

Differences that matter

Feminist Theory and Postmodernism

Differences That Matter challenges existing ways of theorising the relationship between feminism and postmodernism which ask 'is or should feminism be modern or postmodern?' Sara Ahmed suggests that postmodernism has been allowed to dictate feminist debates and argues instead that feminism must itself ask questions of postmodernism. In other words, feminist theorists need to speak (back) to postmodernism, rather than simply speak on (their relationship to) it. This 'speaking back' involves a refusal to position postmodernism as a generalisable condition of the world, and uses close readings of postmodern constructions of rights, ethics, 'woman', subjectivity, authorship and film. Moreover, the differences that matter are shown to concern not only the differences between feminism and postmodernism, but also the differences which define the terms themselves. How to do justice to these differences while 'speaking back' is a question central to the ethics of close reading offered in this book.

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Feminist Theory and Postmodernism

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For my mother

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1 Rights

In what space does feminism belong? It is this kind of question concerning belonging – concerning the proper space of feminism – that has led to a representation of feminism as straddled between the contradictory demands of practice and theory. On the one hand, feminism has been identified as inherently modern – as a politics committed to emancipation, agency and rights. But on the other hand, feminism has been seen to be pulled towards the postmodern, to the very critique of the onto-theological nature of such beliefs. Here feminism, as a set of theoretical perspectives, has increasingly been identified as postmodern or, as discussed in the introduction, as derivative of postmodernism. This division between modern and postmodern elements in feminism is hence mapped on to a division between practice and theory. Regina Gagnier, for example, argues that feminism cannot undermine its basis in a realist epistemology nor its normative ground in humanism, given that it presupposes that the oppression of women exists and that its project is to make the world better for women (Gagnier 1990: 24). But, at the same time, she argues that feminism is pushed towards a post-modern ethics and politics via its very emphasis on the culturally over-determined constitution of the gendered subject (Gagnier 1990: 24). Likewise, Jean Grimshaw argues that feminism needs:

to engage with those theories which deconstruct the distinction between the ‘individual’ and the ‘social’, which recognise the power of desire and fantasy and the problems of supposing any ‘original’ unity in the self, while at the same time preserving its concern with lived experience and the practical and material struggles of women to achieve more autonomy and control over their lives. (Grimshaw 1988: 105)

Here, feminism’s need to engage with ‘deconstructive theories’ is asserted. However, the use of the phrase, ‘at the same time’, also suggests that such an engagement must take place in the context of a concern with lived experience and practical struggle – a ‘taking place’ which is hence constituted as a potential limit to the engagement. These two elements of feminism – the deconstructive or postmodern and the

realist or modern – are hence separated as the differential realms of theoretical engagement and practical struggle.

But is there such an inherent contradiction between the demands of feminist practice (as struggle) and feminist theory (as engagement)? Does this, as Susan Hekman would argue, represent a split between a modern origin and a postmodern future (Hekman 1990: 2–3)? In the first instance, one must question rather than assume such a contradiction between the demands of practice and theory. Understanding feminism in terms of an inherent disjunction between practice and theory is problematic on two counts. Firstly, it undermines the importance of theory to the formulation of political and strategic decisions. Secondly, it implies that theoretical engagement is uninformed by the problems and contingencies of practical politics. Rather than assuming such a disjunction, we can consider how the very demands made by feminism in practice have, in themselves, theoretical implications. Otherwise, as I discussed in my introduction, there is a danger in assuming that feminism is a practice that lacks theory, and hence that feminism requires authorisation through theories that are assumed to originate outside of feminism itself.

In this chapter, I will challenge such a representation of a necessary disjunction between feminist practice and theory, and with it, between modern and postmodern elements of feminism, by considering the issue of rights. Rights can certainly be understood as a centre-piece of modernity, with the initial French civil code, the Declaration of the Rights of Man, representing the first attempt at a modern constitution based directly on the sovereignty of the people (Carty 1990: 1). Does feminism's use of rights discourse mean that feminist practice inhabits the modern in contradistinction to recent shifts in feminist theorising? Is feminism inevitably modern given the use of rights discourse? Does the questioning of rights in some feminist theorising mean that feminism has shifted from the modern to the postmodern? In attempting to deal with these difficult questions, I will raise the possibility that the feminist challenge to the modern discourse of rights may spring, not from feminism's theoretical engagement with postmodernism, but from the way in which feminism uses rights discourse in practice. The question then becomes, not whether feminism uses rights *per se*, but how feminism uses rights discourse in such a way that those rights become subject to a critical displacement.

Dealing with the politics of rights discourse must, in the first place, deal with the question of 'the law' and of modern jurisprudence, through which rights are both instituted as givens and enforced as obligations. My analysis will hence raise a number of issues. Firstly, I

will examine the relationship between law and embodiment. Such an examination will proceed through a close reading of how postmodern jurisprudence constructs the law in relation to bodies. While Douzinas and Warrington place postmodernism alongside feminist and Black critiques as giving 'a voice to the echoes of what has been almost silenced down the long corridors of the time of law' (Douzinas and Warrington 1991: xii), my reading will focus on the way in which postmodernism frames a critique of 'the body of the law' that does not deal with the structural relation between law and particular bodies. Secondly, I will examine the relation between legal citation and rights. While pointing out how deconstruction importantly enables a critique of foundationalism through an emphasis on citationality, I will also problematise this approach by looking at the pragmatic relationship between citationality and embodiment posed by feminist critiques of rights discourse. I examine how feminism has an ambivalent and critical relation to the discourse of abstract rights at the level of practice, addressing three examples which embrace a diversity of both political and legal contexts: the use of rights discourse in the UN conference for women in Beijing (1995); models of reproductive rights in the abortion debate; and, within Britain, feminist responses to the Child Support Act (1991). This chapter considers then, not only how feminism at the level of practice may challenge the modern definition of rights, but also how such a critical feminism resists incorporation into the postmodern due to the pragmatic concern with how law and rights differentiate bodies in historically specific contexts. So while I will question the model of feminism which sees it as 'rooted' in modernity given its use of discourses such as rights (Jardine 1993: 434), I will not then seek to place feminism within a generalised postmodernity.

Law and embodiment

How does postmodern legal theory involve a shift in an understanding of law? Such a term – postmodern legal theory – assumes that postmodernism has produced a coherent body of knowledge within legal theory and hence takes the term 'postmodernism' itself as being unproblematic. Such a taking for granted of the term 'postmodernism' is clearly evident in the context of legal theory, where postmodernism has largely been constructed through the language of application. That is, postmodernism *in* law has been defined as the application of postmodern theory *to* a reading of law. This language of application assumes the stability of postmodernism in the first place. However, such a stability is produced through the application and does not pre-exist it.

Take, for example, Costas Douzinas and Ronnie Warrington's model of what postmodernism in law involves: 'A sensitivity to different forms of speaking and writing; an attention to the repressed and oppressed dialectics and idioms that are always within but apparently excluded from complex texts; an intention to unsettle apparently closed systems and empires of meaning' (Douzinas and Warrington 1991: x). If we take 'the law' to refer to the body of rules that are customary in a community and recognised as prohibiting certain actions and enforcing the imposition of penalties, then postmodernism in law examines how the writing of such rules does not lead to the closure of meaning, but to the opening out of uncertainty, ambiguity and conflict. To this extent, postmodernism in law suggests that the law is irreducible to 'a body of rules': that the law involves the *symbolic coding* of obligations and prohibitions (the commands, 'you must' and 'you must not') which are without foundation in a given society or community. Postmodernism is hence constructed as a way of reading the law *as a text*. In this section, I will discuss postmodernism as the very event of reading the law through postmodernism: that is, as produced through the very designation of postmodern legal theory as a field of writing and knowledge.

In the first instance, such a field of writing constitutes a return to the fathers of law. Texts that have defined themselves as postmodern readings of law have engaged in a critique of foundationalism through a close reading of some of the authorising and canonical accounts of law's origin – whether in the form of classical mythology, Enlightenment philosophy or modern analytical jurisprudence (Carty 1990; Douzinas and Warrington 1991). Carty argues that such a canon begins with the paradox of what is the source of law: of how the law can be the source of itself (Carty 1990: 3). Jurisprudence attempts to deal with this paradox, through narratives of self-legitimation which find the source of law through law itself. Postmodernism in law constructs itself against these meta-narratives. As Gary Minda puts it, in his survey of postmodern legal movements, 'For postmoderns, law cannot be an autonomous, self-generating activity because there are no fixed foundations in which one can ground legal justification once and for all' (Minda 1995: 246). The critique of foundationalism in jurisprudence constitutes a return to the letter of the law, to the very grammar of how law is written as originary.

Significantly, this return has not involved an emphasis on the relation between law and embodiment which has distinguished the feminist concern with the paternal writing of law's origins. I want to argue that this absence is structural rather than incidental. This becomes clear if we examine how 'the body' appears as a signifier in Douzinas and

Warrington's *Postmodern Jurisprudence*. The bulk of their narrative consists of a critique of the law through a critique of the idea of a *body of the law*. Indeed, bodies may occupy the very terrain of the 'non-legal': that which is excluded from the body of the law. They suggest that traditional jurisprudence:

sets itself the task of determining what is proper to law and of keeping outside law's empire the non-legal, the extraneous, law's other. It has spent unlimited effort and energy demarcating the boundaries that enclose law within its sovereign terrain, giving it its internal purity, and its external power and right to hold court over the other realms. For jurisprudence the corpus of law is literally a body: it must either digest or transform the non-legal into legality, or it must reject it, keep it out as excess and contamination. (Douzinas and Warrington 1991: 25)

Here, the return of law's other to the law is the constitutive passage of the law, defining the pragmatic procedure of policing boundaries which inevitably, in its very demarcation of an 'outside', is doomed to fail. What particularly interests me in this passage is the construction of the body upon which it depends. Law is *literally* a body in so far as it is *like* a body – involved in acts of consumption and expulsion. Through analogy, the desired (and impossible) integrity of the law becomes the desired (and impossible) integrity of the body. But whose body? The gesture of this passage relies on an inscription of an undifferentiated body, a body that *does* simply consume and expel, even if it problematises that body through a critique of the conceptual apparatus of organicism and traditional jurisprudence. The analogy sustained between *this* body and the law entails its own set of assumptions and legislations about who (or what) is the subject of the law. For bodies are never simply and literally bodies: they are always inscribed within a system of value differentiation; they are gendered and racially marked; they have weight, height, age; they may be healthy or unhealthy; they may be able-bodied or disabled. This postmodern critique of traditional jurisprudence hence challenges the notion of law as a body only by keeping in place the undifferentiated nature of that body, working to destabilise the integrity of that body through destabilising the relationship between what is inside and outside it.

The implications of this assumption of an undifferentiated body can be traced in Douzinas and Warrington's critique of traditional jurisprudence. In one article, their critique of foundationalism proceeds through a close reading of an authorising tale of law's origins deriving from classical mythology: Sophocles' *Antigone*. The conflict here is between Antigone's desire to bury her brother and the King's decree which forbids the burial of the traitor. Douzinas and Warrington read this tale

as originary: ‘it refers to the leap, both original and final, in which man founded himself by finding himself before the “other” who put to him the first, continuing and last, ethical command which constitutes the philosophical foundation of law as laid down in *Antigone*’ (Douzinas and Warrington 1994: 190). By reading the text, in which there is a dramatic conflict between divine and human law, as a crisis in origins (of the command, ‘you must’) the question of sexual difference is made derivative. The conflict between man and woman is subsumed under the irreconcilable conflict between human and divine which constitutes the crisis of law’s force: ‘We can conclude that at the mythical moment of its foundation the law is split into divine and the human . . . Antigone teaches that the *nomos* rises on the ground of the polemical symbiosis of female and male, singular and universal, justice and the law’ (Douzinas and Warrington 1994: 222). Here, the general critique of legal foundationalism – in which law finds its origin in the split between the divine and the human – takes place through the rendering of sexual difference as secondary, as merely one form of difference in a chain of differences which derive from the originary difference: divine/human.

However, we must be careful here not to privilege sexual difference as ‘the difference’ that marks the crisis. The already differentiated nature of ‘the body of the law’ is irreducible to the gendered body, but represents the law’s own situated-ness in a complex sociality. The indeterminacy of the law’s letter suggests how law is immersed in social relations, such as the paternal relation, which govern and regulate embodied subjectivity. At the same time, posing the question of the gendered body and its relation to law opens up the *limits* of the postmodern critique of *the body of the law*. Here, feminism becomes a limit point of the postmodern narrative – which is not to say that feminism opposes the postmodern critique of legal foundationalism, but rather that the concerns of feminism with the relation between law and particular embodiments helps to define the limits of that general critique.

One of the most interesting texts to deal with the question of the law in relation to the gendering of embodiment is Zillah Eisenstein’s *The Female Body and the Law*. She argues here that the law is phallocratic, that is, it reflects the dominance of the phallus as a symbol of the male body in a social order that privileges the bearer of the penis (Eisenstein 1988: 4). Eisenstein introduces the pregnant body in order to decentre the privilege of the male body (Eisenstein 1988: 1), and to remind us of a potential difference between females and males that makes sameness, as the standard for equality, inadequate (Eisenstein 1988: 2). Eisenstein recognises that the pregnant body is not simply an essence that we can

recover from the weight of phallographic discourse (given its very immersion in the ideology of motherhood). The pregnant body is simultaneously real (as a biological entity) and ideal (as a social construct) and therefore exists in between these realms (Eisenstein 1988: 224). Given this, for Eisenstein, a feminist politics of the law must stay in between these realms: in between sex and gender, difference and sameness, between liberalism and the phallus on the one hand, and deconstruction and feminism on the other (Eisenstein 1988: 224).

One of the problems with Eisenstein's thesis concerns her use of the term 'phallograticism' to describe the relationship between language and embodiment. In her argument, phallograticism undoubtedly involves the construction of the body through language and institutions. It is a symbol of the male body that gains its meaning from the already privileged nature of that body. In this sense, the phallus symbolises the penis as a privileged mark of sexual difference. But here privilege comes both before *and* after the phallus: it is both already inscribed on the male body, and a consequence of the symbolising of that body in a specific economy. One consequence of the ambiguity over the role of the phallus in either naming or constructing privilege may be an over-hasty totalisation. That is, her use of the term 'phallograticism' implies that privilege is a total and singular system, free from the contradictions and opaqueness that a relation of power would surely generate in the production of antagonistic subject positions. It also repeats, rather than deals with, the question of how privilege may mark the body. Is it enough to say the phallus symbolises the penis in a society of male privilege? Surely we need to work out the dynamics of that process whereby certain signs come to have a privileged status.¹ Such a complication of the relation between language, bodies and power may finally question the use of an all-embracing term 'phallogratic' in the context of legal studies. The idea that law *reflects* a pre-existing discursive or power regime neglects the extent to which each site within the social itself is potentially productive rather than simply reflective, involved in the negotiation of contradictions and power relations at a complex and particularised level.

The same ambiguity concerning the relation between bodies and language occurs in the metaphorisation of the pregnant body. The demarcation of sex from gender, the pregnant body as biological and the pregnant body as social, implies that the pregnant body could (at least potentially) exist outside of its interpellation into a semiotic system, whether or not that existence is construed in terms of an essence. I use metaphorisation quite deliberately. Eisenstein is clearly using the pregnant body to *figure* a certain politics of representation and difference. 'The pregnant body' is hence inscribed within the evaluative demands of

her own narrative of law. In this sense, the division of sex/gender within the pregnant body is itself discursive, governed by law. Ironically then, the terms of Eisenstein's own argument work to reveal the non-availability of a sex which is before or beyond the law. Such a non-availability suggests that the gendering of bodies takes place through the law. If this is the case, then the temporality of law as a process (the constituting of legality) implies the existence of a determinate or structural relation *and* a gap between law and embodiment. That is, if the gendering of bodies takes place through a legal process, then gender is both determinate on legality, as it is indeterminate given the non-availability of law as an object in itself.

At one level, Eisenstein's analysis relies on an organic relation between the law and the body, by defining the body of the law as male. The existence of a gap between law and embodiment, and the particularity of the bodies that law may consequently figure and de-figure, is hence excluded from the terms of her analysis. However, at another level, Eisenstein's act of metaphorising the pregnant body serves to reveal the non-availability of a gender which is before the law, or which is the law. The pregnant body's status is not that of the 'real', but is a figure, and as such is constituted and regulated by symbolic law. Given that the pregnant body is only available as a figure (only entering the text through the constitution of law itself), Eisenstein's work enables us to recognise that gender is contested through the law, implying an open structural process in which law itself genders bodies in particular (but not fully determined) ways.

In this sense, a feminist critique of law as a gendering practice may involve a recognition of the gap between law and embodiment, that is, a gap which would problematise any equation between law and the male body. An understanding of the fractured and difficult relationship between law and embodiment enables us to theorise how law involves the shaping and differentiating of bodies and, as such, how bodies are themselves not fully determined within or by the law. Not only does this undermine any equation between law and the male body, suggesting that law is gendering rather than gendered, but it may also suggest that law's relation to embodiment cannot be reduced to gender: the bodies that law differentiates in the process of constituting itself as an object, are always subject to other differences. This approach to law and embodiment interrupts the general postmodern critique of legal foundationalism – and of the (impossible) demarcation of what is inside and outside law – by recognising how what is constructed as 'within' law is already differentiated and that such a difference makes a difference to the policing function of jurisprudence.

Rights and citationality

Significantly, there is very little postmodern literature on 'rights'. Such an absence reflects an implicit understanding of rights: that the discourse of rights belongs to modernity with its emancipatory meta-narratives (such that the 'post-ing' of modernity constitutes the 'post-ing' of rights). So, for example, Anthony Carty's *Post-Modern Law: Enlightenment, Revolution and the Death of Man* assumes the disappearance of Rights as an aspect of Man's own disappearance (Carty 1990: 5). Indeed, there is no suggestion that rights could be understood beyond the Rights of Man: they are assumed to belong to an Enlightenment whose death we should celebrate (Carty 1990: 4). In his consideration of rights and the death of Man, Carty defines post-modernism through deconstruction. He writes: 'Post-modern thought sets a limit to the Enlightenment episode perhaps most precisely by being "deconstructive"' (Carty 1990: 4). A reading of Derrida on law may hence provide us with an insight into the relation between post-modern legal theory and rights which goes beyond any simplistic equation between rights, modernity and death.

In 'Force of Law: The "Mystical Foundation of Authority"', Derrida argues that a deconstructive approach to law proceeds:

by destabilising, complicating, or bringing out the paradoxes of values like those of the proper and of property in all their registers of the subject, and so of the responsible subject, of the subject of law (*droit*) and the subject of morality, of the juridical or moral person, of intentionality, etc., and of all that follows from these, such a deconstructive line of questioning is through and through a problematisation of law and justice. A problematisation of foundations of law, morality and politics. (Derrida 1992: 8)

The law is deconstructable either because it is founded or constructed on interpretable and transformable textual strata or because its ultimate foundation is by definition unfounded (in so far as the act which finds law cannot have in itself foundation if it is to be construed as legislative or creative, as the origin or beginning of law itself) (Derrida 1992: 14).

Derrida specifically defines aporias where the deconstructive possibilities of law may settle. Of significance to my concerns is what he defines as the '*épokhè* of the rule'. Here, Derrida begins with the common axiom that one must be free and responsible for one's actions in order to be just or unjust (Derrida 1992: 22). But at the same time, this freedom or decision of the just must follow a law, prescription or rule, having the power to be of a calculable or programmable order (Derrida 1992: 23). In respect to questions of legal practice then, 'to be just, the decision of a judge . . . must not only follow a rule of law or general law but must

also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case' (Derrida 1992: 23). Therefore, for a decision to be just and responsible it must 'in its proper moment' both be regulated and without regulation, 'it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the affirmation and the new and free confirmation of its principle' (Derrida 1992: 23).

What I think is useful about this deconstructive attention to an aporia in the concept of just action is the way in which it simultaneously attends to law's relation to the past as a faith in precedent, with its newness in the form of its imagined otherness to the past it confirms. What follows from this irreducible doubling of the legislative moment is a securing of the performative or citational aspect of the law. The act of citing the law as the invoking of the past which gives foundation to the present decision constantly re-opens the past, interprets it, decides upon it. The inventive aspect is precisely history's refusal to stay in the past as an ontologically distinct foundation, separate from the authority of who speaks the law, or whose speech is authorised by the law. For deconstruction, law's ability to found (or find) itself is troubled by the very citational act this demand puts in place. If law is always performed, spoken and enlisted as proper (to law), then what is other to law does not simply return, but was already there in the act or the gesture, the moment, when a demand of and for law takes place. The demand for a decision necessarily goes through a passage of the undecidable: a passage which exceeds the very opposition between calculable programmes and the incalculable. The undecidable as a trace or 'ghost' becomes lodged in every decision, cutting it open, as the irreducible demand of the other, the demand that we must decide about what is impossible (Derrida 1992: 24).

What may such an emphasis on law as citation have to say about rights? Perhaps we could return here to the letter of the law: to the liberal legal scholar Ronald Dworkin's attempt to account for the role of the judge. In 'Hard Cases', Dworkin argues that adjudication must be subordinated to legislation: that judges must adjudicate upon that which has been already legislated by a democratically elected (= accountable and representative) political party. He suggests that any attempt to invent laws and establish them retroactively would constitute an injustice against a defendant. As a result, he argues that adjudication itself must be *unoriginal* even if the decision is original. This unoriginality is linked to his position that adjudication should be governed by principle and not policy. That is, judicial decisions must enforce existing political

rights and must, in this sense, evoke an institutional history. He concludes: 'so the supposed tension between judicial originality and institutional history is dissolved: judges make fresh judgements about the rights of parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past' (Dworkin 1975: 1063).

So, here, Dworkin resolves the paradox of the need for unoriginal adjudication and original judgement through a theory of rights as already decided; the judge's decision is a fresh decision, but a fresh decision about rights which are already decided. The decision by the judge *can* only confirm the principles which have already been agreed through political history. This model of rights, as a guarantee of principle, positions rights as prior to the potential conflict involved in decision-making. The writing of rights as having an institutional history which the judge must affirm hence places rights before that history, as a sign of its originary justice. What a deconstructive reading suggests, is that rights must be re-invented in every decision, reaffirmed through being cited and decided upon. Rights cannot be the guarantee of 'the before' or the already decided (as either 'natural' or 'political' rights), but take place through being cut open, through the re-invention of their form. The relation posited here between rights and citationality suggests that rights are constituted through the decision and in that act of (re)constitution are subject to re-iteration and displacement. Rights in this sense always come after an event which marks them out as belonging here or there: their citation is their re-invention, and that re-invention establishes and enforces the boundaries of the rights which are assumed as universals.

What are the implications of the model of rights as citationality for feminism? Drucilla Cornell suggests that feminism should supplement a theory of the alterity or otherness of the law with a notion of gender as a system. Her work exceeds a purely deconstructive reading, retreating to the philosophy of Luhmann to theorise the way in which the relation of gender stabilises the boundary between inside and outside that the law is involved in policing. What Cornell argues is that feminism needs a theory of the system in order to explain the interaction between the semantics of desire and gender hierarchy within the social order (Cornell 1992: 76). Her work implies the inadequacy of a deconstructive strategy to account for the stability of social relations and the legal system (in particular to explain why feminist legal forms have been so difficult to achieve). In other words, deconstruction needs to be supplemented: as a theory of lack (in Cornell's terms), it is also lacking. As my reading suggests, however, the deconstructive emphasis on the undecid-

able comes through the determinate oscillation between the calculable (and in this sense the systematic) and the incalculable (that which resists systematisation). What deconstruction lacks then (at least within the context of legal theory) is not so much a theory of systematisation. Rather, I would argue that deconstruction as a strategy for reading law is not *sufficient* for a feminist politics of the law because it is not a pragmatism: it does not detail the specific content of laws and their effects according to regimes such as gender.

But to argue that deconstruction is not a pragmatism, and that deconstruction therefore cannot define the parameters of feminist legal theory, is not to inscribe the absence of pragmatism in deconstruction as unproblematic *in itself*. I think the issue of pragmatism raises a set of problems that are central to a deconstructive jurisprudence and, concurrently, to the inscription of a jurisprudence which we can call post-modern. It is interesting, for example, that Derrida himself coins a term, 'pragmatology', for the meeting of a pragmatist and deconstructive (grammatological) approach. He argues that such a meeting will define an approach that both takes into account the potential for randomness inscribed by the iterability of the sign, while also recognising 'the situation of the marks', that is, 'the place of senders and addressees, of framing and of the sociohistorical circumscription, and so forth' (Derrida 1984: 27). However, the notion of a 'meeting' of deconstruction and pragmatics points to a *double deficiency of both as strategies for reading law*. The absence of a socio-historical, contextualised and contingent analysis cannot then be simply positioned as incidental to a deconstructive strategy: it structures and limits how that strategy might operate at the level of intervention.² Indeed, Derrida's invention of a new word for the meeting of deconstruction and pragmatism ironically performs the necessity of exceeding the boundaries of deconstruction for a reading of the marks of law. In other words, 'pragmatology' may perform the role of the radical supplement (Derrida 1976: 144–5). The necessity of the term itself reveals that deconstruction is incomplete, in need of supplementation. The absence of pragmatics and, in this, the absence of an attention to the way in which law performs within historically specific contexts such as gender, is structural to a deconstructive reading of law. Pragmatism cannot be simply added to deconstruction: it would involve its radical transformation.

An attention to the historically situated nature of law's mark makes a difference: a difference that is not pure and self-evident, but becomes present precisely through the readings and writings of the law that place law within the social field. A feminist concern with rights as citationality – as subject to repetition and displacement through the legal demand –

hence operates within the pragmatic field in which rights embody particular subject positions. In other words, a constitutive question for a feminism in dialogue with postmodernism and deconstruction becomes: what difference does the citation of rights make in the constitution of gendered subjectivity? This question is the limit point of Carty's post-modern reading of deconstruction on law in which rights as death can evoke only the impossibility of Man.

Embodied rights

The development of a feminist approach to rights may be shaped by an assumption that law and legality is a gendering process: that rights themselves, as citational acts, mark out boundaries which are clearly gendered. Feminism has located how the concept of abstract rights intrinsic to classical liberalism and traditional jurisprudence is necessarily exclusionary, revealing that the construction of a universal, intrinsic right has entailed processes of selection and exclusion (that universal suffrage equals male suffrage). If the concept of rights has to be extended to include women's rights, then its status as universal or self-evident is called into question. Rather than rights being intrinsic (in the form of self-property/ self-ownership), they become at once historically produced and defined along exclusive and partial criteria. Furthermore, rights become productive of the very process of group differentiation, whereby the legitimate subject of rights (the subject who is proper, and has property) is always already the subject of a demarcated, stratified social group which is exclusive of others. Within a classical liberal framework, 'rights' defined 'men' as a group (or 'fraternity') which excluded women, through the very act of constituting that group as a universal. To refuse the universalism of this rights discourse would be precisely to make visible its role in the differentiation and hierarchisation of social groups.

The focus on the group or the collective is indeed central to a feminist discourse of rights. Such a feminist discourse may stress the way in which rights differentiate one group from another, and so determine the relative mobility of subjects. As Iris Marion Young has stressed, 'rights are not fruitfully conceived as possessions. Rights are relationships not things, they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing rather than having, to social relationships that enable or constrain action' (Young 1990: 23). Rights are a product of a discursive and institutionally mediated process, functioning as signs which are exchanged and which over-determine subject mobility.

The linkage of rights with the demarcation of social groups, and hence the reproduction of power differentials, is clearly at odds with any idealised project whereby rights are expanded to include all subjects, regardless of whatever differences between them are proclaimed. That is, if rights are part of our pre-existing discursive economy (suggesting that we cannot simply 'give them up', but must work critically through them, if theory is to engage the social), and if they function to divide resources in the forms of property and power, then rights can be seen as necessarily entailing conflict. Rights evoke interests, and the conflict of interests is instructive of the dynamic and divisive contingency of the social itself. The focus on rights as necessarily exclusionary, as necessarily marking out an other, means that feminism cannot simply reify rights as essential, or represent women's rights as intrinsically 'right' and exhaustible, as if the conjoining of 'women' and 'right' would lead to an absolute and closed programme for action (otherness hence dividing the name 'women', opening out the possibility of differences, as well as dividing the concept of 'right').

This model of a feminist discourse of rights is at odds with the one offered by Patricia J. Williams in *The Alchemy of Race and Rights: Diary of a Law Professor*, although I am very sympathetic with her more general project of critiquing the privatisation of rights (Williams 1991: 102). Williams constructs a narrative whereby 'rights' are set up as a kind of victim, of 'a constricted referential universe', in which they are constrained by the maintenance of a body of private laws epitomised by contract (Williams 1991: 159). The problem with this approach to rights is that it neutralises the very importance of the exclusive nature of rights claims, which, as I have argued, function to stabilise relations of power in the form of the delineation of social groups and hierarchies. It disregards the significance of the extent to which any positive definition of rights is necessarily exclusive, negatively marking out an other which is expelled from its boundaries (which is not to deny that there are more and less exclusive definitions of rights). As a result, women's rights do not precede their articulation in specific contexts: the event of citing women's rights marks out boundaries which can only be concealed by assuming that such rights are self-evident. The feminist critique of how the concept of abstract human rights defines the terms of women's exclusion from the public sphere, as it conceals that exclusion, here becomes an internal critique. Citing women's rights also constitutes, rather than re-presents, a political subject. So while citing 'women's rights' serves to demonstrate the boundaries that established 'human rights', that act also serves to establish its own boundaries.

The importance of recognising the exclusions which are authorised

through rights discourse is clear if we consider the use of 'women's rights' within the context of international feminism. It is the limitations of rights discourse *in practice* that demonstrates the importance of a feminist critique of a universalist model of rights. The issue of universalism was central to some of the 'trouble' that was evident at the UN conference for women held in Beijing in 1995 – a conference that gave an imaginary form/forum to the (impossible) object of international feminism. On one level, it was a 'trouble' that enabled the disappearance of feminist issues from the reporting of the conference. Much of the media attention was spent discussing the conflict between the USA and China – with concern expressed within the USA about China's 'appalling' human rights record (a concern that led to the question: should Hilary Clinton speak at the conference?) (Robinson 1995). Likewise, the Chinese Foreign Ministry were reported to have complained about such criticisms, suggesting that they were a way of attacking 'traditional values' (Hutchins and Munnion 1995). Here, 'women' appeared and disappeared as an object in an exchange about who was entitled to speak of 'human rights'.

Furthermore, the concern about China's 'brutality' was clearly expressed by some Western feminists. For example, Suzanne Moore writes, 'many other people have expressed reservations about the Beijing conference, the chief one being that it is held in Beijing. China is hardly known for its commitment to free speech or to women's rights' (Moore 1995). Here, China is evoked as 'the other' in order to construct the rights of the West – after all, to focus on the abuses in an-other culture is one way of authorising one's own culture (and one's *entitlement* to speak of such rights abuses). We need to reflect upon how the setting up of an international feminist agenda could involve the authorising of the power of Western feminists to define the terms. The use of 'rights discourse' within the conference agenda hence marked out division and antagonism rather than a universal: who has the 'right' to authorise what constitutes 'women's rights' as 'human rights'?

In order for a more mutual engagement within international feminism to take place without such an authorisation, the starting point must be the recognition of the incommensurability of feminist constructions of 'women's rights'. This incommensurability is set up by Nana Rawlings, the 'first lady' of Ghana, as a problem with Western feminism during her attendance at Beijing: 'I'm fed up of attending international conferences where delegates bang on and on about female circumcision. We know that it is a problem and we are trying to deal with it. We don't need anybody to come and tell us that. I say let's first tackle the problem of unfair trading between the developed and developing world' (cited in

Johnson 1995). Here, the implication is that Western feminism has projected its own concern with issues of reproductive health on to 'its others' precisely because of what it cannot see, that is, *its failure to see the international division of labour as a feminist issue*. Here, the event of citing 'women's rights' through making decisions about what that right demands, marks out the boundaries of 'women' – and of what it means to be oppressed as women. As a result, the event of citing women's rights marks out what is assumed as the proper object of feminism.

It does not follow from this argument that female genital mutilation is not a feminist issue, or that Western feminists should not be unconcerned by this practice. Rather, a more mutual engagement would require that one 'gives up' the power to authorise what are the 'proper objects' of feminist dialogue precisely by giving up one's power to authorise what constitutes women's rights.³ Such a refusal of authorisation presupposes a recognition that 'women's rights' is a sign which is up for grabs – open to being re-defined – rather than belonging to an already existing political and legal subject. In other words, feminists need to make visible the boundaries which constitute 'women's rights' rather than assume their universality. It is the demands of feminism *in practice*, in the context of international political relations, that reveal the necessity of such a substantive critique of universalist rights discourse.

Indeed, the very undecidability of what constitutes a right has implications for feminist practice. The feminist debate on abortion in the West, for example, has centred around the question of whether or not to frame the pro-choice position in terms of women's reproductive rights. The very conflict over abortion can be re-defined as a conflict over what is essential, that is, over what constitutes a subject with proprietorial rights (Johnson 1987: 193–4). As a result, the abortion conflict is characterised by competing rights claims, based either on the notion of the rights/autonomy of the mother, or on the rights/autonomy of the foetus. The conflict, dealt with as a rights conflict, becomes centred upon whether the foetus constitutes a subject with proprietorial rights. A feminist approach may argue that the sociality of the subject, its constitution within and through the social itself, means that the foetus, attached to the body of a social subject, does not constitute a subject with proprietorial rights.

Alternatively, a feminist approach could base itself on the undecidability of where the body of the woman ends. The question of the foetus becomes then a question of the integrity of the mother (is it inside or outside the body, is it an aspect of, or external to, her proper self, the rightful domain of her property?). The impossibility of answering this question without neglecting the instability of the boundaries of the

mother's body does not simply negate the autonomy of the mother. More precisely, it establishes that autonomy (of the mother or the foetus) cannot be the grounds for the viability of abortion, as the lack of bodily integrity (and hence the instability of the boundaries of the social subject) leaves us without a proper subject to actualise its rights in a freedom of will and action. Indeed, thinking through pregnant embodiment⁴ may serve to question the model of the autonomous and integral subject central to the discourse of abstract rights. To treat the foetus as a subject with rights is to efface the mother's body. Such a dis-embodiment of the mother *and* foetus is described by Rosalind Petchesky in her reading of the pro-life film, *The Silent Scream*. As she suggests:

the free-floating fetus merely extends to gestation the Hobbesian view of born human beings as disconnected, solitary individuals, paradoxically helpless and autonomous at the same time. It is this abstract individualism, effacing the pregnant woman and the fetus's dependence on her, that gives the fetal image its symbolic transparency, so that we can read in it ourselves, our lost babies, our mythic past. (Petchesky 1990: xi)

Furthermore, an attention to the mother's *feelings* may also serve to destabilise the separation between mother and foetus implicit in the discourse of foetal rights. The pain and anxiety that surround abortion suggest an affective relation between mother and foetus, in which the foetus becomes an aspect of the mother's self-representation as an embodied, emotional and contingent subject. The impossibility of deciding where the subject begins or ends in pregnant embodiment helps shift the debate on abortion from the realm of the individuated subject who 'owns' rights and towards an understanding of the political subject as contingent and relational, as always embedded in relationships with others who cannot be relegated to the outside.

By showing how the problematic of pregnancy declares the non-availability of a notion of autonomy grounded on the integrity or rights of the subject, a feminist approach also shifts the debate on abortion from the question of abstract rights to the question of power relations. As Catherine MacKinnon and Mary Poovey have both pointed out, in light of their interrogation of *Roe v. Wade* (1973), the feminist use of the discourse of individual, abstract rights in representing their position in favour of women's choice, can prove counter-productive. In this particular case, individual rights are framed in terms of 'privacy' (the right to non-interference from public bodies). This concept of the private is precisely that which conceals the political nature of the gendered subject's access to resources, such as information and guidance on contraception, as well as abortion procedures (MacKinnon 1992: 358–62). As Poovey argues, the notion of individual rights framed

around the ideology of privacy, 'may actually exacerbate sexual oppression because it protects domestic and marital relations from scrutiny and from intervention by government and social agencies' (Poovey 1992: 240). A feminist approach may actually involve the disruption of the discourse of individual rights. It shifts the debate from one of autonomy to one of power relations precisely by recognising how privatised rights involve the policing of women's bodily boundaries.

'Rights' is not simply a sign which is always under dispute in its citation in political debates. It is also a signifier which is used by feminist action groups in the event of making their demands. This signifier can often involve naming or self-reference, as with the British feminist action group: Rights of Women (ROW). A cursory glance at a *ROW Bulletin* would suggest that this word 'rights' is used pragmatically, as the sign which most effectively carries the weight of a political demand, being part of the pre-existing discursive economy of radical politics. ROW, that is, does not offer, in itself, a theory of rights. To demand such a theory would be to miss the point concerning the necessities of action within feminism: rights occupy the practical or strategic realm of a demand on others. But the strategic aspect of rights does not mean that their employment lacks implications for theory. Rather, the level of theory becomes at once a question of competing strategic organisations of the real. In order to examine how 'rights' is used by feminist action groups such as ROW, I want to examine responses to the Child Support Act in Britain (1991).

The Child Support Act shifts responsibility for the maintenance of children from the state to the absent parent, setting up an agency to enforce collection. How has feminist opposition to the act involved the mobilising of rights discourse? An article in ROW's Spring 1993 *Bulletin* (*ROWB*) draws attention to the structural effects of the Child Support Act on gender relations by evoking competing conceptions of rights. The article begins by commenting on the *procedure* used to pass this act – it was introduced by statutory instrument and was hence not opened to parliamentary debate (*ROWB* 1993: 2). The article moves from a literal description of the act to an interpretation of its effects. It claims that the act is *about* the welfare of the Treasury – and not women or children (*ROWB* 1993: 2). In this sense, the *ROW Bulletin* looks beyond the literal for an implicit agenda. The article comments specifically on the way in which the act relies on gender-neutral terms (such as the absent parent) to conceal or obscure the way in which its structural effects on men and women are different (*ROWB* 1993: 4). The most important of these effects is not defined as the erosion of women's rights, but as the construction of women's dependence on men through

the removal of an automatic entitlement to Income Support (*ROWB* 1993: 3). The second important effect is the way it normalises the family and heterosexuality – so that women who choose to have children on their own, or lesbian mothers, are made invisible and illegitimate (*ROWB* 1993: 3). The *ROW Bulletin* hence focuses on the normative constraints initiated by particular legislative inscriptions of the social. The concept of women's rights is hence not evoked in terms of the integral rights of an abstract individual. Rather, the concept of rights is used to convey the organisation of subject mobility by various legal definitions of entitlement. It remains here a productive and critical gesture which is attentive to the normalising effect of dominant conceptions of right.

The Child Support Act provides us with an important example of the way in which rights claims fit into a model for feminist action. The literature on the act provided by Legal Action for Women, another British feminist action group, may also be of significance. They define the act as an enshrinement of parental duty, which empowers the secretary of state to assess and collect maintenance payments. The act's stated purpose is 'to establish the rights of children to maintenance from both parents' (Legal Action for Women 1992: 44). Its implicit effect is 'to establish the right of government to refuse to maintain children and their carers, and to end rights of children to maintenance from the state, therefore destroying the absolute right of subjects to Income Support' (Legal Action for Women 1992: 44). Here, the word 'rights' is employed in antagonistic positions implying that, as a signifier, its contexts of utterance are unstable. In this sense, rights can become vehicles for conflicting inscriptions of the social.

But, you might ask, can there be wrong rights? My attempt to differentiate between rights claims suggests an alternative question: whose rights wrong whose rights? This alternative question not only sees rights as relational, but also as involving an antagonism of interests. It demands an ability to differentiate between rights claims *according to the subject and bodies they cite and hence put into place*. In the case of the government's model (that is, the government's justification or legitimisation of the Child Support Act), 'who gains' is 'the taxpayer' or 'the public purse'. Both these constructions of 'who gains' evoke an undifferentiated subject or community. The creation of an imaginary consensus to found the legitimacy of the rights claim gives that claim an absolute foundation as an abstract, transparent and self-evident vehicle of Truth – a process which relies on dis-embodiment rights, abstracting them from the shape of any particular subject or body. In this sense, the government's model of rights participates in a metaphysics that

conceals the uncertainty, instability and division that marks the social relation itself.

The feminist model of rights asks the question 'who gains' in order to restore the opaqueness and conflict concealed by the metaphysics of the governmental right. The 'who' of this model is particularised rather than universal, differentiated along the terms of gender, sexuality, class and race. Specific consequences are defined as follows: the Child Support Act will destroy single mothers'/children's independence from men by denying them Income Support; it will discourage women from escaping from violent relationships; it will open the way for greater levels of government surveillance; it will increase the poverty trap for single mothers by removing supplementary benefits such as free prescriptions, dental care and milk vouchers; and it will 'reimpose a Dickensian discipline, by reversing the movement of all kinds of people to follow their preferred family relationships, lifestyle and sexual orientation, despite limited incomes' (Legal Action for Women 1992: 47). Here, the metaphysics of government right is disrupted in the process of dividing the imaginary consensus into stratified relations of power and conflict. This entails a process whereby the rights claims of the then Conservative government are shown to be illegitimate, invalid and in this limited sense, 'wrong'.

Does it follow, then, that the critical feminist model of rights is 'right'? This is not necessarily the case, as the very particularity of the feminist interpretation may suggest that it would not claim to saturate the discourse of rights, so that an all-inclusive right is made available. The focus on the erosion of women's rights defines the constitution of the right claim itself within the terrain of politics whereby mobility is over-determined in the form of relations of power. The right to state support that organises the radical and feminist position functions as a critical rejection of the relation of dependence for women on men within the family unit that the withdrawal of such a right would consolidate. The absence or presence of a right claim in forging social relations hence over-determines the mobility of particular social groups within ideological formations such as the nuclear family. The implication of rights in a relation of power suggests that the employment of rights functions as a citational act, which stabilises its subject in the event of a delineation (in this case, by re-presenting 'women'). But as citation, the feminist politics of rights does not fully control its subject (women), leading to possibilities of disruption and otherness, whereby women would cease to be adequately named by the rights that specific programmes put in place. In the context of the Child Support Act, and feminist interventions into family law, the rejection of the dominant conception of

right which reifies the nuclear family opens out the possibility of women's subjectivities being inscribed otherwise, in alternative social arrangements and relationships. Such alternatives could not be fully defined by any programme for action – they remain open in the sense that subjects may find themselves in places other than their legal demands.

A feminist politics inscribes a different and differentiated subject in its employment of 'rights': a subject which it both cites (as 'women') and whose instability or lack of integrity it presupposes in the very act or gesture of citing. Feminism's use of rights discourse entails an embodiment of the very concept of right. Rights here do not simply re-present women as a body and so fix her body and police her boundaries. Rather, the notion of embodied rights calls into question the possibility of not having a body (and hence the inevitability of contingency and particularity) as it describes the process whereby bodies become cited and hence constituted through legal demands. This process does not take the bodies of women for granted, or obliterate differences between women, or differences between feminisms. The focus on embodiment as a process, at once temporal and historical, both institutionally delimited as well as performatively inventive, is my call for feminism to deal with the question of how gender systematises itself through law, as it imagines an alternative inscription of women's bodies in the process of re-inventing women as subjects *after* the law.

My concern in this chapter has been to undo the critical gesture whereby feminist theory and practice are divided as modern and post-modern. I have demonstrated how feminism, at the level of practice, has an ambivalent and critical relation to rights. However, I have also differentiated a feminist intervention on rights and modernity from a general postmodern critique. Rights are not simply overcome (as in Carty's model of postmodernism) through theoretical engagement, or simply held in place at the level of practical struggle. Rather feminism's struggle to transform power relations in historically specific contexts involves a challenge to, and destabilisation of, both modern and post-modern conceptions of rights. Rights themselves are differentiated and embodied through the political and legal demands made by feminist action groups.

Such demands have theoretical implications which resist being designated as either modern or postmodern. Feminism, as a form of practical theorising, can be understood as a trans/formative politics in its very refusal to belong either here or there. So while this chapter has not been about postmodernism *per se*, it has raised important questions about how we might designate postmodernism as a space (where one can be either inside or outside). The refusal of feminism to be designated as

either inside or outside constitutes a movement in the term, 'post-modernism', itself. The dis-belonging of feminism may point then to a conceptual horizon where modernism and postmodernism themselves cease to be understood as places one can simply inhabit. Feminism, as a transformative politics, may transform the very conditions in which it is possible to speak of postmodernism as on one side of the law or the other.