

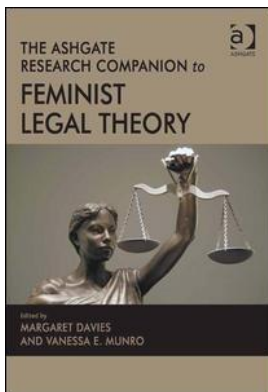
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Feminism, Law and Materialism: Reclaiming the 'Tainted' Realm

Joanne Conaghan

Introduction

... the guiding rule of procedure for most contemporary feminisms requires that one distance oneself as much as possible from the tainted realm of materiality by taking refuge within culture, discourse, and language. (Alaimo and Hekman 2008: 1)

Over the last three decades it has become commonplace in critical scholarship to regard materialism as a discredited theoretical tradition which has been superseded by postmodernism, social and linguistic constructionism, and what is often referred to as 'the cultural turn'. This narrative of eschewal is familiar and closely linked to the widespread rejection of 'totalizing' theoretical projects, usually described in pejorative terms as 'grand theory' or 'metanarratives'.¹ In turn this stance is associated with critiques of Marxism, and to a lesser extent, radical feminism. However, the scope of anti-materialist denunciation is often wider, encompassing all forms of structuralism, modernism, or any adherence to the notion of objective access to a real/natural world or to the divisibility of language and reality (Alaimo and Hekman 2008: 2).

The reasons for the 'eclipse of materialism' (Coole and Frost 2010: 3) are complex and rarely subject to close scrutiny. They include a desire to avoid deterministic accounts of the social world that leave little room for resistance or human agency, challenge analyses of social inequality privileging economic or distributive concerns, and ensure proper recognition of other aspects of social relations and identity and the intersectional dimensions thereof. A postmodern suspicion of any invocation of 'the real' combined with enthusiastic endorsement of social constructionist approaches to the same has resulted in a critical tradition which is less grand and ambitious, more contingent and localized in its attentions. This has affected the content of theoretical engagement, encouraging the discursive decentring of the state, the reconceptualization of political space in less bounded, more fluid terms, and the relegation of class – a central concept in traditional social theory – to a 'bit part' in a series of endlessly dissolving analyses of identities, subjectivities and intersectionalities.

Nancy Fraser, neatly if controversially summed up these developing trends in the late 1990s when she observed a 'shift in the grammar of political claims-making' (Fraser 1997: 2). Fraser argued that the focus of political struggle had moved away from issues of redistribution towards a new politics of recognition, resulting in the 'decoupling of cultural politics from

1 Both terms coined by Lyotard (1984).

social politics and the relative eclipse of the latter by the former' (2). While Fraser's tone was tinged with regret, for many feminists the decimation of materialism affords little cause for lament. Moreover, in a legal context, the feminist attitude to materialism is best evidenced by its conspicuous absence from most contemporary accounts of feminist legal theory (see, for example, Munro 2007, Fineman 2011). On the rare occasion materialism *is* acknowledged (albeit obliquely as 'Marxism'), it is dismissed as having little to do with the role of law in society and therefore of no interest to feminist legal theory (Levit and Verchick 2006: 8). Thus has materialism been consigned to the twentieth-century archives of late modernism.

My purpose here is not expressly to disrupt this narrative or challenge its explanatory power although, like any account offering a broad-brush characterization of theoretical trends over different spatial, temporal, and disciplinary domains, it is vulnerable to charges of distortion, overgeneralization and unfounded assumptions. Moreover, it is never wise to pronounce the demise of a theoretical tradition; experience reveals a disconcerting cyclicality to theoretical endeavours not always apparent in the heat of the intellectual moment (as we shall see, materialism barely had time to succumb before it revived). However, acknowledging the fallibility of the narrative of eschewal does not mean it does not have wide academic purchase. I would suggest it does; in fact, it pretty much serves as the 'received' version of critical theory's past and present. This is the broad history of critical scholarship into which most new scholars are inducted, producing a generation of academics for whom materialism is at best a suspect tradition and at worst a theoretical field that has completely bypassed their consciousness.

This is no less the case within feminism. It is perhaps no coincidence that feminist theory began to achieve academic legitimacy during the intellectual maelstrom marking the transition from structuralist to poststructuralist, modernist to postmodernist theoretical paradigms. Indeed, feminism helped to precipitate the paradigmatic shift this transition represents. The discrediting of Marxism, for example, was aided by the failure of Marxist categories to provide an adequate account of women's subordination. The often convoluted efforts of a generation of feminists raised in the tradition of grand theorizing to offer a coherent analysis that simultaneously encompassed capitalism and patriarchy served only to underline the limitations of Marxism: feminists confronted a theoretical approach in which class and relations of production systematically trumped gender and relations of reproduction within an overarching, highly prescriptive framework leaving little apparent room for challenge or adaptation. It is hardly surprising that after extensive but largely unsatisfactory engagements within the received theoretical tradition (see, for example, Sargent 1981, Young 1997), many feminists raced to embrace the multiple potentialities of new modes of theorizing offered by postmodernism (see, for example, Nicholson 1990).

By the early 1990s, cultural theorist, Judith Butler (1990, 1993), was emerging as a particular influence in feminist legal theory. In theorizing sex and gender as cultural constructs in which sex is positioned as an *effect* of gender not its biological precondition (Butler 1990: 10), Butler's work is perhaps the most notable intervention marking the shift in theoretical attention away from the causes and consequences of women's disadvantage – in their many concrete, material contexts – towards engaging with the discursive processes and practices through which gendered subjectivities and identities are produced and the modes of and possibilities for disrupting or resisting them. Given the authority and cultural pervasiveness of law, Butler's approach lent itself remarkably well to feminist legal deployment (see, for example, Murphy 1997, Loizidou 1999). At the same time, while many of the reasons for this shift in feminist focus are well understood – indeed, were the outcome of a necessary and

broadly progressive interrogation within feminism at the time (Drakopoulou 2000) – it soon became apparent that this theoretical reorientation did not come without costs.

As a framework for political, social and legal transformation, postmodernism has presented feminism with particularly pressing and seemingly irresolvable challenges: if knowledge is always situated and notions of truth, reason and objectivity are but the discursive creations of a foundationalist epistemology which must be jettisoned, how can feminists propound a positive programme for women's emancipation? If sex and gender lack any fixed or biological essence, indeed if gender categories are always suspect, upon what basis can women's identity as *women* be constructed? If women's experiences are so diverse as to preclude any appeal to commonality that does not inappropriately privilege some women over others (usually white, middle-class, Western women), who or what can feminism represent? Finally, if everything is the product of discourse, including our very selves – how are we to act as autonomous agents let alone as a political movement?

These are the kinds of questions with which academic feminism has been beset and as we struggle to answer them, we confront the many limits of the cultural turn. These include: the discursive disaggregation of subjects from their physical, biological, environmental and material contexts, producing the neglect of actual, living bodies; the repositioning of those bodies as scripts upon which discourse acts; and the loss of attention to the materiality of sex and sexed identity. Moreover, once the body as a living breathing entity falls out of the picture so also does the need to feed and clothe that body, put it to work, reproduce it daily and over the life cycle. As a result of the cultural turn, certain key concerns around the sexual division of labour, the interconnectedness of relations of production and reproduction, and the scale and persistence of women's economic disadvantage simply disappeared from the feminist theoretical agenda, notwithstanding their continued urgency in the 'real' world.

This led some legal feminists, including myself, to caution against the gap emerging between feminist scholarship and activism, a gap which was all the more acute in the context of law as a key site of feminist political struggle (Conaghan 2000: 354, Munro 2007: 2). Expressing my concerns at the millennium, I urged a change of direction in legal feminism on the grounds that '... close attention to the material lives of oppressed groups is a necessary task of any political project and ... an important dimension to the intellectual goal of furthering our knowledge and enhancing our understanding of the world' (Conaghan 2000: 385). My call echoed that of others: Susan Boyd speculated that 'something is missing' from contemporary analyses of law and the family, producing the neglect of 'wider trends of globalisation, privatisation, and economic privation' (1999: 370). Margaret Thornton accused feminist legal scholarship of coming across as 'arcane and remote' and in the ideological grip of neo-liberalism (Thornton 2004: 16). To a number of academics then, feminist legal scholarship seemed to be approaching a theoretical and political dead end.

This sense of unease and lack of direction is not confined to law or feminism. Perhaps the best known articulation of critical *ennui* comes from Bruno Latour in 2004 expressing regret about the disengagement with reality occasioned by constructionism. Speculating that critical theory had 'run out of steam', Latour observed that:

*A certain form of critical spirit has sent us down the wrong path, encouraging us to fight the wrong enemies and, worst of all, to be considered as friends by the wrong sort of allies ... The question was never to get **away** from facts but **closer** to them, not fighting empiricism but, on the contrary, renewing empiricism ... the critical mind,*

if it is to renew itself and be relevant again, must cultivate a stubbornly realist attitude ... (2004: 231)

How though, within a predominantly constructionist framework, *does* one cultivate a stubbornly realist attitude? Susan Hekman suggests that postmodernist scholars 'don't like to talk about reality because of its modernist association. So they simply ignore it' (Hekman 2010: 3). The result of this avoidance is an idea of reality as wholly absorbed by discourse, compelling no further interrogation other than constructionist terms. This is precisely what Latour warns us against. How can feminists and other critical scholars afford to ignore or theorize away the concrete material concerns of 'real' people? Is it possible or desirable theoretically to re-engage with reality without sacrificing the substantial insights of the linguistic turn? What might a postmodern materialist feminism look like and what would it entail for feminist legal scholarship and practice?

The purpose of this chapter is to offer a framework for exploring these questions by investigating the potentialities presented by ideas of materialism and materiality. The chapter draws, *inter alia*, from a burgeoning 'New Materialist' literature, spanning multiple disciplines and contexts, including but not limited to feminism. This literature seeks to counter the tendency to erase materiality from theoretical discourse while at the same time highlighting new understandings of the material in light of scientific and technological advances. Revisiting materialism, it is argued, offers new radical potentialities – ethical, conceptual, theoretical and political – in the wake of the postmodernist failure to provide an adequate theoretical base for an activist, politically transformative and materially grounded feminism. It offers a route out of what Stacy Alaimo and Susan Hekman describe as the 'impasse caused by the contemporary linguistic turn in feminist thought' (2008: 1). To this end, I want first to consider what we mean by the material and materialisms.

Mapping the Material

We live our everyday lives surrounded by, immersed in matter. We ourselves are composed of matter ... How could we ignore the power of matter and the way it materializes in our ordinary experiences or fail to acknowledge the primacy of matter in our theories? (Coole and Frost 2010: 1)

The term 'material' is used in everyday conversation in various ways: it may refer to a fabric, for example cotton or silk, or it may be applied more generically to encompass any raw material from which things are made – wood, plastic and so on. In this sense, material denotes 'stuff' or 'matter', the constituent elements of 'things.' More generally, this notion of material tends to correspond with the physical or earthly world.

Another sense of material is linked to immersion in the everyday practical activities which contribute to human sustenance. For example, Margaret Davies characterizes materialism as attention to the 'everyday conditions of women's lives, particularly in relation to work, reproduction and caring responsibilities' (2008: 214). Given the contemporary theoretical preoccupation with the cultural and symbolic, some feminists call for *more* attention to be paid to the everyday conditions of women's lives. Martha Nussbaum, for example, censures Butler for 'turning away from the material side of life, towards a type of verbal and symbolic politics that makes only the flimsiest connections with the real situation of real

women' (Nussbaum 1999). Nussbaum exhorts feminists to abjure the focus on language and discourse and turn to the situations of actual women, understood as living, breathing beings with practical material needs.

'Material' in this context often also assumes an economic or distributive hue. When Fraser observes that 'material inequality is on the rise in most of the world's countries' (Fraser 1997: 11), we know she alludes to economic or wealth-based inequality. In a related context, materialism may mean consumerism, as when Madonna sings about being a 'material girl living in a material world'. All these notions of material draw upon ideas of the real and they are often accompanied by a commitment to the existence of a reality unmediated by discourse, culture or intellectual abstractions.

A further common usage of material is in terms of significance or substantiality. This sense is evident in law; for example, in the requirement that an employer produce a genuine *material* factor other than sex to justify pay differences between men and women.² This meaning is also linked to a usage of 'matter' as in 'what's the matter?' or 'this issue really matters'. Etymologically, the word 'matter' derives from the Latin *materia*, meaning stuff from which things are made. However, it has also been linked to *mater*, the Latin for 'mother', and it is possible that the association of matter with importance, and relatedly, with origin or source, stems from this derivation. In any event, it is clear that 'material' and its various cognates, matter, materiality, and materialize (as in 'to give material substance to') are closely linked, both to each other and to the range of meanings which their ordinary usage denotes.

How do we get from meanings of matter and the material to an understanding of *materialism*? There are at least two core strands of theoretical materialism. The first is the philosophical tradition traceable back to the work of the Ancient Greek philosopher, Democritus, an early atomist in the fifth century BC.³ This strand of materialism is concerned with the nature of matter, or, more broadly, with the composition of the natural/physical world and its relation to human thought. The *Oxford Companion to Philosophy* describes materialism as 'the view that everything is made of or derives from matter' (Honderich 1999: 530). This is often contrasted with idealism understood in Hegelian terms as the belief that ideas (or more broadly the mind/*geist*) constitute reality. In fact, viewing materialism through the crude idealism/materialism polarity is not helpful and it is perhaps not insignificant that in the new materialist literature, explanations of materialism tend to be less prescriptive and more open-ended than the *Companion* account. In their anthology of *New Materialisms*, Diana Coole and Samantha Frost explain materialism simply as 'ways of thinking about matter and processes of materialisation' (2010: 2). Similarly, Myra Hird describes (new) materialism as 'a keen interest in *engagements* with matter' (2009: 330). In both these contexts the key focus is on matter and theorization but without any particular allegiance to the idea that matter is theoretically predetermining. Not surprisingly, much of the scholarship in this tradition, particularly recently, engages with philosophies of science and nature.

By contrast, materialism in social theory and historical materialism in particular, turns the spotlight on the social: social relations, structures, processes, practices and the power dimensions therein. Historical materialism, the theoretical underpinning of Marxism,

2 Equal Pay Act 1970, s. 1(3), now incorporated in the Equality Act 2010, s. 69.

3 'Atomism' here can be understood as the idea that the world is composed of small indivisible particles, i.e., atoms.

begins with people and their practical needs – to feed, sustain and reproduce: our ‘species needs’ require us to work to subsist, producing over time a division of labour, its social organization and the development of technologies of production (Colebrook 2008: 60). In this sense, historical and philosophical materialism can be said to be similarly attentive to natural and/or biological concerns. Indeed, one reason why historical materialism has fallen from general favour is that it is often accused of presenting an essentialist conception of human nature (Edwards 2010: 282). However, it can be argued that, at least in some of his writings, for example, *The Economic and Philosophical Manuscripts 1844*, Marx resisted the idea of an essential, pre-social human nature and located nature firmly in the social (see further Kamenka 1983: 131–146).

In any event, from a starting point of basic human needs, Marx derives a theory of the materiality of history and the development of consciousness:

Men are the producers of their conceptions and ideas – real, active men as they are conditioned by a definitive development of their productive forces ... Consciousness can never be anything other than conscious existence, and the existence of men is their actual life-process. (Kamenka 1983: 169)

Attending to the ‘life-process’ requires engaging with ‘real individuals, their activities and the material conditions in which they live’ (163), specifically with those activities and relations necessary to subsistence. In this way, labour, and the institutions, processes and relations which structure labouring activities, emerge as the primary focus of study, including, Marx argues, historical study:

The first historical act is ... the production of the means to satisfy [men’s basic] needs, the production of material life itself. The first necessity therefore in any theory of history is to observe this fundamental fact in all its significance and all its implication and to accord it due importance. (171)

Historical materialism then is a theory of history but one with descriptive and normative implications: as Marx famously remarked, historical materialism seeks not just to explain the world, but also ‘to change it’ (158). This aspiration to social transformation must, first and foremost, acknowledge the importance of materiality to the human condition. Thus, in his Preface to the *Critique of Political Economy*, Marx observes: ‘It is not the consciousness of men that determines their being, but on the contrary, their social being that determines their consciousness’ (160). Turning away from Hegelian idealism, Marx seeks to offer an account of historical and political change rooted in the practicalities of everyday life. From this core insight historical materialism has evolved primarily as a critique of capitalism but more broadly as an approach to analysing social change.

Historical materialism is frequently criticized for having ‘totalizing’ aspirations, a concern famously expressed in the slogan: ‘Let us wage war on totality’ (Lyotard 1984: 46).⁴

⁴ Kathi Weeks draws a useful distinction between ‘totalizing theories’ which tend to erase agency by ‘reduc[ing] subjectivity to some functional effect of an abstract, determinable and monolithic system of structures’ (1998: 4) and ‘the aspiration to totality’ which she describes as ‘the methodological mandate to relate and connect’ (71). Weeks argues that the aspiration to relate and connect individual subjectivity with wider, structural features of

Historical materialism is also routinely accused of privileging an economic 'base' over a social, political and cultural 'superstructure',⁵ and of offering an essentially teleological view of history.⁶ Such crude characterizations do little justice to such a rich and venerable tradition. It is important to remember that historical materialism did not spring full-grown and immutable from Marx's writings. It has had nearly two centuries to ferment and mature, yielding a range of diverse and sophisticated analyses, many of which simply do not warrant the kind of censure to which the tradition as a whole has been subjected. Far from forsaking contingency and complexity in favour of sweeping generalizations, grand axioms or universal postulates, there is a significant body of historical materialist literature in the tradition of E.P. Thompson and Ellen Meiksins Wood characterized by careful and painstaking study, fully attuned to the intricacies of particular social and historical contexts and the tensions and counteracting political forces therein (see, for example, Thompson 1980, Wood 1986, 1995). In these analyses, the theoretical focus remains firmly fixed on those social relations and processes imbricated in 'the production of life' (Hennessy and Ingraham 1997: 2) and their connection and relation to the 'immaterial' world of language, subjectivity, ideas and beliefs, imagination, value and affect (what is sometimes described as the relation between being and consciousness). In this sense and in contrast to the epistemological emphasis of the cultural turn, historical materialism – and materialism in general – is better understood as an ontological project. Indeed, one of the characterizing features of new materialism is the advocacy of a shift in theoretical focus from epistemology to ontology.

New Materialism

Unprecedented things are currently being done with and to matter, nature, life production and reproduction. (Coole and Frost 2010: 4)

Notwithstanding the theoretical aversion to materialism, recent years have witnessed the rise of a 'New Materialism' which is cross-disciplinary and encompasses a wide range of ideas and concerns.⁷ Renewed engagement with materiality is the result of a wide combination of factors including: new scientific and technological developments requiring us to rethink our understandings of and relations to the physical world; a surge of academic interest in notions of embodiment (particularly in feminism); and increasing anxiety about the tenacious grip of neoliberalism and its far-reaching economic, political and cultural consequences.

social organization, for example, class or gender, does not require the adoption of a closed theoretical system or the denial of human agency.

5 The base/superstructure metaphor actually plays only a limited role in Marx's writing. Ellen Meiksins Wood (1990) points out that it owes more to Engels than to Marx and was taken up and reified in a Marxist–Leninist dogma which elevated a self-contained economic sphere over all others. Wood describes this as a 'distortion' of Marx's original insights (126). E.P. Thompson also challenges the base/superstructure metaphor, describing it as 'wrong' and 'radically defective' (1994: 218–220). Thompson emphasizes the marginality of base/superstructure in Marx's writing, pointing to alternative analogies used by Marx, for example, in the *Grundrisse*.

6 Again a charge strongly disputed by, among others, Wood (1995: ch. 5).

7 The account that follows draws from a range of sources, particularly Alaimo and Hekman 2008, Hekman 2010, Coole and Frost 2010, Hird 2004, 2009, Hird and Roberts 2011.

Much of new materialist scholarship concerns rethinking the materiality of the human body and conceptualizations of the physical world. Indeed, some new materialists explicitly distance themselves from the social theoretical tradition. Within feminism, a distinction is sometimes drawn between ‘material feminism’ and ‘feminist materialism’. Myra Hird and Celia Roberts explain material feminism in philosophical terms as ‘a critique of the ontological conditions that separate nature from culture’ (2011: 211). By contrast, they see feminist materialism as concerned with ‘women’s material living conditions – labor, reproduction, political access, health, education, and intimacy – structured through class, race, ethnicity, age, nation, ableism, heteronormativity, and so on’ (Hird 2009: 329). This distinction may be of practical help in identifying different foci or emphases within the new materialist literature, but mindful of the normative and conceptual constraints such classificatory exercises impose, I am inclined not to follow it and prefer to view the scope of new materialist writing as broadly as possible. Coole and Frost provide what I consider to be a far more useful and less prescriptive ordering of the literature around three core themes:

1. new scientific conceptualizations of matter;
2. new challenges to understandings of life and the human condition; and
3. new engagements with political economy in the context of the pressing urgency of contemporary socio-economic and political realities (2010: 7).

These three themes are united by a common aim – ‘to give materiality its due’ (329) and by a concern to move beyond the theoretical stalemate of the cultural turn.

Rethinking the Physical World

A lot of new materialism takes its cue from recent scientific developments, specifically from newly emerging understandings of matter. Within science and philosophies of science, matter has traditionally been conceived as solid, tangible and inert, stuff which is acted *upon*:

The predominant sense of matter in modern Western culture has been that it is essentially passive stuff, set in motion by human agents who use it as a means of survival, modify it as a vehicle of aesthetic expression, and impose subjective meanings upon it. This [is a] view of inert matter as inherently devoid of agency. (Coole 2010: 92)

This conception of matter has a long pedigree and corresponds to an essentially Newtonian conception of the physical world in which discrete objects are thought to tend naturally towards inertia, moving only when an external force or agent is applied to them (Newton’s First Law of Motion). Inertia then is a core property of Newtonian matter. A similar conception of matter as solid and inert underpins the Cartesian dualism of mind and body (Gatens 1996: 109). Descartes defined matter as a corporeal substance constituted of length, breadth and thickness: so viewed, matter is fixed and measurable. More importantly matter defers to mind: in Cartesian terms, the mind is master of the body, and, by extension, man dominates nature. This yields a particular conception of cause and effect in which inert material substances are subject to external causal forces. Matter is without agency or spontaneity and causation is straightforwardly linear.

New Materialism seeks to conceive of matter in quite different terms, to encourage understandings of the material which are much less fixed and determined, much more ambiguous and complex. Much of this new thinking about matter derives from developments in theoretical physics.⁸ To take two examples: Einstein's theory of relativity, by asserting that time and space are relative and not fixed, challenges the basic premises of Newtonian mechanics; similarly, advances in nuclear physics around the existence, configuration and activities of atomic and sub-atomic particles defy understandings of matter as solid, passive and inert. The particles which comprise matter, viewed through the lens of modern physics, are active, unstable, self-producing and mutating *agents*, a far cry from conceptions of matter as lifeless, inanimate 'stuff'.

I am sadly ill-equipped to offer any detailed account of the nature and implications of modern scientific developments.⁹ However, one cannot fail to be intrigued by the way in which advances in modern science compel a transformation in the way in which we think about and imagine the physical world. Coole and Frost put it thus:

Conceiving matter as possessing its own modes of self-transformation, self-organization and directness, and thus no longer as simply passive or inert, disturbs the conventional sense that agents are exclusively humans who possess the cognitive abilities, intentionality and freedom to make autonomous decisions and the corollary presumption that humans have the right or ability to master nature. Instead the human species is being relocated within a natural environment whose material forces manifest certain agentic capacities and in which the domain of unintended or unanticipated effects is considerably broadened. (2010: 10)

In this brave new world, the nature and effects of materiality cannot be ignored in our theoretical efforts to make sense of things. Matter *matters* because it plays an active role in processes of meaning and apprehension. In this sense, epistemology, as currently understood, must give some ground to ontology, including new investigations of the ontological premises upon which critical thinking, particularly that characterized by the cultural or linguistic turn, has been based. At the same time, the relation between being and consciousness, between nature and culture, emerges as much more complex and harder to grasp than any crude dichotomy between materialism and idealism would have us believe.

Be(com)ing Human

What is the relation between bodies and selves? Who or what is an agent? What are the ontological and ethical underpinnings of distinctions between human and non-human, living and 'dead' matter? While materialism places 'man' and his 'species needs' at the heart of theorization, the cultural turn is often credited with turning its back on humanity, killing off the subject and with it any theoretical conception of human beings not premised on discursive construction: 'People are reduced to nodal points through which messages pass, and the self becomes dissolved into discursive structures' (Archer 2000: 3).

8 Although Gatens (1996: 55–58) argues that similar ideas can be found in the work of seventeenth-century philosopher, Baruch Spinoza.

9 For two excellent analyses of the philosophical implications of developments in scientific knowledge, see Pickering 1995 and Barad 2007.

Within this resolutely constructionist framework, material life has been almost completely overlooked. For example, it is striking that while the human body has attracted huge attention within postmodernist feminist theory, the focus for the most part has not been on the body per se but on discourses *around* and *about* the body. Within this theoretical frame the body is (re)presented as a product of discourse, its materiality ignored or treated as a 'brute given' upon which discourse acts (Bray and Colebrook 1998: 42). Thus are the realities of corporeality reduced to mere linguistic artefacts.

The case against postmodernism here is easy to overstate. As Hekman (2010) observes, some scholars we would most associate with the cultural or linguistic turn, for example, Wittgenstein and Foucault, interrogate the relationship between language and the real in more complex and multifaceted terms than is commonly acknowledged (Hekman 2010: Chapter 2 and 3). Moreover, feminist scholar, Donna Haraway, was probing the interface between discourse and materiality using the trope of the cyborg just as the postmodernist fascination with all things discursive was starting to take hold (Haraway 1990). Even Butler, who is perhaps most associated with the cultural turn in feminism, recognized the need to engage with the material, although some feminists have argued that Butler (1993) does not so much engage with materiality as theorize her way round it (Bray and Colebrook 1998, Barad 2007). The gist of Butler's argument is that materiality is a product of discursive practices, and that bodies, as we understand them, come into being – materialize – through the reiteration of regulatory norms, inter alia, of sexual difference. It follows that our perception of bodies as 'exterior', that is as outside or prior to discourse, is itself a discursive creation. Moreover, 'sex' is not a fact or a 'bodily given'; it is as much a cultural construct as 'gender'. The matter of bodies, Butler argues, is:

indissociable from the regulatory norms that govern their materialization and the signification of those material effects ... What constitutes the fixity of the body, its contours, its movements, will be fully material, but materiality will be rethought as the effect of power, as power's most productive effect. (Butler 1993: xii)

The difficulty with Butler's approach here is not so much that it is wrong; Butler is right to insist that our apprehension of the material world is discursively infused. However, the form her analysis takes permits us *only* to apprehend matter as construction. While Butler seems to acknowledge that matter is not wholly discursive – 'To claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference' (xi) – in its *materializations*, she is effectively arguing, it is always so.

As a result, her analysis does not really allow us to 'get at' matter. Butler does not invite engagement with the *stuff* of bodies. Her approach forecloses exploration of what bodies *do* – how they come about, operate, act, mutate and expire – other than in constructionist terms. It encourages no consideration of how the discursive and material might 'intra-act'¹⁰ in corporeal constitution and representation. In short, Butler's analysis affords no *agency* to the materiality of bodies. By contrast, many new materialists have explored ideas of agency

¹⁰ 'Intra-action' is a term used by Barad (2007) to describe the 'entanglement of matter and meaning'. She uses 'intra' rather than 'inter' to avoid the presupposition that matter or meaning exist independently of each other: 'to be entangled is not simply to be intertwined with one another, as in the joining of separate entities, but to lack an independent, self-contained existence' (ix).

that encompass the agentic capacities of the natural/physical/material world. For example, Alaimo and Hekman claim that 'we need to talk about the materiality of the body itself as an active, sometimes recalcitrant force' (2008: 4). Andrew Pickering argues that 'human agents manoeuvre in a field of material agency' (1995: 7), that indeed we spend much of our everyday lives coping with such agency in the form of climatic variation, natural bodily processes and so forth. Karen Barad describes matter as 'a congealing of agency' (2008: 139). Barad advocates an understanding of discursive practices which goes beyond human-based activities to take proper account of the role of matter in conferring and configuring meaning. In so doing, Barad troubles the distinction between ontology and epistemology, arguing for a notion of 'onto-epistemology' which she explains as 'the study of practices of knowing in being' (Barad 2008: 147):

There is an important sense in which practices of knowing cannot be fully claimed as human practices, not simply because we use nonhuman elements in our practices but because knowing is a matter of part of the world making itself intelligible to another part. Practices of knowing and being are not isolatable but rather they are mutually implicated. (147)

One of the most interesting features of this approach is that it allows us to acknowledge and engage with matter without at the same time reverting to modernist reaffirmations of dichotomous thinking that yield strict boundaries between the world and our knowledge of it. Returning again to Butler's work, Abigail Bray and Claire Colebrook (1998) have argued that notwithstanding Butler's best intentions, *Bodies that Matter* fails to escape the modernist dualities of mind and body, matter and its signification.¹¹ While Butler's focus on the body is an attempt precisely to challenge Cartesianism by arguing that the sexed body is an *effect* of gender rather than its precondition, her preoccupation with the discursive means that she fails to engage with corporeality other than as a *representational effect*. In this way she ends up perversely re-inscribing the mind/body dichotomy by positioning the body as a blank script upon which discourse acts.

By contrast, new materialism represents a genuine effort to give matter its due and to theorize the entanglement of mind and body, nature and culture, human and non-human forms of agency.¹² This is especially pertinent in the context of technological development. As technology fuses with human bodies to replace 'natural' bodily functions; as it is deployed to create human life in circumstances in which 'nature' would hitherto have denied; as, industrialized technologies effect the transformation, indeed threaten the very existence, of the 'natural world', how do we theorize the relation between nature and culture, between mind and matter, between the signifier and the signified? How do we account for natural disasters – not just scientifically but ethically and politically? How do we resolve the difficult and seemingly irresolvable ethical – and often legal – dilemmas which new bodily technologies present? Coole and Frost put it thus:

As scientists succeed in bridging species, artificially creating and extending human and animal life, and manipulating and synthesising genes to create new life forms,

¹¹ Barad (2007) and Hekman (2010) offer a similar critique.

¹² Actor Network Theory (ANT) is another way of acknowledging and theorizing non-human agency, see Latour 2005.

they muddle the concepts and boundaries that are the grounds for much ethical and political thinking. (2010: 22)

Put simply, the conceptual and ethical map by which we have been navigating these issues requires substantial redrafting.

Once again this highlights the importance of ascribing agency. To whom or what do we attribute agency in these difficult, problem-solving contexts? While in a theoretical context agency has been most commonly understood as a feature of the human subject, new materialist perspectives clearly point towards a notion of agency – understood as active or agentic rather than intentional – which is far broader, encompassing much of what we might otherwise dismiss as ‘dead’ matter. Within this framing, it is no longer sufficient to attend only to discourse. We urgently require a practical theoretical accounting of the complex relation between the material world and human knowledge of that world which encompasses the creative and causative effects of material agency. We are also in need of a new conceptual and ethical vocabulary to aid our efforts to comprehend the nature and status of the human condition. That our notion of agency should embrace non-human agentic capacities, particularly in our analyses of causation and responsibility, does not mean we should discard those important values with which *human* agency is traditionally associated – values such as freedom, autonomy, integrity, identity and resistance. It does mean that we need to think much harder about how we frame such values, theoretically, ethically and in terms of our conceptions of social life.

Political Economy after the Cultural Turn

“Late capitalism” is not just a vague abstraction; it is an array of contradictory global and local structural adjustments in the organization of production and consumption that is altering the way life is lived. (Hennessy 2000: 5)

One of the most pernicious effects of the cultural turn is that it has encouraged a theoretical neglect of economic concerns at a time of rapid, radical economic transformation. Against the backdrop of new technological developments (especially in information and communication), growing international competitiveness, global economic restructuring, enhanced capital mobility, the irrepressible rise of flexible labour markets and new forms of (often precarious and low paid) work, dramatic growths in levels of wealth and economic inequality worldwide, all snugly embraced within the warm glow of neoliberal rhetoric and ideology, the critical academy turned away from any engagement with what was widely perceived as the economic determinism of Marxism and historical materialism. Unfortunately, with the abandonment of a theoretical framework in which economic considerations had always been foregrounded, came a theoretical *volte face* in which it was difficult to make any kind of theoretical assertion about the significance of economic relations and processes or to draw connections between economic conditions and exercises of power. It is within this context that Fraser drew attention to the demise of redistribution as a basis for political claims-making (Fraser 1997). More generally, the conceptual currency which emerged as dominant and which was preoccupied with matters of language, consciousness, subjectivity, identity and meaning, did not lend itself to analysis of the large scale, structural and systemic, economic, political and cultural changes taking place. Capitalism and class, labour and productive relations, the causes, course and consequences of severe and intensifying economic and

wealth inequality simply fell for a while from academic view. From a feminist perspective, this was nothing short of disastrous for as Rosemary Hennessy points out: 'Women provide most of the world's socially necessary labour, that is, labour necessary to collective survival' (2000: 6). To abjure a focus on those activities necessary to our individual and collective survival was to disregard what is central to most women's lives.

This is increasingly recognized. There is evidence of real and pressing concern within the feminist academy and more generally to re-engage with issues of political economy (see, for example, Bedford and Rai 2010). But how do we do so without losing the benefits and insights of the cultural turn? How do we fashion a theoretical landscape for talking about the nature and functioning of contemporary capitalism that avoids the trap of economic determinism, is sensitive to temporal and spatial specificities, and takes full account of culture and signification in material contexts?

One difficulty here is that many contemporary scholars are insufficiently attuned to the diversity and sophistication of positions within the existing historical materialist tradition. An aversion to materialism has resulted in a lack of awareness of materialist engagements which do not posit an economic sphere as separate from or prior to other spheres (social, cultural and so on) and are not determining in any absolute or overriding way. Indeed long before the cultural turn, E.P. Thompson repeatedly insisted that what we understand as the economic or material is *irreducibly social*, is, in fact, constituted by social relations and practices:

I am calling in question ... the notion that it is possible to describe a mode of production in "economic" terms leaving aside as "secondary" (less "real") the norms, the culture, the critical concepts around which this mode of production is organized. ... we cannot even begin to describe feudal or capitalist society in 'economic' terms independently of the relations of power and domination, the concepts of use-right or private ownership (and attendant laws), the culturally endorsed norms and the culturally formed needs characteristic of the mode of production. (Thompson 1994: 219)

Here Thompson is maintaining that the 'economic' is always already culturally infused. Indeed in its narrow conceptualization as a privileged sphere, it is itself a product of capitalist ideology (221). This is not to deny that capitalism as a mode of production shapes social relations and practices in significant ways – is, in some sense 'determinative'. However, Thompson's notion of determination is not as closed or impenetrable as is traditionally understood in Marxist theory. Thompson is influenced in this regard by Raymond Williams, an early exponent of cultural materialism, that is, the idea that culture is deeply imbricated in social organization and the mode of production (Williams 1958). According to Williams, 'determination' is a term with multiple meanings:

There is on the one hand the notion of an external cause which totally predicts or prefigures, indeed totally controls a subsequent activity. But there is also from the experience of social practice, a notion of determination as setting limits, exerting pressures ... there is clearly a difference between a process of setting limits and exerting pressures whether by some external force or by the internal laws of a particular development, and that other process in which a subsequent content is essentially prefigured, predicted and controlled by a pre-existing external force. (Williams 1977: 83–85)

Adopting Williams' notion of determination as 'setting limits' and/or 'exerting pressure on', Thompson offers a cautious endorsement of the materialist claim that social being *determines* social consciousness (Thompson 1978: 8). He argues that the capitalist mode of production (which, recall, he does not understand as narrowly economic but as irresolutely social) yields 'a "kernel" of characteristic human relationships – of exploitation, domination and acquisitiveness' (Thompson 1961: 28–29) which find expression in multiple and diverging ways, are historically inflected, and socially and culturally mediated. This is far removed from versions of mechanical materialism in which economic relations are said to be the base upon which the ideological superstructure perilously perches. Nor is Thompson endorsing an Althusserian notion of determination 'in the last instance' (Althusser 1969). He *is* affirming the central importance of human activities around subsistence to an understanding of the social world, insisting on a view of the relationship between social being and consciousness as 'in dialogue' (Thompson 1978: 8) and an understanding of the natural/material as always expressed in social relationships.

Within this frame we are better able to understand the relentless commitment in Thompson's writing to the historical role of human agency. Human struggle, Thompson contends, will always make a difference: 'changes in material life determine the conditions of ... struggle and some of its character: but the particular outcome is determined by the struggle itself' (Thompson 1994: 222). A pertinent example of this approach is Thompson's analysis of wife sale, an English social practice of the eighteenth and nineteenth century (Thompson 1991) which, Thompson maintained, often functioned as a customary form of divorce and remarriage, so that even in the context of this most degrading practice, women could sometimes turn the situation to their own account. The custom formally required a wife's consent and evidence suggests that it was at least sometimes instigated by her to escape a relationship she no longer found satisfactory. Finding himself the focus of feminist criticism for depicting wife sales as anything other than 'yet one more example of the miserable oppression of women' (458), Thompson defended his position by cautioning against a reading of women's history 'as one of unrelieved victimhood' (460). Instead, Thompson emphasized the importance of acknowledging how women could exercise agency even in circumstances of extreme constraint. This was not an analysis in which the author felt bound to follow any 'totalizing' narrative, whether of capitalism, patriarchy or otherwise. As a result, Thompson was able to find 'something at work within the form [of wife sales] which sometimes contradicted its intention' (459), allowing the sale to work to the wife's advantage.

Thompson's historical approach constituted a new brand of 'socialist humanism' (Scott 1999: 70) that contrasted with the economism and mechanical materialism characterizing much of Marxist writing at the time. Moreover, his emphasis on the active role of individual human subjects in shaping their own histories ensured an account which, while continuing to foreground the material, was much more contextualized and much more attentive to social, cultural, spatial and temporal specificity. Nor is Thompson alone in offering a less prescriptive and more nuanced interpretation of historical materialism. Feminist scholar, Hekman (2010) suggests that elements in Marx's writing lend themselves to something other than strict economic determinism and the sharp separation of the natural and the social with which he is usually accredited. Focusing in particular on a close reading of *The Economic and Social Manuscripts*, Hekman argues that Marx's conceptualization of the relation between man and nature may be better understood 'as moving freely between the material and the discursive and indeed focusing on their interaction and inseparability' (2010: 119). In

placing the necessity of human labour at the heart of his analysis, Marx is clearly making a claim about human existence, but not necessarily an essentialist claim about human nature. Indeed, much of Marxist theory seeks to challenge philosophical conceptualizations which posit the individual as separate from or prior to community (for example, liberalism) rather than as produced by and simultaneously productive of social relations.

The real point here is that neither Marx nor Marxism has to be reduced to a single orthodoxy which is itself a product of particular historical interpretations and developments and is not, in any absolute sense, necessary. We are as free in our readings of Marx as we are with other texts. This is the great legacy of postmodernism. Thus, in returning to and re-engaging with the insights of materialism, we should not consider ourselves bound by particular versions of the theoretical past. Indeed, it is this willingness to revisit afresh ideas and understandings which we have perhaps unthinkingly discarded or ignored which most characterizes new materialist writing.

Towards a Feminist Legal Materialism

I began this essay by highlighting a concern in contemporary feminism that a gap had emerged between feminist theory and activism. In many ways, the theory/activism divide replicates the language/reality dichotomy which is the focus of much new materialist scholarship. Within law, this tension between theory and practice – and between the discursive and material – often lurks beneath the surface of debates about the strategic gains and risks of feminist engagement in law reform. On the one hand, feminists argue that law is a crucial site of political struggle and that strategic legal engagement holds the potential to produce concrete outcomes for women, making a substantial difference to the material conditions under which they live. On the other hand, it is asserted that feminist-inspired law reform can produce mixed even counter-productive results for women and is generally characterized by a process of uneven development (Smart 1986: 117). As a consequence, some feminists advocate the abandonment or at least substantial curtailment of law reform activities. We are encouraged to ‘decentre’ law as a strategy of reform and engage with it discursively (see, for example, Smart 1989; Fineman 1990), to approach it as a site of the construction and legitimation of regulatory norms and values which shape and inform meaning and produce gendered subjectivities and identities. This position is strongly influenced by a Foucauldian analysis of power which Smart in particular deploys to argue that the role of law in modern society is changing from an ‘old’ form of sovereign or juridical (top-down, state-based) power to a ‘new’ disciplinary modality in which law functions effectively as a ‘claim to truth’ that is an authenticating discourse which disqualifies or devalues other ways of seeing (Smart 1989: 4–25).

One way to view these two contrasting models of feminist legal engagement might be in terms of modernism and postmodernism respectively. Alternatively, one might invoke the material/discursive distinction to intimate that while law reform seeks directly to address the material realities of women’s lives by providing new remedies or rights upon which they can rely, feminist engagements with law as discourse are less/not concerned with the material lives of ‘real’ women, focusing instead on the realm of immateriality, of subjectivity, consciousness, identity, selfhood and so on. This of course is a crude and rather misleading characterization which fails adequately to acknowledge the role which discursive and linguistic processes can play – in law and otherwise – in shaping the material

realities of people's lives. However, where there is some resonance, or certainly cause for concern, is in the risk that discursive legal analyses, by virtue of their detachment from any material or empirical grounding, lose any sense of strategic or political purpose. Equally problematic is the tendency within such frames to treat political and legal goals 'as if they could be accomplished through theoretical fiat' (Eichner 2001: 6). A further common feature of discursive detachment lies in a preoccupation with social identities and subjectivities and a neglect to attend to, indeed, even to grasp the significance of social *relations*. Indeed some feminist scholars, adopting an identity-based approach, assume a position of intolerance in relation to any categorical deployment of sex or gender (on the grounds that they are 'mere' discursive constructions) notwithstanding their very real and concrete relational, distributional and hierarchical effects. If, on the other hand, we understand sex/gender not as identity but rather, drawing on the insights of historical materialism, in terms of relations and processes, the view that emerges is one in which sex/gender clearly operate as categories of social ordering but do not necessarily take any fixed or immutable form. Within a materialist frame, sex/gender can be conceived as active and evolving, fluctuating and mutating over time, space and context while simultaneously interacting with other material and discursive phenomena, including complexly configured, hierarchically imbued relations and processes (based on sexuality, class, race and so on) which produce multiple, intersecting inequalities (Conaghan 2008).

This point deserves further elaboration as it has presented such a dilemma to feminist legal scholars concerned to address problems of inequality without relying on sex/gender essentialism. The rejection of sex and gender as viable analytical categories is based first upon theoretical recognition that both categories are discursive constructs with no fixed essence or core. To deploy them as analytical categories is to endow them with a stability and authority that they lack. Moreover, to deploy them as markers of identity is to treat identity as unitary rather than fragmented and/or to privilege some aspects of identity (sex/gender) over others (race/sexuality/class and so forth). On the latter point, a focus on relations and processes rather than identity allows for the easier deployment of sex/gender as aspects of such relations and processes, alongside and in conjunction with other aspects (race/sexuality/class), with no necessary implication of privileging or denial of complexity or intersectionality. At the same time, to eschew sex/gender as categories of analysis because they are discursively infused and conceptually unstable is to assume that our categories and concepts are generally otherwise. Language *is* ambiguous, meanings do change over time and space, and the value of concepts and categories lies not in their 'authenticity', their correspondence or otherwise with the real, but on the work that they do, their utility as analytical tools in the context of our efforts to understand and respond to problems of inequality and disadvantage. In that context, what is important is theoretically to anchor our concepts and categories to materiality not as *representations* of the real (thus falling back into the linguistic/reality divide) but as materially situated and intra-active. This requires a new openness about material-discursive encounters and an acceptance that materialism, including some versions of historical materialism, does not require the adoption of closed conceptual frames or crude models of causation. Nor are we compelled to adopt rigid conceptions of class or gender frozen in time and with no possibilities for mutual apprehension. On the contrary, materialism is an insistence that we pay attention to context and detail precisely to understand processes of change and development.

Most important, materialism reminds us that matter matters. The scholarship of cultural theorists such as Judith Butler allows us to conceive of sex/gender in performative terms,

that is, as the citational reiteration of regulatory norms producing sexed bodies and gendered subjects, but it offers no entry into the nature and significance of materiality. By contrast, Karen Barad (2007) has reworked Butler's theory of performativity to emphasize the conjunction of material-discursive practices in the production of meaning. Barad insists on the relevance of materiality – of non-discursive processes – to processes of meaning conferral. She offers the example of foetal imaging via ultrasound (sonogram) to reflect upon what it means to 'see' the foetus on screen. In one sense it is technology which makes the 'seeing' possible; in another sense it is the material presence of new matter in the woman's body which we then 'see' as a foetus by bringing to bear our political and ethical conceptions of autonomous human life. The consequences of this technological-material-discursive encounter are significant in terms of how we perceive pregnancy, childbirth, women's bodies and human life. These consequences cannot be explained wholly in terms of discourse; at the same time they cannot be understood in terms of any sharp separation of language from the real. Barad's analysis offers a glimpse, I believe, of the potential of materialist approaches to advance our understanding of the relation between the world and our knowledge of it. This in turn will provide us with better conceptual and evaluative tools to assess law's operations and potential effects.

What becomes clear here is the need to resist conceptualizations of feminist legal engagement as *either* material or discursive, modern or postmodern, reform-based or theoretical. These are simply two sides of an intellectually contrived divide. Indeed, a lot of current scholarship is far better understood in hybrid terms, recognizing both the discursive dangers of law and its emancipatory potential, and requiring 'a contextual analysis towards the utility of legal strategies and ... a permanently unclosed perspective on their benefits and burdens' (Munro and Stychin 2007: xii). In addition, positing the value of law in stark 'either/or' terms – as either an instrument which feminists can usefully deploy or an oppressive hegemonic discourse which they should resist – is to miss the complex inter- (or intra-) action of the material and discursive in a legal strategic context. The outcome of law reform initiatives will be shaped both by 'language' and 'reality', that is, by discursively imbued regulatory norms (which may or not surface in the context of particular legal engagements) *and* by the material circumstances in which they operate; moreover, the relation between the material and discursive here is neither causally direct nor easily untangled.

This is not necessarily a prescription for making law better correspond to what we conceive of as 'real'. The argument that law fails to reflect women's lives and experiences is commonly rehearsed in feminist legal scholarship. However, it may be that feminists are wrong here to see the problem as one of representation. It has been one of the core tenets of postmodernism to reject the idea of an objective reality 'out there' which can be accurately and dispassionately 'represented' by language (or by law). Instead, it has been argued that language or more broadly discourse is constitutive of the real, that there is no objective 'reality' to be represented, that our perceptions, experiences, our very sense of ourselves is discursively construed. The difficulty with this approach, as has been repeatedly pointed out, is that it has foreclosed any further engagement with materiality, understood as an aspect of the real which has now been reduced to discourse. So we move from a position where there is an objective reality which law does or should represent (hence, for example, positing a need to engage in law reform better to *represent* women's needs) or there is no reality only discourse, in which context there is nothing there to represent and we are free to explore the discursive potential of law as much as we like.

But of course there is something ‘there’ though how and whether to *represent* it is another matter. Materialism offers us a way out of the all-or-nothing dilemma of representationalism. Positing the world as a complex field of human and non-human agency and material-discursive intra-actions and practices, offers us an approach which is not reducible to any simple matrix of reality represented or representation made real. It does however provide us with avenues of theoretical exploration which we have hitherto abjured and it allows us better to apprehend the social world in all its complexity and unpredictability. Most importantly, it invites a conceptual, ethical, and contextual refocusing of feminism, including legal feminism, around material-discursive practices, their intra-action, and their concrete consequences in terms of how they impact upon people’s lives.

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