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Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism

Rosemary Hunter

The concept of 'liberal legalism' refers to a set of assumptions found within law in societies and regimes (such as the international legal order) in which liberalism is the dominant political philosophy. These assumptions broadly concern: (a) the nature of the legal person; and (b) the role of law. This chapter will provide an account of both of these aspects of liberal legalism, and the feminist critiques to which they have been subject. Feminist critiques have been mounted from a variety of positions, ranging from liberal feminists challenging law to live up to its promises, to radical and postmodern feminists who, for different reasons, trenchantly reject the validity of the assumptions of liberal legalism. The chapter focuses on feminist critiques of liberal legalism rather than on internal debates within feminism, although these debates are evident in the different diagnoses of and responses to the perceived problems of liberal legalism.

The Legal Person

As Ann Scales explains, two of the central tenets of liberalism are that the basic unit of society is the individual, who exists prior to social organization, and that individuals are rational and self-interested, and use their rationality to achieve their needs and desires (2006: 64). Consistently with these tenets, the legal person envisaged by liberal legalism is rational, autonomous, self-contained, self-possessed, self-sufficient and formally equal before the law. This person relates to others at arm's length through the mechanism of contract. In the words of Anna Grear, 'the paradigmatic liberal legal subject' is 'a socially decontextualized, hyper-rational, wilful individual systematically stripped of embodied particularities in order to appear neutral and, of course, theoretically genderless, serving the mediation of power linked to property and capital accumulation' (2011: 44). This makes it possible for a corporation as much as a human being to be considered a legal person.

Despite the appearance of neutrality and genderlessness, however, feminist critiques of the liberal legal person have noted its inherent masculinity. This argument is sometimes historical and empirical, and sometimes symbolic and normative. In the first account, privileged white men have populated law, shaped it in their own image, and instated their experience and view of the world as the legal norm, which has then come to be seen as universal, neutral, objective, inevitable and complete (Finley 1989: 892, Davies 1996: 72). The second, symbolic, account draws attention to the systematic associations within the Western imaginary between the characteristics of the legal person – rationality, autonomy,

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self-interest, objectivity, assertiveness, self-sufficiency, self-possession – and masculinity (see, for example, Naffine 2002: 81). We can see this masculine norm in the reasonable man of tort law and self-defence doctrine; the rational, self-interested actor of contract law; the responsible person of criminal law; the unencumbered worker of labour law; the rights-bearing individual of human rights; and the standard comparator of equality law (Finley 1989: 893, 896). These legal persons operate autonomously in the public sphere – it is difficult to imagine them, for example, changing nappies, cuddling children or breastfeeding (Naffine 2009: 158).

A significant consequence of the masculinity of the legal person is that women struggle to attain legal subjectivity. Again, this point may be understood both empirically and symbolically. Empirically, to the extent that law is built around an ideal type to which they do not conform, it creates problems for women and fails to take into account their lived reality and experiences. As Ngaire Naffine has pointed out, for example, ‘women’s bodies [are] not susceptible to the sort of self-mastery required of a self-proprietor’ (1998: 203), and indeed for centuries women’s bodies were seen as men’s property (Naffine 1998: 204, 208–211). Even today, liberal legalism’s autonomous, responsible subject is never pregnant and is not a wife (Naffine 2003: 365). And to the extent that they are excluded from legal subjectivity, women are also diminished, since liberal legal theory treats persons not fitting ‘the normal model of autonomous, competent individual’ as marginal, inferior and different (Minow 1990: 9–10).

On a symbolic level, the construction of the masculine as rational, objective and universal is premised on a binary construction of the feminine as its opposite – as irrational, subjective and particular. Thus, the legal person exists in a symbiotic hierarchy with the devalued feminine – his existence and power depend upon the negation and exclusion of the feminine (Naffine 2002: 81, 87). And again, as Margaret Thornton has noted, liberal legalism’s essentialist representation of ‘woman’ as less than rational has been disabling for embodied women attempting to exercise legal subjectivity (1996: 30–31). One response to this observation has been Luce Irigaray’s call for a legal regime that recognizes two, differentiated sexes rather than only one, universal (that is, male) sex (Irigaray 1993, 1994, 1996).

In her recent work, Naffine has argued for a more complex account of the legal person than that presented above. In contrast to her own earlier position, she now rejects the notion that ‘law adopts a monolithic or singular or static view of the person which ... either forces women out or obliges them to conform to it if they are to be regarded as persons too’ (2011: 16). Rather, she argues that ‘[w]e need to acknowledge that law’s concept of the person changes according to the guiding scheme of interpretation; that legal persons are therefore multiple rather than singular’ (2011: 16). In her 2009 book *Law’s Meaning of Life*, she identifies four views of the legal person: rationalist, religionist, naturalist and legalist. The rationalist sees the legal person as a rational actor, as found in liberal philosophy and criminal and contract law, whose capacity for reason is their most important characteristic. The religionist sees the legal person as a sacred being, whose most important characteristic is their human sanctity and inviolability, as found in human rights and medical law. The naturalist emphasizes the sovereign subject, the embodied and bounded self with rights to bodily integrity; while the legalist understands the legal person as simply ‘an abstract device for endowing a capacity to bear rights and duties’, with no fixed or essential characteristics.

Nevertheless, Naffine concedes that each of these legal persons has ‘a masculine flavour’, and thus continues to make it difficult for women *as women* to be persons in law

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(2011: 16). In relation to the rationalist position, as noted above, women have traditionally been constructed as the opposite of rational (2011: 17), and even though [white] women were admitted to full public citizenship by the late 1920s, pregnant women are still not recognized in law as fully rational – their capacity for self-government in matters such as abortion remains legally limited (2011: 20). One might add that rape law continues at least to compromise women's capacity for sexual self-government, and that family law restricts the ability of separated mothers to determine how and where they and their children should live. The religionist version of the legal person as sacred and inviolable also has difficulties accommodating pregnant women (Naffine 2011: 18). The naturalist version of the legal person as a sovereign and bounded subject similarly has problems accounting for women's sexual and reproductive bodies (2011: 19). And according to Naffine, the legalist view has difficulty maintaining the separation of the legal from the human person in one or other of its patriarchal manifestations (2011: 19). It might also be observed that within the binary hierarchy referred to above, abstraction is associated with masculinity while the feminine is associated with particularity. Thus it would be easier for a legalist to see a man than a woman as an abstract legal person.

The empirical masculinity of the man of law in the form of lawyers and judges has led to calls by some feminists for greater representation of women in the legal profession and in the judiciary. For liberal feminists, this is an argument for law to finish what it began with the formal recognition of women as legal persons and the removal of barriers to women's entry to the professions in the early twentieth century, and to finally accord equal recognition to women's rationality (see, for example, Malleson 2003). Other feminists have argued that law needs to incorporate both sexes rather than just one; that women have important, gendered experiences and perspectives to bring to bear that will ensure legal rules and norms respond to a wider range of litigants and are more fully human (see, for example, Wilson 1990, Hale 2001, 2005, 2008, Rackley 2006, 2007, 2008). More controversially, some have relied on the cultural feminist argument that women reason in a 'different voice' characterized by an ethic of care (discussed below), which again has something valuable to offer to a law previously focused excessively upon individual rights (see, for example, Menkel-Meadow 1986, Sherry 1986, Wilson 1990).

The notion that women bring something different to lawyering and judging may, however, be perceived negatively rather than positively. As noted above, in the Western imaginary, woman's 'difference' has been seen to reside precisely in her non-rationality. This has rendered embodied women, in Thornton's words, 'fringe-dwellers of the jurisprudential community', not fully accepted as agents of legality due to their association with irrationality (1996: 3–4, 31). Moreover, the fact that the masculine in law has been universalized and appears under the guise of impartiality and neutrality means that women's perspectives are understood not as equally universal, but as particular, biased, special interests, not providing the degree of objectivity required for authoritative judgement (Thornton 1996: 6, Graycar and Morgan 2002: 57–58, Munro 2007: 49–50, see also Graycar 1998 and 2008). Thus, women's underrepresentation in the senior judiciary is justified due to their lack of the necessary 'merit' required for appointment.

One recent development within this debate has been the advent of feminist judgment-writing projects, in which feminist academics and lawyers have written 'alternative' judgments in prominent cases, in order to challenge established modes of legal authority, to highlight the masculinity of existing judgments and to demonstrate the results that a more inclusive judiciary might produce (see <http://womenscourt.ca>, www.feministjudgments.org.uk,

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Hunter et al. 2010). Notably, however, these projects have explicitly brought *feminist* perspectives to judging rather than claiming to represent *women's* perspectives or voices. They show how feminist legal theory may be applied in a practical context and illustrate differences within feminism, but they do not conflate women with feminists. This approach is consistent with broader calls for judicial diversity which are premised on the notion that conversations among judges with a wide range of backgrounds, life experiences and intellectual predispositions are necessary for law to attain democratic legitimacy (see, for example, Etherton 2010).

Another feminist line of attack on the liberal legal person has been Jennifer Nedelsky's call to reconceive autonomy (Nedelsky 2011). While other feminist legal scholars have also engaged with the concept of autonomy, it is important to distinguish Nedelsky's work from theirs. Robin West, for example, in her early article 'Jurisprudence and Gender', argues that the 'separation thesis' – the notion that human beings are physically separate from other human beings, and that separateness is epistemologically and morally prior to the relationships and cooperative arrangements that an individual may choose to form – is not true of women (1988: 1–2). Rather, women are 'essentially connected' to others, both materially and existentially, through pregnancy, sexual intercourse¹ and breastfeeding (1988: 3). She thus posits the 'connection thesis', which holds that '[w]omen are actually or potentially materially connected to other human life. Men aren't' (1988: 14). This view of a fundamental gender difference based on the presence or absence of connection locates West within the school of cultural feminism which seeks both to assert and to valorize women's difference from men.

Martha Fineman, by contrast, argues that all humans are dependent at some stage in their lives – in childhood, illness and old age – but caretaking for dependents is seen as a family responsibility and is usually undertaken by women. Because of this universal dependency, however, caretaking should instead be seen as a collective responsibility and care work better valued and resourced (2000, 2004: xiii–xvii). A 'societal commitment to the provision of basic social needs' would enable the achievement of true autonomy for all individuals based on a position of meaningful and widespread equality (2004: 29–30). In her later book, *Caring for Justice*, West comes closer to this position in acknowledging that connectedness is not unique to women, but that the beneficial work of maintaining care and connections is both disproportionately performed by women and insufficiently supported by law and society (1997: 1–5).

Nedelsky goes further than both of these theorists in arguing that liberalism is empirically wrong about autonomy in relation to all human beings all of the time. While liberal political and legal theories take atomistic individuals to be their basic unit, they fail to recognize 'the inherently social nature of human beings' (1989: 8). Social relations with others are *constitutive* of the human, not an optional add-on (1989: 8). In Nedelsky's view, however, this insight does not entail abandoning the concept of autonomy, which she argues remains valuable for feminism (1989: 7). Rather, it is necessary to reconceive autonomy not as an inherent quality of human beings but as a capacity that must be developed and sustained, and which can develop only in the context of relations with others (1989: 10–11). Relationships with others provide the support and guidance necessary for the development and experience

1 By contrast, as Nedelsky notes, the radical feminist view of sexual intercourse as the violation of a woman's bodily integrity is premised on the classical liberal notion of the bounded self (1990: 169–170).

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of autonomy'; thus, relatedness is not the antithesis of autonomy but a precondition for it (1989: 12). This feminist version of relational autonomy then focuses attention on the kinds of relationships that promote (or diminish) autonomy, both interpersonal relationships and relationships with the bureaucratic state. We need to consider how to structure constructive relationships so that they foster rather than undermine autonomy (1990: 168).

Finally, postmodern feminists have critiqued the way in which liberal legalism's account of the legal person does not merely function as a representation of reality, but actively contributes to the construction of gender as a binary system, and of limited meanings and characteristics for 'masculine' and 'feminine' subjects and subjectivity (see, for example, Ahmed 1995: 58, Davies 1996: 4, Hunter 1996: 160, Naffine 2004). Mary Joe Frug, for example, notes that law produces differences and hierarchies between the sexes, and moreover produces these essentialized sexual differences and hierarchies as 'natural' (and hence as unquestionable) (1992: 128). Through an analysis of employment discrimination law, family law, and laws relating to sexual assault and prostitution, Frug (1992: 15–18, 32–33, 129–134) demonstrates how law produces the female body as terrorized ('a body that has learned to scurry, to cringe and to submit'), maternalized ('a body that is "for" maternity') and sexualized ('a body that is "for" sex with men', that is, both desirable and rapable) (1992: 129–130). This construction of the female body in turn affects how we dress, have sex, and regard ourselves and others (1992: 132). Similarly, Carol Smart argues that 'law operates as a technology of gender', 'a process of producing fixed gender identities', rather than merely applying to already gendered subjects (1992: 34). According to Smart, law brings into being 'both gendered subject positions as well as ... subjectivities or identities to which the individual becomes tied or associated'; thus 'Woman is a gendered subject position which legal discourse brings into being' (1992: 34). Smart, too, charts the rise of compulsory motherhood, showing how successive legislative provisions have constructed motherhood as 'natural' and unavoidable for heterosexually active women (1992: 37–39).

Continuing this theme, Sara Ahmed illustrates the way in which child support legislation constructs women as dependent on men and normalizes the heterosexual family, rendering women who have chosen to parent alone or in a lesbian relationship invisible and illegitimate (1995: 66–67). Ratna Kapur shows how the Indian courts' interpretations of sexual harassment prohibitions have reintroduced notions of sexual morality, chastity, and the cultural idealization of pure, modest Indian womanhood, with women claimants not conforming to these norms being denied protection (2005: 39–40). Sally Sheldon (1999) analyses law's gendered constructions of masculine and feminine reproductivity, demonstrating how UK foetal protection legislation, judicial endorsement of foetal protection policies, and legislation providing different degrees of civil liability of women and men for pre-natal injuries caused to children, construct the female reproductive body as weak, penetrable, volatile and uncontrollable, by contrast with the masculine heterosexual reproductive body which is constructed as strong, impermeable, stable and invulnerable. Within this legal discourse, too, men are constructed as breadwinners and women as primary carers. Thus, for instance, it is seen as acceptable for women to be excluded from workplaces involving high levels of exposure to environmental toxins, since the porous female body constitutes a potential danger to the foetus and thus requires control, surveillance and management, and since women are always potentially pregnant and their primary role is to nurture and care for children. The idealized, heterosexual male body, on the other hand, is not excluded from such workplaces, because it is considered strong and impermeable, and because of men's primary breadwinning role, even though men's sperm are equally if not more vulnerable

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to mutation as a result of environmental toxicity (Sheldon 1999: 133–134). Sheldon also contrasts the legal construction of the heterosexual male body with that of the gay male body which, in its obvious susceptibility to invasion and its consequent dangerousness to other bodies in the context of HIV/AIDS becomes ‘feminized’ (1999: 140), and notes also the differential racial and class constructions of potentially dangerous mothers in US and UK law, which account for differential forms of legal regulation (1999: 142).

As a consequence of this analysis of law’s operation, both Frug and Smart argue that ‘legal discourse should be recognized as a site of political struggle over sex differences’ (Frug 1992: 126, Smart 1992: 39), and that feminist strategy should both contest the legal production and perpetuation of rigid identity categories that constrain women’s ways of being in the world and ‘construct an alternative version of reality’ (Smart 1989: 2, 164, see also Cornell 1991: 151–152, Ahmed 1995: 69, Hunter 1996: 160). The feminist judgment-writing projects referred to above take up this challenge, albeit perhaps not in a way Smart might have envisaged (Hunter 2012), by rejecting naturalized gender differences, attempting to open up broader spaces for women to inhabit within law, and writing alternative understandings of women’s diverse realities into the text of the law. The Canadian and UK projects offer, for example, ‘alternative versions’ to the limited, dismissive, uncomprehending or punitive accounts in the original judgments of infertile women (Harris-Short 2010), pregnant workers (Horton and James 2010), caring mothers (Bridgeman 2010, Hastings 2010), surrogate mothers (Ashenden 2010), lesbian ‘other’ mothers (Diduck 2010), lesbian marriage (Harding 2010), surety wives (Auchmuty 2010), young widows (Women’s Court of Canada 2006b), women with learning disabilities (Bibbings 2010, Barker and Fox 2010), young unemployed women (Women’s Court of Canada 2006c), elderly women (Carr and Hunter 2010), rape complainants (McGlynn 2010), Canadian Aboriginal women (Women’s Court of Canada 2006a), Muslim schoolgirls (Malik 2010), and abused women in varying cultural contexts (Bano and Patel 2010, Munro and Shah 2010, Edwards 2010, Monaghan 2010).

Just as law constructs gender and gendered subjects, however, so too does feminist discourse. There is a danger, therefore, that feminist representations of women may be or become as rigid, limiting, constraining, totalizing and oppressive as legal representations. In other words, feminists risk creating our own normative Woman in place of law’s version (see, for example, Frug 1992: 137, Smart 1992: 39, Hunter 1996, Kapur 2001, 2005, Halley 2008, Kotiswaran 2011). In order to mitigate this risk, feminists need to remain aware of our own historical location, avoid one-dimensional representations, present subjects as complex and multi-dimensional and focus on subjects and actions which have the capacity to disrupt existing norms (Kapur 2005: 128–131). Feminist counter-narratives – in judgments or otherwise – must ideally arise from a diversity of feminist voices and must remain contingent, contextualized, subject to discussion and debate, and open to critical scrutiny and revision (Hunter 2012). These desiderata would appear to be contrary to legal method, however, with its quest for certainty and predictability and its projection of apparently common sense and immutable truths. They suggest both a more transformative and a more modest potential for law than liberal legalism would traditionally endorse. It is to this question of law’s role that the chapter now turns.

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The Role of Law

Liberal legalism posits law as an essentially benign, neutral and autonomous institution. It is connected to society in that its function is to assist in the coordination of social activities and the resolution of social problems. It does so according to shared moral values and political ideals, universal principles, rational argument, doctrine and logic. Law reform is seen as a valuable tool for resolving new or newly-discovered social problems and thus, legal change reflects social change. At the same time, liberalism imposes limits on the permissible scope of legal intervention in the social, particularly in relation to spheres of activity designated 'private', in order to maximize individual freedom (O'Donovan 1985: 2, Scales 2006: 64–65). Feminists have rejected this image of law as objective, impartial, progressive and self-limiting and have instead highlighted its tendencies to maintain and exacerbate inequality, exclusion and oppression (Munro 2007: 44, 50).

One key element of feminist critique has centred on the public/private distinction within liberal legalism and its construction of the 'private' as a sphere of legal non-intervention and one in which 'universal' norms such as equality and human rights do not apply (see, for example, Charlesworth 1995: 250, Philipps 2002: 45). Frances Olsen identifies three strands to this critique: first, arguments about where the boundary between 'public' and 'private' is drawn; secondly, arguments that the public/private distinction is incoherent; and thirdly, arguments that the appeal to privacy is both political and gendered; that private freedom belongs only to those with power (mostly men), and without it, privacy connotes insecurity, fear and oppression (often for women) (1993: 322–325). In practice, these strands of critique tend to overlap, with the third being a constant refrain.

In relation to the boundary between public and private, Olsen notes that the concept of 'privacy' 'is not a natural attribute nor descriptive in a factual sense, but rather is a political, contestable designation' (1993: 319). Since law plays a crucial role in constructing and maintaining the division between 'public' and 'private' (O'Donovan 1985: 3), it thus operates in a way that is inherently political (Olsen 1985: 836). So, for example, when law designates 'the family' as a zone of privacy into which the state does not intrude, it effectively refuses to regulate and thus permits and reinforces power differentials within families, manifested in internal hierarchies and inequalities (Okin 1991, Olsen 1985: 837, Auchmuty 2010), and in harms to women and children such as domestic violence (see, for example, Graycar and Morgan 2002: 12, Fineman and Mykitiuk 1994), marital rape (Graycar and Morgan 2002: 13) and child sexual abuse. Likewise, when the state promotes mediation and other forms of private ordering in family law, it tacitly sanctions the continuation of gendered power relations within the family (see, for example, Neave 1994, 1995, Graycar and Morgan 2002: 17).

Other examples of law's public/private distinctions include the refusal to allow tax-deductibility of childcare expenses, thus constructing those expenses as a matter of 'private' rather than state responsibility (Graycar and Morgan 2002: 18–19), a responsibility that falls primarily upon women. In the international law of armed conflict, a distinction is drawn between rape as an official policy of genocide or subjugation, and 'private' rapes in war which are not the subject of regulation, thus leaving many victims of wartime rape without redress (see, for example, Charlesworth 1995: 244). Moreover, the dividing line between public and private tends to be drawn differently according to one's race, class and sexuality (Boyd 1997: 12); so for example, Indigenous women and their children and those dependent

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on welfare enjoy considerably less family privacy than do white, middle class families (Boyd 1997: 20, Graycar and Morgan 2002: 14, 20).

Olsen's second strand of critique – that the public/private distinction is incoherent – is based on two arguments. The first is that law in fact intervenes equally in the 'public' and 'private' spheres; it simply does so in different ways in order to maintain the ideological distinction between the two. The private sphere is the subject of negative regulation and boundary definition. For example, failing to criminalize domestic violence influences behaviour within the family just as surely as positive criminalization would do. Contract law's presumption that there is no intention to enter into legal relations between family members and thus that agreements made within the private sphere of the family are unenforceable clearly regulates the nature of the relations that family members can (and cannot) have with each other (Graycar and Morgan 2002: 15). Legal policies concerning parental responsibility, parental authority, which groupings constitute a family and so on affect how people form families and how power and roles are distributed within them (Olsen 1985: 837). Far from being unregulated, 'the family is a major concern of the state' (Pateman 1983: 297); the notion of 'non-intervention' simply obscures state policy choices (Olsen 1985: 837). The second argument that the public/private distinction is incoherent is based on the observation that, despite the illusion of separation between them (O'Donovan 1985: 160), the public and private spheres are interdependent and mutually constitutive. Structures in the 'public' world of work produce power inequalities within the family, and the gender division of labour within families affects women's participation in the labour market (Pateman 1983: 282, 293, O'Donovan 1985: 12, 106–107). Likewise, '[t]he guarantees of justice and equality held out to citizens in the "public" sphere are worth systematically less to those who are pre-politically disadvantaged' (Lacey 1993: 97). Thus, attempts to reform either the public sphere or family relations are doomed to fail if they do not acknowledge the interconnections and challenge the dichotomy between the two (Olsen 1983: 1529–1530, O'Donovan 1985: 159).

The ideological function of the public/private distinction is seen clearly in the neoliberal 'turn' in political philosophy, governance and regulation, which has seen a shift:

in the political orientation of the liberal state, whose role and responsibilities in relation to the life chances of its citizens [has been] reconfigured. Responsibility for individual welfare is less and less considered to be a matter of collective, social, or public obligation and is increasingly regarded as a private, individual or, at most, a family or charitable matter. (Fudge and Cossman 2002a: 3)

Neoliberalism embraces the notion that the state has inappropriately taken over a wide range of activities which are better left to the 'private' sector, in the form of the market, the community and the family (Kline 1997: 330, 336). Its central claim is 'that private choice is better than public regulation as a mechanism for allocating resources and ordering social affairs' (Philipps 2002: 41, Fudge and Cossman 2002b: 416). Thus, we have witnessed the retrenchment of the welfare state, the dismantling of social programmes, the privatization of public assets and services, and the expansion of the market and voluntary sector to take over many welfare state functions (Boyd 1997: 19, Kline 1997: 332, Philipps 2002: 70), but under significantly different conditions (see, for example, McDerment 2010, discussing the English case of *YL v Birmingham City Council* [2007] UKHL 27).

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Feminist critiques of neoliberal privatization constitute an important recent development in feminist legal and political analysis. Feminist scholars have observed and documented the 'highly gendered implications' (Boyd 1997: 19) of privatization, which has simultaneously involved the reconfiguration of the gender order in relation to paid work (women's increased workforce participation and the demise of the male breadwinner), while the gender division of labour in relation to social reproduction has remained largely intact and arguably intensified (Fudge and Cossman 2002a: 25–26). Lisa Philipps notes, for example, that Canadian tax reforms since 1993 have reinforced the emphasis on individual, family and community responsibility to secure their own welfare, impacting on women as market actors, caregivers and contributors to the voluntary sector (Philipps 2002: 41–42). At the same time, pension reforms have shifted the locus of investment risk from the collective to the individual, which has exacerbated long-term disadvantages for non-standard workers, the majority of whom are women, who take time out of the workforce, work part-time, and/or are in temporary and precarious employment (Condon 2002). Family law and social welfare law increasingly emphasize the enforcement of private support obligations within families, via child support, spousal maintenance obligations, imputed financial support between adults sharing a household, and workfare for single mothers (Cossman 2002). These provisions enable society to benefit from women's social reproductive labour, while disallowing women and children's dependency on the state and enforcing their dependency on individual men, thus reinforcing male power and women's economic vulnerability (Barker 2012: 160–161).

Indeed, the focus of neoliberal family policy on the family's responsibility for the welfare of its members has encouraged a widening of the scope of 'family' in order to cast the net of responsibility more widely (Fudge and Cossman 2002a: 29, Barker 2012: 160). Thus, Nicola Barker argues that legal recognition of same-sex relationships 'fits seamlessly into a neoliberal privatizing agenda' (Barker 2012: 162), as lesbians and gay men are encouraged to take on the burdens of care, financial support and social reproduction (160). The differential impacts of privatization policies on racialized women, immigrant women, women with disabilities, and so on have also been identified (Fudge and Cossman 2002b: 409). Clearly, too, law continues to play a central role. The neoliberal privatization project is not one of deregulation, but of reregulation in the service of a new political agenda (Fudge and Cossman 2002a: 33, 2002b: 416, Philipps 2002: 41).

While some feminists have argued that the damaging effects of the public/private distinction for women may be overcome by extending the 'public' values of justice, rights and equality to areas traditionally designated as 'private', others have made the reverse argument, that values traditionally associated with the 'private' such as care, connection and empathy, should be extended to the public sphere. A prominent argument here has been the feminist ethics of care, which contends that liberal law's ethics of justice – based on the supposedly universal values of rights and formal equality – is both impoverished and founded on false premises (White and Tronto 2004). Human beings are not abstract, disconnected entities but are embodied subjects situated in particular social contexts and in complex relationships of interdependence with others (Gilligan 1982: 74, Tronto 1993: 162, Held 2005: 13). This is similar to Nedelsky's argument discussed earlier, but unlike Nedelsky, feminist care ethicists are not interested in rescuing liberal concepts such as autonomy for feminism, but in positing an alternative moral approach based on the value of caring.

Different versions of the ethics of care have been elaborated over the years. Earlier (1980s) versions posited the ethics of care as a specifically feminine ethics, derived from women's

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experience of maintaining relationships (Gilligan 1982) or, more specifically, from women's experience of mothering (Noddings 1984, West 1988). Later versions have tended to eschew such essentialist foundations and have described the ethics of care as a feminist ethics (Tronto 1993, Sevenhuijsen 1998, Held 2005, though compare Drakopoulou 2000), which better reflects the realities and diversity of women's as well as men's lives and concerns, and offers prescriptions for moral action which are capable of attending to and addressing gendered power differentials and inequalities (Sevenhuijsen 1998, Stewart 2011).

According to Selma Sevenhuijsen, the ethics of care as a moral activity requires judgements about 'what is the best course of action in specific circumstances', a question which engages situated, contextual reasoning rather than abstract reasoning or the application of a set of predetermined principles (1998: 59, 107). Moral problems are approached from an attitude of caring (Sevenhuijsen 1998: 83), a willingness to deploy emotions such as sympathy, empathy, sensitivity and responsiveness (Held 2005: 11), and a 'commitment to see issues from differing perspectives' (Sevenhuijsen 1998: 83). Caring involves sustaining relationships (Gilligan 1982: 30, 32), 'an ability and willingness to "see" and "hear" needs, and to take responsibility for those needs being met' (Sevenhuijsen 1998: 83), and recognition of differences in need (Gilligan 1982: 164). Joan Tronto has usefully distinguished four aspects of care: 'caring about', 'taking care of', 'care-giving' and 'care-receiving' (1993: 114). Notably, the first two tend to be performed by the more powerful in society, while the last two are more often done by the less powerful, and are socially devalued (1993: 114, 117, see also Smart and Neal 1999). Tronto further identifies four core values corresponding to these aspects of care: attentiveness (to the needs of others), responsibility (to care), competence (in care-giving) and responsiveness (of the care-receiver to care) (1993: 127–134).

In the legal context, the ethic of care might be put into practice in a number of ways. Reforms to family law, social security law and employment law could invest the work of nurturing and care with greater value (West 1997: 37, Finley 1989: 896, Tronto 1993: 165–166). In the field of child custody, Sevenhuijsen notes that men and women are in a position of mutual dependency and hence mutual vulnerability as parents (1998: 108). Instead of 'guaranteeing men authority rights to protect them from a (potential) dependency on women' (1998: 111) or maintaining 'the patriarchal view that, for men, connections can only be achieved by enforceable rights' (1998: 112), the law could seek to ensure that men develop greater competence and responsiveness as carers for their children and as receivers of care. At a more conceptual level, law could take a different approach to familiar dilemmas, constructing them not as issues of competing individual rights or interests to be resolved by the application of hierarchical normative principles, but as issues of conflicting responsibilities to be resolved by a contextual analysis that pays attention to relationships, needs, dependency and care (Gilligan 1982: 19, Finley 1989: 899–902, Tronto 1993: 164, Sevenhuijsen 1998: 107, see also McGlynn 2010). It should rely less upon abstract rules, principles and presumptions such as the 'right to family life', 'equality' or the priority of biological ties (Sevenhuijsen 1998: 120–121), and place more emphasis on justice as a process (Sevenhuijsen 1998: 115, 145) 'that is more cognizant of context and that focuses on particularity, cooperation and connection' (Munro 2007: 47).

This last point gives rise to the possibility of judging as a practice of care. In its liberal conception, '[j]udging with authority assumes that one stands above a situation, free of relationships and intimate ties' (Sevenhuijsen 1998: 113). By contrast, West argues that the goal of adjudication should not only be to achieve justice but also to exercise compassion, or care, for litigants (1997: 23; see also Sevenhuijsen 1998: 114). She contends that '[t]he judge-

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litigant relationship imposes caring constraints on decisions' (West 1997: 59, 52), including the requirement to take into account the individual circumstances and particularity of the parties rather than universalizing or commodifying them (1997: 54–55). According to West, many instances of glaring injustice in judicial decision-making could and should have been avoided by a more compassionate interpretation of the applicable law (1997: 48). West's argument and those of the other care theorists noted above bear many resemblances to the practices (if not always the stated intentions) of feminist judging identified in my analysis of the feminist judgment-writing projects and preceding literature (Hunter 2008, 2010).

The discussion of what the ethic of care might mean for law gives rise to the question of the relationship between the ethic of care and the ethic of justice. Some theorists have maintained that the two are simply incompatible, and the ethic of justice must give way to the superior ethic of care (Noddings 1984, Sevenhuijsen 1998: 34). Others have tried to find some accommodation between the two, by according them more or less salience in different fields (Held 2005), or seeing them as compatible, interrelated, and/or a necessary corrective to each other (Tronto 1993: 166–167, 171, White and Tronto 2004, Munro 2007: 27). At one extreme, West insists that justice and care are necessary conditions of each other – 'justice must be caring if it is to be just, and ... care must be just if it is to be caring' (1997: 24) – and she provides numerous illustrations from case law of justice without care (which is ultimately unjust), and care without justice (which is ultimately uncaring). On the other hand, Anne Stewart, in a recent analysis of the gendered effects of globalized commodity chains and the marketization of care, takes the view that a care or relational analysis is more useful than a rights analysis in revealing global gender inequalities, and indeed provides a useful critique of both trade and rights discourses which have tended to prevail in discussions of globalization (2011: 7–8). According to Stewart, the care approach offers greater potential to recognize 'the way in which social and economic relations create injustice' (2011: 63–64), and also enables us to see how market, institutional, family and community relationships may be changed to avoid injustice (2011: 64).

The notion of an ethic of care has, however, been dismissed by radical feminists as simply women attempting to value 'what male supremacy has attributed to us for its own use' (MacKinnon 1987: 39). In the radical feminist view, exemplified by the writings of Catharine MacKinnon in the 1980s, the reality of social life is a gender hierarchy of men's power and domination and women's subordination and submission, imposed by force and marked in particular by men's control over, appropriation and objectification of women's sexuality (MacKinnon 1982: 529, 1983: 644, 1987: 3, 5, 1989: 51–52). Law, in this view, is one of the institutions of male power (1983: 645, 1989: 170). 'The law sees and treats women the way men see and treat women' (1983: 644). Liberal legalism's objectivist epistemology reflects the male perspective and legitimizes and reinforces existing distributions of power (1983: 645, 1989: 162–163, 237). Thus, when the state 'is most ruthlessly neutral, it will be most male'; when judges stick most closely to precedent and legislative intent they will most rigorously enforce male norms (1983: 658). In particular, liberal law fails to recognize and compensate the harms suffered by women under male supremacy, and instead ideologically justifies the harmful activities and defines them as not-harm (MacKinnon 1987).

Feminism's role, then, is to expose and try to change the social reality of women's subordination, placing 'women's experience, and the perspective from within that experience, at the center' of analysis and activism (MacKinnon 1989: 38, 1982: 536, see also 1989: chapter 5). Given the centrality of the appropriation of women's sexuality to the system of male power, radical feminist lawyers have been particularly concerned with laws relating

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to rape, sexual harassment, abortion, pornography and prostitution (see, for example, MacKinnon 1983: 646–655, 1987, 1989). While liberal legalism constitutes these issues as being about consent, morality, free speech and privacy, radical feminists see them as being about systemic sex discrimination. Radical feminist reforms would claim women's concrete reality of social discrimination and exploitation by men, such as sexual assault, pornography and prostitution, as forms of sex inequality – '[t]he main question would be: does a practice participate in the subordination of women to men?' – and would enable women to define and control their own sexuality (MacKinnon 1989: 244–248, 1987: 92).

This agenda achieved some tentative success in the 1980s with the introduction of the legal claim for sexual harassment, a claim which involved taking women's experience of violation seriously and marking 'the first time in history, to my knowledge, that women have defined women's injuries in law' (MacKinnon 1987: 105, 103). However, local ordinances enacted in Minneapolis and Indiana defining pornography involving 'the graphic sexually explicit subordination of women' as a violation of women's civil rights, and providing remedies for those injured by pornography (MacKinnon 1987: 175, 201, 210), were ultimately defeated by the assertion of the masculine value of constitutionally-protected free speech. Subsequently, radical feminist law reform efforts have extended to, and enjoyed somewhat greater success within, the international arena with a focus on violence against women as a violation of women's human rights (see, for example, MacKinnon 2006, United Nations General Assembly 2011), rape in the context of war and genocide (see, for example, McGlynn and Munro 2010), and action to end the international trafficking of women and girls for the purposes of sexual exploitation (see, for example, Barry 1979, Coalition Against Trafficking in Women 2012).

A final feminist challenge to liberal law's account of itself – and also to feminist law reform projects – has come from feminist legal theorists influenced by post-colonialism and post-structuralism, who have focused on the power of law to define and exclude its Others. Kapur, for example, has noted that in both the colonial encounter and the post-colonial era, Third World women have been constructed in law as victims of backward and uncivilized cultures, who exist outside the 'universal' liberal project. In order to attain liberal personhood and thereby obtain equality and rights, they require rescue from and must therefore abandon the oppressive cultural practices in which they are mired. But this definition is itself extremely oppressive for Third World women, rendering gender and cultural relations rigid and immutable and depriving women of the ability to act as agents within their own societies (2005: 2, 109–120).

Smart has observed the way in which law disqualifies other knowledges, including feminist knowledge (1989: 2, 11, 21) and has also argued that by continually looking to law to remedy harms to women, feminists simply legitimate law itself, endorsing its claims to be a force for good when this is far from empirically evident. Rather than seeking to extend the regulatory reach of law, feminists should 'resist ... the creeping hegemony of the legal order' (1989: 5). While she has been careful to point out that this is not a prescription for feminists to disengage from law altogether (matters already in the legal domain cannot be abandoned, for example), Smart warns that instead of automatically assuming law's value and efficacy, the potential costs and benefits of deploying law in particular situations should be weighed up, recognizing that in some cases it may not be the best resource available (1995: 213). The structures of liberal law and the neoliberal restructuring of the state may severely limit the transformative potential of law reform efforts (Smart 1989: 115, 160, Thornton 1991: 456–458, Fudge and Cossman 2002b: 405, Hunter 2002). The costs of calling

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upon law may include the risks of reproducing and reinforcing limiting and constraining views of women, and of cooptation into conservative law and order, nationalist, religious and/or national security agendas (Thornton 1991: 464, Kapur 2005: esp. 120–128). On the other hand, as discussed earlier, by focusing on law not in its own (instrumental) terms but as a discourse which constructs knowledge and subjects, feminists ought to engage with law as a site of discursive struggle upon which to contest meanings about gender, culture and other normative categories (Smart 1989: 88, 165, 1992, 1995: 213, Kapur 2005: 3, 49, 129–131).

In postmodern times, however, the results of any feminist legal engagements will be uncertain. Law itself cannot be understood as having an essential character. It is neither simply an instrument of social coordination nor one of oppression. It is 'a complex and contradictory force', hence 'engagements with law do not produce certain outcomes, a stable subject, or clear victories' (Kapur 2005: 50, see also Sandland 1995). None of this means, according to Smart, that 'we have to abandon politics. But it does mean that we cannot make promises about what our politics will achieve' (1995: 214).

Conclusion

Feminist politics clearly has not achieved the displacement of liberal legalism as the dominant legal form in nation states and international regimes which have inherited the Anglo-American legal tradition. While some concessions have been made to feminist critiques, liberal legalism's core claims about the role of law and the nature of the legal subject remain largely intact, and thus continue to impact adversely on women's lives and gendered subjectivities. The extension and reconfiguration of national and international legal orders in the interests of neoliberalism and globalization have occurred substantially within the same framework, and with obviously gendered effects. Feminist challenges are, therefore, also likely to continue.

This chapter has demonstrated that the nature of feminist critiques and the prescriptions offered have varied widely according to broader differences within feminist theory, ranging from calls from liberal feminists for liberalism fully to live up to its ideals (recent examples include Nussbaum 1999, Mullally 2006, Munro 2007: 51–61), to postmodern concerns to grapple with law at the level of discourse. Feminists have responded to changes in the political and legal environment, but have also been inventive, as seen, for example, in the hybrid blend of activism and critique represented by feminist judgment-writing projects (Hunter 2012). For all its disappointments and frustrations, then, it appears that for feminist legal scholarship, the encounter with liberal legalism has been and is likely to continue to be immensely productive.

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