FEMINISM AND LEGAL POSITIVISM

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Introduction

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

It needs to be made quite clear at the outset that the point of this paper is not to overview the literature on legal positivism, or focus on variations on its basic themes from Bentham through to Austin and Hart, for this has been more than adequately addressed in mainstream legal enquiry and, as Simon notes, even the rigour and elegance of the above expositions are insufficient to overcome the fundamental problems in positivist theory, which are as equally fatal in their most elaborate, as in their most simple, statements (1978:29). Rather, this paper has a more fundamental purpose, and that is to extract the basic definition or understanding of what law is which is implicit in positivist jurisprudence, and to examine, from a feminist perspective, the conceptual and political imperatives that flow from it. This paper postulates that the development of a theory of law which is properly feminist in character must necessarily transcend positivism's claim to trans-historicity and universality, and should articulate the functional and ideological role of legal positivism in the reproduction of the sex and economic class relations of capitalist society. It is proposed to draw attention to the conceptual limitations of legal positivism, and to show that it is a doctrine based on an understanding of "the law" as being an autonomous, self-contained system, one that is supposedly uninvolved in the process of class production and reproduction. It will illustrate how a positivist

understanding of law has a *conservative* political consequence, as it effectively separates critical analysis of the law from broader sociological enquiry into the nature of capitalism when in actual fact "the law" (as we shall see) is intimately involved in the process of reconstituting the relations of capitalism, and, as an institution, plays a crucial role in the class subordination of women.

The key reason why it has been so observably difficult to develop a feminist critique of law relates directly to the conceptual limitations of the *definition* of law provided in the legal-positivist tradition. A feminist critique of law cannot be expressed within a framework that is predicated on the autonomy of the law - that is, one based on an understanding of law as a neutral and independent structure that is supposedly uninvolved as an institution in the repression of women. The corollary of this approach is that women's problems with the law are thus only problems with particular legal rules or, at the most, particular areas of the law. A feminist critique of law must reject this view of the legal systems, and should be predicated on an understanding of law as *praxis* - that is, as Klare defines the term, as being a form of "practice" through which the social order is defined (1977:128). As will be illustrated, a feminist analysis of the law must clearly reject the central tenet of legal positivism - that is, that law is external to the question of class - for such a position by definition renders it impossible to develop a political critique of the legal system. A feminist critique of law, in other words, must recognize and transcend the "mind-forged manacles" (Hay 1975:48-49) of positivist jurisprudence, for this, it is contended, is the first and necessary step in developing a politically meaningful line of enquiry into the relation between law and the subordination of women. It is absolutely crucial that feminists unravel the role the law plays in maintaining and reproducing the sex and economic divisions in our society, for capitalism has a class structure that is innately patriarchal.[1]

These themes will be illustrated by showing the threat to the political interests of the dominant class that are posed by any attempt to "transform" this legal process - that is, to make it more receptive to the claims of the sexually and politically disadvantaged in society - by reference to an examination of the structure and function of the New South Wales Equal Opportunity Tribunal.

To start with: what is legal positivism? There has been a great deal written on this topic, characteristically in supportive (and generally abstruse) terms. H.L.A. Hart succinctly outlines a set of five propositions usually associated with the positivist tradition in law that well illustrate its analytical tenor (1958:601-602). In overview, these are: firstly, that all laws are the command of human beings, (that is, emanating from a sovereign); secondly, the contention that there is no necessary connection between law and morals - that is, law as it is and law as it should be; thirdly, the analysis of legal concepts should be distinguished from historical enquiry into the causes and origins of law, and should be

separated from sociological enquiry into the relationship between law and other social phenomena; fourthly, positivism contends that the legal system is a closed, logical system, in which correct legal decisions can be deduced by logical means from pre-determined legal rules, without reference to social aims, policies or moral standards; and finally, that moral judgments are unable to be established or defended - as can statements of fact - by rational argument, evidence or proof.

As Hart's summary adverts to it, legal positivism is concerned with abstract notions of sovereignty, hierarchy and command as the intrinsic condition of the law. It defines law simply as a set of rules carried from "sovereign" to "subject", that is processed through a legal system that is held out to be primarily administrative in character. Legal positivism presents us with a model of the legal process: the courts, the styles of consciousness with which lawyers perceive and "resolve" problems (Klare 1977:124), the way in which they interact between client and system, and the role of the judiciary, which is supposedly separate from politics, and which is presented as intrinsically neutral and value-free.

Feminist legal enquiry to date has generally been expressed within this conceptual tradition, as it has focused primarily on the function of the law at those points where it directly intersects the social experience of women. For example, there have been extensive feminist critiques of the law relating to rape, abortion, criminal and family law and so forth, but there has been comparatively little attention directed to the broader question as to how the very *structure* of the legal order in contemporary capitalist society - its structural qualities of "formality, generality and autonomy" (Balbus 1977:576) - serve to reinforce and reproduce existing sex and economic class relationships.

Feminist enquiry should appreciate that the distinguishing attributes of the western legal order - its "generality, uniformity, publicity and coercion" (Unger 1976: 72-3) - perform an express political function in the reproduction of class relationships, and ideologically find their expression in a particular legal philosophy - legal positivism - that animates and legitimates capitalist society (Shklar 1964). Positivism in law is structurally connected to a deeper set of presuppositions about society that are expressed under the rubric of "liberalism". Liberal philosophy embraces legal positivism in the way it presents the legal system as a neutral, independent and apolitical mechanism for resolving social tension. This presentation of law is given its political expression in the notion of the "Rule of Law" - that is, the legal doctrine that all people are equal under the law and can expect from it a neutral and unbiased determination of their rights (Dicey 1959:20, 202-3). The "Rule of Law" in fact, is widely accepted as the lynchpin of individual liberty and justice in liberal-democratic society. Indeed, the very legitimacy of the modern state hinges on this "reification" of the law - that is, in obscuring the role the law as an institution plays in the reconstitution of class relationships. In fact, far from recognising the role the law plays

in the process of institutional repression, liberal philosophy presents it as perhaps the only bulwark standing against it. For example, Hayek in his *Constitution of Liberty* (1984:80) outlines the centrality of this understanding of the law to liberal philosophy, maintaining that "the great aim of the struggle for liberty [has been the attainment of] equality before the law". The law stands at the centre of liberal philosophy as it is defined by it as constituting the sole basis of *legitimate* domination (Trubek 1972) and normative order in society. As Gabel illustrates,

> the normative dimension of legal positivism is the theory of utilitarianism . . . [whose] highest sanctity is reserved for the right of the individual to determine *his* own interest, and as a result, it permits legal coercion only if individuals decide through the collective exercize of their "free wills" that such coercion advances the general welfare. The legal form that benefits such a theory is the RULE, because a rule can be "neutrally" applied to each individual equally by an empirical investigation of objective facts (1977).

Thus, the very conceptual framework of liberalism – its definition of "rights", "justice" and "freedom" (Connolly 1984:233) – is ultimately grounded in law and is given expression through the legal system.[2] Hence, the need to justify and to legitimate the operation of law (and thereby the political propriety of people's subjugation to it) – must logically stand at the heart of the liberal philosophical project. It is essential to the legitimacy of the capitalist state that "law" has the ideological veneer of being "autonomous from society . . . a neutral and unchanging state apparatus" (Picciotto 1979).

It is thus hardly by chance that western jurisprudence has been characterized by an almost exclusively positivist frame of reference. Indeed, breaking one of the outlined tenets of legal positivism, and enquiring into the origins of this tradition in jurisprudence, we find that it is intimately linked to classical liberalism as expressed in the writings of Hobbes, Locke and Hume (Simon 1978) – that is, that it is not simply fortuitous that the nascence of positivism in law between "the seventeenth and nineteenth centuries [corresponded to] the period of the revolutionary ascendancy of the bourgeois" (Fine 1984:3). For example, Hobbes specifically developed the first proposition of legal positivism outlined by H.L.A. Hart above and Hume specifically developed the second and fifth propositions.

Legal positivism provides a definition of law that clearly complements the understanding of society implicit in liberal philosophy – that is, that society is an artificial aggregation of freely contracting, autonomous individuals. As Gabel (1977:304) notes,

> at the heart of this positivist model, we find precisely this atomistic view; a normative theory insists on the radical liberty

> of the individual (positivism's subjectivity of values), a legal epistemology that separates fact from value (the formal rule) and a rationalization of practice which accords legal validity only to rule-dictated outcomes.

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

Legal positivism presents us with a highly formalistic and apolitical understanding of the law. The legal system as defined in this tradition is not part of "the problem" and "reforming the law" has, even from a feminist perspective, become almost synonymous with changing the content of particular rules or areas of the law. This of course has an important place in feminist political strategy, but if we are to understand the way in which the legal system reinforces the class oppression of women, we must look beyond the largely artificial way law is defined in the positivist tradition. Feminist legal enquiry needs, in short, a different starting point if it is to understand the specific way in which law mediates class relations (Picciotto 1979:165), specifically the class relations of sex. From a feminist perspective, "the law" must be understood NOT as autonomous from society, but as being a form of practice through which existing sex and economic class relations are reproduced. This involvement can be described in shorthand by approaching the legal system as a form of "praxis" – henceforth to be understood as connoting human activity through which people define or change their world. Thus an acceptance of the understanding of the law presented in mainstream western jurisprudence (as defined by the "science of legal positivism") limits the development of a political critique of law as it presents the law as an autonomous, self-contained system, fuelled by its own logic, which is supposedly uninvolved in the processes of class production and reproduction, simply to the positivist "constituting conventions which set the boundaries among particular interests so that the interests will not destroy each other" (Unger 1975:72). The consequence of legal positivism is, in short, to set up a theoretical schism between law and other social phenomena, conceptually separating it from the capitalist whole of which it is, in reality, a fundamental part. Legal positivism developed at the same historical conjuncture as liberal philosophy, and we must appreciate that it serves the same ideological function – and that is, taking some licence with Poulantzas (1978:207), "to hide the real contradictions, [and] reconstitute at an imaginary level a

relatively coherent discourse which serves as the horizon of agents' experience". Indeed, it is not overstating the case to argue that the veneer of legal positivism is the cornerstone of legitimacy in the capitalist social order, which is unable to countenance even the suggestion that "the Courts" or "the Judiciary" are anything other than autonomous and "politically neutral" arbiters of social tension.

The rejection of the schema of law provided by liberal positivism, however, does not propel us into a crude Marxist instrumentalism - that is, the approach that conceptualizes "the law" as simply an instrument of social control of the bourgeoisie. In its own way, this is as artificial an understanding of the function of the law as is found in liberal legalism, as it is also predicated on a concept or understanding of "law" that has a strong epistemologically positivist flavour, as still presented in terms of "rules" or "commands". Indeed, the *Critique of Law* (1978:34) makes the point that both liberal pluralist and vulgar Marxist analyses both posit law as an "instrument" - the two views differing simply on the empirical point of *whose* interest it expresses - in the former, that of a (generally democratically elected sovereign) and in the latter, the naked class interests of the bourgeoisie. These approaches are both inadequate as they allow no dynamism to the structure of the *legal system* in the production and reproduction of class relations - as Balbus (1977:571) notes, that is, for the way in which "this form [of law] articulates the overall requirements of the capitalist system in which these social actors function".

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

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

Beyond Positivism - Law and Social Reproduction

This article proposes to offer a way to approach the fundamental connections between patriarchy and law (Rifkin 1980:84) by showing how our legal system presents us with a dispute resolution process that has (ideological claims to neutrality and impartiality aside) the express

political function of mediating social tension in the political interests of the dominant classes - that is, serves to define and reconstitute, sex and economic class relations in the interests of capital.

The feminist strategy of "deconstructing" what Klare terms "liberal legalism" (Klare 1979:36) requires us to address, *inter alia*, those structural attributes such as the principle of formal legal equality (what Weber refers to as the "generality" and "universality" of legalism), the significance of the professionalisation of the law and its hierarchical court structure, and the nature and function of "legal method". A feminist sociology of law should illustrate how these characteristics of legalism frustrate the use of the law as an instrument of social change - a vehicle that women can employ in the interests of their political emancipation - as in concert they preclude the "qualitatively different interests and social origins of individuals from entering into the calculus of political exchange" (Balbus 1977:576). These structural characteristics of legalism collapse together to constitute a form of practice through which the social order of capitalism - a social order predicated at heart on the subordination of women - is reconstituted across time. The following section will show how the Western legal order serves to perpetuate and maintain patriarchal domination under what is essentially an ideological facade of formal justice, procedural equity, neutrality and judicial impartiality - to illustrate, in short, that "law-making" for women in capitalist societies is characteristically a "mode of *domination* rather than freedom" (Klare 1979:132).

"Legalism" is committed to generality and universality in its application of the law. That is to say, it applies abstract legal principles without distinction or qualification to those people within its jurisdiction. In bourgeois legal philosophy, "justice" is identified with legal equality, which is conceived of as "the pure formal principle of legal impartiality" (Lang 1979:135). This "equal treatment of all citizens before the law" - in Dicey's terms, the "equal subjection of all classes to the ordinary law of the land" - underpins the Rule of Law doctrine and is ideologically central to the legitimacy of the modern state (1959:203).

Legalism, in short, is predicated on a *formal* equality of all persons; an insistence that is, in *substance*, quite anti-democratic. As Thomas Platt outlines, it insists on treating unlike cases alike, notionalising a legal relationship in *form* that invariably does not exist in *fact* (1975). Transposed upon a system of marked and systemic social inequality, a system predicated upon the social and economic subordination of women, the universality and generality of the law serve to "confer on the propertied classes a sort of factual autonomy" (Weber 1954:699) - a characteristic that is advantageous to those agents with economic and social advantage - and, in both areas, women are structurally disadvantaged as a class relative to men.[3]

That is, apart from its ideological role in the legitimation of the modern state, the principle of "formal legal equality" functions to "*de-politicise*" the dispute before the court, by filling litigants with what Marx calls an "unreal universality" (Marx 1972:30). That is to say, it serves to divest people of their real, individual life, of those "political" attributes such as *sex*, social class, race and educational status which, in all likelihood were the very factors underpinning the dispute in the first place. It is contended that Marx' critique of politics in *On the Jewish Question* is equally pertinent to the function of the law in contemporary capitalist society. Paraphrasing Marx,

> The *law* abolishes, after its own function, the distinctions established by *sex*, birth, social rank, education, occupation, when it decrees that *sex*, birth, social rank, education, occupation are non-political distinctions; when it proclaims, without regard to these distinctions, that every member of a society is an equal partner at *law*, and treats all the elements arising out of the real life of the nation from the standpoint of *the formal equality of the law*. But *the law*, none the less, allows *sex*, private property, education, occupation, to act after their own fashion and *to manifest their particular nature*. Far from abolishing these effective distinctions, *the law* **only exists so far as they are presupposed**; [emphasis added] it is conscious of being innately political and manifests its universality only in opposition to these elements (1978:33). [Author's note: changes to the original text are *italicised*]. (See also Karl Klare 1979:132).

Thus, far from ensuring social equality, legalism's insistence on the principle of formal equality before the law serves to perpetuate social *in*equality. Platt illustrates how certain forms of **actual equality** are necessary conditions for the realisation of **legal equality** - and shows that if some important conditions of living are unequal, legal equality - implying a principle of *impartiality*, becomes a form of **maintaining** and **preserving** actual class inequalities (1975).[4] Indeed, "it is precisely this abstract character [that] constitutes the decisive merit of formal justice to those who wield economic power" (Weber 1968:228-9). Women, as that class located strategically (and, in the logic of the capitalist formation, necessarily) the furthest from all loci of economic, social or political power in contemporary western society, are placed at a considerable structural disadvantage by the principle of formal legal equality (Stubbs:1986). This principle is (to draw again on Marx) "a phenomenal form which makes the actual relations invisible and, indeed, shows the direct opposite of that relation" (Marx 1978:505) and as such is one of the "key mystifications of the capitalist mode of production" as it underpins "its illusions as to liberty" (Marx 1978:506). The *political function* of formal legal equality is thus to "de-politicise" the dispute: to exclude, from the calculus of legal exchange, those political variables,

such as the sex, race, class and education of the litigants, that are properly causally related to the matter before the court.

Apart from being both "general" and "universal", legalism is strikingly "autonomous" - a characteristic Unger in *Law in Modern Society* holds to have four key dimensions (1976:52). Unger holds Law to be *institutionally* autonomous when its rules are applied by highly specialised judicial institutions - "Courts" - the specific task of which is adjudication. It is *methodologically* autonomous when it employs a mode of justifying its acts - that is its decision of cases - that differ from the kinds of justification used in other disciplines or practices (ie the formalism of judicial reasoning). The law is *substantively* autonomous when the rules it has to apply are unable to be evaluated on any criteria extrinsic to the legal system; that is to say, the political origins, significance and ramifications of the rules are supposedly beyond the purview of the court. Finally, legalism is *occupationally* autonomous, having a specialised group "defined by its activities, prerogatives and training, that manipulates the rules, staffs the institutions, and engages in the practice of legal argument (Unger 1976:53).

This characteristic "autonomy" of the Western legal order can be dissected to illustrate its political function in the reproduction of existing class structures across time. Weber illustrates how the emergence of a "distinct" legal profession - what he terms a "status group" was the necessary condition for the emergence of "logical formal rationality" in a legal system (Trubek 1972:737), as it required the development of "unique skills, roles and modes of thought (if it were to be able) to create and maintain universal rules" (1972:739ff). The "alienation" of the law, in short, requires the development of a professional class to mediate access to it. Weber held that the emergence of a distinct legal profession was not only one of the key concepts for understanding the modern legal order but structurally "underlies much of the contemporary dynamics of legalism" (Trubek 1972:739). This professional caste has a "relatively homogeneous occupational workforce that is drawn disproportionately from middle and upper middle class backgrounds" (O'Malley 1983:76) - that is, has a (middle) class homogeneity that serves to ensure that the morality of "the law" is divorced from the values and morality of the wider community. As is convincingly illustrated by Griffiths (1985), the articulation and implementation of the law is controlled by the values and morality of the class that is constituted to run it, and is thus in substance bourgeois. The moral themes and social perceptions of this class pervade, with little exception, women's attempts to employ the law in their political interests.[5] This fact constitutes yet another structural disadvantage to any woman who may aspire to use "the law" to invoke, or to protect, her civil rights, for these "rights" will be both defined, determined, and articulated, primarily by a class that has a vested interest in maintaining the social relations of capitalist production, relations which are predicated at heart on the subordination of women. These "professional" values are crystallised in the judges who, as Justice

Kirby notes, have "traditionally been chosen from that narrow class of successful, middle-aged (*invariably*) male barristers" in a strongly homosocial selection process that inclines toward appointees with a commitment to both the ideology and practice of legalism and who have, invariably, an affiliation with the *status quo* (Kirby 1983:21). The more powerful the appointment, the more accentuated are these qualities[6] and the greater is their impact in giving direction to the development of the law. The class profile of the legal profession and the existence (as we shall later see) of a certain discretionary latitude in judicial reasoning collapse together to fuse a patriarchal bias into "the law" at every level: and accordingly, the processes by which this class homogeneity of the profession is *maintained* should be of concern to a feminist critique of law.[7] Although it is beyond the scope of this article to provide a comprehensive sociological critique of the organisation and structure of the legal profession, we can nevertheless note, by way of example, that it is *prima facie* apparent that the time and cost factors involved in the training of lawyers immediately restricts its access to lower socio-economic groups (O'Malley 1983:76), and the curriculum of most law schools in Australia is subject to the approval of the "profession" - a dependence that shapes not only the technical content of the degree but the way in which it is taught. As Parkin has observed,[8] in "professionalism", "credentials are usually supplied on the basis of tests designed to measure (*and reward*) certain class-related qualities" (1979:55) - legal education emphasising abstract thought, and highly developed reasoning and linguistic skills that both Branson and Miller (1979:30) and Connell (1978) observe are socialised within a middle class cultural environment.

The structural characteristic that Unger describes under the rubric of "methodological autonomy" refers to that specific mode of discourse that is associated with the decision-making process in legalism. The particular and specialised methodology employed in "the law" - in the courts, by lawyers, and in legal academia - is more generally referred to as legal "formalism" and, as Wallace and Fiocco illustrate, it serves to control cognition by employing devices such as specialised legal logic, hierarchical and procedural rules, dichotomous definitions, and an entrenched analytical focus on appellate court decisions. That is to say, formalism is based upon

> a pattern of evaluation of law and legal institutions which is contoured heavily by these cognitive controls which principally measure the internal consistency of rules and their sources to the exclusion of their substantive content and social effect (Wallace & Fiocco 1980-81:309).

Legal formalism underpins the judicial decision-making process in Australian Courts and has a strong ideological significance as it *purportedly* separates the reasoning process from the personal/political/moral caprices or persuasions of the judges themselves

and ties it to an external legal standard. Indeed, as Kirby (1983:37) notes, legalism's greatest proponent of this "strict logic and high technique", Sir Owen Dixon, declared that

> It is taken for granted that the decision of the Court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. *But it is basal.* The Court would feel that the function it performed had lost its meaning and purpose if there were no external (*that is "legal"*) standard of correctness. [Author's emphasis].

However, as we shall see, this legal methodology *fails* to constrain judicial creativity, and certainly does not ensure the "neutrality" of the decision-making process. Indeed, as Horwitz observes,

> the paramount condition for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitable political and redistributive functions of law (Wallace & Fiocco 1980-81:310).

The legal method employed by the judges is governed by the doctrine of *stare decisis* (precedent) and the rules of statutory interpretation, the bench in both cases purportedly guided by "neutral principles of interpretation in relation to abstract legal concepts" (See Mossman in this volume). Professor Mossman well illustrates this point in her analysis of the *French* and "Person cases", showing how the courts will generally avail themselves of the opportunity (particularly in politically contentious cases) to disavow their consideration of the political and social ramifications of the matter before them.

The historical experience of feminists' attempts to engage the law as an instrument of social and political emancipation well illustrates that the foundations of legal formalism, its axiomatic principles of methodological neutrality and judicial impartiality are, in substance, a facade. This *hist*ory has been well documented by feminist legal scholars such as Sachs and Wilson (1978), Scutt (1985) and Mossman (1986). Although this paradigm of legal method deserves a more intimate focus in its own right than can possibly be provided in a paper of this scope, an overview of this literature and some key cases will serve to illustrate the point of this section of the article, and that is, that these purportedly neutral principles of judicial interpretation mask what is in reality, a certain discretionary latitude on the part of the judiciary - that "most professional" of the professional class constituted to run the legal system - and thus serves to ensure that the articulation of "the law" is underpinned by a value matrix that is innately bourgeois. That is, it aims to show, as Stone cogently argued in his classic *Legal Systems and*

Lawyers' Reasoning the system of precedent is based on what he terms "a legal category of indeterminate or concealed multiple reference - the '*ratio decidendi*' of the case" - that confers a *de facto* discretion on the judges in choosing between, in distinguishing, qualifying or rejecting authorities and in delimiting the scope of statutes (1964:235ff).

Stone's charge that the "logical form" is often fallacious and that the (purported) exclusion of judicial consideration of "social needs, social policies and personal evaluation by the Courts" is correspondingly illusory (1964:241) is also highlighted with particular clarity in what are generally referred to as the "person cases". What these articles need to address in more detail, however, is the political *function* of legal method in the process of social reproduction, and the way it relates to other structural attributes of liberal legalism in law's overall political project of maintaining sexual and economic subordination.

In this series of cases, the British and Australian judiciary wrestled for decades with the problem as to whether women, at law, were entitled to be regarded as "persons". As Scutt (1985:167) outlines, these cases were related to the right of women to be classified as "persons" for the purpose of standing for various public offices (including Parliament, local councils, and juries) and to take up other civil rights.

In the first of these cases, *Jex-Blake v Senatus of the University of Edinburgh* ((1973) 11M 747), seven women were denied permission to "attend instruction" in medicine at the University of St Andrews in Scotland, in spite of the fact that the University regulations provided that "persons" were so entitled.

On the basis of the Regulations, and supported by a strong case at common law, Jex-Blake and her associates petitioned the Court for an order entitling them to attend mixed classes for tuition, that further, they be permitted to sit for the final examination and if successful, be allowed to graduate. Scutt notes how the definition of "person" as it is commonly understood - for example, as defined in the Oxford Dictionary, as being "an individual human being . . . of or belonging to the genus homo as opposed to animals, machines or mere objects" - was implicitly *rejected* by the judges in this case (1985:164). Indeed, their decision flies in the face of even the broadest application of the canons of statutory interpretation - for the Court simply disregarded the fact that they were bound by s 5 of the *Acts Interpretation Act* Imp. (1850), which provided that

> in all acts, words purporting the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural to include the singular, unless the contrary as to gender and number is expressly provided.

In spite of this clear and express statutory provision, their Lordships were nevertheless able to determine that "the Law" could still recognise the difference of sex and for the purposes of excluding women from the University on the grounds that they were not "persons". That this decision turned expressly upon what Stone terms "the social policies . . . and personal evaluation of the Court" rather than an adherence to an external standard of legal logic (1964:241) is well illustrated in the decision of Lord Neave, who based his decision on the

> ... belief, widely entertained, that there is a great difference in the mental constitution of the two sexes, just as there is in their physical conformation. The powers and susceptibilities of women are as noble as those of men; but they are thought to be different, and, in particular, it is considered that they have not the same power of intense labour that men are endowed with. If this be so, it must form a serious objection to uniting them under the same course of academic study. I confess that, to some extent, I share this view, and would regret to see our young females subjected to the severe and incessant work which my own observation and experience have taught me to consider as indispensible to any high attainment in learning. A disregard of such an inequality would be fatal to any scheme of public instruction, for, as it is certain that the general mass of any army cannot move more rapidly than its slowest and weakest portion, so a general course of study must be toned and tempered down to suit the average of all classes of students for whom it is intended; and the average will always be lowered by the existence of any considerable numbers who cannot keep pace with the rest.
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> **Add to this the special acquirements and accomplishments at which women must aim, but from which men may easily remain exempt. Much time must, or ought to be, given by women to the acquisition of a knowledge of household affairs and family duties, as well as to those ornamental parts of education which tend so much to social refinement and domestic happiness, and the study necessary for mastering these must always form a serious distraction from severer pursuits, while there is little doubt that, in public estimation, the want of these feminine arts and attractions in a woman would be ill supplied by such branches of knowledge as a University could bestow** [Author's emphasis] (Sachs and Wilson 1978:18; Scutt 1985:165).

The judicial discretion in delimiting the scope of statutes and distinguishing, qualifying and rejecting authorities is clearly presented in the ratio of another of the "person" cases, *Chorlton v Lings* ((1868) LR 4CP 374). In this case, a woman *prima facie* satisfied all the statutory requirements of the *Representation of the People Act* of 1867, which

specified that "every man shall, in and after the year 1868, be entitled to be registered as a voter".

The applicant's counsel argued that on a straightforward application of s 5 of the *Acts Interpretation Act* (1850), his client was entitled to have her name upon the voting register. It is to be recalled that the *Acts Interpretation Act* provided that it applied to all subsequent legislation unless the legislation in question expressly excluded it. The legislation before the court in this case - the *Representation of the People Act* - had no exemption clause.

Nevertheless, the Court was again able to justify a decision contrary to the straightforward and clear intention of the statute. In an exercise in flawed syllogistic logic, the Court held that

> it was not necessary that express words exclude (the *Acts Interpretation Act*) because the subject matter of (the *Representation of the People Act*) makes it quite clear that women are not to be taken as being covered by virtue of the word "man" being used; on the contrary, because man is used women were thereby expressly excluded (*Chorlton v Lings* (1892) at 392).

The selectivity and judicial latitude inherent in the doctrine of precedent is reflected with particular clarity in this case. Scutt, for example, illustrates how counsel for the applicant presented extensive research and case authorities documenting women's participation in various public offices and professions across English history (1985:170,171). For example, in *Olive v Ingrahm* ((1739) 7 Mod. 263, 2 Str. 1114; 87 ER 1230), it was held that a woman could hold the office of sexton. In *Catherine v Surrey* ((1641) in Hakewill *On the Manner of Holding Parliaments in England*), a judgment was given to the effect that a single woman holding freehold land was entitled to vote for members of parliament, a decision repeated in *Hold v Lyle* ((1739) 4 Jac 1). *Rex v Stubbs* ((1788) 2 TR 395; 100 ER 213), also presented for their Lordships' consideration, held (in overviewing the General law to that date) that "there was no absolute rule against women holding any office of which they were capable of performing"[9] - and, in *Reg v Aberavon* ((1864) 17 Ir. C.L. Rep. 157 (CP) 463 (Exch)), there was dicta to the effect that women were able to vote under an Act passed in the reign of Queen Victoria.

Nevertheless, Chief Justice Bovill was able to hold that these authorities were "of little account" (despite being *directly* on the point in issue!!!); and he distinguished them simply on the basis that they were "not mentioned in some [law] reports" (*Chorlton v Lings* 1868) and thus attached little weight to them. It is contended that the case well illustrates Stone's contention that

> the massiveness of the areas for judicial choice at any particular time, **including that between following or distinguishing an earlier case**, is a function not only of the accumulation of past decisions, not only of changes in the environment, but also of new insights and perspectives both on old problems and on new problems . . . (and that) . . . **in many cases, the only authoritative guides . . . usually consist of alternatives amongst which, by the system of stare decisis itself, they have in any case an inescapable duty to choose. . . .** And which alternative is chosen from the versions of the material facts (or the ratio of the precedent case) made or left available by the authoritative materials, will reflect the assessments thus made (1964:282,283). [Author's emphasis].

It is difficult to distil any clear procedural logic in the process by which the judiciary determined these cases. They were chosen as they illustrate clearly the selective use of precedent and the discretionary characterisation of statutes that in **practice** underpins the interpretive function of the judges - and because, as Mossman's analysis of later cases illustrates, they set the tone for most subsequent feminist engagements with the law. These cases stand as stark testimony to Lord Reid's observation in *Essays XXV* that "notwithstanding all the apparatus of authority, the judge nearly always has some degree of choice". It is in this "latitude" - what Stone refers to as "the leeways of choice" (1964:274ff) - that legalism structurally incorporates a value input from the class that has been constituted to administer the legal system - a value input, an interpretive perspective that is almost invariably conservative. That is, in these "leeways" the class position and moral world view of the judicial class becomes *structurally* significant - for capital creates along class (and sex) lines an underlying code through which people interpret their world and evaluate the behaviour of those with whom they interact (Stubbs 1986:45). The interpretation of matters before the Court is thus articulated from the perspective of the world view of the bourgeoisie - that (invariably) middle-class male judge, to whom the subordination of women is inscribed in the grand logical design of life - as was so clearly presented in Lord Neave's misogynistic dictum in *Jex-Blake*. To deify, as did Dixon, the "strict logic and high procedure" of formalism as providing an "*external* standard of correctness" - that purportedly ensures the neutrality and impartiality of legal method - is to worship a false god - for as Stone notes, there is no such thing as "ineluctable legal logic", but in reality legal method collapsed into "a composite of the relations between legal propositions, of observation of facts and consequences, and of value judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which the rule of *stare decisis* confronts the courts" (1964:284). Although it is true that the subjugation to system of rules sets a very general framework which limits the *overt* or naked exercise of discretion of the individual law-maker/adjudicator who occupied a

central position in legal forms past, it serves to replace it with a more insidious and class-based value bias that is cloaked by the all-pervasive ideology of neutrality and impartiality. That is, as Mossman notes, the "nature of decision-making requires choices of the judges that they cannot make without taking into account other factors; and it seems, moreover, that judges may be influenced, often implicitly, by their own life experiences in making such choices" (this volume:30).

As Wallace and Fiocco note, the other key characteristic of legal formalism is its analytical focus on "the internal consistency of the rules and their sources to the exclusion of their substantive content and social effect" (1980-81:309). It relies upon binding, fixed and determinate rules, that pre-exist the dispute and serve to determine the relationship between the parties to it before the matter even comes before the court (Tribe 1975:286), employing what Tribe terms an essentially static (as well as instrumental) model of law and policy in which:

> [1] The state is deemed to have a certain policy or not;
> [2] the policy of the state is deemed to be expressed solely by its positive body of enacted law; and
> [3] a state's policies are then applied or not applied in a particular fact situation (Tribe 1975: 290).

The notorious uncorroborated evidence rule of the common law provides a clear example of how the law structures the relationship between the parties before the dispute presents itself for resolution, and illustrates the innate conservatism of a dispute resolution process that expressly (in the interests of "justice"?) excludes any consideration by the Court of the moral or ethical basis - or, indeed, the contemporary social relevance of - the rules that it is applying. Although statutorily amended in some jurisdictions in recent years (for example, NSW) the general principle of corroboration at common law is that an accused person is able to be convicted solely on the testimony of a single, reliable witness (Aronson, Reaburn & Weinberg 1982:606). At common law, this general prescription is qualified by two key exceptions: the jury in a criminal trial must be warned against convicting an accused person on the uncorroborated evidence of a child, and a similar warning must be issued in the case of a conviction on the uncorroborated testimony of a complainant in trials of sexual offences.[10] As the Criminal Law Revision Committee (11th Report on Evidence (General) 1972 Cmnd), underpinning this judicial direction has been the assumption that the accusation of the offence may have been made "owing to sexual neurosis, jealousy, fantasy, spite, or a girl's refusal to admit that she consented to an act of which she is now ashamed" (Aronson, Reaburn & Weinberg 1982:620). Certainly the rationale for issuing such a caution was not problematic for Mr Justice Sutcliffe in the Old Bailey in 1976 where his Honour held it as apparently self-evident that "it is a well known fact that women in particular and small boys are liable to be untruthful and invent stories" (Pattullo 1983).

Such a claim has no empirical foundation, as the figures for falsely reporting rape are *less* than the false charges made for other serious crimes.[11] Nevertheless, no such aspersion - implying that women *qua* women are "irrational and quixotic" (Patullo 1983: 21) - is cast in parallel on the credibility of the testimony of male victims of common and violent assaults.

Clearly, the procedural requirement of such a judicial warning serves to define the relationship between the parties before the matter presents itself for resolution. That is, the female witness is branded (with complete disregard to the particular qualities of reliability and credibility that she may as an individual possess) as inherently unreliable and childlike - that is, as *intrinsically* unable to be relied upon under oath - in the direction that the judge is obliged to give the jury. The innate *conservatism* of such fixed rule determinations cannot be overstated. The conduct of the trial is unfairly tilted in the favour of the accused by what is in effect an extremely mysogynistic prescription that colours the credibility of the victim's evidence and which she has *no legal right to challenge*. As we shall see, such fixed rule provisions are antithetical to a legal technique that seeks to incorporate evolving visions of law and society (including changes in the political status of women) into legal principle - because it defines these rules as "outside" the calculus of legal exchange, and, as such, is a method of resolving disputes that is appropriate only to a legal system that aspires to remain "frozen in time" (Tribe 1975:307). The political function of these fixed rule determinations of positivism is "to surely deprive the polity of new arguments, and of new data, from which a new moral consensus might emerge" (Tribe 1975:307).

The structural attributes of legalism - the generality and universality of the law, its alienation and professionalisation, its specific methodology, and its fixed-rule determinations - serve to frustrate the use of the law as an instrument for social emancipation as in concert they effectively "preclude the qualitatively different interests and social origins of individuals from entering into the calculus of legal exchange" (Balbus 1977:576) and, further, cloak the intrinsically bourgeois-patriarchal interpretive perspective of the Court with the ideological facade of neutrality and judicial impartiality. That is, "legalism" is innately conservative in that it provides a dispute-resolution framework that *refuses* to recognise the political factors that causally underpin any dispute that comes before it.

Feminism and Legal Formalism : An Examination of the Function of the Equal Opportunity Tribunal in New South Wales

The political function of this form of law - its role in the reproduction of the class relations of capitalist society - is highlighted by an examination of the structure and function of the New South Wales

Equal Opportunity Tribunal - which has attempted to make the legal process more receptive to the claims of the sexually disadvantaged in society. The Tribunal has attempted to move away from the constraints of judicial formalism in endeavouring to provide a more subtantive consideration of the real social issues it was attempting to address than was available within the evidential and procedural constraints of the general law. The Tribunal was constituted under the *Anti-Discrimination Act* 1977 (NSW), Part VIIIA. By virtue of s 107 and s 108, the Tribunal was relieved of the burden of adhering strictly to the procedural rules of evidence and pleading, is able to inform itself of any matter it sees fit, and is directed to act in accord with "good conscience, equity, and the substantial merits of the case" (that is, adhering to the principles of natural justice) without recourse to technicalities or legal form. It would appear *prima facie* that such a forum would be better equipped to address tensions in social relations in the real, political context in which they arise. It offers the potential, in other words, to give some voice to women - to that class that is located strategically, and in the logic of capital accumulation, necessarily, the furthest away from all loci of power in our society. Unfettered by the formalist constraints of the legalist tradition, the Tribunal *has* been more able than the Court to address the question of justice in the real social context in which it arises between the parties. The conservative, bourgeois *male*, (from whom, as we have seen, the legal profession in general and the judiciary in particular is constituted) sees, from the vantage point of entrenched power and privilege, perhaps more clearly than anyone else, that this "mechanism" for emancipating women poses a "threat to their morality and their interests" (de Beauvoir 1984:24). It is a particularly "threatening" institution as its very existence questions what is still the fundamental dynamic of capitalist exploitation; for the *real* (as opposed to tokenistic) interests of women are not able to be accommodated by capitalism without irreconcilable internal contradiction.

By sacrificing strict legalism, the Equal Opportunity Tribunal has actually managed (albeit tortuously, and generally at great personal cost to the plaintiff (Thornton 1979:180)) to achieve something that approaches "social" justice. It hardly comes as a surprise that its successes have engendered such a strident exhortation of competitive capitalist ideology and demands for a return to strict formalism - for it is clear that the closer we get to the heart of capitalist domination, the more raw a politico-legal nerve we trigger. This explains the almost invariable tradition of appeal from Tribunal decisions (using the most ingenious of legal argument, particularly jurisdictional, to ground the appeal within s 118) - to attempt to re-cast the problem in the Supreme Court, where the formality and generality of the law can be invoked to preclude the qualitatively different interests and characteristics of the parties that the Tribunal was able to take cognisance of.

The existence of this right of appeal has served to force a legalistic flavour on Tribunal decisions - the *Anti-Discrimination Board Annual*

Report 1983/1984 noting that "it is apparent (*from the conduct of parties to complaints*) that they are becoming more aware of the encroachment of legalism into this field".

Thus, if exercised (and indeed, in potential effect), the right of appeal serves to re-formalise the process of dispute resolution, stultify legal creativity (Trubek 1972:749-750), places an almost unmanageable financial burden on the weaker party (usually the complainant - illustrating once again the class invisibility of formalism) and serves to re-introduce that element of judicial conservatism into what we earlier saw to be the "leeways" of judicial interpretation.

Despite such constraints, however, the Tribunal mechanism nevertheless offers the potential to relax the formality, generality and autonomy of the law, and thus to permit the introduction of the qualitatively different interests and social origins of women into the calculus of legal exchange - effectively, thus, "politicising" the law.

The reaction expressed in the following (representative) letter to the *Sydney Morning Herald* as part of the conservative hysteria surrounding the *Jane Hill Case* (*Jane Hill v The Water Resources Commission* (1985) EOC 92 127) provides a clear functional example of how the formality, generality and autonomy of the law contributes to the maintenance of existing socio-productive relations - showing the threat to entrenched interests proffered by a form of law that is, to paraphrase Unger (1983:563) "crack'd open to politics".

> Discrimination
> Sir: If ever there was an event which demonstrated the dangers of introducing the law into the area of human relations, it must surely be the Jane Hill case (*Herald*, May 11).
> In finding for Ms Hill and penalising her employers, the Anti-Discrimination Tribunal, aided by the Premier, has ensured that justice has not only not been done, but it can't even be seen to have been done.
> Apart from a relatively small pecuniary gain by Ms Hill, it is difficult to see any benefits at all which have come from this extraordinary decision.
> Ms Hill will find it impossible to work in a normal work situation without being subjected to considerable suspicion and comment by her workmates.
> The people found by the tribunal as being Ms Hill's tormentors have been left in a curious situation, having been named by the tribunal as the perpetrators of most unsavoury acts upon their victim, but being denied, by the Premier, the opportunity to state their case in a proper court of law.
> Last but not least, the taxpayers of NSW have been collectively fined $35,000 for sexually harassing a person unknown to virtually all of them.

> The precedents set by the Jane Hill case are frightening in their implications. It is obvious that the legislation which created the tribunal could well exacerbate the situation which it sets out to remedy.
> *Sydney Morning Herald*, June 7, 1985

The author's view that "the law" should not be introduced into the arena of human relations presupposes that the ordering of human relations, and the perceptions of self and society thereby engendered, are NOT articulated to the productive base of society. The social relations of capitalism are fundamentalised on the appropriation of the labour of women, the attendant ideological commodification of women that this entails and their necessarily limited public autonomy. The author's position becomes clear; what he is in fact saying is that the interests of this class cannot be permitted substantive legal expression - a view that is perfectly logical if your definition of logic is the logic of capital accumulation. Any development in legal form that allows the substantive (as opposed to the ideological value of token) recognition of these interests must be "frightening in their implications" for the author and those "fellows" of his ilk - the members of those classes possessing the real social and financial autonomy in the capitalist social formation. The rationale underlying his exhortation to re-formalise the dispute - to present it in what he terms a "proper" court of law - thus becomes comprehensible. "Proper", as defined in the *Concise Oxford Dictionary* means "relating exclusively or distinctively to" - and the unspoken point of reference in the the author's use of the term are those interests that we have seen are reinforced by legalism. Further, his comments that the Tribunal decision was one wherein "justice" was not done, and was not seen to be done - has an acid irony to it - inverting the concept of justice by tying it to its formal expression in legalism rather than articulating it to the real social matrix in which disputes between the parties are played out.

Therefore the relationship between "women" and "the law" can only properly be understood by approaching the legal system as a form of "praxis" - that is, as a form of practice that has the express political function of mediating social tension in the interests of capital. There is a certain paradox involved in feminists' attempts to invoke "the law" in the interests of their political emancipation; for as we have seen (its ideological claims to political neutrality and judicial impartiality aside), the methodological and structural characteristics of legalism are functionally related to both reinforcing and reproducing the dynamics predicated at heart on the political, economic and sexual subordination of women.

This article has examined some of the structural barriers in legalism that militate against its use as an instrument of social reform. Women must *prima facie* contend with the principle of formal legal equality when attempting to resolve political grievances through the legal system. By

divesting the dispute of its "political" character – that is, by filling complainant and respondant with an "artificial political equivalence" before the Court – the law relieves itself of having to consider the structural inequities underpinning the matter before it. By refusing (in the perverse interpretation of "*justice*") to recognise variables such as sex, class, private property, occupation and education as causally and evidentially significant, "the law" accords them a *de facto* autonomy and in real terms permits them to continue to "act after their own fashion, and to manifest their particular nature" (Marx 1972: 30). Legalism's insistence on formal equality serves to perpetuate sexual *in*equality – as it "precludes the qualitatively different interests and social origins of *women* from entering into the calculus of political exchange" (Balbus 1977: 576). Formal legal equality – ideologically central to legalism's claim to justice and legitimacy – translates in practical terms to a form of maintaining and preserving sex and economic class relationships, constituting, in short, what Balbus (1973: 7) terms "the political expression of bourgeois class interests". This feature of legalism renders it inherently difficult for "the law" to accommodate legislation that is predicated on the recognition of *structural* inequality. The *Loder Case* (*O'Callaghan v Loder & Anor* ((1984) EOC 92 022–24)) provides what has been perhaps the most highly publicised (but by no means unique) example of the inability of the legal system (even in the less formalistic forum of the Tribunal) to address the very issue that anti-discrimination legislation was intended to ameliorate, despite the extensive and detailed preparation of the complainant's case by her legal advisers. Although adverting to the "highly disparate positions" of the parties, (per Matthews, J) their substantive *political* differences (for example, the lack of education, job security, simple self-confidence and financial standing of the complainant, a lift driver on the lowest grade of public service employment, and the relative wealth, education, job security and political influence of the respondent, the head of the statutory instrumentality in which the complainant was employed) were not treated at law as *causal*, and thus the intention of the legislature was effectively circumvented and the action, abstracted from the political environment in which it was both generated and played out, could only degenerate into a damaging focus on the "moral" character of the complainant herself. Indeed, the decision in the final analysis turned on whether the complainant had made it "*sufficiently*" clear to the respondent that his attentions were "not welcome" (EOC 92 024, 75 516). The decision illustrates clearly that the legal system – even in the less formalistic arena of the Tribunal – has little flexibility to deal with "new" legal concepts; for it is, as Collins notes, intrinsically:

> a structure which insists upon the total immersion in the *individualistic* orientation of the rules and procedures of the common law. These traditional rules are the purveyors of values and the definitions of reality, and not only make lawyers suspicious of all combinations, but they also make it

> difficult to conceive of collective groups as individual legal entities (1982:78,170).

The individualist themes of the liberal legalist tradition render it difficult for it to conceptualise, and give legal expression to, the concept of structural group disadvantage - such as sex (or, for that matter, race, class, etc) - which at heart is the raison d'etre of anti-discrimination legislation.

The alienation of the law - "its control by experts socialised in elite institutions and distanced from the lived reality of everyday life in capitalist societies" (Klare 1977: 132) - constitutes yet another impediment to feminists' attempts to engage the law in either the declaration or protection of civil rights for women. The quintessentially middle class homogeneity of the legal profession serves to ensure that the moral themes and social perceptions of this class pervade women's attempts to employ the law in their political interest - the political interests of the bourgeoisie are necessarily patriarchal. Even at the most basic of levels, the class values of the profession structure feminist engagement with the law by controlling their very *access* to it. For example, the *NSW Task Force on Domestic Violence* (1981) reported that women were fortunate (!) if they were able to locate a solicitor who believed their account of their assault and was prepared to constructively assist them in employing even what limited remedies were available to ameliorate their situation.[12]

Having overcome the hurdle of access, women then have to deal with the fact that the "rights" they are petitioning the Court to recognise will be both defined and articulated by the judiciary - the "most professional" of the professional caste constituted to run the legal system - who have themselves a vested class interest in maintaining the social relations of capitalist production. We have earlier seen how the "legal method" employed by the Courts falls far short of its claim to provide an external standard of legal "correctness", an "ineluctable legal logic" (Stone 1964: 282), which supposedly ensures neutrality and impartiality in the application of the law - claims which ideologically mask what is in reality an interpretive latitude on the part of the bench. Through the discretion outlined in legal reasoning - the "leeways of choice" - legalism is able to incorporate a value input from that class that is constituted to administer the system, and thus has an interpretive bias that reflects the world view of the bourgeoisie.

"Patriarchy" is thus incorporated into the very *fabric* of the law by the collapsing together of the class character of the legal profession and the interpretive discretion inhering in "legal reasoning" - a bias that has been effectively obscured by the ideological veneer of neutrality and judicial impartiality.

Legalism provides an essentially static and innately conservative model of dispute resolution in its resolute commitment to binding,

pre-determined rules, which pre-exist the dispute and which serve to define the relationship between the parties before the matter even presents itself before the court. Such prescriptions (that is, as considered, the uncorroborated evidence rule) - are antithetical to a legal process that aims to incorporate evolving social mores into the law as it places these prescriptions outside the calculus of legal exchange, and serves, as Tribe observes, to deny the litigant (that is, the woman rape victim) any explanation of the state's assumptions about her reliability and credibility. Indeed, Tribe further argues that such a method for dealing with social tension is inconsistent with anything but "an unacceptably atomistic, anomic and anticommunal conception of social life" (1975:311) - a conception that is given its practical expression in the social relations of capitalist production. The "fixed rule determinism" of legalism serves to render it more difficult for women to successfully employ the law in the resolution of their political grievances as the conduct of the trial can be tilted against them before the matter is even given a hearing.

Finally, we saw the hierarchical structure of the Court system plays a key role in constraining any grass-roots pressures for a more substantive expression of justice through the legal system. If the lower courts exercise too much latitude with the rules of evidence and procedure - that is, if they take too broad (or even "political") a cognizance of the case before them - the decision will be held to be flawed at law and will be re-cast on appeal to a "higher" court where the formality and generality of the law can be invoked in the name of "justice" and the legalistic self-coherency of "the law" reinforced.

The law constitutes the sole basis of legitimate domination and normative order in Western capitalist societies - and to it, and to it alone, is entrusted the ultimate responsibility for mediating social tension. "Legalism" *purports* to perform this task (in the grand positivist tradition) neutrally and impartially - allegedly serving to merely "constitute conventions which set the boundaries between particular interest so that they do not destroy each other" (Unger 1975:72). This definition of the *function* of the law - of ideological centrality to the legitimacy of the capitalist state - is *not*, as we have seen, vindicated in practice. Beneath this facade, we have found *in fact* a dispute resolution process that is intimately involved in reinforcing and reproducing the sex and economic class relations of capitalism. It provides a mechanism for resolving social tension that confers a *de facto* advantage to entrenched social, sexual and economic interests. It provides an interpretive perspective that reflects the (patriarchal) world view of the bourgeoisie, and its reliance on fixed and determinate rules, which pre-exist the dispute, serves an innately conservative function as they determine the relationship between the parties before the matter presents itself for adjudication and further provides a legal technique that is unable to incorporate evolving social mores into legal principle at a responsive and democratic level, that is, the function of this legal system is to stifle, or at least filter into

insignificance, any claims for social justice made upon it by women. Although it is true, as Thompson (1977:257-267) notes, that the ideological function of the law requires that it occasionally give substantive effect to its claims to equity and justice (which the women's movement has, it is acknowledged, had past cause to be thankful for), its *general*[13] function is to structurally frustrate the attainment of sexual liberation through the legal process.[14]

These structural features collapse together to constitute a form of practice through which the social order of capitalism is reproduced across time; serving to maintain and perpetuate and, indeed, legitimate patriarchal domination under its veneer of formal justice, procedural equity, neutrality and judicial impartiality. Expressed within such a framework, it is hardly surprising that feminist litigators have not, as observed by Rifkin, "challenged the fundamental patriarchal social order" (1983:87) in spite of the fact that the practice of law now includes experienced and talented feminist litigators and academics. Rather than reflecting some sex-typed lack of legal ability, feminist difficulties in engaging the law in the struggle against patriarchy are attributable to the structure of liberal legalism - a *form* of law which for women (to borrow a term used by Connell in another context) effectively constitutes a "praxis trap" - that is, it is "a situation in which people (ie feminist litigators and academics) do things for good reasons and skilfully, in situations that turn out to make their original purpose *difficult* to achieve" (Connell 1983:156). Feminists will continue to find the pursuit of "justice" (as we understand the term) within the parameters of legalism to be a chimera - always promised, never realised - for we are attempting to employ in our interests a legal framework that has the express political function of perpetuating the powerlessness of women, and which institutionally reinforces the patriarchal logic of capital accumulation.

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

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

Endnotes

I wish to express a debt of gratitude to Joan Rattray and Lynette Wagland for their encouragement and assistance in putting this paper together.

1. Although an analysis of this inter-relationship is beyond the scope of this article, it is a nexus that is of fundamental importance in developing a feminist critique of law. It is well addressed, inter alia, in Connell (1983:33-49), Hartmann (1976), Connolly (1979).
2. Indeed, as Pashukanis notes, "It was not for nothing did Engels (in Juristensozialismus, Neue Zeit, 1887) call the juridical way of looking at things the classical world view of the bourgeois, a kind of 'secularisation of the theological', in which human justice takes the place of the church" (1978:23).
3. See, for example, Hartmann (1976), Game and Pringle (1983), Garmanakow (1983), Connolly (1979), Dixon (1978), Kramar (1983), Branson and Miller (1979), Thornton, (1985).
4. Indeed, Hunt draws attention to Weber's observations in Law in Economy and Society (1954) that "formal justice guarantees the maximum freedom for interested parties to represent their formal legal interests (1978:121). But because of the unequal distribution of economic power, which the system of formal justice legalises, this very freedom must, time and time again, produce results which are contrary to religious ethics or political expediency or popular democratic interests".
5. Thus, mysogynism is incorporated into the very fabric of the law by the collapsing together of the class nature of the legal profession (particularly the judiciary) and the interpretive discretion that as we shall later see Stone (inter alia) has shown is a structural characteristic of formalism (1964). Examples abound in every jurisdiction in which women come into contact with the law, for example:

> Mr Justice Slynn: "It does not seem to me that the appellant is a criminal in the sense in which that word is frequently used in these courts. Clearly he is a man who, on the night in question, allowed his enthusiasm for sex to overcome his usual behaviour" (unreported decision, Old Bailey, April 1976).
>
> Button v Button: "The wife does not get a share in the House simply because she cleans the walls or works in the garden . . . Those are the sorts of things a wife does without altering title to, or interest in, the property" (1968 1 All ER 1064, CA).

> Peake v Automotive Products Ltd: "It would be very wrong, to my mind, if [the EEO] statute were thought to do away with chivalry and courtesy which we expect mankind to give to womankind" [1978] 2 All ER 106 per Lord Denning MR.
>
> R v El Vino: "I must acknowledge at the outset that it appears to me trivial and banal even when topped up with legalistic froth. In light of the history those claims [of discrimination] are in my view artificial and pretentions; but the industrial Tribunal thought otherwise and their only concern appears to have been as to how great a sum they could award to this excessively outraged victim of sex discrimination" [Rept NCCL Rights for Women Publication] Ct of Appeal, 24 July 1981 per Lord Shaw.

6. For example, for a profile of that "pinnacle" of judicial achievement - an appointment to the High Court - see Neumann, where he states:

> The typical high court judge is a male, white protestant. . . . of British ethnic origins. He is from upper middle class . . . (and) usually goes to a high status high school (usually private) and then to Sydney or Melbourne University where he has a brilliant academic record. . . . Even if apolitical, High Court Justices usually have conservative inclinations (1973:105).

7. The middle class hegemony of the legal profession in Australia has been clearly empirically documented, for example, by Anderson and Western (1970), Goldring (1976) and Heatherton (1981) - and these studies cast an interesting light on the profile and status of women within the profession. Although there has been a marked increase in the number of women qualifying as lawyers in the last decade, this "advance" must be put in an overall professional perspective. For example, Matthews demonstrates that women are still concentrated in the lower-status and lower-remunerated positions in the professional hierarchy and Heatherton observes that female solicitors are twice as likely as their male counterparts to be employee solicitors, three times as likely to earn less than the mean income for the profession and are three times less likely to specialise in "high-status" areas of the law such as taxation, commercial and company law. It hardly comes as much of a surprise that women are concentrated in the lower echelons of both the practising profession and the judicial hierarchy, effectively in both kept distanced from various loci of power and influence [(1982) 56 ALJ 634].

8. This point is discussed by Pat O'Malley in Law, Capitalism and Democracy: A Sociology of the Australian Legal Order (1983:76 ff).

9. It was decided on point in this case that there was no proscription preventing a woman from becoming an overseer of the poor so long as she satisfied the statutory requirement of being a "substantial landholder".

10. Archbold, a leading common law test on Criminal procedure, issues the corroboration warning in the following terms:

> No particular formula is required but the jury should be warned in plain language that it is dangerous to convict on the evidence of the complainant alone, because experience has shown that female complainants have told false stories for various reasons, and sometimes for no reasons at all. If a proper warning has been given the jury may convict on the complainant's uncorroborated evidence if they have no doubt that she is speaking the truth.

11. Indeed, as Wilson (inter alia) has illustrated the crime of rape is notoriously under-reported (1978).
12. The Report documents a general inadequacy on the part of the legal profession in responding to this pervasive social problem - citing some (unfortunately typical) respondents' experiences when attempting to obtain legal assistance:

    |1| "The cruellest words I personally received were from a legal aid solicitor who said 'it mustn't have been too bad to have lasted seven years' - it was hell", and

    |2| another was told "you have three young children and no immediate family - go back and make the best of it" (1981:42).

13. As Fraser notes:

    > Power and legal authority are never, even in their most alienated forms, a one directional force. Any under class, no matter how oppressed, is capable of having its needs and interests recognised and given formal legal expression to some degree (1976:44).

14. That is, it militates against the successful use of the law as a mechanism for equalising the power between the sexes, for unfettering the restrictions in women's public status, and for liberating them from the sexual fetishisation that inheres in the fabric of capitalist society.

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