

# Book Review: Ratna Kapur's *Erotic Justice: Law and the New Politics of Postcolonialism*

London: GlassHouse, 2005. Pp. vi, 219.

Ryan Charles Gaglio<sup>†</sup>

Nietzsche observed that the commonest stupidity consists of forgetting what one is trying to do.<sup>1</sup> As Ratna Kapur argues in *Erotic Justice: Law and the New Politics of Postcolonialism*, political activism's continued reliance on liberal and Western feminist agendas evinces an absence of deep thinking, in turn unwittingly reinforcing the hegemony and subordination it means to challenge. In this collection of essays, Kapur draws from postcolonial feminist legal theory to critique the misguided causal logic of liberalism, which mistakenly assumes that "more rights lead to more freedom and greater equality."<sup>2</sup> Examining law and political activism, Kapur concludes that, unless modern postcolonial society is understood as the site of an historical, discursive struggle informed by the colonial past, steadfast allegiance to the rights project of liberalism risks perpetuating the subordination of oppressed subaltern groups under the illusive panacea of universal rights.<sup>3</sup> Kapur uses her analysis of the condition of Indian women, transnational migrants, and sexual subalterns—groups marginally situated in and subordinate to hegemonic Indian culture—to interrogate the broader agenda of liberalism and Western feminism. This agenda ostensibly endeavors to protect third-world "victims," but, instead, Kapur argues, it tends to offer legal protection on terms that paradoxically reinforce normative and essentialist assumptions of gender, culture, and agency—thus perpetuating the very subordination and victimization it seeks to remedy.

But *Erotic Justice* not only challenges the politics of liberalism and Western feminism by exposing the limitations of the rights project; Kapur's collection of essays goes a step further and asks what the basis of political activism *should be* without the comfort of liberalism's clear yet misguided

---

<sup>†</sup> Yale Law School, J.D. expected 2008.

1. FREDRICK NIETZSCHE, THE WANDERER AND HIS SHADOW § 206 (1880).

2. RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 11 (2005).

3. *Id.* at 5-6.

agenda.<sup>4</sup> Unfortunately, *Erotic Justice* does not fully answer this question; Kapur suggests that merely opening up the space for new and imaginative possibilities by freeing the political realm from the fallacy of liberalism is productive and useful.<sup>5</sup> Still, the disappointment of *Erotic Justice* in failing to answer its own central question is less indicative of Kapur's authorial shortcomings than it is a sign that the theoretical framework of postcolonialism needs to be reevaluated. Indeed, in recent years the utility of postcolonialism as an analytical framework has been challenged, and critics have railed against it on epistemological, methodological, and practical grounds.<sup>6</sup> Postcolonialism has been criticized for failing to address the true problems of developing nations, issues such as "poverty, resource distribution, state violence, human-rights violations, urban sanitation, and development";<sup>7</sup> it has been criticized for lacking theoretical or methodological bearing and clarity of objectives;<sup>8</sup> and it has been criticized for having become self-referential and self-important—the

---

4. *Id.* at 10.

5. Kapur regularly reminds the reader that the purpose of *Erotic Justice* is *not* to articulate specific legal reforms or outline actionable strategies that will better achieve justice for third-world subalterns: "This book is not focused on developing legal strategies for liberating the Other. Instead, my endeavour is to force an interrogation of, and a sense of accountability within, the scholarship produced by and on behalf of women and subaltern subjects." *Id.* at 6. See also *id.* at 50 ("I do not argue against law, or for abandoning a rights project; I argue in favour of evaluating legal claims from a postcolonial perspective, and engaging with law as a complex, multiple and contingent discourse whose meaning is susceptible to context, cultural histories and the legacies of the past."); *id.* at 93 ("The erotic subject challenges the inviolability of the linear narrative that law tells about sex and culture in India, and continuously ruptures and redraws the boundaries of both. Its disruptive potential creates the possibility of telling more complex stories and to speak from a space 'somewhere in between.'"); *id.* at 136 ("The recognition that the postcolonial subject can return the gaze and force an unpacking of the regulatory norms that underlie women's human rights claims and practices can perhaps provide the alternative and possibly transformative cosmology we are seeking to move towards."). Kapur never explains exactly what role she sees her "contingent discourses" as having in the postcolonial feminist "cosmology" she articulates, nor does Kapur really suggest what legal reforms that incorporate this criticism might look like.

6. This is not the place for a bibliography of the field. See Christine Sylvester, *Development Studies and Postcolonial Studies: Disparate Tales of the "Third World,"* 20 *THIRD WORLD Q.* 703 (1999) for a thoughtful overview of the many criticisms of postcolonialism, focusing primarily on the political and practical shortcomings of the discipline. See also Vijay Mishra & Bob Hodge, *What Was Postcolonialism?*, 36 *NEW LIT. HIST.* 375-402 (2005) for an overview of the more epistemologically and methodologically oriented criticisms. These authors draw on the expanding bibliography of postcolonialism and its critics. See, e.g., PHILIP DARBY, *THE FICTION OF IMPERIALISM: READING BETWEEN INTERNATIONAL RELATIONS AND POSTCOLONIALISM* 217 (1998) (accusing postcolonialism of "making a virtue out of being free-floating and open-ended" that results in its failure to adhere to any established discipline of thought); ARIF DIRLIK, *THE POSTCOLONIAL AURA: THIRD WORLD CRITICISM IN THE AGE OF GLOBAL CAPITALISM* (1997) (criticizing the weakness of postcolonialism's flawed historical methodology); NEIL LAZARUS, *NATIONALISM AND CULTURAL PRACTICE IN THE POSTCOLONIAL WORLD* (1999) (arguing the need for postcolonialism to rearticulate a systematic theory by reconnecting with Marxism and revitalizing its original focus on dehistoricized historical memories); GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* (1999) (reexamining postcolonialism through critiques of Kant, Hegel, and Marx and stressing the need to reestablish links with Marxism).

7. Rajeswari Sunder Rajan, *The Third World Academic in Other Places; Or the Postcolonial Intellectual Revisited*, 23 *CRITICAL INQ.* 615, 615 (1997).

8. See DARBY, *supra* note 6; Mishra & Hodge, *supra* note 6, at 375-402; Sylvester, *supra* note 6, at 703-704, 711-716.

latest incarnation of ivory-tower postmodernism.<sup>9</sup> These criticisms are especially incisive for a scholarship and a politics that seek to react against the dominant imposition of liberalism and of Western feminism and to improve the position of the marginalized and oppressed. Kapur's essays in *Erotic Justice* represent an additional, somewhat responsive voice in this theoretical debate. While *Erotic Justice* does not respond to all of the critics of postcolonialism, the methodology and legal focus of the essays offer a promising glimpse of the future of postcolonial theory as a viable and useful framework. Indeed, if postcolonialism is to survive the attacks of its critics, it will be because of methodologically rigorous scholarship like Kapur's *Erotic Justice*.

Kapur develops her postcolonial feminist framework in her response to Martha Nussbaum's feminist critique of liberalism, *Sex and Social Justice*.<sup>10</sup> In the first essay of *Erotic Justice*, "New Cosmologies: Mapping the Postcolonial Feminist Legal Project," Kapur finds Nussbaum's challenge to liberalism insufficient, because, although Nussbaum adequately assesses the limits and risks of liberalism, she forges ahead with its logic and goals anyway. Wendy Brown calls this "Yes I know. But..." politics:<sup>11</sup> Despite the obvious shortcomings of liberalism, Western feminists and political activists continue to adhere to the rights project out of fear of the consequences of abandoning its truth claims and causal logic. Kapur intends her articulation of postcolonial feminism to release political and intellectual energies that have been trapped by the constraints of the logic of liberalism and to "open[] up the space for new political possibilities and imaginations."<sup>12</sup>

According to Kapur, the recurring refrain of *Sex and Social Justice* is not that the liberal position is fundamentally flawed, but that there has been a profound inconsistency and incompleteness in the way liberalism has operated for women.<sup>13</sup> Yet, the feminist response Nussbaum proposes is inadequate. Kapur contends that Nussbaum advocates a feminist politics that attempts to unmask inequalities within society and the family and to push liberalism's project of increasingly robust rights regimes into the home and other sites of patriarchal oppression and subordination.<sup>14</sup> But, Kapur argues, postcolonialism and subaltern scholarship have thoroughly exposed the fallacy of liberalism's reliance on the narrative of progress, its inability to transcend assumptions about the Other, and its mistaken assumptions about the autonomous, atomized subject.<sup>15</sup> And so, continued adherence to the liberal project, even as modified by feminist critics like Nussbaum, risks perpetuating subordination and

9. DIRLIK, *supra* note 6, at 329. See also Kwame Anthony Appiah, *Is the Post in Postmodernism the Post in Postcolonialism?*, 17 *CRITICAL INQ.* 356 (1991).

10. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999).

11. WENDY BROWN, *POLITICS OUT OF HISTORY* 4 (2001).

12. KAPUR, *supra* note 2, at 11.

13. *Id.* at 16-17.

14. *Id.* at 17-18.

15. *Id.* at 20-27.

oppression. As an example, Kapur offers this analogy: Just as liberal values were used to enable and enhance 19th Century imperialism and colonial expansion, the religious right-wing nationalist movement and contemporary conservative political forces in India—collectively, the coalition of the Hindu Right—have successfully maneuvered the principles and rhetoric of liberalism to assimilate and subordinate Muslims on normative and essentialist terms, to build a monolithic conception of nationalism, and to recognize women's rights within the terms of dominant sexual, cultural, and familial norms; thus, the religious right-wing in India have managed to maintain the status quo by affirming hegemonic stereotypes.<sup>16</sup>

In "New Cosmologies," Kapur outlines how, during the development of Indian nationalism, the law—and in particular the law as it applied to women—developed into a site of struggle between imperialism and nationalism. The British partly justified their colonizing presence in India by appealing to the backwardness of certain customs—for example, child marriage. Liberal-minded British reformers sought to change what they saw as barbaric and backward practices, and they imposed laws to increase the age of consent for marriage from ten to twelve. Indian nationalists resisted reform by rearticulating the domestic sphere as beyond the reach of colonial intervention. Although British laws and reform were eventually enacted, the private sphere of the family emerged from these colonial conflicts as a protected space for the production of Indian cultural values and tradition. Furthermore, the women who occupied this space came to embody Indian nationalism, and the nationalist political elites who constituted the dominant social force projected onto them a set of essentialist stereotypes of normative sexuality: motherhood, wifehood, chastity, purity, self-sacrifice, and other sexualized symbols of Indian culture.<sup>17</sup>

By taking the postcolonial feminist critique seriously and applying its framework to Indian society and history, Kapur exposes the ways that the colonial past informs the postcolonial present. Through the lens of postcolonialism, Kapur demonstrates how the public/private divide that emerged in 19th-century India was the product of a nationalist resistance to imperialism that selected the home, female sexuality, and the Indian woman herself as spaces of Indian cultural autonomy. As Indian nationalists resisted the imperialist intrusions of British law and Western culture, they articulated the private sphere as a site of non-colonization. Inscribed within this space, women were protected from the corrupting influence of the West; in the process, they became the embodiment of pure, untouched Indian culture.

Kapur's interrogation of the postcolonial present as the site of an intertemporal historical struggle thus reveals the recursive effects of the 19th-

---

16. *Id.* at 43-50.

17. KAPUR, *supra* note 2, at 29-36.

century struggle for Indian cultural autonomy and independence. In modern India, the family remains the space of traditional Indian cultural values, and analogous resistance continues to inform present legal engagement with women and the private sphere. Insofar as women continue to occupy this space, they continue to be subjected to stereotyping by the dominant culture—today, conservative political forces such as the Hindu Right. Where the law has been permitted entry into the private realm of the family, such as in the criminalization of adultery, it has done so only to reinforce the moral regulation of women and sexuality according to dominant sexual ideology and conservative norms. Thus, the nationalist response to the colonial project of legal reform—that is, the idealization of women’s bodies—also informs indirectly the substance of law in contemporary India. As a result of the colonial experience, the Indian woman, as a nationalist ideal and as a stereotype, remains the locus of legal and cultural contestation.<sup>18</sup>

Unfortunately, feminist and liberal engagement with law and sexuality in this postcolonial context has neither been wholly transformative nor empowering, and Kapur dedicates much of the remainder of *Erotic Justice* to exposing just how political activism has tended to misunderstand postcolonial feminism and to perpetuate the hegemonic stereotyping of subaltern women, which, in turn, has stymied the realization of full sexual justice in the postcolonial world. In her essay “The Tragedy of Victimisation Rhetoric,” Kapur articulates this criticism most clearly by examining the United Nations (UN)-led international violence against women campaign, which has led to a proliferation of legal rights for women. Yet, Kapur argues that the articulation and implementation of rights meant to protect women has tended to frame the issue of violence in terms of the victimization of women, which sustains normative assumptions about gender, sexuality, and culture.<sup>19</sup> This essentialist treatment of women as agency-less victims without choice only serves to reinforce their subordination and prevents the development of more robust systems of justice that would challenge hegemonic stereotypes and normative assumptions.<sup>20</sup>

But there are areas of contestation where subalterns are challenging the normative stereotypes and essentialist characterizations of third-world women as victims without choice or agency. In “Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India” Kapur examines the disruptive forces of globalized culture, such as satellite television and Western films and music, and of sexual subalterns, such as prostitutes, homosexuals, and transvestites. Kapur’s “The Other Side of Universality: Cross-Border Movements and the Transnational Migrant Subject” looks at the challenges posed by transnational

---

18. *Id.* at 36-43.

19. *Id.* at 96-100.

20. *Id.* at 100-108.

emigrant women, whose hybridity—or cultural and geographic “in betweenness”—complicates essentialist assumptions of culture, and whose ability to choose to leave their homes and move across borders in search of social and economic opportunity questions assumptions of gender and agency. Throughout Kapur’s essays, women are treated as agents capable of choice, deciding to work as “sexually assertive” prostitutes or to emigrate across borders as “transnational migrant subject[s],” thus challenging the assumption that third-world women are pure and chaste victims confined to the home to act as dutiful and obedient mothers and wives.<sup>21</sup> In prostitution, Kapur sees an especially powerful, front-end challenge:

to the nationalist narrative of sex and culture. These sex workers are directly challenging the idea that sex in general, and commercial sex in particular, are inherently negative, corrosive or otherwise dangerous. They are boldly asserting the rightful place of sex. And in so doing, they risk being cast as an even more dangerous affront to Indian culture and the nation.<sup>22</sup>

In each of these areas of contestation, Kapur views the rights project of Western feminism and liberalism as unwittingly obstructing the ultimate realization of more comprehensive sexual justice: The Indian feminist organization, the National Commission on Women, in seeking to protect “morally pure” Indian women from the corrupting influence of Western film and music, encouraged the enforcement of laws that would limit the sensationalization of sex and violence;<sup>23</sup> and liberal reformers—organizations like the UN and Western governments like Australia, the United Kingdom, and the United States—in seeking to control the sex trade and mitigate the risk of terrorism, have tried to regulate the transnational movement of third-world subalterns by implementing programs to disincentivize emigration.<sup>24</sup> Kapur sees these activist efforts at liberal reform as misguided and unreflective, perpetuating hegemonic assumptions that third-world subalterns are agency-less victims without capacity to choose or act independently.

The limitation, of course, to Kapur’s argument is that reading empowerment, choice, and normative challenges into prostitution, emigration, and the acceptance of Western culture misses the fact that globalization has created a new, complex system of winners and losers. For example, the “decision” of a woman to work as a prostitute or to leave her home in search of work is as much about the shifting arrangements of global capital as it is about agency, hybridity, and challenging hegemonic assumptions. On the one hand, choice can be read into third-world women’s “decision” to work as prostitutes or emigrate for work, and, in a sense, a choice *is* being made that can, as a

---

21. *Id.* at 71, 139.

22. KAPUR, *supra* note 2, at 77.

23. *Id.* at 65-69.

24. *Id.* at 70-78, 141-150, 158-169.

consequence, interrogate and challenge normative stereotypes. At the same time, truly understanding the “decisions” of these women also requires examining the social and economic conditions that constrain women’s occupational “choices.” Market changes caused by, for example, a foreign corporation’s decision to relocate production, can shift, constrain, and otherwise distort preferences and markets that had previously been in equilibrium. In that case, prostitution and emigration are the only viable options for women with limited skills and attenuated adaptability.

Liberty of choice is of primary importance to theories of agency, hybridity, and sexual justice, but to be in the position of having to “choose” between emigration and prostitution is to actually be *deprived* of liberty, not to exercise it. Kapur’s postcolonial feminist framework incorrectly construes forced prostitution and compelled emigration as sexual empowerment and cultural hybridity. By viewing the complexities and problems facing third-world women as decision-based challenges to hegemonic norms, Kapur reads the appearance of agency and choice into circumstances where liberty is entirely absent. In settings of poverty, starvation, and lack of opportunity, choice is little more than a creative construct—a novel way of reading prostitution and emigration that ultimately distorts and minimizes the dire conditions of the third world. Such an ivory-towered misrepresentation of reality has led critics to challenge the theoretical and political utility of postcolonialism as a framework for analyzing the third world.<sup>25</sup>

Kapur rejects this line of criticism, dismissing economic analyses of exploitation, prostitution, and emigration as reinforcing cultural and gender essentialism:

Their approach is to characterise sex-workers in India as victims, whose work is determined by economic hardship. This approach is located on an East/West binary and assumes that choice is possible in the West, while economic oppression in Asia is so all-encompassing that the very possibility of choice or agency is negated.<sup>26</sup>

But it is not clear that Kapur’s critics negate choice or agency along an East/West binary. It is a very traditional form of Western feminism that views prostitution—even in industrialized nations—as exploitative and oppressive.<sup>27</sup> True, these accounts are fraught with many of the problems Kapur sees in the

25. See Darby, *Postcolonialism*, *supra* note 6; Rajan, *supra* note 6; Sylvester, *supra* note 6.

26. KAPUR, *supra* note 2, at 76.

27. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47 (1992); Evelina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 HAMLINE J. PUB. L. & POL’Y 1 (1994); Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1 (2002); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523 (2000); Dorchen Leidholt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L.J. 133 (1993); Carlin Meyer, *Sex, Sin, & Women’s Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994).

(il)logic of liberalism, but Kapur rejects alternative explanations without much consideration, because she sees them as perpetuating—at the very least—the rhetoric of victimization.

For Kapur, the first step toward achieving greater erotic justice and articulating a more progressive policy solution is to recognize that “[w]omen can and do choose to move and work in the sex industry, and even find clandestine means by which to enter into another country.”<sup>28</sup> By highlighting women’s choice to work as prostitutes or emigrate for work, the multiple centers of subaltern discourse come to the foreground, evading the simplifying tendencies of gender and cultural essentialism. This, in turn, leads to “more complicated analys[e]s of the cultural location of the sex-worker in India and counter the cultural essentialism that has informed the legal debates.”<sup>29</sup> More rights and legal protections are not the answer, because they tend to perpetuate and reinforce norms, not challenge and undermine them.<sup>30</sup> Kapur is especially critical of the legal reforms proposed by the UN and other Western political organizations and governments dedicated to the rights project, because their “questionable statistics have been combined with other confusions between trafficking, migration, and sex-work.”<sup>31</sup>

But how, exactly, do richer analyses of the location of prostitution in Indian culture further legal reforms aimed at providing greater economic opportunities for women without any options other than selling their bodies to feed themselves and their families? Kapur does not offer a response, nor is her logic sufficiently articulated to allow the reader to venture a prediction as to what a postcolonial feminist answer might be. Instead she demurs, identifying authors and scholars who are working in the field of literary analysis to uncover, for example, the hidden roots of prostitution in the courtesans of 4th-century BC India.<sup>32</sup> This is insufficient.

Although Kapur’s *Erotic Justice* correctly criticizes the many weaknesses of liberalism, it fails to offer any sustainable alternative theoretical or political way to understand the problems affecting subaltern third-world women and impeding the realization of greater justice. Granted, by focusing on the law as a discursive site of conflict, *Erotic Justice* adds much to the methodological viability of postcolonialism by signaling a departure from the use of literary texts and visual arts as evidence of third-world conditions. But Kapur is unable to remain in the realm of politics and law for long, and she often lapses into the much more methodologically flexible realm of literature and “episodic” accounts of contemporary events.<sup>33</sup> Indeed, if law and politics are going to be

---

28. KAPUR, *supra* note 2, at 130.

29. *Id.* at 78.

30. *Id.* at 128-129.

31. *Id.* 143.

32. *Id.* at 78.

33. See, e.g., KAPUR, *supra* note 2, at 138.



used to substantiate and test postcolonial arguments and hypotheses, additional analytical tools from the social sciences must be incorporated into the postcolonial framework. For example, Christine Sylvester, a student of postcolonial feminism, has engaged in data collection and field work to test her hypotheses about different perceptions of the needs of women in Zimbabwe, comparing the needs of women as the women themselves see them with the markedly different perspectives of development agencies who design programs for these women.<sup>34</sup> Looking to the analytical tools of the social sciences—much as the liberal rights project has done, as evidenced by the acceptance of political, sociological, and economic theories of development by the UN, foreign governments, and other international political organizations—would move postcolonial scholarship one step closer to articulating viable policy outcomes, rather than merely opening up a discursive space where creative descriptions take precedence over much needed reform.

Notwithstanding these criticisms, Kapur's *Erotic Justice* is a provocative and refreshing addition to the literature of postcolonialism. While greater rapprochement between liberalism and postcolonialism remains elusive, Kapur's scholarship is a step in the right direction, and her efforts merit scholarly attention and praise. Still, if postcolonialism is to remain a viable framework, it is going to have to adopt some of the methodological rigor of its intellectual rival—it appears that students of postcolonialism have something important to learn from practitioners of the liberal rights project after all.

---

34. See CHRISTINE SYLVESTER, PRODUCING WOMEN AND PROGRESS IN ZIMBABWE: NARRATIVES OF IDENTITY AND WORK FROM THE 1980s (2000); Christine Sylvester, *Urban Women Cooperators, "Progress," and "African Feminism" in Zimbabwe, "Differences,"* 3 J. FEMINIST CULTURAL STUD. 39 (1999); Christine Sylvester, *Development Imaginaries: Shall We Dance, Pygmalion?* (1999) (paper presented to the International Studies Association Conference, Washington, D.C.); Sylvester, *supra* note 6.



# Book Review: *Women, Madness and the Law: a Feminist Reader*

Edited by Wendy Chan, Dorothy E. Chunn, & Robert Menzies. London: GlassHouse, 2005. Pp. xii, 301.

Margaret Hellerstein<sup>†</sup>

In the age of ubiquitous psychotherapy, amidst profuse critiques of the classification and treatment of mental illness, women's relation to 'madness and the law' has received surprisingly little attention in mainstream literature, given the long and troubled relationship between women and 'madness'<sup>1</sup> that continues to resonate in 'psy' sciences, legal regulation, and the criminal justice system. The collection of essays, *Women, Madness, and the Law: a Feminist Reader*, offers feminist perspectives on the ways in which gender informs the construction, diagnosis, treatment of, and responses to, women's mental illness in contemporary Anglophonic society.

The essays in this unusual collection explore a variety of themes, such as criminal insanity in women; feminist critiques of standard diagnosis and treatment, including women-specific syndromes; confinement of women; and feminist antipsychiatry. The authors' perspectives range from gently reformist to defiantly radical, but they share the common opinion that women are suffering as a result of the current system and that something should be done about it. The most interesting essays are those that focus on neglected areas of research (such as women confined to secure hospitals and jails, gender bias in the insanity defense, and violence *by* as opposed to *against* women, to name a few) and those that propose thoughtful alternatives to practices that demonstrably oppress women, of which there are regrettably many. These pieces are interspersed with others that cling to the margins of reasonable debate or boggle the mind with overgenerous helpings of jargon. Although the essays are somewhat hit-or-miss, the collection succeeds in shedding light on

---

<sup>†</sup> Yale Law School, J.D. expected 2007.

1. Editors Wendy Chan, Dorothy E. Chunn, and Robert Menzies prefer the term 'madness' to denote what the psychiatric and lay community would call mental illness. Several of the book's authors also use the terms 'illness,' 'disorder,' and 'disability,' among others. The debate on terminology reflects a deeper debate on the nature of the beast, although none of the authors specifically addresses it. I use the term 'mental illness' throughout this review, not in the interest of siding with mainstream psychiatry but because it is the standard, and as such is more easily comprehensible and, I hope, objective.

some difficult and engaging problems in an area that has been too rarely addressed in either feminist or psychiatric literature.

Why think about women, mental illness, and the law? For one thing, women are much more likely to seek psychiatric treatment for mental illness than men, and they are far more likely (as much as twice as likely as men with respect to unipolar depression) to suffer from the most common disorders – that is, depression, anxiety, and somatic disorders.<sup>2</sup> Indeed, as most of the authors agree, mental illness is traditionally portrayed as a female disease. “Representations of woman as mad,” writes Jane M. Ussher in the opening chapter, “ranging from the dangerous harridan in the attic, to the melancholic maiden languishing helplessly on her bed, all stand as reminders of the potential danger or vulnerability lurking beneath the mask of beauty that otherwise signifies ‘woman.’”<sup>3</sup> Patriarchal explanations for sex differences have alternated between the historical reliance on women’s supposedly chaotic biology to the construal of women as psychically weaker, less resilient, and more likely to be passive victims.<sup>4</sup> These explanations are surprisingly persistent even today, and several of the essays in this book work to combat them.

Feminist thought on women’s mental illness ranges from the argument that an oppressive, sexist, often abusive world naturally produces higher rates of mental illness in women, to the argument that the historic association of mental illness with femaleness sends trigger-happy psychiatrists scrambling for their prescription pads at the first sign of traditionally ‘female’ emotional responses even under legitimately upsetting circumstances, to the wholesale rejection of the field of psychiatry.

Another reason to examine psychiatry from a feminist perspective is that women, once diagnosed with mental illness, are particularly vulnerable in institutional settings. As Ann Lloyd discusses in her engaging and readable chapter, “The Treatment of Women Patients in Secure Hospitals,” women whom the courts deem mentally incapacitated then confine to a hospital are often subject to various forms of mistreatment, including verbal and physical

---

2. World Health Organization website at [http://www.who.int/mental\\_health/prevention/genderwomen/en/](http://www.who.int/mental_health/prevention/genderwomen/en/). See also the National Institute of Mental Health (NIMH) website for a breakdown of the rate of diagnosis for women and men by specific illness, available at <http://www.nimh.nih.gov/publicat/numbers.cfm>.

3. Jane M. Ussher, *Unravelling Women’s Madness: Beyond Positivism and Construction and Towards a Material-Discursive-Intrapsychic Approach*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* 19 (Wendy Chan et al. eds., 2005).

4. See generally *id.*; Bonnie Burstow, *Feminist Antipsychiatry Praxis – Women and the Movement(s): A Canadian Perspective*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005); Kathleen Kendall, *Beyond Reason: Social Constructions of Mentally Disordered*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005); Hannah Lerman, *Women’s Misery: Continuing Pigeonholes into the 21st Century*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

abuse, total infantilisation, and neglect.<sup>5</sup> Because the hospital system is ill-equipped to deal with women and because the staff automatically denies women any agency, the harms these women experience are so serious they approach human rights violations.

Women in prison experience similar maltreatment. In "At the Centre of the New Professional Gaze: Women, Medicine, and Confinement," Joe Sim discusses the continuing medicalization of women inmates' behavior and unwillingness to grant them even a modicum of control over their lives and treatment.<sup>6</sup> Because the female identity is seen as more passive, less rational, and less in need of active participation in its own destiny, women in confinement are extremely vulnerable to abuse and neglect by administrative systems, often languishing for decades or even forever in institutions they ought to have left after a year or two.

The experience of mentally ill women in the criminal justice system, particularly as perpetrators of violent crimes, is one of the most interesting themes. The social construction of femininity codes the label 'violent woman' as either a contradiction in terms or a diagnosis of profound role-betrayal, be it through illness or evil. Even apart from the behaviors society prescribes for women, the characteristics supposed to be inherent to the female sex are incompatible with violence. In other words, even a badly-behaved woman is thought to have a fundamentally passive, emotionally needy, weak-willed nature regardless of her failure to display the 'ideal' feminine characteristics of empathy and nurturing.<sup>7</sup> Consequently, the character of the murderess is not only abhorrent but incoherent, whereas the male murderer is guilty instead of succumbing to the ugly extreme of masculine aggressiveness. As a result, individual women murderers are portrayed either as horrific monsters or as pitiable victims of abuse<sup>8</sup> and of their own irrationality or underdeveloped moral capacity,<sup>9</sup> depending on the journalist.

5. See Ann Lloyd, *The Treatment of Women Patients in Secure Hospitals*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

6. See Joe Sim, *At the Centre of the New Professional Gaze: Women, Medicine and Confinement in Women, Madness, and the Law: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

7. See generally Kendall, *supra* note 4; Lloyd, *supra* note 5; Sim, *supra* note 6.

8. Many women murderers have in fact been abused. The point is not that it doesn't matter, but that this history of abuse is used to avoid assigning agency to women. For essays on this topic, see Wendy Chan, *Gender, Murder and Madness in Women, Madness, and the Law: A FEMINIST READER* (Wendy Chan et al. eds., 2005); Kendall, *supra* note 4; Robert Menzies & Dorothy E. Chunn, *Charlotte's Web: Historical Regulation of 'Insane' Women Murderers in Women, Madness, and the Law: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

9. Herein lies a paradox. Women are often seen as more likely than men to be 'good' due to their alleged tendency toward self-sacrifice and nurturing. On the other hand, philosophers since Aristotle have construed women as so controlled by their biology that they can never truly rule the body with the mind and thus cannot qualify as fully-formed moral beings. The best way to understand sexist views on women's morality in contemporary society may be to say that women are alleged to have a naturally docile and nurturing disposition, but that they lack men's capacity for integrity. See Kendall, *supra* note 4.

In this sense, the lines between madness and badness in women become blurred. A woman murderer is necessarily a little bit crazy, the logic goes, because her behavior is otherwise inexplicable. And these “doubly mad and bad” women are a fearsome lot. No one can seem to agree on whether to pity them or despise them; the one constant is the sense of dissonance and discomfort they produce. This public inability to understand the woman murderer places the suspect at risk for mistreatment: her chosen plea of self-defense may be discouraged in favor of an insanity plea; she may be committed for life to a mental institution despite no evidence of serious mental illness; she almost definitely will be subject to a psychic tug-of-war for agency even after she makes her plea.<sup>10</sup>

Kathleen Kendall, in her excellent and provocative essay entitled “Beyond Reason: Social Constructions of Mentally Disordered Female Offenders,” begins with a striking discussion of the various armchair psychoanalyses of Aileen Wuornos, the serial killer executed in 2002.<sup>11</sup> “[B]ecause criminality implies responsibility for one’s actions and madness infers [*sic*] the opposite, the two categories appear incongruous,” writes Kendall.<sup>12</sup> “[F]emales deemed both mad and bad endanger the social order not only through their actions, but because they threaten to expose the fissures and failures within the myriad of methods designed to understand and manage society’s miscreants.”<sup>13</sup> Kendall, along with Robert Menzies and Dorothy E. Chunn<sup>14</sup> and Wendy Chan<sup>15</sup> expose the astonishing incapacity of contemporary and nineteenth-century society to deal with women murderers in society and in the criminal justice system. These three essays are among the most compelling in the collection.

Another major theme of the book is the examination of how women’s mental suffering is construed, what results from the standard approach, and how it should be changed. The answers given vary widely, as does the quality of the essays on this topic. The standout is Hannah Lerman’s “Women’s Misery: Continuing Pigeonholes into the 21<sup>st</sup> Century,” in which she provides an overview and critique of diagnostic systems as they are applied to women.<sup>16</sup>

The “bible of the mental health field,” the DSM-IV-TR, attempts an atheoretical and objective classification of mental disorders that eschews any discussion of etiology or context. Lerman offers a level-headed and useful feminist critique of the DSM-IV-TR, noting that it succeeds in providing a means for communication among professionals and between clinicians and patients, as well as a starting point for thinking about treatment (e.g. bipolar

---

10. Paula J. Caplan, *Sex Bias in Psychiatric Diagnosis and the Courts in WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

11. Kendall, *supra* note 4, at 41-44.

12. *Id.* at 41.

13. *Id.* at 42.

14. See Chunn, *supra* note 8.

15. See Chan, *supra* note 8.

16. See Lerman, *supra* note 4.

disorders respond to mood stabilizers, whereas unipolar affect disorders do not), yet puts patients at risk (too often borne out) of being treated first as labels and second as people. In addition, the lack of any discussion on etiology or context means that women who develop stigmatizing disorders such as Borderline Personality Disorder because of a history of abuse are viewed as flawed people (a difficulty with the diagnostic category of personality disorders in general), and wrongly subjected to a degree of judgment, if not blame.

The most persuasive suggestion offered in the chapter (indeed, perhaps, in the whole book) is the idea of a category of abuse disorders, which would fall somewhere between personality disorders and Post-Traumatic Stress Disorder (the only diagnosis that entails a normal response to an abnormal situation), as proposed by Lenore Walker. As so many women suffer childhood physical or sexual abuse that leaves them with pervasive and intractable symptoms entrenched in the personality (e.g. compulsive self-harm; blunted or inappropriate affect), this new category could provide not only an alternative to personality disorders but also a more specific and useful diagnosis for women who suffer the long-term effects of childhood abuse, with—hopefully—attendant improvements in treatment. In addition, this diagnosis would also be useful for men who have suffered abuse. Lerman goes on to examine other systems of categorizing mental disorders and concludes, convincingly, that no other alternative as comprehensive and useful as the DSM-IV-TR has been suggested, but that feminists must work to change and improve this diagnostic system.

Two essays on post-abortion syndrome and battered women syndrome fall a little farther from the mark. Eileen Fegan's "Reclaiming Women's Agency"<sup>17</sup> and Julie Stubbs' and Julia Tolmie's "Defending Battered Women on Charges of Homicide"<sup>18</sup> attempt to critique two women-specific disorders, Post-Abortion Syndrome (PAS) and Battered Women Syndrome (BWS), as pseudo-scientific attacks on women's agency. However, the message in both of these pieces – that PAS and BWS may not be valid syndromes, and that they are definitely manipulated by patriarchal regimes to women's detriment – gets lost in an unfortunate cycle of straw-manning and rhetoric.

Stubbs' and Tolmie's insistence on self-defense as the more desirable plea than BWS (because of BWS's overtones of passive victimhood, again a valid point) fails to acknowledge that many 'battered women' who kill their partners are in fact suffering from a cluster of debilitating emotional problems brought

---

17. Eileen Fegan, *Reclaiming Women's Agency: Exposing the Mental Health Effect of 'Post-Abortion Syndrome' Propaganda* in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

18. Julie Stubbs & Julia Tolmie, *Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular*, in *WOMEN, MADNESS, AND THE LAW: A FEMINIST READER* (Wendy Chan et al. eds., 2005).

on by their partners' violence. This is a solid essay, however, and it does provide a very useful discussion of the relative success of BWS as a defense.

More troublesome is Fegan's dismissal of the subjectivity of women patients claiming to suffer from PAS. Rather than critique arguments for the existence of PAS as they have been offered in mainstream literature or by women themselves, Fegan relies purely on evidence of the far right's use of PAS as a tool to attack the pro-choice movement (on the basis that abortion is harmful to women's mental health) and on a few testimonials of women who felt empowered after undergoing abortions to deny any validity to the syndrome. If the syndrome exists, it exists, whether or not the anti-choice movement uses it to attack abortion rights; Fegan spuriously uses proof of its exploitation by the far right to argue for its nonexistence. This is unfortunate, as it would be interesting to know how valid PAS really is and whether there are other women like the few Fegan quotes who also felt empowered, not depressed, after having an abortion. Furthermore, her argument is cheapened by her unwillingness to take seriously the experience of post-abortion mental pain as related by many women.

The most serious critique of the entire collection, which applies across the board to most if not all of the essays: in attempting to preserve women's agency in the face of male-centric 'psy' sciences that consistently portray women as passive victims, many of the authors risk failing, or in fact blatantly do fail, to give credence to real women's felt experiences. Although even Burstow,<sup>19</sup> the most egregious offender, claims to empower "women psychiatric survivors" (as contrasted with the field of psychiatry, which denies them voice), many of these valiant attempts to empower women completely ignore the severity of serious mental illness. Whatever the flaws of the current system may be (and they are deep and numerous), and whatever one chooses to call the phenomenon, mental suffering *does* exist and it *is* incredibly debilitating. Burstow, without bothering to argue much of anything, summarily renames institutionalization as "psychiatric assault" (which she favors discussing at conferences concerned with violence against women) and proposes that electroshock, "a brain damaging treatment,"<sup>20</sup> be criminalized.

Of the benefits of women's "psychiatric survivor" support groups, she writes, "They are places where both male chauvinism and *sane chauvinism* can be left behind and *mad women's identities celebrated*."<sup>21</sup> Burstow is right to critique institutions and institutionalization (as discussed in Lloyd's piece and mentioned above, institutions as they stand are fairly horrible places to be

---

19. Burstow, *supra* note 4.

20. Electroshock therapy is painless; it *can* cause significant memory loss but it is medically quite safe and is—or should be—a last resort. What is more, it is mysteriously effective: some patients who have been suicidally depressed for years and have tried every possible medication see huge benefits from electroshock. *Id.* at 255.

21. *Id.* at 250 (emphasis mine).



confined against one's will), and she is equally on target with her implication that diagnoses can be both sexist and stigmatizing. Institutions should be utterly transformed to places of care and treatment, the process of institutionalization should be significantly modified, and our diagnostic systems need serious work, as Lloyd and Lerner (among others) discussed in their essays. However, Burstow's position—that the preference for sanity over insanity is chauvinism—seems akin to arguing that extreme destitution is simply an alternative way to live and that humanitarian assistance to the poor thus constitutes violence against their free agency.

The idea that mental illness should be a celebrated aspect of identity and that treatment is akin to violence is not only absurd but deeply offensive to anyone who has ever lost a loved one to depression or schizophrenia or, for that matter, to anyone who has experienced the joy of finally taking her life back with the help of treatment.

A final critique: although some of the essays are very clear and well-written, the profusion of jargon in much of the writing ends up clogging the narratives and tangling the arguments, especially when the terms are not defined (and they often are not) and when they seem to be the author's own, or specific to her very small professional circle (and they often are). Most of the essays are quite readable and some are fantastically interesting, but the opening chapter in particular defies comprehension for anyone not well-versed in postmodernism and critical theory: "I will argue," writes Ussher, "that the positivistic and realist epistemological perspectives which underlie mainstream psychological and medical research and clinical intervention should be replaced not by an interpretivist approach, but by a material-discursive-intrapsychic perspective, grounded within a critical realist epistemological paradigm."<sup>22</sup> As the collection is intended to address women, mental illness, and the *law*, many readers will not be versed in postmodern jargon and the majority will likely be at a loss to understand even Ussher's thesis statement.

The quality of the arguments in *Women, Madness, and the Law* is uneven, but the fascinating subject matter and the authors' passion for the material usually make up for it. The book's main strengths are the several innovative discussions of criminal insanity, the few level-headed essays that survey an institution or a system and offer an alternative, and – most significantly – its breadth and originality: in gathering together the voices of practitioners and researchers from six countries speaking from varying perspectives on a vast array of different themes within the oft-ignored junction of feminism and the 'psy' sciences, the editors offer the reader a refreshing and edifying survey of an unfamiliar terrain.

---

22. Ussher, *supra* note 3, at 20.

