fall into a self-limiting trap which obviates the need to view the position of women in far broader terms than law alone. Notwithstanding that caveat, the power of law to affect and determine social relations between individuals in society must be acknowledged. Whilst law is culturally dependent, and will reflect traditionally – socially/culturally – and politically determined social relationships, law possesses unique transformatory power – at least in the superficial regulation of relations in society, if not the power to alter consciousness within society.

FEMINISM AND THE POWER OF LAW[52]

Carol Smart[53]

Law's Power

The aspect of power I have focused on has been in terms of law as a discourse which is able to refute and disregard alternative discourses and to claim a special place in the definition of events. My concern has been with law as a system of knowledge rather than simply as a system of rules – although these two things are clearly related if one accepts that knowledge creates the potential to exercise power (ie through rules). In the first chapter I took issue with Foucault's formulation of the place of law (or the system of juridical rights) as a mode of regulation which is likely to diminish as disciplinary mechanisms (ie psychiatry) develop. He posits two modes of 'contrivances' of power, the 'old' form which is juridical power and the 'new' forms of discipline, surveillance, and regulational. He suggests that the old form will be gradually colonised by the new. However, whilst I accept that there are examples of this colonisation, I have also suggested that the process may work both ways and that the power of law may be enhanced by harnessing disciplinary modes to traditional legal methods by extending law into new terrains created by new techniques. The main example I provided of this was the way in which reproductive technologies have created the potential for new biological and social relationships and how this has created a new field in which law can apply its traditional tenets. I have suggested that rather than abandoning the field to the doctors and social workers or psychiatrists, law has striven to define the parameters of new relationships and that the creation of 'new' arenas has led to an extension of law into more and more intimate areas of personal life. Hence whilst medicine has the power to disorganise the patriarchal family, law has striven to ensure that it does not. The freezing of human embryos, for example, has not preoccupied the psychiatrists and social workers nearly so much as the lawyers who wish to define ownership and inheritance rights and to impose a legitimate family structure on the human tissue.

I am therefore less certain that law's traditional power is diminishing; rather there is a symbiotic relationship between the two modes (of discipline and of rights) and it cannot be presumed that law's part in this will diminish. This raises a dilemma, however, for it law's power is extending it seems to call for greater attention from feminism, not less.

De-centring Law

There have always been two components to feminism's engagement with law. One has been to resist legal changes which appear detrimental to women, the

52 *Ibid*.

53 At the time of writing, Lecturer in Sociology, University of Warwick.

other has been to use law to promote women's interests. The latter increases legislative provisions and empowers law, the former withstands damaging changes but only maintains the status quo. In terms of practical politics these strategies have often been reactive and ad hoc and they do not appear to reflect any coherent feminist analysis of law.

It is therefore important to develop a clearer vision of law. In Chapter Four I have argued against the idea of a theory of law and the development of a totalising theory such as that to be found in early Marxist analysis of law or some feminist analyses. The problem which then arises is whether, without such a general theory, it is ever possible to develop anything other than ad hoc tactics. Yet this is really a false problem. General theories never provide clear tactics, they are always open to interpretation precisely because the general theory operates at a level of considerable abstraction. So it is just as valuable to consider in detail how law operates in different fields and to analyse it its specificity rather than generality. In consequence the vision of law I have outlined is not one that is unified but refracted. That is to say that law does not have one single appearance, it is different according to whether one refers to statute law, judge-made law, administrative law, the enforcement of law, and so on. It is also refracted in that it is frequently contradictory even at the level of statute. Hence legislation to preserve foetal life coexists with legislation which provides therapeutic abortions. Different legislation may have, therefore, quite differing goals; it cannot be said to have a unified aim. The law is also refracted in the sense that it has different applications according to who attempts to use it. For example, migrant families using the 'right to family life' against repressive governments which prevent such families from living together indicates the progressive potential of law. For individual men to use the 'right to family life' against individual women in order to defeat women's autonomy is quite a different matter. Finally law may have quite different effects depending on who is the subject of the law. Hence abortion laws may have different meanings for black or native women on whom abortions are pressed, than for white women who feel they can exercise 'choice'. So if law does not stand in one place, have one direction, or have one consequence, it follows that we cannot develop one strategy or one policy in relation to it.

It also follows that we cannot predict the outcome of any individual law reform. Indeed the main dilemma for any feminist engagements with law is the certain knowledge that, once enacted, legislation is in the hands of individuals and agencies far removed from the values of the women's movement. So does this lead to the conclusion that law should be left unchallenged? This is not the position to which I believe my analysis inevitably leads. My conclusion is that feminism needs to engage with law for purposes other than law reform and with a clear insight into the problems of legitimating a mode of social regulation which is deeply antithetical to the myriad concerns and interest of women.

Precisely because law is powerful and is, arguably, able to continue to extend its influence, it cannot go unchallenged. However, it is law's power to define and disqualify which should become the focus of feminist strategy rather than law reform as such. It is in its ability to redefine the truth of events that feminism offers political gains. Hence feminism can (re)define harmless flirtation into sexual harassment, misplaced paternal affection into child sexual abuse, enthusiastic seduction into rape, foetal rights into enforced reproduction, and so on. Moreover the legal forum provides an excellent place to engage this process of redefinition. At the point at which law asserts its definition, feminism can assert its alternative. Law cannot be ignored precisely because of its power to

> define, but feminism's strategy should be focused on this power rather than on constructing legal policies which only legitimate the legal forum and the form of law. This strategy does not preclude other forms of direct action or policy formation. For example, it is important to sustain an emphasis on nonlegal strategies and local struggles. However, it is important to resist the temptation that law offers, namely the promise of a solution. It is equally important to challenge the power of law and to insist on the legitimacy of feminist knowledge and feminism's ability to redefine the wrongs of women which law too often confines to insignificance.[54]

Carol Smart thus reveals an ambivalence towards the law, in part recognising law's power, in part arguing against too great a reliance on law and legal strategies. The dangers of overreliance on law as a mechanism for social change have been identified and analysed by sociological jurists: there are well documented limits to the power of law.[55] However, what must also be given adequate recognition is the successes which have been achieved through the analysis of discrimination under the law and the pressure for change in the law which has been effected by feminist scholars. The work undertaken in what Ngaire Naffine describes as 'first wave feminism' cannot be underestimated in its importance for securing greater equality for women. The legal disabilities of women in relation to property ownership and control; the position of women in the family; the position of women in employment have all been significantly advanced by the pressure for legal reform. Discrimination still exists – particularly in the field of employment[56] – but great advances have been made, and the role of feminist legal scholars must be recognised and applauded. Law may be a blunt instrument in securing changing social attitudes relating to deeply entrenched prejudicial attitudes, whether they be racist or sexist. Law, however, sets the standard for appropriate attitudes; provides the mechanisms for the redress of grievances where actual behaviour and the required legal standard of behaviour part company. To 'de-centre' law, or to apparently reduce in importance the role of law, is to ignore too great a part of feminist scholarship. The pioneering work of 'first phase' feminist lawyers who explored the discrimination within law and contributed to the movement towards equality should not be underestimated in its importance. That most formal legal inequality between the sexes has been removed in, for example, employment law and family law, is a direct consequence of the feminist endeavour. Moreover, de-emphasising the importance of law is to ignore the very real need for legal rights and remedies in the face of discrimination. The maxim 'no remedy without a right' must be borne in mind. Whilst this is true for society in general, it is particularly significant for those citizens who have traditionally been regarded as second class members of society – women and minority groups. Law must remain as a focal weapon in the support of rights, and as a tool for developing further the realisation of real equality between the sexes. For these reasons, the 'de-centreing' of law – a central tenet of the Critical Legal

54 *Ibid*, pp 162–65.

55 See for example, A Allott, *The Limits of Law* (Butterworths, 1980); RBM Cotterrell *The Sociology of Law: An Introduction* (Butterworths, 1984).

56 For example in the restrictive attitude towards women in the armed forces.

Studies movement[57] – which is suggested by Carol Smart and by critical legal theorist has not been universally welcomed by feminist scholars.[58]

A powerful argument against the 'de-centreing of law' has been made, for example, by the black feminist scholar Patricia Williams. In *The Alchemy of Race and Rights*,[59] Patricia Williams portrays her experience as a black female American, contrasting it with the experience of her white male colleague. Whereas her colleague – in the matter of renting a property – felt little need for the formalities of contract, Patricia Williams regarded legal formalities as an essential process through which she could achieve her objective: for her 'rights' and the language of rights is a fundamentally important and empowering concept. Without legal rights, she argues, black Americans – and particularly black female Americans – are unable to achieve equal treatment. From this perspective, law is and must remain centre stage.

In the article which follows, Anne Bottomley critically analyses the position which Carol Smart adopts in relation to feminism and legal theory[60] and considers the difficulties inherent in the relationship between feminist legal scholarship and traditional legal theory.

FEMINISM, THE DESIRE FOR THEORY AND THE USE OF LAW[61]

Anne Bottomley[62]

> '… the field of law poses quite specific problems for feminist theory which may not be found in other fields…'[63]

What am I? A woman. A feminist. A lawyer working in the academy. In my everyday work I teach – in the areas of property law and equity and trusts. In all aspects of my work I am aware of myself as both woman and feminist. Indeed I entered my area of work specifically because of my gender and my commitment to feminism. How then does my feminism inform my work? How far does my work inform my feminism? I find these questions very difficult and realise, even as I pose them, that generally it is so much easier to presume at least one fixed referent than to have to recognise that I am not at all sure what I mean by 'my feminism', let alone the (many) ways in which it informs (or is informed by) my work.

For us, as academics, the projects of utilising our work for feminism and bringing our feminism into the academy leads us straight into a demand 'for theory'. Indeed recent feminist work has increasingly addressed the problem of what specifically *feminist* theory might be, rather than simply the utilisation of existing theoretical paradigms. I was very interested in a piece published in *Feminist Legal Studies* by an Australian feminist, Shelley Wright, in which she very honestly

57 See Chapter 8

58 See further, Chapter 8

59 Harvard University Press, 1991.

60 In Carol Smart, 'The Women of Legal Discourse' (1992) *Social and Legal Studies*, p 29

61 Seminar paper, European University Institute, Florence, 1993.

62 School of Law, University of Kent.

63 Carol Smart, 'The Women of Legal Discourse' (1992) *Social and Legal Studies*, p 29.

worried through the problem of how far 'feminist' theoretical work had been predicated within dominant theoretical discourses:

> It is not surprising that modern secular feminism should have followed the paths that modern secular masculine revolutions have taken. We have no other models. We are our fathers' daughters, undutiful or otherwise.[64]

Her concern to consider the possibility of an authentically feminist theory has become a familiar problem to us. For the moment I just want to approach the issue through the problem of the practice of theory itself. I want to draw out what I think are two quite different imperatives which often become confused in our work. The first is the development of theory within the imperative of the academy. It is a demand for inclusion; it is derived from our identity as academics, which is *then* fed by our identities as women and as feminists. The second imperative is the use of our work as a resource for feminism – for productive change. For making futures possible for ourselves as women; a world of different gender relations. Some of us are sometimes lucky enough to be able to move with these imperatives in one direction, in which the latter is privileged and the former simply benefits. But too often for most of us it is the former which compels our work into an engagement with theory; even though we would prefer not to recognise this. This is the way in which we will achieve recognition within the academy, in which we might be given a space in which we can even afford to present ourselves as feminist. Indeed in recent years, in England at least, it has become a means of advancement for women academics, as well as a palliative in some faculties for men searching for new theoretical paradigms as they bear witness to the failures of the old master narratives. My point is not to criticise and demand political purity, but rather that we must try and be more honest in recognising the imperatives which impact on our work. Therefore I want to pose questions of our practice of theory; not to challenge it but to context it.

Carol Smart's article, 'The Women of Legal Discourse',[65] begins by not only recognising that 'feminist socio-legal theory has been developing in exciting and … controversial ways over the last twenty years …' but also asserts that 'the field of law poses quite specific intellectual and political problems for feminist theory'. A major concern at the beginning of her paper is not only with a resistance to theory within legal work, but also the imperative to engage with law. She outlines the positions which she sees as resistant to theory, including:

> … a form of resistance to all theory … based … on the argument that, because law is a practice which has actual material consequences for women, what is needed in response is counter-practice not theory. This constituency demand 'practical' engagement and continually renders (mere?) theoretical practice inadequate …. These … elements present a major obstacle to proponents of feminist legal theory as they (we) are met with the frustrations of being ignored or seen as outmoded in and by law and are simultaneously moved to renounce theory by the oral imperative of doing something in or through law.'

I could now move very easily into a critique of this presentation; using it as a point of differentiation to allow me to present my own ideas. All too easily the sub-text becomes 'why she is wrong and why I am right'. It is particularly

64 Shelley Wright, 'Patriarchal Feminism and the Law of the Father' (1933) *Feminist Legal Studies*, p 134. (Extracted at in Chapter 5.)

65 *Op cit*.

difficult for me in trying to avoid this strategy, because the central thesis of this paper is to argue for a reassessment of the way in which we engage in, and utilise, the practise of theory. Therefore what I am about to argue is most easily presented in a mode of critique; but before I address my concerns with Carol Smart's position, I want to signal two important countervailing tendencies which are (I believe) present in feminist work but so taken for granted that we often lose sight of them.

The first is simply that I have more in common with, for instance the work of Carol Smart, that I do with the work of non-feminists. We share a common aspiration and commitment, our feminism. Therefore the terms in which I address her work, or the work of other feminists' theories, must start with a recognition of this.

Secondly between feminists we are engaged in a continual dialogue of possibilities – essentially possibilities for futures; we tell each other stories and weave our fantasies about these possible futures. We carry into these stories our own particular narratives, our histories of time and place, our biographies of the articulate (our intellectual traditions and training) and the inarticulate (our fears and desires), and as one tells one story, another presents a counterpoint, perhaps because of a different intellectual tradition or simply a different perspective. It is a series of presentations in which we have to resist the idea that the final presentation is the final truth but recognise that both our desire, and our work-situation as academics, push us towards an assumption of a narrative in which can effect closure. The wise part of us knows that this is not the case, but that does not matter, it does not detract from the enterprise. What matters more is that we might lose sight of realising that our desire both compels us towards closure and makes it impossible at the very same time. Indeed such is also the motor for academic work – that all theories can only be hypothesis, to be continually tested, worried through and beyond. But I want to add a crucial aspect in regard to feminist work in the academy – and I will pose it simply as a rhetorical question. Do any of us really believe, or want to believe, that our feminism is finally to be tested here? If I turn this question a little it reveals a deep paradox in our work, a paradox which allows the position I have taken above: it is that on the one hand we demand and require inclusion into the academy, and at the very same time we refuse to finally be contained in the academy. If I turn this figure a little again, what we see is that for feminists it is a question of what theory can do for us, what it makes possible for us, rather than looking to theory for a validation of our senses of self or our aspirations for change. It can be part of our feminism but cannot incorporate our feminism; indeed our feminism operates as excess, always propelling us forward. But I have to be careful here, twice now I have used a lineal figure – I have talked of beyond and forward. In fact I want to suggest that this figure is far too simplistic an account of our activities – I want to image rather a continual movement between points which are themselves not fixed. For instance a movement between different theoretical positions, or between 'theory' and 'practice', between claims to 'subjectivity' and denial of the authenticity of 'subjectivity', etc: it is a movement which I want to keep open, recognising paradox, difference, tension etc., not wanting to avoid them, but rather seeing them in relation – a way in which we continue to have stories to tell to each other. What holds us together as listeners I have already suggested, but what might separate us to the point where we can no longer share this process, is not recognising the patterns of dissonance which necessarily play through our work. By this I mean the differences in our intellectual traditions and the tendency in much work undertaken in the academy to privilege the practices of the academy, including

most importantly the desire to define and delineate, to articulate and to capture that which is actually beyond. Beyond because it is both excess and because it is part of other practices. Therefore we have to both continually try and capture which we mean by 'feminism' or 'justice', for instance, and at the very same time know that we cannot, except in immediate (material) circumstances, through which we then play both our biographies and our fantasies of possibilities. For this reason I very carefully earlier in my paper said simply 'feminism': as with 'justice' it is a figure too powerful and too necessarily open, to do anything more, or less, than be immediate and, conversely, keep on the horizons of our desire.

I am aware that my position requires one crucial leap of faith and one very fundamental flaw. The leap of faith is that we can keep and share the aspiration of feminism and afford to recognise its aspect as desire, as beyond theory, beyond articulation. But I do have two points which may help. The first is simple – we are actually doing that all the time; it is simply that we also continually present our desire as something we are just on the edge of achieving. (Few of us are brave enough to lay claim to having achieved it.) Secondly, that it is in fact freeing to recognise that there will always be an excess, and to concentrate on telling stores through which we can explore our desire – stories of the immediate or stories of the archetype, whether in myth or the reproduction of grand theory. All circle around the absent centre: as along as they continue to enable us that is all that matters. So then my flaw – how do we know they are enabling? Cannot I afford to say that we must test that both by our direct experiences, which includes the judgment of our intellect but not only that, as well as the seeming strength of our fantasies of possible futures? Whilst I must recognise the dangers of my position; is the only option open to me to retreat to an orthodoxy which has already failed me? Or can I not take the risk and try and build a new epistemology in which the present orthodoxy is only one element of the possible strategies available to me? Again I could argue that that is what we all do all the time anyway (and perhaps it is crucial to continue to do this without attempting to articulate the practice in the way I am doing!); but within the terms of the methodology I am attempting to articulate, I am convinced that at this juncture it is important to reassess the practice of theory, particularly for those of us who stand in the eye of the paradox – being both feminists and academics.

So now you have my attempt to articulate my methodology – a mixture of pragmatism, strategy and desire! My question is always – what does this enable? What futures does this make possible?

How then does this affect my reading of Carol Smart? Firstly I think that is important to recognise the influences of her discipline of origin – she is a sociologist. Therefore the methodologies she employs tend to derive from this background. I suggest that this includes a tendency to utilise categories and models through which to describe and evaluate material. Therefore models of 'law' are employed and different models counterpoised etc. Further there is a tendency to differentiate between 'practice' and theory'; in which 'practice' should be informed by 'theory' but of itself is simply data for theoretical work. At this level of reading I have many problems with the construction of her methodology. In particular her characterisation of the constituencies resistant to theory seems unhelpful. However if we recognise them as simply 'resistances' rather than forces which are anti-theoretical, then I return to my point about countervailing tendencies. Much as she is warning against no-theory, they [the resistancies] are warning against theory at the expense of engagement with law. The importance is the tension between them; not a choice of one or other but a warning to each other. For Smart herself this (fruitful) problematic is clearly signalled in her work:

> We must remain critical … without abandoning law as a site of struggle …Moreover, more work needs to be done in tracing how women have resisted and negotiated constructions of gender …[66]

However there are tendencies in her approach which could become antithetical to mine. Firstly I am concerned that the process of model building, and the very models built, can become taken too seriously. It is rather as if they begin to have a life of their own, rather than that they are simply attempts to make sense of a confused world. This tendency is, for me, well illustrated in a piece by Drucilla Cornell when she utilises in one paper, Derrida, Lacan and Levinas through an overarching model taken from Luhmann:

> … we need Luhmann to adequately understand how the gender hierarchy functions as a system so as to be structurally coupled with other systems.[67]

However she does go on to say:

> In the light of the current situation, we need to understand why hope is still possible. If systems theory and the philosophy of the limit are in alliance with feminism, then it can only be an alliance, because theory does not change the world, although it can help us see how and why it can be changed. It is still up to feminists to dream of a different world … beyond the gender hierarchy and try to make it a reality.[68]

In truth when I read her paper it seemed to me that this paragraph is not said in strength but rather with a kind of hopelessness – having spent so much time constructing her theory she then has to finally allow that it does not deliver what she in some part of herself knows she needs. She does not, to me, seem comfortable with the excess. I may be being unfair but that is the way I hear it. One of the problems may well be that she is attempting to address again two audiences and two imperatives – her male colleagues and her display of her ability to deploy theory, and her female/feminist colleagues who have a different expectation of the possibilities of the deployment of the masters. In the same way Carol Smart has to pull herself back from the imperative of her models and recognise, in her papers not so much aspirations for change, but rather the need to address an immediacy, a pragmatic demand for response and resistance to the situation we find ourselves in now. Both these papers are addressed to theory but both have to recognise that the feminism of their authors finally escapes being caught within their theoretical frames. That does not mean that their theories are wrong or that they are even unuseful – it simply requires of us a recognition that beyond and behind our incursions into theory lies our feminism.

However, two aspects of the current presence of feminists in theoretical work do need to be addressed. They interrelate but are best presented separately. the first is the possibility of a specifically feminist theory; the second is the deployment of this possibility to offer new life to theory itself. In other words what is sometimes being presented, and received, in the academy, is an image of current theoretical practices as partial, and therefore doomed, because they do not incorporate the feminine and the possibility of, by bringing the feminine into the practice of theory, a new 'reality' of completeness and wholeness. Feminism, by signalling absence and demanding recognition of this absence, seems to set an agenda for a

66 Carol Smart, 'The Women of Legal Discourse' (1992) *Social and Legal Studies*, p 40.

67 Drucilla Cornell, 'The Philosophy of the Limit: Systems Theory and Feminist Legal Reform', in Cornell et al (ed), *Deconstruction and the Possibility of Justice* (Routledge, 1992), p 89.

68 *Ibid*.

demand for presence. When we figure the feminine as lack, we move towards an imperative of incorporation; of the addition of the missing element. Of recovery of the lost, the externalised: that which is not spoken demands a voice.

In work on law this operates to not only build a new model of law as gendered, but also to begin to try and image a model of law in which gender is both recognised and incorporated.

To reach this position requires two moves. Firstly it requires what is essentially descriptive work on law in which the emphasis is on law as a gendered system. Therefore it also tends towards a model of law which exemplifies this position. The second is that it requires a positing of the feminine subject as both external and a 'thing' capable of and requiring presence in law. The promise of this, the desire, is that by the recognition of, and incorporation of this subject, the law would be so radically transformed as to become no longer partial but rather complete.

It is a good story. It is one which allows us to not only to critique partialities but also to offer possibilities not only to ourselves but to other lost souls. The story is compelling; it feed from stories of loss, of separation and a desire to be reunited. A recent paper by Peter Goodrich displays its potential. He begins by quoting Lace Irigaray:

> In order to make the ethics of sexual difference possible, it is necessary to retrace the ties of feminine genealogies … at the levels of law, religion, language, truth, wisdom … to introduce into the history of reason an interpretation of the forgetting of feminine genealogies and thereby reestablish their economy … .[69]

In an earlier draft of this paper he summarised the project:

> … In contemporary terms the question is not simply that of recovering feminine genealogies, it is also that of comprehending the extent of the legal repression of the feminine, not simply in terms of legal doctrine but equally in terms of legal method and the conceptions of justice …

However, his work in tracing the figure of the feminine in the history of the common law reveals a number of important elements. Firstly the ambiguity and plasticity of the figure of Woman. Both revered and feared the figure takes on all that is that which is most desired, all that which is beyond as well and that which connotes those things which cannot be spoken or incorporated and therefore must be avoided. Secondly, whilst it is clear that this is a narrative constructed by and for men, women are also a presence, however marginal their voices, they are there: a series of complaints which speak both actual circumstance, their own needs and their desires. They both figure as excess and themselves construct excess. In both these patterns what is displayed in the very fragility of the attempt to construct a legal discourse; it is powerful in that it connotes both a series of practices and a narrative of law and yet in both aspects it is continually fragile.

From this I take two major points for my thesis. The first is that we have to avoid a temptation to over-construct a model of law as gendered which takes law too seriously as a simple, powerful, discursive practice. We must distinguish between the non-discursive elements of law and the attempts to create a coherence to modern law as rational. We have to distinguish between what

69 Peter Goodrich, 'Gynaetopia: Feminine Genealogies in Common Law' (1993) *Journal of Law and Society*, p 276.

academics write about law and the actuality of legal practice. I am well aware that the dominant ethos in so many ways does radically disadvantage us as women; but I also think that the politics of difference allows us, and indeed compels us, to recognise the inconsistencies, contradictions etc within legal practice and the attempts made to present a picture of uniformity, consistency and logic. The figure of Woman is constantly within both the practice and discourse of law; so is the feminine, on the edge, at the margins but part of the process, even in the attempt to project and utilise the figure as 'other'. Recognising the figure is to recognise that the power of law rests on a very fragile base; as attempt to constantly affirm and reaffirm the enlightenment project of the rational individual – the subject brought into relation through law. It constantly fails to meet these aspirations; in this sense the figure of the feminine, a constant movement of absence/presence, is a recognition of this; even when seemingly projected as external to law.

For good historical and contemporary reasons we want to reject this role. We want to cease to be cast in the image of desire and become participants in the discourse – to make a dialogue. But then we move to our second problematic: to do this we need to present our case by asserting for ourselves a subjectivity and demanding the recognition of this in law. In other words we posit ourselves as both external and having an authentic presence which demands recognition. In England this aspect of the development of feminist theory has often been labelled as 'positivist' and is seen as running counter to the postmodernist tendencies of much contemporary theoretical work on law. I think that there is definitely a danger that it can be both presented and received in this way. My concern is that in doing so it not only posits a feminine subject, based on an analogy to the masculine subject, but it also feeds into grand narratives which present 'law' as a unified and coherent discourse within its own terms and to which we simply need to addend our own. My point is that we should rather use our insights to recognise that law does not deliver within its terms of presentation; that the unified male subject is only very tenuously held together and is a central aspect of law's fragility.

I would pose the same question as Rosi Braiddoti:

> … are today's feminist closet humanists wanting to rescue the shaken edifice of reason, resting on some realist theory of truth? Or are they radical epistemologists, having given up the idea of gaining access to a real fixed truth? In other words, what is the image of theoretical reason at work in feminist thought?[70]

Her concern to find new ways of thinking in which she characterises 'the feminist as a critical thinker, unveiling and criticising the modalities of power and domination in all theoretical discourse including her own'[71] seems to me so important to remember and so easy to lose sight of. She answers my problem of why I find it so difficult to articulate what I want to say by focusing on where my needs come from and recognising my desire:

> … Feminist theory expresses women's ontological desire, women's structural need to express themselves as female subjects … as corporeal and consequently sexed beings …. the disposition of the subject towards thinking

70 Rosi Braidotti, 'On the Female Feminist Subject', in Gisela Bock and Susan James (eds), *Beyond Equality and Difference* (Routledge, 1992), p 181.

71 *Ibid*, p 181.

> … is a pre-discursive element, which is in excess of, and nevertheless indispensable to, the act of thinking as such …[72]

The recognition of this desire becomes then situated in an understanding both of the contexting of the desire and the possibilities of really activating patterns of truly radical change. For her, premised very much within the work of Gilles Deleuze:

> It is less a question of founding the subject than of elucidating the categories by which the female feminist subject can be adequately represented.[73]

What she emphasises is the 'multi-layered structure of the subject'. It is this which I really want to carry forward. If the politics of difference impel us to adopt a strategy towards law which is based on naming law as gendered and a claim for recognition then of the specificity of our own genders needs and aspiration; we should recognise it as a strategy. The strategy should lead us towards a clearer recognition of law itself as plural; if we can open up and expand that plurality by such a strategy so much the better. The strategy is pragmatic; for it to be enabling it must address both our desire and the multiplicity of different futures. The danger is that it might simply feed back into a reengagement with the modernist project; a project which reinforces an attempt to present and represent law as a coherency. Much much more coherent now because of our own incorporation.

We no longer want to be the objects of desire but we must not lose our own desire. We must demand recognition but not hold ourselves simply to a demand for recognition and an engagement within patterns which have already failed us. Truly radical work now demands that we tell each other good stories but not become entrapped within them. As Peter Goodrich says:

> There is no reason, either in history or in doctrine, why different laws cannot govern different genres, separate statuses or the plural identities of legal persons.[74]

We must not lose sight of the 'plural identities of legal persons'; and of the plural possibilities within law. To keep hold of this we must develop immediate strategies as well as keep in sight the horizons of our desire. That our feminism goes beyond our ability to articulate, that it cannot be finally represented either in theory or in law is our strength. It makes possible future rather than simply grafts us on to existing histories.

72 *Ibid*, p 182.

73 *Ibid*, p 190.

74 Peter Goodrich, *op cit*.