Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence

Ben Golder*

Introduction

It is eloquent testimony to the robust debate and critical self-consciousness within feminist legal theory that the discipline interminably seems to be progressing towards a juncture or an impasse, or experiencing yet another problem.[1] These problems are not irresolvable aporias: they represent the structural preconditions of a fully theorised movement. They are not dead-ends, they are open-ended possibilities. This article discusses the contemporary problem of postmodern feminist legal theory. The author argues that this problem can usefully be addressed by reconsidering *the subjects of feminist legal theory*. The problem adverted to is not the contentious marriage of 'postmodernism' and 'feminism', whose union, it is argued, is a constructive one. Rather, the article addresses the practical difficulties inherent in applying a deconstructive feminist critique to the modernist discourse of the Law (the unhappy marriage of "postmodern feminism" and "legal theory").[2] By *the subject of feminist legal theory* the author means both the subject of the Law (in a feminist context, Woman) and the subject of critique (the Law itself). The article aims to show that the history of feminist jurisprudence (necessarily within the confines of this article both schematic and exclusionary) is characterised, even constituted, by successive (re)conceptualisations of these two interrelated subjects. The article

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* Lecturer at University of New South Wales. The author would like to thank Chris Forster and the two anonymous referees from the *SCULR* for their helpful suggestions on an earlier draft of this paper. All errors remain those of the author.

1 See, for example, Currie DH, "Feminist Encounters With Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law" (1992) 5 *Canadian Journal of Women and the Law* 63 pp 63-86; Fraser N, "Multiculturalism, Antiessentialism, and Radical Democracy: A Genealogy of the Current Impasse in Feminist Theory" in *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition*, Routledge, New York, 1997, pp 173-88.

2 The words 'Law' and 'Woman' have been capitalised throughout this paper as an ironic indication of the power and fixity both terms are often granted and as an injunction to deconstruct them.

examines the historical trajectory of "first wave" feminist liberal legalism, "second wave" theorists such as Robin West and Catharine MacKinnon, and "third wave" postmodern feminist legal theory. The author argues that in order to overcome the present methodological problem of applying a postmodern analysis to a modernist legal discourse that seemingly forecloses deconstructive political alternatives, it is imperative for postmodern feminist legal theory to continue the historical process of reinvestigating *the subjects of feminist legal theory*. In other words, in order for postmodern feminist legal theory to offer viable strategies for resistance, it needs not only to continue to critique the subject of the Law (Woman), but also to reimagine the Law itself as the very subject of its critique. Perhaps, the article suggests, when modern Law is understood as at once a more dispersed and interconnected phenomenon – existing in multiple sites, in multiple registers and at the level of the everyday, not just the pomp of the courtroom and the circumstance of the legislature – then postmodern feminist legal theory will be able to engage more constructively with the lived materiality of women's legal oppression. The article seeks to propose ways that a specifically Foucault-inspired feminist jurisprudence could offer alternative avenues for resistance and transformation of the socio-legal norms which structure women's (and men's) lives.

A Schematic and Exclusionary History of Feminist Legal Theory in Three Waves

Any brief overview of feminist legal theory is, by its very nature, (violently) reductive.[3] It is acknowledged that there are many different ways to characterise the various 'waves', or ruptures of new concepts, within feminist legal theory, and generalising in the following manner elides differences amongst and within the various schools of feminist legal theory.[4] The aim of the following discussion is simply to

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3 The reference here is to the ideas of Michel Foucault. See especially Foucault M, "Orders of Discourse" (1971) 10 (2) *Social Science Information* 7, pp 7-30.

4 For a different schematisation of the feminist movement, see Fraser N, note 1, pp 174-8. More because of time and space restrictions than anything else, an analysis of diversity theorists has been omitted from this discussion. Whilst some may place diversity theorists (mostly critical race theorists such as Angela Harris) within the postmodern camp, the author recongises a difference between those theorists who seek to *expand* the category of woman to include different women's

illustrate how feminist legal theory has historically progressed through a reworking of its two twin and interrelated subjects outlined in the Introduction – Woman and the Law – and by so doing to suggest a basis for future directions. The author takes as the "first wave" of feminist legal theory the feminist liberal legal reforms of the mid to late 19th century. Liberalism was, and remains today, the hegemonic political philosophy of the time. It posits a sovereign and autonomous subject who acts rationally in pursuit of his (the word is used advisedly) best interests in a society composed of similarly constituted and motivated atomistic beings. The best way of ordering this society is held to be through a government which guarantees certain liberties and rights (of speech, property, association, religion, and so forth), but which otherwise refrains from interfering in the affairs of its citizens. When it does intervene, it is constrained by the doctrine of the rule of law to do so with neutrality and to treat *all* its citizens in an *equal* fashion. Legal positivism, a doctrine often articulated with liberal legalism, holds that the law is a discrete set of rules quarantined from economic, social, political and religious concerns. The "first wave" of feminist liberal legalism questioned neither the Law's subject nor the Law itself as subject of critique. Its practitioners accepted the Enlightenment conception of the subject as sufficient unto itself, and neglected to examine the ways in which the legal system both constructed female subjectivity and functioned as a site and tool of gender oppression. Rather, they concentrated on rectifying what appeared to be gender imbalances within an otherwise impeccably rational legal system. West observes that for feminist liberal legal scholars, gender discrimination in the Law simply represented a "perceptual error" able to be easily fixed through the mechanism of law reform.[5] For example, divorce laws were reformed through the enactment of the *Matrimonial Causes Act 1857* without any structural

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experiences (race, ethnicity, sexuality) and those who seek to *deconstruct* the category of woman. For an example of the former, see Harris AP, "Race and Essentialism in Feminist Legal Theory" (1990) 42 *Stanford Law Review* 581-616 at p 586. The author views the phase of diversity theorists as a necessary intermediary stage between 'second wave' feminists and postmodern feminists. That is, it is perhaps necessary to expand the categories of white, heterosexual, middle-class feminism before it becomes evident that the epistemological categories themselves are suspect.

5 West RL, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" in Fineman MA and Thomadsen NS (eds), *At the Boundaries of Law: Feminism and Legal Theory*, Routledge, New York, 1991, pp 115-34 at p 116.

analysis of the gendered political economy of marriage and divorce in Victorian England.[6] Reforms were made in a similar vein to property laws and to electoral franchise laws: reforms that substantially left intact the systems responsible for the subordination of women. The guiding principle of the feminist liberal legal enterprise was parity (with men). As Jurgën Habermas stated: "The classical feminism stemming from the nineteenth century understood the equality of women primarily as equal access to existing educational institutions and occupational systems, to public offices, parliaments, and so forth."[7]

Feminist liberal legalism aspired to attain for women the benefits enjoyed by men through slow and piecemeal legal reform: an approach which disclosed a strong faith both in the power of the Law and of time itself to rectify existing gender inequality. As MacKinnon was later to observe, feminist liberal legalism participated in the privileging of the masculine legal norm by refusing to interrogate the sexist basis of the legal system with which its reformist praxis was complicit.[8]

In a sense the metaphor of feminist legal theory's development as a series of 'waves' that succeed each other in their entirety is not completely accurate. Indeed, to assert that feminist liberal legalism has been eclipsed by more radical or pluralist approaches is clearly false. Evidently, the 'wave' metaphor must be understood as signalling how approaches from earlier movements become updated, co-opted, recirculated, even overruled, but can also survive in vestigial form. Liberal legalism still informs many of the contemporary Australian feminist debates – debates which themselves rehearse the foundational demands about 'equality' and 'access' made by the early reformers. For instance, the 'mainstream' feminist opposition to the Howard Government's policies on IVF access for single women and lesbians

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6 For a discussion of these early reforms, see Holcombe L, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England*, Martin Robertson, Oxford, 1983.

7 Habermas J, "Paradigms of Law" (1996) 17 (4)-(5) *Cardozo Law Review* 771-84 at p 777.

8 See MacKinnon CA, "Difference and Dominance" in *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, Cambridge M.A., 1987, pp 32-45, for a critique of feminist liberal legalism. Most of the author's understanding (and criticisms) of the feminist liberal legal movement are derived from critiques such as MacKinnon's. See also West RL, note 5, pp 120-4. See also Barnett H, *Introduction to Feminist Jurisprudence* Cavendish, Sydney, 1998, Chapter One.

is predicated on a belief that these groups of women should have access to reproductive technology because they are substantively *the same as* married or heterosexual women. Obviously, this does little to question the Howard Government's much-beloved nuclear family paradigm (although it arguably resituates it), or to problematise the socially constructed role of women as primary caretakers of children. Similarly, the current debate around paid maternity leave for women in the workforce has been cleverly focused on the antagonism between the perceived financial depredations small business will have to endure at the hands of clamorous, fertile women workers, and the unitary desire of women to be paid for their reproductive roles. It addresses in a marginal way the issue of women's involvement in the paid workforce (although it does not address their systematic concentration in poorly-paid, casual and demeaning jobs; the gendered division of labour) but achieves what it does at the cost of reinforcing women's imposed reproductive roles. These recent debates illustrate perhaps more clearly than any Victorian examples the ways in which liberalism leaves untouched the question of female subjectivity (the subject of Woman) and the gendered legal apparatus (Law as subject of critique). To borrow Audre Lorde's much borrowed phrase, "feminist liberal legal activists and theorists sought [and still seek] not so much to dismantle the master's house using his tools, but rather to borrow them in order to build an extra patio or outhouse in which to accommodate their feminine needs and desires."[9]

Whilst the "first wave" feminist legal theorists did/do assume the unity of Woman and the neutrality of Law, the same cannot be said for the "second wave" of feminist jurisprudence. In fact, both the exemplars of "second wave" feminist legal theory discussed in this section (West and MacKinnon) specifically developed their analyses of the twin subjects of feminist legal theory in response to the deficiencies of the earlier liberal position. It is instructive to note both the ostensible differences (and yet underlying conceptual similarities) between West, a biological essentialist influenced by phenomenology, and MacKinnon, a social constructionist influenced by Marxism. Unlike her liberal predecessors, whose analysis of the gendered structural conditions of the Law was conspicuous by its absence, West

9 Lorde A, quoted in Grillo T, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 *Berkeley Women's Law Journal* 16 at p 16.

does critique the subject of the Law. She argues that "the larger [masculine] legal culture" is oblivious to the gender-specific injuries suffered by women because it is not cognisant of women's inner natures and the different ways in which they experience their (painful) reality.[10] From this vantage point, she critiques the ways in which "women's suffering is so pervasively dismissed or trivialised by legal culture."[11] If West's comments on the systemic nature of gender discrimination within the legal apparatus demonstrate her willingness to subject the Law to structural critique, her phenomenological framework unfortunately prevents her from fully theorising female subjectivity in Law (Woman as subject of the Law). As Drucilla Cornell correctly observes, there is a tension in West's work between biological essentialism and cultural feminism (of the kind practised by Carol Gilligan and Nancy Chodorow), which is ultimately resolved in favour of the former.[12] At bottom, West resorts to the concept of a unitary feminine nature proceeding from biological essentialism "*because of our biological, reproductive role*."[13] This is the basis for her assertion of an unmediated feminine subjectivity and the fact, unrecognised by the legal system, that "women's subjective, hedonic lives are different from men's."[14]

For her part, MacKinnon has no truck with unmediated feminine subjectivity, which she calls "false consciousness". MacKinnon's critique extends beyond West's in that it questions both of *the subjects of feminist legal theory*. For MacKinnon, Woman (as subject of the Law) is constituted by the totalising male (pornographic) gaze as an object for male sexual gratification. Transposing a Marxist paradigm into the field of gender relations, MacKinnon argues that women as a social group suffer structural disadvantage at the hands of men, and that feminine sexual identity is nothing but dominance reified as difference.[15] Following MacKinnon, to have recourse to such an innate, or biologically essential, feminine sexual identity is to accept

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10 West RL, note 5, p 116.

11 West RL, note 5, p 116.

12 Cornell D, "The Doubly-Prized World: Myth, Allegory, and the Feminine" in *Transformations: Recollective Imagination and Sexual Difference*, Routledge, New York, 1993, pp 57-111 at pp 62-3.

13 West RL, note 5, p 130.

14 West RL, note 5, p 116.

15 MacKinnon CA, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, M.A., 1989, p 238.

the socially constructed gender roles assigned to women: "take your foot off our necks, then we will hear in what tongue women speak."[16] Not only does MacKinnon critique Woman as subject, but she also critiques the Law as an instrument of women's social domination. For her, "the rule of law – neutral, abstract, elevated, pervasive – both institutionalizes the power of men over women and institutionalizes power in its male form."[17] Such a claim comprehends both the direct participation of the rule of law in the domination of men over women through social relations (for example, the liberal conception of pornography as "free speech") *and* the discursive element, namely that the neutrality of the liberal apparatus is in fact masculine epistemology masquerading as universal ontology.[18]

It can be seen, then, that "second wave" theorists like West and MacKinnon do extend (to varying degrees) the liberal feminist analysis of Woman as subject and Law as subject of feminist critique. There are some quite obvious differences between them, but it is their similarities (their shared conceptual grammar) which are most interesting, and which provide the basis for the "third wave" postmodern feminist critiques of their work. To take perhaps the most obvious point of contention, whereas MacKinnon views submissive feminine sexuality as a function of a sexist system of gender representation and women who enjoy getting fucked as suffering from a false consciousness imposed by this system (to crudely paraphrase Marx, *they know not that they get fucked*), West argues that MacKinnon's Marxist schema of false consciousness elides women's true sexual nature (their connected selves) and their natural sexual desires.[19] What is seemingly an opposition between social constructionism and biological essentialism, however, actually represents a debate situated squarely within the discourse of the Truth of Woman. The logic that both theorists subscribe to, the conceptual grammar they both employ, is that the Truth of Woman can be ascertained: for West it simply inheres in women's lived sexuality, for MacKinnon it is only ascertainable once one overthrows the shackles of false consciousness (a 'false' consciousness implies its opposite). West's True Woman is lying there on the bed enjoying getting fucked

16 MacKinnon CA, note 8, p 45.

17 MacKinnon CA, note 15, p 238.

18 See MacKinnon CA, note 15, p 237.

19 See discussion in West RL, note 5, pp 127-9.

whilst MacKinnon's True Woman (the determining absence, or unspoken essentialism, in her texts) is standing outside (the system of gender representation) shaking her head knowingly. On a rough sliding scale of social constructionism, we could well situate MacKinnon between West as biological essentialist and theorists like Cornell, Judith Butler, and Mary Joe Frug as exemplars of the postmodern approach. Indeed, Cornell correctly observes that MacKinnon "moves within accepted 'postmodern' insight by recognizing that femininity as imposed sexuality is a social construction",[20] and Jennifer Lynn Orff suggests that MacKinnon "wear[s] the clothing of postmodern knowledge theory."[21] MacKinnon's recourse to a discourse of truth is a function of her Marxist conceptual tools (ideology as opposed to discourse)[22] that engenders (pun intended) some methodological problems – by no means the least being, as Angela Harris pithily observes, "how feminism can exist in the face of its theoretical impossibility."[23] MacKinnon practises a half-deconstruction which is sometimes quite frustrating. For example, at the very moment of its brilliant critique of liberalism's chimeric *aperspectivity*, MacKinnon's feminist standpoint epistemology succumbs to the logic of the transcendental signified (Being, Presence, Truth) by installing its own *perspectivity* as constitutive of its higher truth. Lise Gotell calls this "the truthfulness

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20 Cornell D, 'Sexual Difference, the Feminine, and Equivalency', note 12, pp 112-46 at p 132.

21 Orff JL, "Demanding Justice Without Truth: The Difficulty of Postmodern Feminist Legal Theory" (1995) 28 (3) *Loyola of Los Angeles Law Review* 1197 at p 1231.

22 Much of the discussion around the concepts of 'discourse' and 'ideology' is centred on whether either category is capable of comprehending the material differences in power and influence between competing bodies of knowledge. The Marxist concept of ideology is clearly, if somewhat reductively in some applications, directed towards this end. The author would also argue that it is a very weak application of Foucault's concept of discourse that fails to do the same, given his repeated references – at least in the period from *Discipline and Punish* to the first volume of the *History of Sexuality* – to institutional practices and extra-discursive factors. For an example of a discussion of this sort, see Cossman B, "Family Inside/Out" (1994) 44 *University of Toronto Law Journal* 1 at p 20. The point here is to distinguish between discourse, which does not rely on concepts of truth or extra-discursive or extra-systemic signifieds, and ideology, which does. For a discussion in Foucault about the truth/ideology distinction in Marxist thought, see Foucault M, "Body/Power" in Gordon C (ed), *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Harvester Press, Brighton, 1980, pp 55-62 at p 58 (translated by Gordon C, Marshall L, Mepham J and Soper K); see also "Truth and Power", pp 109-33 at p 118.

23 Harris AP, note 4, p 591.

of powerlessness."[24] It could alternatively be called the fetishisation of marginality or simply the fault line in MacKinnon's work. Whatever its description, MacKinnon's project of interrogating Woman as subject and Law as subject of critique is half-completed, suspended in the aporia of the Truth of Woman.

The "second wave" of feminist legal theory significantly extended the critique of Woman as subject of the Law and the Law as sexist apparatus (and hence a fitting subject of feminist critique). It is in the "third wave", or unapologetically 'postmodern' phase of feminist legal theory, that the twin subjects of feminist legal theory become both further investigated *and* more closely linked together. This section primarily discusses the work of Cornell and Frug, but acknowledges the diversity of approaches within the postmodern genre. While the author appreciates that postmodern feminist legal theory inaugurates a number of different and highly contentious debates, the discussion is limited to the question of how postmodern feminist legal theory continues the historical trajectory of critiquing Woman and the Law.

The concept of a unitary Woman as subject clearly subtends both the analyses of West and MacKinnon. Whilst both these theorists claimed access to the Truth of Woman as subject, Cornell argues that 'the truth of Woman is always an impossibility."[25] Postmodern feminist legal scholars like Cornell argue that Woman is not an entity (biological or otherwise) and that the concept of Woman is a discursive category (hence the cynical quotation marks that attend her in much postmodern writing). As Frug observes, postmodern feminist legal theory adopts a "decentred, polymorphous, contingent understanding of the subject."[26] Simply put, Woman is produced by and through discourse: she is a socially constructed artefact. This is not to say that real women do not exist (an all-too-common Bowdlerisation of postmodern insights), it is rather the somewhat more nuanced claim that they cannot possibly be known other than through discourse.[27]

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24 Gotell L, "Litigating Feminist "Truth": An Antifoundational Critique" (1995) 4 *Social and Legal Studies* 99 at p 104.

25 Cornell D, note 12, p 109.

26 Frug MJ, "A Postmodern Feminist Legal Manifesto" in *Postmodern Legal Feminism*, Routledge, London Routledge, 1992, pp 125-53 at p 126.

27 For an example of an article that assumes the former point, see MacKinnon CA, "Points Against Postmodernism" (2000) 75 *Chicago-Kent Law Review* 687 at pp

Discourse is what gives Woman meaning. Clearly, this is an extension of MacKinnon's ideology-inflected critique of female subjectivity in that it completes the analysis of subjectivity without recourse to an extra-discursive, or transcendental, signified. What postmodern feminist legal theory also does is to recognise the participation of the Law itself as a discourse in the production and regulation of Woman as subject. For postmodern feminist legal theorists, Law does not simply oppress women, it constructs them. Dennis Patterson observes that postmodern feminist practitioners frequently subscribe to "a view of 'woman' not as the instantiation of a universal category, but as the product of legal discourse."[28] Again, this is a theoretical extension of critiques which regard the Law as masculine and dismissive of specific female harms (West), or as a system which functions to oppress pre-formed subjects (MacKinnon). Taking a postmodern approach, it can be seen how the twin subjects of feminist legal theory become further intertwined: Woman is not pre-given but an effect of discourse, and Law is that very discourse.

The above short sketch of feminist legal theory hopefully demonstrates how the discipline has developed, from its liberal incarnations to its postmodern ones, through a constant (re)interrogation of its twin subjects: Woman and Law. From an analysis that assumed the unity and integrity of Woman as external to the neutral system of the Law, feminist legal theory has progressed to a position where Woman is constructed by the gendered discourse of the Law. In the following discussion, the author identifies one of the current problems of postmodern feminist legal theory, and suggests that a possible way forward is to again reconsider one of the subjects of feminist legal theory (the Law) and to continue the historical process of critique adumbrated in this section.

703-9. The most common passage relied upon to explain this point is the one found in Laclau E and Mouffe C, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, Verso, London, 1985 at p 108 (translated by Moore W and Cammack P).

28 Patterson DM, "Postmodernism/Feminism/Law" (1992) 77 (2) *Cornell Law Review* 254 at p 260.

Postmodern Pegs in Modern Holes: Postmodern Feminist Legal Theory's Problem

The problem that most commentators on postmodern feminist legal theory identify is in fact not the problem that is the focus of this section. The problem they identify, one that seemingly gives rise to a panoply of impasses, dead-ends and various other methodological and theoretical hurdles, is the fusion of postmodernism (with its insights about the constructedness of female subjectivity and experience) with feminism (and its concrete political agenda). Simplifying again, the "contentious marriage" of feminism and postmodernism raises related issues of truth and relativism, a material versus a cultural politics, and fraught questions of feminist praxis and agency.[29] This section argues that the problem is in fact misconceived, and that the more pressing problem arises not at the juncture of feminism and postmodernism, but rather at the juncture of a (resolved) postmodern feminism and the Law, or at the matrix "Postmodernism/Feminism/Law" - to appropriate the title of Patterson's article. The section begins by discussing the contours of the debate about whether feminism and postmodernism can profitably coexist.

Of the three points of contention raised above, the issue of truth (and the associated spectre of relativism) seems to ground most 'feminist' objections to the 'postmodern' project (assuming for present purposes the fictional coherence of these camps).[30] The postmodern concern to deconstruct notions of truth as culturally and socially contingent poses a significant problem for feminist efforts because, argues Orff, "when the truth is removed as a yardstick for the measurement of claims of justice, justice becomes a very difficult notion to defend."[31] As Sandra Harding writes, epistemology is at

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29 For a very thorough discussion of all these (and other) issues, see the essays in Butler J and Scott JW (eds), *Feminists Theorize the Political*, Routledge, New York, 1992. See also Nicholson LJ (ed), *Feminism/Postmodernism*, Routledge, New York, 1990.

30 Butler J, "Contingent Foundations: Feminism and the Question of "Postmodernism" in Butler J and Scott JW (eds), note 29, pp 3-21 at pp 3-5. The author is similarly sceptical of either term's pretension to completeness and internal coherence.

31 Orff JL, note 21, p 1246.

base a justificatory category,[32] and once the truth is relinquished (or at least feminism's claim to 'know' the truth of gender oppression), then feminism's normative commitment to ending gender oppression lacks a justification for action. Without concepts of truth, or at least a continuum of truth, there is nothing to authorise feminist reforms. They must compete on similar conceptual terrain with sexist, racist and homophobic ideologies without claiming to be more truthful or more just than they are. Secondly, the antagonism between feminism and postmodernism is also structured along the lines of a material politics as opposed to a cultural politics, or, to paraphrase Nancy Fraser, "a politics of redistribution" versus "a politics of recognition".[33] Feminism is characterised in this dualism as concerned with addressing the structural causes of women's oppression (and hence their 'difference' as a function of their 'domination'), while postmodernism seeks to redress women's oppression through rewriting the cultural script of 'woman' – as if through "theoretical fiat".[34] The traditional dichotomy between theory and practice (and a certain delimitation of "the political") underlies this tension between a material politics and a cultural politics. Finally, the issue of feminist solidarity and the practical consequences of the deconstruction of Woman animate a great deal of the feminist opposition to postmodernism. As Kate Soper observes:

> Feminism, like any other politics, has always implied a banding together, a movement based on the solidarity and sisterhood of women … If this sameness itself is challenged on the ground that there is no "presence" of womanhood, nothing that the term "woman" immediately expresses, and nothing instantiated concretely except particular women in particular situations, then the idea of a political community built around women – the central aspiration of the early feminist movement – collapses.[35]

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32 Harding S, "Feminism, Science, and the Anti-Enlightenment Critiques" in Nicholson LJ (ed), note 29, pp 83-106 at p 100.

33 See Fraser N, "Rethinking Recognition" (2000) 3 *New Left Review* 107.

34 Eichner M, "On Postmodern Feminist Legal Theory" (2001) 36 (1) *Harvard Civil Rights-Civil Liberties Law Review* 1 at p 6.

35 Soper K, quoted in Mouffe C, "Feminism, Citizenship and Radical Democratic Politics" in Butler J and Scott JW (eds), note 29, pp 369-84.

Not only does this seemingly undercut feminist collective action, but also without the sense of a coherent female subjectivity, it is argued, the idea of feminist agency and practice in the world melts into deconstructive air. Thus, armed with these criticisms, the feminist movement derides the postmodern agenda. On the most favourable view, feminism has little to gain from deconstructive insights. On the worst, it is "totally incompatible with postmodern theory."[36]

Much has been written on the supposed opposition between feminism and postmodernism. It is not intended to rehash that debate here. The author's position is that feminism *does* have something to gain from movements (whether labelled 'postmodern', 'anti-essentialist', 'poststructuralist', 'deconstructionist', or otherwise) that seek to contest the concepts of truth and unity. Following Butler's injunction for feminism to rest ('riskily') on contingent epistemological grounds,[37] feminists have a lot to gain by eschewing truth-claims. If acceptance is given (as the author contends it should) to Foucault's claim that concepts of justice and truth are *always already* implicated in power networks, and that the possibility of a pure extra-discursive knowledge is an unattainable (and dangerous) fiction,[38] then feminism is surely complicit in the structures of the systems it seeks to contest when it speaks the language of truth. The concept of truth has historically been mobilised against women (and other marginalised groups). It is the stock-in-trade of our current imperialist, heterosexist and misogynist political order. Why continue its use? Feminism merely purchases a false unity at the exorbitant cost of marginalising its own sisters by grounding its claims in truth. As the historical course of feminism demonstrates quite clearly, what was (and is) true for white heterosexual middle class feminism was (and still is) patently untrue for women of colour, lesbians and many working class women. This move from truth to contingency in feminist political lexicon is an acknowledgment of the "constitutive outside" of all political

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36 Orff JL, p 1246.

37 See Butler J, note 30, pp 3-21.

38 See Chomsky N and Foucault M, "Human Nature: Justice versus Power" in Davisdon AI (ed), *Foucault and His Interlocutors*, University of Chicago Press, Chicago, 1997, pp 107-45 at p 138: "If you like, I will be a little bit Nietzschean about this; in other words, it seems to me that the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power".

communities.[39] It is also a recognition that movements for social change must continue to reconstitute themselves, not just as an act of "political correctness" or as a tactical move but as a precondition of their own sense of 'justice'. Social change is, as Helen Tiffin observed of decolonisation, "process, not arrival."[40] For her, and a postmodern feminist legal theorist like Cornell, justice may inhere in the process of change (and its myriad forms) not necessarily in the truthful *telos*. Truth forecloses these gestures. It is an ungainly and burdensome concept. Furthermore, this move from truth to contingency in feminism's political claims does not necessarily entail a preoccupation with a cultural politics, as some critics of postmodernism (mis)represent. Quite clearly, the challenge of postmodern feminism (and no-one ever said it was easy) is to reconcile the cultural with the material. Rewriting the cultural script of woman must be achieved in tandem with redistributive justice. There is a complex dialectic between the two. Finally, the collectivity of women is not obliterated by the postmodern turn, rather the grounds on which different women are joined in struggle is constantly reworked. Postmodernism, unlike liberalism, does not vaunt the individual and herald the disintegration of collective action. Rather, it stresses the situatedness and constructedness of our subjectivities and enjoins more complex sites and modes of collective struggle. Postmodern feminism hence requires not the absence of women or a women's movement, but rather that different kinds of affinity groups emerge structured around several axes of oppression – such as race, class, ethnicity, or sexuality. Postmodern feminism requires a different sort of politics: a move from solidarity to affinity.[41]

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39 See Butler J, note 30, p 20, n.1. The phrase 'constitutive outside' is used to refer to an excluded domain of objects whose exclusion constitutes the unity of a supposedly stable category, concept or term. For example, the concept of the 'human' depends structurally on correlative concepts of the 'not-human', which have historically included women, people of non-white backgrounds, non-heterosexually-identifying people, and so on and so forth.

40 Tiffin H, "Post-colonial Literatures and Counter-discourse" in Ashcroft B, Griffiths G and Tiffin H (eds), *The Post-Colonial Studies Reader*, Routledge, London, 1995, pp 95-98 at p 95. See the final section for further discussion on the concept of justice as process.

41 On this point, see Harraway D, "A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s", in Nicholson LJ (ed), note 29, pp 190-233. The author's general position on feminism and postmodernism is very similar to that adumbrated in Fraser N and Nicholson LJ, "Social Criticism without

If postmodernism and feminism can indeed by reconciled, then what is the more pressing problem of postmodern feminist legal theory? As indicated previously, the problem is one of praxis, and it inheres in the juncture between postmodern feminism and Law. Whilst the author obviously disagrees with many of the essentialist criticisms of a postmodern-inspired feminism, one of the salient points from that debate is what indeed a postmodern feminist jurisprudence would look like. The question is often posed from a position that assumes the dualism of theory and practice, and the dialectical relationship between the two. The reticence of postmodern theorists to answer this question satisfactorily can be viewed in a number of different ways: first, that there is no answer; secondly, that to answer the question is to pre-empt and circumscribe political solutions; and finally, that the answer itself is a "work-in-progress". In the author's view, this question is crucial to understanding the dilemma of postmodern feminist legal theory. It points to the very real difficulty of articulating postmodern insights within the frustratingly modernist framework of the Law. How can rules of standing or justiciability comprehend a plaintiff's split subjectivity? How does a judge deconstruct when the "plain meaning rule" is the dominant principle in constitutional interpretation? Western legal systems are based upon modernist notions of coherent individuality, rationality and truth. Helen Stacy correctly identifies postmodern feminist jurisprudence's contemporary problem when she observes "the challenge for postmodern legal feminism is how to be politically effective, when that requires an engagement with the very master discourse of law that proscribes such a narrow reading of female identity."[42] The same problem haunts Carol Smart's discussion of law, and impels her solution of abjuring law reform or any engagement with the modernist master discourse.[43] The

Philosophy: An Encounter between Feminism and Postmodernism", in Nicholson LJ (ed), note 29, pp 19-38.

42 Stacy H, "Postmodern Feminist Justice: Identity and Reform" (1998) 4 (1) *Social Pathology* 1 at p 16.

43 The reference here is to her work *Feminism and the Power of Law*, Routledge, London, 1989. The author understands Smart to mean not that feminists should completely jettison law reform, but rather that law reform adds to the power of law to define and exclude, and that feminists need to question their involvement with such a discourse. Law reform should be directed towards reforming this aspect of the law, rather than towards providing solutions for women (p 164). As is demonstrated below, the author believes law reform is and can be useful, as long as it is contextualised within ongoing practices of reform and deconstruction, and in this respect differs from Smart.

contemporary problem of postmodern feminist legal theory, then, is how to articulate a deconstructive agenda within the confines of the modernist legal structure. Does one, following Smart, refuse the siren-call of legal reform, or is there another solution?

The author's suggestion is that, following the historical pattern of critiquing *the twin subjects of feminist legal theory*, postmodern feminist jurisprudence must reassess the Law itself. In true postmodernist style, the answer to the question is to refuse to answer the question as it stands. Once the representation of Law as a modernist monolith is accepted, the problem seems almost insurmountable. Indeed, positions such as Smart's actually make the mistake of assuming that this is the case. Strange as it may seem, Smart actually adopts a (new) form of legal positivism.[44] The author contends that the Law must be (re)understood as comprising more than just its institutions and its texts. Foucault can assist in this process.[45]

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44 This bald assertion perhaps necessitates some elaboration. It does not accuse Smart of a formalist reading of the Law. It is evident that she understands Law in a much more expansive sense than traditional legal positivists do. However, the author takes issue with her argument that the power of Law is growing dangerously (extending into other domains of social life) and that we must hence be circumspect about engaging with it. It is argued that if this were the case then it would either be difficult not to engage with it, or wrong-headed not to attempt to. Where Smart sees a rampant discourse of truth, the author sees a dispersed discourse interconnected with other discourses. It is argued that this provides a good opportunity to deconstruct the Law. Basically, Smart is being accused of being a (pessimistic) legal positivist because she sees Law as predominant and all-powerful, whereas the author views it as being interconnected, contingent, internally and externally contested. This leads to different tactical positions as regards law reform and rights (see footnote 43 and text in later sections).

45 A few caveats are needed here as well. The author is aware of the debates around whether a Foucaultian perspective is productive (or beneficial) for feminism. For two divergent opinions, see Bunting A, "Feminism, Foucault, and Law as Power/Knowledge" (1992) 30 (3) *Alberta Law Review* 829; and Hartstock N, "Foucault on Power: A Theory for Women?" in Nicholson LJ (ed), note 29, pp 157-75. The author's personal contention is that aspects of Foucault's work *do* offer useful insights for a radical feminism. However, there is neither the time nor the space to elaborate on that position here. The use which is made of Foucault in this paper is limited more to his comments on the nature of Law and what this means strategically for postmodern legal feminism, rather than on what his analysis of power or knowledge imports for feminist epistemology. On these more general matters, see McNay L, *Foucault and Feminism: Power, Gender and the Self* , Polity Press, Cambridge, 1992; Ramazanoglu C (ed), *Up Against Foucault: Explorations of Some Tensions between Foucault and Feminism*, Routledge, London, 1993; Sawicki J, *Disciplining Foucault: Feminism, Power and the Body*,

Foucault actually wrote very little about legal systems. First and foremost, Foucault was a theorist of power who was concerned to extend people's understanding of how power operated in modern societies. Writing against what he called the 'juridico-discursive' conception of power, Foucault articulated a view of power not predicated (as were both liberal and Marxist understandings of the state) on the power of sovereigns to command their subjects' obedience through Law, but based rather on the idea of a matrix.[46] For Foucault, power was not simply exercised by one actor over another, rather it circulated throughout the social body and was present in the social institutions of that body: the family, the school, the hospital, the asylum. Social actors were never outside the operation of power, and although actors were differentially placed with respect to the effects of power, different situations gave rise to different power relations. Foucault's new model of 'bio-power' was based not so much on the idea of a rule or a law (or the rule of law) but rather on norms, and their capacity to subtly mould behaviour to certain standards. Foucault's understanding of power in modern society has done much to decentre the modernist conception of the state as the origin of power, and Law as its fundamental expression. Overcoming this modernist representation of Law and power has two interlinked ramifications for a postmodern feminist legal jurisprudence. First, Law is everywhere in social relations – not in its old modernist form as statute book and case law, but as a discourse which (among others) plays a constitutive role in social relations. It is intimately linked to other social discourses. Secondly, this insight allows postmodern feminist legal theory to better engage with the Law and to offer deconstructive solutions. As argued above, the solution to postmodern feminist legal theory's current problem of engaging with the modernist master discourse of the Law is to reinvestigate *the subjects of feminist legal theory*, and to recognise that the Law is no longer that master discourse. Foucault helps us see how modern Law transcends its traditional representation of courtroom and legislature. It is both more and less than this representation, and in this lies the potential for its deconstruction.

Routledge, New York, 1991. Finally, as will be evident in later discussion, the author does not share Foucault's cynicism regarding the concept of justice. Rather, the arguments of Cornell and Derrida that deconstruction may open up the possibility of justice are agreed with.

Some Theoretical and Methodological Principles

The article concludes by sketching a few principles that could inform a Foucault-inspired postmodern feminist jurisprudence.

The Principle of Inter-Discursivity

Whilst some postmodern feminist legal theorists have extended the understanding of the constitutive role that the legal apparatus plays in defining and circumscribing the limits of Woman (as opposed to merely reflecting or oppressing a pre-given subject), this has paradoxically resulted in a new kind of legal positivism. Under this new legal positivism, the Law as master discourse of truth is the most powerful (and overriding) element in determining the Truth of Woman (and her body). As noted previously, Patterson discusses Woman as "the product of legal discourse",[47] Tracey E Higgins writes of how the United States Supreme Court "participated in the cultural process of defining womanhood itself",[48] and Frug analyses the ways in which "legal discourse rationalizes, explains, and renders authoritative the female body rule network."[49] Again, whilst these analyses do build significantly on earlier liberal and radical accounts of the legal system, they tend to install a false conception of the legal system as a monolithic entity that constructs Woman in isolation from other discourses – as if, literally, judges handed down Woman as a decision (inscription by curial fiat). If this were truly the case, then perhaps the modernist structure of legal institutions and legal discourse would indeed foreclose a deconstructive approach. However, the author argues that this position misconstrues the way in which contemporary Law operates. Legal discourse is always articulated in tandem with other discourses. Foucault realised as much in his analysis of modern power relations in *Discipline and Punish*: the Law cannot be analysed in isolation from powerful discourses like medicine, psychiatry, and

46 The discussion in this section is largely informed by Foucault M, "Two Lectures" in Gordon C (ed), note 22, pp 78-108.

47 Patterson DM, note 28, p 260.

48 Higgins TE, "'By Reason of Their Sex': Feminist Theory, Postmodernism, and Justice" (1995) 80 (6) *Cornell Law Review* 1536 at p 1542.

49 Frug MJ, note 26, p 130.

other discourses of the social sciences.[50] It is not only theoretically suspect to arrogate to Law a pre-eminent position in the construction of Woman – it is dangerous. By overstating the role of Law (or rather, accepting the modernist myth of the Law as all-powerful monolithic discourse), crucial opportunities to reform current legal practice are missed. It is clearly misguided to assume that contemporary feminist legal problems like abortion or rape can be solved (or substantially improved upon) by concentrating all efforts on statutes and case law. Medical conceptions of the female body (and the ethics of reproduction) inform judicial and legislative pronouncements on abortion, just as wider cultural assumptions about the impermeability of the male heterosexual body (and the correlative permeability of the female body) find their reflection in the various rape and sexual assault statutes in common law jurisdictions.[51] The author is arguing for an acceptance of *the principle of inter-discursivity* (as opposed to the new legal positivism), a principle that recognises the joint articulation of legal and extra-legal strategies (itself unavoidably calling into question the hermetic idea of the legal). It needs to be understood that the legal oppression of women is a more dispersed phenomenon, transcending the courtroom and legislature. Once this is accepted, deconstructive strategies (questioning the unity of Woman, questioning the subject position of Woman, questioning Truth) can be pursued profitably in other structures and other arenas, and still have flow-on effects in what is currently accepted as legal discourse. By advocating a more expansive and dispersed approach to feminist legal activism and theory, where deconstructing Woman in one cultural category or discourse has a related effect in others, the author is not suggesting the forsaking of law reform, but rather an expansion of the understanding of law reform to encompass deconstruction in other discourses.

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50 See Foucault M, *Discipline and Punish: The Birth of the Prison*, Penguin Books, Harmondsworth, 1991 (translated by Sheridan A).

51 See Naffine N, "The Body Bag" in Naffine N and Owens R (eds), *Sexing the Subject of the Law*, Sweet and Maxwell, North Ryde, 1997, pp 70-84.

The Principle of Schizophrenia

This principle follows on from the previous one. One of the problems inherent in totalising theory (legal or otherwise) directed towards progressive social change is that the theory often mandates certain courses of action, whilst refusing others. The methodology of feminist liberal legalism, for example, is predicated on a belief in the primacy (or, at least, the utility) of existing legal structures. More radical approaches towards achieving social change, such as Marxism, prioritise working outside pre-existing structures in order to circumvent or overthrow them. A postmodern feminist jurisprudence that pays attention to the dispersed and interconnected nature of the modern legal apparatus need not forsake any potential avenue of social change. The zero-sum logic of totalising theory is restrictive: a postmodern feminist jurisprudence must reside (and revel) in the overt contradictions of multiple strategies. The author is arguing here for *the principle of schizophrenia* as a metaphor for the enactment of many and varied strategies simultaneously. This means and entails several different things. To begin with, the deconstruction of Woman in discourses hitherto considered extra-legal (such as medicine or psychiatry) does not require the abandonment of more traditional avenues of legal change – rather, it encourages them. In this respect, a Smartesque abnegation (or even scepticism) of law reform submits the would-be agent for feminist legal change to an invidious choice. Why not do both? If people can be family and not-family (in Brenda Cossman's "inside/out" schema),[52] then traditional avenues of law reform (through different courtroom and legislative strategies as diverse as targeted litigation and "charter politics" through to the use of law reform commissions)[53] can be pursued, while deconstructing in other discourses. In fact, a more secure legal result demands that, strategically, the legal reform and the extra-legal measures be pursued simultaneously. Otherwise, wins gained in one quarter may be eroded in another. Secondly, the principle entails no longer fetishising the methodology. Whilst it will be argued below that justice inheres in process, this does not necessarily mean that there must be a chosen path or favoured techniques. Consciousness-raising must sit (easily or

52 See Cossman B, note 22, pp 1-39.

53 For a discussion of 'charter politics' in Canada and the feminist litigation conducted by the Women's Legal Education and Action Fund, see Gotell L, note 24, pp 99-130.

uneasily) with law reform and more structurally radical agendas. A postmodern feminist jurisprudence cognisant of the dispersed nature of women's legal oppression must not fall into the trap of insisting on some methodologies to the exclusion of others. This position represents a movement from exalting strategy or feminist legal method as a defining category (*as feminists we use consciousness-raising*) to merely using strategy as a particular tool in certain circumstances. This movement from the general to the particular throws up some difficult problems for the postmodern feminist legal activist, such as questions of affiliation (versus affinity) and direction, but the potential gains are impelling.

The Principle of Postmodern Rights and Justice-Process-Deconstruction

Finally, one of the problems encountered by postmodern feminist legal theorists has been the modern legal system's reliance (or, at least, the modern Western liberal democratic system's reliance) on a concept and system of rights. Again, this has been fundamentally a question of how to deconstruct rights (for the white, male, middle-class, heterosexual privilege that they often represent) and then to reconstruct something tangible in their place, given that the liberal apparatus is so heavily dependent on rights. Practical deconstruction seems nigh on impossible in this context (*postmodern pegs in modern holes*). However, the author wishes to argue here for *the principle of postmodern rights*. This principle allows for the continual (and ethical) process of deconstruction, and permits engagement with the current modernist legal arrangements.[54] It denies the false choice

54 As was stated earlier, it is here that the author departs from the views of Foucault, who regards the concept of justice with some scepticism. The views of Derrida are considered more amenable to a utopian and progressive project. It is possible to deny the commodification of justice (that is, justice as something dispensed by a judge and jury, or justice as something one is entitled to) and the transcendental idea of justice (that is, justice beyond the legal system) whilst accepting that justice can reside in processes of endless (re)inclusion. Derrida argues that "[j]ustice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice". Quoted in Sheehan KC, "Caring for Deconstruction", (2000) 12 (1) *Yale Journal of Law and Feminism* 85 at p 131. This is a principle which informs the work of Cornell also. See Williams SH, "Review Essay: Utopianism, Epistemology, and Feminist Theory" (1993) 5 *Yale Journal of Law and Feminism* 289 at p 297.

between deconstruction/critique/(re)imagining *and* law reform. Rights are here understood not in the self-satisfied liberal sense (inalienable, immutable, bedrock, untouchable), but in a much more fluid, contingent and contestable way. Rights here represent not the condition of justice – they are not a *telos* to be attained – but are a strategy deployed like any other. They must be contextualised and endlessly reinscribed to admit the Other, whose call for inclusion will always return to haunt the unity of the inherently partial right. Part of postmodern feminist jurisprudence's problem with current legal discourse is the idea that rights can be deconstructed but then the resulting solution is itself partial. This leads some to think that the concept of a right is useless, non-inclusive, and incapable of representing justice and, more broadly, that the current legal apparatus is not susceptible of deconstructive tactics. The author's position is that this only appears to be a problem if justice is believed to reside in the idea (or the holding of) a right itself. The fetishisation of rights must be resisted, and it must be acknowledged that there is always a "constitutive outside" to any right. Once this is done, it can be seen that the continual process of (re)negotiating rights is itself the very condition of justice. In this sense, the postmodern feminist legal project comes almost full circle (back to feminist liberal legalism). Almost, but not quite. Engaging in law reform on this view is not a mere liberal "tinkering at the edges". It is a step in a wider process of deconstruction and dialogue, and by no means the last or the most important. There is a crucial difference here between means (justice in the postmodern sense) and ends (justice in the liberal sense). There is also a very real tension between the common understanding of a right as something a person is entitled to hold onto and jealously guard, and the postmodern understanding of a right as a tactic in the never-complete circuit of *justice-process-deconstruction*. Postmodern feminist jurisprudence must negotiate this tension as it endlessly contests the various rights, fighting the urge within itself to stop when rights are gained and victories won, because the ultimate victory is the process of negotiation.

Conclusion

This article has outlined the author's thoughts on the historical trajectory of feminist legal theory. It has argued that the successive 'waves' or schools of thought within the movement have progressed through a (re)interrogation of their *twin subjects*: Woman and Law.

The particular 'problem' of postmodern feminist legal theory that has been identified here is the practical engagement of a postmodern or deconstructive agenda with a modernist discourse. The particular 'answer' suggested, based on the potted history outlined in the article's second section, is to continue this process of self-examination and, especially, to re-examine what is understood by Law. The author has argued that postmodern feminist jurisprudence, in order to surmount the practical problems inherent in engaging with the modernist discourse of the Law, should in fact alter its understanding of that same Law. Once modern legal discourse is understood as an ensemble of different discourses, as plural, dispersed and interconnected with other discourses, then several different (and perhaps contradictory) strategies flow from this. With this new understanding of Law (and law reform), postmodern feminist theory can begin to engage with the Law in different ways, and on different levels. The author's argument is that these approaches, in tandem with an approach towards *postmodern rights* which engages with the liberal system on its own terms, can help postmodern feminist jurisprudence in the (ongoing) struggle to end women's legal oppression, both inside and outside the traditional avenues of the Law.

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