

## On Feminist Legal Methodologies: Spilt, Plural and Speaking Subjects

Gina Heathcote\*

### *Abstract*

This article uses Nicola Lacey's 1998 book *Unspeakable Subjects* as a prompt to consider the potential of feminist jurisprudence to develop methodologies that focus on the foundational dimensions of law. I therefore explore possibilities for a feminist account of legal subjectivity that uses Lacey's account of critique, utopias and reform to articulate three interlocking feminist methodologies which I label split subjectivities, plural subjectivities and political responsible listening. I argue that these feminist methodologies draw in understandings of difference and of the centrality of inter-subject relations as the important dimensions of humanness that accounts of autonomy overlook before challenging the text to further consider which voices, and knowledge practices, remain silenced by feminist legal methodologies. To realise these ideas in strategies for law reform I argue for feminist listening that exercises care through the centring of accounts that emerge from those whose normative universe is more often particularised and discounted in law. As such, the article addresses legal subjectivity through the lens of intersectionality but with a jurisprudence that seeks to transcend the constraints of identity politics and through attention to indigenous Australian feminisms.

*Keywords* feminist legal methodology, intersectionality, *Unspeakable Subjects*, legal subjectivity, feminist jurisprudence; indigenous knowledge practices

---

Should feminism aspire to replace or reconstruct the framework of modern legal thought, or should it resist the desire for foundations in favour of a more resolutely critical stances?<sup>1</sup>

### I.

#### Introduction

---

\* Reader in Gender Studies and International Law, Centre for Gender Studies and School of Law, SOAS University of London. I acknowledge the Boonwurrung people of the Kulin Nation as the traditional owners of the land on which I was born, on which I grew into adulthood. and where I concluded the writing of this article. I acknowledge that their land was stolen, and that sovereignty was never ceded. I pay my respects to their elders past and present. I also wish to thank the anonymous reviewers' responses and for their generous reading of my ideas; to give especial thanks to Arlie as my editor, co-editor, co-conspirator and long-time friend; and to Nicola Lacey for books worth re-reading alongside inspirational conversations and teaching that have left important traces across my academic career and were formative in my development of a feminist consciousness.

<sup>1</sup> Nicola Lacey, *Unspeakable Subjects: feminist essays in legal and social theory* (Hart 1998) 167

This article functions simultaneously as a celebration of Lacey's contribution to feminist jurisprudence, a quest for a return and revisiting the central themes in *Unspeakable Subjects*, and a conscious pondering of how to shift beyond the placement of the sex/gender as the central axis within feminist legal theories. To undertake these functions the article unfolds in the following manner. In section two I introduce three different approaches to legal subjectivity: split subjectivity, plural subjects and the politics of listening. Each approach seeks to actively incorporate contemporary understandings of sex and gender as intersectional and thus requiring engagement with (at the very least) race, sexuality, ablebodiedness and class within feminist legal methodologies.<sup>2</sup> In this sense, I recognise Lacey's call for a feminist jurisprudence mindful of adjunct critical legal approaches and expand this to include adjunct critical feminist projects.<sup>3</sup> In section two, the first part approaches legal subjectivity through the motif of split subjects, acknowledging the interconnections and separations that human actors encounter in their lifetimes and which, I argue, better describes and accounts for legal subjects. The second part and approach centres on the possibility of a legal theory that encounters and understands legal subjectivity through the lens of plural subjectivity. I draw on different feminist theories to consider why plural subjectivity is an important feminist ethic, so as to consider a means to understand how difference can be theorised, and, importantly, produce different legal outcomes. The third approach considers the flaws of a feminist theory of split and plural subjects that fails to account for both historical and continuing material harms. I argue that this disrupts the fantasy of a feminist legal subject<sup>4</sup> to recognise the legacy and relevance of both critical race feminism and black British feminism for contemporary gender studies. Recognising that gender law reforms often reaffirm a gendered legal subject, as well as the intersectional harms she experiences, I add Otto's politics of listening as a feminist methodology to engage and actively transform, not only who speaks but how feminists need to learn to listen, often uncomfortably. I draw in indigenous Australian knowledge as an example of the types of listening feminists might commence to re-orientate legal knowledge.

The closing section of the paper draws these methodological reflections back into conversation with Lacey's work on *Unspeakable Subjects*, recognising limitations as well as applications of the approaches discussed. I frame the structure of the article through Lacey's assertion:

Only if both the distinctiveness of and the interrelationships between the projects of critique, utopianism and reformism are recognised will intellectual practices – feminist,

---

<sup>2</sup> The origins of the term intersectionality are drawn from the seminal writing of Kimberlé Crenshaw, and the longer history of critical race feminism in the US, see further: Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour' (1991) 43(6) *Stanford Law Review* 124; as well as the rich history of scholarship on intersectionality written by Black British feminists, see further: Avtar Brah and Ann Phoenix, 'Ain't I a Woman? Revisiting Intersectionality' (2004) 5(3) *Journal of International Women's Studies* 75; Gail Lewis, 'Questions of Presence' (2017) 117 *Feminist Review* 1

<sup>3</sup> NB: I use critical feminist here to refer to a broad range of feminist theories that draw in other forms of critical projects and methodologies including affect theories, cultural studies, postmodernism, postcolonialism, critical race studies, diaspora studies, queer studies, trans studies and decolonial studies, this is not to be confused with the use of the term 'gender critical feminisms' which has been used to denote anti-trans feminists through the preoccupation with the creation of women-only spaces that are often exclusionary and harmful to trans women and gender queer individuals approaching sex/gender in a reductive fashion that is not in line with the approach of this article.

<sup>4</sup> This is a paraphrasing of Joan Scott, see: Joan Wallach Scott, *The Fantasy of Feminist History* (Duke University Press 2011)

socio-legal or otherwise – move any closer to the ethical ideals which, implicitly or explicitly, they espouse.<sup>5</sup>

If contemporary feminist and gender theories espouse a commitment to intersectionality as the ethical link across strands and approaches, below I explore how this might shape critique of legal subjects, images of alternatives – a form of utopianism -, and a need for a practical agenda around reform. However, mindful of the twenty years since the publication of *Unspeaking Subjects* it seems necessary to at once acknowledge the legal reforms based on gender that have occurred in the past two decades and the continued status quo of a system that knits in gendered disadvantages and harms. As such, this article examines how feminist legal theories might approach the interlocking of critique-utopias-reform with new insight.<sup>6</sup> To this end I close the article with a discussion of indigenous Australian accounts of personhood, inspired by the work of artist Charmaine Pwerle, who threads together knowledge of the landscape, women's relationships and the intergenerational and relational aspects of community in her art (see *Figure 1*). I regard indigenous feminisms as asking different questions of feminist jurisprudence promoting an examination of the deep-set knowledge processes that inform Western feminist legal theories.<sup>7</sup> In doing so I wish to contemplate new shapes for feminist critique, unearthing the contours of utopias imagined in feminist writing to prepare for legal reform that challenges feminist thinking as equally as it challenges standard legal tropes.

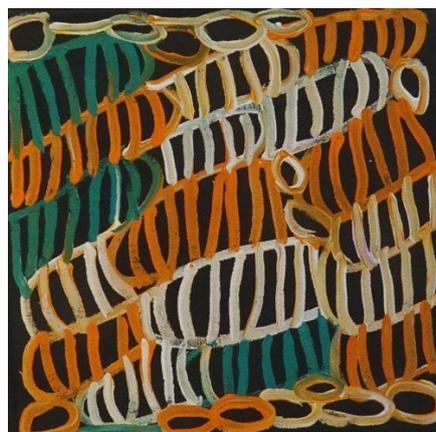


Figure 1: Charmaine Pwerle, *My Grandmother's Country 7B*

Amongst Charmaine Pwerle's art *My Grandmother's Country 7B* invokes indigenous knowledge and relationships to community, law and land beautifully.<sup>8</sup> The painting presents interlocking, sweeping lines, colour and movement that recall the paintings of Pwerle's mother and grandmother.<sup>9</sup> That this is her grandmother's country reminds me of the arrival of

---

<sup>5</sup> Lacey (n 1) 248

<sup>6</sup> Lacey (n 1) 236; also see: Gina Heathcote, 'Critique as Activism as Critique' (2018) 18 *A Collection of Writings on Honour of Professor Dianne Otto, Melbourne Journal of International Law* 131

<sup>7</sup> See further: Various Authors, 'Legalising the Soul: Native Title Rights and Colonisation' (1998) 11 *Australian Feminist Law Journal*; Irene Watson, 'Indigenous People's Law-Ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39

<sup>8</sup> Charmaine Pwerle, *My Grandmother's Country (7B)* Acrylic on Linen (born 1975)

<sup>9</sup> See the art of Barbara Weir and Minnie Pwerle, available at [www.pwerlegallery.com.au](http://www.pwerlegallery.com.au) (last accessed 10<sup>th</sup> December 2018)

my foremothers in Australia, from England, Italy, France and Finland. My white-settler-colonial history of Australian migration, constructing the settler-migrant state, disrupts the telling of indigenous knowledges and resettles as mainstream accounts of belonging and citizenship, displacing indigenous histories and actively frustrating indigenous citizenship and accounts of subjectivity.<sup>10</sup> My awareness of the violent displacement of indigenous people and knowledge from the land which they belong to frames the feminist methodologies written into this article. As such, I wish to unsettle the very sense of knowing – of perception – of knowledge – that feminist jurisprudence takes for granted. I focus on indigenous Australian accounts because it is the displacement of this knowledge that constructs the conditions for my speaking and, thus, to take serious a claim to politically responsible listening, as I write below, I listen to indigenous Australian voices as a means to actively silence my own imagined utopias, spoken and unspoken. The use of Pwerle’s artwork provides a useful visual stimulus of the unreadability of indigenous knowledge practices in contemporary Australia; a fact quite obvious in art and images yet less easy to ‘read’ and ‘see’ or listen to in epistemologies of law.

I regard the turn to learn from indigenous Australia as relevant to a revisiting of Lacey’s *Unspeakable Subjects* because of the unspeakability of indigeneity in mainstream feminist jurisprudence, incorporating a general failure to recognise how law constructs ‘modes of subjectivity that render indigenous and colonized populations as outside history, lacking the requisite cultural practices, habits of thought, and economic organization to be considered as sovereign, rational economic subject’.<sup>11</sup> This points to a persistent cleave in gender law reform such that despite critique and reform, the ‘utopias’ of feminist jurisprudence are yet to actively incorporate or listen to indigenous feminisms. As an Australian citizen, this has a deeply personal resonance although the attention paid to indigenous Australian knowledge is intended to be illustrative of the many knowledge frameworks displaced globally in favour of European enlightenment frames that fail to announce their own particular origins. As such, the article also asks of the reader a reflecting on whose silencing your own capacity to speak, to write, to read, to exist, depend upon.<sup>12</sup> This continues the critical feminist project of Lacey in two distinct ways.<sup>13</sup> First, Lacey acknowledges the necessity of feminist jurisprudence that works with legal and social theories in a critical vein; at once incorporating a foundational intersectionality drawn from critical race feminism while also offering an early account of

---

<sup>10</sup> Allie McDowall and Fabiane Ramos, 'Doing Decoloniality in the Writing Borderlands of the PhD' (2018) 47 (1) Special Issue on South-South Dialogues: Global Approaches to Decolonial Pedagogies *Australian Journal of Indigenous Education* 54; also see: Sujith Xavier, 'Loving, Working and Living on Stolen Land: People of Colour, Settler Colonialism and White Supremacy' December 8<sup>th</sup>, 2018, Reconciliation Syllabus, available online at: <https://reconciliationsyllabus.wordpress.com/2018/12/08/loving-working-and-living-on-stolen-land-people-of-colour-settler-colonialism-white-supremacy/> (last accessed 10<sup>th</sup> December 2018)

<sup>11</sup> Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Duke University Press, 2018) 3

<sup>12</sup> However this is not a call for 'Oppression Olympics', see further: Xavier (n 10); Patricia Williams, 'Spirit Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism (1987) 42 *University of Miami Law Review* 127; Andrea Minear, '“Unspeakable” Offenses: Disability Studies and the Intersection of Multiple Differences' in Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic* (Palgrave MacMillan 2011)

<sup>13</sup> On critical feminist and legal projects, see; Lacey (n 1) 168, describing critical projects as 'which are specifically concerned to go beyond the superficial appearance of legal practices and discourses, and to question, unsettle, expose to careful scrutiny not only current laws and their organisation but also the claims to authority and legitimacy which legal officials, law-makers, legal practices and theories implicitly express'; also see note 3.

future feminist critiques of mainstream US feminist legal theories.<sup>14</sup> Second, despite her detailed theorisation of the fluidity and instability of gender as an organising principle Lacey reminds her readers of the persistence of gender – the real world effects and harms that are experienced as gendered.<sup>15</sup> As such, a feminist jurisprudence that fails to search out the real world gendered harms and that fails to listen to those that suffer from the most deleterious effects of gender violence is only minimally feminist, if at all feminist. This is because feminism is intersectional and feminism is not a saving project, feminism is a knowledge project, an epistemology and an ontology (or, in the words of Jackson and Lacey, an interpretative account).<sup>16</sup>

Pwerle's art demonstrates this displacement of indigenous knowledge in settler-colonial Australia. Pwerle's oeuvre contains large artworks themed around Awleye. Although I grew up in Australia, in second and third generation migrant families, I am not given the knowledge to decipher this word, or its meaning, or to read Pwerle's images (even with an undergraduate degree in Art History!). As such, unlike migrant experiences in Britain that are often expected to assimilate to the dominant British culture, in Australia cultural signifiers that travelled with white migrants as settler colonialism have ignored, destroyed, and displaced indigenous knowledge. I therefore had to learn, as late as 2018, that Awleye refers to women's ceremonies and body paint, which are deeply connected to the understanding of territory and sovereignty:

The women paint each other's breasts and upper bodies with ochre markings, before dancing in a ceremony. The body designs are important and, painted on chest and shoulders, they relate to each particular woman's dreaming. The ochre pigment is ground into powder form and mixed with charcoal and ash before being applied with a flat padded stick or with fingers in raw linear and curving patterns. The circles in these designs represent the sites and movement where the ceremonies take place.<sup>17</sup>

This is not knowledge understood by white/migrant Australians as it is cast within contemporary Australian culture as the language and meanings of the Other. Pwerle's work therefore articulates both my alienation from indigenous Australia (an alienation which is normalised) and the alienation of indigenous women from voicing the contours of Australian histories and what counts as Australian knowledge. The necessity of silencing this history is interwoven into the violent colonial history that white settler Australia either has not told and/or actively renders invisible. Australia's colonial history, instead, is replayed in images of white men flying the British flag as the First Fleet arrives at Botany Bay in 1788 and with indigenous Australians as insignificant as the fauna in the image.<sup>18</sup> White and migrant Australia tells the story of the First Fleet until it is ingrained in the mythology of the nation,

---

<sup>14</sup> Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex work and Sex Trafficking: Four Cases Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law and Governance* 335

<sup>15</sup> Lacey (n 1) 14

<sup>16</sup> Emily Jackson and Nicola Lacey, 'Feminist Legal Theories' in James Penner, David Schiff and Richard Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford, 2002)

<sup>17</sup> Kate Owen, *Charmaine Pwerle*, Pwerle Gallery available online at <<http://www.pwerle.com.au/charmaine-pwerle/>> (accessed May 2018)

<sup>18</sup> Algernon Talmage *Sydney Cove, Jan. 26th 1788* 1937 oil sketch

displacing again and again any knowledge of indigenous Australia before the First Fleet and after.

The displacement of indigenous knowledge, language and histories in the articulation of Australian legal subjectivity was achieved through genocide, a history not spoken within white Australia, or rather what perhaps should be re-described as white and migrant Australia. Law remains silent on the genocide of indigenous Australia, indigenous accounts of subjectivity and indigenous feminisms such that Watson concludes:

I would say there is nothing or very little of the colonisers 'law' that we would seek to incorporate into Indigenous law. The question remains to be answered, how far is the state prepared to go, in peeling away the layers of the imposed colonial legal system? Are they prepared to undress themselves, and in their alien nakedness surrender to the law of the land?<sup>19</sup>

A politically responsible listening prioritises this knowledge to understand my own complicity in the perpetuation of a legal model that constructs its others again and again as a means to sustain privilege, gendered and otherwise. The displacement, going forward, needs to occur within dominant legal accounts and includes gender law reform that does not, at its core, theorise difference as integral to accounts of subjectivity. I return to indigenous accounts of subjectivity at the end of the article, along the way I use Lacey's work to think differently about law's subject/s and to prioritise an approach to feminist jurisprudence that acknowledges gender as one aspect of power and privilege that intersects with, and must be read through, adjunct critical accounts to build utopias and to imagine pathways to reform.

## II.

### *Split Subjects*

. . . [the] project is to contribute to feminism which recognises the problematic status of the category "woman" without making her disappear: which engages with the feminine as a construct, yet as a construct which has enormous social power.<sup>20</sup>

Lacey regards critique as the method of 'scrutinis[ing] the discourses or practices in question in terms of their own realisation of the values by which they profess to be informed.'<sup>21</sup> In this section, I use Lacey's ideas on the relevance of critique to think through the limitations of legal subjectivity. My thesis is that the motif of the split subject, rather than the unencumbered, rational subject, might better reflect human subjectivity and entrench an inclusive legal model at law's foundation – while drawing feminist jurisprudence to search out knowledge formations outside of the Western legal and political traditions usually assumed as the framework for critique. My approach stems from a dissatisfaction with gender law reforms that reify the structures of law and legal arrangements and often reproduce intersectional harms. I argue that the embedded and assumed understanding of subjectivity within law, which derives from the masculine history of law, might be critiqued to shift from the status quo. To this end, I argue for a shift from a legal account of unencumbered to split subjects and I use the split subject as a mechanism to illustrate the poverty of existing

---

<sup>19</sup> Watson (n 7) 58

<sup>20</sup> Lacey (n 1) 14

<sup>21</sup> Lacey (n 1) 231

assumptions with regard to legal subjectivity because all humans experience connection and separation in the formation of the self. My goal is to commence a search, in feminist jurisprudence, to find a language to challenge and critique the male histories of subjectivity. I am interested in how the bridge between lived experiences of the self might inform a nuanced account of the legal subject able to address feminist challenges to existing legal accounts of subjectivity.<sup>22</sup> In this part of the article, inspired by Lacey's perpetual cycle of critique-utopia-reform I argue for the legal subject as one informed by the experience of be(com)ing human rather than the tiresome and misrepresentative individualised, unencumbered and rational subject of liberalism.

To conceive of legal subjectivity as split I was inspired by the thinking of Kristeva, articulated in the context of her reflections on the emergence of a second generation of women's movements in Europe that had occurred by 1981.<sup>23</sup> Kristeva considers the divide between feminist co-optation into state or socialist projects and, what she labels, an 'avant-garde feminism' that is focused on female utopias. The former (early forms of governance feminism within European state structures) Kristeva challenges for the co-optation into non-feminist structures that Kristeva considers ultimately re-appropriating feminist messages for their own ends. Within 'avant-garde' feminisms Kristeva is critical of their dependence on the category woman. Kristeva, then questions whether having started with the idea of difference, feminism will be able to break free of 'its belief in Woman, Her power, Her writing, so as to channel this demand for difference into each and every element . . .'.<sup>24</sup> For Kristeva addressing feminisms 'belief in Woman' is linked directly to the linear temporality of both modernity and the nation. Kristeva works to articulate a feminist account that is not limited to gendered accounts of the political domain, which she frames through the notion of split subjects mirroring the moment of human birth. In centring the human fact of the subject splitting for birth, as a legal motif, I am interested in how this might ground a non-gendered conception of humanness within law – where both autonomy and dependencies are able to be recognised. This would be a precondition to rethinking the knowledge foundations that inform both legal and feminist theories.

Kristeva notes that 'pregnancy seems to be experienced as the radical ordeal of splitting the subject'.<sup>25</sup> As a comment drawn after an analysis of Freud's construction of the female subject as one of lack, or envy, Kristeva proposes a model for imagining a de-gendered subject, where the split subject is the radical moment rather than the sexed body. That is, it is the moment of being born, not the gendering, that propels the legal subject into existence. This aligns with scholars, such as Scott; who, in her account of the legacy of thinking on sex difference, considers the need for feminist scholarship 'to simultaneously insist on and refuse the identity of "women"'.<sup>26</sup> Lacey articulates a similar position in her analysis of the work of both Irigaray and Cornell, concluding:

---

<sup>22</sup> Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (Law Book Company 1997)

<sup>23</sup> Julie Kristeva, trans. Alice Jardine and Harry Blake, 'Women's Time' (1981) 7 *Signs: Journal of Women in Culture and Society* 13 (hereafter 'Women's Time'); Julie Kristeva, 'Motherhood According to Giovanni Bellini' in Leon S Roudiez (ed), *Desire in Language* (Columbia University Press 1980) 237, 238

<sup>24</sup> Kristeva 'Women's Time' (n 23) 33

<sup>25</sup> Kristeva 'Women's Time' (n 23) 31

<sup>26</sup> Scott (n 4) 10

Much work, practical and theoretical, analytical and imaginative, needs to be done if the notions of neutrality, rights, equality and justice are to be understood in their racially, sexually and otherwise oppressive reality and if they are to be reconstructed in a way which promises the genuine accommodation of different forms of life, different subjectivities.<sup>27</sup>

Kristeva's split subject at once acknowledges the incompatibility of the masculine legal subject as a universal, while simultaneously rejecting the feminine, or female experience, as substitute or alternative. Central to this is an understanding of the exclusions feminine universals have carried into feminist scholarship, resulting in the amenability of feminist scholarship to very limited gender law reform agendas while alienating and undermining women from outside of elite women and Western women's experiences of gendered lives. As such, a split subjectivity incorporates a motif of humanness where to be human is to be born into difference.<sup>28</sup> The central pivot being the knowledge that all human subjects originate via the splitting from another subject in a manner that is both one of connection and separateness, that can read difference and dependencies simultaneously, and without gendering.

The split subject can hold the knowledge that 'the relationship posited between male and female, masculine and feminine, is not predictable; we cannot assume that we know in advance what it is'.<sup>29</sup> As such, the split subject need not be fixed to dominant gender arrangements through recognising gender as a power relationship that, in coordination with other power structures, enacts on, shapes, and is shaped by, subjects. For Kristeva, the split subject is linked to understanding of the 'subject in process/in question/on trial'.<sup>30</sup>

To bring this knowledge to legal understandings of subjectivity allows the conceptualisation of legal subjectivity to commence with difference, fluidity, and the capacity for multiple subjectivities as the starting point rather than the deviation: it is this which I consider an important feminist critique. Placing the split subject into legal accounts allows thus (in legal reforms) for recognition of both relationality and autonomy of actors. The importance of this is immediately obvious in, say, crimes of domestic violence. The law's encounter with relationship violence requires knowledge of both the ongoing relationships between the parties and – even at the moment of splitting – of the autonomy of the parties, whether perpetrator, victim/survivor, parent, child, partner, extended family member, or any combination of these identities. As law stands, in cases of relationship violence, the perpetrator is often given too much autonomy (e.g. in framing the narrative)<sup>31</sup> while the victim/survivor is often punished for the continued desire and recognition of the relational (e.g. dropping charges, choosing to return to the relationship). In Manitoba, Canada, it was the creation of courtroom processes that not only saw and valued the relationship but centred the relationship between the parties and the parties and the court to transform outcomes in Domestic Violence Courts.<sup>32</sup> Similarly, Elizabeth's account of custody stalking in UK cases

---

<sup>27</sup> Lacey (n 1) 217

<sup>28</sup> Also see: Hannah Arendt, *The Human Condition* (2<sup>nd</sup> edn, Chicago 1998) 9

<sup>29</sup> Scott (n 4) 11

<sup>30</sup> Kristeva, 'Women's Time' (n 23) 31

<sup>31</sup> Liz Kelly and Nicola Westmarland, (2016) 'Naming and Defining 'Domestic Violence': lessons from research with violent men' (2016) 112 *Feminist Review* 113

<sup>32</sup> Jane Urself, 'The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case study' (1996-7) 8 *Current Issues in Criminal Justice* 263

of relationship violence affirms, ‘fathers who pursue care time with their children are likely to be viewed as moral agents and to receive applause for their actions, regardless of their histories of violence and/or control’.<sup>33</sup> In these situations the past experiences of violence and coercive control are dismissed as unimportant to the ongoing network of gendered relations, while the male desire for access is ‘read’ as the appropriate actions of the unencumbered, rational subject that override the survivor’s accounts of prior violence and control. The gendering of both relationships and rationality thus undoes the capacity of the court to value alternative accounts. The recognition of a split subject might not undo these gendered framings, but it should give pause for rethinking who is rendered rational and full legal subjects informing the narrative to be accepted in court and whose narrative is discounted as relational and thus emotional. The split subject encounters humans as both connected and separate, bridging the self and the legal subject in important ways that undoes the gendered expectations of law and legal relations.<sup>34</sup>

Nevertheless, it is important to anchor the discussion of the split subject with that which it is not intended to be. This is not an ethics of care politics centred on using women’s difference or feminine forms as the normative foundation for a new (or old!) legal model. Nor is this built around the body that is primarily sexed female. Neither is the split subject constructed as an approach aimed at giving the ultimate answer to conceptions of legal subjectivity: this would negate the attention to feminist method attested to earlier which specifically rejects the notion of ‘grand theories’ supplying complete ‘answers’ to complex legal and political projects.<sup>35</sup> The split subject is drawn from, not from a universal feminine form, rather, the knowledge that all humans emerge from a splitting from the pregnant body. This is reflective of an approach where feminist messages are attentive to the complexity and the diversity of the subject’s experiences of the world.<sup>36</sup> The pregnant body is used as a symbol for the reality of human subjectivity as intimately and originally concerned with a breaking away, a separation, and natal potential, rather than an entering of the world as a fully formed and unified subject. This occurs for individuals, whether through the process of being born, or through the growth from childhood to adult that requires variations in dependence on central carers, as well as for states (also legal subjects) which require some form of separation from previous arrangements and independence from previous community structures to assert sovereignty.<sup>37</sup>

For Otomo, the call for a new vocabulary in approaching law is developed as an argument against the development of strategies of compliance that fail to engage in revolutionary feminist practices (and thus akin to Kristeva’s critique, above). Otomo counsels:

---

<sup>33</sup> Vivienne Elizabeth, ‘Custody Stalling: A Mechanism of Coercively Controlling Mothers Following Separation’ (2017) 25 *Feminist Legal Studies* 185, 189

<sup>34</sup> Here I draw on a distinction between the self, as how identity is understood by the individual and subjects (in this case legal subjects) ‘defined by others outside oneself’, see: Robert Hill, ‘Surviving Domestic Violence and Navigating the Academy: An Autoethnography’ (2018) 4 (1) *Journal of Critical Scholarship on Higher Education and Student Affairs* 27, 33

<sup>35</sup> Lacey (n 1) 171, 176 - 178

<sup>36</sup> Hilary Charlesworth, ‘Talking to Ourselves? Feminist Scholarship in International Law’ in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart 2011) 17; Isabelle Gunning, ‘Arrogant Perception, World Travelling and Multicultural Feminism’ (1992) 23 *Columbia Human Rights Law Review* 189

<sup>37</sup> For a longer discussion, see: Gina Heathcote, *Feminist Dialogues on International Law: successes, tensions, futures* (Oxford University Press 2019)

The answer . . . is to hold on to both resistance and revolution as feminist telos, but to distinguish in our minds between the institutional structures . . . (which we must continue to engage with and resist in order to achieve our political goals), and the space created by failures of masculinist . . . discourse which we can fill with revolutionary readings, writings, speaking and beings.<sup>38</sup>

Drawing inspiration from Otomo's twofold project, I consider the split subject as conceptual apparatus to fill the space created by the poverty of masculinist state discourse. Otomo thus finds '[w]e may, for example, remain within a maternal metaphor, but rather than writing it into the sacrificial fraternal economy, hold onto the more nuanced (parasitic, symbiotic, combative) relations between mother and child when thinking about regulation of such relations'.<sup>39</sup> Similarly, I am not advocating the transference from a masculinist conception of law to a feminine conception of law – rather I propose a project of seeing the diversity of bodies and personhood because the split subject, or the pregnant body, is understood as difference, as potentiality, as the natal moment which connects what it means to be human (rather than female or male).<sup>40</sup> Ultimately the split subject is a critique of existing conceptions of law that fail to incorporate the relational within legal relationships, asking why masculinist perceptions of legal subjectivity persist within legal framings. By acknowledging human experience as defined by the splitting from the pregnant body not only is the relational nature of subjectivity embedded as creating the conditions for autonomy of the subject, human difference is constituted as that which makes us the same so that gender of the subject is no longer embedded in law.<sup>41</sup> This, I argue, is not only a critique of relevance for feminist jurisprudence but equally a tool that might illuminate reform strategies that look towards (in the words of Lacey) new horizons/utopias where the embedding of difference, relationality and autonomy function to redesign feminist epistemologies that are inclusive of new and varied meanings of subjectivity. The split subject might even accommodate accounts of subjectivity that include the connection to earth, to land, to non-human animals – an approach to subjectivity that is central to indigenous Australian accounts of law and land; where recognition of the human-earth dependency is as central as human-human dependencies.

### ***Plural Subjects***

. . . though feminism must (and does by definition) start out from the assumption that sex/gender has a general significance across a range of social fields, it must maintain an open mind on the interaction between sex/gender and other important axes of social differentiation (and oppression) such as race, socio-economic class, age, sexual orientation . . .<sup>42</sup>

Lacey's analysis of utopian/utopia in feminist theories analyses approaches that insist 'that we can imagine the world differently' acknowledging this as an important corrective to the political inertia sometimes encountered in critical projects.<sup>43</sup> For Lacey this addresses the

---

<sup>38</sup> Yoriko Otomo, 'Searching for Virtue in International Law', in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart 2011) 3

<sup>39</sup> *Ibid.*, 44

<sup>40</sup> Arendt (28)

<sup>41</sup> *Ibid.*

<sup>42</sup> Lacey (n 1) 13

<sup>43</sup> Lacey (n 1) 234

impasse found within post-structuralist accounts that ‘engage in the impossible project of speaking that which, according to their own analysis, cannot be spoken’.<sup>44</sup> I am interested in the impossibility of difference for feminist legal theories. Given the attachment to women as the subject of gender law reform, in this section I consider what it means to think past the subject of women and to imagine difference as the organising methodology for feminist legal theories. This supplements the critique of subjectivity, above, and wonders about the capacity for feminist legal theories to re-imagine the very categories and structures that inform legal discourse, to:

. . . resist the idea of a complete or overarching feminist theory, which seems to me to encounter the intellectual objection that is inevitably suggests a certain political or empirical priority for sex/gender . . .<sup>45</sup>

In this part of the article, I wish to move beyond the discussion of split subjects to think about what that means in terms of reforming feminist praxis. If the split subject is the epistemology, the plural subject, which I discuss here, is the method and, perhaps, politically responsible listening, which I discuss in the next part, the utopia as it imagines a world of self-reflexive feminisms framed around kindness and care, remembering and listening. To develop a method of plural subjectivities – presupposed by the epistemology of split subjects – I draw on the scholarship of Kapur; in particular her account of peripheral subjects. In the work of Kapur, via the articulation of the peripheral subject as a normative starting point for feminist theorising, a robust critique of feminist approaches to international human rights law, and violence against women strategies within law, is presented.<sup>46</sup> Kapur’s approach hinges on acknowledging the victim subject of liberal-radical feminist approaches to human rights so as to ask how feminism constructs its subject/s and thus its theories of knowing.<sup>47</sup> The peripheral subject recognises non-dominant legal forms as relevant to the rendering of legal reform, in other words, potentially promoting a shift toward legal pluralism through the disposing of dominant thought and knowledge paradigms that underscore legal processes. My argument is this can be expanded to build a mode of plural subjects, entrenching difference in conceptions of subjectivity. The peripheral subject also acknowledges the perspective, agency and voice – as a normative force – outside of the masculine, Western unencumbered subject imagined in liberal projects and often reproduced within gender law reform. When this universal is dislodged from its invisible place in the formation of knowledge, what sits behind? To avoid a substitute of one particular parading as a universal with a new particular parading as a new universal the plural subjects foreground difference as an organising principle that both challenges the persistence of civilising projects and redesigns legal relationships through the expectation of encountering difference.

Kapur demonstrates how contemporary approaches to challenging violence against women under international human rights law constructs a non-Western subject in need of ‘saving’ and elite women within political arenas as ‘agents’ (best placed to undertake the job of saving). The agent-victim binary discounts the capacity of those cast as victim to articulate feminist legal approaches, or solutions, given the necessity that they be saved by those who already have full capacity to articulate normative structures. Kapur challenges feminists to

---

<sup>44</sup> Lacey (n 1) 234

<sup>45</sup> Lacey (n 1) 14

<sup>46</sup> Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005) 131

<sup>47</sup> *Ibid.* 107

attend to the normative agenda of peripheral subjects as a mechanism for disrupting the victim-agent binary.<sup>48</sup> Through highlighting Kapur's work, the peripheral subject emerges as a mechanism for engaging political consciousness in the foundations of law through attention to inequalities and their gendered intersections. That is, the peripheral subject asks difficult (and different) questions with regard to whose interests are represented in gender law reform and, given her location outside of dominant power structures and knowledge producing spaces, is a reminder to articulate gender as embedded in racialised, heteronormative and colonial histories. Gender law reform might look very different if this were the normative starting point, informing feminist methodologies within law: the knowledge and perspective of indigenous Australians, for example, is recognised as of equal value to mainstream Australia.

In order not to construct a new particular that is parading as a universal, I want to suggest the peripheral subject must be placed in dialogue with others, for example, Braidotti's nomadic subject or Brah's diasporic subjects. I am interested in what happens if Kapur's peripheral subject is placed in dialogue with Braidotti's nomadic subject or Brah's accounts of the diasporic subject.<sup>49</sup> The nomadic subject enters Braidotti's work as a cross boundary, stateless post-human whose subjectivity 'reflects the existential situation of the multicultural individual, a migrant who turned nomad'.<sup>50</sup> At the core of Braidotti's project is a commitment to 're-thinking the bodily roots of subjectivity' that acknowledges both the diversity of lived bodily experiences and the epistemological projection of identity onto bodies in a manner that 'Others' specific subjects. Braidotti's account is then able to engage directly with the construction of subjectivity both through and within identity politics, across differentiations, to release understandings of subjectivity into the ranging, temporally shifting and geographically mobile subjectivity of the nomad. Braidotti's work centres on the individual subject within philosophical work, transferring and re-imagining this within the context of law might be deployed to disrupt a return to understanding the sexed and gendered subject is prefigured in our understanding of legal subjects, especially when the nomad is placed in dialogue with the peripheral subject.<sup>51</sup> Braidotti's project is akin to Kapur's focus on subjectivity, although where Kapur draws on postcolonial subjects to frame a subject of resistance to the imperial legacy of legal endeavours, Braidotti uses an account of postmodernism (as the contemporary temporal account rather than an ahistorical theory) and psychoanalytical accounts to explore the role of the affective and the role of desire in the formation of subjectivity. The persistence of difference as a marker of inequality so that, in the words of Braidotti, 'the nomadism in question here refers to the kind of critical consciousness that resists settling into socially coded thoughts and behaviours' can be developed as a normative project that challenges key assumptions that inform legal thinking.<sup>52</sup> Braidotti imagines a version of subjectivity that considerably transcends philosophical traditions that assumed the male body and experience of powerful men as the archetype of the human condition. Consequently, if feminist engagements with law seek to

---

<sup>48</sup> Ibid.

<sup>49</sup> Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (Routledge 1996); Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (2nd edn, Columbia 2011)

<sup>50</sup> Braidotti, *ibid.*, 21

<sup>51</sup> Hilary Charlesworth, 'The Sex of the State in International Law' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (Law Book Company 1997) 251

<sup>52</sup> Braidotti (n 49) 26

move beyond the dominant spaces of gender law reform that have emerged thus far and, accepting that these law reforms tend to reproduce gendered bodies and sexed subjects, a fluid and dynamic account of subjectivity is necessary. If a fluid and dynamic account of subjectivity centres plural subjects as motif, then the nomad, the peripheral or diasporic subjects need not individually stand as the fixed account, but rather feminist epistemologies can be constructed around spaces of dialogue between and with plural subjects. Varied dimensions and experiences of difference, and Othering, are thus called in to inform legal foundations, whether the sex worker, or the migrant, or the widow.

To Braidotti's and Kapur's projects, centred on subjectivity, Brah's work on diaspora furthers our understanding of the failure of categories of belonging within dominant philosophical-political accounts. The closure of identity politics and limited perspective offered when mapping the world through the national state (or nationalism) destroys significant appreciation of the migrant's multi-located sense of belonging and the capacity for human empathy, memory and difference to be the site of our sense of belonging. Like Braidotti and Kapur, Brah's account commences a project of acknowledging fractured subjectivity that has resonance for understanding subjectivity before law. But, rather than seeking a means to understand fragmented subjectivities within an (assumed) hermeneutically sealed world of legal relationships, rules and principles, Brah's work asks us to consider subjectivity as the space to know and understand the 'Other'. Furthermore, Brah's critical contributions remind feminist methodologies that their messages need not look to the global south to 'find' gendered harm and discrimination, and that intersectional harm configures and produces all spaces, even those Westerners imagine as home. Brah's articulation of the migrant, in dialogue with peripheral and nomadic subjects, indicates feminist starting points must be plural subjectivities: that continually open out their invitation to those who are to speak and placing the conceptualisation of subjectivity in flux, as she crosses borders and belongs, finds home, here and there, there and here.

Kapur, Braidotti and Brah all present challenges to the feminist and the legal philosopher alike – they demand a re-assessment of the types of engagements, both practical and substantive, that have evolved and emerged in feminist legal theories since the early 1990s. The expectation that legal arrangements might embrace contemporary gender theorists' formation and engagements with multiple, wandering subjectivities in the first few waves of feminist approaches to law is unrealistic. The types of feminist developments within law have instead mirrored the types of larger development within the discipline of law itself. The consequence has been a re-assertion and acceptance of the sexed and gendered foundations of law and increased critique of the victim and governance feminisms that have emerged in political and legal reforms. To shift beyond this, I argue, a broader and more complex feminist encounter within law is required. Thus, attention to how knowledge is able to traverse legal structures, in a nomadic fashion, with attention to (assumed) peripheral accounts of legal arrangements as normatively equivalent to the core is required. This also produces a central questioning of any sense of belonging, or home, that is derived from a nationalist politics and deprived of the multi-consciousness of the migrant.

As such, through drawing feminist writing on plural subjectivities into a feminist legal project, complexity, fluidity, choice and relationality are demonstrated as elements of human experience that are poorly reflected in legal structures. Acknowledging the perspectives of peripheral, nomadic and diasporic subjects as normative, drives recognition that there is, and

must be, an explicit engagement with ethical commitments knitted within feminist legal projects. The dominant unspoken ethical commitment to feminist legal advances – where the non-Western / migrant / poor woman is constructed and reconstructed as damaged, in need of protection, without voice and cast as an actor defined through her assumed feminine body – is in this approach re-assigned a problematic gender ethic. Peripheral, nomadic and diasporic voices instead challenge the binary of m>f as the central / single organising force in critical feminist accounts and in law. Consequently, feminist projects within law must actively work to disrupt this sense of knowing, or assumed gender politics, to use and develop plural understandings as a mechanism to intervene and disrupt precisely what we think law *should* be. It is in stories of plurality that the knowledge to disrupt the intersecting power relations is made visible and the peripheral, the nomadic and the diasporic subject might begin conversations that are transformative of the normative order and its underpinnings.

My final thought on plural subjects returns to Lacey and traces her response to difference and its pivotal placement in feminist jurisprudence to acknowledge Lacey's identification of the continued tension between diversity as cornerstone of feminist methodologies and the potentially destabilising effect of events to draw diversity into legal processes. Lacey identifies that 'diversity and fragmentation of social experience' functions to construct the need for feminist jurisprudence to 'listen to the insights of women in a variety of locations relative to the many powerful sites of oppression – class, race, sexuality'.<sup>53</sup> At the same time, Lacey recognises 'the spectre of total fragmentation seems to threaten feminisms mission to speak in the voice of political outrage or advocacy'.<sup>54</sup> To address this, I have tried to avoid falling into the articulation of a grand theory but to rather interrogate law's self-perception and to conceive of ways to imagine that perception differently – and with difference as an organising principle. The split and plural subject thus function to re-imagine law as designed around the unifying aspects of human experience, to be born, to be different. Least my approach entering into the abstraction of masculinist accounts of justice and law,<sup>55</sup> in the following section I shift to the very practical, and yet little practiced, art of listening – with political responsibility.

### ***Speaking Subjects***

It assumes that a single individual can “get inside” the experience of others, imagine what their lives might be, *without ever having to listen to anyone else*.<sup>56</sup>

In this quote from *Unspeakable Subjects*, Lacey analyses liberal political theorist Rawls' construction of the original position as a device for understanding justice. Lacey's analysis not only interrogates the assumed role of disembodied and degendered subjects who people the original position, but further asks how a project of political justice can proceed without listening to the situated understanding of the Other. I want to return to this idea of listening in this section, further complicating the split and plural subject to move beyond abstraction,

---

<sup>53</sup> Lacey (n 1) 175

<sup>54</sup> Ibid.

<sup>55</sup> John Rawls, *A Theory of Justice* (Cambridge 1971)

<sup>56</sup> Lacey (n 1) 65 (*italics in original*)

critique or utopias and to propose listening as a prelude to gender law reform. I expand Lacey's articulation of the situated speaking subject through a review of the work of Otto.<sup>57</sup>

Lacey analyses the impact of gender law reforms to find 'the institutions which reformist interventions seek to change are themselves interwoven with and dependent upon a complex network of other institutions'.<sup>58</sup> The reality of this has been demonstrated in the variety of gender reforms seen in law in the twenty years after the publication of *Unspeakable Subjects*, whether focused on rights and empowerment or laws that criminalise gender-based violence. I am particularly interested in how the spectrum of gender law reforms within law have to often enshrined sex difference, and legal responses to the assumed priority of sex difference, as the organising principle of gender law reform.<sup>59</sup> That is, at the centre of gender law reform lies a gendered binary that reinforces and revolves around the categories of men and women, with an assumed heteronormative relation and that tends to essentialise gender categories rather than transcend them. For feminist legal theorists, balancing the need for legal clarity within intersectional feminist methodologies is not straightforward, even if plural and split subjects might, at a deep level, help re-frame our understandings of legal subjectivity: in other words, law requires categories of inclusion while intersectionality requires nuanced understanding of the overlapping of categories of exclusion.

In this part of the article, to understand how gender operates in any specific legal context, how gender interlocks with other sites of privilege, and the best means to see the gender norms of institutions I argue for politically responsible listening. This is a conscious shift from a feminist methodology theorising difference that, in contrast, pivots around the experience/expertise of white, western and/or elite women in a given political context. As such, the third approach to intersectionality, which I wish to add to the theorising of plural and split subjectivity above, incorporates Otto's articulation of listening in feminist jurisprudence. Otto's analysis is drawn from an analysis of people's tribunals which she describes as while functioning 'imitate the legal form of a court, they seek to perform the power of law, but in a way that gives voice to dissenting perspectives and to subjects whose experience has been silenced by law and mainstream politics'.<sup>60</sup> In reflecting on her role as Expert Panelist at the Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict, held 10-11 October 2012, in Phnom Penh, Cambodia and as member of the Judicial Council for the Women's Court—Feminist Approach to Justice, which was held 7-10 May 2015, in Sarajevo (Sarajevo Tribunal), Otto records:

I have realised more fully the limits of conceiving responsibility only in terms of perpetrators—whether individuals, states, or non-state actors like militias and multinational corporations. Justice also requires challenging the structures of economic and military power, which institutionalise impunity in a larger sense. The means of challenging structural injustice lie largely outside the law, in the politics of the everyday, for which we all share some responsibility.<sup>61</sup>

---

<sup>57</sup> Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) *London Review of International Law* 225

<sup>58</sup> Lacey (n 1) 235

<sup>59</sup> Also see: Janet Halley, 'Take a Break from Feminism?' in Karen Knop (ed), *Gender and Human Rights*, (Oxford University Press 2004) 57

<sup>60</sup> Otto (n 54)

<sup>61</sup> *Ibid.* 229

Otto thus draws into focus both the macro and micro dimensions of gendered encounters, identifying the nexus between conflict-related sexual violence (the focus of the Tribunals) and larger transnational political arrangements and the nexus with the everyday, gendered operations of human lives. Situating herself as complicit, Otto articulates a role for politically responsible listening to re-align the assumed knowledge and sites of knowledge in justice project.

Otto's description of politically responsible listening as active listening and hearing what the meaning of gender is, how gender harm emerges, and is sustained, and how legal institutions bring gendered assumptions into gender law reform is an excellent companion to Kapur's challenge to take seriously the normative commitments, the knowledge production and the views of those that are most affected by the changes feminism may wish to operationalise. This includes, by definition, an acceptance that changes might be asked of actors within academic and legal institutions that disrupts existing power and privilege, including for some women or feminists, is uncomfortable, and may even be silencing of these actors. For feminist legal theorists the project of working to actively bring the self into the 'frame of responsibility' draws in not only the positionality of the scholar but also the relationship between feminist and other sites of critical engagement with law through a forced recognition of gender's intersectional nature.

Otto writes of the role of experts at the hearings in Phnom Penh, noting the space between the acts of listening during the testimonies in the hearings and the contributions of experts. Otto concludes:

Although the experts spoke with passion and commitment, there was very little resonance between what they had to say and the survivors' testimonies of their quotidian struggles for survival in the present realities of post-conflict (in)justice. For me, it was an object lesson in how agendas, understood as universal, can not only fail to connect with the local, but can also dictate how the problem is presented and addressed at the local level.<sup>62</sup>

For Otto part of the solution is to build practices that make clear the connection between listening and responsibility. This approach offers no simple reformation of feminist work on law as it is, at its heart, an understanding of the co-optation of feminist accounts of law into the continued production of specific types of legal interventions and a challenge to what feminist actors within legal spaces think they know. Consequently, there must be attention to where race, sexuality, class, ableism, and other forms of privilege integrate into feminist knowledge production to reinforce the status quo when transformed into institutional outcomes. As such, Otto's politics of responsible listening asks for reflection on our own co-optation, as feminist and legal scholars, in the legal formations that we position as sites for gender law reform. I regard this as a methodology well beyond the conventional means and mechanisms that we might listen to others through. That is, if feminist jurisprudence accepts the reality of plural subjects as speaking subjects, who will inform the normative contours of political and legal arrangements, then a politically responsible listening asks of about each feminist's own complicity in the maintenance of the status quo where gendered power interacts and produces raced, classed and ableist power and privileges in a simultaneous and self-sustaining network of relations. This is a knowledge project. For me, personally, it is a

---

<sup>62</sup> Ibid., 243

need for recognition of the dislodged voices of indigenous histories in the formation of the Australian state – where I was born – as having a normative force that should be central to the future of the legal relations in Australia. At what cost would listening to these articulations of human relations, of subjectivity, of belonging, and of being, be made? A politically responsible listening is a space of feminist law reform that begins with listening to this knowledge.

### III.

#### Conclusions

Lacey's text *Unspeakable Subjects* has its prescience in the quest to centre feminism's capacity to question and reshape the categories within legal writing and research.<sup>63</sup> In this article I have centred legal subjectivity to articulate new methods of critique, utopia and reform to re-imagine a legal subject beyond sex difference, that is ungendered in a manner that permits engagement with difference within and throughout gendered lives. I have drawn on three interlocking methodologies to re-imagine legal accounts of subjectivity, inspired by Lacey's process of critique, utopias and reform in feminist analysis.<sup>64</sup> In drawing in Kristeva's work an alternative to masculinist conceptions of legal subjectivity is articulated through the motif of split subjectivity.<sup>65</sup> Likewise, through presenting the texts of Kapu, Braidotti and Brah in dialogue, an understanding of legal subjectivity via plural subjectivities is imagined.<sup>66</sup> The plural subject is conceptualised through a dialogue on difference that is constructed to speak alongside and within the split subject framework. Following Lacey, I acknowledge law's need for certainty and closure,<sup>67</sup> and while recognising the unpredictable outcomes of legal reforms, I developed in the third account the writing of Otto on a feminist politics of listening.<sup>68</sup> Finally, the images of Charmaine Pwerle demonstrate the unreadability of forms of knowledge dislodged from conceptualising what it means to be human in dominant accounts which, I have argued, feminist legal theorists must learn to listen to, to read and to understand to avoid co-optation in legal projects and law reform that re-assert the status quo of gender relations and wider power structures. What then does it take to listen and understand, to incorporate into feminist critique, utopia and reform, indigenous understandings of law?

The impact of terra nullius surrounds us: violations of our law, ecological destruction of our lands and waters, dispossession from our territories and the colonisation of our being. Terra nullius has not stopped; the violations of our law continue, the ecological destruction of the earth our mother continues with a vengeance, we are still struggling to return to the land, and the assimilator-integrator model is still being forced upon us. This is terra nullius in its practical and continuing application. There is no death of terra nullius.<sup>69</sup>

---

<sup>63</sup> Lacey (n 1) 187

<sup>64</sup> Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights*, (Oxford University Press 2004)

<sup>65</sup> Kristeva 'Women's Time' (n 23)

<sup>66</sup> Kapur (n 46); Braidotti (n 49); Brah (n 49)

<sup>67</sup> Lacey in Knop (n 60) 46

<sup>68</sup> Otto (n 55)

<sup>69</sup> Watson (n 7) 50

The split and plural subject, heard in indigenous scholarship, is also a subject connected and a part of the earth, indigenous law shifts feminist challenges to the individualised, rational legal subject and questions not only isolating of subjects from another but also the isolating of human subjects from non-human subjects. A project of politically responsible listening, following Otto, not only listens but reflects on the complicity we maintain in projects of environmental destruction and the perpetuation of colonial forms through law. The degendered subject, split and plural, is transformed further, re-imagined and questions asked of legal and political arrangements that destroy the environment that sustains us. This knowledge that indigenous accounts contribute to re-imagine legal subjectivity as one invested in relation to the earth / our environment requires more listening to make sense of this in a political era where this connection has been disentangled from human legal relations. The displacement of indigenous knowledge in Australia was encapsulated in the dispute of the building of a bridge to Hindmarsh Island in

The recent dispute over the building of a bridge to Kumarangk, illustrated the power of the state to intrude into the discussion and determination of our cultural and spiritual identity. But the dispute also illustrated the power of indigenous peoples to continue to echo the voices of the ancestors on law and culture. The women of Kumarangk said we are still the carriers of 'women's law-business', and we still honour that after 200 years of colonialism. And the state said: you are lying.<sup>70</sup>

In fact, in the inquiry into the building of the bridge no indigenous women were listened to: they chose not to speak due to the sacred nature of the knowledge required to be communicated. When questioning occurred of an indigenous elder, Watson records the following exchange:

Q. So you cannot tell us, can you, in what way the bridge would affect the spirituality of the island, which is women's business, can you.

A. No, I have no way in the world of explaining that to you. I never come here to talk about the women's business on that site.

Q. You are not in a position to talk about it, are you.

A. Because I can't, I'm a man.<sup>71</sup>

Ultimately the truth of the existence of women's business, women's knowledge, became the question which the inquiry answered with a negative. That is, if this knowledge could not be spoken within the space of the inquiry it could not exist. This failure to listen, to bear responsibility for the history of silencing, rendering invisible and ignoring indigenous knowledge demonstrates the antithesis of Otto's politically responsible listening.

To conclude, in returning and re-reading Lacey's *Unspeakable Subjects*,<sup>72</sup> feminist legal theorists are reminded of the necessity for feminist legal methodologies that problematise foundation categories and orthodoxies within jurisprudence. In this article I have used this as

---

<sup>70</sup> Ibid.

<sup>71</sup> Watson (n 7) 51

<sup>72</sup> Should feminism aspire to replace or reconstruct the framework of modern legal thought, or should it resist the desire for foundations in favour of a more resolutely critical stances? (Lacey)

stimulus for engagement and reflection on a wide range of feminist possibilities. I have argued that through developing a feminist jurisprudence responding to the foundations of law, contemporary feminist legal theories are better able to commence dialogues that respond to contemporary (not necessarily legal) feminist writing on gender and race, subjectivity and silencing/listening.

What then if we were to listen, to allow the split-subject to honour plural lives and world views, could feminist jurisprudence contemplate what it means to say:

The law transcends all things, guiding us in the tradition of living a good life, that is, a life that is sustainable and one which enables our grand-children yet to be born to also experience a good life on earth. The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it. And it is, as explained by George Tinamin: Ngangatja apu wiya, ngayuku tjamu. This is not a rock, it is my grandfather. This is a place where the dreaming comes up, right up from inside the ground.<sup>73</sup>

---

<sup>73</sup> Watson (n 7) 39