Shock to Thought: An Encounter (of a third kind) with Legal Feminism

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Abstract: This paper takes a recently published text and, in examining it closely, argues that it exemplifies trends within feminist scholarship in law, which might be characterised as establishing a form of orthodoxy. The paper explores some of the ways in which this orthodoxy is constructed and presented, and argues that it is characterised by a commitment both to 'grand theory' and Hegelian dialectics. The adoption of this model of work seems to offer a chance to hold together the triangular figure of women/theory/law reform. The paper will argue that, whilst this model is clearly a valid choice, and attractive to feminist scholars in the promise it seems to hold, the model is not to be presumed but rather should be examined and considered in terms of its potential for feminist scholarship. Both within its own terms, and as part of the construction of an orthodoxy, the paper will argue that it is in fact problematic and that feminist scholarship would be better served by seeking an alternative theoretical model. An alternative is suggested, using the work of Deleuze, but it is acknowledged that this will require the acceptance of a very different theoretical configuration from that suggested by the triangular model of women/theory/law reform.

Keywords: Badiou, Deleuze, dialectics, difference, legal feminism, orthodoxy, politics

INTRODUCTION

Feminist scholarship in law has become a well-established presence in the academy. In the decade since this journal was established, we have seen a proliferation of texts (including the *Feminist Perspectives on Law* series published by Cavendish), journal papers, seminars, and courses which evidence that presence. Indeed, whereas one of our purposes in setting up this journal was to make sure that feminist material had a place for publication, we now find much feminist material being published in other journals, although there is still some difficulty, I think, in placing material in the more 'prestigious' mainstream law journals rather than in those journals dedicated to socio-legal or critical legal studies. As it becomes easier for feminist work to be published elsewhere, there is a subtle shift in the ways in which a specifically feminist law journal can be used. Principally, I think, it is now important that we more consciously use this space, to pursue difficult and complex debates within feminist scholarship, in particular with regard to the presentation of a more rigorous and selfreflective engagement with law and theory. It is, perhaps, in the nature of the development of new areas of work that for certain purposes (that is, for the purpose of establishing the work as valid within the academy) there is a tendency to emphasise what is held in common and to be rather reticent in exploring, in a sense exposing, what remains in contention. This is particularly if it looks, from a scholastic perspective, as if these issues of contention run so deep that they might threaten to implode an 'area' which presents the semblance of a unity of approach, and especially if that semblance of unity has been thought to be a necessary condition for its reception into the academy.

Further, many feminists who have been active in the women's movement, know that too often feminist political work can become mired in a complex of internal disputations which threaten to block effective political engagement. I remember a recent conference on women and law, at which the panel of speakers, including myself, having spoken over a wide range of issues, were faced with hostile questioning from an audience which took as its major thrust of critique, the fact that the panel did not 'speak to them' in the sense of 'for them'. It did not address what they saw as their major concerns, at that point in time, from their position and experiences. The impact of this on me was that I felt silenced, as if by not managing to address all the potential audiences and issues with a sense of immediacy to them, I should not speak at all. Now, in retrospect, I think this experience can be used positively to remind ourselves of the tension between presenting 'feminism' as 'a thing' of sufficient form and coherence to be mobilised as an important area of scholarship, and recognising the continued contentions in feminism, in particular the very different aspirations which women bring to the promise of feminism. Let me put it this way: As feminists we seek the greatest possible change for the greatest number. At the same time we are increasingly aware that we have to be modest in the ways in which we go about change: modest, in that the task is so huge that finding patterns for change is extremely difficult; modest also in remembering and recognising the diversity of the project, in the sense of the very different needs, aspirations, and agendas which women, impacted within their own sites by specific patterns of oppression, bring to the project of change, at least in a more immediate time scale. Whilst we recognise the complexity of these issues, we also recognise that "evidence of the continued global oppression of women remains overwhelming" (Conaghan, 2000, p. 354).

However, these tensions within feminism, as presented within the academy, play out in a way which suggests that feminist scholars are not always comfortable about examining them too closely, particularly when they might seem to challenge the presentation of feminism as sufficiently coherent for 'it' to have a recognised presence within academic work; in other words for 'it' to become an item on the academic, scholastic agenda. When a small group of us were asked, some years ago, to contribute a chapter on feminism to a collection on critical legal studies, we chose to present a paper which centred on a series of challenges to both established and critical law work. The editor immediately came back to us and said that what was actually required was that we describe and introduce to the readers the feminist agenda. We refused to do this and wrote a second version of the paper arguing that feminism was not to be thought of as only having a validity if we could produce a neat coherent account of it within standard scholastic terms and that what we wanted to do was to lay down a challenge to the ways in which 'they' were willing to apprehend feminism (Bottomley et al., 1987). Since then, feminists have moved on to explore ways in which feminism can be brought into the academy, and, again, it was the establishment of journals such as this one, which helped not only to profile and develop feminist work, but also to provide a space for debating between ourselves the continued contentions within feminism. It could be argued that it is a recognition of the extent of the impact of feminism within the academy which gives rise to my article now, in this place and in the form in which I have cast it. At first blush, it is a recognition of a real level of success in feminist scholastic work in terms of the status it is now given as opposed to a decade, or certainly two decades ago. But, I will argue that this has been bought at a cost which we should

be willing to acknowledge and consider. The cost is that the acceptance of the work has been achieved by presenting it in the terms which the editor of the critical law collection so many years ago said was necessary, presenting it as sufficiently coherent, in theoretical terms, to be established as a 'body of work' analogous to a 'school of thought'. How this has been achieved is the focus of this article. My argument is that in order to achieve this level of recognition, feminist scholarship has been rendered into a particular form which 'fits' current scholastic imperatives and that, in a negative sense, by linking feminism to scholarship of that form, we actually tie the future of feminist scholarship (and political interventions) into a particular set of practices which limit our potential. I believe that this is already evident, both in the resistance that many younger women scholars feel to being seen as part of this thing called (the label of) 'feminism', despite the shared characteristics of their own commitment to feminism and the ways in which their own work could clearly be read as 'feminist', and in the difficulty with which many feminist scholars (that is those who accept and use the label) engage with emerging critical scholarship, as if it is somehow likely to threaten feminism rather than possibly open us to new ideas, new alliances which could strengthen feminism both as scholarship and as a source of new ways to engage politically.

To begin to explore this must be done modestly, even if my tone will sometimes be assertive in order to try and emphasise the argument I am making. I want to make clear that I undertake my project in a particular way. I want to find a way of exploring the construction of feminist theory within the academy (that is of feminism as a mature scholastic enterprise) which does not suggest that I am saying that such an engagement is necessarily wrong. I am more interested, in a Foucauldian sense, with looking back at what has happened and analysing why, within a particular institution (the academy of law, at this particular conjuncture), knowledges of feminism are produced, and reproduced, in a particular way and with a particular impact. I do not want to suggest that there might have been a better way, let alone a more proper way. But I do want to suggest that we need to be much more aware of the impact that the presentation of feminism as a theoretical and scholastic enterprise has had. Further, I want to go on to suggest that the range of feminist work, as well as the potential of it, is not limited to constructing feminist scholarship in one form. To emphasise this point I shall call the particular form of, or trend within, feminist scholarship, a 'feminist orthodoxy'. What I will suggest is that without careful examination of the emergence of this orthodoxy, it threatens to limit, hold back and possibly stagnate the potential of feminist scholarship in law.

My construction of a 'feminist orthodoxy' is contentious in that I am presenting a 'type' or 'trend' which many readers might think I wish to use as a label of criticism and will want to know exactly who, as scholars, I think are implicated. This approach might seem to be amplified by the method I have adopted, which is to focus on one text alone as exemplifying characteristics of this 'orthodoxy'. In fact I think that we are all, necessarily, implicated in that all of us who work as scholars within the legal academy cannot be innocent of, or avoid the use or impact of, the imperatives that construct us as scholars within a particular enterprise. However, some of us seem more willing to work within these imperatives, without close examination of them, than others and therefore their work becomes overtly marked as being constructed within those patterns.Within these terms we can use one text to excavate trends which are more overt within that text than similar texts, but are actually present, to some extent,

in much of our work. In this sense then, highlighting a 'feminist orthodoxy' is about patterns in feminist scholarship rather than the work of particular scholars, but it would be dishonest of me not to admit that I believe it marks some scholarship (and therefore some scholars) much more clearly than others, and that therefore I am suggesting that certain work is not only representative of the construction of a 'feminist orthodoxy' but is more clearly implicated in that construction.

Moreover, the characteristics of this feminist orthodoxy are largely attributable to the imperatives of the academy, rather than to anything we would recognise as specifically 'feminist'. To make such a statement is neither profound nor controversial; none of us would expect feminist scholarship to claim a heritage or a pathway which is innocent of the broader context of scholarship and the place within which it is pursued. Neither do I view such a recognition as particularly problematic. As scholars who are feminists, it is to be expected that we wish to develop scholarship, informed by our feminism and constituted as exploring and developing feminist ideas and concerns, which is also acceptable as a valid scholastic enterprise.

Whereas once, perhaps two decades ago, and within the context of a very vibrant women's movement in the U.K. at least, it might have seemed that the argument I am about to construct is essentially a concern about the incorporation of feminism into the academy, a kind of co-opting which might threaten to sever feminist work from a political context, my current concern is different, addressed as it necessarily is, to a very different contemporary situation within as well as outside the academy to that faced two decades ago. My concern is to examine the extent to which feminist scholarship has come to be dominated by a set of core themes and methodological presumptions which, I shall argue, threaten to limit the potential of feminist work.

Although this article does no more than try and open up to scrutiny the ways in which the imperatives of the academy have tended to lead to the construction of feminist scholarship within a particular form, I argue that this process has led to the privileging of certain types of feminist work which fit a particular model, the 'orthodox', and to the consequent marginalising of other work and that this process could threaten the potential diversity and vitality of feminist scholarship which does not meet this model. I argue further that a suturing of feminist scholarship to a dominant orthodox model, threatens to marginalise feminism in terms of developing patterns of scholastic work. These developing patterns might well, and I believe can, help us to think new forms of feminism for new futures, but in order to open ourselves to these possibilities we have to be willing to examine the ways in which we have come to presume that feminist scholarship is necessarily marked by certain characteristics in order for it to be recognisably feminist.

In other words, I am calling into question the way in which the form of feminist knowledge which I label orthodox, is produced and constructed. There are two (closely related) contexts which need to be examined: first, the imperatives of the academy, especially the law academy, which tend to provoke in us certain patterns of engagement and; second, the dominant theoretical paradigm used in the academy, which remains wedded to a presumption of scholastic engagement as a dialectical process of progressive synthesis. My purpose is to argue that a significant account of feminist scholarship has been constituted into an orthodox form as it has responded to these contexts, reproducing them in a way which has come to suggest that this is the only form that feminism within the

academy can take in order for it to be recognised as such. The construction of this trend to orthodoxy needs to be understood, not to be dismissed or devalued, but to be 'placed', so that we understand it not as a full or final account of the potential of feminism, but rather as one account of one form of feminist scholarship. In so doing, we can become much more aware of how prevailing powers tend to shape scholarship, but also of the potentials of other forms of scholarship and, as feminists, open ourselves to the possibilities of them.

A NOTE ON METHOD

I have chosen to focus my arguments through the close reading of one text written by a feminist scholar and am very aware of the dangers of so doing. First, my article might then be thought of as an extended critique of the work of this scholar, which it is not intended to be. It is, rather, an examination of one particular text and the ways in which that text has taken form. It does not hold the author responsible for what I shall argue is carried in the text. Further, I am using this text to exemplify the production of what I have already suggested is my main focus, that is the development of a 'feminist orthodoxy'. So, second, I am open to the criticism that in using the text to bear such a weight I am reading too much into it or that it is not a fair representation of the broader pattern of development to which I am alluding. I am aware of the potential force of these criticisms, and I have some points tomake, at this stage, to explain if not defend mymethod. As feminist scholarship has developed within the academy of law, it has become commonplace to offer histories and maps to introduce others to the field and give them a resource to help them find their way around and locate specific debates and materials. Many have found such surveys useful, whether as sympathetic researchers or younger feminist scholars wishing to enter the field. Moreover, as courses have developed focused on feminist material, such surveys, whether constituted as papers or books, have become a major resource. Any text which offers itself as such a mapping exercise can be examined on its own terms, as an exercise in constructing a survey of the field, that is as an act of representation. One might open to question how well, how accurately, the field is represented, but my questioning is not in these terms. It is, rather, to look at how the field is constituted within that representation.1 The text I have chosen to examine does offer an account of the development of feminist scholarship within the academy of law. In fact, it is constituted as a celebration of the development of such scholarship to other scholars whomay be sympathetic to feminist work but not entirely conversant with it. Although within the text there are times when other feminists are being addressed, they are generally addressed in terms which make clear what the author considers to be the imperatives of feminist scholarship. Therefore, whilst the major thrust of the paper is to present feminist work to others, there is also a secondary text addressed to feminists, about what constitutes feminist scholarship in order for it to continue to be vibrant. Within these terms, it seems to me to be fair to open the text to a close reading of its construction as exemplifying a certain pattern of work.

The reading I am about to engage upon does not open the text to critique in the sense of suggesting it is somehow partial or lacking in its presentation – that it could have been improved upon if it had addressed other issues for instance. Rather my reading seeks to look at the way in which the text is constructed and to consider this construction, not merely in relation to the question of the (re)presentation of the field of feminist scholarship, but

also in terms of why it has come to be presented in a particular way and the consequences of that presentation. My reading is aimed at examining issues of the production of knowledge, specifically how knowledges of and within feminist scholarship are constituted.
So, finally, it must be underlined that I am not concerned either with judging the normative value of the text, or seeking to replace it with a better text. This is simply, modestly, asking what forces have helped constitute the text in a particular way and with what possible effect. I do suggest that this is indicative of a pattern within feminist scholarship which I have called orthodox and that, as with all orthodoxies, it should be recognised that this can become a limitation on other work developing within the field. But this is not to argue that the orthodox position is invalid, simply to contend that it if it is allowed to stand without examination, it can operate to over-determine the field and limit potentials in other directions. If there is a baseline for me it is this: Any orthodoxy which is constituted either as the authoritative voice of a field or as establishing the key indices of work within that field, inevitably threatens to function as a power block which will begin to operate as a force of recognition and exclusion. It is that of which we must be wary.

ENCOUNTERING LEGAL FEMINISM

The text I have chosen as a focus is entitled *In Praise of Legal Feminism* (Naffine, 2002). It was written, originally, as a keynote speech for a British conference of socio-legal scholars and was, I am told, generally very well received. It is important to note this origin. A text written for a conference is addressing a very specific audience, in this case a group of scholars who could generally be taken as likely to be well-disposed towards the speaker and her subject, certainly unlikely to be immediately dismissive but equally likely to be well-meaning rather than particularly well-informed. The text begins with these words:

> Within the legal academy, the achievements of feminists have been substantial and cumulative. This paper is both a critical and appreciative reflection upon them. It extends praise to legal feminists for their contribution to our understanding of law, but concedes the intellectual difficulties encountered, and sometimes even engendered, by feminists. What is unusual and commendable about the writing of feminists is its intellectual transparency (Naffine, 2002, p. 71).

And ends with:

> The changing of the legal mind still depends on the continuing goodwill of fair minded men (and women) who are willing to listen to feminist scholars and to learn from them, and thus to enter into dialogue . . . They must suspend old ways of thinking and embrace open scholarly debate (Naffine, 2002, p. 101).

The purpose of the text is clear – it is addressed principally to "fair minded men" demanding of them that they move from being merely well-meaning to actually engaging with feminist scholars. It is a totally commendable strategic move to appear before such an audience and demand to be taken seriously as colleagues. But note, even at this point, how the case is presented.
Firstly, we have the use of a very 'tight' name for the project, "legal feminism".2 I have argued before that the process of naming, of giving an identity through this process, is not innocent and carries very specific

messages (Bottomley, 2000). The identity suggested here is one which not merely brackets feminist and legal scholarship but suggests a fusion, it has become presented as an identity in its own right by being given a particular form of name. We have moved one step on from the present general use of 'feminist legal scholarship'. What is suggested by the term, is that we are now more than feminists working in law with a commitment to our feminism, and our work is now constituted in a form that suggests a 'school of thought'.3 Not merely a useful chapter heading for a book on jurisprudence, this act of naming a body of work in the form of a school of thought implies that the work has achieved a level of maturity which is commensurate to the established schools of thought. In other words, it can meet and match them within the terrain of legal theory.

Such an act of naming must then be backed by evidence of a coherent identity. This is initially alluded to in two ways. First by the simple assertion that much has been already been achieved (it is both "substantial and cumulative") in contributing to "our understanding of law" (a neat rhetorical device here – feminists are introduced in the third person, the author stands apart from "them" and 'praises them' and then uses the second person to confirm her position with the audience in 'our' understanding); second, by introducing the paper as a "critical and appreciative reflection", which will amount to a cataloging of "legal feminism", giving it a history and a geography.

Narratives to establish identity usually activate three scenarios: an account of origins, a geography of the terrain (premises, principles and methods), and a map for future work. They are generally assertive in their tone and compelling in their arguments – they are stories of arrival. The rhetorical strength of the argument is premised on an assertion that so much has already been achieved that it now demands recognition. Foundations are already well laid, we are now building above ground. To move forward within these terms is therefore to have to accept that the foundations are, indeed, well laid.

Within the context of the giving of this paper, this is an understandable strategic move. The problem however is that such a presentation demands that a coherent account of feminism is presented which will make the best case for inclusion. At the bottom of the first page the author alludes to the problem of 'speaking for all feminists' (my words not hers) by observing "feminist reproaching feminist for failure to pay sufficient regard to all the subtleties of the feminist project". She then notes in a footnote that:

> . . . the feminist project is not singular. As I will endeavor to show, there is a number of, mainly constructive, debates among feminists about their appropriate aims and methods. And, of course, feminist scholars possess a broad range of intellectual and feminist backgrounds . . .My intention, however, is to draw out the communalities of purpose of feminist legal scholarship, to enable a view of legal feminism as a whole (Naffine, 2002, fn. 2, p. 71).4

It is my contention that drawing out these "communalities" is a dangerous enterprise when they are put to the purpose of constructing an internal coherence (and direction) for "legal feminism as a whole". It is this which helps to begin to construct an orthodoxy – an act of recognition, by a feminist, of what can be held together within 'the' project, which becomes in effect the claim to an identity. My sense is that a reference in a footnote noting that the project "is not singular" will easily get lost. Indeed, the placing of it in such a form suggests that it is can be overcome, especially when the purpose of the paper is to make it clear that the lack of "singularity"

is an issue which can be trumped by "drawing out communalities". That this can be an act of not only drawing together but also of delimitation, that boundaries as well as internal "communalities" may be being constructed, is not, necessarily not, examined.5 What is important here is to put the focus on things which can be held together, presented as already constituting a form, an identity, which deserves recognition.

Despite the reference to "intellectual transparency", what cannot within this context be transparent is examining the felt need to present an image of 'the project' moving forward as a thing called 'legal feminism'. Why is it powerful to render the diverse body of feminist scholarship into one body of 'legal feminism' in this way? It is because the claim for recognition of the work is actually a claim for inclusion into the academy at a particular level, as a 'school of thought', as a body of knowledge, which can be presented within terms the academy recognises and privileges as 'legal theory'. This is a much greater claim than to a space for 'feminist scholarship on law' or a holding together of a diverse set of practices called 'feminist perspectives on law', this is rendering 'the feminist project', I would argue, into a coherent identifiable body of knowledge named 'legal feminism'.

I will go further and suggest that the text is presented through two tropes: one, providing the evidence to justify such a claim and second, disciplining the difficult, awkward, uneven features of feminist scholarship into a form which can sustain that claim. In these terms it is particularly ironic that references, in the first paragraphs, to the transparency of feminist scholarship (and later also to its generosity) as well as to the difficulties encountered (and engendered!) by feminist scholars, will become woven into a narrative which indicates (argues for) the way forward that all of us (can) share.

However, constructing 'legal feminism' turns out to be rather problematic when the text has to engage with the many heritages of feminist work in law.

FUSING IDENTITY FROM THE THREADS OF DIVERSE HERITAGES

In praising the achievements of 'legal feminism', the author begins by outlining its purpose:

> The general purpose of legal feminism is to make sense of the many ways gender shapes law, to reveal the many ways that law, as a consequence, harms women, and to try to change law so that women are helped (Naffine, 2002, p. 72).

Within this pattern of argumentation, feminist engagement with law is premised on looking at the ways in which law "harms" women and finding ways of alleviating this. Taking this starting point is understandable. Early feminist work necessarily located itself in this way, as a concern to challenge the gender blindness of academic work and the marginalisation of 'women's issues' (if they were recognised at all), as well as responding to work with feminist activists outside the academy on issues of oppression and demands for law reform.

However, by introducing 'legal feminism' in this way, we begin with a firm if, some might argue limited, focus and a series of presumptions which lead work in a very particular direction. How gender shapes law/revealing harm/change in law is the tripartite configuration of the field. The suggestion seems to be that of a series of moves, from gender to harm to reform, and from general theory to specific examples to proposals for change. As

feminist work developed, there was certainly a concern to situate proposals for reform within a broader analysis of law which sought to be predictive as to the relative merits of any proposal for reform, both in terms of likely impact on the immediate issue and the possible impact on related issues (see, for example, Bottomley and Conaghan, 1993). In that sense a need for work of a more abstract and theoretical nature was widely recognised. Within these terms, it seemed that any theoretical project was entered into very purposefully. However, a number of issues have arisen subsequently which make this configuration more problematic.

First, there is the question of the extent to which a focus on gendered harm might skew a good analysis of law and tend to lead to generalised statements which turn out to be not quite so easy to sustain (Bottomley, 2000). Second, there is the question of how far this emphasis on the productive role of theory tends to limit our investigations of the potential of theoretical work by presuming that any engagement with theory must be based on reaffirming ontological and normative themes within theoretical work (Drakopoulou, 2000a, b).

The particular configuration laid out in the text carries an implied reversal of what I suggested above was an historical account of how many of us moved as feminists into theoretical work – from immediate engagements to looking for a more theoretical context from which to try and develop more carefully considered strategies for engagement. The reversal gives primacy to theoretical engagement, although the purpose remains one in which the promise of reform in and of law remains the central premise.6 Within these terms, theoretical work must be judged for its validity by two measures, its own internal coherence (the usual measure of the academy) plus its relevance and ability to yield product in terms of an agenda for change (the feminist imperative and measure of success). Holding this together, as legal feminism, is a heavy burden and one which asks more of scholars working within this terrain than most other academics. In an important sense, the text presents an argument that, despite problems, it can and has been done and, in making this argument, three key assumptions must be made: first, that we can answer the demands of scholarship; second that we can answer the demands of feminists, by; third, providing a model of work which meets each imperative under one rubric.

But before I proceed with this argument, what might seem like a digression is important. Within the academy of law, many of us were educated in a tradition which divorced theory from practice, and that division was something which we clearly, as feminists, wished to challenge. Finding a way to bring these tropes together within one field of work is something for which many of us have strived; the questions will always remain 'why' and 'how' we achieve, if we do, the delineation of such a field. The imperatives of academic work, let alone feminist imperatives, mean that the presentation of feminist work which can be both theoretically coherent and productive of agendas for reform is, in law schools, compelling. On the one hand, to engage with theory and yet, at the same time, have agendas for change, suits the modern academy which strives, increasingly, to show its relevance to world-outside, all the while asserting that world inside is worth defending as it houses a body of scholars who not only produce work for now but also engage in 'blue-skies' thinking. In other words, we are not merely technocrats for our discipline, policy-makers in a kind of extra-mural government department, but remain more than that. Presenting feminism as being concerned with and able to deliver on both fronts is actually congruent with the developing climate in universities. So,

an argument constructed for inclusion into the academy, emphasising the incorporation of theory/practice within an identity called legal feminism, will resonate. What is required, however, in a text such as this and aimed at such an audience, is the construction of a model which presents this as a coherent project in theoretical terms.

Constructing feminist scholarship in law into a form which can be rendered an identity called 'legal feminism' not only requires finding a model which brings together theory/practice, but also a model which brings together very divergent work marked, on the one hand, by traces of concerns and methods derived from the social sciences, and on the other hand, by traces of concerns and methods derived from the humanities. Again, it could be argued that it is a strength of feminist work that it refuses to be bound within either disciplinary complex. Many of us feel uncomfortable with that division. The tendency in plate-glass universities to place us firmly in the social sciences was, for instance, a real hindrance to those of us more interested in work associated with the humanities (Bottomley, 1997). At the same time, it seems to me that feminist scholarship in law has often taken on a very heavy burden in trying to address a broad range of materials and issues raised about law within, or derived from, distinct disciplinary bases. When we examine more carefully the tripartite configuration of legal feminism, it should be noted that we move through a range of registers, moving between work derived from the social sciences and work derived from the humanities. Again, as with theory/practice, it could well be that in bringing this work together, the presentation of legal feminism seems strengthened by the incorporation of such a range of scholarship. And, again, it is not without its counterpart in other sections of the academy. It has become, for instance, a feature of the socio-legal movement that it no longer regards itself as limited to social science methodology, and so for feminists to refuse a disciplinary divide is again resonant. But what this means is that trying to hold legal feminism as an identity incorporating all these tropes is, again, going to require a model which affirms that all aspects of the tripartite configuration are brought together, synthesised within one model of scholarship. All the time what is being presented is a picture not merely of the range of work, but of a synthesis of that work.

There are many important questions which could be teased out here – but I want to concentrate on the construction of legal feminism as providing a particular image of feminist scholarship. First, there is the mark of a mixture of heritages, which are brought together as if they coalesce. Second, theory comes first. In a sense, it is the development of theory which will give direction to the project and hold the whole thing together. But, third, theory must be capable of delivering an agenda (or agendas) for reform.

At one level, this could be read as a fair description of much feminist work to date. However, there is now a substantial body of literature within feminist scholarship which has spoken to a concern that by taking this as 'the' rather than 'a' *modus operandi*, it has limited feminist work to focusing on clear incidents of 'harm' and thereby tending to skew a broader critique of, and engagement with, law (see, for example, Bottomley, 2000). Are we to limit ourselves, be limited, to this account of feminist work? Is the only validity for any feminist engagement, that it will produce patterns/agendas for change, as meaning reform of law? And what presumptions does it make about the kind of theory we are looking for/constructing (Drakopoulou, 2000a, b)? It is at this point that I would argue that we could easily slip from a way of describing (much) feminist

work, to ascribing the form which feminist work will take in order for it to be recognised as 'feminist'. In other words 'legal feminism' could be read as exemplifying the beginning of an orthodoxy. In order for 'legal feminism' to be presented as focused and coherent, feminist scholarship becomes limited to that which will fit this picture. But it is not merely scholarship of a theoretical nature which might be placed outside this presentation of 'legal feminism' it is also, conversely, feminist scholarship which is not sufficiently theoretical within the terms set out later in the text.

If feminist scholarship has already engaged with law within the tripartite configuration suggested in the text, what success has it had? Within the text we are told that:

Feminists have convincingly demonstrated law's failure to make sense of many aspects of women's lives, and yet legal institutions have proved remarkably resistant to feminism and its findings (Naffine, 2002, p. 72).

Obviously how we measure success, failure or resistance is problematic, but, as it happens, within this text (and perhaps understandably given the context of its origins) the author focuses not on "legal institutions" in general, and hence the need to address the issue of the relative merit of being reform-focused, but rather the academy of law. The text concludes by saying of orthodox jurisprudence that:

It has been reluctant to concede that new points of view might be better than well-used ones. It has been unwilling to concede that it own view is necessarily limited, partial and so constantly in need of revision . . . The changing of the legal mind still depends on the continuing goodwill of fair-minded men (and women) who are willing to listen to feminist scholars and to learn from them, and thus to enter into dialogue. Faced with the 'irregular case' of women, they must do more than just 'shrug their shoulders' and proceed with business as usual. They must suspend old ways of thinking and embrace open scholarly debate (Naffine, 2002, p. 101).

Within this context, what matters in the end is the measure of success in terms of 'legal feminism' being recognised and engaged with in the academy as legal theory. What began as requiring that any project of reform is underpinned by good theoretical work, has become the need for a coherent body of theory which we can then look to, to deliver a basis for engagement with law (reform).

Embedded within this account of 'legal feminism's' demand for engagement within the academy, is a very clear picture of how knowledge proceeds: from partial tomore complete accounts. It is a dialectical process requiring open, scholarly debate, in which feminism, as the counterpoint to the present orthodoxy of jurisprudence, is posited as the antithesis which, if synthesised into jurisprudence, will move us all forward as scholars together. Presumed is the process of scholarly progress; presumed also is the idea that by using the tools and methods of that process, we can and will proceed. All that is letting us down is that we are not listened to carefully enough and with enough seriousness. It is rather like saying – we deserve it because we have all the marks of scholarship which you expect – and then wondering why the task turns out to be quite so difficult. Although the focus in this context is on fair-minded men, perhaps we should also consider how far it is possible to discipline feminist scholarship into the coherent project which 'legal feminism' seems to require of us, as well as asking whether the picture of inclusion into the academy is not rather too

simple.
I suggest that presenting feminist scholarship as 'legal feminism' ready to demand "open scholarly debate" is premised on two principles: first, that feminist scholarship itself can be constructed as sufficiently coherent, as well as carrying significant material of import to all scholars, to be spoken and heard within "open scholarly debate"; and, second, that "open scholarly debate" is something which we all understand and can share in the academy. We can find ground upon which to meet and exchange ideas. This presumes, further, that "fair-minded" scholars will be won over by evidence and argumentation of a certain level of strength, and that the promise of challenging the present partial account of law with the offer of a fuller account, will enable the presentation of a complete picture. In other words, this construction of the production of knowledge is premised upon a particular image of scholarship, the pursuit of truth, and a particular method, a dialectical process through which we progress towards truth. This image ignores critical questions of power and the production of knowledge as constituted within the academy. This does not mean that we cannot strategically use this construction of academic work, just as we can strategically use the idea of the rule of law, but it does mean that we have to be aware of how and why we are using it and keep open a recognition of the limits as much as the benefits of such a play.
Keeping in mind the construction of knowledge is essential when we move, as in the text, into an account of what we do which focuses on the object of study and the methods by which it is studied. It is all too easy to slip from thinking about the production of scholarship and our role as scholars, to an account which presumes the attributes of scholarship as given.
The "general purpose of legal feminism" is revealing harm to women. As this is played through in the text, we encounter a trope which requires that 'woman' as the object-of-study becomes visible. The text attempts to synthesise work which presents 'woman' in this way, and, in so doing, moves within and through the territories of law, sociology and philosophy, our tripartite heritage, without addressing any methodological issues that might arise from bringing them into relation with each other. Within this terrain, the figure which must be found and addressed, is that of 'woman'. How this is achieved and the consequences of these moves are issues to which I now turn.

THE FIGURE OF WOMAN IN LAW

The first presentation of this figure is of woman as harmed by law, in other words as the 'victim' of law. Focusing feminist scholarship is this way might seem to be uncontroversial – there may be some problems, already alluded to, but the principle thrust would seem to describe much feminist work. But if this is 'the' motor of feminist engagement, what are the potential consequences of playing it through in this way? I mean here, not the potential for revealing the effect of law on certain women in certain circumstances, nor the possible linkages to a package of proposed reforms, but rather the need to think of it as presented as fundamental to the feminist project and method, as a fundamental constituent of our engagement with theory.
Presenting woman-as-victim leads to an account of law as either letting women down by not protecting them sufficiently or, in its very construction, as itself harmful to women or exacerbating harm to women. Within this trope, revealing harm and its extent then moves to proposals for change

in order to alleviate that harm. It is questionable how far any legal change can impact on the harm identified but the sense is that we should continue to try and look for some change rather than none – anything else would be to turn away from the problem we have revealed through our work and not put to use our skills as lawyers rather than as mere social scientists. This seems to be the only possible, ethical, reason for our engagement with law and so much a feature of feminist work as to be uncontroversial. But it can, possibly always will, reproduce features which are in fact problematic both in terms of a method *per se* as well as in terms of an ethical engagement, particularly if they are not recognised.
I wish to take some time in exploring a quite different way of thinking through this form of engagement and considering its consequences.

ENCOUNTERING BADIOU'S *ETHICS*

By using one aspect of a text by a modern French philosopher, Alain Badiou (2002), I hope more clearly to critique this aspect of feminist work which has become central to the orthodoxy expressed in 'legal feminism'.

There are a number of reasons for pursuing this. First, it posits one example of how description may become ascription and then carry with it certain detrimental effects. Second, in examining its construction we can gain more insight into why it has been reproduced as central to feminist purpose and method and ask whether it is necessary to keep this as 'the' focus. Third, examining the attempts to hold this together as purpose and method, to keep stable something which is regularly rendered problematic and threatens to destabilise the feminist project as presented within the terms of legal feminism, might help open to question whether it is the most useful way to move forward. Heroic efforts have to be made to stabilise it, but, for reasons I will suggest, it is presumed that without this object of study and the method by which it is studied, feminism will somehow unravel, at least feminism as we know it.
On the presumption that Badiou's work is not necessarily familiar to scholars working within law, I need to begin by outlining something of his extended essay which was, he tells us in his introduction, written at speed and at the request of a friend for publication in a series of books aimed at introducing key philosophical ideas and debates to undergraduates and children. It is an unashamedly polemical tract, written with a sense of surging anger, in which he speaks of his need to counter the interpretation of recent and current political events and of the need to create a philosophical and political position which will allow for truly radical intervention against the dominant orthodoxies – which include, for Badiou, the orthodoxy of the seemingly radical position of building ethics based on a concern for 'the other'. There are three major moves in *Ethics*: his refusal of an 'ethics' grounded in 'the other'; consequently, his refusal of the dominant "politico-ethics" of human rights; and finally his commitment to "an ethic of truth" as an affirmative practice.
His refusal of an ethics grounded in 'the other' can be read as a critique of Emmanuel Levinas, but is actually aimed at work inspired by or attributed to the influence of Levinas, and in the sense that the use of Levinas exemplifies or is strongly congruent with the 'mood' and 'mode' of our times:

For the honour of philosophy, it is first of all necessary to say that this ideology of a 'right to difference', the contemporary catechism of goodwill with regard to 'other cultures', is

strikingly distant from Levinas's actual conception of things.
The heart of the question concerns the presumption of a universal human Subject, capable of reducing ethical issues to matters of human rights and humanitarian actions.
. . . ethics subordinates the identification of this subject to the universal recognition of the evil that is done to him. Ethics thus defines man *as a victim* (Badiou, 2002, p. 10).7
7 The refusal of the foundationary figure of 'victim' is, of course, first made in the work of Nietzsche.

Badiou starts from asserting that there are two primary indices of this mode of thinking which must be focused upon and answered: "the presumption of evil" and "the subject defined as victim". His project overall is to refuse this form of 'ethics' and construct, in the alternative, an "ethical practice of truth". The refusal is absolute. At this point I do not want to examine his alternative, but rather to concentrate on his reasons for refusing what has become constituted as 'ethics' premised on 'the other':

. . . the ethical primacy of the Other over the Same requires that the experience of alterity be ontologically 'guaranteed' as the experience of a distance, of an essential non-identity, the traversal of which is the ethical experience itself. But nothing in this simple phenomenon of the other contains such a guarantee. And this simply because the finitude of the other's appearing certainly can be conceived as resemblance, or as imitation, and thus lead back to the logic of the Same. The other always resembles me too much for the hypothesis of an originary exposure to his alterity to be necessarily true (Badiou, 2002, p. 21).

In other words, the very idea of being able to 'become' an ethical subject via, and only via the apprehension of the "fleshy epiphany" of the face of 'the other', is to return to the simple problem of how we will 'know' the other as authentic, and authentic not only within their own terms but our own, if we do not 'know' ourselves. Thus the move to open us "to an ethical opening to alterity", in fact returns us to the same conundrum.What Badiou, to me, suggests is not only the inherent impossibility of this move as authentic, but also the very selfishness of it.8 It places 'other' as a necessary gesture in making an 'ethical-self'. Badiou suggests that, in practice, this becomes associated with two "congruent effects": first, the valorisation of an 'ethics of difference' in which respect for 'the other' becomes not merely a concern to 'see' other but to respond to the needs of the 'other as-victim' – why? Because we have not thought of ourselves as anything but a subject who will find our ethical selves by so responding: We require of the other that they present to us as victim.9 'The ethics of difference' is therefore, in truth, not a reciprocal device but one in which we constitute ourselves by finding an 'other' to confirm us. 'Difference' in these terms becomes a dialectical process in which we are led not merely to affirm the other, actually ourselves, but to offer to the 'other' the gesture of inclusion.

8 It has been pointed out to me that I am using Badiou's text here to make a point not raised within his own work – his concern is to critique the real potential of radical alterity, that is the real 'otherness' of 'other' in that it can only, in fact, be constructed on the basis of resemblance, that is what is like/unlike and that he is not concerned with knowledge of self in the way in which I suggest. To a great extent I accept this criticism but have decided to continue with my use of his text, not so much as a 'reading' of it, but as a way in which the text made me think of the particular aspect of construction of ethical-self. In these terms the words 'suggest' and 'to me' must be firmly born in mind!
9 This is tied of course to his attack on the privileging of 'evil' within the work of Levinas.

This may seem contradictory but it is not. What is being suggested here is that the recognition of 'difference' in these terms becomes a need to find a way in which difference is both recognised and incorporated; otherwise we turn away from the face and leave what it represents to its own fate. We search for something abstract enough to incorporate difference, a gift we can offer which also, as it happens, will confirm our own privileges, 'ethics', 'the rule of law' and 'human rights'.
There are, of course, a huge number of crucial leaps here, but that is one of Badiou's strengths – he does not remain within the terrain of abstract scholarship in his critique but rather moves between the planes of the theoretical and the political. To "think the unthinkable" can begin by accessing this "congruent effect" either through the theoretical or the political planes – what is required is both a radically new process of thinking and a radically new form of politics.

THE ETHICS OF 'LEGAL FEMINISM'

What I want to suggest is that the 'shock' of Badiou into making us think about an ethics based on difference and then expressed in a politics of human rights, is a shock which feminist scholars can use, by analogy, to investigate and critically examine our own construction of an ethical practice for feminist scholarship based on 'the other'. There is much more in Badiou's work which will be of concern to feminists, but at this point I simply want to take one model of a shock to thought in relation to one area of work (Levinasian) which has become so attractive to scholars, and think it through in relation to our own scholarship as feminists in relation to the figure of woman-as-victim and the search for legal reform.
The particular twist to 'the ethics of the other' played through within the text of legal feminism is that it moves in two directions: one is that it is presented as an issue of (ethical) scholarship, and the other that, consequently, although we are concerned with 'women' in general, we are focused on woman-as-victim within the legal system, as our object of study. Therefore within this particular narrative, there seems to be a double effect in that woman/feminist who is scholar, is doing the work of presenting 'a face' to be apprehended by her and other scholars. Let me play this out more fully with regard to the text under discussion.
Although the text begins with the evocation of woman-victim of law, it moves swiftly on to the achievements of women scholars, as this is the focus of the demand for inclusion in the academy. Women legal scholars are:

> . . . insiders who can interpret law, apply it, and even earn a living from it. They are fluent in legal language, and so they are able players of "the language games" of law. To nonlawyers, feminist lawyers are an elite; they are in the legal club (Naffine, 2002, p. 77).

By having become 'insiders', although she emphasises their marginal status within that club, women legal scholars find they have created an 'other': the women clients of the system of which they are now a part.
Having reviewed the problem of the "fear of essentialism"10 (how do we cope with the 'ethics of difference'? – which I will come back to) and moved on to the "partial paralysis of theory and practice" (which again I will come back to), the author argues for the "ethical duty" of feminist scholarship:

> . . . those with the time, the resources and the education are better placed to develop

effective arguments for social and legal change based on good and persuasive research. The woman on the production line in the car factory may be less well located to analyse her situation, historically, economically and politically, and to articulate her concerns convincingly, than the person whose job is dedicated to analysing her situation as a professional and intellectual task. Indeed, this may be said to be the ethical duty of intellectuals – to bring a larger view to the understanding of an individual's situation. If the feminist intellectual will not speak for this woman, then perhaps no one will (Naffine, 2002, p. 92).

She here reproduces the very slippage that Badiou warns us about: her "ethical duty" becomes translated into a confirmation of what she has to offer and therefore a confirmation of herself. What is on offer and confirmed is the role of the academy, the role of the feminist scholar and the law as the site for change. The position of the individual woman (the victim on the factory floor) becomes part of a 'larger picture' to be elucidated within academic texts of law and, hopefully, thereby productive of legal and social change (put that way round). As Badiou says of this form of ethics:

. . . ethics prevents itself from thinking the singularity of situations as such, which is the obligatory starting point of all properly human action. Thus, for instance, the doctor won over to an 'ethical ideology' will ponder, in meetings and commissions, all sorts of considerations regarding 'the sick', conceived of in exactly the same way as the partisan of human rights conceives of the indistinct crowd of victims . . . (Badiou, 2002, p. 14).

In effect the individual is not only not able to speak of and for herself, but will be subsumed into a generalised collectivity of women/victims who require our help as academics and lawyers. They become no more than figures we address by offering our services – our scholarship and our law. And, as Badiou goes on to say:

. . . the same doctor will have no difficulty in accepting the fact that this particular person is not treated at the hospital . . . because he or she is without residency papers . . . What is erased in the process is the fact that there is only one medical situation, the clinical situation, and there is no need for an 'ethics' to understand that a doctor is a doctor only if he deals with this situation . . .

The position and skills of a doctor are much more easily translated into a division between the generalised 'ethics' of medical care and the imperative to act so as to give care, but the message is clear: despite seeming to see the position of the woman factory worker, we move quickly into a scenario in which our ethical responsibility is to speak 'for' her rather than 'to' her, and in speaking 'for her' we are distanced not merely from her, but also from any political responsibility towards her, she is simply part of a larger picture.
It is here that the feminist scholar in law seems to have a double burden – she is academic with ethical problems (especially in relation to the apprehension of the victim of harm) and she is lawyer (who has the training and skills which might be offered to the victim to try and use the law). Within the discourse of a feminist legal scholarship, these are understandable imperatives: What we find, we should seek to change, at least alleviate. But what Badiou is asking us to stand back and think about is how easily this slips into patterns of potentially patronising and distanced 'concern' which more easily becomes the focus of establishing a claim to academic work rather than really addressing the circumstances and needs of the woman victim. Scholarship requires distance; feminism requires, at a minimum,

sympathy with the position of the woman studied. The conflicts between the two are frequently examined in literature dealing with social science methodology, especially in relation to empirical work. But in this text, not addressing social science methodology but rather a more generalised account of feminist scholarship in law, the focus is more hazy and the figure of the scholar hovers between a social scientist and a lawyer without ever having to give a clear account of either. We shift from what might have become an account of directly dealing with the woman/client to a more generalised account of a grouping which does not require empirical research. Thus the woman scholar of law can begin to deal with questions of presentation of the needs of a client group in a much less focused way and we slip into dealing with questions which owe their origins more to the work of philosophy and the humanities than social sciences.
This slippage between the heritages of social sciences, humanities and law, and also what I might call the hangover of the imperative of feminism to engage for political purposes which must necessarily be focused on change, produces some very muddled accounts of the feminist project contained in legal feminism. It is as if the strength of feminist work in law is that it attempts to pull all these heritages together; but, it seems to me, they not only often pull in different directions but also allow crucial slippages when moving from one register of work to another yet presenting it all as if it was one practice of scholarship. The picture may begin with a focus on woman-as-victim, but it quickly moves into a very different discursive form.
The text recognises that feminists have struggled with a number of the issues surrounding the study of 'woman'. The author alludes principally to the "fear of essentialism", which led to "the partial paralysis of theory and practice":

Anxiety about essentialism has generated excessive caution in the development of theory and its application . . . (Naffine, 2002, p. 90).

She cites two major problems for feminist scholarship that arose from "the fear of essentialism". The first:

[A] problem with the concession to the authoritative experience of the person in 'the box seat' is that the so-called 'other' may thus be romanticised, as exotically different and perpetually unknowable. In other words, the concerted effort to do justice to the world views of those differently situated, by declaring them the final authority on their own situation, contains the tacit proposition that their experience is somehow always beyond reach, always in some way incommensurable to one's own experience. This is to fall into the trap that some men set for themselves, but perhaps with less goodwill . . . to declare women obscure and unknowable . . . (Naffine, 2002, p. 91).

She then goes on to the second problem:

A related problem with the work of the feminist scholar who is concerned not to generalise too much beyond her own experience and who wishes to avoid the 'masculine third person', is that her writing can become highly autobiographical, even solipsistic (*ibid*.).

Both these problems must be overcome, she argues, in order to achieve legal scholarship; they are overcome by realising the need to move into a more abstract terrain. If we recognise that:

. . . those having the experience may in fact have a poor critical appreciation of what is

going on, not only because they do not have the time and energy to analyse it, but because the situation itself addles their perception. Marx referred to this as false consciousness (Naffine, 2002, p. 92).

And guard against:

. . . the case that the intellectual gets her subject wrong, precisely because she is too divorced form the situation, which is why it is important to recognise the need for constructive alliances between researcher and researched. Without such alliances there is certainly a danger of reducing the women who are subjects of inquiry once again to rather strange scientific objects (Naffine, 2002, p. 92).

Then we have achieved a good standard of, and an ethical balance to, our scholarship. But look more closely at the series of assumptions and slippages which are being made here. First, experience now takes centre stage – because somewhere in this mix, we have come to a point of not only being concerned about the position of 'other' (woman out there) but we also presume to speak for her, and must therefore lay a claim to her voice. It is rather like taking the role of advocate without receiving instructions. In fact it would be difficult to take instructions from 'her' because there are too many 'hers', many of whom have not yet achieved a standard of sufficient consciousness which will allow them to speak with any authority (real authenticity) about their own needs or wishes. So we have to move up the ladder of abstraction, in order to speak not merely of 'them' but for 'them'. And we must try to do so, we cannot stand back and say this women's experience is beyond mine and therefore it is not for me to speak of it, or I only know myself and therefore can only speak for or of myself. In what form of feminist scholarship, derived from what disciplinary practices, are these still real issues? They are certainly political issues when formulating a campaign, and they are issues for social science research which tries to convey the needs/wishes of women premised, at least in part, on what 'they' perceive to be these needs/wishes. But feminist scholarship in law (as opposed to social scientists working on legal issues) very rarely attempts to speak in such a way. It is not within our training. Feminist scholarship by lawyers is much more likely to come across the problem of essentialism when postulating whether a particular law has had a particular impact on a particular group and whether a change in the law is likely to improve the situation. In other words, it is premised on a more distanced account from the very beginning and the problem for legal scholars has been defining the group with sufficient recognition of its many constituent parts rather than exploring issues of an experiential nature. Further, it seems inimical to me that contemporary feminist scholarship in law should ever go as far as to try and speak 'for' women rather than 'of' the position of some women in relation to a specific aspect of law. Why then does the text spend so much time worrying about the impact of the "fear of essentialism"? Not, I think, because it has constrained feminist scholarship in law (although it has been a problem for campaigners) but because what it really being defended here, and needs defending, is the ontological category of 'women'.We have actually moved in the text from a concern which seems addressed to issues of feminist method in social sciences to an issue which has been fundamental to feminist philosophy: Can we hold 'women' together in one grouping so as to be able to speak of them as a group? And, in this sense, one of the most challenging aspects of feminist work has been how we ground that ontological status: could it be through a common material base or a common experience of oppression,

> etc., etc. . . . The social sciences certainly fed into this debate by exploring and providing models for the collection of empirical data – but the question is essentially one of a philosophical nature. And this resonates in this text, as in so many others, in a concern 'with theory' but without an examination of the philosophical base of the use and construction of theory. So, we slip from a social sciences model of 'practice' to a discourse derived from a different register, for a discussion of 'theory'. And within this text, theory is mobilised to rescue us from the problems of essentialism, just as it requires that we are so rescued in order for us to mobilise theory as scholars.
> The fear of essentialism was such that,
>
> Caution was required at all times and so it seemed that grand theory was off the agenda (Naffine, 2002, p. 89).

But:

> One might further observe that there is an obligation on the intellectual to advance large arguments and grand theories, which necessarily ride roughshod over the details of human difference, because they are provocative and often deliberately so (Naffine, 2002, p. 92).

Theory is privileged, and seemingly both necessarily "grand" and distanced from "the details of human difference". We move into a terrain in which it is 'theory' which is presumed to be productive, but then slip back into that old problematic of the problem between theory and practice and a reminder that, for all the practice of theory, we are still lawyers. The author notes in a footnote that:

> Admittedly, it is difficult to marry high-level theory with specific law reforms. The heroic endeavours of both Drucilla Cornell and Luce Irigaray have met with limited success (Naffine, 2002, p. 94).

Is anyone surprised that the work of 'high level theorists' should have met with limited success in terms of specific law reforms? Do we really hold this as part of the measure of the value of their work? And if we too are to work 'in theory', is it to be a measure of ours?
Two constructs are evident here – first a presumption that somehow we must work through a theory/practice relationship in a model which both satisfies the imperatives of our feminism and also the imperatives of the work of theorists in the academy and that second, theory comes first. The implication is that failure with law reform is due, in part at least, to a failure to yet provide sufficient theory. What model for theoretical work is employed in this text?
In a section on 'the partial paralysis of theory and practice', following the section on being overconstrained by a concern with the fear of essentialism in relation to experience, we read in the text that:

> . . . it is . . . rather foolish . . . for scholars who are by profession dedicated to the acquisition of knowledge second hand, that is through the writing of others. Necessarily we must be able to speak beyond our direct experiences, indeed, to recognise the limitations and distortions of those direct experiences, and to enlarge our understanding and to stand corrected. Indeed, this is the dialectical method of which I first spoke and which has really been more typical of feminism (Naffine, 2002, p. 92).

THE ORTHODOXY OF LEGAL FEMINISM

In the text it is argued that although "feminists have convincingly demonstrated law's failure to make sense of many aspects of women's lives . . . legal institutions have remained remarkably resistant to feminism and its findings . . . the movement into law had not brought about a paradigm shift in legal thought" (Naffine, 2002, pp. 72–73). But what has feminist scholarship, especially that represented as legal feminism, exposed or offered which might make a "paradigm shift" an appropriate response?

The method chosen by many feminists could be called explicitly dialectical. Feminist legal theory has proceeded often by way of a series of tentative theses, to which other feminists (and other theorists) have posed antitheses, which have then resolved into tentative syntheses – which have provided the starting point for fresh theses . . . It is now common for feminists reviewing the achievements of their peers to observe the waves of thought which have flowed out of feminism – from liberal feminism to radical feminism, from cultural feminism to post-modern feminism – and so to acknowledge the developmental nature of their knowledge. They are likely to concede the continuing influence and benefits of each of these schools of thought (Naffine, 2002, p. 80).

So the basic methodology employed by feminism is dialectical. I have to say that I think the author is right in terms of much of the overtly theoretical work, but that, unlike her, I view this as a problem not only for feminists, but for all critical scholars. In the text, it is not only introduced as the model we can use to describe feminist method but, by implication, it is a good, if not the only, way to proceed. Dialectical argumentation is only explained not itself examined, just as no alternatives are alluded to. Effectively this sutures feminist scholarship to Hegelian dialectics, willingly embraced without question. And what are the consequences? A presumption that difference is the productive element of synthesis: duality is found to enable the overcoming of it. This is the motor that allows us to 'make progress', looking back on 'the developmental nature of their (our) knowledge'. In simple common sense terms, of course one can see it that way. But, I would argue that this view of scholarship (that is the production of knowledge) is very conservative, very lineal and very predicated on feminism being no more than a supplement to the dominant orthodoxies. As we track our way through the 'waves' of feminist scholarship,11 indeed now 'schools of thought', we see clearly that this method is not founded in feminist scholarship but predicated on the patterns of thinking at the time. This is not merely about how feminists produce thinking, but about how the academy works. What possible paradigm shift can then be evoked? It can only continue as a dialectical relationship, not so much as between feminists but between feminists and the academy, with the emphasis on the incorporative moment of synthesis. The model of Hegelian dialectics still provides the dominant form for thinking difference and the development of scholarship within the academy – but alternatives are being, have been, explored. If feminism becomes too closely sutured to one method, one form, then its continued existence may become predicated within this form. Just as previously some critics found feminism too implicated with liberalism and emancipatory politics to provide a focus for more critical work, so in the future it may be claimed that feminism is too implicated with Hegelian models to survive any philosophy developed beyond them. What is never questioned is the fundamental dialectical methodology expressed both as 'feminist method' and as the form of engagement with theory. Let me suggest two aspects to this which the author herself recognises as problematic but manages to overcome in order to hold the whole edifice together. First, the figure which I have already examined – woman

as victim as the focus of our work. The presumption is that we must hold together this figure otherwise we lose our claim to speak not merely 'of' her but 'for' her. In dialectical terms, without this figure we have nothing to offer of countervailing force to the existing, partial, paradigm of scholarship. We could not present ourselves as feminist scholars without an object of study as well as a method by which we study that object. In order to keep it in play we must, despite the problems of essentialism and subjectivity, move to a sufficiently abstract level of engagement. This always marks the dialectical method – shifting through levels of abstraction until we can reach a point which is recognisable within the terrain we seek to engage. Hence we must necessarily move to 'grand theory' in order to engage with grand theory dialectically. This, of course, presumes that this is the only form of scholastic engagement. Leaving aside the possibility that there are other forms of scholastic engagement, what we need to examine are the limitations of this form of engagement (which is to accept that it can be productive but to argue that we must also consider its limits).

All the time, what resonates throughout this approach is that 'the subject' is woman-out-there who we acknowledge as the subject for us (as feminist scholars) to study and to whom we offer, we hope, legal reform, but necessarily delivered through 'grand theory' and that meanwhile, what we are much more certain about is that we offer to legal scholars, our insights into this 'subject', and we can therefore lay claim to a proper place within the academy as women, and as feminist intellectuals. Indeed it is the woman-out-there, our *raison d'etre* as feminists, to whom we offer up the academy along with our feminism.

Badiou's critique is aimed specifically at the construction of an ethics based on the apprehension of 'the other'. It is obvious that I have moved his critique and put it to the purpose of an entirely different project – I have used it to tease out the implications of presenting an 'other' in the guise of victim as the basis for the presentation of feminist work within the academy. Leaving aside for the moment whether this move on my part is theoretically valid, there are two points I want to make. The first is the lack of focus on the feminist scholar herself: She is not an object of study and the particular construction of knowledge in which she is participating is not in doubt. I do think that part of the problem is an uneasy inheritance of law/sociology/philosophy which is not examined and is very common to feminist work. But there is also something else which needs to be examined here – it is a presumption that without the figure of woman, the feminist project as 'legal feminism' will unravel. And further that the figure of woman which we require is the figure of victim needing our help. Although there is some recognition that using this figure involves some difficult moments, it is still our task to find a way to keep her as our focus of work. In the end the success of this focus is our ability to keep on working in this way – rather than asking what we have delivered, can deliver, for her. I think that this is analogous to the issues which Badiou is highlighting in his own concerns – but his move is then to find another way to ground ethics and it is at this point that I am no longer interested in using his work (not anyway for purposes here). Therefore, to return to questioning the strength of using his work at all in the way that I have, it has been simply to recognise, by analogy, that constructing a figure in a particular way may well carry certain consequences and open two questions: Is it necessary and are their alternatives? I want to go back to how the figure is used in the broader thrust of an argument for 'legal feminism'.

My argument within the context of this text is that feminist scholarship is presented as capable of synthesis within the prevailing model of

academic work. At one level it is – but is this all that it is capable of and what does it do to feminist work to construct it is this way? With a focus so sharply placed on praising the potential of the synthesis of 'legal feminism' as a scholastic enterprise, the paradox is that those very aspects that are presented as problematic within the text, will have to be continually revisited. Not only because they are not within the terms used, cannot be, answered in any decisive way, but because they will, in some aspect, be required in order to keep open a 'feminist' supplement within the scholastic community. If feminism remains predicated on presenting 'the female subject', the problem of essentialism12 will always be there to be answered, but it will always be there. If feminism is to be presented as requiring a normative base within this form of theoretical work, then the 'ethics of difference' will still be played through in one of its many variations. And there will always be an attempt to incorporate difference by finding a level abstract enough in law and in scholarship to enable the established order to be confirmed by offering the promise of our own privileges. 'Grand theory' may not be too good on delivering law reform, but we can retreat to the use of legal discourse to find a way forward:

> The lawyer's overt commitment to justice further strengthens the position of the feminist. For she can invoke law's own objectives and stated intentions which are to do right by everyone; to be fair and impartial (Naffine, 2002, p. 78).

Just as we can appeal to "open scholarly debate". But why should any "paradigm shift" be expected from any of this? The project is inherently conservative, not only because what is lost to view is any reference at all to politics and power, but also because, despite a claim to theory, it is theory itself which remains untheorised.

LEGAL FEMINISM/FEMINISM

Tying in feminism to the dominant existing theoretical paradigm means quite straightforwardly presenting feminism as constituted by and within a Hegelian dialectic. In so doing, the constraints of dialectical thinking are not examined and what we stand to lose is the potentials for feminist thought through and in relation to radical rethinking beyond the Hegelian project emerging in philosophical work, seen, for instance, in the work of Badiou and Deleuze. I firmly believe that it is in this work that we will find much to revitalise and move forward feminism and that it is through engaging with this material that we will enable conversations with new generations of scholars. If, however, we let 'feminism' in the academy become dominated by the 'legal feminism' approach, the consequence will be a closure to the new, a stagnation, a sedimentation into a past which can produce only a limited agenda for the future – for feminists, for radical scholars and for the potential for work between them.

Is There a Minimum Content to Feminism?

Both Badiou and Deleuze address two projects: One is a concern to move beyond what they both argue are the outmoded constraints of Hegelian dialectical thinking, and the second in a concern to find and commit to an ethical practice (and hence new forms of political engagement) against the prevailing orthodoxies of post-modernism, either in it's presentation as beyond ethics or in the defense of an ethics derived from a Levinasian dialectic.

In Praise of Legal Feminism addresses, in common with many contemporary feminist texts (for example, Conaghan, 2000), the problems which many feminists encountered when faced with the allure of postmodernism. The text focuses on two issues which were indeed the major

foci of concern to feminists: the "death of the (female) subject" and the "fear of essentialism". The working presumption (again in common with the majority of feminist work) is that these problems have had to be accommodated or overcome, in order for feminist scholarship to continue. I would suggest that this is presuming that feminism needs to achieve a certain ontological status in order for 'it' to exist as a category.Without that status 'it' could not take a place, find a place, within the academy. 'It' could not enter into a dialectical relationship with other 'schools of scholarship' as an equivalent partner. 'It' certainly could not achieve a discipline status in its own right, if that was what was sought.

We took seriously the announcement of our death, so seriously that we spent a great deal of time proving that we were still alive and kicking. But how was our survival achieved? By moving backwards, not forwards. By reasserting that we had an identity and a place, constituted in and by the dominant orthodoxies before post-modernism really disrupted everybody's lives. By not letting go of an identity which, in the case of feminist scholars of law, tried to find a model which could bring into relation theory with practice, and work derived from a sociological base with work derived from a philosophical base, into a form of feminist legal scholarship which now asserts an arrival as 'legal feminism'. However unstable and fraught and difficult to hold together, in the face of everything being challenged, it seemed that feminist scholarship could not survive unless somehow it held on to this. Indeed, found ways of affirming it.

But it is not merely feminism which seeks normative and ontological patterns, these are the very patterns required within an Hegelian model – synthesis is about progression, progression towards a better future. If we are to engage with scholarship within these terms, then they not merely resonate with feminist inclinations, they require them and amplify them. My argument is that we do not need to limit ourselves to a presumption that feminism can only survive if it conforms to the patterns of an identity with category status. Two aspects are important here. First, that some of the challenges of post-modernism are important challenges to thinking which should not be resisted only by returning to 'old' models, but may be useful 'shocks to thought'13 which do lead us to seek out, create, new paradigms for knowledge(s). In so doing, when we turn to encounter the challenges to post-modern thinking coming from 'new' philosophy, we should be willing to test and rethink presumptions we have made about feminism and be willing to think that feminism may be constituted in ways which do not rely on what we have assumed we need, but may be vibrant in quite a different form. In Deleuzean terms, if we think more of feminism as a force, a movement of potentials, rather than an identity, we may be opening potentials which may seem initially strange, destabilising and disorientating but do not necessarily mean that we are 'lost', just radically changed and transformed.

But is there, then, a kind of minimum content to a thing we can call feminism? I think that although these are not the terms which really need to be addressed or indeed the way in which such a question should be asked, there are clear indices which help us to define what we mean by the term. Moreover, by addressing the issue in this way I can try and open up a space for dialogue between those working within the traditional orthodoxies and those of us who are committed to challenging those orthodoxies and therefore, for some, challenging the emerging orthodoxy as exemplified in the text of 'legal feminism'. Three indices seem to me to be irreducible minimums. The first is that we have so many clear examples of the continuation of power structures which overtly work against women.

The second is that so much of what we do now is necessarily strategic and contingent. (Deleuze explicitly recognises that women in their struggle as women require, at present, a 'subjectivity'. He recognises that need for now, and implicit in that recognition is a presumption that in using that 'subjectivity', we do not need to confine ourselves to it by limiting our potentials for futures beyond the need for it. The question is how we do it, why we do it and with what level of recognition of it as a device do we bring to our use of it.15) The third is our commitment to change, a refusal to accept the circumstances which continue to operate against women. These could be thought of as an irreducible minimum, but it could equally be thought of as aspects which constitute a force, an imperative, and a field of activity within which we pursue our many divergent interests and needs, held together, loosely, by our common recognition of ourselves as challengers of the status quo, and a commitment to try and hear clearly the many voices within the field and enter into many conversations with them/us. Through this field, paths and energies cross and recross with differing intensities and differing impacts on others. It is fluid and what is important is to do everything we can to keep movement open. This is a much more Deleuzean model of the practice of theory.

Deleuze recognises, activates, difference but not within a dialectical framework – his work reaches towards a model, an understanding, which keeps open and productive difference(s), therefore synthesis is something which he wishes to avoid. Contingent claims and alliances may be made for good strategic political reasons, but there is no striving towards a state of final balance, final inclusiveness. Instead he offers a series of experiments, both for thought and for political practice, within the frame of an ethical commitment to seeking ways to expose, challenge and change the dominant oppressions of society today, constituted in the many forms by which power asserts and reproduces itself. His method is both grand and modest at the same time. Grand in that he seeks fundamentally to disrupt patterns of thinking which we have taken for granted, modest in that he asserts that small challenges are significant. It is not a matter of waiting for grand theory to present an agenda, it is rather that we should continually be struggling to create change in thought and at the very same time be politically engaged. Within this model theory/practice is not an issue in terms of which one comes first, because both are being continually (re)negotiated. The subject is not an issue and we do not need to fear essentialism – because we do not need to believe in some transcendental sense in the first, and we do need to lay claim to speaking for all or trying to find a theory/politics for all, at once in one form in the second. What using this model does require of us is a willingness to let go of a presumption that either norms or ontology will be found in theory itself. Rather, norms and the possibility of change for the better are to be found in the practice of theory, the reasons why we engage with it and the many ways it may be productive in its use. It does mean letting go of a presumption that it is 'theory' in some grand sense which will, one day, provide us with complete answers and an agenda for change. It also means that, however attractive it might seem to present ourselves as a unity constituted within an identity of 'legal feminism', we must recognise that this limits the potential of our work. It may help to lay a claim to a place within the academy, but it does so by suturing ourselves to dominant orthodoxies. It may also seem attractive because it offers a seeming coherence which will help place and give direction to our work in a very immediate way.16 I hope that I have given some indication here that the cost of this is the heroic effort required to present ourselves in such a way, to keep the figure

stable, and the consequences of this for our scholarship and political work as feminists. Trying to hold everything together within a more and more abstract theoretical model, is only one way of thinking a future for feminist scholarship and it is one which is more predicated on past practices rather than looking to a future of alternatives. Ironically, I believe, that a model which breaks with the Hegelian past, leaving behind what seems to be an assured future for feminism as a distinct entity, will be more productive for feminist scholarship. That which seems to most threaten the feminist project, will, I believe, offer a much more productive series of engagements for feminists as scholars and as political activists. The emergence of a prevailing orthodoxy sutured to Hegelian dialectics, should be seen for what it is, one form of engagement but not the only one. An alternative will be more difficult to deliver, but to seek it should end the search for 'a theory', which will speak to and for all feminists and concentrate instead, on constructing patterns of engagement which are both more modest in their nature and far more radical in their purpose. The final irony is that I think that this describes with far more accuracy than the text of legal feminism, the pluralistic nature of current feminist scholarship and political engagement. Finding a different way of thinking and using theory may well then be both more representative of, as well as more conducive to, the full potential of feminist scholarship.

FEMINIST SCHOLARSHIP IN LAW RATHER THAN LEGAL FEMINISM

My concern with the emergence of an orthodoxy which I have come to associate with the term 'legal feminism' is that by turning towards a particular theoretical mode of engagement – dialectical – it requires that work proceeds in a way which begins with difference but focuses on the promise of synthesis. The synthesis sought is within the academy at the level of presenting a theorised body of knowledge. Difference is presumed to be a dialectics of difference. In order to enter into this dialectical relation, a coherent 'school of thought' needs to be established. This is done by presenting the figure of woman, the basic feminist concern, then holding that figure together within a particular formulation of woman-as-victim within a framework of law and law reform. This figure must be kept stable as the object of study in order for the feminist scholar and lawyer to proceed within the twin objects of both studying her and offering her help. Anything which threatens to destabilise the figure needs to be resisted where the usual strategy for resistance is to move to a higher plane of abstract thought and to mobilise the needs of the actual woman-as-victim as still requiring our help which can only be achieved by holding the figure together and finding sufficient theory to provide coherent strategies for law reform. Within this formulation we seek a theoretical model which will provide us with a sufficient normative base and a pattern of scholarship which suggests progressive movement. Better theory will make for better law reform to meet the needs of women/woman-as-victim.

This model is certainly aspirational – but can it deliver the promise of more than being recognised as a school of thought within the academy? I believe that there is little to encourage us in the idea that 'grand theory' of the Hegelian type will produce models for law reform. Indeed such a pursuit of theory is more likely to end up as simply that, a pursuit of theory. And in pursing such theory as feminists, we will continue to make presumptions of an ethical and ontological nature which we do not necessarily need to make when we turn to thinking about thinking and practicing theory. Different types of theoretical engagement might not seem to be

immediately addressed to feminist concerns and traditions but might well serve us in ways which we do not at this point anticipate.
Let me suggest that using the term 'feminist scholarship on law', a much looser formulation than legal feminism, might connote a much broader range of scholarship undertaken by feminists as feminists but not addressed to, defined by, or limited by the orthodoxy presumed in legal feminism. There is a role for theoretical work which breaks with the Hegelian dialectic, even, to the extent of letting go of 'women' as a category and 'subjectivity' as a necessary rather than a convenient, strategic tool. There is a role for theoretical work which does not in any immediate sense deliver reform agendas. There is also a role for feminist work which struggles with immediate engagement with law and issues of reform, not only because it is so necessary not to stand aside but because it is where we tease out so much of our thinking. Such struggles may neither derive their impetus from theoretical work nor feed directly into theoretical work of an abstract nature. It is not a question of applying theory but rather of finding our needs for theoretical engagements through localised, small incursions into issues of law. I have frequently heard voiced recently a concern with how little law has actually delivered in terms of reform or the impact of reform: but what did we expect? That it would be easy? That it would be transformative? Neither 'law' not 'theory' will deliver grand plans for great change – the point is to keep on struggling to open issues, keep them open and to keep on seeking and questioning possibilities and potentials. This is not a slip into relativism nor a retreat into reformism – it is to recognise that our aspirations as feminists have not changed but that our methods, means and incursions into the practice of theory (and of law) have to be modest within the context of a firm commitment to challenge and to change. Within these terms, a Deleuzean model of theory, of thinking about thinking as the practice of theory, has much more to offer feminists, I believe, than the dialectical model presented in 'legal feminism' and would open us to a much more inclusive, interactive and productive account of the potentials, the productive pluralities, within feminist scholarship as a practice of feminist engagement.

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