# NEOLIBERAL MELANCHOLIA: THE CASE OF FEMINIST LEGAL SCHOLARSHIP

***Margaret Thornton****

## 1. INTRODUCTION: THE MARKET EMBRACE

This paper arises out of concern for the future of feminist legal scholarship. I want to caution against a too ready acceptance of progressivism and draw attention to the corrosive impact of neoliberalism and its effect on the contemporary legal academy. The social justice environment that engendered Second Wave Feminism has become passé. The shift to the right is so pronounced that it has enabled the discourse of the market to become the metanarrative of our time.[1] The intimate relationship effected between neoliberal governments and the market has caused civil society to contract and faith in the political to diminish. The individualising, privatising and marketising propensities of neoliberalism are weakening the collective underpinnings of feminism, along with other social movements; competition is necessarily corrosive of community. Because the academy reflects the values of the broader political economy, my fear is that depoliticisation is constricting the lifeblood of feminist legal scholarship.

The shift away from the familiar relationship of citizen and state to that of consumer/entrepreneur and market points to the way that the discourses of social justice and common good have been replaced with those of individual desire and private profit. The swing is partly a result of the pendulum effect that has arisen from the *ressentiment* of conservatives towards social liberalism's favouring of collectivist and reformist policies.[2] This movement to the right has been marked in Australia, New Zealand, Canada, the United Kingdom and the United

* Professor of Law and Legal Studies La Trobe University Melbourne (m.thornton@latrobe.edu.au). Versions of this paper were presented at the F-LAW Conference Flinders University Adelaide 19-21 June 2003 and Institute for Feminist Legal Studies Osgoode Hall Law School York University Toronto 7 October 2003. I thank the participants at these presentations for their helpful feedback. I also thank the organisers of the F-LAW conference and Professor Mary Jane Mossman, Director of the Institute for Feminist Legal Studies at York University, for inviting me to speak and for providing financial support. The paper draws on a research project supported by the Australian Research Council.

1 Roberts Peter 'Rereading Lyotard: Knowledge, Commodification and Higher Education' (1998) *Electronic Journal of Sociology* http://www.sociology.org/content/vol003.003/roberts.html viewed 19 February 2004 p 8.

2 *Ressentiment* is a concept developed by Nietzsche that refers to the desire to retaliate by inflicting pain in the hope that a victim might lessen his or her own pain. See Nietzsche Friedrich *On the Genealogy of Morals* trans Kaufmann W and Hollingdale R J Vintage Books New York 1969 p 121. Wendy Brown argues that *ressentiment* inheres within liberalism because it simultaneously promises both freedom and equality. See Brown Wendy *States of Industry* Princeton University Press Princeton 1995 p 67.

States, as well as in Scandinavia and other parts of continental Europe. It is widely recognised that progressive forces are in disarray with no agenda for change.

The decentring of the values of civil society in favour of the market is also reflected in the academy, where there has been a resiling from theory, reflexivity and critique in favour of applied and technocratic knowledge because the latter are valued more highly within the market. Indeed, the process of commodifying education is transforming the very *idea* of the university in which knowledge is pursued for its own sake.[3] Because the legal academy is particularly sensitive to changes occurring within the broader political economy, the impact of the swing to the right is felt acutely.[4]

The transmogrification of knowledge cannot be attributed to the swing of the political pendulum alone, however. Parallelling the *ressentiment* towards social liberalism is the intellectual turn in favour of postmodernism, a phenomenon that has not only undergirded the market turn, but has transformed feminist thought. The anxieties associated with the universality of knowledge and truth claims have beset all institutions of late modernity. Inevitably, the academy as a key knowledge producer is a primary site of this anxiety. While the market has a totalising effect, it simultaneously evinces postmodern traits with its fickleness and perennial ability to re-invent itself. Far from being a fixed entity, the market flits from place to place, eternally in search of cheaper means of production and more profitable trading opportunities. Feminist legal scholarship is inevitably caught within the twin turbulences of our time – the postmodern and the market turns.

Being on the outside, or going against the grain, has been the conventional subject position of feminism. Just as fiction and popular culture have been able to envision justice in ways that remain ineffable within official legal accounts,[5] feminist theorists' imaginings of justice have been informed and energised by life at the margins. Nevertheless, despite the rhetoric of outsider benefits, feminist legal scholars have needed an institutional connection, however discomfiting, in order to survive and conduct their critique of law, even though institutionalisation always carries

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3 See for example Newman John Henry *The Idea of a University* ed with introd and notes by Ker I T Clarendon Oxford 1976 (1st edition 1852); Jaspers Karl *The Idea of the University* ed Deutsch Karl trans Reiche H A T and Vanderschmidt H F Owen P London 1960; Habermas Jürgen 'The Idea of the University: Learning Processes' in *The New Conservatism: Cultural Criticism and the Historians' Debate* ed & trans Nicholsen Shierry Weber Polity Press Cambridge 1989; Smith David and Langslow Anne Karin (eds) *The Idea of a University* Higher Education Policy Series 51 Jessica Kingsley Publishers London & Philadelphia 1999; Coady Tony 'Universities and the Ideals of Inquiry' in Coady Tony (ed) *Why Universities Matter* Allen & Unwin Sydney 2000.

4 I have addressed this issue in more detail elsewhere. See Thornton Margaret 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3; Thornton Margaret 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8 *International Journal of the Legal Profession* 37; Thornton Margaret 'Inhabiting a Political Economy of Uncertainty: Academic Life in the 21st Century' Occasional Paper No 2 Institute of Postcolonial Studies Melbourne 2002.

5 For example Sherwin Richard K *When Law goes Pop: The Vanishing Line between Law and Popular Culture* University of Chicago Press Chicago & London 2000; Thornton Margaret (ed) *Romancing the Tomes: Popular Culture, Law and Feminism* Cavendish Publishing London 2002.

with it the possibility of domestication.[6] The potential for damage within the contemporary neo-liberal legal academy has increased because of the combined effects of corporatisation and aggressive managerialism, which could result in the feminist critique being either eviscerated or excised altogether.

Postmodernism has been concerned with deconstructing truth claims of all kinds, a project to which law has been understandably resistant from the outset. Law, at least within the English Common Law tradition, could be described as the paradigmatic modernist discourse, as universality, objectivity, neutrality and truth feature among its central norms.[7] In contrast, particularity, discretion, permeability and uncertainty are regarded with suspicion within the dominant philosophy of legal positivism because such values are corrosive of the rule of law. Nevertheless, it is the latter constellation of values that now typify the legal academy, which is appearing increasingly unstable as a site of orthodox knowledge production.

In alluding to feminist legal theory, I am not privileging a particular standpoint. As with social theory generally, there is no agreed-upon perspective or unified notion of 'feminism' in feminist legal theory; it is multifaceted and heteroglossic, which is at once its strength and its Achilles heel. Overcoming the limitations associated with the unitary category 'woman' has caused an enriched notion of the legal subject to emerge, which is raced, sexualised and differently-abled, as well as sexed. Diffusion has nevertheless clouded its feminised identity and rendered it politically vulnerable. Anne Barron suggests that feminism has been 'truly infected with the postmodern disease',[8] but such a negative conceptualisation overlooks the manner in which both feminism and postmodernism are linked to a particular politico-historical moment. Social liberalism, for example, seemed to require a circumscribed concept of woman in order to effect far-reaching law reforms. Heterogeneity may be inherently incapable of resisting the depredations of neoliberalism, but I do not believe that clinging to the universals of the past could save legal academic feminism.

In this paper, I first consider how the category 'woman' has imploded within feminist theory and the significance of the implosion for feminism within the legal academy. I then show how legal feminism, still reeling from this blow, was subjected to a second major assault with the rise of neoliberalism and the market turn. These trends are not discrete but imbricated with each other. Despite the market's universalising tendencies, its chameleon-like morphology simultaneously serves to undermine them. Belying its up-to-the-minute trendiness, neo-liberalism also displays a deep moral conservatism, which is anti-feminist, anti-Aboriginal rights, anti-gay and lesbian rights and, generally, anti-progressive.[9] In view of the devastating effect of the confluence of these trends on the legal academy, I conclude by posing the question as to whether life for feminist legal scholars might be better outside the academy.

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6 Messer-Davidow argues that United States feminism became eviscerated as a direct result of institutionalisation within the academy. See Messer-Davidow Ellen *Disciplining Feminism: From Social Activism to Academic Discourse* Duke University Press Durham NC & London 2002.

7 Lacey Nicola 'Feminist Legal Theory beyond Neutrality' (1995) 48 *Current Legal Problems* 1.

8 Barron Anne 'Feminism, Aestheticism and the Limits of Law' (2000) 8 *Feminist Legal Studies* 275.

9 Cf Messer-Davidow above note 6 at 226-227, 287.

# 2. FEMINISM IN A POSTMODERN FRAME

## *2.1 That Category 'Woman'*

Feminist legal scholarship has had a remarkably short history in the history of the world,[10] but like all histories, it consists of multiple narratives. On the one hand, there are the official stories, constructed by legislatures, courts and organs of the state. The *leitmotif* of the official story of women and law is one of the triumphs of progress and reason in accordance with liberal theory. On the other hand, there is a range of accounts emanating from feminist activists and scholars, which has been shaped by political practices that arise from the subjectivity of individual experience. It is the latter, the unofficial stories of courage and resistance by individual women emerging from multiple sites and temporalities that have engendered feminist law reform and theorising. The accounts of otherness, oppression and violence constitute an unsettling and discomforting counterpoint to the official stories of progress and 'letting in'.

Catharine MacKinnon's well-known work is an example of feminist theorising based on the oppression of women.[11] In arguing that all women are subordinated by virtue of their sex, her thesis constitutes a form of modernist grand theorising that sought to construct new universals in the liberal mould at the very moment postmodern theory was seeking to destabilise them. MacKinnon's universalised 'woman' ostensibly had the effect of reducing all women to a common set of biologised and sexualised variables that sloughed off differences between them. In addition, the subordination thesis was resented because it tended to depict women as victims and ignore the power of individual agency. What is more, the biologistic basis of MacKinnon's theory suggested that victimhood was an immutable condition. This one-dimensional view of women was counterpoised against a similarly reductive view of men as oppressors, a characteristic that did not endear feminism to those men who might otherwise have been sympathetic. Hence, notwithstanding the onset of the postmodern turn, it is unsurprising that there was a feminist backlash against MacKinnon's work.[12]

Despite the trenchant attacks on MacKinnon, which ultimately were to dilute her impact within the academy, one must acknowledge the power and effectiveness of her thesis when it first became widely known within the international arena two decades ago. Her black and white approach – 'feminism unmodified'[13] – communicated a clear political message that entered

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10 I was surprised to see some of my own work recently described as 'pioneering' on the basis of an essay published as recently as 1986. See Conaghan Joanne 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351 at 360 note 34. The article was Thornton Margaret 'Feminist Jurisprudence: Illusion or Reality' (1986) 3 *Australian Journal of Law & Society* 5. Other 'pioneering' work cited by Conaghan also dated from the 1980s.

11 For example MacKinnon Catharine A *Towards a Feminist Theory of the State* Harvard University Press Cambridge Mass 1989.

12 There are many examples, but see especially Bartlett Katharine T 'MacKinnon's Feminism: Power on Whose Terms?' (1987) 75 *California Law Review* 1559 (Book Review); Smart Carol *Feminism and the Power of Law* Routledge London 1989; Abrams Kathryn 'Ideology and Women's Choices' (1990) 24 *Georgia Law Review* 761; Harris Angela 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

13 The phrase is used as the title of one of MacKinnon's books. See MacKinnon Catharine *Feminism Unmodified: Discourses on Life and Law* Harvard University Press Cambridge Mass 1987.

popular consciousness and carried moral weight in both academic and popular discourses in a way that is no longer possible. However, to characterise the category 'woman' as an aberration to be corrected is to fall into the liberal progressivist trap that accords with the official story, for it assumes that things are always getting better. The construct was the product of a particular historical moment, as Elizabeth Weed points out:

> [T]he category of Woman, as produced by poststructuralist and psychoanalytic theorists of the 70's and early 80's, was not a *mistake* to be corrected and replaced by theories of the differences among women. It was, rather, an historically produced theory which, like all theories, yielded insights and blind spots.[14]

Maria Drakopoulou explains how a particular *episteme* emerges during a given historical period which, rather than being seen as 'a progressive unfolding of truth' is 'an integral part of a genealogy of feminist legal knowledge'.[15] Drakopoulou uses the *querelle des femmes* of early seventeenth-century England to illustrate her thesis. Through these writings, she suggests that women were able to create a discursive space in which to contest contemporary representations of female nature.[16] Drakopoulou argues that this 'female nature' emerged from an essentialised identity predicated on the commonality of female experience, particularly in marriage.

In applying this idea of the *episteme* to Second Wave Feminism, we can see that the category 'woman' constituted not just a unifying concept for the women's movement, but also a point of contestation for those women who felt excluded by its unmodified character. As a result, '*she*' was rejected as totalising and one-dimensional by those who felt little empathy with 'her'. For example, I recall attending a huge Women and Labour conference in Brisbane in 1984 when Aboriginal and Torres Strait women vented their anger over their perceived exclusion from what they regarded as a white, elitist, middle class movement.[17] The majority of us present, to whom most of the by-now pejorative descriptors applied, felt remorse at our arrogance and obtuseness. Attacks against this one-dimensional '*woman*' of feminist discourse multiplied on the part of women, who had formerly felt excluded by virtue of their ethnicity, sexual preference, disability and class, but now felt empowered to speak. Perhaps inevitably, the category 'woman' imploded and identity politics erupted around the world.[18]

The demise of the category 'woman' had a marked effect on the academy, the primary source of feminist theorising. As a corollary of the essentialist critique, women's studies began to be viewed as unattractive and dated: '[T]he women in women's studies appear as cumbersomely

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14 Weed Elizabeth 'Women's Studies Beside Itself' (1997) 7 *Surfaces* 105 http://pum12.pum.umontreal.ca/revues/surfaces viewed 19 February 2004.

15 Drakopoulou Maria 'Women's Resolutions of Lawes Reconsidered: Epistemic Shifts and the Emergence of the Feminist Legal Discourse' (2000) 11 *Law and Critique* 47.

16 As above at 55.

17 Women and Labour Conferences were held biennially in Australia during the 1970s and 1980s. They were notable for their passion and energy, as well as their size, as they attracted about 2,000 women (and a sprinkling of men), numbers that are hard to credit in the prevailing neoliberal climate.

18 Moghadam Valentine M (ed) *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective* Westview Press Boulder Col 1994.

essentialist bodies that refuse to be dislodged'.[19] While not wedded to one discipline, women's studies tended to be closer to the humanities/social science clusters than the physical sciences or the business/management/law clusters. The former have always displayed a greater interest in social theory, whereas the latter has generally eschewed reflexivity and critique in favour of market and professional interests. Never popular with the academic mainstream because of their ambiguous disciplinary status and because such courses were dismissed as more 'political' than 'academic', women's studies units began to disappear. Some units were closed down, while others were 'mainstreamed' through incorporation into conventional disciplines or conversion into units for the study of gender, sexuality, diversity and/or cultural studies. With its veneer of neutrality, 'gender' was viewed as a more palatable term within an increasingly hostile environment. At the same time, however, it has to be acknowledged that feminist scholars were increasingly of the view that gender studies was a more appropriate term for the project on which many feminist scholars themselves had by now embarked. That is, they had turned their attention to men and masculinity in a discursive attempt to stop the depiction of women as 'the problem', as well as to resist the on-going objectification of women.

The intersection with other dimensions of difference – race, sexuality and disability – also made the new buzzword, 'diversity', more appealing. Although diversity has an undeniable postmodern ring to it, it may be deployed by management in order to occlude issues of inequality in favour of something more anodyne and less threatening.[20] The movement away from the dissonant language of *in*-equality in favour of diversity serves to depoliticise further a competitive market environment in which inequality is necessarily normative. The moral conservatism of neoliberalism is designed to revive incarnations of the heteronormative family and the privileged position of Benchmark Men (that is, those who are white, heterosexual, able-bodied and middle class) within it. In this way, conventional iterations of public life with a neoliberal gloss are reified.

Despite the positive aspects arising from the broadening of the category woman, the disintegration of a unifying subject has, perhaps inevitably, contributed to the weakening of the commitment to feminism. This is despite efforts by feminists, such as Gayatri Spivak[21] and Judith Butler,[22] who, like Drakopoulou, advocate that the category 'woman' be invoked epistemically to problematise, interrogate and deconstruct its seeming essentialism. Thus, even everyday words like 'woman' can be shown to lack a stable meaning because, as Butler argues, 'speech is always in some ways out of control'.[23] The speech act performs an extra-linguistic or social role, or what

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19 Bowlby Rachel 'The Work of Women's Studies' (1997) 7 *Surfaces* 104. See also other contributions to the roundtable http://pum12.pum.umontreal.ca/revues/surfaces viewed 19 February 2004.

20 Terms such as 'managing diversity' and 'workplace diversity' are now replacing equal employment opportunity (EEO) within official discourse, because the latter is so closely associated with social liberalism. See Thornton Margaret 'EEO in a Neoliberal Climate' (2001) 6 *Journal of Interdisciplinary Gender Studies* 77.

21 Spivak Gayatri 'Subaltern Studies: Deconstructing Historiography' in *In Other Worlds: Essays in Cultural Politics* Methuen New York & London 1987. See also http://www.emory.edu/ENGLISH/Bahri/Glossary.html viewed 19 February 2004..

22 Eg Butler Judith *Bodies that Matter: On the Discursive Limits of 'Sex'* Routledge London 1993 at 221-22. See also Sandland Ralph 'Seeing Double? Or, why 'to be or not to be' is (not) the Question for Feminist Legal Studies' (1998) 7 *Social & Legal Studies* 307.

23 Butler Judith *Excitable Speech: A Politics of the Performative* Routledge New York & London 1997 p 15.

she aphoristically refers to as 'social magic'.[24] Fascinating though this poststructural excursus into the semiotics of 'woman' may be, it nevertheless signalled a move away from the political, qua government, qua public sphere, to a more introspective orientation within feminist theory:

> This shift from the overtly collectivist and political to the more individualist and philosophical might be viewed negatively as a shift from insurrection to introspection, or positively as the coming to age of feminism as an intellectual endeavour, or perhaps more neutrally as simply symptomatic of the 1900s. However, one views the development, it is clear that epistemological, ontological, and representational questions currently serve as a key locus of feminist concern and the significant grounds for dispute between feminists.[25]

I am not suggesting that we attempt to resuscitate the 'woman' of feminist discourse. She is an idea whose time has passed, despite her siren call. Joanne Conaghan refers to the fear of essentialism that has animated a conscious choice to direct the focus of feminist research away from the category 'woman' to more abstract projects.[26] In addition to heightening the excessive self-consciousness associated with the possibility of essentialising 'woman', poststructuralism has inadvertently contributed to, or is symptomatic of, the cleavage that has developed between the focus on multiple identities and the political. Nancy Fraser sees this 'decoupling' of cultural politics from social politics as one of the features of the 'postsocialist condition'.[27] This condition, a corollary of neoliberalism, has brought depoliticisation in its wake. Feminist scholarship has evinced a comparable change of orientation. An exclusive focus on particularity and the micropolitical serves to deflect attention away from what is happening at the macropolitical level, including disengagement with the social justice agenda and the normalisation of the market metanarrative.

The collapse of the category 'woman' and the rift between feminist legal theory and a politics of social justice parallels the inertia besetting democratic politics generally.[28] The withdrawal from collective interests in favour of a cynical individualism and obsession with the self is characteristic of the condition. The contraction of civil society and the pursuit of individual desire through the market endorse the view that we inhabit a post-socialist, post-political age.

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24 Butler Judith 'Performativity's Social Magic' in Shusterman Richard (ed) *Bourdieu: A Critical Reader* Blackwell Oxford 1999.
25 Kemp Sandra and Squires Judith (eds) *Feminisms* Oxford Readers Oxford University Press Oxford & New York 1997 p 8.
26 Conaghan above note 10 at 369-370.
27 Fraser Nancy *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* Routledge New York & London 1997 p 5.
28 Cf as above at 175.

## *2.2 Legal feminism*

Legal feminism, an offshoot of Second Wave Feminism, has sought to secure justice for women through legal reform. It has also unsettled legal norms and paved the way for the development of a body of sophisticated theoretical work. For example, a deconstruction of the public/private dichotomy, a central tenet of liberal legalism, enabled the spotlight to be turned on heretofore hidden phenomena, such as violence in the home.[29] In the workplace, scrutiny of the normative worker and patterns of work called into question the sexual division and hierarchisation of labour, as well as the sex of the worker.[30]

Feminist legal scholarship has nevertheless sought to go further than reforming the law as it is, either by substituting 'women' for 'men', or by adding women in. What is considered to be 'feminist' about feminist legal theory is the nature of the questions asked, which go far beyond the sort of questions conventionally asked within legal discourse, and the criteria of relevance and proof applied in addressing those questions.[31] The tools of deconstruction are frequently invoked to interrogate the gender, sexuality and embodiment of the legal subject. Other methods include a focus on individual subjectivities and the giving of voice to those whom law normally discounts, other than in stylised roles, such as survivors of sexual assault and domestic violence. In this way, feminist legal theory has carried out a transgressive role within legal discourse. Feminist legal scholarship has mirrored, albeit in somewhat opaque fashion, trends in feminist theory, social theory, mainstream legal theory and popular discourse, as well as contemporary political moods. Feminist legal scholarship thereby both reflects and constitutes the new feminist legal episteme.

Despite desperately wanting to recognise difference and diversity, all strands of feminist legal theory have not necessarily welcomed the postmodern imperative in favour of multiple identities because it has rendered engagement with law and reformism more difficult.[32] While legal personality displays the masculinist bias typical of the universal,[33] feminist legal scholars are divided about how law ought to accommodate the feminine. At one level, there are the perennial debates around whether the 'reasonable man' should be transmuted into the 'reasonable person' or be discarded altogether in favour of a new standard, such as the 'reasonable woman'.[34] At

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29 O'Donovan Katherine *Sexual Divisions in Law* Weidenfield London 1985; Olsen Frances E 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497; Thornton Margaret (ed) *Public and Private: Feminist Legal Debates* Oxford University Press Melbourne 1995; Cossman Brenda and Fudge Judy *Privatization, Law, and the Challenge to Feminism* University of Toronto Press Toronto 2002.

30 See eg Williams Joan *Unbending Gender: Why Family and Work Conflict and What to do about it* Oxford University Press New York 2000; Collier Richard 'The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the 'Private Life' of the Law School' (2002) 22 *Legal Studies* 1.

31 Bartlett Katharine T 'Cracking Foundations as Feminist Method' (2000) 8 *American University Journal of Gender Social Policy and Law* 31. See also Wishik Heather 'To Question Everything: The Enquiries of Feminist Jurisprudence' (1986) 1 *Berkeley Women's Law Journal* 64; Naffine Ngaire 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71.

32 Conaghan above note 10.

33 Davies Margaret and Naffine Ngaire *Are Persons Property?* Ashgate Aldershot UK & Brookfield Vt USA 2002.

34 Eg Shoenfelt Elizabeth L Maue Allison E and Nelson JoAnn 'Reasonable Person Versus Reasonable Woman: Does It Matter?' (2002) 10 *American University Journal of Gender, Social Policy and the Law* 633; Kerns Leslie M 'A Feminist

another, there is the question of how one might fashion a feminised legal subject that does not have a reductive effect, particularly in respect of corporealised harms such as domestic violence and sexual assault.

Feminist legal theory has not been constrained in the same way as the feminist reform project in envisioning the way things might be.[35] By and large, the reformist project has had to defer to prevailing legal norms and adjudicative paradigms of legal method;[36] radicalism cannot be practised on real clients in the same way that it can on hypothetical ones. In contrast, the impact of the postmodern imagination has led to feminist legal theory's engagement with an eclectic range of theorists and disciplinary perspectives, which go far beyond the boundaries of legal orthodoxy. A cursory look at contemporary law reviews reveals that the woman of feminist *legal* theory is no more one-dimensional than the 'woman' of feminist discourse generally. [37]

Feminist poststructuralism, a sub-set of postmodernism, has been more interested in the 'capillaries', the embodied micro-political sites where power operates, rather than in a conventional top-down and abstract focus that is typical of legal hierarchies. Poststructuralism has also involved the insights and theories of a range of disciplines outside the boundaries of law, and has been deployed to challenge the orthodoxy of legal positivism. Literary and semiotic approaches to legal writing and the constitution of symbolic meaning through legal language are exemplary: 'Postmodern theory has contributed the notion that a subject, or subject position, is constituted in discourse rather than being a property of persons.'[38] The diverse strands of feminist legal theory have sought to transcend conventional legal paradigms by providing radically new ways of seeing, as well as breaking down the insular assumption that law must be studied from a legal standpoint. The interdisciplinary nature of feminist theory has encouraged scholars from a range of disciplines to make legal texts the subject of their critique. The popularity of literary and hermeneutic projects, for example, has appealed to English and cultural studies scholars.

Deflection of the objectifying gaze from women and Indigenous people to benchmark masculinity and heterosexuality, as well as 'whiteness', represents an attempt to disrupt the conventional orderings of modernity within legal texts. A rich body of literature, which sought to engage with and critique both mainstream and progressive social theory, as well as legal doctrine, has emerged with a great flourish during the short life of legal feminism.

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Perspective: Why Feminists should give the Reasonable Woman Standard another Chance' (2001) 10 *Columbia Journal of Gender and Law* 195.

35 The work of Cornell is exemplary. See for example Cornell Drucilla *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* Routledge New York & London 1991; Cornell Drucilla *The Philosophy of the Limit* Routledge New York & London 1992; Cornell Drucilla *Transformations: Recollective Imagination and Sexual Difference* Routledge New York & London 1993.

36 For example Kahn Paul W *The Cultural Study of Law: Reconstructing Legal Scholarship* University of Chicago Press Chicago & London 1999; Mossman Mary Jane 'Feminism and Legal Method: The Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 30.

37 For a comprehensive overview of current feminist legal scholarship, see Conaghan above note 10.

38 Smith Dorothy 'Schooling for Inequality' (2000) 25(4) *Signs* 1147 at 1148. For a critique of feminist poststructuralist accounts of linguistics, see Threadgold Terry *Feminist Poetics: Poiesis, Performance, Histories* Routledge London 1997. See also Butler *Excitable Speech* above note 23.

It is notable that the production of this variegated body of feminist legal theory has been confined almost entirely to the academy. In contrast, feminist legal activism now tends to be found outside the academy. There is a propensity to view the fertile field of feminist legal theory to which I have alluded as arcane and remote; activists are more interested in making a difference in the instant case than by envisioning the way things might be. Indeed, the schism between theory and practice, and their respective sites of knowledge production, has become marked. The contemporary position contrasts with that of the 1970s and 1980s when feminist legal academics were engaged in a range of activist projects that accorded with the norms of social liberalism. The feminist ideal was one of praxis in which theory was grounded in the political realities of experience. Furthermore, feminist practice sometimes received institutional support from the academy. While law schools generally frowned upon full-time legal academics engaging in routine legal practice for profit, voluntary community service in the interest of worthwhile causes and 'the disadvantaged' was viewed positively. Many feminist legal academics willingly gave of their time and expertise, participating in major campaigns around domestic violence, sexual assault, women in prison, and so on. As well as agitating for law reform, they gave advice and ran litigation.

The disintegration of the category 'woman' parallelled the resiling from feminist activism. It is notable that the withdrawal of progressive *pro bono* effort on the part of legal academics suited neoliberal governments as they proceeded to unravel the agenda of social liberalism. The shift away from theory in favour of applied knowledge within the academy also suited neoliberal governments as it discouraged interrogation of their practices. The creation of an audit culture, in which academics are compelled to demonstrate *productive* outcomes, has underscored the theory/practice split.

At an earlier moment, the modernisation of the law curriculum had coincided with the high point of social justice and the activist imperative. It also parallelled the dramatic increase in the percentage of women who entered law schools during the 1970s and 1980s. Feminist perspectives began to appear within the law curriculum, which were not necessarily confined to elective subjects alone.[39]

If feminist legal theory was packaged in a way that is acceptable to institutional gatekeepers, those strands of scholarship closest to the dominant paradigms of legal positivism, such as doctrinal exegesis, secured approval. Feminist legal theory must not be permitted to destabilise the epistemological foundations of orthodoxy. Grounded as it is in a history of oppression, feminist legal theory always has the potential to unsettle and destabilise within the conservative milieu of the legal academy. The critique of law's claim to universality, objectivity and neutrality is discomfiting because it exposes the fragility of the masculine identity of the paradigmatic legal person.

Feminist legal theory's normative purpose was also perceived to be destabilising by its detractors: exposure of law's failings, the theorisation of difference and the development of blueprints for reform, which are all about creating a better and more just society. Furthermore,

[39] At Macquarie Law School, for example, feminist perspectives constituted a central dimension of Personal Injury, which was a compulsory crime/tort subject from approximately 1980. The legitimacy of the feminist approach was accepted within the academy for more than a decade before the subject was reconceptualised and blanched of its feminist content.

the feminist legal gaze has focused on familiar and everyday sites, such as the family and the workplace, in order to expose the dark side of ordinary life. Feminism in the everyday practice of the legal academy may therefore be personally confronting to colleagues in a way that critical race and other strands of social theory may not be. Life and work are no longer able to retain a strict line of demarcation between them when each domain clearly leaches into the other. This is the nub of the feminist aphorism 'the personal is the political'.

It is the political underpinnings of legal feminism that has caused it to be given short shrift by conventional legal scholars. Despite the debates that have raged within feminist legal theory, neither mainstream legal scholarship nor critical legal scholarship more generally has barely been touched by feminist insights.[40] This is not to deny the existence of dynamic pockets of feminist legal scholarship within law schools, which have been supported by progressive male colleagues, but to stress that considerable energies have been devoted to safeguarding small spaces, which may be quickly papered over if there is a change of direction.[41] Altering the cartography of legal knowledge may be an aspiration of the feminist legal project in the academy, but it is recognised as being very much a vision of the way things might be rather than a realisable aim.

There was a brief political moment when the majority of law teachers made at least a tokenistic nod in the direction of feminism, when progressive course conveners made valiant efforts to include feminist perspectives in their teaching, and conference organisers felt that it was *de rigeur* to include a feminist voice on conference panels. The imperative in favour of mainstreaming, induced by corporatisation and ever-changing forms of governmentality within the academy, has seen the muting, if not the erasure, of the feminist voice. The women now invited to speak on mainstream panels are more likely to speak in orthodox tongues. It is my contention that although gender has been tolerated at the fringes of legal knowledge, it was never really accepted by the mainstream as a legitimate category of analysis, as it was by the humanities and the social sciences. This is probably because so much has been at stake in the corrosion of legal positivism's claims to truth, including the unmasking of the masculinised character of legal personhood, which continues to present itself as neutral and depersonalised.[42]

Feminist legal theory has always occupied a parlous position at the edge of dominant legal discourses, but it has nevertheless been sufficient for feminist legal scholars to have thrilled and inspired individual law students, as well as to have produced an intellectually exciting body of creative scholarship in a remarkably short time. Legal feminism now faces being significantly eroded by the impact of neoliberalism and the market message. It may be that the very success of

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40 For example Morgan Derek and Wells Celia 'Editorial' (1999) 19 *Legal Studies* 1 at 3; Naffine above note 31 at 95; Johnstone Richard and Vignaendra Sumitra *Learning Outcomes and Curriculum Development in Law: A Report commissioned by the Australian Universities Teaching Committee (AUTC)* (2003) Commonwealth of Australia Canberra at 130.

41 Helen Ward conducted a study of the feminist content in introductory courses in Australian law schools 1995-98 in which she found that there was a relative dearth of feminist critical commentary, although a few law schools scored well. See Ward Helen '"The Adequacy of their Attention": Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject' (2000) 11 *Legal Education* Review 1. Interviews that I conducted with academics in law schools throughout Australia in 2002-03 found that there had been a weakening of the commitment to feminism. See also Thornton 'The Demise of Diversity' above note 4.

42 Eg Davies and Naffine above note 33.

feminism carried with it the seeds of its disintegration, as the *ressentiment* of conservatives and anti-feminists asserted itself insidiously within a corporatised environment.

## 3. THE COMMODIFICATION OF HIGHER EDUCATION

Neoliberalism and globalisation have induced profound shifts in the conventional role of universities as primary knowledge producers. The disinterested pursuit of knowledge for its own sake, the traditional cultural mission of the university, is 'in ruins', according to Bill Readings.[43] It is paradoxical that governments have starved universities of funds at the very moment that they have been expected to contribute to the new knowledge economy by educating vastly increased numbers of potential new knowledge workers. For the discipline of law, this has meant training more lawyers, both local and foreign, whose expertise in areas such as contract law, corporate law and intellectual property law is crucial to the facilitation of the market within the new economy.

The academic focus is presently on vocationalism, practical skills and applied knowledge. Within the market paradigm, theory and critique are generally deemed to lack use value. Furthermore, the market has no interest in being deflected from its relentless pursuit of profits by discomfiting questioning. The neutral veneer of the technocratic occludes the political nature of the favoured knowledge being purveyed to students. Carol Smart has written persuasively about law's capacity to silence feminist discourse,[44] but it is technocratic law that does this most effectively.[45] Socio-legal courses of all kinds, which developed from the curricular diversity inspired by the egalitarian and redistributive policies of social liberalism and which questioned and critiqued the centrality of the masculinist subject, are presently being contracted or excised in law schools everywhere. Such courses are particularly vulnerable in 'new' universities,[46] where resources are stretched and the pressure to engage in market activities is most pronounced. It is those 'fields close to the market [that] gain power and influence within the university'.[47]

Social liberalism, with its norm of tolerance, compelled an uneasy truce between masculinist institutions and feminism,[48] but a 'backlash' against the gains effected is now in evidence.[49] Some students will want to study feminist legal theory but, if the demand is not high,

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43 Readings Bill *The University in Ruins* Harvard University Press Cambridge MA & London 1996.

44 Smart Carol *Feminism and the Power of Law* Routledge London & New York 1989.

45 Thornton Margaret 'Technocentrism and the Law School: Why the Gender and Colour of Law Remain the Same' (1998) 36 *Osgoode Hall Law Journal* 369.

46 'New' universities are former colleges of advanced education in Australia and polytechnics in the UK, which were included in unified university systems in 1988 and 1992 respectively.

47 Slaughter Sheila and Leslie Larry L *Academic Capitalism: Politics, Policies, and the Entrepreneurial University* Johns Hopkins Baltimore 1997.

48 For an excellent study of social liberalism in Australia and its relationship with the feminist movement, see Sawer Marian *The Ethical State? Social Liberalism in Australia* Melbourne University Press Melbourne 2003.

49 Blackmore Jill and Sachs Judyth 'Managing Equity Work in the Performative University' (2003) 18 *Australian Feminist Studies* 141. See also Whip Rosemary 'The 1996 Australian Federal Election and its Aftermath: A Case for Equal Gender Representation' (2003) 18 *Australian Feminist Studies* 73.

that will be a rational justification for not offering it. The majority of students, now our 'customers', who may be paying substantial fees, are less willing to engage with the hard questions – the how and the why of the knowledge before them. There is not only the 'post-social condition' that has resulted in the disappearance of such questions from the public agenda, but the fact that the legal knowledge with which students now engage has become commodified. The product they are paying for is a law degree – the credential to enable them to obtain well-paid positions and repay their ever-expanding education debts. If the period of formal legal education has been reduced to two years for a graduate course, as is now the case at a number of Australian law schools, or even one year, as is the case with the Common Professional Exam course in the UK,[50] the exclusion of feminist subjects will be rationalised on the basis of space and time constraints. Furthermore, in a marketised political economy, students are less inclined to undertake theoretical and critical courses, because they feel that they might actually detract from their labour market opportunities. Law students in the UK, Canada and Australia are now saying that they do not want subjects that are identifiably feminist on their CV's out of fear that their career opportunities with corporate law firms could be jeopardised.[51] Both offering and enrolling in such courses have come to be imbued with risk.

All facets of legal studies that are closest to the humanities and social sciences are vulnerable in this climate. Turning away from areas such as legal history, legal philosophy and legal theory in favour of skills and applied knowledge has contributed to a less hospitable atmosphere with regard to feminism within the legal academy. As the demand is invariably lower for critical than for applied subjects, university and law school administrators may decide that the former are dispensable in the current climate and that feminist lecturers should be deployed to teach compulsory subjects, particularly those that facilitate business. It has also become fashionable for conservatives to aver that feminism is passé and we live in a post-feminist age.[52] This supposition arises from the widespread belief that equality between men and women has now been achieved because women are no longer excluded from the professions or public life. The struggle to be 'let in' continues to inform popular understandings of feminism, a simplistic understanding that the neoliberal academy is happy to endorse.

Apart from teaching, the entry of the market into higher education is also affecting the research and writing of academics. New forms of governmentality have been authorised by the state and effected through line managers, whose role it is to ensure that scarce resources are maximised and that academics contribute to the production of new knowledge that has market value. In Australia, 'priority areas' may be specified, which are more likely to include commercial law or international business than feminist legal scholarship. The privileging of performativity has meant that entrepreneurialism and the generation of grant and consultancy income have become

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50 The Common Professional Exam (CPE). For details, see the Law Society for England and Wales website http://www.lawsociety.org.uk viewed 19 February 2004.

51 Interviews conducted by the author with Australian, UK and Canadian legal academics in 2002-03.

52 Smart above note 12 at 84. Even the Australian Prime Minister, John Howard, is now echoing such sentiments. See Summers Anne *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia* Random House Australia Sydney 2003 p 21.

primary criteria for appointment and promotion. Slaughter and Leslie's phrase 'academic capitalism' symbolises how the profit motive has captivated the academy.[53] Grants themselves may now be deemed to be more important than the substance of the research for the purposes of appointment and promotion.[54] Feminist legal scholarship may attract grants, and even consultancies, but such scholarship is never going to be associated with venture capital of the magnitude that animates university research managers. Once feminist legal scholars have been compelled to become teaching-only staff, teaching 'black letter' law subjects to ever-increasing numbers of students, or have left the academy to be made over into corporate lawyers, feminist legal theory could wither and die.

The implosion of the category 'woman', together with the neoliberal resiling from commitment to the social good may have induced a shift away from feminist activism, but it is the move to harness the research effort within universities that has clinched the evisceration of feminist legal scholarship. Because 'political' activities are discounted by current auditing mechanisms, there is no performative box that can be ticked to signify productivity on the part of feminist activists. Feminist legal theory that is written at a high level of abstraction may fare quite well in an auditing system, such as the RAE (Research Assessment Exercise) conducted in the UK. University auditing has nevertheless deflected attention away from the questionable nature of both local and global market practices, as well as permitting an unravelling of progressive reforms. Endless scrutiny, surveillance and accountability contribute to the creation of a culture of conservatism and timidity, as well as instability. The practice of feminist legal scholarship is fraught in this environment. Publications deemed to be 'political' face being discounted, particularly when they are unlikely to appear in the 'right' journals. A focus on Third World or Indigenous women may pass muster because it proffers a convenient presbyopia by deflecting attention away from what is happening at home. Third World feminism may also be subsumed under the voguish rubric of 'globalisation'.

## *4. FRAGILE FUTURES*

While feminist social and cultural theorists may be found outside the academy, independent feminist legal scholars without institutional affiliation are rare. As well as seeming to need the grit of legal institutionalism against which to react intellectually, feminist legal scholars have relied upon an academic base for their identity and legitimacy. Although the environment could change with an increasing rate of redundancies and early retirements within a volatile sector, there is not presently a class of independent, unaffiliated legal scholars committed to the critique of law to enable us to test this proposition.

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53 Slaughter and Leslie above note 43.

54 Marginson Simon and Considine Mark *The Enterprise University: Power, Governance and Reinvention in Australia* Cambridge University Press Cambridge 2000.

Ngaire Naffine, drawing on Wittgenstein, describes feminism within the legal academy as a 'form of life' for legal feminists who are endeavouring to make sense of law and its institutions.[55] Engaging with law as a 'form of life' from outside the academy appears to be more problematic. Whether this is a by-product of the relative novelty of legal feminism, the self-referentialism and hegemony of formal legal discourse, the lack of credibility associated with unaffiliated scholarship, or the general absence of a class of intellectuals of independent means, is not altogether clear. As outsiders *inside* the legal academy, feminist legal scholars occupy a unique inside/outside space. However, for a feminist legal academic to become an outsider *outside* the academy may mean that law is no longer a 'form of life'. The grit that produces creative scholarship within the academy is absent, even though anger at society's devaluation of the feminine may not have abated. Of course, it might be averred that this Renaissance Legal Feminist might be more creative if she were to be free of the constraints of the corporatised academy but, like Renaissance Man, she would need to be a woman of independent means or to have a modern Medici as benefactor. If not, and this is the more likely scenario, she would have to expend endless energy promoting herself and her writing within the market in order to survive. The irony is that she could find herself mimicking the very performative behaviour that she once found so repugnant within the academy.

The conjunction of postmodernism and neoliberalism does appear to add up to post-feminism within the legal academy. The impasse is yet another manifestation of the postmodern dilemma. How should feminist legal academics respond to the market metanarrative – the new universal, albeit one imprinted with the contemporary postmodern stigmata of fickleness and insecurity? Perhaps small acts of defiance are all that we have at our disposal. Bill Readings said that if we inhabit the ruins of the university, we must do what we can and learn to negotiate among them.[56] Of course, there are pockets of resistance everywhere, but legal academics on the whole have been remarkably quiescent in the face of academic capitalism. The culture of competitive individualism that has always resided at the heart of a hierarchical system has been propped up by a system of performativity and strengthened by mechanisms of accountability and control. Regular auditing of research, teaching, enterprise, and other aspects of university life, have become ubiquitous.[57] Performance deemed to be unsatisfactory in any respect might incur sanctions, such as more teaching or less benefits, as well as failure to have tenure/promotion/renewal of contract confirmed. It could even lead to redundancy for those in tenured positions. Technologies of surveillance and audit contribute effectively to the prevailing culture of uncertainty within universities. The new forms of governmentality are inducing feminist scholars to be more deferential towards authority in order not to draw attention to themselves. This may entail the conscious erasure of signs of the feminine from their teaching, research and publication. This concept of self-policing represents a manifestation of the

55 Naffine above note 31.

56 Readings above note 43 at 171.

57 For example Bradney Anthony 'The Quality Assurance Agency and the Politics of Audit' (2001) 28 *Journal of Law and Society* 430; Shore Cris and Wright Susan 'Audit Culture and Anthropology: Neo-liberalism in British Higher Education' (1999) 5 *Journal of the Royal Anthropological Institute* 559; Power Michael *The Audit Society: Rituals of Verification* Oxford University Press Oxford 1997.

Foucauldian idea of government of the self, or governmentality, as elaborated upon by Nikolas Rose.[58] Furthermore, those who benefit from the new culture may feel that they have an investment in its continuance and are unwilling to critique its excesses. An example is the acceptance by academics in Canadian law schools of salary increases far in excess of those received by their peers in the humanities and social sciences.[59]

Feminist legal theorists are in disarray. But is it any wonder? If the institutional base is disappearing beneath our feet, it is very difficult to stand back and calmly theorise what is occurring. Some of us struggled to plant the seeds of feminist legal scholarship in the rocky ground that was available in the 1970s and 1980s. Some seeds took root because social liberalism was sustained by the old-fashioned liberal values of tolerance and academic freedom, but those values have become tarnished and the context is now dramatically different.

I do not wish to concede that the political moment of legal feminism belonged, like the category 'woman', to social liberalism and is now passé, that is, it has displayed 'the creativity of a minor trajectory [that] is all too brief'.[60] Instead, I want to discourage an exclusive focus upon individual and micropolitical sites, which have grown out of the conjunction of neoliberalism and postmodernism and become disconnected from the broader political picture. Auditing mechanisms within the academy promote preoccupation with the self through individual displays of performativity, which are necessary for survival, as well as acting as technologies of surveillance and insecurity. Political engagement, rather than introspection, has always been the more effective path of resistance, as anti-globalisation movements reveal. Although I do not want to discount the importance of the reflexive exercise, I am beginning a conversation in which I hope others will join so that we might discursively constitute a new *episteme* of feminist legal theory that is linked to the political. I do not wish to see legal feminism becoming yet another footnote to the history of jurisprudence. ●

58 Rose Nikolas *Powers of Freedom: Reframing Political Thought* Cambridge University Press Cambridge 1999 p 3. Government of the self is one dimension of Foucault's web of governmentality, which he describes as the 'conduct of conduct'. Governmentality theory is particularly apt when applied to the neoliberal academy.

59 Interviews conducted with Canadian legal academics in October and November 2003.

60 Rose above note 58 at 280.