The Jurisprudence of Difference

Writing Law's Others

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> *One has to be audacious in one's reading, so that it becomes an intense deciphering. We need not be afraid of wandering, though one should read in terms of a quest. There always has been femininity from time immemorial but it has been repressed. It has never been unnamed, only suppressed. But it constantly reappears everywhere. . . . {Law} is like history. It is organized so as to repress and hide its own origin which always deals with some kind of femininity.*[1]

There is an immediate and striking sense in which common law is tied to what are classically projected as feminine principles. It is a tradition which has prided itself upon the particular character of its justice, the subjectivity – the discretion – of its judges, and the malleable and essentially cyclical quality of its rules. As an unwritten system of law, the tradition which John Selden explicitly termed "Our Lady the Common Law"[2] is a law without writing and so a law without law.[3] For the Western legal tradition, from the Ten Commandments to the Twelve Tables, from the *Corpus iuris* to the *Code civile*, law was writing: *ratio scripta* meant law, written reason was a synonym for legality. The common law, however, resisted the imperative to codify, and while the law was gradually, indeterminately, and haphazardly reported and collected into books, its sources and reason were neither conceived as the logic of the written nor represented as universal law. Rather than relying upon tablets, tables, or other inscriptions or reminders, the common law conceived its sources as oral or oracular and found its origins in nature or in the immemorial and indefinite web of practice continued since time out of mind. The source of the law was not writing, nor was it conceived as some form of exterior inscription but rather as an internal principle of unwritten recollection, a faith or heart or body that lived the law. In contemporary terms it could be said that the very concept of the unwritten tradition of customary law was embedded – both in theory and in practice – in relationships rather

than abstractions, in indeterminacy rather than objectivity, and in analogy, image, or likeness rather than rule.

The metaphors of origin or genesis of common law were thus traditionally viewed as being markedly feminine. The earth, the land, life constantly gave birth to a law which was explicitly termed the *lex terrae* or law of the land. Its sources were native custom and colloquial norms "connatural to the Nation."[4] Nature herself was deemed the ultimate origin of rules that were older than the oldest human law. The concept of the immemorial as another reason or justification for law again linked common law to a mystic, ineffable, or non-institutional beginning, to an abyss of lost or indefinite time which would have been seen by contemporaries of the early doctrinal writers as distinctively, if not threateningly, feminine.[5] The feminine, in short, was a sign of origin and it was also and inescapably a sign of the source of law. To the extent that the source of customary law was figurative, politically or empirically indistinct, the feminine representation of, or metaphor for, the origin of law also acts historically as a screen or image that distances, forgets, or represses the origin: the representation necessarily has as one of its functions that of symbolizing or veiling something which cannot be looked at directly, namely, a human origin which law or doctrine needs to hide or by other means to veil or dissemble.[6] The feminine origin is thus conceived as a lost source, a veiled or absent beginning: the origin precedes the institution of law, and so law is deemed to displace or supercede the feminine which always came before and was less than the law. For much contemporary feminist legal theory the principal task of a feminist jurisprudence is that of recovering the lost origin or repressed feminine genealogy of law: "Somewhere every culture has an imaginary zone for what it excludes, and it is that zone we must try to remember today."[7] It is not, however, simply a question of disclosing or disinterring the other history or feminine metaphors of a particular system of law. It is rather that the repressed feminine principle returns throughout the law. Feminist legal theory thus traces the various feminine possibilities or forms of difference within the law to the ultimate end of subverting or deconstructing a system of governance that has historically and structurally privileged masculinity and the values associated with patriarchal government.

This essay will trace the history and the contemporary forms of feminist legal theory and will endeavour to indicate through the example of feminist analyses of the law of contracts the practical political difference that feminism makes to the analysis of a body of substantive legal rules. Proceeding from the history of the repression of the feminine to the analysis of a feminist rewriting of a specific legal discipline obviously involves a series of choices and exclusions. Feminist legal theory has been a prolific genre of legal writing

in America and latterly in Europe over the past two decades.[8] The literature has been varied, wide-ranging, and frequently extremely radical both in relation to established legal institutions and within the feminist movement itself. While many would not agree with the more apocalyptic expressions of the political urgency of feminist legal philosophy or with the celebrated view of Ann Scales that "the life and death struggle is now,"[9] the claims of feminism are at the least dramatically subversive of the classical legal conceptions of the rule of law, its method, style, reason, and claims to neutrality. In its strongest form, a feminist philosophy of law challenges the entire normative structure, the pedagogic and the professional practices of the legal institution. It suggests that the differences of gender are real differences, that "there is something of the other that cannot be transmitted unless there is a political revolution such that a masculine man will let go of his phallic position and accept, even without understanding, the possibility of something else."[10] In Catharine Mackinnon's alternative formulation, "Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. . . . If feminism is revolutionary, this is why."[11]

Feminine Genealogies and Plural Identities

The first division of the law of persons, according to Bracton who here followed the Roman law, was between slave and free. Only secondarily were persons divided between male, female, and hermaphrodite. The first distinction arguably crosscuts the second, but Bracton immediately added that "women differ from men in many respects, for their position is inferior to that of men."[12] Defined by reference to men, the feminine sex or female personality (*femina* or *mulier*) is never independently defined in classical law: in the strongest of senses female sexual identity was simply not a relevant facet of legal personality. Femininity was synonymous with complete absence of personality, such that in juridical terms the female was a chattel or thing, while in logic an argument *ad feminam* was an argument *ad rem*. Both in ecclesiastical and in civil law, in theology and jurisprudence, the fate of women in law was that of a radical inferiority or structural subordination that was deemed so natural as to deserve neither definition nor systematic elaboration. While the relation between the sexes was regulated most directly by ecclesiastical laws of marriage, civil law stated the principles of women's inferiority and their legal incapacity in direct and revealing forms. The *Digest of Justinian* had classically indicated that "women are debarred from all civil and public functions and therefore cannot be judges

or hold a magistracy or bring a lawsuit. . . ."[13] Women were legally children with regard to civil functions, they were inferior and always in the power of men. In slightly wider terms, sex and disability were synonymous with femininity: women were said to be prone to seduction and to deceiving as well as to being deceived. Their sex was characterized by weakness, vulnerability, cunning, and dissimulation. Other terms that recur are frivolity and frailty as qualifications of a being that in theological terms lacked moral substance and was guilty of the first and worst of all sins, namely, the attempt by Eve to arrogate to herself knowledge of good and evil, powers that were not human but of the divinity.[14]

The values attributed to femininity or to women are not constant over the long time-spans of institutional histories, and it is important to note that values which one era viewed as essentially feminine might in a subsequent period be deemed intrinsically masculine.[15] It seems nonetheless apparent that within the two laws of Rome, the canon law and civilian traditions, certain attributes or characteristics of femininity were to become significant commonplaces or topics of the legal tradition throughout its early modern and modern history. First, both in concept and definition, the legal tradition defined women in terms of their sexual or reproductive function: in crude terms nature was stated to have created women for the purpose of childbearing, and this characteristic of femininity was taken to be definitive of all others. For legal purposes the woman was a sign of exchange value within a masculine economy of property right and reproduction. The site of that economy was in theological and juridical terms the home (*oeconomie*), which lay in the power, or properly the "prerogative," either of the father or the husband. While there were various exceptions to this principle, such that, for example, a spinster or "feme sole" in her majority could by common law own property, make contracts, and inherit in her own right, the overwhelming concern of the law was to regulate and distribute the incidents of marriage. Even in a sympathetic account of the law, marriage was deemed to be the destiny of women: "All [women] are understood either married or to be married and their desires subject to their husband. . . . "[16] Second, the effect of defining women in terms of a sexually derived essence was that the biological subordination of women became exemplary of a series of further political, cultural, and epistemological incapacities. Nature was thus held to preclude women from political office and public functions where civil law did not directly apply. Custom determined that women were confined to the tasks, the language, and the tutelage of the *gynaeceum*, of child-rearing or domesticity. Reason indicated that feminine logic was a slender form of understanding (*tenuitate intellectus*) and that women were prone to irrationality, passion, simplicity, and at worst to the corrupting or idolatrous dictates of sense and of flesh. In the conclusion to a book-length discussion

of the legal incapacity of women, Lord Chief Justice Fortescue, in the latter half of the fifteenth century, cites Saint Augustine directly to confirm that "as the flesh is to the spirit... the pre-eminence of the man over the woman seems to be comparable to the pre-eminence of the reasoning faculties over sensual appetites, or the soul over the body."[17] In terms of ecclesiastical law the same set of binary oppositions can be found repeated in the view that the "empire of woman is against – is the subversion of – good order, equity and justice.... Monstrous is the body of that commonwealth where a woman beareth empire for either it doth lack a lawful head, or else there is an idol exalted in the place of the true head. An idol I call that which hath the form and appearance but lacks the virtue and strength which the name and proportion do resemble and promise."[18]

In legal terms the lesser condition or inferiority of women in ecclesiastical and civil law came to be spelled out in a variety of different ways within local law, and the figures of theological and secular legal definitions of femininity came to be repeated at critical points in the development of the various traditions of common law. In France, according to Bodin and Hotman, the Salic law had immemorially held that women would never inherit and so could never govern any portion of the land of France.[19] In England custom and precedent were held to have decided again and again that women could not enter public office or professional life, that English nature best fitted the female to domesticity, and that women were prone to deceive, to fabricate, and to confuse. It is indeed in terms of these characteristic incapacities that the modern judiciary, in England and in America, have variously denied women the status of persons,[20] required corroboration of female testimony,[21] presumed that domestic agreements were not legally enforceable,[22] designated sexuality for the purposes of marriage in terms of genitalia,[23] or determined that the pervasive "reasonable man" test of private and public law could not extend to any notion so contradictory as that of a "reasonable woman."[24] The examples could be multiplied but the logic remains largely invariant. In *Jex Blake v. Senatus Academicus of University of Edinburgh*, at the end of the nineteenth century, Lord Neaves based a decision to exclude medical students from the defendant university on the strength of the argument that "there is a great difference in the mental composition of the two sexes, just as there is in their physical composition.... [T]hey [i.e., women] have not the same power of intense labour as men have."[25] In *Viscountess Rhondda's Claim*, Lord Birkenhead, then Lord Chancellor, was even more dramatic in the logic of his exclusion of the plaintiff from a seat in the House of Lords. She was not "disqualifed" from the exercise of a public function as was required by section 1 of the Sex Disqualification (Removal) Act of 1919, for the simple reason that disqualification required the removal of some prior entitlement. This the

plaintiff could not argue, for a minor may grow up, a felon may be pardoned, a bankrupt discharged, "these things are possible in nature and permissible in law, but a person who is a female must remain a female till she dies."[26]

The purpose of such illustrations is twofold. In the first instance, however much the law may declare a residual ability or internal capacity of evolution "in the light of changing social, economic and cultural developments,"[27] the inscription, constitution, and method of law within the Western tradition has been geared at a structural level to the definition and correlative exclusion of women as the binary opposite or other of masculinity. It is not simply that the feminine in law traditionally represented the fickle, fragile, and foolish, but that in an altogether stronger sense femininity was the flesh opposed to a masculine spirit, image to substance, emotive passion to rational will. A woman, according to the sixteenth-century humanistic lawyer Alciatus, was a confused man, and while the feminine might have a biological and indeed "bestial" essence, she also had an infinite variety of cultural attributes or accidents.[28] In this respect it is politically and legally difficult not to accept the depiction of the sheer weight of the juridical history of oppression offered by Catharine Mackinnon or the picture of a structure erected throughout the history of Western jurisprudence effectively making women "uncivil" in the strict sense of being outside of the definition of legal subjectivity. As Julia Kristeva has remarked, "It is noteworthy to observe that the first foreigners to emerge at the dawn of our civilization are foreign women – the Danaides."[29] They bring with them a series of characteristics of the outlaw or stranger. These nomadic women are of uncertain origin, extraneous status, exiled, and close to madness. They are other in the sense of being excluded, itinerant, and far from home. In this context feminine subjectivity or women's experience can be defined in a preliminary and partial way as that of subjection, of oppression, and of silence. A feminist jurisprudence consonant with such a definition of women's experience could be said to analyse the "effects of law upon women as a class" and so concentrates upon certain collective features of widely varied experience of legal affects.

The second reason for tracing, if only in minor detail, the extended history of subordinate feminine legal statuses is to advert to certain contradictory features of the history depicted. In one aspect, which is closer to theological than to secular legal definitions of the feminine, the attributes of women are invested with extraordinary power. The other is always a threat, and the feminine is a double threat in being foreign or alien as well as being defined in opposition – and so in proximity – to masculinity. The feminine other is associated with nature, matter, body, sense, and flesh. Such forms of otherness obviously have the negative powers of their own exterior being. More than that, however, the law

has tended to link women as nature to the sins of the flesh and the confusion of sense. It is women who have the power to understand the machinations of hidden things, to work wonders that bring harm upon men, to deceive, to fool, to betray, and to destroy. It is this latter aspect of feminine power that deserves to be further reconstructed. If the history of the legal tradition is a history of the repression of the feminine, it is repressed because it represents an unbearable threat, it is repressed because the law cannot bear to reexperience the trauma that had been captured in the figure of femininity. Repression, in other words, is neither conscious nor purposeless. It is rather the negative basis at the root of identity.[30] Thus the contingency of the feminine establishes – by negation – the objectivity of the masculine, as similarly its indeterminacy grounds the certainty of its opposite, its difference lends symmetry and its dispersion unity to the antagonistic bearer or masculine vehicle of its repression. Two aspects of this process of the internalization and return of the repressed deserve analysis. First, the history of the repression of the feminine can be traced through the repressed texts and hidden figures of legal tradition: the ensuing analysis will thus briefly recall those texts that tradition and doctrine ignored or excluded. In a secondary sense the repressed is incorporated into or exists in a space within the subject, conceived either as the institution or as tradition.[31] The existence of the repressed is an active contradiction of the unity, identity, or conscious volition of the legal subject, and feminism returns to claim the dispersion of the identity of "woman" quite as much as it denies the unity or coherence of the masculine form. A second and more substantive definition of feminist jurisprudence is thus one which moves beyond the expression of the collective experience or "different voice" of women to what Luce Irigaray has termed an ethics of sexual difference, namely the construction and inscription of differences, of feminine genealogies and of women's speech and writing within the rhetoric and the practice of substantive legal rights: the writing of the body or *écriture féminine* is in this sense an expression of a cultural unconscious, of a repressed and so phantasmic reality, of a different law.

In terms of the repressed tradition of feminine texts, the opening remarks as to the inherent if little acknowledged femininity of common or unwritten law can be significantly reinforced by considering the specific mythologies and substantive figures of women buried within the tradition. Irigaray has recently commented, in a text devoted to the "forgotten mysteries of feminine genealogies," that "in order to make an ethics of sexual difference possible, it is necessary to retrace the ties of feminine genealogies" in law as well as in religion, language, and philosophy.[32] It is necessary, in other words, to attend to the repressed of the tradition and to recover what remains of the speech of the repressed,

of those who resisted, were excluded, or otherwise failed. In this respect the entire tradition can be followed in its obverse form through the various and numerous figures of excluded women. While it would be impossible to survey the full panoply of missing, excluded, or forgotten texts advocating feminine rights and women's differences, certain exemplary texts can be recalled. In one of the earliest texts of the common law tradition, Fortescue's *De natura legis naturae* (Of the nature of natural law) of circa 1466, the claim of a woman, the king's daughter, to inherit her father's kingdom is analysed in the form of a hypothetical case brought by her against the king's brother and her own son, the king's grandson.[33] Although the eventual judgement in the case is wholly in favour of masculine succession to the throne, the treatise itself is devoted to denouncing women's claim to succession to public office and contains an elaborate and extensive discussion of theology, canon law, civil and common law on the nature and rights of women. These arguments will not be rehearsed here except for the purpose of making two points with regard to what may plausibly be termed a foundational common law text.[34]

First, the whole impetus of Fortescue's analysis of the right of feminine succession to the throne is negative or suppressive. The daughter's claim is represented and justified in about a third of the textual space devoted to each of the alternative claims and rebuttals of the brother and the grandson. Nonetheless the daughter does make a case, from theology and law, in favour of feminine succession, arguing that the Bible allows such inheritance and that nature and secular law, logic and precedent, all allow women to govern. That case is rebutted at extraordinary length by the other litigants and by the judgement. What is remarkable is simply that such a topic is canvassed at such length in a treatise on the law of nature at the dawn of the modern common law tradition. Denial, or more technically negation, represses and so incorporates that which is denied; it creates an interior space and in a sense imprisons that which is denied. The argument of *De natura* in this paradoxical sense recognizes and to a limited degree validates the claims of feminine succession. In other words, there would be no need to expend such authorial or textual energy upon the refutation of the claim if women were not perceived as threatening or if their claim were genuinely absurd or legally ludicrous. The text is written by one of the early "authors," sages, or sources of the common law tradition, and the dedication of such a degree of space and erudition to the refutation of the claim of women to legal personality and constitutional rights suggests both that women were a threat to the tradition, and that their case was one which needed urgent settlement.

Second, Fortescue's elaboration of the nature of natural law and of the daughter's claim to her father's kingdom is made via a series of images and invocations of an alternative

tradition or feminine genealogy of law and of common law. Borrowing from the medieval tradition of Christian philosophy, and particularly from Boethius, Fortescue depicts the origin and "mother" of all law as being providence – *Providentia* – otherwise termed Fate or divine will. This mother gives birth to natural law which must remain a part of, or must participate in, its maternal law for the explicitly stated reason that "the offspring is a portion of the mother's entrails (*portio est viscerum maternarum*)."[35] This figure of femininity at the source of law has a more concrete expression in the daughter of the law of nature, namely moral wisdom or *Phronesis*, who is stated to be the truth of justice and "is comely of face and beautiful of aspect."[36] Justice herself is the genus of which law is the species. It is indeed from justice that the law gets its name, "for *jus* is so called from *justitiae*."[37] Justice is part of the law of nature and she is also a woman who pronounces judgement upon all human actions and "who assigns to everyone their right."[38] In making her claim to a right of succession the king's daughter can thus call upon an established tradition of feminine governance, and she does so to some effect in her argument before the imaginary court of the second book of *De natura*. She thus argues that the duty of royalty is a symbolic function and its specific tasks can be performed vicariously, that is, delegated to others. The symbolic function, however, is not simply something that women can perform, it is something that historically and conceptually women have performed better than men. She proceeds in the tradition of the "Querrelle des Femmes" to list the women who have governed or judged, fought and ruled in the history and mythology of the Western tradition. She invokes an alternative genealogy in which far from being the opposite of men, women were rulers, judges and monarchs with distinct and remarkable characteristics. In biblical terms, was there ever, she asks, a wiser judge than Deborah?

> Who ever waged wars of her people more bravely than Tomyris Queen of the Massagetae? Who ever subjugated nations with the sword more strenuously than Semiramis? . . . Doth not the kingdom of the Amazons also, which is always ruled by women, defend itself stoutly against all the lords of the world? Assuredly this parchment would not suffice to contain the names, were they recorded, of the noble women who have ruled nations with vigour and great justice.[39]

The records have neither been kind to nor retentive of this history of feminine governance and of illustrious and erudite women. Fortescue did not return to the issue in any of his later works, and the subsequent tradition tended to assume the accuracy of the theological and civil law arguments which Fortescue had recounted. The principal treatises on the constitution and the courts of England subsequent to Fortescue depict the domestic place and the political and legal exclusion of women as established facets of common law.

Sir Thomas Smith, for example, simply follows Aristotle in depicting women as subordinate to men and assumes that in terms of common law the exclusion of women from inheritance and office depicted by the Salic (i.e., French) and Roman laws is as true of England and common law as it is of France.[40] Other more general works on the ecclesiastical and civil polity, those of Hooker, Downing, and Ridley, as well as the more specific treatises on aspects of the jurisdiction and doctrine of common law seem happy to repeat expressions of policy that now appear as precedents.[41] Only with the work of the scholar, antiquarian, and lawyer John Selden does the issue of feminine right reemerge as a substantive theme within common law. While certain legal and theological texts made incidental remarks or digressive comments on histories of feminine rule,[42] the second forgotten – or, more accurately, repressed – text is Selden's *Jani Anglorum* (English Janus), a history of the other faces or the feminine forms of common law.

Selden's text provides an extensive and erudite account of feminine genealogies at the source of common law. Dedicated – not without irony – to Janus, "King of Great Britain," the work consists of a series of narratives and myths, derived from fragments and scraps of the ancient constitution and government of Britain, "though injury of time . . . and loss through neglect have erased so much that I was not able to put upon the work the face of history."[43] Janus is the god of doorways and gates, of entrances and the beginnings of things. Janus is a god, in short, of orgins and sources. As regards "English-British" law, Selden depicts a genealogy that not only attributes the origin of common law to feminine sources but equally argues that common law allows women to inherit the crown and to participate in public office. At one level Selden repeats, though in greater detail, the feminine figures that Fortescue had used to depict the metaphysical origins of common law. Following the tragic drama of the *Oresteia*, the law is attributed originally to the Furies, the Goddesses of Justice who avenge the wicked and attend to the good. The first judges were thus women, the *Semnai theia* or Venerable Goddesses, before whom all judges and dispensers of law must pass.[44] In conceptual terms the myth of the Furies, the daughters of necessity, of providence, or of fate, provides a remarkable figure for the representation of a feminine principle of justice in which a species of conscience plays the role of an internal law. The Furies avenge evil deeds by hidden means: the only intimation of the presence of the Furies is the onset of madness in their victim. Their law is inexorable and they come by night, fearsome and invisible, to destroy those that have harmed their kin or offended against the laws of the blood. From these Furies, Selden argues, are descended the rulers and the lawgivers of England.

In terms of British constitutional history, Selden subsequently lists the female monarchs

of Britain, the illustrious women rulers from the memory of whose governance he can expound a view of the sanctity, foresight, and superiority of feminine rule. Adding to the list of the virtues of women's rule associated with biblical and historical rulers, with Deborah, Artemis, and the Amazonian women, he proceeds to recount the virtues of Martia, Boadicea, and Elizabeth and to suggest that in the light of such histories arguments against women's public role or governance are "mad rude expressions not unfitting for a Professor of Bedlam College."[45] Again, the issue is not the substantive historical point of doctrine but rather the invocation of an alternative genealogy or of other sources and methods of common law that might reflect the role and rights of women. Selden expands the argument in favour of feminine succession to the crown, an argument that had also been forcefully put by the Scottish divine John Leslie in a series of works advocating the regency of Queen Mary.[46] The purpose or end of his argument is the conclusion that common law has always allowed women not only to the throne but also in principle to political suffrage and public office.[47] The feminine is the end of nature and, in the form of justice, it is the telos of law. In that latter aspect it is worthy of note that the legal advocacy of the feminine cause did not always or necessarily stop with the recounting of an alternative mythology or with a history of the "other face" or repressed and fragmentary narrative of feminine rule. Selden is perfectly explicit as to the substantive institutional and professional implications of feminine genealogies. They imply the independent suffrage of women and access to political rights and legal capacities. On this point it is useful to return to a third text, the anonymously published work entitled *The Lawes Resolutions of Womens Rights*, which appeared in 1632 and is sometimes taken to represent the early emergence of a feminist movement in common law.[48]

The Lawes Resolutions was subtitled *The Lawes Provision for Woemen* and the running head of the book was *The Womans Lawyer*. It was an attempt to write a systematic treatise upon the second division of the law of persons, namely, that between male and female. Its purpose was to list all those laws that touched specifically upon the lives of women, for, as the author explains,

> methinks it were pity and impiety any longer to hold from them such customs, laws, and statutes, as are in a manner, proper, or principally, belonging unto them. . . . I will in this treaty with as little tediousness as I can, handle that part of the English law, which contains the immunities, advantages, interests, and duties of women, not regarding so much to satisfy the deep learned or searchers for subtlety, as woman kind, to whom I am a thankful debter by nature.[49]

Again, at the end of the work, the point is made that the systematic presentation of all

those "customs, cases, opinions, sayings, arguments, judgements, and points of learning" addressed to or "principally belonging to women" is a necessary exercise in relation to a knowledge which was not only "dispersed in our Law books" but also "heretofore . . . smothered, or scattered in corners of an uncouth language, clean abstruded from their sex. Which concealment, because it seemed to me neither just, nor conscionable, I have framed this work. . . ."[50] The treatise details and endeavours to circumvent the law's restrictions upon and denigrations of women. It cites "our late . . . Queen Elizabeth"[51] as a bulwark against the oppression of women, and in keeping with such an expression of purpose it analyses the variety of laws touching upon or threatening women in terms of the best manner of manipulating them or, by novel fictions or by reference to alternative customs and sources of law, avoiding their adverse effects.

The Lawes Resolutions could accurately be described as attempting to take apart or to deconstruct the legal fictions that constructed the accessory place of women within common law. It traces the legal surfaces of gender in terms of the figures of femininity that are spread diversely across the texts of common law. Following the classical institutional divisions, the study of the law relating to the female sex moves from issues of personality, to things and finally actions or at least the avoidance of actions being brought against women in the form of dispossession of property, loss of dower, and similar adversities. The first two books thus treat principally of the legal incapacities of the female sex. Such incapacity is most notably the product of marriage by virtue of which at common law the wife loses her personality and becomes a part of the husband, a member of the household or family, of that institution of which the husband is head: "It is known to all, that because women lose the name of their ancestors, and by marriage usually are transferred into another family" they cannot inherit. Nor can married women make contracts. They can neither alienate nor receive property, nor can they bring an action or hold a public office or dignity. The inequalities of the law are listed and the iniquities of women's inferior condition are deplored. In particular the author berates and suggests ways around the various legal provisions that either denigrate women or threaten their limited spheres of freedom. Thus it is pointed out that where women do retain an independent personality it is normally to their disadvantage, the most notable of which was that the married woman could be tried and punished for criminal causes. If she killed her husband it was petty treason.[52] The examples could be multiplied but it will suffice simply to note that especial attention was given to the inequity of the husband's legal power to beat the wife, and to the limitations upon dower. As regards the former, *The Lawes Resolutions* suggests that the wife similarly terrorize the husband: "Why may not the wife beat the husband,

what action can he have if she do?" The author then adds the plea that "God send women better company."[53] As regards the rights of the widow, the suggestions are more interesting and radical. Not only does the text list all the ways in which the wife may lose her dower – that third of her husband's property which she has use of for her natural life – but it also suggests that loss of the husband is no great disadvantage:

> Consider you [i.e., widows] how long you have been in subjection under the predominance of parents, of your husbands, now you be free in libertie, and free *proprii iuris* at your own Law; you may see that maidens and wives vows made upon their souls to the lord himself of heaven and earth, were all disavowable and infringible by their parents or husbands. . . . but the vow of a widow, or of a woman divorced, no man had power to disavow. . . ."[54]

In short, there is ample evidence within the legal tradition of a history of represssed texts and forgotten or failed arguments for the constitutional recognition of the full legal personality of women. It is significant also that such texts do not predicate their argument as to the status of women in law upon the notion of the potential equality of women but rather upon the argument that there is a distinct tradition of women lawgiving and of feminine rule. In other words, the legal status of women was not a question of the equality of women nor was it a matter of the homogeneous recognition of the status of a single group or category. *The Lawes Resolutions* did not analyse the uniform effect of law upon women but rather collected together the dispersed and distinct provisions affecting the diverse statuses, periods, and fortunes of femininity in common law. In specifically doctrinal terms, women were never a singular category but always a plurality dispersed over a series of temporal categories – at nine years of age she might have dower, at twelve she may consent to marriage, at fourteen she is at discretion and may choose a guardian, at twenty-one she may alienate her lands[55] – and according to several relationships, such as infancy, virginity, wardship, concubinage, elopement, marriage, separation, and widowhood. What could in one sense be viewed as a hierarchical nonrecognition of femininity as either a gender or cultural attribute could in the more radical context of the *Womans Lawyer* also connote the pursuit of a complex of differences. It suggested eventually not merely that women rectify or variously assert their equality, capacity, or difference in relation to specific provisions but also that women could have their own unique law, that they could eventually be *proprii iuris* or actors according to a law that was peculiarly, distinctly, and uniquely their own. Two observations can be made with regard to this account of the dispersed character or diverse identity of the feminine.

First, the history briefly outlined tends to confirm the genealogical view that the legal tradition carries within itself a series of very different figures, values, and terms for

femininity. These may well be repressed, hidden, and often unamenable to historical proof for reasons which were specified very early in the modern tradition by the feminist author Judith Drake:

> I cannot prove all this from Ancient records; for if any Histories were anciently written by women, time and the malice of men have effectually conspired to suppress them, and it is not reasonable to think that men should transmit, or suffer to be transmitted to posterity, any thing that might show the weakness and illegality of their title to a power they still exercise so arbitrarily and are so fond of.[56]

What is peculiarly significant about such lost or failed texts is that they can indicate not simply the diversity of or differences between women but also that within the tradition there are many instances or periods in which femininity was conceived and figured differently. It shows that contemporary culture, including often contemporary feminist culture, is remarkably limited or narrow in its perception of the tradition and of the values that law attributes to or associates with women: "The contemporary practice in many fields of cultural studies of considering only the most recent historical periods threatens to trap us in an extraordinarily narrow definition of culture, leaving us with an impoverished set of possibilities for representing gender difference, or even indifference."[57] History, conceived as the genealogical tracing of the infinite strands that compose the temporality of the present, does not constitute unitary identities but rather dissipates the singular and homogeneous, the author, subject, origin, and cause, in favour of a plurality of corporeal styles, inscriptions, and personae of gender and sexuality. "Woman," as Lacan laconically observed, "does not exist."[58] Nor does "the experience" of women outside of the construction of gender in historically and politically specific contexts:

> The *appearance of substance* is precisely that, a constructed identity, a performative accomplishment which the mundane social audience, including the actors, come to believe and perform in the mode of belief. Gender is also a norm that can never be fully internalized; the "internal" is a surface of signification, and gender norms are finally phantasmatic, impossible to embody.[59]

Thus in contemporary feminist jurisprudence plurality and intersection become important foci which crosscut the traditional categorizations of gender: women's class, colour, creed, sexual orientation, and ethnicity are as significant and compelling as the imaginary unity or culturally attributed classification according to gender alone.[60]

The refusal to limit, to constrain, or to juridically define the feminine or woman as either unity or essence has a variety of political and jurisprudential consequences. In the work of a number of contemporary feminisms it suggests a transition from a view of the feminine as simple difference or as the other of masculinity, associated with those values

that the masculine lacks, to a perception of a contingent and future difference that exists outside of or beyond the binary hierarchy of gender.[61] The feminine is represented as plural and as changing, as fluid and associated with shifting and unequal values over time. In a political sense the feminine may well be associated with opposition to the masculine imposition of gender identities, and the recollection of feminine genealogies is here also the invocation of another law associated specifically with repressed traditions of resistance. In this context, Irigaray has continuously sought the historical emblems or mythical figures of an alternative order or law of the city. The *Oresteia*, *Antigone*, and *Aphrodite* are all replayed in terms of the representation of a femininity that exceeded the masculine order of law and imposed a respect for values associated with the natural environment, with the body, with the relation of mother to daughter, and with the spiritual as well as the secular. She invokes a law which was and could yet be consonant with sexual difference and with an ethics and legality which recognized and permitted that difference.[62] It is not simply that feminine sexuality is plural or "is not one" but rather that the refusal to identify and confine the feminine acts as a possible resource for the rewriting of the laws resolutions of women's rights. In other words, history has variously identified the feminine with particular values and traits. The politics of gender consists in large measure of deconstructing these traits, of treating them as contingent and so facilitating an order and law that could genuinely accommodate difference as opposed to treating difference as a species of subjection or subordination. To elaborate this thesis it may be helpful to analyse a specific body of common law rules, and to this end the next section will move to briefly sketch the potential impact of feminist legal theory upon the mundane workings of the law of contract.

Feminist Methods and Sexual Contracts

As a political intervention into the interpretation and practice of law, feminist jurisprudence is concerned both with the theoretical analysis of the legal construction of gender and with the empirical analysis of the effects of law upon women. The latter concern has been a crucial aspect of feminist method in the sense that the analysis of how legal intervention or lack of intervention ignores, excludes, defines, restrains, or burdens women's lives is both an intensely personal and a deeply political issue. For feminist legal scholarship, the starting point for both empirical and theoretical analysis lies in the politics of personal experience: the effect of law upon women is initially a biographical and sociological question, a matter of the bodies, the pleasures and pains, the relationships, the memo-

ries, the intentions, the frustrations, the successes, and the failures of women's lives.[63] This recourse to the diverse narratives of individual and collective experiences has been a signal facet of feminist legal method: it listens to the personal, attaches value to emotions, reinvests the bodily with significance, and more expansively challenges the abstraction, the proclaimed objectivity, universality, neutrality, and value-freedom of legal analysis.[64] The very form of law's representation, its impersonal voice and normatively distanced representations of relationships, its stylistic deletion of the first person singular from the law student's text, are all manifestations of a species of sexual tyranny that works through the form of written law.[65]

The feminist concern to reassert the private domain as a site of political struggle, to make the politics of the *gynaeceum*, of domesticity and reproduction, of relationships and of love, visible as dimensions of the public sphere, has involved a considerable overturning of traditional legal boundaries, styles, and systems of classification. One characteristic of feminist legal method has thus been a trajectory of displacement in which experience challenges abstraction, contingency – touch, dependence, and uncertainty – opposes determinacy, the play of language, the polysemy of meaning, and the politics of style also subvert the grand reasons and the untroubled references of juridical prose. Aligned with practices as diverse as consciousness raising, oral history, mythology, biographical narrative, poetry, and *écriture féminine*,[66] the initial and continuing stake of feminist method as the inscription, the recollection and the expression, of experience is the reassertion of feminine subjectivities. It challenges the legal construction of the feminine body and its subjectivity. In Cixous's words,

> This flesh that's been superhistoricized, museumized, reorganized, overworked, is feminine flesh; in the "woman" projected by the Law, wounded by the same strokes of the censor that tailor an imaginary cut from a pattern – more or less skintight, clinging, incarcerating – for every woman; this little culture-sized "woman" encounters the singular life-sized woman . . . different as one text is from another.[67]

In synoptic terms, "flesh is writing, and writing is never read: it always remains to be read, to be studied, sought, invented."[68] In short, the body is the unconscious and it presses endlessly to impose its content, its "wild and populous texts," across the barrier of (legal) consciousness.

The return of the repressed, in both biographical and sociological terms, becomes a problem for lawyers only to the extent that either the style or the expression of the experiences of injustice can be made to appear in the languages of law.[69] Legal rules encode the feminine and construe gender across the discourse, the divisions, categories, and reasons

of law. Sexual identities are cast and exchanged across the semiotic fields of legal meaning. Both access to and the power to change the attribution and repetition of these identities depends upon access to the textual system that produced them. Such access is complex in the sense that the discourse of law has always already demarcated and defined the values, procedures, and content of such textual identities. It has already determined the normative character and content of the feminine or of "woman" and so placed feminist jurisprudence and feminine experience in the position of the stranger, the newcomer, the chimera, and quite frequently the irrational. The law, one might say, is already contracted to the opposition of the sexes. It is already contracted to a language, to meanings, procedures, and rules which predetermine the position of feminine identity and frequently exclude women literally, legally, and linguistically from the major sites of political expression. It is further contracted to a particular set of procedures for hearing and judging disputes between subjects and across the divisions of gender. This prior contract or antecedent bond, this conjunction or espousal of an instituted division or separation of identities comes to appear as a model for sociality as a whole.

Feminist analyses of the common law of contracts return in principle to the conceptions of relationship that contracts imply. What the revolutionary Russian jurist Pashukanis termed the "contractual form of human relationship" and attributed to the legal expression – and embodiment – of the exchange of commodities,[70] can be more extensively reformulated in feminist jurisprudence in terms of a longer history of the exchange of subjects within an economy of sexual reproduction. The contractual form of human relationship is a socially determined relationship between legally defined persons, and it is simultaneously a formalization and a diminution of that relationship or of those persons. The contract is the form in which the subject writes the law.[71] In its earliest form within the Judaeo-Christian tradition, it is Moses who covenants for the people of Israel and places the tribes of Israel in a restrictive or contracted relationship with the "one god" to the exclusion of all others, including, and by no means accidentally, the feminine Egyptian god Osiris represented by the golden calf: "What Moses condemned in condemning the idolaters, was, in historical terms, the cult of maternal feminine divinities, and the incestuous fertility rites which accompanied such cults."[72] Along with the prohibition of the Egyptian goddess, Moses bans the multiple figurations of hieroglyphics, the inner Egypt of the Sphinx, of phantasms and enigmatic icons, and replaces these imaginary realms with the letter and the law of the father. It is noteworthy not only that the contract was a jealous one, that it excluded other gods and peoples not party to it – strangers – but also that it was preceded by a period of isolation or separation of the sexes:

the men were forbidden to lie with their women prior to their meeting with God: one conjunction should not be confused with another. Further, it was Moses, father of the tribe, a man among men, who made the contract for the people and brought back the written law. The archetypal legal contract – compact, pact, or covenant – was definitively hierarchical, doubly exclusive in being monotheistic as well constrictively unilateral, and arguably directly misogynistic in denying all cults or myths of feminine deities as well as the rites and the figures, the linguistic and imagistic phantasms, that accompanied such rites. It was in theological terms a marriage: one party promised to govern and the other to obey, one to give and the other to receive, one to act and the other to react, one to lead and one to serve. In short the contract was designed to express faith in a hierarchical system of belief and in a tabular or scriptural form of law.

The theological model of contract is predicated upon a promise made vicariously with God. It is operative upon the fiction that the contracting subjects created the authority which, paradoxically, both preceded them and constituted them as subjects. Within the Judaeo-Christian tradition the authority which the contract fictively or mythologically established instituted a patristic power. The contract authorized God the father. It authorized an absolute power, and that power both created and passed through the social in the specific form of a series of further paternities: the king, the bishop, the judge, the father, the husband, the son. In terms of the modern legal tradition, the patristic structure of the giving of the law, the decalogue, is repeated in secular theories of the institution of profane law through a social contract establishing explicitly a fraternity and not a sorority. To understand the conception of relationship that underlies the political philosophy of the social contract requires a return to the ecclesiastical model upon which it is based. The social contract is again, as Carole Pateman has illustrated, a contract between men which fictively establishes a "Civil Parent," a paternal power modelled upon the divine family and eternal father.[73] The social contract, in short, establishes, first in spiritual law and latterly in secular law, the transmission of power from the patriarch to the king to the father by means of natural law. Writing a century before the publication of Robert Filmer's *Patriaracha*,[74] the Anglican divine Calybute Downing attributed the power of the domestic and the social father directly to nature: "In the state of innocency there was superiority, not only betwixt man and all other creatures, but also betwixt man and woman... both *patria potestas* [the absolute power of the father within the family] and *regia potestas* (the extension of the former to many families) being part of nature."[75] Nature or Filmer's ancestral father, the patriarch or *pater patriae*, transmit the power invested in them by virtue of an original contract according to a law of paternal succession which time turns into nature.

It takes little historical analysis to establish that the law of contract is modelled upon and emulates an ecclesiastical contract, that the spiritual bond or oath precedes and determines the secular. What is interesting from the perspective of feminist jurisprudence is not, however, the historical predominance of the patristic contract and the polity which it both institutes and represents. It is rather that a close reading of contemporary contracts can reconstruct the historical repression of femininity within the putative freedom of private law. Feminist method initially poses the question of the effect of law upon women, and it has thus to be stated initially that from an empirical perspective the legal model of contractual relation neither expresses the experience of women nor in all probability plays any very significant role in the regulation or sanctioning of the relation between the sexes.[76] The initial and most devastating observation is simply that the patristic character of the social contract has meant the exclusion of women from the realm of contracts. In historical terms married women lacked contractual capacity because they had no legal personality independent of their husbands. In contemporary common law, the wife still lacks capacity in the domestic sphere, and it is instructive to look briefly at the language of noncontractual relations in the early twentieth-century decision that reiterated this point in its modern vestments.

According to Lord Atkin in *Balfour v. Balfour* domestic promises between spouses are "outside the realm of contracts altogether." The reason he offers for this precedent is that "natural love and affection" lie at their basis and natural love and affection "count for nothing in these cold Courts." He proceeds subsequently to offer the remarkable view that "the parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."[77] According to Duke LJ the enforcement of domestic promises would "go to the very root of the relationship . . . and be a fruitful source of dissension and quarrelling," while Warrington LJ is even more explicit with regard to the incapacity of the wife: she could "never have intended to make a bargain which could be enforced in law."[78] The story that the judgements tell is one which opposes the legal relation to the private relation, the public sphere to the home, and the written language of law to the emotive, ephemeral, and little heard language of love. Such romantic justifications for the decision, however, both belittle the social value of relationships[79] and belie the effect that the judgement will have upon women by virtue of the radically hierarchical and often violent nature of the judge, enforcer, and reporter in the domestic court, namely, the familial lawgiver, the father and husband. As Mary Astell remarked as early as 1700, the more plausible explanation of such limitation is

that "covenants between husband and wife, like laws in an arbitrary government, are of little force, the will of the sovereign is all in all. Thus it is in matter of fact . . . men will happily sign articles (relating to property and goods) but then retract them because being absolute master, she and all the Grants he makes her, are in his power."[80]

The legal unconscious is here quite evidently populated by women: that which the law cannot recognize is explicitly if opaquely subjected to another law, the law of the father, which also becomes the law of the husband. In contemporary terms, the doctrinal separation of contract from marriage and the refusal of doctrinal writers to examine the gendered character of contractual and noncontractual relations leaves feminist jurisprudence with the critical role of recollecting and representing the relationships that the law of contracts either hide or reformulate. In an inventive analysis of American impossibility doctrine, Mary Joe Frug indicates the striking sexual metaphors used in what English law categorizes as cases of frustration of contract. She proceeds to allude to the possibility of exploring the parallels between impossibility doctrine and the development of divorce and annulment law.

> Like impossibility doctrine, the function of annulment and divorce is specifically to excuse performance of obligations imposed by the contractual relations of the parties. But the analogies between these fields have historically been foreclosed to contract disputes because of the segregation of the legal subject areas.[81]

This segregation has a decidedly gendered character and the suppression or simple ignorance of that character facilitates the institution of a law of obligations which has neither any historical sensibility nor any grasp of the reasons and contexts that generated its categories.

Frug's analyses of the method, figures, and substantive effects of contract doctrine point perhaps unwittingly to a deeper or more permanent relation between the gender of contracts and the law of marriage. As has been argued, one level of this parallel is historical and follows the classical lineage from the first covenant to the contemporary (corporate) contract. What is significant about that lineage is that it brings with it a model of contractual relationship which will always hide – in the distance of the origin – the place of the feminine within the relationships of contracting. The social contract literally denies the civility of women and institutes a law which ignores the gender of persons by simply legislating the normative, or better the coercive, power of the masculine, which is to say of a personality or legal subjectivity without any conception of the legal existence of another sex, without any recognition of sexual difference as a structure of social relations. Implicit, masked, or suppressed in that legislation of a purportedly neutral or

sexless identity is also the gender-specific though unconscious representation of relation: as early as Bracton, the model of gift and of contract was binary and oppositional, namely, something certain *(certa res)* was to be passed between the contracting parties, who were divided between sender and recipient or between *animus donandi* and *animus recipiendi*. The best evidence of contractual intention was writing.[82] In short, the contract divides between the active and the passive, masculine and feminine, inside and outside, and offeror and offeree.

The contemporary law of contracts retains that language, amongst other things, in the notion that the offeror is master of the contract: the offeror can determine both the method and the substance of acceptance. One example of the gendered implications of the relation between the master and the recipient of the offer in the formation of the contract can be taken from the apparent anomaly of the postal rule. A considerable academic literature as well as a substantial body of Anglo-American contracts doctrine has built up around the anomalous rule that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination. Without being drawn into the detail of debates surrounding the postal rule, it is generally deemed to have originated in 1818 in the decision of *Adams v. Lindsell*,[83] a decision which concerned delay in the delivery of the offer by virtue of the careless misdirection of the letter by the offeror. The decision was justified in that case by reference to the need to indicate some cutoff point in relation to the communication necessary for the formation of a contract. Later decisions have doubted the wisdom of arbitrarily and universally favouring the offeree in cases involving the post, one decision going so far as to describe the rule as a "museum piece." Academic commentary has also tended to be alternately incomprehending of the rule and hostile to its continuance.[84] Although the rule is depicted as an anomaly and is in most quarters generally accepted to lack any rational justification, it is also resignedly recognized that the rule will stay.[85] What fuels such resignation and a more general incomprehension of the rule is simply that there is neither any logic to its application – it does not apply to more recent forms of indirect communication – nor any significant justification for its continued use: it is quite simply an anomaly that has become a precedent.

Ironically the postal rule considerably predates the decision in *Adams v. Lindsell* and can be explained by reference to the repressed gendered relation between offeror and offeree. The postal rule is an allegory of the paternalistic protection of the feminine offeree. In doctrinal terms the need to allocate specific rules governing contracts made between absent parties had a peculiar role to play in relation to marriage contracts. The

contract of marriage was the most significant and often the only contract that a woman would make. It was not, however, a contract that she could enter independently or without the consent of her father or guardian, so her acceptance of an offer or proposal of marriage was only one element in the exchange of promises and property that comprised the full marriage contract. Much of the law surrounding the contract of spousals thus protected the parental interest in the exchange and there was, for example, a peculiarly detailed law of defamation which allowed actions to be brought against anyone who communicated information that might prejudice the marriage.[86] Similarly stringent regulations surrounded abduction and elopement.[87] Within this legal context the consent of the woman to the offer of marriage was of interest to a network of further contractual or proprietary relations instituted around the marriage. Most notably the father of the woman would have promised either money or property to the prospective suitor and the acceptance of the proposal would thus complete or render legally enforceable the transaction between the groom and father-in-law.[88] The consent of the woman to the marriage was, however, necessary and raised peculiar legal problems where the spousals contract was made between absent parties, by messenger or by letter. The law governing the formation of the contract was ecclesiastical law and it had its roots in civilian doctrine.[89] If the offeror sent the offer by messenger or letter, does the woman have the capacity to utilize the same form of acceptance? According to the earliest treatise on the issue, she does have that capacity – it is granted to her by the offeror – and may accept either by messenger or letter. As to when the contract is completed, the answer is that the contract is formed and binding upon the expression of consent to the messenger or the posting of the letter. Henry Swinburne writes "that there is mutual agreement at one instant . . . because the party which did first consent is still presumed to continue and persevere in the same mind, until the time of the other's consent."[90] The consent of the other is the consent of the woman; she is to be paternalistically protected by the rule or fiction that the sending of the acceptance is also its delivery. While Swinburne suggests that the fiction is justified by the power of the offeror's intention, by the general rule that the expression of intention is to be taken to continue constantly unless explicitly revoked, the obverse of this power of the offeror's intention is arguably the insignificance of the offeree's acceptance. It is parasitic upon a series of transactions between men and upon communications between the father-in-law and the son-in-law in which the offer made to the woman is also the acceptance by performance of a unilateral contract with the father-in-law. The acceptance of the offer brought by messenger or letter carrier is secondary and accidental to other transactions. The woman's acceptance or voice is tenuous and accessory: the acceptance concerns

nothing more significant in legal terms than a relationship between the sexes, a love either consummated or thwarted, the life, destiny, or fate of a legally subordinate being.

The example of the postal rule illustrates and supports the argument pursued by a number of feminist legal theorists who consistently maintain that the purportedly abstract and normative character of legal rules in a discipline such as contract simply suppresses the relationships and the gender of the contracting parties. The rules and the decisions are stories of power and of subjection. They are, however, presented in the reporting and representation of law in the guise of neutrality, detachment, and normativity, separated from their context and bereft of the passions, commitments, and differences that constituted the relational or living content of their conflicts. The identity and relations of the sexes are deferred, yet "this deferral is not neutral. By confining issues that particularly concern women to domestic relations or sex discrimination courses, casebooks combine with standard law school curriculums to perpetuate the idea that women's interests are personal, concerning only themselves or their families."[91] Not only does the abstraction of legal content deny or suppress the gender of relationships but the very form of legal analysis refuses to admit the appropriation and perpetuation of a series of gender-specific values as the correlative of legal reason and its appropriate method. In Clare Dalton's analysis of nonmarital cohabitation contracts, she thus concludes that deconstruction reveals

> the world of contract doctrine to be one in which a comparatively few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private, or form from substance, or objective manifestation from subjective intent.... [W]e can neither know nor control the boundary between self and other.[92]

Ethical Feminism and Writing Legal Difference

The analysis of repressed elements of gender in the law of contracts raises a series of further issues for feminist jurisprudence. The contractual form of human relation suppresses the feminine in the sense of regulating a public domain which either ignores the sexual identity of persons or by way of the doctrine of incapacity excludes women. Further, at the level of method, the contractual form of relation suggests that social relations are separate from and largely antithetical to private relations. The legal relation of contract explicitly excludes that series of attributes or values which contemporary culture associates with femininity. The contractual relation is archetypally constructed in writing between autonomous individuals. It is rights orientated, formalistic, and independent of

context. It has, in short, the moralistic attributes which contemporary feminist legal sociology would characterize as masculine and oppose to the ethical values of the feminine, based according to Carol Gilligan and others upon care, relational networks, human consequences, particularity, and the uncertain and fragmentary growth of spirit in concrete contexts.[93] Contract doctrine, for Frug, is "like a phallus.... singular, daunting, rigid and cocksure."[94] The feminist analysis of contracts would thus suggest a radical rewriting of contracts and of the procedures for their interpretation, a rewriting which would take account of the feminine and of the impact of contracting upon women. It would suggest an alternative vision of social relationships and of human attributes in which the values associated with multiple and continuing relationships, with an ethics of the particular, a legality of the contingent, and the justice of immediate relationships would play a part in the process of social reproduction.

The articulation of reformist demands in relation to contracts doctrine or in relation to other spheres of substantive law does not resolve the issue of the specific place, language, and method of a feminist legality. In one respect this may be a virtue of feminist theory, namely, that it refuses the universalizing character of positivistic jurisprudences, the political imperialism of liberal legal theory, and the vacuous abstraction of dogmatic theologies of law which make no effort to relate the categories of juristic thought to the experiences of institutional life.[95] It is perhaps enough to trace the repression of the feminine, to voice the experiences of that repression, and at the level of theory to continuously deconstruct the dogmatic categories of an inherited law. The jurisprudence of difference would here be a jurisprudence of fragments, of the relics, repetitions, and repressions of customary law. It would be an oppositional and subversive enterprise at the boundaries of traditional jurisprudence and in the margins of professional legal practice. For the very reason that such a position, however numerous the women professionals and however vocal the representatives of the feminist cause in law, would still represent the feminine as an oppositional category, as stranger or other, within the inexorable repetitions of the law: "To claim a right to subjectivity and to freedom for women, without defining the objective rights of the feminine genre, appears to be an illusory solution to the historical hierarchy between the sexes and risks subjecting women to the power of an empty affirmation...."[96]

The argument presented by Irigaray, Cixous, and other French feminists has always, perhaps surprisingly, had a focus upon law and upon the qualities and the literary representations of justice. Irigaray has recently devoted two works to the elaboration of a theory of feminist legality – *Le temps de la différence* (1989) and *J'aime à toi* (1992) – and it

seems not inappropriate to end this chapter by offering a brief interpretation of that theory. In common with the majority of Anglo-American feminist jurisprudence, Irigaray both asserts the universality of the subordination of women within the Judaeo-Christian tradition and conceives the jurisprudential representation of that subordination in terms of a series of binary oppositions within which the feminine is always the lesser or inferior element of the couplet. The starting point for Irigaray's feminist legality is the invocation of forgotten mythologies, cults, and creeds of the superiority of the feminine. In common with much of recent continental feminist poststructuralist theory, she overturns the traditional philosophical oppositions and in a series of works opposes poetry to prose at the level of expression, unconscious to conscious at the level of memory, difference to similarity at the level of method, body and energy to Christian moralism at the level of spirituality, and East to West at the level of metaphysical understanding. Her argument is here consistently libidinal, it searches for and expresses an excess of meaning, a beyond that transcends the political sterility of established oppositions.[97]

One of the primary sources for the invocation of principles of feminine difference is the history of feminine deities, cults and myths of women rulers and lawgivers. Such mythologies exist outside the juridical boundaries of the Western tradition, they came before the tradition was established, they existed – in exile or exclusion – as heresies within the tradition, and they return either via the unconscious or from the traditions which surround the geopolitical space of Western legalism. The forms or narratives of feminine difference return under the signs of nature, body, and spirituality to assert the possibility of another order of the city and a separate law and place for women. In peculiarly concrete legal terms, Irigaray suggests that the first division of the law of persons should be between male and female and the definition and demarcation of sexual identity should be the first legal right insisted upon by women. It would inaugurate a series of further legal indications of difference:

> In *Speculum of the Other Woman*, I wrote that to establish a political ethics, a double dialectic is necessary, a dialectic for the masculine subject and a dialectic for the feminine subject. Today, I would say that a triple dialectic is necessary: that of the masculine subject, that of the feminine subject, that of the relation between the two both in private and public spheres.[98]

In legal terms the creation of a legal order that allowed the difference of the sexes and separated the masculine and feminine genres so as to allow their interaction would have to begin with the recognition and definition of female sexual identity as a form of legal personality: "The urgency and the simplicity of the contemporary problem of law as it

touches upon the law of persons . . . is that all differences are valid except for the difference which is constitutive of sociality: sexual difference."[99]

The argument from difference suggests not only the significance of myth, of the repressed, and of the other or the stranger to juridical culture, in short the value of the feminine legal subject, it also indicates the need for a positive definition and objective protection of the feminine genre:

> In the absence of civil laws positively defining their real rights and duties, women have nothing but subjective criteria to refer themselves to. . . . [T]o claim a right to subjectivity and to liberty for women, without defining the objective rights of the feminine genre, would seem to be an illusory solution to the historical hierarchy of the sexes and risks subjecting women to the power of an empty affirmation. . . .[100]

The definition of the civil rights of women takes various forms, but can be loosely classified in terms of method and content. At the level of method Irigaray is concerned to resolve the oppositions between objective and subjective rights and to formulate the mediations between that and other related oppositions. Thus she suggests that a law that recognized and was appropriate to sexual identity would need to reconcile the universal and the particular: the individual is both particular in their individuality, their difference, and universal in their genre. It is in relation to the latter that the law should correspond to and provide for the two separate genres. Each individual's sexual identity would equally form the basis of a legally recognized right, both as a member of a genre and as a legal subject that relates to or desires members of its own and the other genre. In short the individual is recognized as having both an objective and a subjective identity: "The law constitutes an objectivity. But, if it adequately reflects the reality of the person, it must also have a subjective dimension. It must guarantee a subjectivity which is faithful to itself, which does not define itself nor alienate itself through things."[101] In addition to this legal mediation of subject and object, it is also suggested and is indeed implicit in the invocation of myth that law needs to reconsider the relation of nature to culture and in particular to rethink the role of spirituality, of body, rhythm, life, and death within the social.

In positive terms, the civil rights that the law of persons should enact are reasonably evident. At a mundane level Irigaray recommends four areas of objectively protected rights. First, a right to the physical and moral inviolability of the person, which would include a positively enforced civil identity, freeing each woman from the need to "constantly defend herself against rape, attack, incest, pornography and involuntary prostitution, notably through the public representation of women's bodies and speech."[102] Second, a right to free maternity, free that is from financial and ideologial pressures of either a

spiritual or a secular kind. Third, the right to a culture, to languages, religions, sciences, and arts – a symbolic – appropriate to feminine identity. Fourth, a preferential and reciprocal right protecting the relation of mother to daughter, both physically and economically, such as to free women from a type of "familial-conjugal institution."[103] Only through such simple and urgent legal forms of protection could the legal personality and collective identity of the feminine have the opportunity of emerging in the full panoply of its difference. Despite the linguistic, cultural, and jurisdictional gulfs that separate continental and Anglo-American legal systems, the argument has much in common with certain strands of American feminist jurisprudence. The revaluation and juridical protection of the feminine in terms both of sex and gender, body and soul, requires radical departures in legal method and in the substance of law.[104] A civic or public relation between the sexes requires first the establishment or legal identification of the existence of the second sex.

In terms finally of the substantive example of contracts pursued earlier, it is important to note that there was never any single law of contracts nor only one system of justice for those who avoided or failed to keep their promises. Feminist jurisprudence suggests a repressed realm of relationships which escape or are denied the status and the protection of contractual relations, in effect constituting what Drucilla Cornell terms a second order of law, a slippage from law to Law:

> The intertwinement of law with the Law [of the Father] explains why we cannot settle for changes in the legal system – these reforms must themselves involve a challenge to gender identity. Otherwise – and we have certainly lived to testify to this reality – even the most modest legal reforms will be undermined at every stage by the re-assertion of the Law.[105]

Irigaray suggests one path that such a challenge to gender identity could take without abandoning the law to its male guardians. It can be added that the slippage from law to Law is a move from one law to another, and in classical terms the move from secular law to spiritual law, from law to equity, or from common law to canon law can provide a striking example of the revaluation of terms that a positivized and dull legal modernity had repressed. In terms of contracts one may note that there were both temporal and spiritual dimensions to contracting and that these were reflected in separate though parallel systems of law. Breach of oath (*laesio fidei*) was a matter for the spiritual court, and an action would lie for breach of faith, as for perjury. Such spiritual default would be examined according to spiritual rules and procedures and would result in a separate order of spiritual judgement requiring corporal penance rather than temporal restitution.[106] While the example of spiritual bonds may not be an especially attractive one, the example

may nonetheless serve usefully to illustrate the possibility of different orders of law and separate forms of rights. One law had long mingled with another, one genre with its complement and latterly its opposite. There is in short no reason why the legal recognition of separate forms of personality or sexual identity should not be expressed and protected through distinct systems of law.

NOTES

1. Hélène Cixous, "Writing and the Law: Blanchot, Joyce, Kafka, and Lispector," *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, ed. and trans. Verena Andermatt Conley, Theory and History of Literature, vol. 77 (Minneapolis: University of Minnesota Press, 1991), 3.

2. John Selden, *Titles of Honour* (London: Stanworth, 1614), 14.

3. Since early in the tradition, all common law has existed in books – in writing – but this alone does not render a system of unwritten law into a written one. The distinction between *ius non scriptum* and *lex scripta* is a technical one and redolent of further connotations. Unwritten law is plural in its sources and in the case of English common law also lacks a constitution. Further, unwritten law connotes a system of law which never conceived of itself as a textual system or as a pre-given unity. See, for discussion, P. Stein, *Regulae iuris* (Edinburgh: Edinburgh University Press, 1966); and Peter Goodrich, *Reading the Law* (Oxford: Blackwell, 1986).

4. See, for example, Sir John Davies, *Le primer report des cases et matters en ley resolves et adjudge en les courts del roy en Ireland* (Dublin: Franckton, 1615), fol. 2b-3a; and for an analysis of the relation between the *lex terrae*, faith and love of English law as distinct from civil law, John Selden, *Ad fletam dissertatio* (1647; Cambridge: Cambridge University Press, 1925), 141, 173. For an extended discussion of such metaphors, see P. Goodrich and Y. Hachamovitch, "Time out of Mind," *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, ed. P. Fitzpatrick (London: Pluto Press, 1991), 159-81.

5. On the mystic character of origins, see Michel de Certeau, *The Mystic Fable, Volume 1: The Sixteenth and Seventeenth Centuries*, trans. Michael B. Smith (Chicago: University of Chicago Press, 1992), ch. 3. Luce Irigaray, *Marine Lover of Friedrich Nietzsche*, trans. Gillian C. Gill (New York: Columbia University Press, 1991), also provides an interesting discussion of metaphors of origin.

6. On the feminine and the veil, see Jacques Derrida, *Eperons/Spurs* (Chicago: University of Chicago Press, 1979), 46-55. The veiling of the feminine is an antique theological and legal thematic. In Christian terms, the woman was not made in the image of God and so should veil her face. See, for example, the discussion in Juan Luis Vives, *A Very Fruteful and Pleasant Boke Called the Instruction of Christen Women* (1509; London: H. Wykes, 1523), sig. K i a: "Now shamefacedness and sobriety be the inseparable companions of chastity, in so much that she can not be chaste, that is not ashamed: for that is as a cover and a veil of her

face." A more virulent view of woman as image and potential idol can be found in J. Knox, *The First Blast of the Trumpet against the Monstrous Regiment of Women* (1558; New Jersey: Associated University Press, 1985), 19-51, 66-70, pursuing a patristic theme: "How can woman be the image of God, seeing she is subject to men and hath none authority, neither to teach, neither to be witness, neither to judge, much less to rule or bear empire?" (50). In legal terms the married woman was termed a "feme covert," or in Latin *nupta*, "that is, veiled, as it were, clouded and over-shadowed, . . . she has lost her stream, she is continually *sub potestate viri*." *The Lawes Resolutions of Womens Rights* (London: John More, 1632), 125.

7. Catherine Clément, qtd. in Sandra M. Gilbert, "Introduction: A Tarantella of Theory," *The Newly Born Woman*, by Hélène Cixous and Catherine Clément, trans. Betsy Wing, Theory and History of Literature, vol. 24 (Minneapolis: University of Minnesota Press, 1986), ix. For a distinctive and broader discussion of repression, see Julia Kristeva, "Psychoanalysis and the Polis," trans. Margaret Waller, *The Kristeva Reader*, ed. Toril Moi (Oxford: Blackwell, 1986), 301-20.

8. For recent consepectuses, see Katharine Bartlett and Rosanne Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder, CO: Westview Press, 1991); Martha Fineman and Nancy Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991); Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen and Unwin, 1990); and Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

9. Ann Scales, "The Emergence of Feminist Jurisprudence," *Yale Law Journal* 95 (1986): 1393. For commentary on the issue of the political significance of law, see T. Stang Dahl, *Women's Law* (Oslo: Norwegian University Press, 1987), 29; and S. Gibson, "The Structure of the Veil," *Modern Law Review* 52 (1989): 420. See also the discussion of the power of law in Smart, *Feminism and the Power of Law*, ch. 1.

10. Cixous, "Writing and the Law," 27. For a similarly extensive statement, see Luce Irigaray, *Le temps de la différence* (Paris: Livre de Poche, 1989), esp. ch. 3.

11. Catharine Mackinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 117.

12. Henry de Bracton, *On the Laws and Customs of England*, ed. George E. Woodbine, trans. Samuel E. Thorne, 4 vols. (Cambridge: Harvard University Press, 1968-77), II, 31. The classification comes from Gaius, *Institutes*, ed. F. de Zulueta (Oxford: Oxford University Press, 1946), 5. See also D.G. Hall, ed., *Treatise on the Laws and Customs of England Called Glanvill* (1187; London: Nelson, 1965): "If anyone has a son and heir and also a daughter or daughters, the son shall succeed to everything . . . the general rule being that a woman never shares in an inheritance with a man" (77), and "legally a woman is completely in the power of her husband *(mulier plene in potestate viri)*" (59). Thomas Smith, *De republica Anglorum* (1565; London: H. Middleton, 1583), 19, attaches his discussion of feminine right as an appendix to the depiction of the incapacity of bondmen. In the anonymous *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives* (London: J. Walthoe, 1700), 4: "A feme covert in our Books is often compared to an infant, both being

persons disabled in the law; an infant is capable of doing any act for his own advantage, so is not a feme covert."

13. *Digest of Justinian* 50.17.2 (Ulpian). See further *Digest*, 1.5.9 (Papinian): "There are many points in our law in which the condition of females is inferior to that of males"; and *Digest*, 1.9.1 (Ulpian): "Greater dignity inheres in the male sex."

14. For an interesting legal discussion of the "sin of Eve," see Sir Henry Spelman, *The History and Fate of Sacrilege* (1632; London: Hartley, 1692), 3: "That divine faculty of knowing good and evil tickled the itching humour of a weak woman, and to be like god, fired her wholly with ambition, and carried her and Adam into the highest kind of sacrilege, committing thereby robbery upon the deity herself." Cixous, "Writing and the Law,"15, offers an interesting alternative reading of the sin of Eve, not in terms of transgression but in terms of an alternative to the secret of the law.

15. See Jeanne Schroeder, "Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Jurisprudence," *Iowa Law Review* 75 (1990): 1137: "Any sophisticated theory of jurisprudence and gender requires not only inspection of contemporary society and its stereotypes of the self, but also a recognition that contemporary stereotypes are culturally contingent." For extended historical discussions, see Caroline W. Bynum, *Fragmentation and Redemption: Essays on Gender and the Human Body in Medieval Religion* (New York: Zone Books, 1991); and James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987). Also important is Page duBois, *Sowing the Body: Psychoanalysis and Ancient Representations of Women* (Chicago: University of Chicago Press, 1988).

16. *Lawes Resolutions*, 6.

17. John Fortescue, *De natura legis naturae* (1466), *The Works of Sir John Fortescue*, ed. C. Fortescue (London: privately printed, 1869), 326.

18. Knox, *The First Blast*, 55-56. For discussion of the binary oppositions and of the various hierarchies which constitute the subject, see particularly Hélène Cixous, "Sorties," *The Newly Born Woman*, 63-132; Marie Ashe, "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence," *Syracuse Law Review* 38 (1987): 1129, esp. 1153ff; and Jamie Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory," *Iowa Law Review* 62 (1991): 489.

19. Jean Bodin, *De republica* (1580; London: Knollers, 1606), 1753. See also Antoine Hotman, *Traité de la loy salique* (Paris: M. Guilleme, 1616). Smith, *De republica Anglorum*, 13-19, takes the influential view that the Salic law becomes – presumably through the Conquest – part of English common law.

20. The history of these cases is extensively discussed in A. Sachs and J.H. Wilson, *Sexism and the Law* (London: Martin Robertson, 1976). See also Naffine, *Law and the Sexes*, ch. 1; J. Scutt, "Sexism and Legal Language," *Australian Law Journal* (1985): 163; and Mary Jane Mossman, "Feminism and Legal Method: The Difference That It Makes," *Australian Law Journal* (1986): 30. Nadine Taub and Elizabeth M. Schneider, "Women's Subordination and the Role of Law," *The Politics of Law: A Progressive Critique*, ed. David Kairys, rev. ed. (New York: Pantheon, 1990), 151-76, discuss the American cases.

21. The standard evidential caution, "It is known that women in particular and small boys are liable to be untruthful and to invent stories," is repeated in most criminal law textbooks and by the judiciary in the form of a corroboration warning. See the discussion of rape in Smart, *Feminism and the Power of Law*, ch. 2.

22. See, for the classical statement of this principle, *Balfour v. Balfour* [1919] 2 KB 571; in an American context see *Morone v. Morone*, 50 N.Y. 2d. 481, 413 N.E. 2d. 1154 (1980), and *Hewitt v. Hewitt* 77 iii.2d 49, 394 N.E. 2d 1204 (1979). See further the excellent discussion in Clare Dalton, "Deconstructing Contract Doctrine," *Yale Law Journal* 94 (1985): 997.

23. See *Corbett v. Corbett* [1970] 2 AER 33. See also Richard Collier, "The Art of Living the Married Life: Representations of Male Heterosexuality in Law," *Social and Legal Studies* 1 (1992): 543.

24. Thus in *R v. Camplin* [1978] 2 AER 168, at 180. The principle in this case is discussed in excellent detail in Hilary Allen, *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (Milton Keynes, Eng.: Open University Press, 1987). Using sentencing statistics collated between 1950 and 1983, she observes that "a woman appearing before the criminal court is about twice as likely as a man to be dealt with by psychiatric rather than penal means" (xi).

25. *Jex Blake v. Senatus Academicus of University of Edinburgh* (1873) 11 M 784, at 834.

26. *Viscountess Rhondda's Claim* [1925] AC 339, at 362. See also *Chorlton v. Lings* [1866] LR 4 CP 374, and the discussion in T.D. Fergus, "Women and the Parliamentary Franchise in Great Britain," *The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination*, ed. Sheila McLean and Noreen Burrows (London: Macmillan, 1988), 80-101.

27. *R v. R* [1991] 4 AER 481, at 483 (per Lord Keith). See also the discussion in *Stallard v. H.M. Advocate* [1989] SLT 469; [1989] SCCR 248; and the commentary by Lindsay Farmer, "The Genius of Our Law . . . : Criminal Law and the Scottish Tradition," *Modern Law Review* 55 (1992): 25.

28. Andreas Alciatus, *De notitia dignitatem* (Paris: Cramoissy, 1651), 190.

29. Julia Kristeva, *Strangers to Ourselves*, trans. Leon Roudiez (New York: Columbia University Press, 1991), 42.

30. "What is the 'Other'? If it is truly the 'other,' there is nothing to say; it cannot be theorized. The 'other' escapes me. It is elsewhere, outside: absolutely other. It doesn't settle down. But in History, of course, what is called 'other' is an alterity that does settle down, that falls into the dialectical circle. It is the other in a hierarchically organized relationship in which the same is what rules, names, defines, and assigns 'its' other. . . . [N]o 'Frenchmen' without wogs, no Nazis without Jews, no property without exclusion." Cixous, "Sorties," 71.

31. "Repression, not forgetting; repression, not exclusion. Repression, as Freud says, neither repels, nor flees nor excludes an exterior force; it contains an interior representation, laying out within itself a space of repression." Jacques Derrida, *Writing and Difference*, trans. Alan Bass (New York: Routledge, 1978), 196. Julia Kristeva similarly remarks that "repressed desire pushes against the repression barrier in order to impose its contents upon consciousness." "Psychoanalysis and the Polis," 307.

32. Luce Irigaray, "Le mystere oublié des généalogies féminines," *Le temps de la différence*, 120-21 (my translation).

33. Fortescue, *De natura*, 192.

34. For an extended analysis of these texts, see Peter Goodrich, "Gynaetopia: Feminine Genealogies in Common Law," *Oedipus Lex: Studies in the History of the Law of Images* (Los Angeles and Berkeley: California University Press, forthcoming).

35. Fortescue, 240.

36. Ibid., 224.

37. Ibid., 222.

38. Ibid., 249.

39. Ibid., 266-67.

40. Smith, *De republica Anglorum*, 19-21, 102-03. After a discussion of freemen and bondmen, Smith continues: "in which consideration also we do reject women, as those whom nature hath made to keep home and to nourish their family and children, and not to meddle with matters abroad, nor to bear office in a city or commonwealth no more than children and infants..." (19).

41. Richard Hooker, *Of the Lawes of Ecclesiastical Politie* (London: R. Scott, 1593-97); Calybute Downing, *A Discourse of the State Ecclesiasticall of This Kingdome in Relation to the Civill* (1632; Oxford: W. Turner, 1633); Thomas Ridley, *A View of the Civille and Ecclesiasticall Law* (Oxford: H. Hall, 1607). In terms of common law sources, see William Lambard, *Archeion or Discourse upon the High Courts of England* (London: Seile, 1591).

42. See, for example, the expansive William Heale, *An Apologie for Women* (Oxford: J. Barnes, 1609), arguing for the illegality of the husband's putative right to beat his wife; and the remarkable Lodowick Lloyd, *A Briefe Conference of Divers Lawes* (London: Creede, 1602), who also briefly adverts to feminine mythologies of the origin of law.

43. John Selden, *Jani Anglorum facies altera* (London: T. Bassett, 1610), sig. a 4a.

44. Ibid., 4. For a detailed depiction of the Furies and the Fates, see Thomas Heywood, *Tunaikeion or Nine Bookes of Various History Concerninge Women* (London: Adam Islip, 1624). Selden himself also devoted his most substantial historical study to early mythologies. See his *De dis Syris syntagmata II* (London: G. Stansby, 1617); partially translated by W. Hauser as *Syrian Deities* (Philadelphia: Lippincott, 1880).

45. Selden, *Jani Anglorum*, 20.

46. John Leslie, *A Defence of the Honour of the Right Highe, Mightye and Noble Princesse Marie Queene of Scotlande and Dowager of France* (London: Dicaeophile, 1569); John Leslie, *De illustrium foeminarum in repub. administrandi* (Rheims: Fognaeus, 1580).

47. Selden, *Jani Anglorum*, 21. The arguments are repeated in slightly different form in John Selden, *England's Eponimis* (London: T. Basset, 1683).

48. See the discussion in Ian Maclean, *The Renaissance Notion of Woman* (Cambridge: Cambridge

University Press, 1980), ch. 5. More broadly, see Ian Maclean, *Woman Triumphant: Feminism in French Literature 1610-1652* (Oxford: Clarendon Press, 1977).

49. *Lawes Resolutions*, 2-3. Compare Dahl, *Women's Law*, 17: "The purpose of women's law is to describe, explain and understand the legal position of women, with the specific aim of improving the position of women in law and society"; S. Atkins and B. Hoggett, *Women and the Law* (Oxford: Blackwell, 1984), 1: "We seek to understand how the law has perceived women and responded to their lives"; and Julia Brophy and Carol Smart, eds., *Women in Law* (London: Routledge, 1985), 4: "Our starting point is the experience of women because it is this that has alerted us (for generations) to the impact of law. No parliamentary statute, legal text book, jurisprudential treatise on justice or equity, or Law Commission paper has that value."

50. *Lawes Resolutions*, 403.

51. Ibid., 400.

52. Ibid., 208.

53. Ibid., 128.

54. Ibid., 232.

55. This restricted list is taken from Sir Thomas Wood, *An Institute of the Laws of England* (Savoy: R. Sare, 1720), 18.

56. Judith Drake, *An Essay in Defence of the Female Sex* (London: Roper, 1696), 140-41. For a discussion of feminism and historical writing, see Denise Riley, *Am I That Name? Feminism and the Category of 'Women' in History* (London: Macmillan, 1988); Joan Kelly, *Women, History and Theory* (Chicago: University of Chicago Press, 1984); Michelle Perrot, ed., *Writing Women's History* (Oxford: Blackwell, 1992); and Rosi Braidotti, *Patterns of Dissonance* (Oxford: Polity, 1991), ch. 6.

57. DuBois, *Sowing the Body*, 1.

58. Jacques Lacan, *Feminine Sexuality* (New York: Pantheon, 1982), 168. For the history of that pronouncement, see Elizabeth Roudinesco, *Jacques Lacan & Co.: A History of Psychoanalysis in France, 1925-1985* (Chicago: University of Chicago Press, 1990), 506-26; and Catherine Clément, *The Lives and Legends of Jacques Lacan* (New York: Columbia University Press, 1983), ch. 2.

59. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 141.

60. For accounts of differences within feminist legal theory, see Angela Harris, "Race and Essentialism in Feminist Legal Theory," *Stanford Law Review* 42 (1990): 581; P. Cain, "Feminist Jurisprudence: Grounding the Theories," *Berkeley Women's Law Journal* 4 (1990): 191; Kimberle Crenshaw, "A Black Feminist Critique of Antidiscrimination Law and Politics," *Politics of Law*, 195-218; Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1990); and bell hooks, *Yearning: Race, Gender and Cultural Politics* (Boston: South End Press, 1990). On the conception of a postmodern feminism, see Clare Dalton, "Where We Stand: Observations on the Situation of Feminist Legal Thought," *Berkeley Women's*

Law Journal 3 (1988): 1; and Mary Joe Frug, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)," *Harvard Law Review* 105 (1992): 1045. See also the interesting discussion of the legal subject in Jennifer Wicke, "Postmodern Identity and the Legal Subject," *University of Colorado Law Review* 62 (1991): 455; and the response by Mary Joe Frug, "Law and Postmodernism: The Politics of a Marriage," *University of Colorado Law Review* 62 (1991): 483. For an interesting philosophical discussion, see Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), ch. 7.

61. This position is well discussed in terms of ethical feminism and its potential contribution to jurisprudence in Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, 1991), esp. 8-16. It is also the central thesis of Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

62. See particularly Luce Irigaray, *Ethique de la différence sexuelle* (Paris: Editions de Minuit, 1984), 113-24; and Irigaray, *Le temps de la différence*, 82-86, 103-23. For similar uses of mythology, see Cixous, "Sorties"; and Mary Daly, *Gyn/Ecology* (London: Women's Press, 1978).

63. See Catharine Mackinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987), 9: "Try thinking without apology with what you know from being victimized." See also Mackinnon, *Toward a Feminist Theory of the State*, 120: "To say that the personal is political means that gender as a division of power is discoverable and verifiable through women's intimate experience of sexual objectification, which is synonymous with women's lives as gender female. Thus, to feminism, the personal is epistemologically the political, and its epistemology is its politics." For discussions and expressions of feminist method in law, see Williams, *Alchemy of Race and Rights*; Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1992); Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes," *Stanford Law Review* 41 (1989): 751; Martha Minow, "Feminism in the Law: Theory, Practice and Criticism," *University of Chicago Legal Forum* (1989): 115; K. Lahey, "...Until Women themselves have told all they have to tell...," *Osgoode Hall Law Journal* 23 (1985): 519; and Katharine Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103 (1990): 829.

64. Most notably, Mackinnon, *Toward a Feminist Theory of the State*, 248: "If objectivity is the epistemological stance of which women's sexual objectification is the social process, its imposition the paradigm of power in the male form, then the state appears most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied...."

65. For expressions of this view, see A. Bottomley, "Feminism in Law Schools," *Women and the Law*, ed. S. McLaughlin (University College London, Faculty of Law, Working Paper No. 5, 1987); M. Minow, "Feminist Reason: Getting It and Losing It," *Journal of Legal Education* 38 (1988): 47; and the exchange between Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal

Method," *Wisconsin Women's Law Journal* 3 (1987): 81, and Drucilla Cornell, "The Doubly-Prized World: Myth, Allegory and the Feminine," *Cornell Law Review* 75 (1990): 644.

66. *Écriture féminine* translates loosely as feminine writing and is associated most closely with the work of Cixous. The practice of *écriture féminine* is predicated upon a corporeal and libidinal writing, a pure creativity of release, the expression of desire over propriety, of life over death. The function of this writing – if it can be said to have a function – is that of subverting and moving beyond the policing of language and of discourse. It aims to overthrow the laws of genre and the legislation of style: "Perhaps what is hardest and most necessary, is to positively forget these judges who make us answer their stupid summons stupidly, justify the non-justifiable, speak silence, crush the music under the millstone of words, lie by swearing to tell only their truth, plead guilty to a lack of absence." Hélène Cixous, "Tancredi Continues," *Writing Differences: Readings from the Seminar of H. Cixous*, ed. Susan Sellers (Milton Keynes, Eng.: Open University Press, 1990). For discussions of *écriture féminine*, see M. Shiach, *Hélène Cixous: A Politics of Writing* (London: Routledge, 1991); Braidotti, *Patterns of Dissonance*, 238-73; and Susan Sellers, *Language and Sexual Difference* (London: Macmillan, 1991).

67. Hélène Cixous, *Coming to Writing and Other Essays* (Cambridge: Harvard University Press, 1991), 56.

68. Ibid., 24. The repressed returns, in other words, at the level of writing. See also Hélène Cixous, "The Laugh of the Medusa," trans. Keith Cohen and Paula Cohen, *New French Feminisms*, ed. Elaine Marks and Isabelle de Courtivron (Brighton: Harvester, 1980), 245-64.

69. For some cautionary comments on the assumption that the politics of discourse is necessarily a politics that extends beyond the symbolic, see Suzanne Gibson, "Continental Drift: The Question of Context in Feminist Jurisprudence," *Law and Critique* 1 (1990): 173. See also Alison Young, "Of the Essential in Criticism: Some Intersections in Writing, Political Process and Law," *Law and Critique* 1 (1990): 201; Smart, *Feminism and the Power of Law*, ch. 1; and Fineman, introduction, *Boundaries of Law*, xii: "I, for one, am a legal scholar who has lost faith. Feminism, it seems, has not and, perhaps, cannot transform the law. Rather, the law, when it becomes the battleground, threatens to transform feminism." For an interesting substantive discussion of this question of political strategy, see N. Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy," *Journal of Law and Society* 20 (1993): 93.

70. E.B. Pashukanis, *Law and Marxism* (London: Ink Links, 1978).

71. On the writing of law and particularly the contracted restraint of legal writing, see Arthur Jacobson, "The Idolatry of Rules: Writing Law according to Moses with Reference to Other Jurisprudences," *Deconstruction and the Possibility of Justice*, ed. David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (New York: Routledge, 1992), 95-151.

72. Jean Joseph Goux, *Les iconoclastes* (Paris: Editions de Seuil, 1978), 14 (my translation). The discussion in that work is based, of course, on Sigmund Freud, *Moses and Monotheism*, trans. James Strachey (London: Hogarth Press, 1939). For an early legal account of the mythological basis of the story of the golden calf, see Selden, *De dis Syris*, 38-42.

73. Carole Pateman, *The Sexual Contract* (Cambridge: Polity, 1988), ch. 2 and 4. See also Rosalind Coward, *Patriarchal Precedents* (London: Routledge, 1983). For a historical analysis, see G.J. Schochet, *Patriarchalism in Political Thought* (Oxford: Blackwell, 1975).

74. Sir Robert Filmer, *Patriarcha or the Natural Power of Kings* (London: W. Davis, 1680). For an interesting digression on women, see Robert Filmer, *An Advertisement to the Jury-Men of England Touching Witches* (London: Royston, 1653).

75. Downing, *A Discourse*, 64.

76. Many of the arguments developed from the analysis of the empirical significance of contracts in the work of Stewart Macaulay and others apply equally to the gender of contracts. See Stewart Macaulay, "An Empirical View of Contract," *Wisconsin Law Review* (1985): 465. More broadly on a similar theme, see M. Galanter, "Justice in Many Rooms," *Journal of Legal Pluralism* 19 (1986): 1.

77. *Balfour v. Balfour* [1919] 2 KB 571, at 579.

78. Ibid., 577, 575.

79. The courts are fond of remarking that these agreements are too trivial for the courts, too uncertain and vague to be binding, too inconvenient or informal to aspire to law. See, for example, *Spellman v. Spellman* [1961] 2 AER 468, and *Jones v. Padavatton* [1969] 2 AER 66 (mother-daughter relationship giving rise to a "distressing" and "most unhappy" case). Nor is it without interest that another example of this denial of capacity or intention is the relationship of priest to Church, which again cannot be the subject of a contract because the priest is married to – devoted his whole life to – the Church. See *President of the Methodist Conference v. Parfitt* [1984] 1 QB 368, and *Davies v. Presbyterian Church of Wales* [1986] 1 AER 706.

80. Mary Astell, *Some Reflections upon Marriage Occasioned by the Duke and Dutchess of Mazarine's Case* (London: J. Nutt, 1700), 39. Dalton, "Deconstructing Contract Doctrine," 1113: "The stories told by contract doctrine are human stories of power and knowledge." On the politics of the distinction between public and private, see, for example, Margaret Thornton, "The Public/Private Dichotomy: Gender and Discrimination," *Journal of Law and Society* 18 (1991): 448.

81. Mary Joe Frug, "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law," *University of Pennsylvania Law Review* 140 (1992): 1029. See also the analysis of relations in Mary Joe Frug, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook," *American University Law Review* 34 (1985): 1065.

82. Bracton, *On the Laws and Customs of England*, II, 62-63.

83. *Adams v. Lindsell* [1818] 106 ER 250.

84. See, for example, A. Nusbaum, "Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine," *Columbia Law Review* 33 (1936): 920; and S. Gardiner, "Trashing with Trollope," *Oxford Journal of Legal Studies* 112 (1992): 170.

85. See Gardiner, "Trashing with Trollope," 192; and P.S. Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 1991), 77.

86. See, for example, the discussions in *Pollard v. Armshaw* [1601] 75 ER 1073; and *Davies v. Gardiner* [1611] 4 Co Rep 16 b, 79 ER 1155.

87. See, for example, legislation of 1486 (3 H VII cap 2) specifying the penalites for "carray a woman away against her will that hath lands or goods." See also *Marsh v. Rainford* [1589] 2 Leon. 111 Cro Eliz 59, 73 ER 608.

88. See *Alice's Case* [1458] Y.B. 37 Hen. VI; *Assaby v. Lady Manners* [1516] Dyer 235 a; *Weeks v. Tybald* [1605] Noy 11, Yellv 17, 1 Rolle Ab. 6; or *Sandhill v. Jenny*, H 2 Jac B R Rot 511, 73 ER 608.

89. On the Roman law and its reception, see J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), 45-46.

90. Henry Swinburne, *A Treatise of Spousals, or Matrimonial Contracts* (1686; London: Browne, 1711), 180.

91. Frug, "Re-reading Contracts," 1078.

92. Dalton, "Deconstructing Contract Doctrine," 1114. See also Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis in Feminist Legal Theory," *Texas Law Review* 63 (1984): 387; and Niklas Rose, "Beyond the Public/Private Division: Law, Power and the Family," *Journal of Law and Society* 14 (1987): 61.

93. For various depictions of such values, see Gilligan, *In a Different Voice*, ch. 2; Frances Olsen, "The Sex of Law," *The Politics of Law*, 453-67; Cixous, "Sorties"; Irigaray, *Marine Lover*; Luce Irigaray, *This Sex Which Is Not One* (Ithaca, NY: Cornell University Press, 1985); Cornell, *Beyond Accommodation*, ch. 1; and Derrida, *Eperons/Spurs*, 71: "It is impossible to dissociate the questions of art, style and truth from the question of woman. Nevertheless the question 'what is woman?' is itself suspended by the simple formulation of their common problematic. One can no longer seek her, no more than one could search for woman's femininity or female sexuality."

94. Frug, "Rescuing Impossibility Doctrine," 1035.

95. This point is well developed in Smart, *Feminism and the Power of Law*, 68-72.

96. Luce Irigaray, *J'aime à toi* (Paris: Grasset, 1992), 18 (my translation). Ashe, "Mind's Opportunity," 1170-71, reaches a similar conclusion: "Feminist jurisprudence has, for some time, recognized in our law, beneath the surface of a discourse based on rights, the operation of power in limitation and constraint of female language and action, of peculiarly female acts of verbal and physical differentiation.... Recognizing the universal reality of female subordination, we have long known that legal reforms can alter the status of women only to the degree that they cause, or are accompanied by new ways of thinking about gender differentiation."

97. For a comparable statement of the desirability of a jurisprudential recourse to myth, see Cornell, *Beyond Accommodation*, 171-79.

98. Irigaray, *Le temps de la différence*, 55.

99. Ibid., 74. See also Irigaray, *J'aime à toi*, 89: "The sexual dimension of the person is important for the

production and reproduction of the social; without it, no society. But neither its dignity nor its necessity is recognized. Civil society remains enslaved by money and domination."

100. Irigaray, *J'aime à toi*, 18.

101. Ibid., 93.

102. Ibid., 205.

103. Ibid., 206.

104. Young, *Justice and the Politics of Difference*, ch. 4 and 8, is perhaps the most imaginative proponent of this position within American jurisprudence. Frug, "Postmodern Feminist Legal Manifesto," 1048ff, is also close to this position.

105. Cornell, "Doubly-Prized World," 689-90.

106. See the excellent discussion in R. Cosin, *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesiasticall* (London: n.p, 1591), esp. 24-26, 50-53.