THE BODY IN LEGAL THEORY

BY

JUDITH E. GRBICH*

INTRODUCTION

Women have always been incredulous about the naturalness of power but their experience has been defined as ignorance by professional communities whose beliefs have been established as foundations of knowledge. Feminist jurisprudence has begun to question these professional communities about the naturalness of legal power and the foundational character of beliefs about law.¹ This paper will address some issues raised by feminist work upon the theory of the subject,² it will investigate the place of subjectivity within disciplinary constructions of meaning. It aims to consider the theory of the subject within jurisprudence as a way of articulating the issues which traditional jurisprudence ignores - the positionality of knowers about law, the negotiation of meaning about authority, and the professional academic practices which exclude women's experience from the development of legal theory. It investigates the epistemological status of the body.³ I prefer to describe this project as one

---


² See generally on epistemological issues concerning the body Adrienne Rich, Of Woman Born 39 (1976); Elizabeth V. Spelman, Woman as Body: Ancient and Contemporary Views 8, no. 1 Feminist Studies 109 (1982); Nicky Diamond, Thin is the feminist Issue 19 Feminist Review 45 (1985); Alison Caddick, 'Feminism and the Body' 74 Arena 60 (1986); Judith Butler, 'Variations on Sex and Gender: Beauvoir, Wittig and Foucault' 5:4 Praxis International 505 (1986); Elizabeth Gross, 'Philosophy,
of legal theory rather than jurisprudence as legal theory connotes to me an inquiry into the relation of individual subjects to the question of authority, it could just as well be described as feminist jurisprudence. But the present meaning of jurisprudence seems to present 'law' as an existing object waiting to be discovered, while I prefer to understand my project as an inquiry into the practices whereby the beliefs and questions about authority create our understanding of 'law'.

The theory of the subject questions the origins of knowledge and directs attention to social practices which contain and confine what subjects can know. It places our recognition of what is 'natural' as an effect of power—whether the naturalness of femininity or the naturalness of legal institutions. It can provide a link with feminist political struggle, for it seeks to promote women's subjectivity as valid knowledge, their sense of what is just and unjust in present social conditions become the resources for changing our beliefs and knowledge about authority.

Part one of the paper provides an introduction to issues of epistemology in writing legal theory; it seeks to raise questions about frameworks or assumptions regarding legal knowledge but any answers given are always tentative. It assumes that the search for criteria of knowledge, the search for certainty, can only be abandoned when one occupies a position of social power. It assumes that the calls for abandoning epistemology and simply entering the 'conversations of mankind' as a theory of knowing, cannot be heeded while women's experience continues to be constituted as inexpert, unreasonable and merely gossip. Beliefs in the existence of foundations can only be abandoned by those who control entry to the conversations, in which case it is only the form of foundationalism which is being changed, not its existence as social practice. Part one addresses issues of knowledge underlying traditional liberal legal theory and modern liberal legal theory. Epistemological issues of the materialist tradition are raised, including Marx and Wittgenstein. Post structuralist linguistic theory is considered as an introduction to the present concerns of feminist jurisprudence with the meaning of legal language and the possibilities for female subjects of changing the meanings of words. I argue that problematizing the


linguistic categories of thought should be thought of as a question of subjectivity, as expressions of life, rather than as interpretation.

Part two of this paper develops the idea of language practices as sexualized forms of representation, of language as always expressing the imaginary or metaphorical form by which we constitute 'forms of life'. Part two is concerned with developing a feminist theory of law as embodied imagination, as a way of locating the present concrete practices by which we are required to believe that professional, masculine metaphors of 'being' are universal.

Part three is an enquiry into practices of constituting women as subjects for male lives; it is an attempt to develop the theory of law as embodied imagination in order to make places for women's imaginings, for women's theories of being which have been excluded by professional practices of the disciplines. The legal practices of 'judging' bodily harm as disfigurement are theorised as one more form or instance of a male theory of being, of what it is like to be human. Anti-discrimination practices are theorised as part of the post modern conditions in which women must negotiate the reality of individual mistreatment.

I. FRAMEWORKS OF KNOWLEDGE: WAYS OF KNOWING

This part is an investigation of some of the present conditions of writing feminist legal theory. Its aim is to interrogate the current frameworks of knowledge within which the feminist jurisprudential endeavour is placed. Its purpose is to locate those features of professional, academic law-writing which appear to distance the legal theory project from the concerns of current political practice for women. It locates the writer as part of the investigation in order to retain as far as possible the nature of the writing conditions of feminist legal theory. One problem to be investigated is how can I write a legal theory for women, that is, an account of the nature of power and authority which is sensitive to the different understandings which women experience about authority, without

---


7 Dorothy Smith has established the importance of writing conditions, see Smith 'The social construction of documentary reality' 44, no. 4 *Social Inquiry* 257-68 (1974); Smith 'Textually mediated social organisation', 36 *International Social Science Journal* 59-75 (1984) and *The Everyday World as Problematic: A Feminist Sociology* (1987).


9 The question of writing theory for women has been addressed by Smith D, 'A Sociology for women' in J.A. Sherman and E.T. Beck (eds), *The Prism of Sex: Essays in the Sociology of Knowledge* (1979). See also M.J. Boxer, 'For and about Women: the theory and practice of women's studies in the United States', 7 *Sims* 661 (1982);
reproducing the conditions of that authority? The identification of idealism as feminist legal theory's fundamental error has located the legal theory project as an account of social change. It locates legal theory as a social theory, as one aspect of understanding the nature of social relations, of the historical process of their formation and reproduction. In the identification of idealism as an error of liberal legal theory two claims are implicit regarding the way in which understanding can be achieved. Implicit in the charge of error is a theory of knowledge or a different framework of knowledge or understanding.

In this section I shall locate the present debates and professional writing upon feminist legal theory as part of the present conditions of writing legal theory. This means that discourses of rights and equality will not be identified and abandoned as simply idealism but will be understood as material practices or conditions with which writing theory must contend. The present debates on the merits of 'rights' and 'rights talk' have a history in several theories about knowledge. The debates have other histories of course but the purpose here is to write an account which places the present conditions of legal writing in a theoretical framework for understanding problems of the discipline, the discipline of legal knowledge. Questions about the nature of understanding in the law discipline link theories of knowledge or epistemologies with present social conditions. Is the way in which we know about a society connected to the way in which it is? Is the way in which we know about law, and jurisprudence, connected to the way in which women can achieve social justice?

(a) Liberal Legal Theory and Knowledge of Law

The commitment to 'rights' within liberal political philosophy and liberal legal theory is premised upon a theory of knowledge in which the 'objects' of knowledge, the knowledge itself, are understood to be separate from the subject or inquirer. This epistemology can be characterised as the

---

10 McCloud, S.G., 'Feminism's Idealist Error,' 14 New York University Review of Law and Social Change 277 (1986). McCloud argues at p. 298 that 'the sexual equality dichotomy's particular failure is its philosophical idealism: it begins with an idea of what sexual equality should be like, rather than from an understanding of current law and its effects upon the working conditions of the majority of women ....' McCloud says that 'to be meaningful today, the concept of sexual equality must be tempered with an appreciation of the historical condition of working class women in a class-divided society and with the relative scarcity of resources' (at p. 313).

11 Dorothy Smith has placed the conditions under which women write sociological theory as a disciplinary problem in her work upon the writing of a sociology for women. See D. Smith (1987) supra n. 7, at p. 81 ff.

12 Dworkin's work is an example of the epistemological commitments of liberalism. Propositions of law are understood to be interpretive of a single legal history which is the 'enterprise in hand.' Law becomes that legal history which it is the judges job to continue into the future; Dworkin argues that this history can and should be treated by its authors 'as an object in itself.' R. Dworkin, 'How law is like literature', in R. Dworkin, A Matter of Principle 146-166 (1985). Dworkin has raised the question 'whether liberalism can indeed be traced, as many philosophers have supposed, back
'picture theory' of Wittgenstein's *Tractatus*\(^{13}\) or the 'looking glass' of Lewis Carroll.\(^{14}\) This commitment to 'rights' in classical liberalism takes the form of idealism because the theory assumes ideas about rights alone can produce changes in the society. A 'right' is taken to be a thing which someone can have and know the qualities of independently of the differing conditions of their lives. To claim the commitment to 'rights' is idealistic and in error\(^{15}\) is to question whether the picture theory epistemology can be an adequate framework for understanding the place of law in social change or even the nature of law in a society.

A commitment to 'rights' remains idealistic as long as it is removed from the actual practices of 'rights.'\(^{16}\) Rights practices have a place in understanding social change but these practices include those relations of production, reproduction and ethnicity which exclude the majority of the population from exercising institutional resources such as lawyers and courts for sanctioning the pursuance of 'individual' needs and interests. If you are poor 'rights' remain an ideal\(^{17}\) but economic incapacity to exercise 'rights' is nevertheless a part of rights practices. Rights practices include those relations of sexuality in which the individual needs and interests of women are not characterised as matters amenable to the exercise of institutional resources. The question which a focus upon frameworks of knowledge makes possible is the materiality of 'rights talk'. Can 'rights talk', the expression of rights, be used by oppressed groups to change the concept of what is just and unjust? Can the expression of what is just and unjust alter the practice of oppression and exploitation? An adequate approach to


\[^{14}\] Lewis Carroll, *The Penguin Complete Lewis Carroll* (1939). Iain Stewart points to the epistemological position of Carroll's looking glass metaphor in the 1941 work of Llewellyn and Hoebel, *The Cheyenne Way* 41 (1941); see I. Stewart *supra* n. 5, at 107.

\[^{15}\] McCloud, *supra* n. 10.


\[^{17}\] The argument here is not against the holding of ideals but against the assumption that the holding of ideals alone can transform the conditions of everyday life.
considering the materiality of 'rights talk' requires attention to the subject of language, ideology and knowledge - the knower. It also requires changing the epistemological status of the knower to that of an active subject situated in relations within which meaning can be negotiated. This involves seeing 'rights' as meanings temporarily fixed by the institutional practices of the subject's position.

Even to talk of liberalism's premise that the objects of knowledge are separate from the subjects of inquiry is to take part in the objectification of the ways of knowing. It is difficult to discuss the picture theory epistemology without adopting that methodology of understanding in which knowing is about an 'object' rather than a social relation in which beliefs can claim justification.

Picture theory epistemology is not of course peculiar or confined to liberalism but it appears to be what supports the plausibility of the tenets of liberal political philosophy. Within this tradition equality can be established in formal or 'objective' ways, it can be satisfied by patterns of ideas without regard for the life details or individual characteristics of the subjects of the knowledge. That one can 'know' equality exists while living a life in which needs for subsistence, housing and education remain unsatisfied is evidence of the strength of the picture theory in all western liberal democracies. This theory of knowledge and the philosophy of mind tradition of which it is a component has been seen by some as one of the historical, intellectual conditions for the success of liberal political philosophy.18

Liberal legal theory's premises about the ways of knowing contain also a position on the subject of knowledge, the nature of the knower. The picture theory of knowing places the inquirer or subject outside the field to be discovered, separate and at one observational point. The inquirer is an abstract individual19 who has no social position, no position within the social relations of the 'knowledge world'. 'Personal' details of sex, race and class are not placed within the theory, it is assumed these social relations of reproduction/sexuality, ethnicity and production do not contribute to the knowledge which will be 'found'. The object of an inquirer's endeavours is assumed to be the same or fixed, regardless of the different social relations in which inquirer's beliefs are sustained.

Knowledge of law and authority is regarded as non-situated, knowledge which will 'hold good' under different social conditions of inquiry. It will be 'objective' in the scientific sense of able to be replicated or understood as valid regardless of the social relations in which the beliefs about authority are sustained, justified and reworked. Where site has been incorporated into

---

18 Peller argues that 'The metaphoric division of the world into subjective and objective categories, and the ordering of those categories so that one is seen as original and transcendental, form the metaphysical infrastructure for virtually all liberal explanations of social affairs.' See G. Peller supra n. 5, at p. 1265.

19 Peller argues that 'Liberal knowledge .... presumes that an act of cognition can occur separate from the object of cognition and separate from the social forces which it studies' (at p. 1269) and 'the external self-present source which liberal discourses purport to re-present is always an effect of the differentiation of the discourse itself.' Peller supra n. 5, at p. 1270.
liberal legal theory it is never the site of the inquirer but instead the site of the official who is said to recognise the diverse beliefs held within social relations.20 But the identification of the official privileged to distil and represent the diversity of beliefs about authority and the nature of 'legitimate' power is made only after the form of authority has become known, a form of authority 'discovered' by the abstract individual.

The commitment to 'rights' in liberal political philosophy has been taken up in recent work by modern liberal jurisprudence as an issue of the relation between language and the world. The word 'rights' and the word 'law' have become a focus of inquiry.21 The early Wittgenstein's picture theory of language has been used as description of the traditional claim of legal theorists that law is neutral.22 While the original claim was one of political neutrality it has been recharacterised as a claim of 'word' neutrality, that is, the words of laws simply reflect the reality of social life as if words simply represent the 'objects' or constituents of social life.23 The patterns of meaning found within laws would, in a picture theory story, be only that meaning found that really existed among the real objects of social life. The words of laws would be neutral because, in this account their existence does not imply any social or political practices of mediation from or by the world of reality.

The recharacterisation of the claims of political neutrality of laws as one of word neutrality has permitted modern liberal legal theorists to find alternative forms of justification for the belief that laws are logical, rational rule-practices for reaching agreement upon social problems. The recharacterisation of laws as 'word-games' has permitted the modern theorist to become a member of a conversational community whose beliefs acquire the form of rationality,24 while those critics of old-style legal theory are

21 This focus upon the relation between language and the world is not of course restricted to liberal jurisprudence nor does such a focus indicate agreement between theorists. For a broad account of the law and language focus see P. Goodrich, 'Law and Language: An historical and critical introduction', 11 Journal of Law and Society 173-206 (1984).
22 Williams has described the critical legal studies movement as comprised of scholars whose 'central parable' contains 'a rejection of the picture theory, and of the concomitant view of law as neutral ...' Williams' point was that this position '.... necessarily implies that law is political [but] this does not necessarily imply that law is ideological in the sense that it consistently functions to legitimate an illegitimate order.' J.C. Williams (1987) supra n. 5, at p. 471.
23 The problem with this characterisation of law-words as reflecting social life is the assumption that there is one form of social life which the words represent. Pat Williams argues that the 'governing narrative' of rights has a different meaning to a black community. Who has experienced the historical practices of denial personhood, than it does to other groups. She argues that to black Americans rights assertions are empowering simply as assertions of new boundaries around the self which were never previously possible for blacks. The word rights 'is still so deliciously empowering to say. It is a sign for and a gift to selfhood ...' P.I. Williams, 'Alchemical Notes: Reconstructed ideals from deconstructed rights', 22 Harvard Civil Rights -Civil Liberties Law Review 401-433, at 431 (1987).
24 Williams has considered the implications for law of the new epistemology. She identifies 'law' as legal doctrine and argues that it functions not so much to compel specific answers as to provide an approved language for talking about the issues in a given conflict.' The purpose of this approved language is 'to create a consensus about which issues are potentially relevant to its resolution. Doctrine, in other words,
forced to take up positions of irrationality or indeterminacy. In the hands of a modern liberal legal theorist critics of the neutrality model of law are placed as failing to appreciate the irony of their own position of making relativistic claims. How, it is argued, can a critic claim that law words can never be a true representation of reality and expect their own law words to be taken for anything other than one more claim about the nature of real social life no more nor less valid than other claims? In the hands of the modern liberal legal theorist one is either for the rationality of lawyer's conversations about law or one must inhabit the uncomfortable and uncertain world of relativism. Lawyers conversations remain privileged and the meaning of authority is to be decided behind closed, professional doors.

My point is that the adoption by liberal legal theorists of different ways of knowing can provide a theoretical framework capable of discarding the problems which idealism entailed. However by retaining the focus upon lawyers conversations about law, the meaning of words continues to take an ideological form, it continues to be theorised as a set of fixed meanings, a structure from which women are excluded as subjects. New frameworks of knowing appear to hold the promise of seeing 'rights talk' as a resource for building justifications for women's beliefs about systematic dehumanisation and desexualization as women, but this promise appears foreclosed by the ultimate deferral to lawyers talk. Recognition of the practices of deference in writing legal theory, the materiality of these practices, seems to be a requisite of writing a legal theory sensitive to women's experience of authority.

(b) Materialist Theories of Knowledge

Feminist legal theory writing takes place within an academic community in which the picture theory epistemology of the early Wittgenstein is no longer regarded as the obvious theory of knowledge. The later Wittgenstein's work upon knowledge as a 'form of life', in which the knowers are inextricably placed within and not outside, has become another framework of inquiry. In the later Wittgenstein words do not denote or 'pick out' the objects in life but instead are the games by which the knowers describes the scope of the conversation, not its outcome.' Williams (1987) supra n. 5, at p. 495.

But I would argue that the point of the new epistemology is that conversations have no prescribed scope. As Williams pointed out at p. 476 Wittgenstein's major point was that 'once the picture theory's 'old textbook distinctions' are discarded the world can be reimagined.' But Williams' new world is very much like the old, law is either legal doctrine or it is not law. She attributes a stance of agreement, consensus and choice to a conversation about morality which a powerful community has designated as 'law', but a conversation from which many are excluded because they speak an unapproved language, they hold another morality and know other experiences of authority far removed from the notion of choice. I would understand the implications of the new epistemology for law as involving a questioning of the certainty of legal professionals that they hold a special knowledge of law. It involves questioning the notion, in Rorty's words, that 'the voice of the professional always has an overriding claim on the attention of the other participants in the conversation.' R. Rorty, Philosophy and the Mirror of Nature 392 (1980).

Williams, supra n. 5, at p. 474.
negotiate the forms of life. In what has been called the 'new epistemology' of Wittgenstein knowledge itself has changed. It is no longer an object but a social form created by the practices of human inquiry.

The new epistemology is understood to be a materialist theory of knowledge because knowledge is co-extensive with the material practices by which humans transform the natural. It is materialist because the subject of knowledge is theorised as active in relation to established codes of meaning. Within this tradition of theorising understanding some forms of the new epistemology have offered a framework for the writing of feminist legal theory, rather than legal theory 'as usual'. Where knowledge is posed as both a material practice or relation and an objective one the 'new epistemology' appears to present old problems for the development of a specifically feminist legal theory. Those materialist theories of knowledge which retain a place for subjectivity within the framework, instead, appear to provide scope for recognition of different and valid social forms, differences which are not simply reversals of the 'objective'.

One form of the new epistemology has entered the legal theory debates as the retheorisation of the relation of legal language to social practice. In the work of Wittgenstein understanding is the consensus achieved by linguistic practices, assumptions and traditions, but the language use practices are inextricably part of the same world as the practitioners. There are no objective external restraints upon language-use in the earlier sense of words being linked to the objects of reality. Agreement in language use is reached not on whether a word matches the object of knowledge but agreement is the usage within the different forms of life. While the investigation was developed as a philosophy of language the focus was an epistemological one concerning certainty, doubt, truth, and how one can 'have' knowledge. Wittgenstein explained these aspects of a theory of knowledge by arguments against the possibility of private language, a language known only to one person. Certainty could be experienced only as a sharing of public beliefs.

Wittgenstein's notion of the forms of life was undeveloped and mostly unargued. The nature of these agreements, customs, and practices was left vague. A more comprehensive and explicitly argued theory of the nature of the 'forms of life' and their relation to the achievement of shared beliefs is

27 This linking of the new epistemology to a materialist theory of knowledge, the claim that it is materialist, would be regarded by some scholars as inconsistent. I am using 'materialism' to mean 'an ontological thesis about the nature of reality' in which it is assumed human practice is co-extensive with the forms in which it is thought or understood. Writers who insist that a materialist ontology demands a reflection theory of knowledge appear to be wedded to a Cartesian mind/body dichotomy in which subjectivity must either be excluded or understood as a passive mind. See D-H. Ruben, *Marxism and Materialism* 1-8 (1977), and generally A. Collier, Materialism and Explanation in the Human Sciences in J. Mepham and D-H. Ruben, *Issues in Marxist Philosophy, Vol 2: Materialism* 35-60 (1979). Collier says 'materialism is often defined as the primacy of existence over consciousness, or of being over thinking, or of matter over mind, but that such definitions are 'deceptively simple'. (at p. 36). See generally on materialism and knowledge S. Timpanaro, *On Materialism* (1975); T. Benton, *Philosophical Foundations of the Three Sociologies* 170-199 (1977).
found in the works of Marx. Marx's theory of historical materialism has provided a framework for locating the dialectical form of both labour and knowledge in the social life of any society. Historical materialism was written as a theory for explaining the process of social transformation and as a theory for the political practice of achieving the transformation of the appalling conditions of poverty and human degradation in 19th century European capitalist societies. Historical materialism contains a theory of knowledge not unlike the 'new epistemology' of Wittgenstein and others. Knowledge includes both the ideologies of the ruling class and the proletariat, but the substantial works of Marx on the 'forms of life' which are constituted by human labour contain assumptions and ontologies about the validity of different ideologies.

Historical materialism, as a theory of social transformation, was written over a lifetime and therefore it progressed, as a theory, in ways which the writer understood to be a refinement of earlier versions. The later writings have been interpreted as providing a more developed theory but in the structuralist form of assessments or critiques of historical materialism structure overrides any place for subjectivity. This makes the structuralist interpretations disappointing for feminist theory. Marx's earlier writings on historical materialism however provide the details of assumptions regarding 'humanness' or human nature which are integral parts of the materialist theory of knowledge contained within historical materialism.

I will provide an account of historical materialism as a theory of social transformation, in the structuralist tradition as it is one frequently presented as the Marxist theory. The purpose is to discuss the problems which the structuralist account of historical materialism presents for developing a feminist theory, problems which focus upon the preservation of the objectivity of knowledge and which concern the theorisation of the subject in relation to dominant ideologies, the ruling ideas. These themes appear to be the 'new' premises of post structuralism.

Historical materialism began in opposition to the philosophy of Hegel that history was the development of the Idea, or self-consciousness. In the Hegelian tradition the progress of the human mind, enlightenment, was thought to ground the changing form of society. Marx's theory of social change was the opposite; it was the form of society, the social relations of the mode of production which gave rise to the Idea, or ideology. The 'ruling ideas' of any society were 'nothing more than the ideal expression

30 Marx later works include A Contribution to the Critique of Political Economy, Grundrisse, Capital, Theories of Surplus Value.
31 Marx's earlier writings include: Critique of Hegel's Philosophy of Right', Economic and Philosophic Manuscripts of 1844, The German Ideology.
of the dominant material relationships ...\(^{33}\) Social change, or historical development, depended upon struggle and conflict within the relations of production. The relations of production corresponded to a definite stage of development of the material powers of production. The real foundation of a society was the economic structure or sum total of the relations of production.\(^{34}\) While political, juridical and philosophical developments - the superstructure - were based on economic development, and reacted upon that economic base, it was 'economic' conditions which ultimately determined historical development.\(^{35}\) Engels conceded that 'men make history themselves' but, 'only in given surroundings which condition it and on the basis of actual relations already existing, among which the economic relations, however much they may be influenced by other political and ideological ones, are still ultimately the decisive ones, forming the red thread which runs through them and alone leads to understanding.'\(^{36}\)

In any structuralist account - whether of historical materialism or language - explanation proceeds by theorising a system or structure in which there are levels or units which interlock in predetermined ways. Which level or unit is given priority or is determinative 'in the last instance' will vary. The subjects in a structuralist account are 'agents' or bearers of relations and remain disembodied, and abstracted.\(^{37}\) In a structuralist account of historical materialism the 'actual relations' of the mode of production - the economic structure - are given priority over the 'men' who make history. The economic structure is said to determine the process of transformation. However in Marx's early writings it is clearer that the process of transformation is a dialectical one in which economic practices are the lived and interpreted knowledges of situated individuals. Men and women make the history which is the relations of production. Their subjectivity or consciousness of self as humans is an important part of the theory which explains social change as a reworking in social form of human needs.

In *The German Ideology* Marx placed 'human nature,' the assumptions of what are humans 'are like,' as a dynamic within historical developments. Marx argued that the first premise of a materialist methodology of human history was the existence of living human individuals. The first fact to be established, in the explanation of change, was the 'physical organisation of these individuals and their consequent relation to the rest of the nature ....

---


\(^{36}\) F. Engels *Id* p. 202-203.

The Body in Legal Theory

The writing of history must always set out from these natural bases and their modification in the course of history through the action of men.38 Marx's ontology or assumptions of how people are, his 'theory of being,' makes it clear that their subjectivities or knowledges of the relations in which they are situated are part of the 'natural' within which the social relations are formed, maintained and reproduced. People are what they do in life, not individually but activity in a relational form. 'The social structure and the state are continually evolving out of the life-process of definite individuals ...'39 In this theory of being humans are part of nature and this includes both the situated human body and consciousness experienced within that life situation. The Cartesian legacy of the mind/body dichotomy makes it difficult to convey the point that human practice involves the understanding which embodied existence necessarily and sufficiently provides, sufficient because knowledge acquires its form as knowledge in relational, social ways.40 Marx's early writings on the 'essence' of humanness appear to provide an example of the standpoint specificity of knowledge and the limitations which actual life practices place upon representation.

Marx's theory of being, how people are, is embedded in his theory of labour. Humans are definable, and express themselves, by what they do; the first facts of existence are the life-activities by which humans satisfy their existence, by which they produce their means of existence. This involves the activity of transforming nature. But this theory assumes human labour always involves the production of things; there appears to be no place in the theory for the reproduction and nurturance of people, women's work also at the time of Marx's writing.41 The dialectical process by which social practices constituted the 'natural' and the natural in humans, human needs, reconstructed the social form is clear enough, but by omitting labour upon the reproduction of new lives the theory assigns a good part of women's work to some biologically determined realm. The context of Marx's work on human nature was a theorisation of estrangement or alienation involved in the capitalist labour process and this partly explains the emphasis upon things. It was argued that in capitalist relations of production the commodities produced by the worker's labour do not belong to the worker and

---

40 The Cartesian legacy has been the focus of recent feminist philosophical theory, some examples are: J. Thompson, Women and the High Priests of Reason, 34 Radical Philosophy 10-14 (1983); G. Lloyd, The Man of Reason: 'Male' and 'Female' in Western Philosophy 38-50 (1984); Susan Bordo, 'The Cartesian Masculinization of Thought', 11 Signs (1986); J. Hodge, 'Subject, Body and the Exclusion of Women from Philosophy', in M. Griffiths and M. Whitford (eds), Feminist Perspectives in Philosophy 152-168 (1988).
therefore he or she becomes alienated from the species life work, from the species and from nature.42

However the theory remains troubling because it retains the objectification of human labour as a criterion of human knowledge,43 a criterion with which current feminist theory remains beset. Marx argued that it is only when the species can achieve a consciousness of its humanness, in the form of recognising its species powers as its own objects, that alienation will be transcended. Marx wrote, in the manuscripts of 1844:

'It is just in his work upon the objective world, therefore, that man first really proves himself to be a species being. This production is his active species life. Through and because of this production, nature appears as his work and his reality. The object of labour is, therefore, the objectification of man’s species life: for he duplicates himself not only, as in consciousness, intellectually, but also actively, in reality, and therefore he contemplates himself in a world that he has created."44

But this concept of humanness is one feminist theorists are finding difficulty in adopting, both in epistemology and social theory.45 It remains to be seen, in future feminist writing within the marxist epistemological traditions whether Marx's theory of being will provide a fruitful ground for the development of frameworks or ways of knowing.46 Is the devaluation of the use value of labour, its usefulness to others, and the elevation of exchange value in current practices - the commodification of labour referred to in the extract above - an explanation for current practices of objectification? Must Marx's concept of humanness, as involving the objectification of self and others, be interpreted as one more example of a male viewpoint? While it is trite to identify such a theory as simply that of an individual male writer whose understanding is limited to the duplication of lives being the labour of another, it is not so trite to recognise the theoretical resources available at the time as exemplaries of masculinist knowledge.

If one regards the stage of objectification and estrangement of self and others as Marx intended, as a part of the Hegelian dialectical process of unity, self-estrangement and reconciliation in a higher unity,47 Marx's theory provides something more than just an apt description of a sexist society or just a realist account of a stage of social development through which western

45 Feminist work which has been critical of objectification of self as part of a theory or concept of humanness includes: S. Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication', 72 Va. L. Review 543 (1986); R. West, 'Jurisprudence and Gender', 55 University of Chicago Law Review 1-72 (1988).
46 Elaine Scarry provides an excellent epistemological work focusing upon Marx's use of body metaphors, in E. Scarry The Body in Pain, 243-277 (1985).
phallocentric civilisation has not yet passed. Recent understanding that 'objectivity' is knowledge from a gender position - the male viewpoint - begins to fill out some of the themes of the dialectical form of labour and knowledge within historical materialism.

Nancy Hartsock has argued that the sexual division of labour in Western societies, the different daily activities of males and females, may have given rise to a different consciousness of the world. From a male viewpoint, which Hartsock calls 'abstract masculinity,' there are clear boundaries between self and others, public and private.48 It is male consciousness which has been enshrined as objective knowledge. One focus of writing feminist legal theory is to inquire whether current understanding about the nature of law represents the consciousness of male lives, in the sense that professional knowledge about the nature of law is a representation about authority from a male standpoint.49

(c) Post Structuralist Epistemologies

Post structuralist theory takes different forms in different disciplines and coheres as 'post structuralism,' as an 'ism,' only by a common origin in Saussurian linguistic theory.50 Saussure theorised language as a structure within which meaning was produced by the differences between the words or signifiers.51 Structuralism became that theory of meaning in which the networks of differences supported themselves. Post structuralism was that dissatisfaction with the subject as a 'programmed' individual. Post structuralist theories have differed in the extent to which human activity, subjectivity or consciousness was placed as an account of the active subject but nevertheless they have retained the focus upon the primacy of language and discourse. It is difficult to find an epistemology or theory of knowing about authority from a male standpoint.

49 Feminist work in legal theory which has linked knowledge of what law means with the theory of a male standpoint includes: K.A. Lahey, '... until women themselves have told all that they have to tell' 23 Osgoode Hall Law Journal 519-541 (1985); H.R. Wishik, 'To question everything: The inquiries of feminist jurisprudence', 1 Berkeley Women's Law Journal 64-77 (1986).
within post structuralism as the priority retained for language over subjectivity has meant the subject is always theorised as knowing within terms whose meaning is never fixed. Where meaning is always deferred and present justifications of the authenticity of belief by reference to experience must be rejected epistemological concerns have been transposed into those of hermeneutics or 'the conversations of mankind'.

However, where meaning can be regarded as temporarily fixed or as contingent upon the time and place of the conversation certainty can be claimed from experience and knowledgeableability posed. This does not imply any return to picture theories, beliefs gain their authenticity as knowledge by inclusion in the conversations which language and power make available. The difference that matters is that exclusions from conversations by use of reason, logic, science, expertise or professionalism can be identified as privileged beliefs, beliefs which would otherwise remain as barriers to those constituted by powerful conversations as irrational, illogical, unscientific, inexpert or simply unknowledgeable.

Structuralist linguistic theory was a resource available for the psychoanalytical theory of Lacan, the political theory of Althusser, Foucault's early archaeologies of knowledge and the deconstruction methodology proposed by Derrida. In each, language as systems of signification is given priority over subjectivity; meaning is always deferred and certainty forever dispersed. Lacan emphasised the primary of language, a system of symbols or signifiers, in the construction of the individual as subject or self. It is the child's entry into the symbolic universe, via language, that constitutes the child as self or separate from his or her mother. The idea of acquiring a position in consciousness by identification through language with imaginary signifiers was taken up by Althusser in his concept of interpellation. Subject positions are created within discourse and the human person is located within the theoretical structure only so far as he or she may occupy such a position, a position which must always be the site of various intersecting discourses. This Althusserian theorisation of the social construction of the human subject has borrowed from Lacan the idea that the individual takes up his or her social position and subjectivity as a person by entering into the discourse of language. The individual is interpellated into the social, in the Althusserian sense of being hailed by the categories of speech and thought; the individual recognises himself or herself as the person hailed and is thereby constituted as a person.

In The Birth of the Clinic, an early archaeology by Foucault of medical knowledge, meaning was that play of signification between words. Foucault was writing a history of the beliefs by speakers that words

---

52 Rorty uses the phrase 'the conversations of mankind,' see R. Rorty, Philosophy and the Mirror of Nature (1980). While the phrase is intended by Rorty to cover the conversations of both men and women I have retained the phrase in this article only where a conversation or theoretical position appears to arise from a male standpoint.


represented objects of pathological anatomy. Knowledge was that relation between words which was forever being rearranged at another site.\(^55\) In The Archaeology of Knowledge he stated that he had no wish to exclude or discourage others in their efforts to uncover and free 'prediscursive' experiences from the 'tyranny of the text', he did not wish to 'neutralise discourse, to make it the sign of something else' nor to 'pierce through its destiny in order to reach what remains silently anterior to it ...\(^56\) He preferred to 'maintain it in its consistency, to make it emerge in its own complexity'. In the 'Order of Discourse' a commentator upon the text was understood by Foucault to be simply reiterating that meaning which was within a text and always silently beyond.\(^57\) Derrida was writing in opposition to the belief that western thought has been structured in terms of dichotomies or polarities: good vs evil, truth vs error and man vs women.\(^58\) Derrida's project was to expose the privileging of terms given first place in the preceding list. Meaning was to be located outside these oppositional structures, within the gaps, elsewhere, and at another time. Meaning was difference from the logical differences within the structure of language and deferred. The deconstructive project involved reversing the priorities of oppositional structures and displacing them. Simple reversals of logocentrism would not be enough, one had to tease out the 'warring forces of signification within the test itself' by the techniques of displacement, and supplement.\(^59\)

One of the problems which these linguistically oriented forms of post structuralist theory pose for a feminist writing project in legal theory is the absence of a position for the active, intentional and inquiring subject. It is assumed the individual, the subject, is constituted by the terms of the discourse. As an epistemology there is no space provided for the negotiation of subjectivity, identity, or personhood. In each of these linguistically oriented theories knowing is separated from the knowing subject - it has an existence of its own. It is the referent of the signifiers - the words, and is deferred. In separating knowledge from the consciousness of subjects it appears the subject/object epistemology of the picture theory is resurrected where it had been abandoned. As theories these versions of post structuralism appear unable to contribute to an effective political practice against oppression primarily because subjects are understood as unable to challenge the dominant meanings which the words are represented as holding.

Other versions of post structuralist theory provide resources capable of grounding a political practice. If subjectivity is given a non hierarchal place with language/signification knowledge and meaning can be represented as

---

59 Barbara Johnson, Translators introduction to Dissemination p. xiv (1981). Feminist discussions of Derrida and deconstruction include E. Gross Derrida, Ingaray and
entering in the subjectivity of the individual. This means she can claim to hold a justified belief that her experiences of life give to the language a better and more comprehensive meaning than that embedded in the dominant discourse. If she cannot claim at least an authenticity to the new meaning of words, at least a temporary fixing of meaning, she can have no political practices. We must assume practice is underwritten by communication through word or deed - both can only acquire status as practical activity through language. Post structuralist theories which have retained a place for subjectivity appear to be more able to ground a particularly feminist legal theory.60

In the work of the French philosopher Foucault language and subjectivity are retained in forms which do not presuppose the priority of either. Foucault's work has become controversial as a feminist resource perhaps as a result of his explicit disinterest in feminist politics. It is certainly capable of both feminist and patriarchal readings.61 It appears to me that his concept of the subject as an effect of discursive, disciplinary power upon the body is one in which subjectivity is retained in a multiple and non-essentialist form.62 He uses the concept of body in the tradition of Merleau-Ponty, as a 'body subject,' which carries the meaning of both the situated physical body and the intentional knowledgeable subject.63 The body is subjectivity in a post-Cartesian framework; why assume bodies do not encompass thought and intention?

In the work of Foucault knowledge emerges as that temporary form of truth constituted by institutions which produce and monitor discourse.64

---

60 Chris Weedon emphasises the importance of subjectivity in feminist theory, see Feminist Practice and Post structuralist Theory (1987).


64 M. Foucault, 'Two Lectures,' in C. Gordon (ed), Michel Foucault: Power/Knowledge (1980).

---

Language is the site of struggle and the thing to fought for; control of meaning is the victor's prize, but only as an emblem or effect of power. The focus of Foucault's later works is upon a study of bodies as the effects of power/knowledge. He states 'we must attempt to study the myriad of bodies which are constituted as peripheral subjects, as a result of the effects of power.' The subject or individual becomes both the effect of power and the 'element of its articulation.' In this framework discourses of biological difference, can be theorised as temporal, temporary and as resources. Discourses about female biology and bodily capacities are thereby made available, not for constructing a vision of the true woman or even for repudiating others visions but as metaphors for knowing which privilege women's historically specific social positions.

In Foucault's framework power is invested in the body. This means that the language which we use to give meaning to our experience of the body is available to structure and constitute women's social experience beyond what is normally understood as matters of biology. If we think of bodies as elements in the articulation of power, in Foucault's sense, we can begin an inquiry into language as expression and the practices of expression. This inquiry would locate male and female bodies as the temporal sites at which meaning about sexuality, labour and identity are constructed. It would have as a goal the mapping of the sexualized forms of representations about power/authority and the ways in which these representations enter the conversations of humanity.

Representation appears always to have had a sexualized form. It appears to be a legacy of the picture theory epistemology that power has become located outside and separate from an embodied subject in the same way that 'representation' is commonly understood to reflect the nature of the object, rather than the nature of the subject. The implications of changing inquiry from language about things to language as expressive of subjective

---

68 M. Foucault, 'They are not only its inert or consenting target: they are always also the elements of its articulation. In other words, individuals are the vehicles of power, not its point of application.' Id p. 98.
70 Marie Ashe's metaphor of birthing provides an example of this kind of endeavour. She draws upon her experience of creating a new life to constitute the theorisation of law as labour, uncertainty, division, coherence and promise, see 'Minds' Opportunity: Birthing a post structuralist feminist jurisprudence' 38 Syracuse Law Review 1129-1153 (1987).
life,\textsuperscript{72} include understanding 'representation' as the imaginary or metaphorical form in which we constitute the 'forms of life.'\textsuperscript{73} Representations are imaginary in the sense they are beliefs that meaning pre-exists the communication of representation. That we commonly understand the term representation to be 'about' a pre-existing known object and the term imaginary to be 'about' the fictional is simply the effect of resources invested in the picture theory epistemology from which representation has traditionally taken its meaning.

Once the move is made to an epistemology in which knowing is an active involvement of the subject in intentional and purposive practice upon the world all representations of what the world 'is like' are imaginary or creative, as meaning no longer pre-exists the practices of representation. If language is understood to be expressive of embodied practices of situated experience, work can begin on how these forms of expression constitute our 'being' in the world and, particularly, what kinds of social relations are built upon these 'theories' of being. We can begin to consider other theories of being.

\section*{II. KNOWING ABOUT LAW: LAW AS EMBODIED IMAGINATION}

In a feminist legal theory project inquiry into the sexualized forms of representation would not begin with questions regarding the nature of 'law' as a discrete phenomenon.\textsuperscript{74} Law cannot be an object as knowledge is not separate from the inquiring subject so it would not make sense to inquire into matters of its nature. It would be assumed that mainstream theories of what law 'is' are the representations from the male experience of power, representations from positions of empowerment.\textsuperscript{75} Considerable work has already been done on the jurisprudential settlement reached for constituting the new class order of the 17th and 18th century English nobility.\textsuperscript{76} It has been argued by Duncanson that the 'rule of law' and its jurisprudential supports is that theoretical position which enabled a new arrangement of power to be distinguished from the aspirations of the powerful.\textsuperscript{77} Law as a

\begin{itemize}
\item \textsuperscript{72} Feminist work of this kind includes Teresa de Lauretis, Alice Doesn't: Feminism, Semiotics, Cinema (1984); Kaja Silverman, The Acoustic Mirror: the female voice in Psychoanalysis and Cinema (1988).
\item \textsuperscript{73} Peller argues that 'representation is always interpretation based upon the interpreter's metaphors for constructing reality.' Peller, supra n. 5, at p. 1270.
\item \textsuperscript{74} Duncanson has identified the work of Hart and Dworkin as 'versions of jurisprudence [which] claim to be able to provide accounts of law such that it can be identified independently,' versions which he labels as 'law as a discrete phenomenon.' See I.W. Duncanson, 'Law, Democracy and the individual' 8 Legal Studies 303-316, at 305 (1988).
\item \textsuperscript{75} Duncanson has noted 'I am suggesting that positivist theory has as its silent premise the existence of a social system like that of the eighteenth century as it may have looked to men like Lord Chesterfield.' Jurisprudence and Politics 33 Northern Ireland Legal Quarterly 1-19, at 11 (1982).
\item \textsuperscript{77} I.W. Duncanson, 'Jurisprudence and Politics' 33 Northern Ireland Legal Quarterly 1-19, at 8-11 (1982); I.W. Duncanson, 'Moral Outrage and Technical questions: Civil
'discrete phenomenon' is understood to be a representation from a class position, that of the powerful. Law as an 'interpretive concept' appears to make the legal process available as an authoritative representational form for all players but this account limits representation to those life experiences of persons holding authoritative community positions - the officials of the official order. Can the jurisprudential settlements on the autonomy of individuals, underwritten by the development of 'legal rights,' be interpreted also as a sexed representation about power, a representation which was drawn from the experience of separateness in male life and which constituted the plight of the female as the atomised relations of capitalism progressed? Feminist political theorising has drawn our attention to these issues.

If we begin to theorise law as language expressive of subjective life representations of what law 'is' become the resources for building feminist legal theory. In each of these expressions about 'law' we can inquire into the 'forms of life' from which the subjects have taken their theories, assumptions or ontologies of being. 'Law' then becomes a theory of embodied imagination, the metaphors of 'being' in the world, and the feminist legal theory project becomes the task of engaging with those practices which appear to have excluded women's imaginings of life possibilities from the conversations of 'humanity.'
These practices would appear to include the professionalised form of legal theory writing and beliefs about the nature of legal reasoning. It is part of the legal theory tradition that we engage with other theorists who have constructed their project as one of the nature of 'law' as a discrete phenomenon. Because 'law' has been understood to be legal doctrine and other rulings or interpretations of officials legal theory writing for feminists carries sanctions of irrelevancy or unprofessionalism if departures are made from the representations with which she is engaging. If we want to begin with a conception of 'law' as embodied imaginations, so that its sexualized form can be recognised and expanded with the metaphors from female embodiment, part of the writing project must include the mapping of these 'sanctions'. This is not to paint a picture of a hostile and grudging academic community in which feminist writing projects are ridiculed and publications disproportionately rejected, although such practices are well known already. It is instead to include in the feminist writing project the interrogation of our own assumptions about 'law', in order to permit the sexualized representations from women who are not professionally trained in legal writing to enter the conversations upon the experience of authority. This is my original problem of investigating those practices which would permit the writing of an account of power and authority which was sensitive to women's experience of that authority. I simply do not know what such an account would be like, but I suspect it would be unlike present legal theory.

Part of the feminist legal theory project must include inquiry into the ways in which legal reasoning transforms the embodied imaginations from male lives into the 'objective' form of doctrine which passes for the

with Robin West's thesis that the narrative in legal theory, like all narrative, brings us face to face with our moral selves, our moral options, and our capacity for moral action (at p. 209); instead I would maintain that the narrative in present legal theory brings some people face to face with their selves, options and capacities but not most people, and mostly not women.

85 A letter written by myself and a male colleague to the editor of Ratio Juris in 1988, commenting upon the difficulties which the 100% male composition of the Advisory Editorial Committee would present for women writing jurisprudence, was acknowledged by a reply from the Editor addressed only to my male colleague. Copies of correspondence available on request. A recent article in an Australian journal by Kim Rosser on the 'Law and Gender' course at the University of N.S.W. Law School inspired a male lawyer to write to the Editor that next there would be courses on 'animals and the law'; see K. Rosser, 'The Feminist Project in Action', 13 Legal Service Bulletin 233 (1988), and B. Walsh, 14 Legal Service Bulletin 38 (1989). A feminist paper entitled 'Standpoints within Taxation Law Scholarship' presented by myself to the Australian Law Schools Association Conference in Sydney in 1988 at a Revenue Law interest group session prompted a participant, a Dean of a Law School, to remark that feminist scholarship was not appropriate in taxation law.
86 The links made here between authorship and authority can also be found in the women's writing genre, see N.K. Miller, 'Changing the subject: Authorship, Writing and the Reader' in T. de Lauretis (ed), Feminist Studies/Critical Studies 102-120 (1986); K.B. Jones, 'On Authority: or, why women are not entitled to speak' in I. Diamond and L. Quinby (eds), Feminism and Foucault: Reflections on Resistance 119-133 (1988). See also M. Foucault, 'What is an Author?' in D.F. Bouchard (ed), Language, Counter-Memory, Practice 113-138 (1980).
87 I think Pat William's writing on the black experience of authority provides such an account, see P. Williams, 'On being the object of Property' 14, 1 Signs 5-24 (1988).
The Body in Legal Theory

We have to start 'conceiving reason differently,'89 a task which has already constituted the conditions for creativity in feminist social sciences.90 Criteria of objectivity and neutrality have been already argued as specific practices of displacing the positionality of knowers - whether in the natural sciences,91 the social sciences92 or the law tradition.93 'Objectivity' in legal research is one more writing practice with which the feminist legal theory project has begun to engage. However, to expand inquiry into the practices of positionality to include the legal reasoning of judicial officials appears to present other kinds of problems. If one focuses upon legal decisions as 'just' the representations of male lives one nevertheless confirms that embodied imagination as the 'law' vision. The problem appears to be how can one overcome the 'looking glass effect,'94 where the looking glass which is 'law' is that embodied imagination with which we appear compelled to engage? The resolution seems to be that the embodied imaginings or looking glass effects, can never be overcome, because they remain simply an expression of what might be. To aspire to overcome particular embodied representations because of their partiality or because of a different 'embodiment' would be to return to the picture theory world of certainty with its known hazards.

If we begin to conceive of legal reasoning without its 'lawness,' that is, not as a privileged representation but as just representation we all become its 'officials.' We can undertake our research outside the forums of the official. Continuing to heed the relevance of judicial decisions and legal doctrine becomes one writing practice of maintaining 'relevancy' and 'professionalism' under conditions not of our making, conditions which must remain contested.

88 Catherine MacKinnon has shown how abstract rights 'authorize' the male experience of the world.' She argues that 'the liberal view that law is society's text, its rational mind, expresses this in a normative mode ...' C. MacKinnon (1983) supra n. 1, at 658.


93 K.A. Lahey, '... Until women themselves have told all that they have to tell ...' 23 Osgoode Hall Law Journal 519-541 (1985); M. Matsuda, 'Affirmative Action and Legal Knowledge: Planting seeds in plodded-up ground' 11 Harvard Women's Law Journal 1-17 (1988).

94 I. Stewart, supra n. 5, at 118.
III. WRITING FEMINIST LEGAL THEORY

(a) An Inquiry into the Practices of Constituting Being

The aim of this section is an inquiry into a set of practices which appear to constitute women as disfigured, practices which appear to place a woman's subjectivity in a bodily form which she does not experience as 'self'. The aim is to develop the theory of law as embodied imagination by tracing women's resistance to or denial of the myriad representations within privileged or 'policed' discourses upon the nature of women. It is an archaeology of finding women's embodied imaginings, their theories of being which have been excluded by the professionalised and masculinized nature of the disciplines. It is a preliminary inquiry which focuses upon disciplinary conversations.

I am assuming that a feminist writing project in legal theory should include current political practices of women as the resources of the theory, that the theory should attempt to make sense or give meaning to practice, not in a facile, post hoc way but, by incorporating the validity of women's experience into a conversation where those experiences are interpreted as justified beliefs. Individual experience takes the form of knowledge in social practices which provide justifications for the validity of experience. This place for theory in the development of knowledge - the social forms of understanding - is not new, it is assumed within the practices of any professionalised knowledge. It appears to be new only where the experiences one seeks to bring within a professionalised discipline are outside that discipline. The need to articulate the validity of experience and the practices of justification are the effects of the disciplinary exclusions of closed conversations - whether exclusions on grounds of reason, logic, science, expertise or professionalism.

While the inquiry of this section is into the practices of disfigurement, the development of feminist legal theory could of course be undertaken within any set of practices which constitute human subjectivity. The practices of disfigurement seem to highlight the present parameters of identity politics within women's writing in the humanities and the social sciences. It is a set of practices which are 'rich' with women's resistance to their meaning, resistance and denial taking place largely outside the

98 See generally on the writing and rewriting of female bodies and identity, K. Chemin, The Hungry Self (1985); S. Gubar, "The Blank Page" and the Issues of Female
ritualised form of practice upon which this preliminary study focuses. But this disparity between the obvious rationality of the legal practices of disfigurement and women's struggles against that obvious rationality is precisely that point available for mapping the sexualized forms of representation, the forms which women experience as oppressive, as the authority of others.

In women's resistance to the practices of disfigurement are different embodied imaginings about human life, what it is like to be human. A world imagined from the position of one whose labour and sexuality have been constituted as female is a different world. The 'legal' practices of disfigurement take place within the traditions of awarding compensation for pain and suffering, a tradition often located as a tort or civil wrong on the part of one and the awarding of monetary damages to another for an act or failure to act which has occasional bodily harm. Bodily harm is constituted as disfigurement by the injured person conforming to that experience of pain and suffering considered appropriate to his or her body. These legal practices are simply one of the many practices in which women are required to live or experience a male theory of being. While I have referred to the practices of disfigurement as 'legal' for the purposes of clarity, I wish to withhold any conclusion upon in what sense they are legal, for the aim is to generate the sense in which women experience authority in the practices of disfigurement.

These practices of disfigurement are aptly described by Mr Justice Walters in his decision of the South Australian state Supreme Court in 1979. He was explaining to a young girl who had suffered burns to her body the life-activities which would open to her as she came, in his Honour's words, 'face to face with the experience of womanhood.' He said:

'...a matter which .... in my view, creates one of the most serious consequences for the appellant is the effect that the scarring and disfigurement of her body will have on her sexual attractiveness and her prospects of marriage. Although the scarring and disfigurement will not, in the nature of things, deprive her of her chance of marriage, I think the time will come when, if she should form an attachment to a young man, or if indeed she receive a proposal of marriage, she will feel bound, under a sense of moral duty, to reveal the imperfections of her body and the unsightly scarring which disfigures it. In the event of her marriage, the problems likely to be associated with the happiness and comforts of a fulfilling marriage life cannot be discounted, even though she may have a patient and understanding husband. It is true that the scarring and disfigurement can now be concealed by a suitable mode of dress, but the appellant has not yet had to come face to face with the experience of womanhood and all the vagaries of fashion. When she does so, she may find that the...'

realities of life will not be as kind to her as they have been up until now. 99

In this account a woman’s imaginings of the realities of life have been excluded by the practice of representing the text as an objective conclusion upon her future. The practices whereby a legal text is understood as an instance of reason or logic, of rationality, exclude a different embodied imagining. Hers would not be rational within the logic of the text, hers would not complete the pattern set out by the practices of legal reasoning.

A woman’s embodied imaginings are silenced by the available discourse, in the sense that any departure from the script already written robs the practice of their rationale. Why present an injured body to the court on the grounds of disfigurement if you have not suffered emotional stress? The legal meaning of disfigurement is the emotional distress. There are other juridical discourses available where injured bodies suffer financial loss caused by the disfunction of bodies, but these are not the practices of disfigurement. A woman is silenced because the text only has a rationale when she follows the script, her presence in the court is given the meaning which the representational practices of the text provide. The point is that these professional practices of representing the judicial text as an instance of rationality contribute to the experience of disfigurement in an injured female body. She is required to demonstrate emotional pain and suffering appropriate for her sex, and thereby verify the sex-specific conceptions of beauty and disfigurement inherent in the ‘professional’ theory of being a woman. The legal text as an instance of rationality provides the justification that her account of being injured has taken the form of her knowledge of disfigurement.

Scientific traditions of establishing proofs or the truth of an object represented have found their way into judicial practice of all kinds, they are not confined to the constitution of disfigurement but they have a long tradition in disfiguring practices. Disfigurement depends upon medical and legal professionals attesting to an injured woman’s bodily departure from current aesthetic standards of beauty and her emotional departures from normal standards of emotionality - in the latter case the expert is required to attest to her normality as a female by her due departure from the normal or male standard. The introduction of professional knowers, the experts whose observe from fixed points, repeats the scientific form of proof by positioning observers who report upon an ‘object’ from different points. 100 The concurrence of observation and report establishes the proof that she is indeed disfigured for the same object is thought to have been observed from different angle points. Her body is inspected by a professional who gives expert evidence on her departure from the aesthetic norm. Her mental suffering is


100 Woolgar gives an account of the scientific tradition of establishing certainty by observations from different positions, S. Woolgar, Science: The Very Idea 72 (1988).
assessed by a professional who also gives expert evidence on the greater propensity of females to suffer emotional stress.

Each is a discourse on male sexuality, in each is a theory of being in which human flourishing is to follow the embodied imaginings of the male enlightenment. A woman with facial or surface injury is required to display her body before an array of 'objective' eyes and confess that she does indeed suffer the emotional stress of living with a female body which has been injured. She may even be required to confess that her body is her only asset, which she would then be required to qualify and clarify and make clear her meaning - that the idea of 'woman' entombed in the juridical discourse of disfigurement is that of an object of exchange, amongst males. The scripts made available in professional discourses provides meanings of female experience which have been produced in closed communities.

These theories of being for women are located in precise practices in which female subjects negotiate their consciousness of self, identity and flourishing. In some discourses of male sexuality the body of a woman is of value when offered in marriage, it may be seen as her only asset in that transaction, as if her body is the sign of another's sexuality. The script may require her to confess that her body is his sexuality. She must clarify her meaning and make it clear that her bodily injury is in fact an injury to her sexuality, though only from the point of view of her prospective partner, as if 'woman' is a body upon which the sexuality of another can be writ.

The juridical dialogue foretells the requisite practices of, and ethical requirements of, an unveiling of the asset to be offered to a potential buyer and the likely connections between the sight of her body and the prospects of marriage. It also foretells of those daily life rituals whereby her body is constituted as a sexual object for the comforts of another; while it appears to be her happiness and her fulfilment in 'married life' that is under consideration the story is foretold with the gaze of another. It is through the eyes of a potential husband who must look at her disfigured body that her comforts and her sexuality are foretold. She will, in this juridical tale, be afforded only so much of comfort and sexuality as he can muster. The meaning of her female experience presented to her by professional discourse is part of a subjectivity which she experiences as multifaceted, as resourceful, repellent, disruptive and coherent. The historical meanings within the practices of male sexuality are resources for re-imagining the nature of women's flourishing, the embodied imaginings set within the practices of everyday life, practices in which women live historically specific lives.

The young woman in the judicial dialogue will become a disfigured woman as she lives out her life within a female body which will not be permitted to be concealed by a 'suitable mode of dress' and within a consciousness in which femininity has precise and proscribed emotional boundaries. Her female body and her female consciousness will be moulded according to the particular social and political agendas of her time.101 She

---

101 This idea of consciousness being moulded according to a political agenda is Lacqueur's. T. Lacqueur, 'Orgasm, Generation and the Politics of Reproductive Biology' in C. Gallagher and T. Lacqueur (eds), The Making of the Modern Body 1-41, (1987). While Lacqueur's concept might suggest little space for the active subject
will be required to exhibit distress at her embodiment, an embodiment of his diminished sexuality. The judicial dialogue foretells of the life activities through which she will, in the words of this particular professional 'authority', 'come face to face with the experience of womanhood.' But there are other experiences of womanhood, there are other experiences of what sexuality is like for women with bodily injury.

(b) Re-Mapping the Forms of Human Flourishing

A feminist legal theory project should aim to trace those practices in which women resist the sexualized representations of male lives. It should be asked in what ways do women's theories of being re-map the forms of human flourishing? Part of this project is to highlight the specific practices of displacing the positionality of knowers, here the forms of legal reasoning and textual mediation and promotion of professional knowledges. The knowledge that 'woman' has a greater propensity to suffer emotional distress has been produced under long and diverse material conditions in Western civilisation. This knowledge continues to constitute female subjectivity and is maintained in those practices, among many others, whereby the legal text is understood as an instance of rationality; other expressions of female embodiment must compete for positions of knowledgeability within communities of women. The conversations of 'mankind' displace women as knowledgeable about emotional life and emotional experience. The professional, masculine maps of human flourishing must be placed in the legal theory project as maps, so that the practices of their resistance can be brought within feminist theorising in ways in which highlight the continuous renegotiation of meaning.

Aristotle's theories of generation and sex distinction provided a purportedly objective account of the reasons woman was less rational that man; she was an imperfect male because her body lacked the necessary vital heat to produce a perfect bodily form - that is, the male form. The economic conditions of the nineteenth century Victorian England produced the knowledge that woman was governed by her reproductive capacities. Her menstrual periodicity signalled an unstable bodily economy, her reproductive

I have read it positively in the sense that subjectivity is negotiated within practices of meaning from which the subject is never excluded.

102 Young v. Woodlands Glenelg Church of England Girls Grammar School Inc. (1979) 85, L.S.J.S.


104 See Carroll Smith-Rosenberg's study of Victorian middle-class women's attitudes towards their own sexuality 'A Richer and a Gentler Sex' 58 *Social Research* 283-309 (1986).
functions were offered as the basis for her greater emotional volatility. Medical professionals testified that women were more 'nervous' and emotional partly because of the necessities of concealing sexual desire, which was considered to be one of the 'forces bearing upon the female, who is often much under its dominion ...'

During the nineteenth century the knowledge that women's greater emotionality was produced by her reproductive functions and her sexuality, that 'woman' was naturally emotional, was accompanied by the production of the new knowledge that insanity in women was caused by their sexuality. Whether a woman was 'normal' or insane could depend upon different readings of her bodily desires. Nineteenth century medical treatments for female maladies were the conditions under which male professionals ousted the female midwives from health services for women and generated for themselves new areas of practice. Victorian women lived the contradictory practices which brought with them the diagnoses of normality or insanity.

The psychiatric photography of Dr H.W. Diamond at the Surrey Asylum in 1848 is one instance of the aesthetic conventions of the era. The 'sanity of female inmates was often judged according to their compliance with middle-class standards of fashion;' and yet, too much attention to dress and appearance was another sign of madness. Diamond valued his photographs for their objectivity, he believed they were valid records of types of insanity. His female subjects were arranged and posed, with the finest attention to detail and dress; insanity was depicted by untidiness and melancholic expression, or perhaps by a dress out of character with a subject's class or advanced age. Dr Henry Maudsley managed to build an eminent medical career upon his practice of mental diseases. His studies of the 1870's found that criminals had a natural affinity for evil, that crime was a disease like insanity. His theories of physiological determinism led him to the knowledge that members of the criminal class were 'physically deformed as well as morally corrupt, [they were] recognisable by their 'badly formed angular heads' and, in the case of women, by their ugliness and gracelessness. The practices and knowledge sketched in brief here, of masculine aesthetics, of female insanity and sexuality have contributed to our present meaning of 'woman' and continue to constitute the feminine body according to the political agendas of the latter half of the twentieth century.

---

107 Dr R.B. Carter writing in 1853 on female emotionalism. In Ilza Veith, Hysteria: The History of a Disease p. 201-2 (1965). This reference to Dr Carter was obtained from Mary Poovey supra, n. 106.
109 E. Showalter, supra n. 108, at p. 84.
110 E. Showalter, supra n. 108, pp. 84-86.
Laqueur has written of the discontinuity in representations of male and female bodies and questioned the nature of the political agendas underlying representations of bodies and their sexual differences.\textsuperscript{112} His work on the medical and philosophical production of knowledge concerning reproductive biology points to a shift of interpretation of bodies during the early eighteenth century. Laqueur argues that the old model was one of hierarchical ordering, by which he means they were vertically ordered and 'according to their degree of metaphysical perfection, their vital heat, along an axis whose telos was male ...\textsuperscript{113} This paradigm led to the discoveries, of the third century B.C. by the anatomist Herophilos, of the homologous nature of male and female reproductive organs. Galen, in the second century A.D., claimed that a woman had testes very much like a man's, 'one on each side of the uterus, the only difference being that the male's are contained in the scrotum and the female's are not.'\textsuperscript{114} Until the eighteenth century in medical literature the reproductive organs of the female were represented as the inversion of the male, a homologous representation that persisted in popular culture to at least the nineteenth century.\textsuperscript{115} As women were assumed to be a version of the male, bleeding in men and women was 'regarded as physiologically equivalent, nose bleeding and menstruation were equivalent signs of the resolution of fevers.'\textsuperscript{116}

This homological ordering of bodies changed in the eighteenth century to a new model of incommensurability, in which male and female bodies were regarded as 'horizontally ordered, as incommensurable ...'\textsuperscript{117} The assumptions of homologies was inadequate in light of the new politics and society of the Enlightenment. Fundamental sexual differences between male and female bodies were sought as the political agenda changed. Political theorists such as Hobbes argued that there was no basis in nature for authority of king over people, nor man over woman.\textsuperscript{118} As Londa Schiebinger argues 'to the mind of the natural-law theorist, an appeal to natural rights could be countered only by proof of natural inequalities.'\textsuperscript{119} Laqueur argues that 'the political, economic and cultural transformations of the eighteenth century created the context in which the articulation of radical differences between the sexes became culturally imperative ... New claims and counterclaims regarding the public and private roles of women were thus

\textsuperscript{111} E. Showalter, supra n. 108, p. 118.
\textsuperscript{113} T. Laqueur, supra n. 101, p. 3.
\textsuperscript{114} Galen \textit{De semine} 2.1, in \textit{Opera omnia} C.G. Kuhn (ed) 20 vols (1821-33), 4: 596. This reference has been obtained from Laqueur supra n. 101, p. 2.
\textsuperscript{115} T. Laqueur, supra n. 101, p. 2.
\textsuperscript{116} T. Laqueur, supra n. 101, p. 8.
\textsuperscript{117} T. Laqueur, supra n. 101, p. 3.
\textsuperscript{118} T. Laqueur, supra n. 101, p. 18.
contested through questions about the nature of their bodies as distinguished from those of men.120

(c) The Order of Simulation and Scenario

The aim of writing feminist legal theory should include the interrogation of current frameworks of knowledge as a form of practice in which resistance can be placed as an embodied imagining. The political agendas of the period have constituted the postmodern conditions of our writing121 in which models of the real are created without origins or realities. Representations can only simulate the real, they have become imaginary in which each is a negation of the fixity of any sign.122 With the deferral of any sense in the real by present conditions of writing, representation has taken on the form of the imaginary and has become a scenario of power, which endlessly repeats its attacks upon the order of the real.123

The feminist legal theory project is set within sexualized representations of a simulated female body. Male and female bodies are represented as the same, as equal, the simulacrum of the other. In the professional discourses of 'mankind' the embodied imaginings from male lives constitute male and female experience as if they were real, a position which can become true only for the male conversants. Women are required to simulate another's reality.

In the sex discrimination discourse of Australia and the United Kingdom a person who wishes to claim a juridical remedy must begin with an assertion of social commensurability for male and female bodies. The practice of litigation requires proof that the individual has been treated unfavourably in circumstances in which a person of the other sex would not have been so treated. The individual must first specify the circumstances which would be the same, or not materially different, for a person of the other sex.124 Unless the dialogue is constructed in such a way that the

120 T. Laqueur, supra n. 101, p. 35.
123 J. Baudrillard, supra n. 122.
124 In Australia discrimination on the ground of sex is made unlawful by both Federal and State legislation. The Federal or Commonwealth legislation, Sex Discrimination Act 1984 provides a definition of 'direct' discrimination, as follows, Section 5:

'5. (1) For the purposes of this Act, a person (in this sub-section referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;
(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,'
individual asserts the sameness of economic and social practices for men and women the claim for a remedy for individual mistreatment cannot begin. It is one of the conditions of litigation that a woman must represent that there can be conditions of social life which are experienced by women the same as they would be experienced by men. She must take part in a representation which contradicts her experience and her imaginings, she is drawn into a scenario of power each time she claims the reality of her mistreatment. She must represent a woman's experience of some aspect of social life as if it were male experience and assert the reason of sex as the ground upon which she has been treated less favourably. She must endlessly negotiate the reality of her unfavourable treatment against a scenario of power constituted by another, a negotiation in which she designates which aspects of her experience mean the required rationale of sex. She must designate a sexuality which is determined by another's logic.

Other juridical practices can also be investigated in this broader context of the simulable body. The judiciary have recently decided that, as a matter of 'objective fact,' males and females suffer the same amount of distress where the bodily surface or form is injured, the court must assume it is simply a human body in question. New non-discriminatory standards of judging now require a female to represent that there can be conditions of social life which are experienced by injured women in the same way as they would be experienced by injured men. She is required to express the experiences of a simulated body. Assessment of distress is now to be made solely by 'subjective' legal tests, that is, according to the litigant's own assessment or statement of emotional pain and suffering, 'properly

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.'

It is true that the Sex Discrimination Act does provide another 'definition' of discrimination, that of Section 5(2), known as indirect or systemic discrimination, as follows:

'S. (2) For the purposes of this Act, a person (in this sub-section referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the aggrieved person does not or is not able to comply.'

Here she is not required to represent that the conditions of women's lives are experienced by women the same as they would be experienced by men. Here her representations of reality require different simulations. She must represent that the conditions of male lives are those with which she cannot comply by reason of her sex, whereas it must appear to her that she is constituted as having an inability by reason of other's power. Her sex alone does not constitute her inability, for the reasonableness of the conditions of male lives can displace this rationale.

Ralevski v Dimovski N.S.W.L.R. 487 (1986). The New South Wales Court of Appeal held that 'differential approaches to the assessment of cosmetic injury to men and women, as such, should be regarded as inadmissible. Men and women who come to our courts are entitled to the assessment of their damages by judges who approach their functions without preconceived discriminating distinctions. If such distinctions
The Body in Legal Theory

proved'. The judiciary has let it be known that as females generally do suffer greater emotional distress in cases of disfigurement they would anticipate that, 'in the natural course of things,' female litigants would report a heightened experience of pain and suffering. Where she used to constitute the male as normal by her 'abnormal' experience of heightened emotionality, she is now required to imagine other women conforming to the male experience of normality and herself as deviant because she cannot simulate this new reality of women.

The questions seem to have changed but for women who take part in present practices the answers remain the same. A woman is still required to report that amount of emotionality expected of a female body, she is still placed between normality and insanity and her sexuality is 'read off' her female body through male eyes. But the answers for males appear to be different. The injured male, who gives the requisite 'subjective' account of little pain and suffering, is nevertheless, by virtue of a stated reliance upon sex discrimination legislation, entitled to the same amounts of monetary compensation as would be awarded to a female.

The new paradigm in which she must imagine women's experiences as the same as men's is part of the process whereby the social activity of humans transforms the material available. The particular woman in current sex discrimination litigation still has to live the present meaning of 'woman.' If she is denied employment because she is disfigured, or simply not attractive enough, she is required to assert that her female body is the cause of the employer's departure from normal employment practices. The dialogue requires her to assert that employment practices are the same for men and women, that male and female bodies are, alike, not normally judged for aesthetic qualities in the employment decision. Whether she wins or loses, a simulable female body is asserted, whether she wins or loses the judicial 'masters' of the court have entered into a dialogue with the employer on the attractiveness of her body and whether the employer's opinions on this had influenced the employment decision. Under the present meaning of 'woman' it is always she who will be scrutinised and unveiled before a court simply because it is still women who are constituted around male aesthetics and male sexuality. The body of woman now, the feminine body as it is presently understood, is the material upon which the social practices of simulation operate.

Present meanings of 'woman' differ as much as women's lives differ. They are as diverse and different to each other as they are to men's lives. It is this diverse positionality of women's lives which has been denied by the traditions of western knowledge. Male knowledge as objectivity not only

---

127 Kirby, P. in Ralevski v Dimovski supra n. 126. at p. 494.

128 In Ralevski v Dimovski the male appellant had initially stated that the facial scarring had not caused him embarrassment. Kirby P. commented, as follows ... I am inclined to believe that initial answer did not represent a true indication of the appellant's feelings but a response to perceived norms of a culture which is inclined in
places women as unknowledgeable it excludes the different representations about power constituted within women’s lives. The practices of positioning a female body as a woman’s only asset, an asset to be realised in the marriage transaction is one experience of power relations. It was a real practice in which women lived and if we can believe the tale of the young girl’s fate, the experiences of womanhood foretold by the South Australian state judge, it is a practice which some women still live. It is presumably a bourgeois practice in which women are bought and kept for the sake of their beauty and their sexuality. Other women are placed in relations in which their labouring skills are devalued in different ways. They may live as the aesthetic objects of another and also seek employment in institutions where female bodies are required to display beauty as well as labour. Women seek maintenance awards from judges who decide that little maintenance is required as an attractive body will soon find another spouse to assist in maintaining a home. Women, find an award of compensation for unlawful dismissal at age sixty is diminished because a judge decides her appearance is attractive enough to warrant further employment by some unknown, or ‘universal’, male.

Writing feminist legal theory must include preserving the presence of active and intentional subjects within the remapping of the forms of human flourishing. The focus becomes one of retrieving women’s experiences of authority in both senses of being subjected by the traditions of objectivity and rationality and being the subjects of authority, that is, being knowledgeable about relations of power. Women’s writing is replete with the experiences of subjection but we are only beginning to claim the resources necessary for communicating women’s knowledge of themselves as authorities. The male jurisprudential tradition can then be seen as a professionally constituted and legitimated vision of the male as an authority, as one kind of authorship which underwrites the relations of power.

---

129 Supra, n. 99.

130 In a recent application for an exemption from the requirement to advertise employment on non-discriminatory standards the South Australian Equal Opportunity Tribunal decided that it was not necessary to consider the application for exemption as the employer’s requirement that waitress/employees of his restaurant work ‘topless’ did not offend against the anti-discrimination provisions, similar to s. 5(1) in note 124 supra. The employer was simply reminded that he was obliged to offer employment as a topless waiter/waitress to persons of both sexes. See In the Matter of an Application for exemption by Nieham Pty Ltd and Working Women’s Centre Inc. and Ors. (1987) EOC 92-194.

131 A female shop-assistant found to have been unlawfully discriminated against on the ground of sex by her dismissal at 60 was awarded one year’s salary in compensation, not the full 5 years to the period of retirement at 65. The Tribunal stated ‘in respect of the claim relating to loss of salary until age 65 the Tribunal sees many impediments. The complainant is an attractive presentable, well-spoken person in good health who could reasonably be considered to be able to obtain employment in the field of her experience or in other fields in the future.’ See Anstee v Allders International Pty Ltd (1985) EOC 92-132.