of being one from whom her self is taken. If so, then consensuality—the lodestar of value for the liberal legalist—is a very different experience for men than it is for women. Second, Nancy Chodorow<sup>70</sup> has argued that a young girl's early and distinctively uninterrupted identification with her mother may leave in women an indelible sense of "connectedness" that is itself at odds with the atomism and egotism assumed by the liberal self. As a result, women may experience the self as more continuous with others than do men. Third, as Nel Noddings suggests and as I have explored elsewhere, women may have a different experience of selfhood in part because of their distinctive role in the reproductive process.<sup>71</sup>

All of these otherwise different arguments point in the same direction, and it is a direction that should be endorsed by social theory: The liberal self at best reflects male experience of selfhood within the liberal tradition. It is not an accurate account of all experience, because it is not an accurate account of women's experience.

The social and legal scholar's critique of the liberal self and the feminist critique of selfhood thus run on parallel tracks: They both aim to reveal the particular and the contingent behind the falsely claimed universal in the modern liberal's description of the desirous, rational, egotistic self. But this structural similarity, I think, obscures what may be far more significant differences between them. The feminist critique aims to show that the "liberal self" is an invention *not* of a particular societal power matrix, but instead of a very general power matrix—patriarchy—which exists across time and culture. According to the feminist critique, the

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<sup>68</sup> See MacKinnon, *Feminism Unmodified* (cited in note 6).

<sup>69</sup> See West, 3 Wis Women's L J 81 (cited in note 10).

<sup>70</sup> Chodorow, *The Reproduction of Mothering* at 211-12 (cited in note 60).

<sup>71</sup> Noddings, *Caring* at 128-31 (cited in note 59); see also West, 55 U Chi L Rev 1 (cited in note 61).

masculine self, of which the liberal self is an instance, is an invention of a patriarchal power which both transcends and predates particular cultures. Thus, the liberal self may indeed be a social construct—a product of a particular society—but it is also an instance of a “masculine self” which is at root not a social construct at all, but a patriarchal construct, the origin of which transcends and predates particular societal forms.

In spite of their shared logic, there are, consequently, striking differences between the feminist critique of the liberal self on the one hand and the critical scholar’s critique of the liberal self on the other. The feminist argument assumes at least a “thin” universal gendered oppression across cultures that the critical theorist denies, while the critical theorist assumes a sameness across gender that the feminist critique denies. Both aim to show that a claimed natural universal essence—the “liberal self”—is in fact a particular construct of power, but they each purport to expose a different matrix of power. Briefly, critical social theory emphasizes that the “self” is a social construct, defined and produced by a liberal-cultural understanding, while feminism stresses that the same “self” is a gendered construct, both bound and produced by masculine, patriarchal and, to some degree, misogynist experience. Both seek to reveal the particular behind the purported universal, yet the “particular” being revealed by each is quite different, and it is not at all clear that both explanations can be right in any sort of simple way.

Thus, while there are surface similarities, there are also deep tensions between the critical and the feminist critique of the liberal self. That tension, though, is not what I want to focus on here. For there is an even deeper tension between what I will call the social theorist’s universalist claim regarding the self, and feminist interpretations of women’s experiences. By the universalist claim I mean to refer to the social theorist’s claim that not just the *particular* liberal self, but virtually *every* possible description of the nature of the self, is a social construct. Although critical legal scholars occasionally equivocate on this point,<sup>72</sup> the critical social theorists generally do not. The social theorist’s claim is decidedly *not* that the liberal self is a *false* description that oppresses, censors or denies the “true” nature of the self. Rather, the liberal self, like any description of the self, is an invention, not a falsification.

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<sup>72</sup> Stanley Fish explores their equivocation in Fish, *Anti-Professionalism*, 7 Cardozo L. Rev. 645 (1986). See also Kelman, *A Guide to Critical Legal Studies* at 112-13 (cited in note 4).

As such, it is subject not to claims of truth or falsity, but rather to political modification. To use Foucault's formulation, the relation between the components of selfhood—pleasure, desire and action—may vary across time and across culture, but in every case, the experience of the nexus between pleasure, desire and action is the experience of something that has been societally invented, not the experience of something which is naturally there. Thus, the self is inevitably the invention of societal powers—there is no “natural self” with a “true inner nature” for society either to liberate or oppress, or for a particular description, such as the liberal self, either to mirror faithfully or misdescribe inartfully. There simply is no “true self.” Society inevitably constructs, rather than represses, the true inner self.

Put affirmatively rather than skeptically, the critical social theorist's claim is that *whatever* is experienced as selfhood is a socially constructed self—there is no selfhood that pre-exists society. If we think of modern critical theory as a kind of consciousness raising, we might put the insight as a two-step phenomenological process. What one experiences on a daily basis as “selfhood” is in fact a socially constructed web of subjectivity. What one comes to realize after having seen the social light, so to speak, is not only the constructivity of one's prior experience of the everyday “self,” but also both the negativity and the potentiality of what remains: the potential for change, and the jolt of suppressed power that inevitably accompanies a sudden awakening to the contingency and malleability of one's life and world.

Now the question I want to pose is whether this universal claim—that *any* description of a concrete, given, natural, precultural self is delusional, and that our only true inner nature is one of instability, potentiality, negative capability and susceptibility to change—that our inessentialism is our essence—is an accurate account of women's inner lives. It may, of course, be true of men but not true of women. At least one strand of feminist writing beginning with de Beauvoir<sup>73</sup> and continuing through the object-psychologic tradition of Chodorow<sup>74</sup> suggests very strongly that the universalist claim may indeed be true *of men*; there may inevitably be, in both the experience as well as ideal of masculine subjectivity, a hard but fragile “knot” of “self.” This knot of self, regardless of its particular societal description, has not only been invariably “so-

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<sup>73</sup> Simone de Beauvoir, *The Second Sex*, translated and edited by H. M. Parshley (Alfred A. Knopf, 1952).

<sup>74</sup> See Chodorow, *The Reproduction of Mothering* (cited in note 60).

cially constructed," but precisely because of its vulnerability and contingency, requires near-constant reaffirmation and reconstruction both by the bolstering efforts of others (such as women), and the very existence of others (again, women). The existence, the fragility, the social and psychological contingency and the artificiality of this inner masculine knot of selfhood seem to be confirmed by at least those forms of feminist theory that emanate from object psychology. The reality of this "knot" of selfhood is also confirmed, less formally, from women's reports of their own experiences of masculinity: Women's folk lore, consciousness-raising sessions and conversations are replete with recountings of the sheer time and energy expended in the never-ending and enormous female task of maintaining the male's masculine sense of self.

Whether or not the universal claim is a valid description of men, the question still remains: Is it a true account of the sense of self experienced by modern women? The Herculean efforts of post-structuralist feminists notwithstanding, there are enormous problems aligning the universalist claim with modern women's experiences. Rather, many women's experiences, recounted in feminist discourse, *reverse* the phenomenological description of awareness given above in two ways. First, on a very literal level, the poststructuralist description of the daily-experienced "socially constructed" self is simply wrong: What women experience on a daily basis is not a socially constructed *selfhood*, but rather, a socially constructed *lack-of-self*, a sense of selflessness. Put another way, women distinctively bear the mark of patriarchal power by denying rather than acting upon (even if that action takes the form of renunciation) their pleasures, and internalizing and identifying with rather than avoiding their pains.<sup>76</sup> While the affirmative, non-judicial powers in varying societies may construct women in many different ways, *patriarchy*, by contrast, has not been constructive or inventive in the way claimed by critical social theory. Modern patriarchy does much for and to women, but one thing it does not do is create on her behalf anything that even remotely resembles a subjective "self." Indeed, if patriarchy has affirmatively created a social existence for women, it is one of objecthood, or otherhood, but most assuredly not selfhood—this is one of the central insights of the feminist movement, and one of the essential moments of consciousness-raising.

Of course, even this cross-cultural feminist critique—that pa-

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<sup>76</sup> I discuss this in West, 3 Wisc Women's L J (cited in note 10).

triarchy denies women not only the liberal's egotistic, desiring self, but virtually every description of the self—is not literally incompatible with the social theorist's claim that the experience of selfhood is a social construct. It denies only the universality of the construction. But to limit feminism to this narrow focus on the constitutive constructs of patriarchy is to truncate feminism needlessly. The point of so much contemporary feminist writing, particularly nonacademic feminist writing, is not simply that patriarchy denies women one form of being—selfhood—and constructs for women another form of being—objecthood. Rather, the point is that patriarchy, and more particularly patriarchal violence, is blindly destructive, not constructive, of all that is of value within us.

As we become more aware of the presence of patriarchal power, we become more aware of that which is within us—whether or not we decide to call it a “self”—and of that which is vulnerable to patriarchy's terrible destructivity. “Feminism,” construed most broadly, historically has aimed to reclaim that which is destroyed, and not just identify that which is constructed, by patriarchy. The narrative of at least some forms of feminist consciousness-raising, then, is precisely the reverse of the social-theoretical description given above: While the social theorist experiences a daily but constructed self, and comes, through critical enlightenment, to experience a negative capability, or selflessness, women experience a daily but false sense of selflessness—which is experienced not as negative potentiality, but as an exceedingly still incapacity. Through consciousness-raising, women come to reclaim a self that is within. It is this “reclamation of that which is within,” which is utterly incompatible with the critical theorist's understanding of the self.

Let me mention four aspects of our internality that modern feminists persuasively argue are threatened by the destructivity, rather than constructivity, of patriarchal power. First, Adrienne Rich eloquently maintains that a young girl's natural, early, fierce, loving, erotic and caring identification with women and girls is shattered by the pervasive patriarchal institutions of compulsory heterosexuality.<sup>76</sup> All of these institutions, which include marriage, romance and the censorship in almost all cultures of the rich history of women bonding with women, redirect the young girl's affective identification toward men. This destruction of the woman-to-

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<sup>76</sup> Rich, *On Lies, Secrets and Silence* at 199-201, 223-30 (cited in note 17).



woman bond is pervasive, universal, sometimes subtle and psychological and sometimes overt and violent, but it is no less criminal for its boring and banal typicality. It stunts our emotional lives and it perverts our wholeness. It eats away first at our self-affection and then at our self-esteem; it teaches us to deny our desires, our instincts and our pleasures, and distrusts and distance ourselves from those from whom we have received that which has best sustained us. Adrienne Rich calls this aspect of our destroyed internality the "Lesbian in Us,"<sup>77</sup> and she describes the destruction of this part of herself thus:

I was born in 1929. In that year, Virginia Woolf was writing of the necessity for a literature that would reveal "that vast chamber where nobody has been"—the realm of relationships between women . . . . Two women, one white, one black, were the first persons I loved and who I knew loved me. Both of them sang me my first songs, told me my first stories, became my first knowledge of tenderness, passion, and, finally, rejection. Each of them, over time, surrendered me to the judgment and disposition of my father and my father's culture: white and male. My love for the white woman and the black woman became blurred with anger, contempt, and guilt. I did not know which of them had injured me; they became merged together in my inarticulate fury. I did not know that neither of them had had a choice.<sup>78</sup>

On the subject of "woman-to-woman relationships," Rich continues, quoting Emily Dickinson, "My Classics veiled their faces." She then discusses her own reclamation of her internality:

Reading . . . [an essay by Bertha Harris on the silence surrounding the lesbian] I found she had described to me for the first time my own searches through literature in the past, in pursuit of a flickering, often disguised reality which came and went throughout women's books. That reality was nothing so simple and dismissible as the fact that two women might go to bed together. *It was a sense of desiring oneself; above all, of choosing oneself; it was also a primary intensity between women, an intensity which in the world at large was trivialized, caricatured,*

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<sup>77</sup> Id at 199.

<sup>78</sup> Id at 199-200.

*or invested with evil.*

Even before I wholly knew I was a lesbian, it was the lesbian in me who pursued that elusive configuration. And I believe it is the lesbian in every woman who is compelled by female energy, who gravitates toward strong women, who seeks a literature that will express that energy and strength. It is the lesbian in us who drives us to feel imaginatively, render in language, grasp; the full connection between woman and woman. It is the lesbian in us who is creative, for the dutiful daughter of the fathers in us is only a hack.<sup>79</sup>

Ellen Bass discusses a somewhat different aspect of our threatened internality. She argues that our pornographic, incestuous and sexually abusive culture shatters women's natural, playful and affective eroticism—to use Ellen Bass's language, “a basic and vital impulse—to desire to be seen, to be known, naked, in sexual sharing.”<sup>80</sup> This abusive culture identifies sexuality with female degradation, helplessness, mutilation and, in the extreme, with injury and death. Bass relates the shattering of her own eroticism in this way:

. . . I would be distracted by an image of myself as a stripper, gyrating in a dark theater in front of ogling men. This picture disgusted me. I didn't understand it. I hated that it was a part of my mind. Then I remembered: When I was a small child, my mother took me to the doctor . . . . In the examining room I took off my clothes. I don't know whether I misunderstood the directions about what clothes to remove, whether I seemed cheerful about disrobing, or whether the doctor . . . said something that elicited this response from my mother, but she laughed and joked, “She's going to be a striptease artist when she grows up.”

I was horribly embarrassed. Although . . . I had never seen a stripper . . . I was enough of a child of our culture to feel degradation and shame . . . . And way back, the calendar in the candy store . . . . The picture: a woman holding groceries in both arms, her back to me, but she looked over her shoulder right at me, her mouth a surprised red O, her underpants having slipped down to her

<sup>79</sup> Id at 200-01 (emphasis added).

<sup>80</sup> Bass and Thornton, eds, *I Never Told Anyone* at 53 (cited in note 19).

ankles, wind blowing up her skirt, her rosy buttocks exposed . . . . The woman is helpless, her arms are full. She cannot pull up her pants, push down her skirt, walk or run. The viewer, presumably, is chuckling, ongoing his view of her, enjoying her “appealing” dismay as well as her nakedness . . . . How many little girls and boys sat looking at that calendar? . . . Notice, next time you are shopping, the covers of magazines at children’s eye level.<sup>81</sup>

Bass describes first the mutilation and then the reclamation of that “which should be a birthright” in this way:

I was not sexually abused. Yet I was sexually abused. We were all sexually abused. The images and attitudes, the reality we breathe in like air, it reaches us all. It shapes and distorts us, prunes some of our most tender, trusting, lovely and loving branches. We learn that this is who a woman is . . . .

We all, women and men, live our lives in an environment that fouls one of the magnificent, holy aspects of our natural world. Creation, love, fertility, the union of two becoming one, joining in body and in ecstasy—this possibility, which should be our birthright, has been fouled . . . . Recently I have recognized that the image of the stripper is a perverted travesty of a basic and vital impulse—the desire to be seen, to be known, naked, in sexual sharing . . . . When I realized this, I was overwhelmed with feelings: anger and sadness at the insidiousness of our culture’s effect on our lives; relief in finally understanding why such ugliness was a part of me; and exhilaration at reclaiming the erotic strength and vigor of the original desire, that of sharing who I truly am with my lover, both as a gift and as an affirmation of my self.<sup>82</sup>

Third, Tillie Olsen, argues that patriarchy shatters our will to create. It shatters the belief in the validity, strength, vitality and beauty of that which can be molded from one’s own life experiences. Olsen describes this aspect of women’s expropriated internality:

How much it takes to become a writer . . . how much

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<sup>81</sup> Id at 51.

<sup>82</sup> Id at 53.

conviction as to the importance of what one has to say, one's right to say it. And the will, the measureless store of belief in oneself to be able to come to, cleave to, find the form for one's own life comprehensions. Difficult for any male not born into a class that breeds such confidence. Almost impossible for a girl, a woman . . . . Sparse indeed is the literature on the way of denial to small girl children of the development of their endowment as born human: active vigorous bodies; exercise of the power to do, to make, to investigate, to invent, to conquer obstacles, to resist violations of the self; to think, create, choose; to attain community, confidence in self. Little has been written on the harms of instilling constant concern with appearance; the need to please, to support; the training in acceptance, deferring. But it is there if one knows how to read for it, and indelibly there in the resulting damage. One—out of twelve.<sup>83</sup>

Lastly, and most controversially, the French feminist Luce Irigaray contends<sup>84</sup> that patriarchal society destroys, excludes, negates and renders fantastic women's internal, pre-lingual and even pre-symbolic sense of ourselves as witness to the truth that the violence done upon the world by discursive categorization—this breaking into subjects, objects, principles, rights and wrongs—is false, is wrong, and is not all. Irigaray explained in an interview:

. . . [w]hat a feminine syntax might be is not simple nor easy to state, because in that "syntax" there would no longer be either subject or object, "oneness" would no longer be privileged, there would no longer be proper meanings, proper names, "proper" attributes . . . . Instead, that "syntax" would involve nearness, proximity, but in such an extreme form that it would preclude any distinction of identities, any establishment of ownership, thus any form of appropriation . . . .

I think the place where it could best be deciphered is in the gestural code of women's bodies. But, since their gestures are often paralyzed, or part of the masquerade, in effect, they are often difficult to "read." Except for

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<sup>83</sup> Olsen, *Silences* at 27-28 (cited in note 24).

<sup>84</sup> See Luce Irigaray, *This Sex Which Is Not One*, translated by Catherine Porter (Cornell University Press, 1985); Luce Irigaray, *Speculum of the Other Woman*, translated by Gillian C. Gill (Cornell University Press, 1985).

what resists or subsists "beyond." In suffering, but also in women's laughter. And again: in what they "dare"—do or say—when they are among themselves. There are also more and more texts written by women in which another writing is beginning to assert itself, even if it is still often repressed by the dominant discourse . . . .<sup>85</sup>

Affirmatively, this voice within speaks sometimes by not speaking. It speaks in silent, sometimes laughing collaboration with particular women and with all women for an affirmative recognition of the "self within." It speaks as a source of fulfilled need, pleasure, desire, communion, intersubjectivity and *jouissance*:

If you/I hesitate to speak, isn't it because we are afraid of not speaking well? But what is "well" or badly"? . . . What claim to raise ourselves up in a worthier discourse? Erection is no business of ours: we are at home on the flatlands. We have so much space to share . . . we have so many voices to invent in order to express all of us everywhere . . . . Stretching upward, reaching higher, you pull yourself away from the limitless realm of your body. Don't make yourself erect, you'll leave us. The sky isn't up there: it's between us.

And don't worry about the "right" word. There isn't any. No truth between our lips. There is room enough for everything to exist. Everything is worth exchanging, nothing is privileged, nothing is refused . . . . Between us, there are no proprietors, no purchasers . . . . Our bodies are nourished by our mutual pleasure . . . our exchanges are without terms, without end. How can I say it? The language we know is so limited . . . .

Let's leave definitiveness to the undecided; we don't need it. Our body, right here, right now, gives us a very different certainty. Truth is necessary for those who are so distanced from their body that they have forgotten it. But their "truth" immobilizes us, turns us into statues, if we can't loose its hold on us.<sup>86</sup>

Negatively, the voice within criticizes, intuits, witnesses and insists that this broken discourse we call culture is not ultimately human.

How can I say it? . . . that their history, their stories,

<sup>85</sup> Irigaray, *This Sex Which is Not One* at 134 (cited in note 84).

<sup>86</sup> *Id.* at 213-14.

constitute the locus of our displacement. It's not that we have a territory of our own; but their fatherland, family, home, discourse, imprison us in enclosed spaces where we cannot keep on moving, living, as ourselves. Their properties are our exile. Their enclosures, the death of our love. Their words, the gag upon our lips.

How can we speak so as to escape from . . . their distinctions and oppositions: virginal/deflowered, pure/impure, innocent/experienced . . . . How can we shake off the chain of these terms . . . ? Disengage ourselves, *alive*, from their concepts? . . . You know that we are never completed, but that we only embrace ourselves whole. That one after another, parts—of the body, of space, of time—interrupt the flow of our blood. Paralyze, petrify, immobilize us. Make us paler. Almost frigid.<sup>87</sup>

The critical female self knows herself as a fantastic, un-lived, unspeakable, unspoken alternative which cannot render itself more concrete, and which is known in large part through its absence from cultured life. It is, for example, that part of themselves which the silent and silenced female Yale law students know to be absent from law, legal culture, law school and legal discourse. This anti-symbolic, uncultured, natural, loving, female self knows herself often and tragically as that which is feared, repressed, despised, raped, abused and killed by the vicious side of patriarchy. She knows herself even more often as that which is trivialized, fantasized and rendered unreal, untrustworthy, irrational and ultimately nonexistent by the cultured side of patriarchy. It is no wonder that she hates and disowns herself. But paradoxically, she also knows herself, at times, as exceedingly, painfully, achingly real. She knows herself as joyful, living, loving and real, even as she knows herself as only dimly perceived, because she is so universally denied. She knows herself, miraculously if only on occasion, not as the hated, feared, denied, trivialized and trampled upon, but as worthy and beautiful, and as one who must be reclaimed from denial, fear, oppression and loathing.<sup>88</sup>

What of *this* "self"—this woman-bonded, creative, playfully

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<sup>87</sup> Id at 212.

<sup>88</sup> For a general introduction to French feminism, see Claire Duchon, *Feminism in France* (Routledge & Kegan Paul, 1986). Drucilla Cornell compares and contrasts the biologic and psychologic "essentialism" I have defended here and elsewhere (West, 55 U Chi L Rev 1 (cited in note 61)) with Julia Kristeva's psychoanalytic essentialism. She then criticizes both from a postmodern perspective. See Cornell, Cornell L Rev (1989) (forthcoming).

erotic, loving, unspeakable and negative female self? In a sense, of course, the social theorist is right to deny her existence. The social theorist is concerned with discursive truths, and the truth of this female self is by definition that which is unspeakable. But I believe feminists should not conclude from this discursive exclusion of the female self that we have discovered yet another socially constructed and ultimately nonexistent self which should be banished from all thought, dreams and histories. We should conclude that we have discovered the logical limits of the discursive object of social theoretic understanding.

Feminist legal theories in particular should stay true to these glimpsed and occasional experiences of the self within. If we want an ideal to guide a critique of law that is total, if we want a source of light to guide legal reforms that are truly progressive, if we want to understand how we should begin to remake and reclaim the world in a way that is more loving and more holistic, then we should be extremely wary of the postmodern, poststructuralist and social-theoretic claim that this non-discursive, woman-bonded, creative, erotic and quietly rebellious self within is but another product of a political, patriarchal, liberal and societal discourse. We should instead seek to protect and nurture and give voice to that most tentative, intuitive, unschooled and above all else undisciplined female self that lies within. For it is that self who will show us truly new ways to judge, new ways to legislate, and new ways to order. It is that self who can show us how to create a safe world without killing the spontaneous, the physical, the natural, the unpredictable and the pleasurable. And of course, it is that self that has yet to make its presence felt in most of our hypothetical constructs or utopian dreams, much less in our societal and legal discursive reality.

#### CONCLUSION

What is of value in critical social theory for feminists? My suspicion is that what attracts many feminists to critical social theory is not its anti-essentialism, but more simply its skepticism: its refusal to accept any particular account of truth or morality as the essential true, moral or human viewpoint. This skepticism is entirely healthy and is something we should treasure. The anti-essentialism of the critical theorist's vision, by contrast, is something we should reject. Surely we can have this both ways. A skepticism toward particular claims of objective truth, a particular account of the self, and any particular account of gender, sexuality, biology or what is and is not natural, is absolutely necessary to a healthy and

modern feminism. But that skepticism need not require an unwillingness to entertain descriptions of subjective and intersubjective authenticity, claims of a pervasive and cross-cultural patriarchy, various accounts of the female self, promises of a nurturant or caring morality, or remembrances of a feminine and feminist closeness to nature. These descriptions, claims, accounts, promises and remembrances, considered so problematic by critical social and legal theory, are precisely what have recently animated feminist legal theory and practice. All I have argued in this paper is that we should not forsake them out of a misguided attempt to remain true to a critical philosophical vision which, like the enlightenment vision it seeks to replace, has not been of our own making.



