Gender Perspectives in Law 5

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Reassessing Feminist Legal Theories

Springer

Gender Perspectives in Law

Volume 5

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Reassessing Feminist Legal Theories: Introduction

Miodrag A. Jovanović and Ana Zdravković

The latest book in the Springer series *Gender Perspectives in Law*, which is entitled *Reassessing Feminist Legal Theories*, offers a perspective on theoretical/philosophical grounding of some of the dominant themes from the disciplinary field. The title of the volume, however, already pinpoints some of the intricate and harshly debated meta-theoretical issues of the scholarship. First of them concerns the adjective 'feminist' in correlation to law. By deliberately merging and contrasting some of the classical works in the field with fresh scholarly contributions, the volume problematizes the very meaning of concepts 'feminism/feminist' and 'gender', their mutual relation, as well as their correlation with 'law'.

To begin with, even if we assume, which is not in itself uncontroversial, that a 'feminist' perspective necessarily depicts the connexion between 'gender' and 'law', it is far from clear how one should think of the resultant disciplinary endeavour. Namely, does this perspective enable grounding of a discipline labelled 'law and gender', akin to similar scholarly fields, such as 'law and society', or 'law and religion'? This seems to be Conaghan's approach, who states at the beginning of her book with that exact title, that it is about "exploring the relationship between law and gender."[1] Alternatively, a feminist perspective may serve the purpose of devising a

[1] Conaghan (2013), p. 5. By the end of the book, she offers some tentative conclusions. Namely, while "gender is not *inherent* in law in any absolute sense", that is, "the law–gender relationship is contingent rather than necessary", this alone "does not preclude a determination that gender is indeed built into the very forms of law", Conaghan (2013), p. 245. Hence, when arguing that "law is gendered", Conaghan is interested in "deploying gender as an evaluative tool in legal contexts", that

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distinctive area of law, called 'law on gender'/'gender law', akin to 'law on contracts and torts', or 'criminal law'. In order for something to count as an 'area of law', it should form "a subset of the legal norms in the system", which is as such "intersubjectively recognised by the legal complex in that system",[2] that is, by "a cluster of legal actors",[3] such as "judges, legislators, legal academics, private and government lawyers, civil servants, law reform movements, legal services regulators, law commissions, legal advisors, academic publishers, conference organisers, law journal editors, legal associations, court registries, casebook and textbook writers, case reporters, and the like."[4] It is important to note that, even if the dominant classification system of norms does not contain particular area of law (e.g. gender law'), one of the tasks of legal scholarship may be to try to "inaugurate" such area.[5] A feminist perspective may serve exactly this purpose.

Indeterminacy with respect to what a 'feminist perspective' amounts to has a further implication. Hence, by using 'legal theory' in plural, the volume's title indicates that different theoretical approaches towards the subject matter are possible. Indeed, a cursory overview of the literature demonstrates the lack of consensus when it comes to *the* adequate disciplinary methodology. Feminist jurisprudence is often depicted as a parcel of the wider project of critical legal studies, thereby belonging to what Bentham famously characterized as "censorial jurisprudence".[6] Such is, for example, the understanding of "feminist philosophy of law" as the discipline which "identifies the pervasive influence of patriarchy and masculinist norms on legal structures and demonstrates their effects on the material conditions of women and girls and those who may not conform to cisgender norms. It also considers problems at the intersection of sexuality and law and develops reforms to correct gender injustice, exploitation, or restriction."[7] As such, it "is an effort to

is, in "prompt[ing] a better (more inclusive) understanding of law in which gender considerations come more easily to the fore." See Conaghan (2013), p. 247.

[2] Khaitan and Steel (2023), p. 78.

[3] They are "related to each other in dynamic structures and constituted and reconstituted through a variety of processes", most important of them being "drafting, representing, advising, judging, prosecuting, teaching, and writing law." Karpik and Halliday (2011), pp. 220–221.

[4] Khaitan and Steel emphasize that, "[w]hile legal scholars are part of the legal complex, they matter with respect to determining the existence of an area of law only to the extent that their research and teaching interacts with and influences the practice of law", Khaitan and Steel (2023), p. 80.

[5] Khaitan and Steel (2023), p. 79.

[6] Whereas "expository jurisprudence" is the investigation of what the law is, "censorial jurisprudence" is the investigation of whether the existing law ought to be in line with a certain assumed standard, Bentham (1780/1789) (Kitchener: Batoche Books, 2000), p. 234. *Cf.* Bentham (1891), p. 99.

[7] "To these ends, feminist philosophy of law applies insights from feminist epistemology, relational metaphysics and progressive social ontology, feminist political theory, and other developments in feminist philosophy to understand how legal institutions enforce dominant gendered and masculinist norms. Contemporary feminist philosophy of law also draws from diverse scholarly perspectives such as international human rights theory, postcolonial theory, critical legal studies, critical race theory, queer theory, and disability studies", Francis and Smith (2021). The pressing need to

examine and reformulate legal doctrine to overcome entrenched bias and enforced inequality of the past as it structures human concepts and institutions for the future."[8]

Conaghan is not satisfied with the thus conceived methodological orientation of feminist jurisprudence. She finds it "striking . . . that although feminism and critical legal theory have together produced vast reams of literature which contest virtually every aspect of how law is traditionally conceived, mainstream legal scholarship remains strangely immune to the contamination which such a challenge presents." Therefore, she urges for "a gendered analysis",[9] a seemingly much needed methodological approach for elucidating the relation between gender and law.

Green is, however, unpersuaded by this attempt at providing a feminist analytical jurisprudence. He says that "to establish that the very forms of law are 'gendered' would take an explanation of those forms and an account of the sense in which they are masculine (or feminine)." In Green's opinion, "Conaghan does not undertake that analysis."[10] His ultimate conclusion is that, while "gender is of no relevance to general jurisprudence", it is "highly relevant to law because gender norms shape the content and application of the law." Therefore, gender warrants a familiar normative methodological approach of critical evaluation, but it is also relevant "to some problems in special jurisprudence",[11] understood as a discipline concerned with conceptual problems about some specific doctrinary issues (e.g. in family law, anti-discrimination law, labour law, etc.).[12]

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The contributions to this volume include papers written by Nicola M. Lacey, Duncan Kennedy, Dragica Vujadinović and Adriana Zaharijević, Duška Franeta, Lídia Balogh, Francesca Poggi, Zara Saeizadeh, Fabio Macioce, Wojciech Załuski and Antonio Álvarez del Cuvillo. The volume opens with the reprints of two remarkable papers that has firstly been published more than two decades ago yet have not lost their relevance.

Nicola M. Lacey addresses the fact that feminism, while challenging the concept of gender or sexual neutrality, questions the very existence of such neutrality—an

enhance the legal and factual status of women and girls, including through theoretical considerations of these matters, can also be understood in light of the fact that the prohibition of (gender) discrimination can be regarded as a *jus cogens* norm, see Zdravković (2021), p. 155.

[8] Francis and Smith (2021).

[9] Conaghan (2013), p. 15.

[10] Green (2020), p. 898. And indeed, when defining what she means by the preferred analytical method, Conaghan admits that "a truly gendered analysis turns out to require a layer of investigation not generally considered to be part of legal enquiry. Unearthing the normative premises which support legal rules and doctrines and considering their impact and effects in a wider social, political and cultural context requires a penetration of the boundaries of the strictly legal and a reframing of the legal landscape in terms which threaten the integrity of law as a discrete sphere of operation." Conaghan (2013), pp. 82–83.

[11] Green (2020), p. 911.

[12] Green (2020), p. 894. For reviewing approaches to the gender perspective in Public International Law, see Zdravković (2023) and the reviewed book.

ideal deeply ingrained in the self-conception of a liberal legal order and a crucial methodological tenet of good scholarship. Starting from the position that sex or gender plays a significant role in determining and thus elucidating the structure of social practices such as law, as well as that the impact of gender on society is inherently politically contentious, in the sense that gender serves as a focal point for oppression and inequality rather than just a form of distinction, the paper outlines the evolution of feminist legal thought. Lacey contrasts "liberal feminism" perspective, which highlights the exclusion of women from complete legal subjectivity, focusing on achieving inclusion through sex-blind equality, from "difference feminism", in which the analytical emphasis is on the assimilation of women into a male-centric understanding of legal subjectivity and which advocates for embracing and accommodating gender differences. The paper delves into the 'doble binds' that feminism encounters as it seemingly diverges from the neutrality that plays a central role in contemporary thought and the modern vision of the rule of law, while attempting to explore the implications of difference feminism on feminist practices and answer how this perspective intersects with other critical theories, particularly those addressing class and race issues, together with the question of how the concept of law influences these debates.

Duncan Kennedy offers an in-depth analysis of the complex issues surrounding male sexual abuse of women and provocative dressing, while highlighting two conflicting viewpoints: the "conventional view" which perceives provocative female attire as a trigger for abuse; and "radical feminism" which views sexual abuse as a foundational element of the patriarchal system. Through a thorough examination of how legal systems and mainstream culture eroticize dominance, violence, and abuse, the author recognizes that according to radical feminists, patriarchy manifests itself in the realm of fashion, utilizing sexual abuse as a tool for male disciplinary terror against women. This power dynamic is further entrenched by the integration of erotic pleasures of male dominance in all aspects of society. The paper concludes that abuse is harmful for both genders, not solely due to the imperative of safeguarding human rights, but also because abuse discourages risking different forms of pleasure found in the imagery of anything that abuts the real-life sites of oppression.

First originally published contribution in the book is the one co-authored by Dragica Vujadinović and Adriana Zaharijević, which represents feminist critical reconsideration of justice, identifying that it is necessary to include family justice and gender justice within the inclusive understanding of justice and equality within constitutional democracies and the context of global justice. In addition, it draws attention to the disputable nature of the mainstream separation between the public and private spheres and the ensuing reduction of justice to the public sphere. By challenging the conventional portrayal of justice as a female figure and examining the origins and interpretations of justice, particularly in relation to family and gender dynamics, this chapter delves into the evolving discourse on gender justice within contemporary justice theories. In that regard, John Rawls's idea of justice is specifically examined, together with two other mainstream theories of justice, Michael Walzer's communitarian theory and Philip Green's social-democratic theory, both of

which incorporate aspects of family and gender equality. Furthermore, the paper leans on the perspectives of liberal feminist thought on justice of Susan Moller Okin, the feminist socialist thought on justice of Nancy Fraser, and the social justice conception of Iris Marion Young.

Duška Franeta explores the common applications of the concept of human dignity within feminist discussions, particularly the concept of objectification which stems from the Kantian idea that people should not be treated as means to an end. Specifically, this concept is applied to social practices or behaviours that dehumanize women, particularly in contexts related to sex. The paper reminds that certain authors within feminist discourse advocate for the legal abolition of sexual harassment and exploitation, viewing them as forms of objectification, while for others, human dignity is critically examined as an element of (in Peter Sloterdijk's terms) the *thymotic* conceptual arsenal that closely links it to independence, autonomy, impartiality, justice, etc. When viewed in this light, human dignity is seen as disruptive to the acknowledgment of important moral values, potentially reinforcing male dominance over women. A third perspective on the usage of human dignity concentrates on shame societies and the relationship between shame and dignity, while contrasting ancient *dignitas*, shaming practices, patriarchal rank and honour with societies that respect the human dignity of women. These varying interpretations of human dignity in feminist discourse differently reflect on contemporary morality, law, and practical philosophy. Finally, Franeta elucidates ways in which they advocate for a more consistent safeguarding of human dignity, a more nuanced understanding of dignity, and challenge certain foundational aspects of contemporary law and morality.

In the next chapter, Lídia Balogh provokingly questions the role of gender as a legal concept for advancing women's rights, by trying to underline the need to separate law from the realm of activism. By recalling the constructivist understanding of gender in legal and public policy realms, which meant that it primarily served as an analytical concept that encompassed the social roles of women and men, along with the associated social expectations, stereotypes and power dynamics, it is shown that the interpretation of the notion has recently changed, since it has evolved into an activist concept, and this shift may not serve the promotion of women's issues. The analysis suggests that viewing gender as an analytical concept remains valuable in social science research for understanding gender dynamics and addressing social issues. Nonetheless, as a legal concept, gender is shown to be less relevant to women's rights than anticipated and as a political and movement slogan, it may be detrimental to women's causes. The study delves into the complex history of the Istanbul Convention and the contentious debates surrounding gender and women's rights. To contextualize gender as a legal concept, the Balogh draws parallels with the evolution of intersectionality, prompting reflection on whether a concept should be adopted in legal frameworks purely based on its success in academic analysis and activism.

Francesca Poggi conceptually analyses gender-based violence, since the concept is vague and lacks final definition, yet it is still crucial for the feminist movement. Even though the concept of gender-based violence is perhaps one of the most

important contributions that feminist thought has made to legal theory and its political and social significance is demonstrated by its widespread adoption in both theory and practice, it still raises several challenges. The theoretical aspect is particularly complex, as there are multiple interpretations of the concept within literature and legal frameworks, leading to ambiguity. From the political perspective, the feminist movement's struggle to assert gender violence has reinforced societal stereotypes by portraying women as weak and as victims. Poggi also recognizes that there has simultaneously been an overemphasis on adopting new gender-oriented criminal offences. The conceptual analysis such as the one included in this chapter should precede the identified debate in order to clarify the notions of violence and gender and their interplay.

Zara Saeizadeh deals with the citizenship of trans* individuals. Feminist perspectives on citizenship have long critiqued the traditional focus on male, white, heterosexual, and able-bodied citizenship. However, many feminist theories on citizenship uphold the gender binary system and the concept of universal rights for all, which often overlooks differences and systemic inequalities. Saeizadeh focuses on how feminist politics address the citizenship of trans* individuals through the framework of trans* citizenship as proposed by Surya Monro, while also considering Nancy Fraser's ideas on recognition. She focuses on the politics of recognition, which highlights the status and needs of citizens as crucial for achieving social justice and also illuminates the limitations of identity-based politics of recognition in feminist theories and practices which have led to social injustices and affected trans* people's needs, directly impacting their citizenship. It is argued that trans* citizenship demands the attention of feminist socio-legal researchers, practitioners, and policy makers to address the social status and needs of trans* individuals, recognizing the diversity of their knowledge and experiences.

In the paper by Fabio Macioce, the notion of vulnerability is reassessed from a feminist perspective, bearing in mind the connection between privilege and gender oppression. Within the feminist debate, it was developed in light of women's status and the issue of gender-based violence. In this later context, the notion of vulnerability has faced significant criticism for being seen as promoting unjustified essentialism and potentially reinforcing exclusion and victimhood. The paper aims to demonstrate how re-evaluating the concept of vulnerability, especially group vulnerability, can be both theoretically coherent and politically beneficial. By fostering forms of collective agency that are politically constructive, Macioce suggests that reconsideration of vulnerability can serve as a prerequisite for contesting prevailing power hierarchies, fostering new dialogues, introducing alternative narratives and uniting otherwise marginalized interests and needs.

Wojciech Załuski reflects on whether the "reasonable person standard" should be "genderized", since some courts have already adopted the "reasonable woman standard" within sexual harassment law, assuming that women have a lower threshold for identifying conduct as sexual harassment compared to men. The analysis identifies the most common arguments against such change, together with its normative implications. The main criticisms are that it may reinforce gender stereotypes and lacks a solid scientific foundation. However, it is argued in this paper that

the latter objection is not as strong, since scientific theories, such as evolutionary theory and neuroscience, support the idea of gender differences in the perception of sexual misconduct, as well as in other mental traits like attitude to risk, dominance assertion, and empathy. This suggests a following normative implication: instead of confining the reasonable woman standard to sexual harassment cases alone, it is proposed for consistency reasons either to completely discard gender differentiation in the standard (if one agrees with the first objection and/or believes that 'reasonableness' should be defined by mental faculties common to both genders), or to apply it in more legal contexts beyond sexual harassment law. The paper advocates for the former option, which involves embracing a personalist (i.e. based on philosophical view called "personalism") interpretation of the reasonable person standard, as a more convincing approach.

In the final chapter, Antonio Álvarez del Cuvillo recalls that certain feminist authors claimed that individualist notion of discrimination, derived from Aristotelian concept of equality, ineffectively address women's oppression. This concept is closely related to the idea of substantial equality prevalent in modern democracies. However, the regulations against discrimination often rely on individualistic legal frameworks, which can be narrowly interpreted by legal practitioners, reducing marginalized groups to abstract reasons for differentiated treatment. In order to reconstruct a group-based understanding of sex discrimination, it is essential to develop a theory on the damage caused by discriminatory conduct, articulating both individual and social harm. The paper claims that such an approach sheds light on various issues, including justifying affirmative action, the possibility of reverse discrimination, applying discrimination by association, distinguishing discrimination from stigmatization, and considering whether men can challenge indirect discrimination that harms them individually and women globally.

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Volumes of this sort are rarely expected to solve all the open issues in the given disciplinary field. In that respect, this volume is no exception. Although at times it may appear to reinforce some of the aforementioned divisions within the scholarship, it nonetheless strives to open the room for distinctive methodological approaches to various gender issues. In doing so, the volume fosters the idea that feminist scholarship is—to paraphrase Julie Dickson's dictum for general jurisprudence—"a broad church",[13] insofar as it welcomes all theoretical accounts that can elucidate various complex aspects of the relation between gender and law.

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Feminist Legal Theory Beyond Neutrality

Nicola Lacey

Contents

Abstract The paper explores the intersection of feminist legal theory and the concept of neutrality, addressing the challenges contemporary feminist legal scholarship faces in reconciling the ideal of gender or sexual neutrality with the realities of legal practice. It examines the evolution from liberal feminism, which emphasises sex-blind equality, to difference feminism, which highlights the importance of recognising and accommodating differences. Through a critical analysis of supposed 'double binds' confronting difference feminism, the paper investigates the

I should like to acknowledge with very warm thanks the importance of the discussions I had with David Soskice whilst I was writing this paper; the openness and generosity with which he entered into dialogue was a mark of the possibility of the exchange across disciplines to which the paper seeks to contribute. I should also like to thank the audience to whom the lecture was delivered, whose questions helped me to develop its argument; Anton Schütz, who engaged me in critical dialogue about its contents; and Peter Goodrich, with whom I had thought-provoking discussions of Irigaray.

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implications of contextualising legal subjects within broader social and relational contexts. It also evaluates the interplay between feminist legal theory and other critical theories, particularly concerning class and race. By delving into current debates on legal subject conceptualisation, the role of psychoanalysis in feminist thought, and the advocacy for special rights for women, the paper aims to provide a nuanced understanding of how feminist strategies can navigate and potentially subvert entrenched stereotypes and power dynamics within the legal system.

> *Le neutre est suppose representer un ni-l'un-ni-l'autre. Avant que ce ni-l'un-ni-l'autre puisse se signifier, il importe que l'un et l'autre existent, que deux identites soient definies differement que comme poles artificiellement opposes d'un modele humain unique'*. (Luce Irigaray, *J'aime à toi*, Paris, Grasset 1992, p. 198.)

1 Introduction

The figure of neutrality stands in many ways as a powerful symbol for the challenges faced by contemporary feminist legal scholarship. For in questioning not only the reality but the very possibility of gender or sexual neutrality, feminism has pitched itself against both an ideal which lies at the heart of the ideological self-conception of a liberal legal order, and a key methodological tenet of what has been taken to be good scholarship. In this paper, my focus will be on some supposed 'double binds' which confront feminism as it appears to turn away from the neutrality which has a central place in the framework of modern thought and in the modern ideal of the rule of law. But I could hardly fail to be aware of the second problem, writing, as I am, a paper to be delivered on a platform from which, as a student, I was lectured on the overweening importance of understanding the difference between the law as it is and as it ought to be, and in terms which generally assumed the autonomy and integrity of law and legal method. This positivist stance did not invariably preclude a certain reflexivity about the lecturer's standpoint. I remember being advised, on one particularly memorable occasion, that the ensuing lecture would be based on two premises: first, that the Oxford English Dictionary was always right; and second, that whatever the Queen in Parliament enacted was law. Following and indeed expanding on this good example, I should begin by stating that my lecture is based not on two but on three premises: first, that sex or gender is one important factor in determining and hence in explaining the shape of social practices such as law; second, that the ways in which gender shapes the social world are presumptively politically problematic—that is, that gender has marked an axis of oppression and injustice rather than a mere differentiation; and third, that writing, as I shall, in the first person, does not undermine any value which there may be in what I have to say.[1]

[1] Beyond this minimal statement of what I take to be the modest premises of feminism, I shall not occupy myself with questions about the status of feminist or other critical projects in relation to law,

I want to begin by sketching, in a necessarily caricatured way, the development of feminist legal thought from one position to another.[2] The first position-I shall call it 'liberal feminism'-is one in which the analytic emphasis is on the implicit and explicit exclusion of women from the full status of legal subject, whilst the normative emphasis is on our inclusion via a strategy of sex-blind equality. The second, which I shall label 'difference feminism', is one in which the analytic focus is on a problematic assimilation of women to a substantially male conception of legal subjectivity, and in which the normative emphasis is on the recognition and accommodation of difference. After colouring these sketches in, I shall go on to consider a number of apparent 'double binds' which are thought to confront difference feminism. The particular questions which I want to address are these. First, what sort of feminist practice does difference feminism imply, and under what conditions can the practices which it engenders avoid reproducing images of sexual difference as, if not 'essential', at least shaped in relatively intractable ways? Secondly, how does this issue affect the relationship between difference feminism and other critical theories, particularly those concerned with questions of class and race? And thirdly, how is the structure of these problems affected by the ways in which we conceptualise law or the legal? I shall think through these questions in relation to three current debates: first, a debate about how the legal subject is conceptualised; second, a debate about the place of psychoanalysis in feminist thought; and third, a debate about the desirability of special rights for women.

2 Feminist Legal Theory: From the Age of Innocence to the Color Purple?

The premises which informed liberal feminism and what might be called feminist legal theory's age of innocence are well known and can be very simply stated. In a variety of ways, implicitly and explicitly, women had been excluded from

many of which I take to have been resolved by the 'interpretive turn' in social theory. I do, however, want to record my pleasure in the Faculty's invitation to me to speak on a specifically feminist theme, and my gratitude to Helena Kennedy for her generosity in chairing the lecture. The invitation was one which I was only too happy to accept, conscious as I am of what it meant to me to be both student and teacher in a university with radical traditions and in which a woman's sex has never been institutionalised as a barrier to membership of the intellectual community. It is also a pleasure to have this occasion to express my appreciation of the intellectual companionship and the personal support and encouragement which several of my teachers and later colleagues at U.C.L. provided.

[2]The characterisation is schematic and does not attempt to incorporate every position associated with feminist legal thought: it is designed rather to point up the particular trajectory which will be the main focus of my discussion. Similarly, the labels are used as a matter of expositional convenience: I do not mean to imply, for example, that all exponents of positions within the spectrum of 'difference feminism' see themselves as moving beyond the ambit of liberal politics, broadly understood. Whilst some of the questions raised by difference feminism about liberalism and about the philosophical discourse of modernity are addressed indirectly later in the paper, a full analysis of these issues runs well beyond its scope.

membership of the community of legal subjects. Whilst explicit discrimination such as the exclusion of women from political suffrage and from rights of ownership had largely been swept away by the time of feminism's rebirth in the 1960s, feminist lawyers pointed out a myriad of subtler and more indirect ways in which the constitution of legal rules and categories in fact excluded or disadvantaged women, and expressed a view of the world which reflected male interests.[3] This feminist analysis drew on a distinction between sex and gender, and, in doing so, sought to undermine received views about the importance of 'natural' differences between the sexes. Since the ancient disadvantages and exclusions which had marked the legal status of women had generally been justified in terms of supposedly 'natural' characteristics and incapacities, the interpretation of many, if not most, of these differences as social constructs-as matters of gender rather than of 'given' sex-assumed a distinctive political importance. For if the social meanings of gender were contingent, albeit powerful, this entailed first, that they could no longer feature as counters in the justification for differential treatment; and second, that they could be changed by changing powerful social practices such as law. Notwithstanding references to biological differences such as reproductive capacities which would call for appropriately but exceptionally different treatment, sex difference per se was accorded little importance: what mattered to liberal feminism was the way the meaning of sex-i.e. gender-had been constructed. And if sex difference was unimportant, it could hardly he a barrier to a sexually universal-or neutral- conception of citizenship and legal subjecthood.

The task of constructing this feminist critique was, of course, a laborious one. It entailed an elaboration of the detailed ways in which the shape and enforcement of, for example, laws on rape, child custody, part time work, or marital property, in fact had an adverse impact on women.[4] But the politics which informed the task was relatively unproblematic. For it was, in essence, the very same politics which informed the ideological self-conception of the liberal and democratic legal order which it took itself to be criticising. The argument was simply this: if, as a liberal society, you profess to accord women the full rights of citizenship, then you are logically committed to attending to the various ways in which your legal framework in fact falls short of this universalist ideal. Give women the same rights and entitlements as you give to men; treat women equally; dispense your justice even-handedly. Live up, in other words, to the ideal of neutrality between persons which is a central component of the modern imaginary. The clearest symbol of this brand of legal feminism's political achievement in the UK is probably therefore the Sex Discrimination Act 1975, which prohibits not discrimination against women, but rather discrimination *on grounds of sex.*[5]

[3] For an example of this kind of work, see Atkins and Hoggett (1984).

[4] It also, crucially, entailed a careful analysis of the general patterns of legal intervention and non-intervention.

[5] It is interesting to note that this was, even formally, a commitment to sex neutrality but not, strictly speaking, to gender neutrality. For if gender is defined as that set of social practices and discourses

The position I have just described is often characterised in later feminist work as the call for formal as opposed to substantive equality.[6] This is something of a misdescription, because even this early liberal feminism went well beyond a call for formally equal status. For example, in deciding what would count as equal treatment, the present effects of past discrimination, which marked sexually the impact of sexually neutral rules, could be taken into account-as in the SDA's conception of indirect discrimination. And this concern not just with the formal surfaces of law but with its impact entailed a strong affinity between feminist scholarship and detailed socio-legal research which reached beyond the bounds of legal doctrine-cases and statutes-to comprehend enforcement practices, broadly understood.[7] This is an affinity which characterises feminist legal research to this day, and it is one which, as I shall argue in more detail later, we forget at our peril. Furthermore, the caricature of liberal equality as inevitably premised on 'sameness' is an exaggeration: liberal theorists such as Ronald Dworkin, for example, have been concerned to emphasise the notion of equality as 'treatment as an equal' rather than as 'equal treatment'.[8]

Nonetheless, it is clear that in several important respects liberal feminism contained the seeds of its own deconstruction, and these were quickly identified by difference feminism. The basic problems of liberal feminism were as intimately linked with its conceptual framework as the form/substance distinction which I have mentioned. One set of problems had to do with a particular configuration of the division between public and private, which feminists questioned in a way which began to take their feminism beyond the bounds of the liberalism which had given it birth.[9] This important subject has been very fully analysed and I will not address it in this paper.

The problem on which I do want to focus is the simple fact that liberal feminism's central ideal amounted to a strategy of assimilation of women to a standard set by and for men.[10] The rights assigned to men as legal subjects had to be made available to women wherever a comparison between the treatment of the two revealed a disparity: but the equalisation was almost invariably in one direction-towards a male norm. The radical potential inherent in the idea of 'treatment as an equal'

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which determine the meaning of a woman's or a man's sexual identity, it can hardly be doubted to include our sexual orientation. And the SDA does not straightforwardly encompass discrimination on grounds of sexuality as opposed to sex. Cf. Drucilla Cornell's argument for encompassing discrimination on grounds of sexual orientation within Title VII of the U.S. Civil Rights Act: 'Gender, Sex and Equivalent Rights', in Butler and Scott (1992), p. 280. For further discussion, see below at fn. 62.

[6] See for example Katherine O'Donovan (1985), Chapter 7; Smart (1989), pp. 82–5, 139–44.

[7] A good example is Carol Smart's *The Ties that Bind*, Routledge (1984).

[8] Dworkin (1977), p. 227. This is not to imply that Dworkin's theory in general is satisfactory from a feminist point of view: see Frazer and Lacey (1993), pp. 53–77; Hunt and Kerruish (1992).

[9] Lacey (1993), O'Donovan (1985), Olsen (1983).

[10] Lacey (1986), Cornell (1992a), p. 280: O'Donovan (1985), Chapter 7; O'Donovan and Szyszczak (1988).

was not realised, because the political debate issued in by liberal feminism was highly circumscribed. Far from engendering a substantial reconsideration of the way in which the world was organised, the public standards already in place were assumed to be valid, and the feminist conceptual tools of bias, discrimination, equal worth measured against them. To borrow Katherine O′Donovan's formulation, the general tendency was simply to assume that 'a woman could be more like a man'. And even the occasionally converse strategy-that of 'making a man more like a woman'-left in place prevailing views about sexual difference and, crucially, about its specific shape.[11] On the view emerging in the difference feminism which challenged liberal feminism, the SDA was toppled from its position at the summit of feminist achievement. With its symmetrical and comparative method and its sex-neutral conceptual framework, it became instead the symbol of the effacement of the feminine, of women, from legal discourse-an effacement which was all the more problematic because it was effected in the name of sexual equality.

The general shape of difference feminism entailed, of course, its own set of laborious and detailed analytic tasks. It brought with it a shift of emphasis beyond a concern with the differential impact of laws on subjects pre-formed as women and men to the recognition and explication of a more dynamic role for law in constructing and underpinning gender hierarchies.[12] It entailed the need to focus not just on law's construction of images of women and femininity but also its constitutions of men and masculinity. If the argument about the pitfalls of the liberal/comparative approach was to be made out, we had to substantiate the central claim that the legal subjecthood to which women had been assimilated was implicitly male, and possibly that the very methods of legal practices were masculine. Our focus shifted-in common with broader developments in critical legal theory-from the instrumental aspects of law to its symbolic aspects. The messages about women and men transmitted by law; the role of law as a discursive practice into which the material realities of women's and men's embodied lives are inserted, and in which the assumptions underlying law's conceptualisation of subjecthood are constructed as (T)ruths; the subtle role of law in categorising and disciplining its subjects: all these became the stuff of critical legal analysis, accompanying and sometimes displacing the more materialist focus of earlier critical traditions informed by Marxism.[13] As befitted the focus on discourse, the main emphasis of this feminist scholarship was on critical analysis. But an underlying normative commitment to the recognition of differently constituted subjectivities could be perceived from very early on and has become both more insistent and more explicit with time. A new set of utopias began to emerge, and they were oriented to the construction or imagination of a more polyphonous and inclusive law, and to thinking beyond a law whose dominant mode is to fix its subjects' sexual or other identities within rigid categories.

[11] O'Donovan (1985), Chapter 7 and 8.

[12] For a variety of work representing this kind of development, see Naffine (1990), Smart (1989), Graycar and Morgan (1990), Cornell (1991), Frug (1992).

[13] See Collins (1982).

3 More on the Subject of Sex

I now want to give a somewhat more detailed account of just how the critique associated with difference feminism conceptualises the legal subject and argues for its maleness. The basic argument is that the paradigm legal subject has been constructed as an individual, and moreover as an individual abstracted from its social context, including the context of its own body, and of the dependence of its own identity on its relationship towards and affective ties with others.[14] The features of the subject to which legal rules and methods attach importance is characterised in terms of a number of distinctive capacities, foremost among which is reason: paradigm legal subjects are those who have the capacities for rational understanding, reflection and control of their own actions. It is this emphasis on reason and the capacity for self-control which underpins the equation of individual rational subjectivity with masculinity.

The argument depends on an assertion of the power of a number of binary oppositions within (and indeed prior to) modern Western thought. Important examples include reason and emotion, self and other, individual and community, mind and body, public and private, male and female. The crucial step in the feminist deployment of this argument depends on three assertions: first, that these oppositions are dichotomous-in other words that each member of the pair is defined in opposition to, and is hence inconsistent with, the other: second, that the dichotomies are marked by hierarchy-in other words, that one member of the pair has been privileged in modern western thought and social practice; and third, that the hierarchies are marked, among other things, by sex-in other words, that the feminine has been associated with the less valued members of each pair.[15] The feminine, and hence women, have been associated with emotion, the body, the private; masculinity, and hence men, with reason, the mind, the public. To the extent, then, that the conceptualisation of subjects within legal doctrine, and the insertion of embodied women and men into those frameworks via legal discourse, are genuinely marked by the features of reason and individuality and by the repression or forgetting of the body and affectivity, and to the extent that these hallmarks of subjecthood are elevated to the status of objectivity or universality, women will find themselves constructed as non-standard, as other.

This is not to say, however, that the feminine has no role to play within the legal construction of subjecthood. On the contrary, according to this argument woman's role as other is integral to man's constitution as one: the woman as other acts as the support which gives back to man, in a mirror image, his sense of the integrity of his own identity. This function is poetically evoked by Luce Irigaray in the following passage from her letter to Nietzsche:

[14] See Naffine (1990, 1994); for analogous arguments in philosophy and political theory see Jaggar (1983), Chapters 3 and 7; Lloyd (1984); Frazer and Lacey (1993), Chapters 2 and 3; Taylor (1985), pp. 187–210.

[15] For an elegant statement of these arguments, see Olsen (1990), pp. 199–215.

'Learn what was the foundation of everything you have built up. If you want to rise up once more, remember the earth you take flight from. For if she were to fail you, you would lose the very sensation of height.[16]

And should you [here the addressee is female] stir even ever so slightly, that tightrope walker up there may fall into the abyss! That is how he manages to stay up there alone-if you don't remain the prisoner of his lack of freedom, he falls! And as (he) takes each next step, (he) suffers from the risk that it entails! And each time (he) plunges back into the depths of the flesh, her stillness exalts him and (he) thrills at the brilliance of his new exploit! As with her subterranean and submarine strength she keeps the rope secure for his glorious ascent.'[17]

The point is made more directly by Ngaire Naffine:

'Officially, the legal subject is potentially anyone, anywhere. And it is this any-person ness of the legal person which is supposed to ensure that the law is at the disposal of us all, equally-without fear, favour or affection. This book, however, has found the legal subject to be someone with a quite specific set of distinguishing characteristics. But these characteristics do not sit easily together. On the one hand our man of law is assumed to be a freestanding, autonomous creature, rationally self-interested and hard- headed; on the other hand he is a being who is assumed both to have and to need access to the values of Gemeinschaft, the family values, though he must not display them in his public, legal Gesellschaft life. The legal person described here is thus essentially a paradox . . .

The argument of this volume has been that the law . . . assigns to women the job of holding the two worlds together . . . As the courts continue to tell us, the Gemeinschaft functions are vital and necessary ones, but they are most appropriately performed by dutiful wives and mothers-not by the man of law. Women's domestic labours sustain the paradox of the man of law.'[18]

The unacknowledged feminine, then, operates as a necessary complement to the in fact partial constitution of the masculine subject of legal doctrine: its hidden existence is essential to the conjuring trick which sustains the illusion of the (masculine) subject's self-identity.

4 Mapping the (Apparent) Double Binds

I now want to sketch what are often thought to be double binds for difference feminism. I have already observed that one of the beauties of early liberal legal feminism was the relative simplicity of its politics: essentially, its politics was not

[16] Irigaray (1991), p. 20.

[17] Irigaray (1991), p. 24.

[18] Naffine (1990), pp. 148–149. The difference in written style of Naffine's and Irigaray's overlapping arguments is itself significant. Whilst Irigary speaks to us directly, Naffine's subjectivity is distanced by the use of the neutral, and hence, according to the logic of her own argument, masculine third person. I shall take up the question of written style and feminist theory in the final section of the paper.