

DECONSTRUCTION, FEMINISM, AND LAW: CORNELL AND MACKINNON ON FEMALE SUBJECTIVITY AND RESISTANCE

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*In examining familiar things we come to such unfamiliar conclusions that our very language is twisted and bent even as it guides us. Writing “under erasure” is the mark of this contortion.*¹

*What, then, is truth? A mobile army of metaphors metonymies, anthropomorphisms . . . truths are illusions of which one has forgotten that they are illusions coins which having lost their stamp, are now regarded as metal and no longer as coins.*²

*Yet a gaze averted from the beaten track, a hatred of brutality, a search for fresh concepts not yet encompassed by the general pattern, is the last hope for thought. In an intellectual hierarchy which constantly makes everyone answerable, unanswerability alone can call the hierarchy directly by its name.*³

*Sexual difference is one of the major philosophical issues of . . . our age. According to Heidegger, each age has one issue to think through, and one only. Sexual difference is probably the issue in our time which could be our “salvation” if we thought it through.*⁴

I. INTRODUCTION: POSTSTRUCTURALISM AND LAW

In 1967, Jacques Derrida published three philosophical works that altered the critical and philosophical landscape of the late twentieth century. Those works—*Of Grammatology*, *Speech and Phenomena*, and *Writing and Difference*—attempted to rethink the very fabric of thinking itself, and aimed at displacing a mode of reasoning that Derrida argued intrinsically required dominance as a condition of its operation.⁵ In brief, Derrida argued that Western philosophy, and by inference Western modes of rationality and being, were based on a desire

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1. Gayatri Chakravorty Spivak, *Translator’s Preface* to JACQUES DERRIDA, *OF GRAMMATOLOGY* at xiv (Gayatri Chakravorty Spivak trans., The Johns Hopkins Univ. Press, First Am. ed. 1974) (1967).

2. FRIEDRICH NIETZSCHE, *On Truth and Lying in a Non-Moral Sense*, in *THE BIRTH OF TRAGEDY AND OTHER WRITINGS* 146 (Raymond Guess and Ronald Speirs eds., Ronald Speirs trans., 1999) (emphasis added).

3. THEODOR W. ADORNO, *MINIMA MORALIA* 67-68 (E.F.N. Jephcott trans., NLB 1974) (1951).

4. LUCE IRIGARAY, *AN ETHICS OF SEXUAL DIFFERENCE* 5 (Carolyn Burke & Gillian C. Gill trans., Cornell Univ. Press 1993) (1984).

5. JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., The Johns Hopkins Univ. Press First Am. ed. (1974) (1967); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., The Univ. of Chicago Press 1978) (1967); JACQUES DERRIDA, *SPEECH AND PHENOMENA* (John Wild ed., David B. Allison trans., Northwestern Univ. Press 1973) (1967).

to suppress difference in the name of identity. Reason, for Derrida, was a form of desire, and was intimately linked with perpetual violence.⁶

Derrida's philosophical investigations undermined the idea of reason as a neutral mechanism which could lead to universalizable and "true" conclusions. Indeed, Derrida showed that Western thought was based upon a logical hierarchy. Rather than discovering that our supposedly value-free conceptual terms could be applied without bias, Derrida showed that bias was part of their very structure.⁷ He spent much of his career illustrating the ways in which a series of conceptual terms repeated themselves in Western thought and lived experience, delimiting our very capacity to think in novel ways.⁸ For Derrida, concepts are *things*, as tactile in their effect as earth and water, as restrictive as chains, and yet as invisible as ether.⁹ His project makes the invisible structures of thought, inquiry, and self-identity visible, showing us how what we often hold to be a condition of freedom in fact turns out to be a yoke of enslavement.¹⁰

This insight is at the foundation of postmodern philosophy, a critical *strategy* (not a system or method) aimed at unsettling all modes of transcendental, fixed, or essentialist thought. It attacks the hegemonic foundationalism that lies at the base of Western thought. This strategy, also called deconstruction, is thus a kind of philosophical, critical and social *practice* aimed at rethinking the world. For many, this is deeply threatening. But, as a means of exposing the structurally embedded power relations that inhere in the deepest tissue of our daily lives, deconstruction is also a method of reinventing the world. To some, it is thus deeply utopian.¹¹ Moreover, deconstruction

6. See DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 91-92.

7. *Id.* at 288-289.

8. See generally DERRIDA, OF GRAMMATOLOGY, *supra* note 5, at 27-73. "The entirety of Derrida's philosophical program was aimed at questioning what he called the "metaphysics of presence" inherent in Western thought. That notion, according to Derrida, privileged models of thinking based on transcendental – and thus finally unprovable – postulations and certitudes. To put the matter more bluntly, Derrida argues that Western metaphysics and logic are based upon an imaginary sphere of 'full presence,' where language would become transparently clear, and in which its relation to objects was unambiguous. In addition, he points out that this model tended to privilege the spoken word over the written word, since the former always carried with it the possibility of the autonomous "speaking subject" who could in fact give full presence to any utterance. The problem with these presumptions, says Derrida, is that they tend to *erase* all cultural biases involved in this process of thinking, or worse, they simply ratify the general tendencies inherent in a culture's thinking. Hence his notion of phallogocentrism, where Western reason is disclosed as a decidedly masculine – and thus *nonobjective* – mode of thought."

9. *Id.* at 158: "[R]eading . . . cannot legitimately transgress the text towards something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the text whose content could take place, could have taken place outside of language, that is to say, in the sense that we give here to that word, outside of writing in general . . . *There is nothing outside the text.*" *Id.* at 158.

10. See, e.g., CHRISTOPHER NORRIS, THE CONTEST OF FACULTIES 2-5 (1985).

11. Nancy Fraser & Linda J. Nicholson, *Social Criticism without Philosophy: An Encounter Between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19, 26-27 (Linda Nicholson ed., 1990). Derrida himself would object to this usage. He holds that utopianism is a vestige of what the philosopher Martin Heidegger calls "onto-theological thought," where the wish for a plenitudinous realm of unfettered life—a kind of Eden of absolute epistemological and ontological bliss—presupposes a transcendent position that is unreachable for human thought. In addition, Derrida points out that such transcendental thought is a mode of forgetting our locatedness or our situatedness, and that it is thus part of an Enlightenment legacy that seeks to "paper over" or

rethinks the very foundations of thought, not merely its various “superstructural” (surface) manifestations. It is this deep radicalism that has attracted many feminist theorists, who saw in the universalist, egalitarian, and entirely noble promises of modern liberal-democratic thought a troubling distortion of the experience of being a woman.¹²

Among contemporary legal philosophers, no one has more thoughtfully engaged in the ongoing discussion surrounding these issues than Drucilla Cornell. She has attempted to bring together postmodernism and legal feminism in an effort to radically re-imagine what it is to be a woman. In pursuit of this goal, she powerfully criticizes the essentialism of law professor Catherine MacKinnon’s equally ardent critique of sexual difference in the legal arena, and argues that it is only with a new form of utopianism that women will be able to move beyond the constraints of masculine legal and social theory.¹³ But Cornell also argues that it is *impossible* to merely reject the contemporary construction of the feminine—precisely the position MacKinnon seeks to promote. As such, Cornell argues for a unique brand of utopianism: one that recognizes the limits of imagination in its very effort to think in new and transgressive ways. It is this dialectic—between “alterity” (thinking otherness) and “embeddedness” (our restriction to historical circumstances)—that gives life to Cornell’s work.¹⁴

This discussion is divided into three distinct sections. First, I shall attempt to outline the issues that distinguish modern from postmodern thought, a description that will also outline some of the major tenets and limitations of liberalism. Second, I will describe the ways in which postmodern thought is

“steamroll” our own relation with our rational constructs. An example is the notion of the feminine itself, which Derrida has attempted to show is not the fulfillment of “Woman” as a semi-divine entity, but the denigration of *women* under the veil of totalizing rationalism. Derrida’s own ambivalence is expressed in the following commentary on the dangers and omissions of utopian thinking – which must in principle and by necessity forget the particular in the name of the universalizeable – from a 1998 interview: “Although there is a critical potential in utopia which one should no doubt never completely renounce, above all when one can turn it into a motif of resistance against all alibis and all ‘realist’ and ‘pragmatist’ resignations, I still mistrust the word. In certain contexts, utopia, the word in any case, is all too easily associated with the dream, with demobilisation, with an impossibility that urges renouncement instead of action. The ‘impossible’ of which I often speak is not the utopian, on the contrary it lends its own motion to desire, to action and to decision, it is the very figure of the real. It has duration, proximity, urgency.” See Interview by Thomas Assheuer with Jacques Derrida, *Intellectual Courage: An Interview*, available at http://culturemachine.tees.ac.uk/Cmach/Backissues/j002/Articles/art_derr.htm.

12. *Id.* at 25-35.

13. DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW*, 119-164 (1991). Cornell describes the project in the following way: “The necessary utopian moment in feminism lies precisely in our opening up the possible through metaphoric transformation . . . Utopian thinking demands the continual exploration and re-exploration of the possible and yet also the unrepresentable. Deconstruction reminds us of the limits of the imagination, but to recognize the limit is not to deny the imagination. It is just that: the recognition of the limit. . . Without utopian thinking, however, feminism is inevitably ensnared in the system of gender identity that devalues the feminine. To reach out involves the imagination, and with imagination, the refiguration of Woman.” *Id.* at 169.

14. Oddly enough in this context, Cornell’s work has many affinities with the work of American philosopher John Dewey, whose notion of situatedness as a ground of limit *and* possibility was a central tenet in his work. See JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY*, in 2 *THE ESSENTIAL DEWEY* 171-172 (Larry A. Hickman et al. eds., 1998).

attractive to many feminist thinkers. Third, I will outline Cornell's project in more specific terms, particularly with reference to her dialectical understanding of utopianism. This will entail a discussion of what it means to "rethink" what it is to be a woman, as well as a discussion of some of the central elements of her disagreements with Catherine MacKinnon. In that section I hope to describe the ways in which such attempts to avoid the dominating effects of male-centered reason underscore the difficulties of such a project.

II. MODERN AND POSTMODERN THOUGHT

A. Origins of Modernism and Modernist Thought

What is postmodernism? In the most general sense, it is a philosophical and critical posture that has ceased to aim at the articulation of a universal conception of truth. This is a marked departure from traditional conceptions of philosophy and social criticism—a posture I will describe as the classical approach. From Plato to Rousseau and beyond, the aim of philosophy has been to articulate a conception or method of truth that would be free from contingency.¹⁵ All truth-claims in such a classical system would be *intersubjective*—applicable with equal validity in any context. To reach such a goal, philosophical discourse sought again and again to subject itself to critical doubt in order to discover a site of critical and interpretive certainty. This is most fully evidenced in Descartes' promulgation of the *cogito*, where the philosopher, subjecting himself to radical thought, discovers that his own subjective capacity for doubt remains stable even as all else is placed in question. This "residual" fact leads the philosopher to reconstruct the world on the basis of the certainty of subjective experience. Hence the *cogito*: "I think therefore I am," from which an entire world, based in rational thought, was held to follow.¹⁶

This quest for universal truth often led to an inquiry into the "nature" of human beings: again and again, philosophical discourse sought to uncover and explain the fundamental truths of such entities as political life, personhood, and reason itself.¹⁷ Such a tendency (which Theodor Adorno suggests is nothing more than a desire to master nature and control things around us) reaches its apex in the Enlightenment. In that period—one whose effects are still felt today—a model of gender-neutral reason assumes predominance.¹⁸

15. DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 251-277.

16. See generally RENE DESCARTES, *Meditations on First Philosophy*, in PHILOSOPHICAL WRITINGS 59 (Elizabeth Anscombe & Peter Thomas Geach eds. and trans., 1954).

17. MAX HORKHEIMER & THEODOR ADORNO, DIALECTIC OF ENLIGHTENMENT 3-4 (Herder & Herder eds., John Cumming trans., 1972) (1944). The language of Horkheimer and Adorno is scathing in its critique of what they perceive as Enlightenment rationality run amok in the modern world: "In the most general sense of progressive thought, the Enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disaster triumphant. The program of the Enlightenment was the disenchantment of the world; the dissolution of myths and the substitution of knowledge for fancy. . . [T]he human mind, which overcomes superstition, is to hold sway over a disenchanted nature. . . [But] what men want to learn from nature is how to use it in order wholly to dominate it and other men. That is the only aim. Ruthlessly, in despite of itself, the Enlightenment has extinguished any trace of its own self-consciousness." *Id.*

18. See *id.* at 4.

Philosophical discourse is transformed from critical inquiry into Reason itself.¹⁹ Reason comes to be understood as an instrumental methodology aimed at discovering unalterable truth. Most importantly, as Reason is made universal, it is also made unassailable. In this new formulation, the connection of reason with power—and thus with *the position of the male*—is disguised. As a result, any complaint against “reasoned” decision-making becomes a kind of “unreason,” madness, or (in the age of medical science), a mode of insanity.²⁰

B. Modernism Realized: Characteristics and Consequences

The full flowering of Enlightenment rationality (Reason in the transcendental sense) occurs when the methods of inquiry most suited to the totalizing imperatives of Enlightenment thought—the transcendental impulse, one might call it—intersect with the development of various technological powers to give rise to what Foucault has called the “human sciences.”²¹ This is the advent of the modern era, which begins around 1800.²² Here, thinking embraces technology, in the name of progress, to form the fundamental grid in which we still live today. Utilitarian thought prevails, and technocratic “expertise” becomes a standard for thinking through the important issues of social life.²³

The actual causes of the birth of the modern era are manifold and beyond the scope of this analysis. But certain features of the modern period are

19. See *id.* at 9.

20. See generally MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (Richard Howard trans., Vintage Books 1988) (1965). Foucault makes the point that what was once held to be merely aberrant behavior becomes increasingly codified and institutionally, medically, and legally organized in the early years of the 19th century. The effect of this transformation includes, among other things, the creation of a medical-juridical conception of “insanity” (as opposed to mere eccentricity), along with the ground necessary for the notion of the “hysterical female.”

21. See MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 303-304 (Vintage Books 1994) (1966). Foucault argues that linear, Enlightenment, and humanist models of progress fail to recognize that radical ruptures in patterns of thought occur from time to time throughout history, raising serious questions about the continuity of reason. More specifically, he argues that the “human sciences”—what might best be understood as the sciences that take the epistemological figure of “man” as their starting point, are relatively new, and that the appearance of this new figure—somewhere around 1800—marks a radical departure in Western thought. In Foucault’s words: “Before the end of the eighteenth century, *man* did not exist—any more than the potency of life, the fecundity of labour, or the historical density of language. He is a quite recent creature, which the demiurge of knowledge fabricated with its own hands less than two hundred years ago.” *Id.* at 308.

22. *Id.* at xii.

23. See HORKHEIMER & ADORNO, *supra* note 17, at 7. “In advance, the Enlightenment recognizes as being and occurrence only what can be apprehended in unity: its ideal is the system from which all and everything follows. . . . Bourgeois society is ruled by equivalence. It makes the dissimilar comparable by reducing it to abstract quantities. To the Enlightenment, that which does not reduce to numbers, and ultimately to the one, becomes illusion; modern positivism writes it off as literature.” *Id.* See also ADORNO, *MINIMA MORALIA*, *supra* note 3, at 21, where Adorno describes the way the cult of the administrative expert has melded with an impulse toward pragmatism to undermine alterity in thinking: “The departmentalization of mind is a means of abolishing mind where it is not exercised *ex officio*, under contract. . . . Thus, is order ensured: some have to play the game because they cannot otherwise live, and those who could live otherwise are kept out because they do not want to play the game.”

apparent and are in need of brief elaboration. As suggested above, perhaps its primary feature is the tendency to assume the intercontextual validity of truth claims. A claim about “man,” for instance, would automatically be understood to be a claim about *people* in general. Initially, such a claim might exclude women.²⁴ Later, especially in liberal thought, such a claim might include women, but only as a subset of men. The language of rights, so vital to the constitutional history of the United States and liberal-democratic political philosophy, is a powerful legacy of such thinking. The idea that universal claims about “man” might be gendered, or skewed by the position of the speaker, or by the product of social, racial, or class affiliation was not merely unconsidered, but *unthinkable*. As Foucault puts it, there was simply no epistemic space for such considerations.²⁵ Further still, the methodology of Reason would prevent non-universalizable claims from attaining the status of being “true.” Only certain kinds of statements could be made if they were to be taken seriously. All else was nonsense: “womanly,” as Wordsworth might say.²⁶ Foucault describes the disciplinary and coercive character of modern reason in striking fashion in his famous essays, *The Discourse on Language*:

[I]n order to belong to a discipline, a proposition must fit into a certain type of theoretical field. . . . In short, a proposition must fulfill some onerous and complex conditions before it can be admitted within a discipline; before it can be pronounced true or false it must be, as Monsieur Canguilhem might say, “within the true.”²⁷

Foucault’s point is to illustrate the simultaneously constructive and restrictive powers of disciplines. Disciplines not only prevent one from saying certain things (a judge granting a directed verdict because the sun is shining), but they also grant the very ground of speaking itself (the very authority of the judge to speak the language of the law). An example of the latter is seen in the language of rights itself: to make a claim of right is to make a claim in the name of a form of essentialist conclusions about what it is to be a person. The very transparency of that claim—the fact that it is a *mode* of arguing that even the layperson engages in—is illustrative of its productive force, as well as of the scope of modern thought. Modern thought has colonized the field of that which is “in the true.” As a result, we not only *speak*, but *think* that language.

Jean François Lyotard has further illustrated the contours of modernism in his short book, *The Postmodern Condition: A Report on Knowledge*.²⁸ Like Foucault, he points out that modern thought tends towards transcendental claims. As evidence of this, he cites the work of such 19th century thinkers as Hegel, Marx, and later, Freud. In the case of each of these thinkers, we find the assertion of fundamental truths about the essential nature of human being. For Hegel, this

24. See Sandra Harding, *Feminism, Science, and the Anti-Enlightenment Critiques*, in FEMINISM/POSTMODERNISM, *supra* note 11, at 83, 84-89 (Linda Nicholson ed., 1990).

25. See FOUCAULT, THE ORDER OF THINGS, *supra* note 21, at 346-48.

26. WILLIAM WORDSWORTH, *Preface to Lyrical Ballads*, in THE PRELUDE: SELECTED POEMS AND SONNETS 1, 13 (Carlos Baker ed., Holt, Rinehart & Winstron, Inc. 1954) (1800).

27. MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE OF LANGUAGE 223-224 (A.M. Sheridan Smith trans., Pantheon Books 1972) (1971).

28. JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984) (1979).

truth resided in Reason itself. The movement of all human history was understood as the unfolding of reason on the path absolute truth—or what Hegel refers to as “thought knowing itself.”²⁹ For Marx, human nature was linked to productive power.³⁰ One’s laboring capacity was the essence of personhood, and the truth of the individual could only be realized through recapturing this primary power.³¹ Finally, for Freud, all human experience was linked to the unfolding of desire. To be, for Freud, was to be in the midst of desire and its Other—repression.³²

All three thinkers—so emblematic of 19th century thought—share an important tendency: they all presume to speak of the essential nature of human being. As such, they invoke the tendencies of modern thought described above. Lyotard, however, suggests that what distinguishes such thinkers, and what marks them as modernists, is their tendency to engage in the production of “grand narrative” or what he elsewhere calls “metanarrative.”³³ For Lyotard, metanarrative is the defining characteristics of modern thought; further, it coincides with placing oneself in the privileged position of the metasubject.³⁴ The end result is the production of an abstract subject, the subject as it is defined, for example, in the language of the United States Constitution—or in MacKinnon’s *Feminism Unmodified*.³⁵

Perhaps more significantly, Lyotard argues that these metanarratives all aim at their own legitimation.³⁶ In the increasingly secular world of early 19th century industrialization, the substance of theological narrative may have subsided, but the form remained.³⁷ That is, religious belief may have diminished, but religiosity in belief did not. Hence the masculine worship of science as a new religion. Into this form was inserted the content of the new metanarrative, one that aimed at establishing the supremacy of the new siblings, *techne* and *logos*—practical and abstract reason, respectively.³⁸ In turn, thinking ultimately becomes technology, a method of active manipulation and coercion,

29. See generally, G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT (A.V. Miller trans., Clarendon Press 1977) (1952).

30. Karl Marx, *The Grundrisse*, in THE MARX-ENGELS READER 222-223 (Robert C. Tucker ed., 1978).

31. See Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 74-79 (Robert C. Tucker ed., 1978).

32. See SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS, XX, 265-66 (James Strachey ed. and trans., 1965) (1953). For an excellent introductory discussion of Freud’s conception of desire as the fundamental feature of human existence, see ELIZABETH WRIGHT, PSYCHOANALYTIC CRITICISM, 9-36 *et passim* (1984).

33. LYOTARD, *supra* note 28, at xxiv. Lyotard’s phrases the issue as follows: “Simplifying to the extreme, I define *postmodern* as incredulity towards metanarratives . . . To the obsolescence of the metanarrative apparatus of legitimation corresponds, most notably, the crisis of metaphysical philosophy and of the university institution which in the past relied on it.” *Id.*

34. *Id.* at 34.

35. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

36. LYOTARD, *supra* note 28, at 27, 35. Lyotard ironizes the very notion of truth as nothing but the effort at legitimation in the following passage: “True knowledge . . . is always indirect knowledge; it is composed of reported statements that are incorporated into the metanarrative of a subject that guarantees their legitimacy.” *Id.* at 35.

37. *Id.* at 30.

38. See *id.* at 30.

but of a sort so compellingly effective in its aims as to eliminate defiance. After 1800, to be non-scientific is to be non-rational. It is, in short, to be mad. And thus is the sphere of reason both extended (to virtually all spaces of human experience) and limited (now, only certain things count as utterable “within the true”). Most importantly, women are not “within the true.” They are a symbol and manifestation of the residue of man. As Linda Nicholson puts it:

For Lyotard, these metanarratives instantiate a specifically modern approach to the problem of legitimation. . . Thus, in Lyotard’s view, a metanarrative is *meta* in a very strong sense. It purports to be a privileged discourse capable of situating, characterizing, and evaluating all other discourses but not itself be infected by the historicity and contingency which render first-order discourses potentially distorted and in need of legitimation.³⁹

The virtues of metanarrative, particularly in the legal sphere, may well be apparent and compelling. In Rousseau’s *Social Contract*,⁴⁰ his argument is attractive for the simple and inexorable reason that it is intended to be universal in its application. It is therefore ineluctably democratic in its reach, if not in its content. Mill’s *On Liberty* is a similar metanarrative.⁴¹ There, the sovereignty of the individual over himself (the masculine case is of course important here, particularly for the faultless and nonreflective blindness it illuminates) is asserted as a vital element in the struggle against political tyranny.⁴² But the notion of “the individual” that drives such an assertion is left uninterrogated. Why? For the simple reason that Mill presupposed, as someone “in the true,” the metanarrative character of his insights. To be true in any meaningful sense, a statement had to be true in a universal sense, particularly when such statements referred to subjective identity.

There are problems with such a theory, of course. First, there is no way in which individuals may be subsumed under a single descriptive category without doing violence to the notion of the “individual” itself. From a perspective that emphasizes the particularity of each individual, the notion of universally extended “individual rights,” as a shared bundle of rights attributable to and owed each individual, is untenable, particularly given the fact that every individual is, in principle and practice, unique. Further, such theories presuppose much about the underlying shared principles and practices of persons within the culture. While a general theory of “man” might work within a society in which cultural presumptions—and especially notions of selfhood—were uniformly shared, it would seem to fail where such general agreement were not in place. And one is hard pressed to imagine such a place. How these problems unfold is at the center of postmodern thought.

39. Fraser & Nicholson, *supra* note 11, at 22.

40. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Charles Frankel trans. and ed., Hafner Publishing Company 1947).

41. See John Stuart Mill, *On Liberty*, in *ON LIBERTY* (David Bromwich & George Kateb eds., 2003).

42. George Kateb, *A Reading of On Liberty*, in *ON LIBERTY* 46-63 (David Bromwich & George Kateb eds., 2003).

C. Lyotard's Elaboration of the Postmodern

In *The Postmodern Condition*, Lyotard suggests that the universalizing tendencies of modernist thought are no longer compelling.⁴³ For varying reasons, he tells us, the modernist impulse towards the metanarrative has been debunked.⁴⁴ The legitimating function that the metanarrative once served has been replaced by more local, plural, and immanent “stories” of personhood and culture—or what I shall call from this point the histories of the public and private subject. Thus individuals no longer seek—at least according to Lyotard’s version of postmodernity—to “verify” their own subjective conditions in a larger narrative. As such, postmodernism is seen as a social and political posture that is open to multiplicity and diversity in a radical manner: rather than attempting to collect and coerce individuals within the rubric of a grand theme, be it one of liberalism, Marxism, or Feminism, it eschews such thematization altogether.⁴⁵ Postmodernism is thus a mode of thinking and being that is freed (at least in principle) from the tutelage of transcendental truth or certitude. It is also playful, experimental, and avant-garde; it aims not at the re-establishment of a new “Truth,” but at the dissemination of multiple truths. Postmodernism is the philosophy of difference and multiplicity.

The idea behind such a shift harkens back to a claim made earlier: systems of thought and the structures of knowledge are *real* in the strong material sense of that word. To live in a culture is to inhabit structures of being so pervasive yet invisible as to live within a doubly enchaining prison house: not only are we entrapped by these structures, but we fail to notice that we are entrapped, except perhaps in some deep, inarticulate sense. Such is the genius, and horror, of modern culture from the Lyotardian postmodern vantage point. Culture is voracious and silent at once.

To use the language of Thomas Kuhn, we inhabit large paradigms of scientific and social knowledge.⁴⁶ These paradigms are deeply entrenched, difficult to dislodge, and change only rarely, though they do so with astonishing rapidity when the time comes. In the case of legal thinking, this perspective is

43. LYOTARD, *supra* note 28, at 3-4.

44. *Id.* at 11.

45. *Id.* at 15. One hesitates to say “movement” in this context, as much of the impulse behind postmodern thought is to avoid such globalizing tendencies. Christopher Norris explains this desire as follows: “Deconstruction [and by extension postmodernism] can be seen as a vigilant reaction against [the] tendency in structuralist thought to tame and domesticate its own best insights.” CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 1-2 (1991). See JACQUES DERRIDA, *WRITING AND DIFFERENCE*, *supra* note 5, at 278: “Perhaps something has occurred in the history of the concept of structure that could be called an ‘event,’ if this loaded word did not entail a meaning which it is precisely the function of the structural—or structuralist—thought to reduce or to suspect. . . . What would this event be then? Its exterior form would be that of a *rupture* and a redoubling.” To use the term “movement” would be to enlist the service of a credo or identifying statement of principle at the core of postmodern discourse. Such a step would inevitably serve to dislodge and expel precisely those alternative voices and visions that postmodern thought is intended to make audible and visible. Hence the dilemma: to some, postmodernism is a theory without a theoretical explanation for itself (hence nonsensical); to others this absence of theoretical strictures entails utter anarchy in critical thought (postmodernism as subjectivism gone wild); while to others the absence of a theoretical frame is the virtuous consequence of inhabiting a cultural epos in which grand narrative explanations have (thankfully) exhausted themselves.

46. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43-51 (1962).

particularly compelling. Law is, in effect, the single most powerful metanarrative of culture. Its “truth,” in the sense of the validity of its role and authority in culture, is unassailed even at those moments of its most hideous excesses. “Law” as a principle and practice of guiding human behavior is never in question. What receives questioning, instead, is the function—the performative effectivity—of particular laws. But law as metanarrative remains unchallenged. As such, the metanarrative, with all its coercive, reductive tendencies, and especially with its claim to value-neutrality, continues in its power to deform those subjects who live within it. A woman, for instance, held up to the cold cunning of law, is not a woman; she is a subject.

Lyotard’s *Postmodern Condition* challenges such grand assumptions, and it is perhaps in this light that one can see the attraction of postmodern thought to feminist theory. Feminists have again and again attempted to offset, through practical as well as theoretical engagements, the metanarratives that they sense surrounding and entrapping them as women. Feminists—like others who have felt the hammer blows of mainstream culture—have learned to be deeply distrustful of large theory. Lyotard echoes this in every aspect of his work. As a practical means of invoking resistance to metanarrative, Lyotard (and many feminists) seeks to multiply the available alternative narratives of selfhood. This shift is described by Linda Nicholson as deeply compatible with the imperatives of non-essentialist feminist thought:

We cannot have and do not need a single, overarching theory of justice. What is required, rather, is a “justice of multiplicities.” What Lyotard means by this is not wholly clear In any case, his justice of multiplicities conception precludes one familiar, and arguably essential, genre of political theory: identification and critique of macro-structures of inequality and injustice which cut across the boundaries separating relatively discrete practices and institutions.⁴⁷

In place of the focus on macrostructures, Lyotard seeks to uncover the varied fabrics, some as fine and imperceptible as gossamer, that constitute culture and its many subjects. Again, we can see a connection with feminist theory. In her essay, “Race and Essentialism in Feminist Legal Theory,” Angela Harris, argues that it is a grave error to attempt to speak in a fundamental (metanarrative) voice.⁴⁸ The reason is simple and compelling: culture is crisscrossed with multiple voices, as are the persons who live within it. The insistence that we speak, or think, or feel in some unitary fashion is the demand

47. Fraser & Nicholson, *supra* note 11, at 23 (citation omitted).

48. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 235, 237 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). Citing the work of Robert Cover, and taking up Lyotard’s notion of identity as the product (at least in part) of complex language games, Harris puts the issue the following way: “Lawyers are all too aware that legal language is not a purely self-referential game, for ‘legal interpretive acts signal and occasion the imposition of violence upon others.’ In their concern to avoid the social and moral irresponsibility of the [subjective] voice, legal thinkers have veered in the opposite direction, toward the safety of the second voice, which speaks from the position of ‘objectivity’ rather than ‘subjectivity,’ ‘neutrality’ rather than ‘bias.’ This voice, like the voice of ‘We the People,’ is ultimately authoritarian and coercive in its attempt to speak for everyone.” *Id.* (citations omitted). For more on the relation between legal language and legal violence, see generally Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

of technocratic and scientific culture. From a postmodern perspective like the one Harris articulates below, it is a means to choke the vitality and mystery of what it is to be:

The metaphor of “voice” implies a speaker . . . [W]e are not born with a “self,” but rather are composed of a welter of partial, sometimes contradictory, or even antithetical “selves.” A unified identity, if such can ever exist, is . . . not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated. A multiple consciousness is home both to the first and second voices, and all the voices in between.⁴⁹

Harris’s specific concern here is with what might be termed the modern—as opposed to postmodern—tendencies of some models of feminist theory. She questions the global and essentialist premises that she uncovers in the radical feminism of Catherine MacKinnon. We shall return to that issue in our discussion of Drucilla Cornell. Here, however, it is sufficient to note that Harris has recognized the violence inherent in all modes of general theorizing. Like Lyotard, she sees a shift towards a valorization of the particular and specific as the best means to avoid such violence. Also like Lyotard, she must confront the question of how local, immanent criticism can confront a force of such global and machine-like dimensions as that of modern Enlightenment rationality. In short, both Lyotard and Cornell must find a means of confronting the Law. This is the “terror” that postmodern philosophy and feminist theory equally fear: to eschew the language of the global may be to eschew any impact on the machine. Thus do law schools stamp out new workers to people the levers of the legal blast furnace, and thus does the image of each figure warp behind the heated air that rises and bends with each cast.

How can one combat such disfiguring forces? And is it possible to do so by simply refusing to play the game? Finally, how does one avoid being disfigured in the process of refusal? Such questions mark the project that Drucilla Cornell has set as the fundamental task of a postmodern jurisprudence, and it is to the unfolding of her vision of that jurisprudence, in its utopian and nonessentialist dimensions, that we shall now turn.

III. DRUCILLA CORNELL’S POSTMODERN LEGAL THEORY

A. Derridean Origins

One of the central premises of Jacques Derrida’s deconstructive theory rests upon his infamous and powerful phrase, “*There is nothing outside of the text.*”⁵⁰ This phrase, the subject of virtually infinite commentary—some decrying it as the worst form of idealism, suggesting that it denies anything but the written and is thus a springboard to nihilism, others embracing it as the victory of unencumbered (and thus engaged) imagination over the real— has at its essence a relatively simple and unobjectionable claim: the idea that human experience is available to us only in the form of some kind of narrative. For Derrida, human experience is itself a form of narrative, with an important caveat. It is a narrative

49. Harris, *supra* note 48, at 237 (citation omitted).

50. See DERRIDA, OF GRAMMATCLOGY, *supra* note 5, at 158.

whose origins are irretrievable and whose ends are not reachable.⁵¹ For Derrida, the idea of narrating all of human life, with its infinite capacity for difference, is a goal beyond human reach. In short, writing is an unending task, the Sisyphean labor to which humankind is *thankfully* condemned.

As we just noted, conservative critics of Derridean deconstruction have attacked the open-ended nature of his enterprise.⁵² In the absence of universally recognized (i.e., essentialist) human goals, the deconstructive project is decried as nihilist.⁵³ Human activity, such critics suggest, must be aimed at the achievement of a higher good.⁵⁴ The absence of such a good produces a spiral of unending, aimless conversation which, ultimately, will descend into babble.

Derrida's response to such critics is a powerful endorsement of what he calls a philosophical "principle" of *difference*.⁵⁵ The very purpose of deconstruction, he argues, attempts to free systems of thought from unnamed, imperceptible conditions that limit the freeplay of thought.⁵⁶ For Derrida, these limiting conditions pervade Western thought; the most prominent instances of it he terms the "phallogocentric" and "logocentric" characteristics of all Western reason.⁵⁷

Logocentrism, Derrida argues, is a tendency in thought which valorizes identity over difference. In simple terms, he claims that a canvas of the history Western thought illustrates the extent to which all divergent, digressive, and errant philosophical impulses are relegated to the field of error.⁵⁸ The very nature of reason, he suggests, is an attempt to tame and restrain—by intellectual violence, which ultimately is tied to emotional and physical violence—an entire field of human experience, that of "otherness" or what is sometimes referred to as "alterity."⁵⁹ The fundamental point is simple: Western thought is violent in its restrictiveness; indeed it *requires* the violence of restriction on all that it expels

51. See DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 279.

52. See ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND, 25, 34-35 (1987). Extremely strident versions of this type of critique abound; they are usually marked by neo-conservative calls for a return to classical, foundational, and canonical texts, as well as for the articulation of essentialist principles for adjudication of any number of social dilemmas. The popularity of such claims is underscored by the success of such polemics as Bloom's 1987 book, along with the production of texts that decry the relativism of postmodern thought in general. See generally WILLIAM J. BENNETT, THE BOOK OF VIRTUES (1993) and E. D. HIRSCH, CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987). It is important to note that, while these works tend to display a remarkably cursory, narrow-minded and even reactionary misreading of postmodern thought, they are not to be wholly disregarded. Hirsch's book, in particular, is something like a primer of canonical thinking, and is worthy of review by even the most unsympathetic reader. Indeed, the postmodern deconstruction of Western models of personhood *relies* upon prior articulations of those very models.

53. BLOOM, *supra* note 52, at 34.

54. *Id.* at 370-79.

55. DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 198, 203.

56. See DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 278-279.

57. JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND 414-496, 480 (1987). See also JACQUES DERRIDA, DISSEMINATION 128-134 (Barbara Johnson trans., The University of Chicago Press 1981) (1972).

58. See DERRIDA, OF GRAMMATOLOGY, *supra* note 5, at 75-76.

59. See DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 79, 124.

from its field. Or, to put it another way, reason requires violence in order to exist:

[I]t has always been thought that the center, which is by definition unique, constituted the very thing within a structure which while governing the structure, escapes structurality. This is why classical thought concerning structure could say that the center is, paradoxically, *within* the structure and *outside* it. The center is at the center of the totality, and yet, since the center does not belong to the totality (is not part of the totality), the totality *has its center elsewhere*. The center is not the center.⁶⁰

If we substitute the word “Man,” or “the masculine,” for the word “center” in this passage, we have a telling example of the ways in which thought is imbued with violence, and of the ways in which a gendered notion of reason has come to be accepted as the norm. “Man,” for Derrida, is that unique entity which both governs the structure of thinking and yet which somehow escapes the scrutiny of that very thinking. Man is both at the heart of Western thought, life *and law*, and yet is somehow “outside” it. Derrida goes further to suggest that the sense of coherence that we draw from Western reason, its attraction as something that provides order to existence, is itself a kind of masculine violence that organizes the disparate according to this principle of masculine identity.⁶¹ In short, Reason is not neutral; it is an expression of masculine desire:

[A]s always, coherence in contradiction expresses the force of a desire. The concept of centered structure is in fact the concept of a play based on a fundamental ground, a play constituted on the basis of a fundamental immobility and a reassuring certitude, which itself is beyond the reach of play.⁶²

This “fundamental immobility” is embodied, at least in part, in the activity of a masculine reason, and receives one of its most glaring cultural exhibits in the violence of the law.

The violence of reason is one of the most prominent features of the corpus of Derridean thinking, and is perhaps *his* most Promethean task: trying to use the very philosophically constricted ground to overcome that restrictiveness – it is akin to thinking outside one’s native tongue without recourse to any already-available alternative language. As yet, no alternative method for thinking exists. Derrida suggests that logocentric violence is most readily apparent in the cultural and philosophical omnipresence of what he calls “binary opposition:” the pairing of complementary terms in such a way that the prior, or initial term holds a hegemonic position in relation to the second, or minor term. He cites many classic examples of such constructions: inside/outside; good/evil; true/false; and, most important for our purposes here, man/woman.⁶³

60. DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 279.

61. See DERRIDA, OF GRAMMATOLOGY, *supra* note 5, at 18-21.

62. DERRIDA, WRITING AND DIFFERENCE, *supra* note 5, at 279 (citation omitted).

63. See DERRIDA, OF GRAMMATOLOGY, *supra* note 5, at 10-21. Throughout this text, Derrida establishes and explores some of the central terms of postmodern theory. One such term, *logos*, emphasizes the relationship between the word and metaphysical presence. Elizabeth Wright describes Derrida’s claim in the following way: “In its habitual logocentrism, Western thought represses writing which, being subject to difference and differal, is a threat to the speaking voice. Logocentrism thus gives us the illusion of immediate access to full truth and presence.” ELIZABETH

If all Western thought is logocentric (again, using a principle of exclusionary reason to limit what Derrida calls the “freeplay” of thinking), it has another characteristic that participates in its gendered quality. Derrida calls this the “phallogocentrism” of reason: its rootedness in a decidedly male, masculine economy of images.⁶⁴ The male/female binary opposition is only the most glaring example of this dynamic. In addition, logocentrism, or the foundational principle on which Western reason resides, establishes as its primary symbol the phallus itself. Power, authority, and certitude are all linked to a symbolic order that is phallogocentric.⁶⁵

This conflation of logos (reason) and the phallus (the authoritarian origin of a decidedly male symbolic order) leads such feminist thinkers as Luce Irigaray and Helene Cixous to take up the term *phallogocentrism* as the characterizing feature of Western thought.⁶⁶ In this portmanteau term, reason and narrative are brought together in an almost unshakeable gendered unity. As Cixous puts it, “Intention, desire, authority – examine them and you are led right back . . . to the father. *It is even possible not to notice that there is no place whatsoever for woman in the calculations.*”⁶⁷ This combination of a phallic symbolic order and a logocentric system of exclusion and inclusion results not only in the expulsion of woman from the narrative of Western thought (of which law is, again, a supreme example), but in her invisibility:

WRIGHT, FEMINISM AND PSYCHOANALYSIS 316-317 (1992). For our purposes, the central consequence of Derrida’s claim is the construction of a structure of rational and cultural relationships in which a prior (“full”) signifier is *opposed* to a secondary (“partial” or “parasitic”) signifier. Thus a term like “man” is associated with full presence, while “woman” is understood as a secondary, parasitic phenomenon. This binary structure is even more evident when one considers the history of the man/women opposition in much psychoanalytic literature: man is associated with reason, women with hysteria. *Id.* at 163-165. See PEGGY KAMUF, A DERRIDA READER, 447 (1991).

64. DERRIDA, THE POST CARD, *supra* note 57 at 414-496, 480 (1987). See also JACQUES DERRIDA, SPECTRES OF MARX: THE STATE OF DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL 98 (Peggy Kamuf trans., 1994) (1993). See also Jacques Derrida & Christie McDonald, *Choreographies, in THE EAR OF THE OTHER: OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION* 169 (Christie McDonald ed., Peggy Kamuf trans., 1985).

65. DERRIDA, THE POST CARD, *supra* note 57 at 414-496, 480 (1987).

66. The etymology of this portmanteau term is itself the subject of a fascinating history which oddly enough, has a gender dichotomy running through it. THE PENGUIN DICTIONARY OF LITERARY TERMS AND LITERARY THEORY properly attributes coinage of the term to Jacques Derrida. J.A. CUDDON, THE PENGUIN DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 662 (1998). On the other hand, THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM attributes its most famous formulation to literary critic Jonathan Culler, who wrote, “[P]hallogocentrism unites an interest in patriarchal authority, unity of meaning and certainty of origin.” THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM 225 (Joseph Childers and Gary Hentzi eds., 1995). The term is a conflation of “phallogocentrism”—a term signifying the dominance of the masculine in language—and “logocentrism”—a term which brings to the light the tendency in Western metaphysics to associate reason and the word. The crucial point, as feminist psychoanalytic scholar Elizabeth Wright points out, is that “both phallo and logocentrism are monolithic systems: while the former privileges the phallus as the universal arbiter of sexuality, the latter privileges the Word as the ultimate arbiter of truth. This equation finally becomes explicit in Derrida’s critique of Lacan’s seminar on Poe.” ELIZABETH WRIGHT, FEMINISM AND PSYCHOANALYSIS, *supra* note 63, at 317. See also JACQUES DERRIDA, *The Purveyor of Truth, in THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND*, *supra* note 57, at 481. The irony, of course, is that the very fame of the word emanates from male scholars—Freud, Lacan, and Derrida, among others.

67. PAM MORRIS, LITERATURE AND FEMINISM 118 (1993) (emphasis added).

Cixous associates phallogocentric language with a cultural order based on possession and property. Within such an order exchange is part of the system of power; nothing can be freely given. Patriarchy is maintained by the exchange of women as possessions from fathers to husbands always so as to control or gain something.⁶⁸

In short, to be—as a meaningful member of the societal order—is to be phallogocentric. Hence, does the law demand of its practitioners, before all else, that they become men?

B. Cornell's Extension of Derrida's Critique

As was suggested earlier, Drucilla Cornell is one of the first feminist thinkers to fully explore the relationship of postmodern or deconstructive thought (sometimes called “Derridean”) to *both* feminism and law. Cornell takes many of the insights of postmodern theory to articulate the dilemma of feminism in general:

If there is to be feminism at all, we must rely on a feminine “voice” and a feminine “reality” that can be identified as such and correlated with the lives of actual women; and yet at the same time all accounts of the feminine seem to reset the trap of rigid gender identities, deny the real differences between women (white, heterosexual, women are repeatedly reminded of this danger by women of color and by lesbians) and reflect the history of oppression and discrimination rather than an ideal or an ethical positioning to the Other to which we can aspire.⁶⁹

Cornell suggests that the most radically efficacious task available to feminists today—the means most useful in describing women's suffering and in promulgating a new vision of woman that escapes the phallogocentrism of dominant discourse—lies in the deconstruction of essentialism.⁷⁰ In the process, she re-invokes, in dynamic fashion, a philosophical argument that has been with the West at least since Plato: the contrast between a thinking that is essentially *revelation*, where the thinking subject reveals her intrinsic powers and

68. *Id.* at 119.

69. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 13, at 3. An example of this is found in Catherine MacKinnon's ruthless (and one might say, masculinist) response to Angela P. Harris's thoughtful criticisms of the latent essentialism inherent in MacKinnon's various positions about feminist politics. In essence, Harris suggests (quite respectfully) that MacKinnon's “general theory of social inequality” is of a sort precisely outlined in the analysis of classical modernist theorizing in Section II, above. MacKinnon, says Harris, again and again theorizes from the position of white women, which then is expanded so as to masquerade as a general account, “MacKinnon's essentialist approach recreates the paradigmatic woman in the image of the white women, in the name of ‘unmodified feminism.’ As in the dominant discourse, black women are relegated to the margins, ignored extolled as ‘just like us, only more so.’ But ‘Black women are not white women with color.’ Moreover, feminist essentialism represents not just an insult to black women, but a broken promise—the promise to listen to women's stories, the promise of feminist method.” Harris, *supra* note 48, at 248 (citations omitted).

70. See CORNELL, *supra* note 13, at 4. Cornell clarifies the dilemma in *BEYOND ACCOMMODATION* when she points out that attempts to “write feminine difference, or even to specify the construction of woman or women within a particular context, has been *identified* as essentialist and then, depending on one's position on essentialism, either affirmed or rejected. . . . The central tenet of this book is that once we understand what is entailed by the deconstruction of essentialism, we will be able to show why there is no such necessary relationship.” *Id.*

characteristics, and *invention*, where the subject attempts to forge new models of personhood through the process of thinking “otherwise.”⁷¹ For Cornell, the only means out of the binary divide of male/female, with all of its oppressive consequences, is via the latter model. It is, for her, time to deconstruct the gendered opposition that pervades Western reason, and so to reinvent the model of the legal subject.

Cornell begins her analysis with one of the central critical motifs in deconstructive theory. She focuses on the issue of “metaphoric transference,” or what other thinkers have called the critique of representation.⁷² In that analytic model, the question of *how* we represent things is elevated above the question of *what* we represent when we say something. The reason for this is simple: humans have no access to the “essence” of a thing. Indeed, Derrida argues that the very idea of “essence” is a human invention, aimed at reducing the particularity of each lived individual for the sake of generating mastery over the object in question.⁷³

An example may help to explain this distinction. When a woman (the same holds true for any person) is asked to tell about herself, she will often begin by reciting a list of important attributes: “I am a lawyer and a mother,” one might say. Of course, the list may go on for quite sometime, at which point the questioner (through a sense of satisfaction) will interrupt the process. In fact, however, the question is analytically impossible to complete, because our access to “ourselves” is always no greater than the sum of discursive utterances one can muster. At that point in our hypothetical conversation when our speaker stopped, the questioner might ask, “Is that it, then? You are a mother, lawyer, gardener, and lover of Chopin?”

Clearly, these do not complete a canvas of the “essence” of our speaker. Another utterance, another gesture, would always add to the essence of what she is or was. In short, although we construct visions of our essential selves via metaphorical constructs, or what Cornell calls the “metaphorical transference of properties,”⁷⁴ we are never really able to “get to” the essential. Indeed, Cornell goes so far as to claim that the quest for the “essential” is a classically masculine approach to thinking about personhood.⁷⁵ As such, it must be avoided if women are to be able to reinvent themselves in the contemporary arena:

71. *Id.* at 134. Cornell explains as follows, “MacKinnon, ironically, participates in that silencing [the silencing of women] through her refusal to recognize the legitimacy of speaking or writing from the side of the feminine.” *Id.*

72. *Id.* at 148-50. More specifically, Cornell invokes Theodor Adorno’s critique of the notion of mimesis in challenging traditional Western notions of representation, and in invoking an ethical dimension in the very act of representation—one which permits the object of representation to “be in its difference.” Mimesis, in this context, is not a question of likeness, but of permitting the shimmering autonomy of the object as appearance. See T.W. ADORNO, *AESTHETIC THEORY* 86-87 (C. Lenhardt trans., 1984).

73. See CORNELL, *supra* note 13, at 143. Cornell states, “The feminine as *Other* remains. To write as the residue, as the remains, is to echo the thing or object that women are defined as within the economy of the masculine symbolic. But feminine writing also indicates that the remains of the current system of gender representation are feminine precisely as they are remains, outside the system. Derrida’s *Glas* shows us that the writing of the remains is the stylized undermining of the claim of identity.” *Id.*

74. *Id.* at 100-01.

75. *Id.* at 31.

We prescribe these properties as the essence of the thing because that is how we know the thing, or more precisely how we think the thing should be. If we cannot know the form of the thing through purified expression, we are always *prescribing* its properties. It is this moment of prescription in metaphorical transference which assigns the proper that makes Derrida himself suspicious of metaphor.⁷⁶

Law, as a form of prescription, is thus a kind of controlling device which has the cunning to disguise its claims as transcendental truth:

[W]e cannot separate our actual existing legal system from the law of the replication of existing gender identity. In other words, if we are to challenge the situational sexism women endure within our own legal system, we must also challenge the current gender divide as it is implicated in the limits we have experienced on the possibilities of the legal reform and transformation.⁷⁷

This problem is magnified by the character of the law itself. For Cornell, the fact that the trail of descriptive metaphor never ends is intolerable to the dynamics of law. Indeed, she suggests that the essential myth of legal thinking is that the metaphoric “trail” can be completed.⁷⁸ Law is therefore inherently *prescriptive*. Further, law participates in a kind of active forgetting of this fact; law, and all models representation, depend upon the fact that the prescriptive moment be forgotten, or erased, thus suggesting that legal pronouncements had “captured the point” in question. In short, law lays claim to a quasi-transcendental notion of truth:

[W]hat one is really doing when one states the essence of Woman is reinstating her in her proper place. But the proper place, so defined through her essential properties of what women can be, ends by shutting them in once again in that *proper* place. In this special sense, the appeal to the essence of Woman, since it cannot be separated completely from the *prescription* of properties to her, reinforces the stereotypes that limit our possibilities.⁷⁹

For Cornell, the effect of this analytic move is to enchain women in a masculine discourse once again. Luce Irigaray describes this as “dereliction,” the notion that feminine difference cannot be expressed except as signified within a structure of representation constructed by the masculine imaginary or masculine symbolic.⁸⁰ In such a model, woman is always subordinate and other. This entails an “inability to express either the repressed maternal, or the actual, libidinal relationship to the mother, as other than phallic, the longing to be in the place of the man so as also to satisfy ‘Mommy.’”⁸¹

How do we escape from the inescapable? How do women, or, for that matter, how does anyone reinvent themselves in a discursive regime that

76. *Id.*

77. *Id.* at 9.

78. *Id.* at 33.

79. *Id.* at 31.

80. *Id.* at 7-8. See also LUCE IRIGARAY, *THE SEX WHICH IS NOT ONE* 112-113 (Catherine Porter trans., 1985) and LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN* 239 (Gillian C. Gill trans., 1985).

81. See CORNELL, *supra* note 13, at 7-8.

permits no fundamental eccentricity?⁸² Most of all, how can law—that region of human activity most committed to the promulgation of rules—ever come to respect the difference that constitutes women? For Cornell, the answer is in the dream of a “new choreography of sexual difference,” or what might be understood as a new image and practice of interaction vis a vis sexual identity.⁸³ In the process, she asks us to rethink the very notion of utopian thinking itself.

IV. CONCLUSION: CORNELL'S DISPUTE WITH MACKINNON

The controversial nature of deconstruction as feminist practice is drawn in its clearest form when we compare the work of Cornell with that of legal theorist and professor of law Catherine MacKinnon. Cornell herself is an admirer of MacKinnon's work.⁸⁴ She notes with appreciation MacKinnon's power at illustrating the inequality that exists between men and women, in particular insofar as MacKinnon is able to expose the way in which that inequality—so rooted in ordinary experience as to be deemed “natural”—appears unchangeable.⁸⁵ MacKinnon's classic formulation of the nature of the difference between men and women embodies her illustrative powers: “Difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged, when women are punished or when they are protected in its name.”⁸⁶

In MacKinnon's view the domination of women manifests itself most fully in her bipolar description of sexual interaction: women get fucked, men fuck.⁸⁷ The mere repetition of this dynamic results in its subconscious reification across the spectrum of social activity. Men become the standard of authority and control as well as the perspective from which reality is enumerated and judged. Cornell, citing Simone de Beauvoir, summarizes this by saying that “men are in the right for being men.”⁸⁸ She continues: “The identification of their [men's] perspective as objective is what gives their vision ethical credibility. It is not one

82. Many thinkers, most notable of all Stanley Fish, would disagree with such an assertion. No system, he argues, is so total or undivided to fail to admit alternatives, counter-arguments, or even fundamental challenges. Hence the idea of a “closed,” or even “relatively closed” system is impossible. Change, or difference occurs, according to Fish, precisely because change is unavoidable. To “take a position” is to imply the very possibility of different positions. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). The insufficiency of this explanation for women is apparent from a survey of virtually any of the contemporary women theorists. Fish presumes the reasonableness of discourse, as well as its shared accessibility. Cornell, Irigaray, or Harris, in turn, insist that discourse itself is gendered in such a way as to exclude a position that refuses traditional conceptions of what it is to have a position. This difference of opinion, it would seem, is insurmountable.

83. This is one of Cornell's richest and most perplexing formulations. Although she discusses the “new choreography of sexual difference” again and again throughout *BEYOND ACCOMMODATION*, she never attempts to fully characterize what that term might mean. It is likely that she does so to avoid producing a recipe or formula for personhood—a course that would immediately reduce the vitality of any “new choreography.” See CORNELL, *supra* note 13, at 138-60.

84. See *id.* at 129.

85. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 35, at 12-13.

86. *Id.* at 8.

87. CATHERINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 124 (1989).

88. CORNELL, *supra* note 13, at 120.

viewpoint on reality amongst others; it becomes the standard of accuracy itself.”⁸⁹

Given this, MacKinnon goes on to claim that any appearance of the feminine will reflect the degradation of women as passive receptacles—as “fuckees.”⁹⁰ The ordinary world for women is a pornographic one; women are little more than fantasy play-objects created by and for a world defined by men. Most importantly, the very conceptions that women have of themselves reflect and repeat this reality. Women have only two options: they can embrace and endorse their slave-like relation to dominant males (and to society in general), or they can ape the male point of view (and become neo-males). In both cases a woman “remains always a woman.”⁹¹ This subordinated position—woman as either doormat or plaything—manifests itself *in every region of a woman's life*. MacKinnon captures this subordination in its most explicit form when she describes the essentially pornographic relation of all women to sex: “Pornography participates in its audience's eroticism because it creates an accessible sexual object, the possession and consumption of which *is* male sexuality, to be consumed and possessed as which *is* female sexuality Men *have* sex with their *image* of a woman.”⁹²

MacKinnon's conclusion is that women must abandon their affiliation with the feminine, that *any* association with the feminine is a reinstatement of oppression.⁹³ This abject rejection, this “great refusal,” is at the core of MacKinnon's understanding of what an unmodified feminism would be: it would be a total refusal of a masculinist model of personhood. Left with two options—affirming themselves as sexualized and trivialized playthings or simply refusing what they are—women have little choice. Feminism modified is the feminine refused. Cornell captures the bleakness of these choices as follows:

MacKinnon must reject any attempt to affirm the feminine as it is manifested in the lives of actual women as having any normative significance. For MacKinnon, it is profoundly mistaken to emphasize feminine difference as having value. Such affirmations of feminine difference should be condemned as complicity in our oppression.⁹⁴

Put in other terms, according to MacKinnon, women should “chuck the whole project” of what it (presently) is to be a woman. They should embark on a course characterized by refusal. There is nothing within the feminine worth saving. It is far too polluted a subjective category to be worth redeeming.

89. *Id.*

90. *See id.* at 5; MACKINNON, *supra* note 88, at 124.

91. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 35, at 150. *See also* LAURA MULVEY, *Visual Pleasure and Narrative Cinema*, 16 SCREEN 3, 6 (1975) (discussing a similar logic of submission and reference in relation to the representation of women in cinema).

92. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 35, at 150.

93. *See id.* at 172. MacKinnon makes the remarkable linear logic of her argument clear, writing, “[Pornography] institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female to the extent that gender is sexual, pornography is part of constituting the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be.” *Id.*

94. *See* CORNELL, *supra* note 13, at 125.

Moreover, a “feminist” politics should attempt to define itself in stark contrast to the dominant male vision. Women should object at every turn. The image of feminist struggle should approximate struggles for battle. Cornell summarizes MacKinnon’s position in the following dramatic passage:

MacKinnon’s militant, programmatic anti-utopianism is the inevitable expression of her argument that there is only one reality for women, and that this reality is the self-enclosed, self-perpetuating reality of male domination. For MacKinnon, women can’t escape from the real world Feminism as politics is a struggle for our power against theirs.⁹⁵

Such a model of personal and political redefinition is deeply objectionable to Cornell for two fundamental reasons. First, Cornell finds MacKinnon’s rejection of the feminine to be a rejection of the historically undeniable and ethically worthy elements of what it is to be a woman.⁹⁶ Simply put, womanhood (for Cornell) isn’t *all* bad. Indeed, Cornell holds that MacKinnon’s rejection of all that is feminine is a capitulation to the dominant male representation of women. By rejecting the feminine, MacKinnon is granting power to men once again; she is admitting that women have no place in the current system of power. They are “nothing.” As Cornell puts it:

Put very simply, MacKinnon’s central error is to reduce feminine “reality” to the sexualized object we are for *them* by *identifying* the feminine totally with the “real world” as it is seen and constructed through the male gaze.⁹⁷

Cornell suggests that MacKinnon makes a second error: the latter presumes that women have the unmitigated *power* to reject the representation that has accrued to them via the male gaze.⁹⁸ That is, MacKinnon seems to believe that “the feminine” is unambiguously represented in culture, and that women can make a clear decision to reject the feminine as it presents itself to them. In short, MacKinnon reduces the issues of feminism to a “yes or no” decision—one of complicity or refusal: it is a feminist version of the “with us/against us” mentality.

Cornell vehemently rejects such alternatives.⁹⁹ At the essence of deconstructive thought lies the belief that the bipolar structures of Western thought—man or woman, friend or foe, good or evil—distort the reality of lived experience. According to a deconstructive view, access to the world around us is inextricably intertwined with our ability to describe that world. Hence the ways in which we represent the world, accomplished largely through language, have an enormous impact on “what the world is.” We might return to the famous citation by Derrida that began this essay: “There is nothing outside the text.” This does not mean that the world is a big textual fantasy. Rather, it means that the world is the product of an enormously intricate interaction between imagination, desire, and material conditions of existence. MacKinnon,

95. *Id.* at 128.

96. *Id.* at 132-33. In Cornell’s words, “MacKinnon’s transposition of the Marxist paradigm to gender is that it must reject any ethical ideal of the feminine as distortion, and therefore, it leaves us only with the struggle for power within the pregiven hierarchy.” *Id.*

97. *Id.* at 130.

98. *Id.* at 140-41.

99. *Id.* at 141.

according to Cornell, grants authority only to the last term—material conditions.¹⁰⁰ And she assumes that we can clearly “know” what those conditions are doing to us. Consequently, MacKinnon is in many ways a deeply conservative thinker. Again, citing Cornell:

MacKinnon, ironically, participates in that silencing through her refusal to recognize the legitimacy of speech or writing from the side of the feminine. . . . Her implicit confusion is a failure to distinguish the feminine from actual women.¹⁰¹

What is the nature of this confusion? Actual women, Cornell agrees, suffer horrific, utterly unjustifiable oppression.¹⁰² They carry within themselves, to various extents, the feminine. But the *fact* that they contain the feminine does not mean that the feminine is to be rejected. For Cornell, the denigration of the feminine is a consequence of the position that term (or mode of life, if you prefer) occupies in the prevailing “discourse” of the West.¹⁰³ And one cannot simply say “no” to the discourse one finds oneself within. As was suggested earlier, such a move would be akin to a native speaker of English saying “no” to the English language: such a refusal is unthinkable, since to think that “no”—and to think in general—is to think in one’s native tongue. Indeed, to wholly reject the feminine would be to injure women twice: robbed as they are of many of the opportunities available to men, women who rejected the feminine would be shorn of the only specific quality they might claim as their own. Second, lacking any available language of self-definition, women would be without any sense of self. In Cornell’s view, *the feminine is the source of a utopian alterity—a way to imagine the world otherwise*. It is so precisely because it suffers in light of masculine discourse. Rather than understanding the feminine as *lack*, Cornell asks (like many other cultural feminists) that it be understood as a highly mediated social formation, one which, at its best moments, gains its very power by being “other” to the dominant masculine paradigm.¹⁰⁴

This paradoxically empowering notion of the feminine is illustrated by Cornell’s discussion of the term *jouissance* (the French term for orgasm), which Cornell suggests entails the seriousness and play required by an empowering feminism.¹⁰⁵ *Jouissance* is appropriate here, says Cornell, because it suggests a way out of the fucker/fuckee opposition that MacKinnon constructs. First, the term itself is feminine.¹⁰⁶ That is, it is *gendered* in French (*la jouissance*), in a

100. *Id.* at 128-129.

101. *Id.* at 134.

102. *Id.* at 129.

103. *See id.* at 130. The notion of discourse as the organizing pattern within and around which Western thought unfolds is established by a number of late 20th century thinkers, most notably Michel Foucault and Thomas Kuhn. *See* MICHEL FOUCAULT, *THE ORDER OF THINGS*, ix–xxv (1994). *See generally* THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, 1996.

104. *See id.* at 141.

105. *See id.* at 156. “Feminine style is this constant experimentation to write the unspeakable, knowing all the while the inherent contradiction in the effort. But without the effort, we can only have the wordless repetition of the same, in which the feminine is denied and repudiated, and our desire is rendered inexpressible, and therefore non-existent in its specificity.” *Id.*

106. *See* ELIZABETH WRIGHT, *FEMINISM AND PSYCHOANALYSIS*, *supra* note 63, at 185-187. Unlike English, French nouns are gendered, and therefore require a masculine or feminine article. Thus *la porte* is a feminine noun for door, while *le vin* is a masculine noun for wine. The etymological origins

manner unavailable in English. Second, the root of the word—*jouir*—means “to enjoy.” The term thus establishes a simultaneous relation between self-enjoyment, play and sexual gratification. Finally, in its juridical use in French courts, *jouissance* entails a right to use or possession, much as we might say in the Anglo-American property context that someone has a “right” to quiet “possession” of a piece of land.¹⁰⁷

I raise these linguistic cross-references not to flee from the tactile complaints raised by MacKinnon in her analysis of gender relations, but to suggest that her polemical position—for all its creativity and power—is ultimately myopic. Cornell pursues this line of critique in detail. She suggests, first, that MacKinnon is quite right in showing that equality, as it is constructed in American law, posits the masculine as reference point. Equality thus understood is “equality as likeness,” a schema in which the prevailing norm is always male-identified.¹⁰⁸ Women’s “difference” in this model is always difference as subtraction from a male standard. MacKinnon goes on to point out that, “men’s differences from women are equal to women’s differences from men. There is an *equality* there.”¹⁰⁹ MacKinnon’s “equality of difference,” if you will, while not represented in the lived experience of women, *is*, in her view, most clearly represented in her one-sided understanding of sex. For MacKinnon, sex is essentially pornographic, and it is a pornography which emulates a male fantasy of domination at every turn.

MacKinnon’s attack on the validity of sexual relations between men and women gives rise to a second point, one which marks Cornell’s most strident critique. MacKinnon, says Cornell, sees the struggle for equality as a veiled attempt at *revenge*.¹¹⁰ Ultimately, MacKinnon’s project is a masculine one, *for the simple but fundamental reason that it embraces a masculine vision of power and pleasure*.¹¹¹ MacKinnon’s work, so rooted in anger at the masculine, thus forecloses some of the utopian and radically new paths that feminist experience and jurisprudence might engender. Cornell, trying to summarize MacKinnon’s position, puts it as follows:

Women are fucked. And that is that. Any attempt to write from the side of the feminine, any attempt to celebrate feminine desire, our sexuality, is rejected. Feminine *jouissance*, with all its disruptive force, is denied as the pretense that allows us to make peace with the world as it is. In its worst form, according to MacKinnon, it promotes the illusion that “we can fuck our way to freedom. . . .”¹¹²

of gendered language is beyond the scope of this paper, but such an analysis would go far towards suggesting the ways in which language is by no means value neutral, particularly in English, where the gendered quality of things-in-the-world is disguised by the absence of gendered articles. *See also* COLLINS ROBERT FRENCH DICTIONARY 391 (2d ed. 1987).

107. *See* COLLINS ROBERT FRENCH DICTIONARY, *supra* note 107, at 391.

108. *See* CORNELL, *supra* note 13, at 138-39.

109. MACKINNON, FEMINISM UNMODIFIED, *supra* note 35, at 37.

110. CORNELL, *supra* note 13, at 138. “MacKinnon’s rejection of calculable proportion as justice, on the other hand, is done, not in the name of justice, but in the name of the *revenge* which turns the tables.” *Id.*

111. *See id.* at 139.

112. *Id.* at 139.

MacKinnon thus engages in what I would like to call the “pragmatic mode” of radical engagement. Such a posture gains its force in two ways: first, by a radical refusal of prevailing allocations of power (here, the refusal of the masculine and its trappings); second, by the practical intervention in current ways of life in order to secure the deserved fruits of culture for the oppressed group. Such a model of radicality is vital to any fight against power. But it comes at a cost. Struggling against power in a deeply practical way often entails reinforcing and embracing the very forces one wants to fight against. In other words, MacKinnon still allows the masculine paradigm to define women’s struggles; or to put it still another way, she is using the very tools of masculine domination to fight against masculine domination. More importantly, MacKinnon’s extremely traditional modification of Marxist theory for a feminist end repeats an unresolved problem in Marxist thought: the dilemma of transforming prevailing systems of power into authentically new forms of social life. In this sense, both Marxism and MacKinnon share a deeply conservative element. They both aim at revolution, a transformation which implies that continuity of some kind of foundation or center to political and personal life, not transgression, which implies a radical break.

In contrast to the pragmatic model, one might posit what I call an “alterity model” of radical engagement. Here, one attempts to escape the binary structure of thinking in a more fundamental, visionary, and utopian way. This is the posture Cornell adopts, and it highlights what she understands as MacKinnon’s central failure. The latter, says Cornell, fails to see

[T]hat the attempt to evoke sexual difference involves the indication of the beyond to the replication of this current system of *gender* identity in which feminine difference is opposition and is evaluated only in comparison with the masculine norm. To recognize that we must think sexual difference – including the specificity of feminine desire – if we are ever to disrupt the repetition of the same is not, as MacKinnon would have it, to advocate a *rule* of how sexual difference or gender identity should be calculated or evaluated within the current gender dichotomy.¹¹³

Cornell goes on:

Woman, the feminine, is what cannot be captured, and therefore belies the absolute hold of this reality over us as it also denies that woman can be reduced to the “*pas tout*.”¹¹⁴

Moreover, there is an element of impossibility and elitism in MacKinnon’s analysis. MacKinnon first tells us that woman is nothing but “fuckee.” Yet MacKinnon herself somehow escapes this prison-house. How can this be? Cornell asks: “[H]ow can MacKinnon, a fuckee, know at all? She is the object. Feminist knowledge is, by her definition, impossible.”¹¹⁵

Cornell gives two possible answers. The first is elitist: MacKinnon, as privileged player in the dynamic of culture, is somehow “above” the structure.¹¹⁶

113. *Id.* at 139.

114. *Id.* at 141.

115. *Id.* at 141.

116. *Id.* at 142.

As Derrida puts it, she is both inside and outside at once, occupying a heroic position deeply reproductive of romantic (and masculinist) notions of genius. Second, Cornell suggests that MacKinnon—somehow—has found the “truth” of women’s plight.¹¹⁷ As such, MacKinnon’s position is both “truth *of*” and “truth *beyond*”—the privileged position of the intellectual set free by Mind. The false masculinist ideal that intellect can get “beyond” to the truth thus repeats itself. In Cornell’s words:

MacKinnon . . . wants to “capture reality” so that we can expose the “truth” of women’s condition. She offers us a *critique* which assumes that she has given us the foundation of the real. Derrida shows us that reality can never be completely enframed.¹¹⁸

MacKinnon’s project—so important, so powerful in its illustrative and oppositional force—is ultimately masculine, according to Cornell. Only by beginning to think the validity of the feminine in its status as otherness will the utopian dimensions of feminism begin to be engaged. In short, MacKinnon is unable to think the radical as alterity; she is enframed by the masculine, and repeats that model in her radical feminism. She attempts to enframe the situation of the feminine once and for all in a world in which women, struggling with all their might against the daily violence of a masculine world, become like the very enemy they seek to leave behind.

117. *Id.* at 140.

118. *Id.* at 140.