UNSPEAKABLE SUBJECTS

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FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY

NICOLA LACEY

OXFORD
1998

Hart Publishing
Oxford
UK

Distributed in the United States by
Northwestern University Press
625 Colfax, Evanston
Illinois 60208–4210 USA

Distributed in Australia and New Zealand by
Federation Press
PO Box 45, Annandale
NSW 203 Australia

Distributed in the Netherlands, Belgium and Luxembourg by
Intersentia, Churchillaan 108
B2900 Choten, Antwerp
Belgium

Hart Publishing is a specialist legal publisher based in Oxford, England.
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Telephone: +44 (0)1865 434459 or Fax: +44 (0)1865 794882
e-mail: hartpub@janep.demon.co.uk

British Library Cataloguing in Publication Data
Data Available
ISBN 1–901362–33–7 (cloth)
1–901362–34–5 (paper)

Typeset in 12pt Bembo
by SetAll, Abingdon
Printed in Great Britain on acid-free paper
by Biddles Ltd., Guildford and King's Lynn

Acknowledgments

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Mansell Publishers, for "From Individual to Group?", from B.A. Hepple and E. Szyszczak, *Discrimination: The Limits of Law* (1992) pp. 99–124; Sage Publications, for "Theories of Justice and the Welfare State", from (1992) 1 *Social and Legal Studies* pp. 323–44 and for "Normative Reconstruction in Socio-Legal Theory", from (1996) 5 *Social and Legal Studies* pp. 131–57; Blackwell Publishers for "Theory into Practice: Pornography and the Public/Private Dichotomy", from (1993) 20 *Journal of Law and Society* pp. 93–113; JAI Press Inc. for "Community in Legal Theory: Idea, Ideal or Ideology?", from (1996) 15 *Studies in Law, Politics and Society* pp. 105–46; The Faculty of Law of the University of Western Ontario, for "Unspeakable Subjects, Impossible Rights", from (1998) *Canadian Journal of Law and Jurisprudence*; Edinburgh University Press, for "Closure and Critique in Feminist Jurisprudence", from Alan Norrie (ed.), *Closure or Critique: New Directions in Legal Theory* (1993) pp. 194–213; and Oxford University Press, for "Feminist Legal Theory Beyond Neutrality", from (1995) 48 *Current Legal Problems* pp. 1–38.

Contents

Preface

The essays which appear (in modified form) in this book were written during the last seven years, and develop ideas which have been forming over a longer period. During this time I have incurred far more debts of intellectual gratitude than I can possibly acknowledge here. I do, however, want to mention a number of people and institutions whose influence on my work in feminist theory have been of particular importance.

My interest in issues of law and gender was first prompted by workshops run by the Women Law Teachers Group in the early 1980s, and further stimulated by discussions at the conference "Feminist Perspectives on Law" organised by the Women's Caucus of the European Critical Legal Conference in 1986 and by seminars run by the Oxford University Women's Studies Committee between 1984 and 1990. Perhaps (optimistically) because the impetus for their existence has been diluted by the diffusion of lively pockets of feminist endeavour in a number of law schools and conferences around the country and in the journal *Feminist Legal Studies*, or (pessimistically) because of the increasingly pressured academic environment, the first two of these groups have since disbanded. They have, however, had a lasting influence on my work, and several former members remain among my closest colleagues. My editorial involvement with the proceedings of the 1986 conference led to my becoming an associate editor of the *International Journal of the Sociology of Law* and then, in 1992, of *Social and Legal Studies*. The editorial boards of these two journals have been a constant source of both personal support and intellectual exchange about feminist ideas. My two and a half years in the Law Department at Birkbeck College provided me, for the first time, with a working environment which not only tolerated but positively encouraged the incorporation of feminist analysis in legal education, and with a wonderful group of colleagues who shared many of my intellectual concerns. My criminal law and jurisprudence students at Birkbeck, as well as the students at Oxford University who attended Mary Stokes' and my feminist legal theory seminars, and my students at the Australian National University in

1992 and at the Humboldt University in Berlin in 1996, gave me lots of ideas and reassured me that the effort to introduce feminist issues to the law curriculum was worthwhile. As several of the essays in this collection argue, the capacities of any individual depend upon her social environment, and I feel very lucky to have been associated with each of these institutions.

Another set of feminist themes which find expression in this collection have to do with the connections between private and public, personal and political, affective and rational dimensions of human life. It is therefore a particular pleasure to be able to acknowledge the importance of a number of friendships for the work represented in this book. I should like to thank Susanne Baer, Elizabeth Frazer, Sandra Fredman, Ngaire Naffine, Katherine O'Donovan, Frances Olsen, Renata Salecl, Suzanne Shale, Carol Smart, Mary Stokes, Celia Wells and Lucia Zedner, not only for their generosity in commenting on papers and debating ideas over the years, but also for leavening the academic world with that most indispensable intellectual resource: a sense of humour. Richard Hart has been an exemplary editor, combining efficiency, support and genuine intellectual engagement on a scale rarely encountered in the world of academic publishing. Finally, but principally, David Soskice discussed many of the ideas in this book with me, allowing me to convince him (well, *most* of the time . . .) of the importance of feminist social theory, and convincing me in turn (well, *most* of the time . . .) that men can be good feminists. Along the way, among other things, he cooked me wonderful dinners and made me laugh a great deal. This book is dedicated, with my love, to him.

NICOLA LACEY

London, 1997

An introduction to the essays

Let me begin with an admission. If somebody had told me, when I graduated from University College London in 1979, that a decade later I would regard feminist legal theory as an important part of my work, I should have been quite baffled. While, like many of my contemporaries, I found it natural to describe myself as a feminist, the idea that feminism might be of relevance to the content of my legal education had simply not occurred to me. When I returned to UCL as a lecturer in 1981, after two years as a graduate student in Oxford—an experience which had done nothing to change my consciousness on the matter—I heard that a group of women legal scholars were meeting regularly under the aegis of the Women Law Teachers Group. I had, of course, noticed with irritation that I was one of only five women law teachers at UCL. (The students had noticed it, too, and large numbers were soon beating a path to my door, looking for a sympathetic ear to a variety of problems, notably the legal profession's continuing resistance to genuine equal opportunities a mere six years after the enactment of the Sex Discrimination Act . . .) So I went along to a meeting of the Group, looking forward to extending my network of female colleagues and to exchanging experiences of life as a woman in the academy. What I encountered was something very different, and a great deal more disturbing. Certainly, the Group provided a supportive network which was, and remains, of great personal importance to me. What I was not prepared for was that it introduced me to a set of intellectual debates which would gradually, over the next few years, lead me to question a number of the most basic assumptions upon which my legal education—and my own teaching—had been founded.

The essays which form this collection themselves tell the story of this intellectual journey, and I do not propose to summarise either the essays or the direction of the route in this introduction. I do, however, want the introduction to achieve two things. The first is to give a sense of why this journey seemed necessary to me, in the hope of convincing the reader that it will be worth accompanying me in the pages which follow. The second is to identify some broad themes

which run through the essays, in the hope of helping the reader to maintain a sense of continuous direction notwithstanding the varied practical terrain occupied by the different chapters. By providing at this stage a broad definition of what I mean by feminist legal theory, and by identifying how I take feminist legal theory to relate to various other forms of legal and social thought, I also hope to give the reader a sense of what distinguishes my own approach from that of other writers in what is now—happily—a fertile and variegated field of legal scholarship.[1]

Characterising feminist legal theory

I need, then, to begin by saying something about what I mean by "feminist legal theory". There are two questions here. First, what do I mean by "feminist *legal theory*" as opposed to "feminist criticism of particular laws"? The two are, of course, rather different. When I went to my first meeting of the Women Law Teachers Group, I certainly did not need to be convinced that, for example, the law of rape operated in deeply objectionable ways from even the most moderately feminist point of view. The idea of feminist legal theory, however, goes much further, in that it suggests that there is something not merely about particular laws or sets of laws, but rather, and more generally, about the very structure or method of modern law, which is hierarchically gendered. To most lawyers this is a far more counter-intuitive claim than that of feminist bias in particular laws. It is, however, absolutely central to any strong feminist theory of law. All of the essays in this collection, therefore, engage at some level with the question of whether there are things of a *general* nature to be said about what we might call the sex or gender of law.[2]

But this is to say only something very vague about what makes a "legal theory" *feminist*. It is crucial to acknowledge from the outset

[1] See for example Bottomley (ed.) (1996); Bottomley and Conaghan (eds.) (1993); Cornell (1991), (1995); O'Donovan (1985); Naffine (1990); Naffine and Owens (eds.) (1997); Olsen (ed.) (1995); Smart (1989), (1995).

[2] In this introduction, I shall use the terms "sex" and "gender" interchangeably. In early feminist scholarship, it was usual to draw a strong distinction between the two, with "sex" referring to bodily or biological characteristics and "gender" to the social roles and meanings attached to particular sexed bodies. "Sex" was taken as given, and "gender", understood as a social construct, was the primary analytic tool of feminist thought. As time has gone on, however, feminist theory has questioned the sex/gender distinction, and has been increasingly inclined to view sex as much as gender as socially constructed. These developments are discussed in detail in Chapters 4 and 7: see further MacKinnon (1989); Lacey (1997).

that to refer to "feminist legal theory" is to gather together a set of heterogeneous approaches, many of which make appearances in the chapters of this book. In this introduction, I shall not be concerned with these important differences. I shall simply set out from an inclusive conception of feminist legal theory as proceeding from two foundational claims and as characterised by a particular methodological orientation. First, at an analytic and indeed sociological level, and on the basis of a wide range of research in a number of disciplines, feminist legal theorists take sex/gender to be one important social structure or discourse. Feminists hence claim that sex/gender characterises the shape of law as one important social institution. Analytically, therefore, feminist legal theory aspires to provide a more sophisticated conception of law than can theories which ignore the influence of sex/gender. Secondly, at a normative or political level, feminist legal theorists claim that the ways in which sex/gender has shaped the legal realm are presumptively politically and ethically problematic, in that sex/gender is an axis not merely of differentiation but also of discrimination, domination or oppression. Normatively, therefore, feminist legal theory aspires to produce both a reasoned critique of current legal arrangements and—in some versions—a positive conception or vision of how law might be constructed in ways which move towards ideals of sex equality or gender justice. Though not all feminist legal theorists endorse a utopian project, the critical reconstruction of ideas of equality, justice and rights has been one of the most persistent preoccupations of feminist legal thought.[3] Finally, at a methodological level, feminist legal theorists are almost universally committed to a social constructionist stance: in other words to the idea that the power and meaning of sex/gender is a product not of nature but of culture. Feminist legal theorists are hence of the view that gender relations are open to revision through the modification of powerful social institutions such as law.

Within this broad conception, it is worth distinguishing two main schools of feminist legal thought. The first, which might be called liberal feminism, is committed, as is mainstream legal theory, to the ideals of gender neutrality and equality before the law. Its focus is primarily instrumental, seeing law as a tool of feminist strategy, and the impact of law as a basis for feminist critique. By contrast the second approach, which I shall label difference feminism, is sceptical about the possibility of neutrality; it has an implicit commitment to a more

[3] For further discussion, see Chapter 8.

complex idea of equality which accommodates and values, whilst not fixing, women's specificity "as women"; and it has a focus on the symbolic and dynamic aspects of law and not just on its instrumental aspects.[4] Looking back, I would say that in 1981 I was already—like most of my colleagues—a liberal feminist, albeit not a very thoughtful one. What I found disturbing about the scholarship to which I was introduced was the way in which it required me to amend or even to think beyond certain aspects of the liberal framework which had informed my legal education. In what follows, I shall therefore concentrate on the implications of this more radical approach to feminist legal theory—difference feminism—for the tenets of conventional legal scholarship and theory, so as to show how my intellectual journey began. In doing so, I do not mean to imply that I find all aspects of difference feminism persuasive: indeed, the essays in this collection question or reinterpret some of its central claims. What I do maintain is that difference feminism poses a challenge to the framework of conventional legal scholarship which is of sufficient intellectual power to demand a meticulous and reasoned response. A rigorous formulation of the most powerful arguments of difference feminism is therefore of central importance to contemporary legal theory.

The feminist challenge to conventional legal scholarship

Over the last fifteen years, a number of important intellectual movements such as "law in context", "socio-legal studies" and "critical legal studies" have begun to reshape the approach of legal education. Notwithstanding their influence, the orientation of most courses in law remains a broadly positivist one. By this I mean simply that legal education assumes the existence of a relatively discrete social phenomenon—law—and sees itself as imparting both knowledge of particular laws and techniques through which students can broaden and use this knowledge in intellectual and practical contexts. Furthermore, in so far as law courses reach beyond the description and analysis of law, they tend to do so by contextualising that analysis within a set of broadly liberal ideas which are thought to inform legal arrangements in modern societies such as Britain. I therefore want to single out a number of assumptions common to positivistic and liberal legal scholarship which are the target of feminist critique

[4] For more detailed discussion, see Chapters 6 and 7.

of the gender bias of law and legal method. These various points are closely interwoven, but I think that it is useful to separate them out to get a sense of the range of arguments which have been influential in the development of feminist legal thought.

The neutral framework of legal reasoning

A central tenet of both positivist scholarship and the liberal ideal of the rule of law is that laws set up standards which are applied in a neutral manner to formally equal parties. The questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning have featured little in either mainstream legal theory or legal education. These questions have, on the other hand, always been central to critical legal theory, and they find an important place within feminist legal thought. In particular, the work of social psychologist Carol Gilligan[5] on varying ways of constructing moral problems, and the relationship of these variations to gender, has opened up a striking argument about the possible "masculinity" of the very process of legal reasoning.

As is widely known, Gilligan's research was motivated by the finding of psychological research that men reach, on average, a "higher" level of moral development than do women. Gilligan set out to investigate the neutrality of the tests being applied: she also engaged in empirical research designed to illuminate the ways in which different people construct moral problems. Her research elicited two main approaches to moral reasoning. The first, which Gilligan calls the ethic of rights, proceeds in an essentially legalistic way: it formulates rules structuring the values at issue in a hierarchical way, and then applies those rules to the facts. The second, which Gilligan calls the ethic of care or responsibility, takes a more holistic approach to moral problems, exploring the context and relationships, as well as the values, involved, and producing a more complex, but less conclusive, analysis. The tests on which assessments of moral development have conventionally been made by psychologists were based on the ethic of rights: analyses proceeding from the ethic of care were hence adjudged morally under-developed. It was therefore significant that Gilligan's fieldwork suggested that these two types were gender-related, in that girls tended to adopt the care perspective, whilst boys more often adopted the rights approach.

[5] See Gilligan (1982).

Gilligan's assertion of the relationship between the two models and gender is a controversial one. Nonetheless, her analytical distinction between the two ethics is of great potential significance for feminist legal theory. The idea that the distinctive structure of legal reasoning may systematically silence the voices of those who speak the language of relationships is a potentially important one for all critical legal theory. The rights model is, as I have already observed, reminiscent of law: it works from a clear hierarchy of sources which are reasoned through in a formally logical way. The more contextual, care or relationship-oriented model would, by contrast, be harder to capture by legal frameworks, within which holistic or relationally-oriented reasoning tends to sound "woolly" or legally incompetent, or to be rendered legally irrelevant by substantive and evidential rules. Most law students will be familiar with the way in which intuitive judgements are marginalised or disqualified in legal education, which proceeds precisely by imbuing the student with a sense of the exclusive relevance of formal legal sources and technical modes of reasoning.

There are, however, several important pitfalls for feminist legal theory in some of the arguments deriving from Gilligan's research.[6] One way of reading the implications for law of Gilligan's approach is that legal issues, indeed the conceptualisation of legal subjects themselves, should be recast in less formal and abstract terms. But such a strategy of recontextualisation may obscure the (sometimes damaging) ways in which legal subjects are already contextualised.[7] In the sentencing of offenders, or in the assumptions on which victims and defendants are treated in rape cases, for example, we have some clear examples of effective contextualisation which cuts in several political directions—not all of them appealing to feminists. In certain areas, it may be that legal reasoning is already "relational" in the sense espoused by many feminists, but that it privileges certain kinds of relationships: such as proprietary, object relations.[8] A general call for "contextualisation" may also be making naive assumptions about the power of such a strategy to generate real change given surrounding power relations: as the case of rape trials shows all too clearly, the framework of legal doctrine is not the only formative context shaping the legal process. The important project, then, is that of recontextualisation understood not as reformist strategy but rather as

[6] For a useful discussion, see Frug (1992) Ch. 3.
[7] See further Chapter 7.
[8] For further discussion see Nedelsky (1993); Irigaray (1992); see also Chapters 4 and 8.

critique: in other words, the development of a critical analysis which unearths the logic, the substantive assumptions, underlying law's current contextualisation of its subjects, and which can hence illuminate the interests and relationships which these arrangements privilege.

Law's autonomy and discreteness

Another standard assumption of mainstream legal scholarship is that law is a relatively autonomous social practice, discrete from politics, ethics, religion. An extreme expression of this assumption is found in Hans Kelsen's "pure" theory of law,[9] but weaker versions inform the entire positivist tradition. Indeed, this is what sets up one of positivism's recurring problems—that is, the question of foundations, of the boundaries between the legal and the non-legal; of the source of legal authority, and the relation between law and justice.[10]

This mainstream assumption, like the idea that legal method is discrete or distinctive, is challenged by feminist legal theory. Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually-patterned lines. In doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries. Hence the ideals of the rule of law call for modification and reinterpretation. There are obvious, and strong, continuities here between the feminist and the marxist traditions in legal thought.[11]

Law's neutrality and objectivity

As I have already mentioned, difference feminism has developed a critique of the very idea of gender neutrality, of gender equality before the law, in a sexually-patterned world. Feminist legal theory deconstructs law's claims to be enunciating truths, its pretension to neutral or objective judgement, and its constitution of a field of discrete and hence unassailable knowledge.

This argument takes a number of forms in contemporary feminist legal theory. One derives from the Foucaultian critique of feminist writers such as Carol Smart.[12] The argument is that law, by policing

[9] See Kelsen (1967).
[10] For an extended analysis of this problem, see Davies (1996).
[11] See Collins (1982).
[12] See Smart (1989), drawing on Foucault (1972); (1977).

its own boundaries via its substantive rules and rules of evidence, constitutes itself as self-contained, as a self-reproducing system.[13] There is, hence, a certain "truth" to this aspect of law. But by standing back so as to cast light on the point of view from which law's truth is being constructed, we can undermine law's claims to objectivity. Another, rather different, example is Catharine MacKinnon's well known epistemological argument.[14] In MacKinnon's view, law constructs knowledge which claims objectivity, but "objectivity" in fact expresses a male point of view. Hence "objective" standards in civil and criminal law—the "reasonable person"—in fact represent a position which is specific in not only gender but also class, ethnic and other terms. The epistemological assertion of "knowledge" or "objectivity" disguises this process of construction, and writes sexually specific bodies out of the text of law. The project of feminism is to replace them. The difficult trick is to do so without fixing their shape and identity within received categories of masculine and feminine. Hence not all feminists endorse the idea of abandoning "reasonableness" tests or the appeal to otherwise universal standards.[15]

Law's centrality

In stark contrast to not only a great deal of positivist legal scholarship but also much "law and society" work, feminist writers have often questioned law's importance or centrality to the constitution of social relations and the struggle to change those relations. Clearly feminist views diverge here. Catharine MacKinnon, for example, is optimistic about using law for radical purposes; but many other feminists—notably British feminist Carol Smart—have questioned the wisdom of placing great reliance on law and of putting law too much at the centre of our critical analysis. Perhaps this is partly a cultural difference: the British women's movement has typically been relatively anti-institutional and oppositional. Yet even in the USA, where there is a stronger tradition of reformist legal activism, feminists associated with critical legal studies have been notably cautious about claims advanced in some critical legal scholarship[16] about law's central role in constituting social relations. Feminists have thus tended further towards a classical marxist orientation on this question than have their

[13] Cf. the arguments of autopoietic theory: see Teubner (1993).
[14] See MacKinnon (1989).
[15] See for example Cornell (1995) Ch. 1; for further discussion, see Chapters 4–7.
[16] See for example Unger (1983).

non-feminist critical counterparts. In terms of analytic focus, however, this has led feminists to address a range of social institutions—the family, sexuality, the political realm, bureaucracies—well beyond the marxist terrain of political economy. Feminists writers continue to be ambivalent about whether and how law ought to be deployed as a tool of feminist action, practice and strategy.[17] To the extent that feminist critique identifies law as implicated in the construction of existing gender relations, how far can it really be used to change them, and do strategic attempts to use law risk reaffirming law's power?

Law as a system of enacted norms or rules

Typically, feminist legal theory reaches beyond a conception of law as a system of norms or rules—statutes, constitutions, cases—and beyond "standard" legal officials, such as judges, to encompass other practices which are legally relevant or "quasi-legal". For example, the Oslo School of Women's Law had its main focus on administrative and regulatory bodies such as social welfare agencies, the medical system and the family.[18] This reorientation is born of a very basic socio-legal insight: that the power and social meaning of law are determined not only at its legislative, doctrinal and judicial levels but also by a myriad non-legal or partially legal decisions about its interpretation and enforcement.

This institutional refocusing is also connected with post-structuralist ideas, and notably with Michel Foucault's reconceptualisation of power—a reconceptualisation which has important implications for law.[19] Foucault distinguished between sovereignty power—power as a property or possession; juridical power; and disciplinary power—the relational power which inheres in particular practices and which flows unseen throughout the "social body". His argument was that the later modern world was gradually seeing the growth of subtle, intangible, disciplinary power, at the expense of both the old sovereignty and modern juridical power. Foucault was therefore inclined to think that law was waning in importance as a form of social governance. Smart, however, uses his argument about power in a different way in relation to law: she points out that law itself embodies disciplinary power. For one of the distinguishing features

[17] See in particular Smart (1989) Ch. 1; Bottomley and Conaghan (eds.) (1993).
[18] Stang Dahl (1986).
[19] See Foucault (1972), (1977); Smart (1989); for further discussion, see Chapters 3 and 5.

of disciplinary power is its subtly normalising effect, and as soon as we look beyond a narrow stereotype of law as a system of rules backed up by sanctions, we begin to see that one of law's functions is precisely to distribute its subjects with disciplinary precision around a mean or norm.

For example, the way in which legal rules distribute social welfare benefits or allocate custody of children (on divorce or via adoption) reflects judgements about the right way to live; it expresses assumptions about "normality". A yet more spectacular example is that of the construction of gay and straight sexualities in criminal laws and in family and social welfare legislation. These "normalising" assumptions have a pervasive power which also structures the administration of laws (e.g. of social welfare benefits and policing policies) at the bureaucratic level, generating phenomena such as reluctance to prosecute in "domestic violence" cases, the oppressive policing of gay sexuality, and the discriminatory administration of welfare benefits. Feminist (like other critical) analyses are interested here not just in legal doctrine but also in legal discourse, i.e. how differently sexed legal subjects are constituted by and inserted within legal categories via the mediation of judicial, police or lawyers' discourse. The feminist approach therefore mounts a fundamental challenge to the standard ways of conceptualising law and the legal, and moves to a broader understanding of legally relevant spheres of practice.[20]

Law's unity and coherence

Readers of both student texts and legal cases will be familiar with the very high importance attached by lawyers and legal commentators to the idea (or ideal) of law as a unitary and a coherent system of rules or norms. It is an idea which informs legal theory in a number of ways. Once again, Kelsen provides a spectacular example: his Grundnorm had to be hypothesised precisely because otherwise it would have been impossible to interpret law as a coherent, non-contradictory normative field of meaning. As a law student, one of the first things one is taught to do is to hone in on contradictory or inconsistent arguments. The idea of coherence as the idea(l) which lies at the heart of law finds its fullest expression in Ronald Dworkin's idea of "law as integrity",[21] but it is also voiced in procedurally-

[20] See further Chapter 8.
[21] Dworkin (1986).

oriented ethical and political theories, notably in critical theory of the Frankfurt School.[22]

Feminist scholarship, like much other critical legal theory, is concerned to question this belief in law's coherence and to reconstruct the pretension to coherence as part of the ideology of both law and jurisprudence: as part of what helps to represent law as authoritative, adjudication as democratically legitimate and so on. The critical analysis of contradictions, and the unearthing of what have been called "dangerous supplements" and hidden agendas, takes place both at the level of doctrine and at that of discourse.[23]

To take some specific examples, the assertion within legal doctrine of particular questions or issues as within public or private spheres is contradictory, question-begging, under-determined: sexuality, for example, is public for some purposes and private for others.[24] The idea of the legal subject as rational and as abstracted from its social context is undermined by exceptions such as defences in criminal law, shifts of time-frame in the casting of legal questions, and an arbitrary division of issues pertaining to conviction and those pertaining to sentence.[25] In contract law, one could cite shifts between a freedom of contract model and a model which views contract as a long-term relationship within which, for example, loss occasioned by the parties' general reliance upon the contractual relationship can be recognised and compensated.[26] Nor are these incoherencies confined to the doctrinal framework: they mark also the discourse through which human subjects are inserted into that structure. For example, the rational and controlled male of legal subjectivity is also the rape defendant who is vulnerable to feminine wiles and who is, on occasion, incapable of distinguishing "yes" from "no". The unearthing of such contradictions is not just a matter of "trashing": it forms part of an intellectual and political strategy—of exposing law's indeterminacy, of emphasising its contingency, and of finding resources for its reconstruction in those doctrinal principles and discursive images which are less dominant yet which fracture and complicate the seamless web imagined by orthodox legal scholarship.

[22] Habermas (1992).
[23] Fitzpatrick (ed.) (1991); see further Chapters 4, 5, 7 and 8.
[24] See Olsen (1983) and Chapters 3 and 5.
[25] See Kelman (1981) and Chapter 7.
[26] See Collins (1997).

Law's rationality

Perhaps most fundamentally of all, it is argued that contradictions and indeterminacy in legal doctrine undermine law's supposed grounding in reason, just as the smuggling in of contextual and affective factors undermines law's apparent construction of the subject as a rational, self-interested actor. Furthermore, in so far as law is successful in maintaining its self-image as a rational enterprise, this is because the emotional and affective aspects of legal practice are systematically repressed in orthodox representations. Once one reads cases and other legal texts not only for their formal meaning but also as rhetoric, one sees how values and techniques which are not acknowledged on the surface of legal doctrine are in fact crucial to the way in which cases are decided.[27]

These, then, are the principal ways in which feminist legal theory has challenged the tenets of conventional jurisprudence and legal education, and it was my (then very vague) apprehension of these sorts of arguments which prompted me to start thinking seriously about feminist legal theory in the early 1980s. As I hope this brief account reveals, feminist theory engages with some highly complex questions: it is not surprising, therefore, that it is a rapidly moving field which constantly throws up new questions just as old ones appear to be nearing resolution. It is—like all intellectually challenging approaches—marked by vigorous contestation. A more concrete analysis of key feminist controversies appears in the chapters of this book. What I hope to have achieved in this preliminary characterisation is to have communicated a sense of the intellectual vitality and ambition of feminist thought. I hope also to have suggested the extent to which feminist legal scholarship has to swim against a very strong current of intellectual convention—something which, for feminist scholars as well as students, is occasionally both exhausting and disorienting.

Feminist and "critical" legal theories: methodological and political heteronomy

It is implicit in what I have already said that the approach which I shall be pursuing in this book is one which sets its face firmly against the idea that feminist legal theory is itself—either politically or

[27] See for example Frug (1992).

methodologically—an autonomous intellectual field.[28] Feminist method, in my view, shares certain conceptual tools with other critical approaches, including marxist theory, critical legal theory, critical race theory and queer theory. Each of these approaches is concerned, along a certain dimension, to dig beneath the surface of legal and social arrangements so as to illuminate their deeper logics. In doing so, such approaches draw upon the intellectual resources of a number of disciplines, including history, economics, sociology, psychoanalysis, pscyhology, philosophy and political science. None of these "critical" legal theories sees legal theory as autonomous in the way in which, for example, analytical jurisprudence regards itself as being. This is a matter both of method—willingness to draw on a variety of disciplines—and of subject matter: the vision of the boundaries between legal and social theory as porous is informed by an interpretation of the legal world as inextricably linked with the political, social, economic and cultural worlds. Hence many of the chapters of this book engage primarily with what would generally be thought of as political or social theory rather than as jurisprudence.

There is a second, somewhat different, sense in which the essays in this collection refuse the idea of feminist legal theory as autonomous—a sense which might lead some feminists to decline to describe my approach as feminist at all. In my view—as reflected in the definition of feminist legal theory given earlier in this introduction—the question of both the practical significance and (hence) the relative political importance of sex/gender in any particular realm of social life is one which has to be carefully analysed in the light of other critical analyses and their interaction with the social construction of gender. In other words, though feminism must (and does by definition) start out from the assumption that sex/gender has a general significance across a range of social fields, it must maintain an open mind on the interaction between sex/gender and other important axes of social differentiation (and oppression) such as race, socio-economic class, age, sexual orientation in any particular instance. A feminist political and legal theory could never, in other words, be the only legal or political theory which one needed. Moreover, I believe that a number of feminist issues in legal and social theory can best be identified by beginning one's analytic journey in an ostensibly

[28] This is a controversial issue among feminist scholars. It is also one which might be thought to have discrete institutional implications for the organisation of legal education, for example in terms of whether feminist questions should be integrated in the existing curriculum or dealt with in special courses such as "Law and Gender".

non-feminist location,[29] just as, conversely, an analysis of feminist issues can often illuminate more general problems in social thought.[30]

One could, of course, define this question about the relationship between feminist and other forms of critical social theory out of existence by arguing that an adequate feminist theory would always have taken account of other relevant social axes such as class and race. Certainly, as I argue in almost all of the chapters of this book, an adequate feminist legal theory needs to avoid essentialising either "woman" or "the feminine", recognising the ways in which such categories are inevitably mediated through and transformed by these other factors. I do, however, resist the idea of a complete or overarching feminist theory, which seems to me to encounter the intellectual objection that it inevitably suggests a certain political or empirical priority for sex/gender.[31] Hence these essays are informed by a preference to think in terms of a plurality of critical social theories contributing to an overall debate. Their project is to contribute to a feminism which recognises the problematic status of the category "woman" without making her disappear: which engages with the feminine as a construct, yet as a construct which has enormous social power.

The organisation of the collection

The reader should now be reasonably well equipped to embark upon the journey represented by the chapters which follow. In the expectation that at least some readers may work their way through the whole collection, I have arranged the essays in two groups which develop two main themes. The first group of essays are critical engagements with liberal individualism and its implications for law. These essays address liberal individualism in two different ways. First, they analyse the conceptual framework of legal systems and legal reasoning. For example, Chapters 1, 4 and 5 consider the sense in which the paradigm subject of law is constituted as an individual with particular characteristics—characteristics which turn out to be strongly gendered in a masculine direction. Secondly, these essays address the individualism of the ideals and values embedded in liberal legal ideology. For example, Chapters 2 and 5 analyse the way in which

[29] As in Chapters 2 and 5.
[30] See for example Chapters 1 and 8.
[31] See Chapters 6 and 8.

liberal conceptions of justice predispose liberal legal systems to the recognition of certain kinds of social arrangements and inhibit their recognition of others. Chapters 1, 3 and 5 also consider the relationship between these two forms of individualism in legal thought. A particular pre-occupation is the communitarian tradition in social theory, and the first part of the book gradually develops a view both of certain continuities between feminist and communitarian thought and of the ways in which communitarian claims require us to modify the individualist framework of conventional legal scholarship.[32] However, these chapters also build up a critique of communitarianism which suggests that significant aspects of communitarian thought are every bit as unsatisfactory, from a feminist point of view, as their liberal counterparts.

While some of these themes reappear in the Chapters 6, 7 and 8, with Chapter 5 in particular consituting a bridge between the two sections, the main preoccupation of the second group of essays is methodological. They engage with the question of what kinds of project feminist legal theory should attempt, tracing the relationship between feminist legal theory and other influential theoretical traditions in and beyond the legal. In particular, they identify a close relationship between feminism and interpretivism in social theory—an approach which the earlier chapters identified as one of the most persuasive aspects of communitarian thought. Thus Chapters 6 and 8 consider the relationship between analytic, empirical, critical, reformist and utopian projects in feminist legal theory, whilst Chapter 7 attempts a critical assessment of the contribution of two extra-legal disciplinary resources—psychoanalysis and rhetorical politics—to the development of feminist legal thought. An underlying concern of each of these chapters is the location of feminist thought within the (supposed) dichotomy between modernist and post-modernist approaches, and the capacity of interpretive method to undermine this dichotomy.

Though all of the essays have been modified to some extent so as to avoid overlap, they remain self-standing. Many readers may therefore wish to design their own routes through the collection, planning their own journeys and, very possibly, reaching different destinations from the author.

[32] For an analogous argument about political theory, see Frazer and Lacey (1993).

PART I

FEMINIST CRITIQUE OF INDIVIDUALISM IN LEGAL AND POLITICAL THOUGHT

1

From Individual to Group? A Feminist Analysis of the Limits of Anti-Discrimination Legislation

Over the last few years a plentiful and challenging literature has developed in which feminist writers have constructed an illuminating critique of legal approaches to dismantling sexism and sex discrimination.[1] Much of this literature makes passing or more substantial reference to questions of racism, generally in the context of an acknowledgement of the specificity of the oppression of black women. However, most of it[2] does not address directly the question of what use the critical tools and insights of feminist social theory might contribute to a more thoroughgoing analysis of laws designed to combat racism. This silence is born partly of a recognition and respect for the specificity and complexity of racism and its relationship to law; a (proper) inhibition from too easily regarding racism and sexism as simply analogous social institutions; and an understandable concentration on the question of women's oppression and its legal constitution, stretching beyond anti-discrimination legislation, which is the central focus of feminism.

However, I think it is true to say that many of us who are concerned with this general field of inquiry are uncomfortable with the fact that, with some notable exceptions,[3] there has been a relative lack in British law journals of critical analysis specifically focused on race discrimination law. There is no real British equivalent to American "critical race theory"; nor has the problem of the "intersection of race and gender", identified by Crenshaw, claimed serious attention among British scholars.[4] This is not to say, of course, that

[1] See for example O'Donovan and Szyszczak (1988); MacKinnon (1989), Chapter 12; Smart (1989).

[2] Including my own contribution: see Lacey (1987).

[3] See Fitzpatrick (1987); Lustgarten (1980), (1986).

[4] See Crenshaw (1988), (1989); for an exception in relation to Britain, see Fredman, Stanley and Szyszczak (1992). For examples of American "critical race" scholarship, see Bell (1987), (1992); Williams (1991), (1995); Harris (1990); Kennedy (1989); Lawrence (1987);