CHAPTER 8

'TRADITIONAL' JURISPRUDENCE

'Traditional' jurisprudential theories are male theories of and about law, and about law's relationship to society. In this chapter these 'traditional' theories are subjected to feminist critical analysis. In the first part of this chapter, positivist legal theory is considered by feminist scholars Ngaire Naffine and Margo Stubbs. In the paper which follows, Nicola Lacey submits the common assumptions made by positivistic legal scholarship to feminist analysis. Attention is then turned to social contract theories. John Locke, writing in the seventeenth century provides one analysis of the basis of the relationship between citizens and the state. The more recent *Theory of Justice* of John Rawls is also analysed from a feminist perspective. Marxist theory has long occupied both traditional jurisprudence and feminist scholars. In the third part of this chapter Engels' work on the source of women's oppression is considered and critically analysed.

Contemporary jurisprudence is considered in the fourth and final part of this chapter. In the post modern age – characterised by uncertainty and diversity – the 'Grand Theory' has fallen into disfavour. Critical Legal Studies (CLS), the movement which characterises dissatisfaction with past theorising, is considered here. One of the tenets of CLS is its suspicion of rights-based theories. From a feminist perspective this has considerable implications as will be discussed in this part of the chapter.

POSITIVIST LEGAL THEORY

Positivist scholarship became dominant in the 19th century. Fuelled by the perceived need to identify the characteristics of law and legal systems, positivist scholars seek to portray law in a scientific manner. Natural law thinking, so influential from ancient times, was perceived to cloud people's thinking about law by insisting on lofty moral notions of 'right' and 'good' law.[1] From a positivist perspective, it is not primarily the 'rightness' or 'goodness' of a legal system which is of central importance, but rather the identification of the central concepts in the law as laid down by 'political superiors' to citizens. While John Austin,[2] Hans Kelsen[3] and HLA Hart[4] offer differing analyses of positivism, the central objective is shared. From a feminist perspective, however, positivism has been found wanting.

In *Law and the Sexes*[5] Ngaire Naffine turns attention to legal positivism:

1 See AP d'Entrèves, *Natural Law;* JM Finnis, *Natural Law and Natural Rights* (Clarendon, 1980).

2 *The Province of Jurisprudence Determined* (London, 1832).

3 See, *The General Theory of Law and State* (Harvard University Press, 1946).

4 *The Concept of Law* (Oxford University Press, 1961).

5 Allen & Unwin, 1990.

LAW AND THE SEXES

Ngaire Naffine[6]

Legal Positivism

Legal positivism represents the official version of law – law's explanation of itself. It is the dominant model of the legal process in the Anglo-American and Australian legal world, 'the typical outlook of the legal profession [which] informs most legal scholarship and teaching …'.[7]

Legal positivism is fundamental to the constitution of legal thought. It is a key reason why lawyers come to accept the official version of law as legal reality, why lawyers tend not to question the nature and purpose of law but take it as a given. It also helps to explain why the law comes to assume the status of objectivity and why judges become the seekers of truth.

Positivism is a philosophical position. According to Flew's *A Dictionary of Philosophy*,[8] its exponents use the term 'positive' in a very particular sense, to indicate 'that which is laid down, that which has to be accepted as we find it and is not further explicable'. Positivists are committed to the scientific method. They believe that 'all genuine human knowledge is contained within the boundaries of science [and that] whatever questions cannot be answered by scientific methods we must be content to leave permanently unanswered'.

To the positivist, what matters, scientifically, is what we are able to observe. It follows that moral issues, questions of judgment and belief, are rendered extraneous. The positivist invokes a rigid separation of facts and beliefs and exalts the value-free nature of the scientific method. Science, it is thought, should refrain from making value-judgments about the matters it observes and it should not enquire into the values held by those paced under the microscope.[9]

Transposed to the legal context, a positivist outlook interprets law as a collection of rules which can be authenticated as valid law by the application of certain formulaic tests. These tests are intended to indicate whether any given rule has issued from a recognised law-maker. If it has, that rule becomes part of 'the data' of law 'which it is the lawyer's task to analyse and order'.[10] Put differently, law is that, and only that, which has been laid down or 'posited', as John Austin put it, by an appropriate source. Thus to Cross, a rule derived from precedent was a proper rule 'because it was made by the judges, and not because it originated in common usage, or the judges' idea of justice and public convenience'. And to Kelsen, 'law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and other norm systems'.[11]

In the view of legal positivists, it is not the lawyer's job to look behind the laws for the values which might inform them. The justice or fairness of any particular

6 At the time of writing, Research Fellow, University of Adelaide and Visiting Scholar, Australian National University.

7 RBM Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 1984), p 10.

8 London: Pan Books, 1979.

9 RBM Cotterrell, *op cit*, p 10.

10 RBM Cotterrell, *op cit*, p 10.

11 All quoted in B Simpson, 'The Common Law and Legal Theory', in W Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986).

law is simply not essential to its understanding and certainly beyond the interest of the lawyer. What matters is that it has gone through the necessary processes to function as official, usable legal material.

In his analysis of law and modern society, the British jurist PA Atiyah offers a useful summary of the key propositions which comprise the positivist approach to law:

> First, laws are commands of human being addressed to other human beings; second, there is no necessary connection between law and morals; third, the analysis of law and legal concepts is a true 'scientific' enquiry which is concerned with the formal requirements of valid law, and not with its content; and fourth, judges, when deciding new points of law, must confine themselves to 'legal' arguments and not to moral or policy issues.[12]

Atiyah blames the positivist tradition in law for what he sees as the impoverishment of legal theory and English law. He believes that positivism has contributed to an unwillingness on the part of lawyers to address the moral and political components of law. Positivism may also be seen to legitimate the refusal of most judges to consider the extent to which their particular approach to the world informs their decisions, that is, it lends support to the formalist position that what is being dispensed is always a politically neutral type of justice.

According to the Australian legal critic Margot Stubbs,[13] (see below) legal positivism is a highly convenient approach to the law from the point of view of the legal professions. Its doctrine that law is 'an autonomous, self-contained system' renders the perceptions and the methods of lawyers as neutral, value-free and independent of politics. Lawyers are untainted by passions; they rise above commitments to any particular ideology in their disinterested pursuit of their client's interests.[14]

FEMINISM AND LEGAL POSITIVISM[15]

Margot Stubbs

Introduction

It is a timely observation that the development of a feminist critique of law has failed to keep pace with feminist enquiry in other disciplines. The purpose of this paper is to focus attention on why this is so. It aims to illustrate how the conceptual framework of legal positivism (a doctrine that constitutes the methodological infrastructure of Western legal discourse) has very effectively constrained the development of a feminist critique of law. Further, the article will proceed to a consideration of the direction that a 'jurisprudence' that is properly feminist in character should take, suggesting a framework within which the fundamental connections between patriarchy and law can be constructively addressed.

It needs to be made quite clear at the outset that the point of this paper is not to overview the literature on legal positivism, or focus on variations on its basic themes from Bentham through to Austin and Hart, as this has been more than

12 PS Atiyah, *Law and Modern Society* (Oxford University Press, 1983), p 103.

13 M Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* at 63.

14 N Naffine, *Law and the Sexes*, pp 34–36.

15 (1986) 3 *Australian Journal of Law and Society* at 63.

adequately addressed in mainstream legal enquiry and, as Simon notes, even the rigour and elegance of the above expositions are insufficient to overcome the fundamental problems in positivist theory, which are as equally fatal in their most elaborate, as in their most simple, statements.[16] Rather, this paper has a more fundamental purpose, and that is to extract the basic definition or understanding of what law is which is implicit in positivist jurisprudence, and to examine, from a feminist perspective, the conceptual and political imperatives that flow from it. This paper postulates that the development of a theory of law which is properly feminist in character must necessarily transcend positivism's claim to trans-historicity and universality, and should articulate the functional and ideological role of legal positivism in the reproduction of the sex and economic class relations of capitalist society. It is proposed to draw attention to the conceptual limitations of legal positivism, and to show that it is a doctrine based on an understanding of 'the law' as being an autonomous, self-contained system, one that is supposedly uninvolved in the process of class production and reproduction. It will illustrate how a positivist understanding of law has a conservative political consequence, as it effectively separates critical analysis of the law from broader sociological enquiry into the nature of capitalism when in actual fact 'the law' (as we shall see) is intimately involved in the process of reconstituting the relations of capitalism, and, as an institution, plays a crucial role in the class subordination of women.

The key reason why it has been so observably difficult to develop a feminist critique of law relates directly to the conceptual limitations of the definition of law provided in the legal-positivist tradition. A feminist critique of law cannot be expressed within a framework that is predicated on the autonomy of the law – that is, one based on an understanding of law as a neutral and independent structure that is supposedly uninvolved as an institution in the repression of women. The corollary of this approach is that women's problems with the law are thus only problems with particular legal rules or, at the most, particular areas of the law. A feminist critique of law must reject this view of the legal systems, and should be predicated on an understanding of law as praxis – that is, as Klare defines the term, as being a form of 'practice' through which the social order is defined.[17] As will be illustrated, a feminist analysis of the law must clearly reject the central tenet of legal positivism – that is, that law is external to the question of class – for such a position by definition renders it impossible to develop a political critique of the legal system. A feminist critique of law, in other words, must recognise and transcend the 'mind-forged manacles'[18] of positivist jurisprudence, for this, it is contended, is the first and necessary step in developing a politically meaningful line of enquiry into the relation between law and the subordination of women. It is absolutely crucial that feminists unravel the role the law plays in maintaining and reproducing the sex and economic divisions in our society, for capitalism has a class structure that is innately patriarchal.[19]

16 WH Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) *Wisconsin Law Review* 29.

17 K Klare, 'Law-Making as Praxis' (1979) 40 *Telos* 123.

18 D Hay, 'Authority and the Criminal Law', in *Albion's Fatal Tree: Crime and Society in 18th Century England* (New York: Allen Lane, 1975), pp 48–49.

19 *Feminism and Legal Positivism*, pp 63–64.

To start with: what is legal positivism? There has been a great deal written on this topic, characteristically in supportive (and generally abstruse) terms. HLA Hart succinctly outlines a set of five propositions usually associated with the positivist tradition in law that well illustrate its analytical tenor.[20] In overview, these are: firstly, that all laws are the command of human beings, (ie emanating from a sovereign). Secondly, the contention that there is no necessary connection between law and morals – that is, law as it is and law as it should be. Thirdly, the analysis of legal concepts should be distinguished from historical enquiry into the causes and origins of law, and should be separated from sociological enquiry into the relationship between law and other social phenomena. Fourthly, positivism contends that the legal system is a closed, logical system, in which correct legal decisions can be deduced by logical means from predetermined legal rules, without reference to social aims, policies or moral standards. Finally, that moral judgments are unable to be established or defended – as can statements of fact – by rational argument, evidence or proof.

As Hart's summary adverts to it, legal positivism is concerned with abstract notions of sovereignty, hierarchy and command as the intrinsic condition of the law. It defines law simply as a set of rules carried from the sovereign to 'subject', that is processed through a legal system that is held out to be primarily administrative in character. Legal positivism presents us with a model of the legal process: the courts, the styles of consciousness with which lawyers perceive and 'resolve' problems,[21] the way in which they interact between client and system, and the role of the judiciary, which is supposedly separate from politics and which is presented as intrinsically neutral and value-free.

Feminist legal enquiry to date has generally been expressed within this conceptual tradition, as it has focused primarily on the function of the law at those points where it directly intersects the social experience of women. For example, there have been extensive feminist critiques of the law relating to rape, abortion, criminal and family law and so forth, but there has been comparatively little attention directed to the broader question as to how the very structure of the legal order in contemporary capitalist society – its structural qualities of 'formality, generality and autonomy'[22] – serve to reinforce and reproduce existing sex and economic class relationships.

Feminist enquiry should appreciate that the distinguishing attributes of the Western legal order – its 'generality, uniformity, publicity and coercion'[23] – perform an express political function in the reproduction of class relationships, and ideologically find their expression in a particular legal philosophy – legal positivism – that animates and legitimates capitalist society.[24] Positivism in law is structurally connected to a deeper set of presuppositions about society that are expressed under the rubric of 'liberalism'. Liberal philosophy embraces legal positivism in the way it presents the legal system as a neutral, independent and apolitical mechanism for resolving social tension. This presentation of law is given its political expression in the notion of the 'rule of law' – that is, the legal doctrine that all people are equal under the law and can expect from it a neutral

20 HLA Hart, 'Positivism and the Separation of Morals' (1958) 71 *Harvard Law Review* at 601–02.

21 K Klare, *Law-Making as Praxis*, *op cit*, p 124.

22 I Balbus, 'Legal Form and Commodity Form: An Essay on the Relative Autonomy of the Law' (1977) 11 *Law and Society Review* 71.

23 RM Unger, *Law in Modern Society* (New York: The Free Press, 1976), pp 72–73.

24 J Sklar, *Legalism* (1964).

and unbiased determination of their rights.[25] The 'rule of law' in fact, is widely accepted as the lynchpin of individual liberty and justice in liberal-democratic society. Indeed, the very legitimacy of the modern state hinges on this 'reification' of the law – that is, in obscuring the role the law as an institution plays in the reconstitution of class relationships. In fact, far from recognising the role the law plays of the individual (positivist's subjectivity of values), a legal epistemology that separates fact from value (the formal rule) and a rationalisation of practice which accords legal validity only to rule-dictated outcomes.

It stands to reason that positivism in law should thus be subjected to the same criticisms that have been directed at liberalism – namely that it provides us with a largely artificial understanding of the way modern society works. Legal positivism, however, has not been subjected to as incisive or developed a criticism as has liberal philosophy. This is no doubt due to the ideological importance of the law in legitimating the modern state, and the fact that the study and practice of 'the law' have been so 'professionalised' in character. That is, that legal education has been largely left in the control of that group of people, middle-class male lawyers, who have a vested interest in maintaining its existing form and the class structure it reinforces.

Legal positivism presents us with a highly formalistic and apolitical understanding of the law. The legal system as defined in this tradition is not part of 'the problem' and 'reforming the law' has, even from a feminist perspective, become almost synonymous with changing the content of particular rules or areas of the law. This, of course, has an important place in feminist political strategy, but if we are to understand the way in which the legal system reinforces the class oppression of women, we must look beyond the largely artificial way law is defined in the positivist tradition. Feminist legal enquiry needs, in short, a different starting point if it is to understand the specific way in which law mediates class relations,[26] specifically the class relations of sex. From a feminist perspective, 'the law' must be understood not as autonomous from society, but as being a form of practice through which existing sex and economic class relations are reproduced. This involvement can be described in shorthand by approaching the legal system as a form of 'praxis' – henceforth to be understood as connoting human activity through which people define or change their world. Thus an acceptance of the understanding of the law presented in mainstream Western jurisprudence (as defined by the 'science of legal positivism') limits the development of a political critique of law as it presents the law as an autonomous, self-contained system, fuelled by its own logic, which is supposedly uninvolved in the processes of class production and reproduction, simply to the positivist 'constituting conventions which set the boundaries among particular interests so that the interests' will not destroy each other.[27]

The consequence of legal positivism is, in short, to set up a theoretical schism between law and other social phenomena, conceptually separating it from the capitalist whole of which it is, in reality, a fundamental part. Legal positivism developed at the same historical conjuncture as liberal philosophy, and we must appreciate that it serves the same ideological function – and that is, taking some

25 AV Dicey, *Law of the Constitution* (New York: St Martin's Press, 1958), pp 202–03.

26 S Picciotto, 'The Theory of the State, Class Struggle and the Rule of Law', in *Capitalism and the Rule of Law: From Deviance Theory to Marxism* (Academic Press, 1979), p 165.

27 RM Unger, *Knowledge and Politics* (New York: The Free Press, 1975), p 72.

licence with Poulantzas, 'to hide the real contradictions, [and] reconstitute at an imaginary level a relatively coherent discourse which serves as the horizon of agents' experience'.[28] Indeed, it is not overstating the case to argue that the veneer of legal positivism is the cornerstone of legitimacy in the capitalist social order, which is unable to countenance even the suggestion that 'the courts' or 'the judiciary' are anything other than autonomous and 'politically neutral' arbiters of social tension. The rejection of the schema of law provided by liberal positivism, however, does not propel us into a crude Marxist instrumentalism – that is, the approach that conceptualises 'the law' as simply an instrument of social control of the bourgeoisie. In its own way, this is as artificial an understanding of the function of the law as is found in liberal legalism, as it is also predicated on a concept or understanding of 'law' that has a strong epistemologically positivist flavour, as still presented in terms of 'rules' or 'commands'. Indeed, the critique of law[29] makes the point that both liberal pluralist and vulgar Marxist analyses both posit law as an 'instrument' – the two views differing simply on the empirical point of whose interest it expresses – in the former, that of a (generally democratically elected sovereign) and in the latter, the naked class interests of the bourgeoisie. These approaches are both inadequate as they allow no dynamism to the structure of the legal system in the production and reproduction of class relations – as Balbus notes, that is, for the way in which 'this form [of law] articulates the overall requirements of the capitalist system in which these social actors function'.[30]

As suggested, a feminist analysis of law must address the significance of the form of law in regulating the oppression of women in capitalist society. That is, a necessary element of any feminist critique of law must be the examination of the way in which the structural characteristics of the Western legal system – its formality, its generality, its autonomy and its professionalism – function to mediate social tension in the political interests of capital, an interest that we have seen is necessarily predicated upon the political, sexual and economic subordination of women.

Our critique of law – a feminist critique of law – needs to be developed within a theory of social reproduction; it is only by transcending the positivist conceptual framework of both liberal legalism and Marxist instrumentalism that we can make the conjunction between 'the woman question' and 'the law' – and thus articulate the crucial role the law plays in the production (and, importantly, the reproduction) of the iniquitous class relationships of capitalist society.

Beyond Positivism – Law and Social Reproduction

This article proposes to offer a way to approach the fundamental connections between patriarchy and law[31] by showing how our legal system presents us with a dispute resolution process that has (ideological claims to neutrality and impartiality aside) the express insignificance, any claims for social justice made upon it by women. Although it is true, as Thompson[32] notes, that the ideological function of the law requires that it occasionally give substantive effect to its claims to equity and justice (which the women's movement has, it is

28 N Poulantzas, *Political Power and Social Classes* (New Left Books, 1978), p 207.

29 1978.

30 *Op cit*, p 572.

31 J Rifkin, 'Toward a Feminist Jurisprudence' (1983) *Harvard Women's Law Journal* 83 at 84.

32 EP Thompson, *Whigs and Hunters: Origins of the Black Acts* (Penguin, 1977), pp 257–67.

acknowledged, had past cause to be thankful for) its general function is to structurally frustrate the attainment of sexual liberation through the legal process.

These structural features collapse together to constitute a form of practice through which the social order of capitalism is reproduced across time; serving to maintain and perpetuate and, indeed, legitimate patriarchal domination under its veneer of formal justice, procedural equity, neutrality and judicial impartiality. Expressed within such a framework, it is hardly surprising that feminist litigators have not, as observed by Rifkin, 'challenged the fundamental patriarchal social order'[33] in spite of the fact that the practice of law now includes experienced and talented feminist litigators and academics. Rather than reflecting some sex-typed lack of legal ability, feminist difficulties in engaging the law in the struggle against patriarchy are attributable to the structure of liberal legalism – a form of law which for women (to borrow a term used by Connell in another context) effectively constitutes a 'praxis trap' – that is, it is 'a situation in which people (ie feminist litigators and academics) do things for good reasons and skilfully, in situations that turn out to make their original purpose difficult to achieve'.[34] Feminists will continue to find the pursuit of 'justice' (as we understand the term) within the parameters of legalism to be a chimera – always promised, never realised – for we are attempting to employ in our interests a legal framework that has the express political function of perpetuating the powerlessness of women, and which institutionally reinforces the patriarchal logic of capital accumulation.

The purpose of this article has been to suggest a framework within which the fundamental connections between culture, patriarchy and law can be constructively addressed. It is contended that the lacunae in feminist scholarship in relation to law seriously impairs the feminist political project: for, as we have seen, 'the law' plays a key institutional role in both reinforcing and reproducing the class subordination of women to men. I have argued that it simply incorrect to 'dismiss' the law from feminist scholastic and strategic enquiry as some 'inert' mechanism for giving effect to 'male' interests. It is, rather, an organic social relation that is actively involved in mediating and controlling the tensions engendered in a class-structured society. 'The law' is intimately involved in structuring every aspect of women's lives. It stands at the very centre of the 'arena of social struggle' and is of fundamental significance to the very legitimacy of the capitalist State and, by implication, the legitimacy of sexual subordination. I believe that a reorientation of the 'feminist' approach to law is long overdue: for as it is politically central to patriarchal domination, we simply cannot afford to keep it at the penumbra of our political project.

Our task, as I perceive it, is to 'crack open' law to politics: to reject the conceptual framework of positivist jurisprudence, and to approach the law as a form of praxis, for only then can we unveil its particular function in the process of reproducing the exploitative sexual and economic class structures of capitalist society.

33 J Rifkin, 'Toward a Feminist Jurisprudence' (1983) *Harvard Women's Law Journal* 83 at 87.

34 R Connell, *Which Way is Up?* (Sydney: Allen & Unwin, 1983), p 156.

FEMINISM AND THE TENETS OF CONVENTIONAL LEGAL THEORY

Nicola Lacey[35]

In this paper, I shall explore the argument that there is something not about particular *laws* or sets of laws, but rather, and more generally, about the very structure or methodology of modern law, which is hierarchically gendered. To most lawyers this is a far more counter-intuitive claim than, say, feminist allegation of bias in particular laws. It is, however, absolutely central to any strong feminist theory of law. In what follows, therefore, my main concerns will be to clarify the ways in which feminist legal theory differs from and challenges the understandings of law which inform conventional legal theory; to explore the continuities between feminist and other critical approaches to the study of law; and to identify some of the difficult questions still confronting feminist analyses.

To speak of 'feminist legal theory' is, of course, to gather together a set of heterogeneous approaches. In this paper, I shall not be concerned with these important differences. I shall simply set out from an inclusive conception of feminist legal theory as proceeding from two foundational claims. First, at an analytical and indeed sociological level, and on the basis of a wide range of research in a number of disciplines, feminist legal theorists take sex/gender to be one important social structure or discourse. We hence claim that sex/gender characterises the shape of law as one important social institution. Secondly, at a normative or political level, feminist legal theorists claim that the ways in which sex/gender has shaped the legal realm are presumptively politically and ethically problematic, in that sex/gender is an axis not merely of differentiation but also of discrimination, domination or oppression. At a methodological level, feminist legal theorists are almost universally committed to a social constructionist stance: in other words to the idea that the power and meaning of sex/gender is a product not of nature but of culture. Feminist legal theorists are hence of the view that gender relations are open to revision through the modification of powerful social institutions such as law.

Within this broad conception, it is probably worth distinguishing two main schools of feminist legal thought. The first, which might be called liberal feminism, is committed, as is mainstream legal theory, to the ideals of gender neutrality and equality before the law. Its focus is primarily instrumental, seeing law as a tool of feminist strategy, and the impact of law as basis for feminist critique. By contrast the second approach, which I shall label difference feminism, is sceptical about the possibility of neutrality; it has an implicit commitment to a more complex idea of equality which accommodates and values, whilst not fixing, women's specificity 'as women'; and it has a focus on the symbolic and dynamic aspects of law and not just on its instrumental aspects.[36] In what follows, I shall concentrate on the implications of this more radical approach to feminist legal theory – difference feminism – for the tenets of conventional legal scholarship and theory.

I shall approach this question by singling out a number of assumptions common to positivistic legal scholarship which are the target of feminist critique of the

35 Professor of Law, Birkbeck College, University of London; Visiting Professor in Feministrechtwissenschaft, Humboldt University, 1996.

36 For more detailed discussion see Nicola Lacey, 'Feminist Legal Theory: Beyond Neutrality' [1995] *Current Legal Problems* p 1.

gender bias of legal method. These various points are closely interwoven, but I think that it is useful to separate them out to get a sense of the range of arguments which have been influential in the development of feminist legal thought.

1. The neutral framework of legal reasoning

A central tenet of both positivistic scholarship and of the liberal rule of law ideal is that laws set up standards which are applied in a neutral manner to formally equal parties: the questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning has featured little in mainstream legal theory. These questions have, on the other hand, always been central to critical legal theory, and they now find an important place within feminist legal thought. In particular, recent work by Carol Gilligan[37] on the varying ways of constructing moral problems, and their relationship to gender, has opened up a very striking argument about the possible 'masculinity' of the very process of legal reasoning.

As is widely known, Gilligan's research was motivated by the finding of psychological research that men reach a 'higher' level of moral development than do women. Gilligan set out to investigate the neutrality of the tests being applied: she also engaged in empirical research designed to illuminate the ways in which different people construct moral problems. Her research elicited two main approaches to moral reasoning. The first, which Gilligan calls the ethic of rights, proceeds in an essentially legalistic way: it formulates rules structuring the values at issue in a hierarchical away, and then applies those rules to the facts. The second, which Gilligan calls the ethic of care or responsibility, takes a more holistic approach to moral problems, exploring the context and relationships, as well as the values, involved, and producing a more complex, but less conclusive, analysis. The tests on which assessments of moral development have conventionally been made by psychologists were based on the ethic of rights: analyses proceeding from the ethic of care were hence adjudged morally under-developed. It was therefore significant that Gilligan's fieldwork suggested that these two types were gender-related, in that women tended to adopt the care perspective, whilst men more often adopted the rights approach.

Gilligan's assertion of the relationship between the two models and gender is a controversial one. Nonetheless, her analytical distinction between the two ethics is of great significance for feminist legal theory. The idea that the distinctive structure of legal reasoning may systematically silence the voices of those who speak the language of relationships is a potentially important one for all critical legal theory. The rights model is, as I have already observed, reminiscent of law: it works from a clear hierarchy of sources which are reasoned through in a formally logical way. The more contextual, care or relationship-oriented model would, by contrast, be harder to capture by legal frameworks, within which holistic or relationally oriented reasoning tends to sound 'woolly' or legally incompetent, or to be rendered legally irrelevant by substantive and evidential rules. Most law students will be familiar with the way in which intuitive judgments are marginalised or disqualified in legal education, which proceeds precisely by imbuing the student with a sense of the exclusive relevance of formal legal sources and technical modes of reasoning.

37 Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982). (See further Chapter 6.)

There are, however, several important pitfalls for feminist legal theory in some of the arguments deriving from Gilligan's research.[38] One way of reading the implications for law of Gilligan's approach is that legal issues, indeed the conceptualisation of legal subjects themselves, should be recast in less formal and abstract terms. But such a strategy of recontextualisation may obscure the (sometimes damaging) ways in which legal subjects are already contextualised. In the sentencing of offenders, or in the assumptions on which victims and defendants are treated in rape cases, for example, we have some clear examples of effective contextualisation which cuts in several political directions – not all of them appealing to feminists. In certain areas, it may be that legal reasoning is already 'relational' in the sense espoused by many feminists, but that it privileges certain kinds of relationships: ie proprietary, object relations.[39] A general call for 'contextualisation' may also be making naive assumptions about the power of such a strategy to generate real change given surrounding power relations: as the case of rape trials shows all too clearly, the framework of legal doctrine is not the only formative context shaping the legal process. The important project, I would argue, is that of recontextualisation understood not as reformist strategy but rather as critique: in other words, the development of a critical analysis which unearths the logic, the substantive assumptions, underlying law's current contextualisation of its subjects, and which can hence illuminate the interests and relationships which these arrangements privilege.[40]

2. Law's autonomy and discreteness

Another standard assumption of mainstream legal scholarship is that law is a relatively autonomous social practice, discrete from politics, ethics, religion. An extreme expression of this assumption is found in Hans Kelsen's 'pure' theory of law,[41] but weaker versions inform the entire positivist tradition. Indeed, this is what sets up one of positivism's recurring problems – that is, the question of foundations, of the boundaries between the legal and the non- legal; of the source of legal authority, and the relation between law and justice.

This mainstream assumption, like the idea that legal method is discrete or distinctive, is challenged by feminist legal theory. Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines: in doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries. Hence the ideals of the Rule of Law call for modification and reinterpretation. There are obvious, and strong, continuities here between the feminist and the Marxist traditions in legal thought.

3. Law's neutrality and objectivity

As I have already mentioned, difference feminism has developed a critique of the very idea of gender neutrality, of gender equality before the law, in a sexually

38 For a useful discussion, see Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992), Chapter 3.

39 For further discussion see Jennifer Nedelski,' Reconceiving Rights as Relationship' [1993] *Review of Constitutional Studies*, 1; Luce Irigaray, *I Love to You* (trans Alison Martin) (Routledge, 1996).

40 See further Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Social and Legal Studies*, 131.

41 H Kelsen, *The Pure Theory of Law* (University of California Press, 1967).