

HEINONLINE

Citation: 38 Austl. Feminist L.J. 41 2013



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Nov 17 00:15:42 2014

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1320-0968](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1320-0968)

INHERITING AND INHABITING THE PLEASURES AND DUTIES OF OUR OWN EXISTENCE: *THE SECOND SEX* AND FEMINIST JURISPRUDENCE

*Ann Genovese**

Abstract: This essay considers the relation between the conduct and the personae of the feminist, the historian and the jurist; and, the writing of history and of jurisprudence. It does so treating part of the relation between historiography and jurisprudence as engaged as an art of self-fashioning, in the preparation for an 'institutionalised social office'. The immediate purpose of this essay is to show how these arts of self fashioning came to be inherited by Australian feminism. In doing so, I will assert the centrality of Simone De Beauvoir's *The Second Sex* in that tradition. I suggest that acknowledging this practice and its inheritance is important when considering how we might live productively the plurality of institutional life and the life lived — in law, and for our present.

'How, in the feminine condition, can a human being accomplish herself?'¹

1.0 INTRODUCTION

This collection of essays importantly seeks to engage with the tradition of critique. It does so by asking how we ought to interpret the forms and purpose of history as a critical methodology for law, and to revive the dialogue between law and history in ways that speak to our own times. This tradition of looking to the conventions and idiom of history to destabilise law's assertions and certainties is a persistent and perennial technique for legal scholars and lawyers alike, albeit inherited in different ways. The concerns of the dialogue between law and history — what History looks like, as much as what it can do for Law — have of course not been consistent or uniform over time. The possibilities of history as a site and tool of critique for law are as captive to the location and temporality of the legal critic as they are to the forms and expressions of law itself. ² This includes interpreting the effects of taking for granted history's usefulness for law that

* Melbourne Law School, University of Melbourne. Email: a.genovese@unimelb.edu.au I thank Karin Van Marle for generously hosting a Feminist Legal Theory Network meeting at the Department of Jurisprudence, University of Pretoria in July 2012, for which this paper was originally written. I also thank and acknowledge Ann Curthoys, John Docker, Maria Drakopolou, Julie Evans, Rosemary Hunter, Peter Rush, and in particular, Shaun McVeigh, for their conversation about and engagement with my project, and their contributions to this paper.

¹ Beauvoir Simone de *The Second Sex* (first published France 1949) Borde Constance and Malovany-Chevalier Sheila (trans.) Vintage New York 2011 p 17.

² For a recent examination of these and other contentions see Tomlins Christopher and Comaroff John "'Law As...': Theory and Practice in Legal History' (2012) 1 *UC Irvine Law Review* 1040.

this edition rightly emphasises. What has been consistent in this critical tradition however is that history exists — as empirical content to challenge law’s doctrine as much as method to disrupt the idealised and politicised form of its subjects — as something external to the lawyer or legal scholar; something outside of ourselves that can be deployed to analyse the truth of law as knowledge or as activity, in different times and places.

While acknowledging the continued significance of History as a site and tool of critique for and about Law, what I want to offer to the conversation taking place in this collection is a meditation about the relation between jurisprudence and writing history that is aligned with a different tradition. This tradition — which reaches back to the Greeks, and has been uninterrupted ever since — is concerned with asking the question ‘How should I conduct a life?’³ It involves understanding that there is a relation between persona — the status and official existence of a subject — and the conditions of a person’s experience, and that this relation shapes their attitudes, obligations and responsibilities. This orients the attention of the philosopher toward an acknowledgement and appreciation of the ways in which the ‘normal, natural, everyday state of human beings’⁴ form the purposes of a philosophical life. Philosophy within this tradition becomes not a discourse to be mastered but a type of ‘know-how’, as philosopher Pierre Hadot reminds, in order ‘to change [one’s] way of living and seeing the world.’⁵ The writing of philosophy is understood, then, as a *practice*: a conscious and productive activity through which the philosopher offers training, to self and others, in how to consciously form a life, as well as to remind that choosing the forms and expressions of life’s conduct comes both with costs, and possibilities. Writing with these concerns is not merely self-narration for the purpose of describing or contesting political formation and belonging.⁶ The philosopher’s telling of their own embodied formation creates instead a conscious relation between the philosopher and their reader, offering a set of exercises to orient attention toward how we inherit and inhabit the pleasures, trials and duties of our own existence.

Thinking in and with the tradition of conduct means approaching questions about both ‘law’ and ‘history’ differently. The purpose of history, for example, can also be understood through the exercise of its writing. The practice of historiography is intended neither to simply communicate nor assert a narrative of the past, but ‘to form and train’⁷ the historian to care for a life through an examination of their inheritances. This involves, as Hadot and Michel Foucault have both noted in reflecting on their own practices as historians of and in the tradition of conduct, a specific attitude toward time.⁸ It is the realities of one’s own experience and conditions

³ Hadot Pierre *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault* in Davidson Arnold I. (ed) Chase Michael (trans.) Blackwell Publishing Oxford 1995 pp 264–274; Hadot Pierre *What Is Ancient Philosophy?* Chase Michael (trans.) The Belknap Press Cambridge Mass. 2002 pp 253–270.

⁴ Hadot 2002 as above at 269.

⁵ As above at 274.

⁶ Hadot 1995 above note 3.

⁷ Hadot 2002 above note 3 at 274.

⁸ For example Foucault Michel *The Government of Self and Others: Lectures at the College De France 1982–1983* (Gris Fredric ed, Burchell Graham trans) Palgrave Macmillan London and New York 2008 pp 3–7, 385–86; Foucault Michel *The Use of Pleasure : The History of Sexuality Volume Two* (first published 1984) Hurley Robert (trans.) Vintage Books New York 1987

that contour how the past is addressed, as ‘the present is the only reality that belongs to us and depends on us’⁹. Historiography in the tradition of how to conduct a life thus offers a particular understanding of the relation between past and present that must always be reimagined, and relocated, as the exercise of its writing ‘presents a continuous act, permanent and identical with life itself, that must be renewed at every instant.’¹⁰ It is part of a training in which a person — through their persona as historian — enters into a ‘mode of existing-in-the world’,¹¹ an exercise that shows the historian how they are to be responsible for what they inherit.

Jurisprudents who align with this tradition of conduct ask similar questions, directed toward how to live with law.¹² Yet these jurisprudents, although not taking up the persona of historian, are careful to pay attention to what they too inherit, and how it informs the shape and obligation of the care and practice of law in their own time. By returning to the Greeks, and showing their continued presence through the seventeenth centuries to our own times, Peter Goodrich, for one example, reminds us that the tradition of ‘knowledge of oneself and care of oneself’ produces a ‘materialisation of thought’, that ‘entail[s] decisions that ground a life’; decisions which include those made with, in and about law.¹³ And as Goodrich describes, the obligations of the jurispudent who understands law as a way of life are to pay attention to ‘the relationships that law engenders and the practices it supports.’¹⁴ Thinking with conduct thus has its own genealogies that can be rejoined to the critical use of history in law. As an activity, this involves showing that history is not only an object to reframe, reform or revolutionise law, nor only a technique to abet or complicate law’s critical projects. It is also a practice of writing law’s inheritance that trains the legal historian to understand how to take care of the conduct of their law.

Bringing historiography to jurisprudence in this way can be understood as an art of self-fashioning, as Foucault would describe. Yet in Foucault’s account, like many others, these arts are oriented toward shaping the realm of men.¹⁵ From Aristotle onwards, writing in the conduct of life tradition has expressed ‘an exemplary human experience’¹⁶ to prepare a man for ‘institutionalised social office’ as priest, mayor or monarch, as well as the ‘more elusive offices of the intellect’ such as those of poet, jurispudent or historian.¹⁷ Women of course have been intentionally excluded from the social realm of office-holding, but the art of self fashioning that is

pp 3–32; Hadot Pierre *The Present Alone Is Our Happiness: Conversations with Jeanie Carlier and Arnold I Davidson* (2nd edn) Djaballah Marc and Chase Micheal (trans). Stanford University Press Stanford California 2011.

⁹ Hadot 1995 above note 3 at 268.

¹⁰ As above at 268.

¹¹ As above at 265.

¹² McVeigh Shaun ‘Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law’ *UC Irvine Law Review* (forthcoming 2014); Black C.F. *The Land is the Source of the Law* Routledge London 2011; Goodrich Peter *Law in the Courts of Love: A Brief Historical and Practical Manual* Palgrave Macmillan New York 2007.

¹³ Goodrich Peter ‘Satirical Legal Studies: From the Legists to the “Lizard”’ (2004) 103 *Michigan Law Review* 397 at 500.

¹⁴ As above at 501.

¹⁵ For example: Foucault 1984 above note 8.

¹⁶ Hadot 2002 above note 3 at 261, quoting Jacques Bouveresse on Wittgenstein.

¹⁷ Condren Conal ‘The *persona* of the philosopher and the rhetorics of office in early modern England’ in Condren Conal, Gaukroger Stephen and Hunter Ian (eds) *The Philosopher in Early Modern Europe: The Nature of A Contested Identity* Cambridge University Press Cambridge UK 2006 p 66 at 67.

practiced by the intellectual personae, each with their distinct and distinctive ‘skills or virtues’, has a feminist inheritance.¹⁸ Although this may well have been a more difficult register through which to assert the experience of self-formation as a training for life, this has nevertheless been accomplished by many women, and for a very long time. Thinkers and writers as diverse as Christine de Pizan and George Eliot, for example,¹⁹ have been exemplary in practicing a personae that shows there is a difference between expressing oneself through one’s art, and the art of fashioning a self through activity, which involves acceptance of the responsibilities that attach to the performance of that activity in a life. The questions that organise this inherited art of living — how to think and act with the conditions of embodied experience in order to transform a chosen life — were of importance for women and Women’s Liberation in the later twentieth century.²⁰ There are possibilities that this tradition offers to the practice of feminism as it has become institutionalised since then, as we create and occupy social as well as intellectual offices of our own. This tradition seems however to languish in our present. We are, perhaps, in thrall to the project of critique that conditions our own situation, especially when working and thinking with law. An examination of embodied conditions in much contemporary feminist legal scholarship, for example, is relegated to a category of quotidian experience. It has become either something subjective from which to argue for recognition; or something held outside of the persona of the feminist legal scholar altogether, to be measured in relation to other women as empirical evidence for law’s bias.²¹ The tradition of conduct that the feminist thinking with experience has inherited in law is therefore difficult to see.

So my purpose in this essay, after much deliberation of the literal project of genealogy — the idea that traditions of activity and thought are indeed the ‘filial relations that cluster around history’²² — is to show and remind how these arts of self fashioning came to be inherited by Australian feminism. In doing so, and in trying to take seriously my own responsibilities of office — as an historian of contemporary Australian lawful relations — I want to suggest that a failure to acknowledge this inheritance, or at least not to rejoin it to the different genealogy of critique, comes at a cost when considering how we might accept the plurality of institutional life and the life lived — in law, and for our present.

¹⁸ Women of course have occupied social office with specific duties and skills before our present episteme, performed in the home or church — as Condren indicates above. It is important to note however that these offices are distinct to those of men as they did not attach to the realm of state, an issue made by Beauvoir herself, above note 1 at 71–125. For an example of consideration of women’s occupation of intellectual personae, see again Beauvoir above note 1 at 724 expressly, and throughout the book.

¹⁹ Green Karen and Broad Jacqueline ‘Fictions of a feminine philosophical *persona*: Christine de Pizan, Margaret Cavendish and *philosophia* lost’ in Condren, Gaukroger and Hunter above note 17 at 239; Gatens Moira ‘The Art and Philosophy of George Eliot’ (2009) 33 *Philosophy and Literature* 79.

²⁰ For example: Gatens Moira *Imaginary Bodies: Ethics, Power and Corporeality* London and New York Routledge 1996 pp 125–126; Cavarero Adriana (first published Italy 1997) *Relating Narratives: Storytelling and selfhood* (Paul A Kottman, trans) Oxford and New York Routledge 2000 pp 55–56.

²¹ For an assessment of these directions see Joanne Conaghan ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 *Journal of Law and Society* 351. For a foundational example of the problems of experience for feminist jurisprudence in the terms argued see MacKinnon Catherine A. ‘Reflections on Law in the Everyday Life of Women’ in Austin Sarat and Thomas R Kearns (eds) *Law in Everyday Life* University of Michigan Press Ann Arbor 1993 p 109.

²² Ferrell Robyn ‘Copula: The Logic of the Sexual Relation’ (2000) 15 *Hypatia* 100 at 102.

2.0 EXEMPLARS AND TRAINING MANUALS

In situating this inheritance, I want to consider Simone de Beauvoir, and her seminal work, *The Second Sex* (1949). Beauvoir appears in my meditation, then, neither in the guise of a romantic resuscitation nor a transposed historical truth, but as a late modern exemplar of how women with particular opportunities, and institutional belonging, might live with the responsibilities and pleasures of their existence.²³ Thinking with — rather than as, or critically against — Beauvoir enables me to reconsider how I conduct my own activities, in order to live a particular kind of life with, and as, particular personae: as feminist, and as historian of jurisprudence. This register gives shape to the essay in two interconnected ways. The first is to understand how Beauvoir's project in *The Second Sex* — to write her life — works as set of exercises²⁴, a training manual, for herself, and for us as readers.²⁵ I will explore how she reasserts the philosophical question of the tradition of conduct — how should I live? — as a question of how she might live, as a woman, in Paris, in 1949. As Beauvoir explains, the purpose of her book is to elucidate: 'How, in the feminine condition, can a human being accomplish herself?'²⁶ Beauvoir does not pose an attitude in *The Second Sex* that enables self reflection for its own sake; she orients her attention instead to how living as a woman *in relation with* others, especially men, is experienced. This is not to reify the pleasures or deny the limits of her own existence, but to be sober about accepting and acknowledging her own complicity in the conduct of her relations, and in her own time and location. What she offers in her practices of writing is, then, a training in how to live as a woman, where persona and personal experience are not separated. This is an inheritance that matters in our own time, as she shows how our condition of being in the world is specific and embodied, which brings its own duties, as well as its own possibilities for transformation. *The Second Sex* in this way also offers a genealogy for (and of) those who read it. This is the second aspect of thinking with Beauvoir that matters to how I might rejoin the tradition of conduct of a life to the critical practices of feminist jurisprudence. As Australian feminist philosopher Moira Gatens has noted and argued, 'in the accretions of meaning' around Beauvoir's famous assertion that 'One is not born but rather becomes a woman,' can be found '[t]he backbone of contemporary western feminist thought...*The Second Sex* allowed its readers to collectively construct an imaginary that

²³ My intention in considering Beauvoir as part of what we might inherit in law is to orient away from the tradition of critique. This includes how I write about Beauvoir. There is of course a sustained critique of Beauvoir and her project, directed in particular to her lack of political conceptualisation, her seeming disregard for subject position, and her lack of philosophical originality based on her relationship with Sartre. For examples of how these critiques are canvassed, and also assessed against Beauvoir's relation to the tradition of conduct, see Moi Toril *Feminist Theory & Simone de Beauvoir* Blackwell Oxford and Cambridge Mass. 1990; Vintges Karen *Philosophy as passion: the thinking of Simone de Beauvoir* Indiana University Press Bloomington 1996; Simons Margaret A. *The philosophy of Simone De Beauvoir: critical essays* Indiana University Press Bloomington 2006; Simons Margaret A. 'Confronting an Impasse: Reflections on the Past and Future of Beauvoir Scholarship' (2010) 25 *Hypatia* 909.

²⁴ As Hadot 1995 as above note 3 might describe.

²⁵ Vintges Karen 'Simone de Beauvoir: A Feminist Thinker for Our Times' (1999) 14 *Hypatia* 133; and for a literal significance of this training: Portuges Catherine E. 'Simone De Beauvoir: Feminist As Teacher' Perspectives Sur Sartre et Beauvoir (1985) 9 *Dalhousie French Studies* 107.

²⁶ Beauvoir above note 1 at 17.

became a feminist imaginary²⁷. I will examine how this forms part of my own inheritance; how the localised experience of reading Beauvoir in the 1960s in Australia opened up a way of living that was rebellious, and defiant. An ethics in which feminine viewpoint and experience was centralised, but not reified; and in which women's agency was recognised by not absolving them (or us) of responsibility for the consequences of action.²⁸ As Beauvoir presented an ethics as opposed to proposing a politics in her writing, Australian readers — like millions of others all over the world — were given a training in how to think and act that was, and could still be, directed toward conduct rather than critique. It is thus the form, content, and mode of address in *The Second Sex* as my own genealogy that I want to discuss in the second part of the paper, and with the persona of historian. Beauvoir's practice — and her project — shows a way to account for my inheritances (of law and feminism) responsibly, and in doing so to ask questions about what it might mean to rejoin feminist jurisprudence in Australia to the tradition of conduct of life.

3.0 SIMONE DE BEAUVOIR AND THE TRADITION OF HOW TO LIVE

If addressing Beauvoir's existential project as one formed and performed within the tradition of how to conduct a life,²⁹ *The Second Sex* is startling — intimate, personal, defiant, feminine — and impossible to reconcile as the work of anyone but Beauvoir. In her wonderful 1980 essay 'Simone de Beauvoir and Existentialism', French feminist philosopher Michelle Le Doeuff makes the point clearly that although *The Second Sex* is often critiqued for being 'a labor of love, and one of [Beauvoir's] morganatic wedding presents' to Sartre (as it applies and thus confirms his own project),³⁰ Beauvoir nevertheless 'operates a series of transformations on the existential problematic.'³¹ Beauvoir does this by orienting attention to the attitudes and practices of what it

²⁷ Gatens Moira keynote address, Sixth Australian Women's Studies Association Conference, Perth 27–29 November, 1996, quoted in Bulbeck Chilla 'Simone de Beauvoir and Generations of Feminists' (1999) 25 *Hecate* 5; see also Moi Toril *Simone De Beauvoir: the making of an intellectual woman* (2nd ed) Oxford University Press Oxford and New York 2008.

²⁸ Curthoys Ann 'Adventures of Feminism: Simone de Beauvoir's Autobiographies, Women's Liberation and Self-Fashioning' (2000) 64 *Feminist Review* 3.

²⁹ It is important to note how the Existentialists are aligned to the tradition of how to conduct a life described in the first part of this paper: see for example Hadot 2011 above note 8 at 130–132. My intention here is to show that Beauvoir because of how she writes and what she attempts to understand as the project of writing, inhabits that tradition even more strongly than Sartre and others. I have been guided in my thinking through an inheritance of Australian feminist philosophy, using Le Doeuff Michelle 'Simone De Beauvoir and Existentialism' (1980) 6 *Feminist Studies* 277; Le Doeuff Michelle *Hipparchia's Choice: An Essay Concerning Women, Philosophy, Etc* (first published France 1989) (trans Selous Trista) Blackwell Oxford UK and Cambridge Mass. 1991; and Gatens above note 20 at 95–107. For a discussion of the shape and meaning of this philosophical inheritance, including the significance of Le Doeuff in Australia, see Battersby Christine 'Learning to Think Intercontinentally: Finding Australian Routes' (2000) 15 *Hypatia* 1.

³⁰ Hadot reminds that we read philosophers in relation to their world — the relational and embodied practices of choosing to live a philosophical life. He means we see them as part of a 'school' in this sense: Hadot 1995 above note 3 at 274–5. This steers away from reading Beauvoir as only in a sexual relationship with Sartre (though that of course is important also), but in a relational experience of choosing a philosophical life with him, and others, including Merleau-Ponty, in Paris in the 1940s. In this way, they share a basic problematic, but their ways of writing how to conduct an authentic life are distinct: see Le Doeuff 1991 above note 29.

³¹ Le Doeuff 1980 above note 29 at 283.

means to be woman choosing a life lived, with philosophy, and in relation to others. It is this assertion of a particular persona — as woman — that makes *The Second Sex* a ‘tour de force’³², deserving of recognition as an important philosophical text.

So what ‘transformations’ does this attitude and practice enact, and how? The core problematic of existentialism is an ethical question: how to live an authentic life, in which it is irresponsible to refuse to recognise oneself as a free subject. The subject self is not captive to external determinations that produce inevitable consequences on and for a life. As such the subject’s choices about their existence — how they practice the art of their own living — is directed always to realisation of their liberation as a human being. It involves self-questioning, and robust rearticulation of boundaries and norms as they relate to the self, but also in relation to and with others. This ethic refuses political engagements. For Sartre, it is for example ‘senseless to dream of complaining, since nothing alien to us has decided for us what we feel, what we live, what we are... Isn’t it myself who decides the coefficient of the adversity of things?’³³ The existent self thus aims always to ‘transcend’ the ‘immanence’ of the ‘facticity’ of the material world, and denies ‘the efficacy of social or historical determinations’.³⁴ Oppression — the usual double to liberation — therefore has at its heart a void in the existential project, it cannot be ‘thematized’.³⁵ As a result, the self, and how the self might conduct relations with others, exists outside any institutional rule, or its determinate powers; and as such it can always be transformed.

Beauvoir investigates the same problematic but this ‘leads to opposite consequences’³⁶ because woman’s experience of her situation — which she must acknowledge responsibly in her own ethical projects — is formed by an exteriority *she did not fully choose*.³⁷ Woman, like any human being, seeks autonomy, but ‘in a world where men force her to assume herself as Other’.³⁸ As Beauvoir explains: ‘no man would consent to being a woman but all want there to be women’.³⁹ Her point, made repeatedly in *The Second Sex*, is that the male existential ‘project’ is to give meaning, or value, to life. Life itself, its reality, is forced instead to be represented by woman through her body — by blood, sex, birth, death. Her existence is therefore, for men, as an immanent Other that reminds him of what he cannot transcend. The way Beauvoir interprets the relation of men with women’s bodies in this way enables her to ‘ground an ontological-carnal hierarchy of “the masculine” and “the feminine”’, as Le Doeuff suggests.⁴⁰ This relation is what Beauvoir argues produces men’s horror of women, and presupposes the use of force against them.⁴¹ It also enables the myths and meanings within which both sexes experience life: it is this Self/Other relation that grounds her claim that woman is not born, but made. Beauvoir thus

³² As above at 280.

³³ As above. Le Doeuff is referring to Sartre’s *Being and Nothingness*; his ‘systematic version of 1943’.

³⁴ As above.

³⁵ As above.

³⁶ As above at 279.

³⁷ This question was first interrogated by Beauvoir Simone de *The Ethics of Ambiguity* (first published France 1948) (Frechtman Bernard trans) Citadel Press New York 2000.

³⁸ Le Doeuff 1980 above note 29 at 278.

³⁹ Beauvoir above note 1 at 161.

⁴⁰ Le Doeuff 1980 above note 29 at 280.

⁴¹ For example Beauvoir above note 1 at 176–180.

‘transforms’ existentialism by orienting it toward a world where institutions and cultural practices perpetuate woman’s Otherness. Woman cannot deny her exteriority, as the male existential subject has done (but perhaps should not). As Beauvoir explains: ‘Woman’s drama lies in this conflict between the fundamental claim of every subject, which always posits itself as essential, and the demands of a situation that constitutes her as inessential.’⁴²

In this way, Beauvoir places the problem of freedom expressly into relation with a lucid description of how experience of a life is formed. She argues repeatedly for women to take responsibility for reading their ‘situation’, ‘condition’, or ‘exteriority’, with clarity, and often discomfort. This is not to reify or celebrate ‘women’s experience’ as an essence, but to demonstrate that in paying attention to how women’s condition is constantly reinvented, and lived, it can be changed. As Beauvoir writes:

‘It is not a question of abolishing the contingencies and miseries of the human condition in her but of giving her the means to go beyond them. Woman is the victim of no mysterious fate; the singularities that make her different derive their importance from the meaning applied to them; they can be overcome as soon as they are grasped from new perspectives.’⁴³

The point for Beauvoir in making this connection between liberation and feminine agency is to insist that conduct of a life is chosen. Throughout the text she is resolute about women taking responsibility for all the messy dimensions that form their experience, and thus shape their ways of being in the world.⁴⁴ This includes being clear-sighted about how a woman as subject can be complicit in her subjection. Beauvoir offered, then, in 1949, a feminism in which there is no exculpation of the self through structures and institutions or ideologies exterior to oneself; although she insists that we read these as dangerous and often seductive realities that require change. She makes the point that despite many educated, independent (French) women achieving concrete means to live an authentic life, it is possible to accept one’s subordination and refuse responsibility for one’s freedom by continuing (or neglecting) to see oppression in more convenient or conventional terms: such as duty, custom, obligation, security, or exceptionalism in relation to other women.⁴⁵ Yet, despite the toughness Beauvoir directs towards woman acting as an accomplice with the material and cultural means by which her subjection is ‘made’, ‘woman’ in this ethical project cannot cease being (or refuse the persona) ‘woman’ any more than a man can cease being ‘man’.⁴⁶ It is important to recognise that for Beauvoir man (as problem for woman) must also be free for her to recognise herself the same way, and that ‘he would be liberated with [her] liberation.’⁴⁷ The Self/Other relation that allows the transcendence of each is thus based, she argues, on friendship, recognition of experiential relations that are intimate; as opposed to status relations based on liberal ideals of equality (which always infers woman’s essentialised

⁴² Beauvoir above note 1 at 11.

⁴³ As above at 762.

⁴⁴ As above at 439–664, for example as mother, wife, lover, ‘Independent woman’, etc as described in Part 2, Volume 2 ‘Situation’.

⁴⁵ As above at 723, 667–708 these are named as ‘justifications’ used by ‘the woman in love’, ‘the narcissist’, ‘the mystic in Part 3 Volume 2 ‘Justifications’.

⁴⁶ As above at 759.

⁴⁷ As above at 756.

difference),⁴⁸ If woman is to move toward liberation, towards the conditions of her own independence, this is done as a complicit act with men. As Beauvoir concludes:

‘To emancipate woman is to refuse to enclose her in the relations she sustains with man, but not to deny them; while she posits herself for herself, she will nonetheless continue to exist for him as well: recognizing each other as subject, each will remain an other for the other; reciprocity in their relations will not do away with the miracles that the division of human beings into two separate categories engenders: desire, possession, love, dreams, adventure’⁴⁹

4.0 *THE SECOND SEX* AS A PRACTICE OF LIVING

If Beauvoir’s purpose is to understand how to form a life that does not refuse the conditions of existence, the mode of becoming she addresses as writer is not divisible from her activity of writing. In this way *The Second Sex* performs its project: it is about writing the self as an ethical practice, as a training manual for herself, and others.⁵⁰ Although of course Beauvoir wrote four memoirs that expressly explore her life,⁵¹ the purpose of *The Second Sex* is different; and it is useful to remember that she in fact wrote it first, as a preparation for *Memoirs of Dutiful Daughter* (1958). As Beauvoir noted, in interview: ‘Wanting to talk about myself I became aware that to do so I should first have to describe the condition of woman in general.’⁵² This experiential viewpoint also appears in her novels, such as *The Mandarins* (1954). As Beauvoir saw it, it was through the act of writing in different genres that she ‘rendered’ her ‘lived and felt experience.’ Belonging within the tradition of conduct of a life meant she offered no polemic or ‘theory’ for any political movement, or any bounded, moralising feminist analysis. The project, the exercise, in all Beauvoir’s work is clear. As she said in interview, in 1979: ‘writing about myself is the most appropriate way of talking to others about themselves.’⁵³ In this interview with Margaret A Simons, Beauvoir was also adamant that her ethical philosophy were ‘essays’, belonging to a literary genre. This question of how women write philosophy through other genres as a way of asserting the specificity of their persona has been considered by both Michelle le Doeuff, and more recently by Moira Gatens, with express reference to Beauvoir.⁵⁴ Both argue, in different ways, that in understanding how writers like Beauvoir appreciated the forms and inheritances of their own traditions, and the choices made in the self-expression of their ideas and experiences of those traditions, it is possible to ‘stress the experimental and embodied nature of [their] art [and how it holds] as a philosophical practice.’⁵⁵ I think it is important too, in accepting the duties of

⁴⁸ As above at 439–523, ‘The Married Women’, for example.

⁴⁹ As above at 766.

⁵⁰ See in general Vintges above note 23.

⁵¹ *Memoirs of a Dutiful Daughter* (1958), *Prime of Life* (1960), *Force of Circumstance* (1963), *All Said and Done* (1972).

⁵² Quoted in Vintges above note 23 at 119.

⁵³ Simons Margaret A. and Benjamin Jessica ‘Beauvoir Interview (1979)’ in Simons Margaret A. *Beauvoir and the Second Sex: Feminism, Race and the Origins of Existentialism* Rowman and Littlefield Publishers Maryland and Oxford UK 2001 pp 1–22.

⁵⁴ Le Doeuff 1991 above note 29; Gatens Moira ‘Literature As Experimental Philosophy’ (2007) 22 *Australian Feminist Studies* 25.

⁵⁵ Gatens as above at 30.

my own *personae*, to understand precisely what the art of writing the self — its form and content — express as an historical practice in similar terms.

As historiography, *The Second Sex* orients attention to how to take care of the inherited conditions of women's life in the present. This is not just because it is a writing project that comes from Beauvoir's life, but because of the step she takes to understand how her experience of that life is situated for, and in, the here and now. Beauvoir describes the aims of the book as 'an attempt at lucidity... to take stock of the current state'.⁵⁶ The concrete conditions of the 'current state' of being, against which woman takes responsibility for her ambiguous choices, include a longer history of how they are derived, and these must be described. Because these described conditions of the present are clearly Beauvoir's own, she does not reify an essential experience of 'woman' as it developed over time. The historical past as she herself states, 'cannot be considered as defining an eternal truth'. Her experiential viewpoint in this way disarms the poststructuralist critique (best and most famously argued by Joan Scott) of how experience can be a dangerous form of historical evidence.⁵⁷ But for Beauvoir, experience shapes the conduct of the writer, and the exploration for others of what and how her own present is embodied and located. As such the historiography of *The Second Sex* is already 'anti foundational'⁵⁸ because she is writing the self, not reclaiming or seeking to essentially explain the marginalized experience of others. Beauvoir's attitude to her own life, the fact that her experience grounds her consideration of the relational ontology she develops in *The Second Sex*, thus avoids the dangers of constructing experience that Scott warns against. In this way, Beauvoir's practice of writing the self (which must include how women's situation comes to be) shares a great deal with Foucault's later ethical practices developed in his history of sexuality.⁵⁹ Unsurprisingly, although *The Second Sex* doesn't read like anything written by Foucault, or Nietzsche for that matter, she belongs to the same tradition. Beauvoir is adamant, for example, that we cannot avoid partiality approaching the conditions of the present, and that it cannot be teleological. She also insists that an account of the present's lived dimensions cannot be written if in doing so the writer seeks to exculpate their embeddendess in it. As she explains:

'even the way of asking the questions, of adopting perspectives, presupposes hierarchies of interests; all characteristics compromise values; every so called objective description is set against an ethical background. Instead of trying to conceal those principles that are more or less explicitly implied, we would be better off stating them from the start; then it would not be necessary to specify on each page the meaning given to the words 'superior', 'inferior', 'better', 'worse', 'progress', 'regression' and so on.'⁶⁰

This interrogation of the past for the present is necessary to understand materiality and the choices women make in accepting their freedom, *for the now*.⁶¹ History in *The Second Sex* and *The*

⁵⁶ Beauvoir above note 1 at 11.

⁵⁷ Scott Joan W. 'The Evidence of Experience' (1991) 17 *Critical Inquiry* 773.

⁵⁸ As above at 797.

⁵⁹ In *Care of the Self: The History of Sexuality Volume Three* (first published 1984). This is a point also made by Curthoys above note 28, amongst others. See also Foucault 2008 above note 8 at 1–23.

⁶⁰ Beauvoir above note 1 at 11.

⁶¹ As above at 760; Le Docuff 1980 above note 29 at 284.

Second Sex as historiography, operate to perform the problematic of Beauvoir's ethical project. She writes neither to transform nor reclaim women or their experiences, but 'to merely translate [...] a situation that is showing itself to be historical precisely in that it is in the process of changing.'⁶²

5.0 HISTORIOGRAPHY AND JURISPRUDENCE, STATUS AND CONDITION

A particular aspect of this 'translation' is to understand how the rules and ideas that materially shape women's condition (as well as the institutions through which those rules are administered) exist in the present. For Beauvoir, as noted, her ethics (unlike Sartre's) does not operate outside these institutions — but in response to them. As she notes: 'lawmakers, priests, philosophers, writers, and scholars have gone to great lengths to prove that women's subordinate conditions was willed in heaven and profitable on earth'.⁶³ It is in this way that Beauvoir offers a very particular account in *The Second Sex* of how law appears and acts, and how woman lives with it, that belong to her own time. This offers a training in how to think about the relation between jurisprudence and historiography in my own. On one hand, Beauvoir, is very concerned with concretely altering certain limits to women's autonomous choices, circa 1949 (in particular, economic and reproductive freedoms). She argues repeatedly that abortion and birth control, for example, require concrete change in terms of their availability and legal status. She also argues for a 'better organised' society that recognises the need for care of children in a way that enables their mothers to work. Without such changes to law's rules, and its customs, woman cannot experience 'voluntary motherhood', and cannot choose her own freedom.⁶⁴ As many scholars have noted⁶⁵, the attention Beauvoir paid to such questions connect her with the liberal traditions of legal reformism, posited by JS Mill in particular (of whom she approved).⁶⁶ Beauvoir however never offers an assessment that such changes determine how women can live their lives. For example, she is adamant that despite being the beneficiary of the rise of formal equality in political terms, and having access to rights in formal legal terms not previously open to her, the persona of the Independent Woman may not by simple deduction be free. As Beauvoir writes:

'One must not think that the simple juxtaposition of the right to vote and a job amounts to total liberation... work is not freedom... Today, the majority of workers are exploited. Moreover social structures have not been deeply modified by the changes in woman's condition. This world has always belonged men and still retains the form they have imprinted on it.'⁶⁷

Although Beauvoir's 'Independent woman' lives at the vanguard of the future, in that she enjoys suffrage, chooses to work *and* may also freely choose to experience being a wife and mother, how she conducts herself in relation to any change in her status and her existent condition, are

⁶² Beauvoir above note 1 at 750.

⁶³ As above at 11.

⁶⁴ As above at 524–570 'The Mother' Chapter 6 Volume 2, and expressly 531–533, 735–736

⁶⁵ Le Doeuff 1980 above note 29 at 287.

⁶⁶ Beauvoir above note 1 at 140, 152.

⁶⁷ As above at 721.

uncertain. It is in being aware, responsibly, of this ambiguity — this ‘drama’ — that woman’s autonomy is lived.

This consideration of Beauvoir’s own ethical problematic — her ‘state of being’ in post-war Paris 1949 — thus shapes how she seeks its expression in the past. Woman must ‘know’ the forms and customs of law (in relation to abortion, for example) as they are part of her ‘facticity’.⁶⁸ She explains very clearly that the present takes for granted the promise of a legal expression of equality as a political ideal (and that women in the early twentieth century through their own concrete action achieved much of this change in status for themselves). But that should neither frustrate woman’s consideration of her present condition, nor fool her that such consideration is unnecessary. ‘Woman’, Beauvoir suggests, should be vigilant:

‘We are no longer like our militant predecessors; we have more or less won the game; in the latest discussions on women’s status, the UN has not ceased to imperiously demand equality of the sexes, and indeed many of us have never felt our femaleness to be a difficult or an obstacle; many other problems seem more essential than those that concern us uniquely: ...Yet we know the feminine world more intimately than men do because our roots are in it; we grasp more immediately what the fact of being a female means for a human being, and we care about knowing it.’⁶⁹

Beauvoir’s point here is about the duality of status and condition. She argues that we should observe the way that law’s rules and forms operate, and how they attach to the male existential will to give meaning to life: (‘afraid of woman, legislators organise her oppression’)⁷⁰. At the same time, the written form of law only expresses the customs and mythologies of women’s existent condition, (‘man only took possession of that which he already possessed; he put law into harmony with reality.’⁷¹) Unlike, then, other feminist histories contemporaneous with *The Second Sex* (such as Mary Beard’s *Women as Force in History* (1946))⁷² Beauvoir does not allow law to be determinately addressed. For her, status — a legal concept — and condition, as its constituent experiential double, are neither in mutual operation, nor separate. They often work against each other, and in different ways to create different relations for women with men and in law because of the contexts of their own times (contexts propelled as she notes by how property and inheritance is organised, as much as family life and work is technologically altered).⁷³ How women live with law is thus an example which gives descriptive and historical shape to women’s existence, in which ‘either she finds work but is enslaved or she is enfranchised but can do nothing with herself.’⁷⁴ For Beauvoir, this ‘opposition between law and custom’ creates some of the material ambiguities for woman’s situation, any time. As she reminds, this ambiguity carries to

⁶⁸ As above at 525–526.

⁶⁹ As above at 15.

⁷⁰ As above at 88.

⁷¹ As above at 88.

⁷² The premise of Beard’s historiography is to seek origination for oppression, the source of which is argued to be the legal status of wife, as expressed in Blackstone’s *Commentaries*. For discussion of Beard and Beauvoir in a tradition of feminist historiography see Curthoys Ann and Docker John *Is History Fiction?* UNSW Press Kensington NSW 2006 pp 158–163.

⁷³ Beauvoir above note 1 ‘History’ Part 2 Volume 1 at 71–156.

⁷⁴ As above at 149.

her present: ‘abstract rights...have never been sufficient to guarantee women a concrete hold on the world.’⁷⁵

This genealogical attention to law has then a purpose for Beauvoir’s project of woman ‘accomplishing herself.’⁷⁶ As she writes ‘[l]aw and custom did not always coincide: and a balance was set up between them so that woman was never concretely free.’⁷⁷ Beauvoir is also clear that what law and custom materially produce is the ambiguous status/condition relation for women, which is always being reinvented. ‘Law’, as a result, although not the cause of women’s oppression, gives it expression. Yet because law is not determinative of that oppression (in contrast to Mary Beard’s analysis, or even Wollstonecraft’s before her), it cannot be fixed. As such it can be both positively and negatively experienced. Law in *the Second Sex* not only works then as an example of how woman’s ‘facticity’ exists, but also as an example of an ethic of action (as opposed to a politics of change). By paying attention to the ambiguity of how she inherits the changing forms and customs of law, as well as taking responsibility for how she participates and acts in concert with it, Beauvoir reminds that woman’s autonomy can be realised. And it is this attention to law as forming the conditions of a life lived by woman that enables me to inherit the *Second Sex* not only in my persona as feminist, but as historian of jurisprudence also.

6.0 INHERITANCE AND RESPONSIBILITY

‘Half victim, half accomplice, like everyone’ — JP Sartre⁷⁸

Reading *The Second Sex* as a history of the formation of an ethic offers much to my own project of writing about the forms, shapes, elisions and relations between feminism and jurisprudence in Australia in later modernity. I have found this project very difficult to conceptualise, write and complete. Part of the difficulty has been that it began as a project of political critique, where both law and feminism operated as empirical phenomena that somehow existed separately to me, to be observed archivally. My question was intentionally ironic: has feminism failed the family?, and my concern was (and still is) to interrogate the implications of the specific relationship between feminist praxis and family law, since the 1960s. The problem that I tried to address was how feminism has come to represent both success and failure as a political project: understood as both irrelevant for many women, and yet an institutional threat for many men, especially in relation to legal reforms around children, and property. I returned to some of my older work, to questions of how equality/difference as a feminist problematic in one sense gave gendered relations more politico-legal clarity throughout this period, but also made them more socially complex. Yet the more empirical work I have done, the more difficult I have found it to interrogate the feminist present through the language of political critique, using liberalism’s own concepts, while also

⁷⁵ As above at 152.

⁷⁶ As above at 17.

⁷⁷ As above at 149.

⁷⁸ As above at 277, epigraph ‘Lived Experience’ Volume 2.

attempting to account for the shape of their dominance. I have been struggling to give an account therefore of what 'law' has come to represent, and enact, in the post war world, that would enable forgotten or at least different feminist traditions and inheritances to have voice. In doing so it is very hard not to notice strain and ambiguity within how the project of legal feminism has unfolded, how, in Beauvoir's terms it has reified the question of status, sought determinate foundation for women's subjection in law's form, and sometimes neglected to see how such attention did not only alter women's condition positively, but sometimes negatively also, and sometimes not at all. For example: when considering debates around the rise of child support legislation or property law reform in the 1980s, I could not remove my discomfort in thinking through how a resort to particular kind of legal framing of the intimate relations between men, women and children in which equality status achieved a great deal in legal terms sometimes favoured a political morality that has unexpected or messy consequences. This shifting and ambiguous alignment between morality, ethics and politics is a core concern of many theorists.⁷⁹ It is also something historian Ann Curthoys has described, I think rightly, as a strain within Australian feminism in our own times, in that it

'licenses women to claim moral irresponsibility on the basis that they, we, are victims of a deep imbalance in the power relations between the sexes. Women must always be seen as innocent, and men (or "patriarchy") as guilty. This feminist form of *ressentiment* once proved an excellent basis for a call for change, a revolution in consciousness, and remaking of human relationships and in this sense it was liberating, for a time. It always carried with it however the danger of a profound over-simplification of our understanding of social and political life.'⁸⁰

Curthoys argues that feminist judgment in these terms became as straitjacket for feminist action more generally. How, for example, could a position of victimhood (or in Beauvoir's terms, the insistence on determinate causation of oppression, which offered something, or someone, to blame) be sustained against 'critics who drew attention to the privilege of some women and the lack of it in some men'.⁸¹ Even, perhaps, more importantly for those of us writing in Australia was the problem of how such a moral feminist position could be sustained against the critique of indigenous peoples: 'How could the white woman be seen as victim in settler colonies across the globe?'⁸²

I have tried to approach my feminist discomfort by addressing these questions genealogically in my project, taking equality/difference (and feminist legalism's use of it) as something to be destabilized. This is because the liberal paradox potentially masks a particular form of legal exculpation — or at least enables a righteous belief in the power of legalism to overcome itself, and thus a lack of acknowledgment of feminist agency or implication in its performance. Thinking with Beauvoir assists with this project.⁸³ Her ethics are a training in how to write histories of Australian feminist jurisprudence that steer away from critique of law's

⁷⁹ Butler Judith *Giving an Account of Oneself* Fordham University Press 2005.

⁸⁰ Curthoys Ann 'Autobiography and Cultivating the Arts of the Female Self' in Bennett Jane and Shapiro Michael J (eds) *The Politics of Moralizing* Routledge New York and London 2002 p 93 at 94.

⁸¹ As above at 94.

⁸² As above at 94.

⁸³ As above at 95.

changing or evolving rules and social structure towards questions of how we practice the self as feminist jurists at this particular moment in time. As philosopher Karen Vingtes suggests, this is because Beauvoir shows that '[w]e constantly have to shape ourselves freely into a specific subject in the world' and in choosing to do so 'we do not live through others; we endorse not only our own freedom but also the freedom of others.'⁸⁴

My practice of writing this history, and living with my law, within the tradition of conduct of a life offered in *The Second Sex*, means being responsible for how my 'situation' is formed. This means paying attention to how my own experience — as an Australian lawyer, historian, feminist, who came to understand herself as such in the early 1990s — is implicated in the content of what I write, as well as constitutive of its form and description. *The Second Sex*, in a double manoeuvre, also exists as a part of the facticity of both these aspects of my responsible histories. It does so in two ways.

The first has to do with feminism in Australia; and how Beauvoir's work was received. Published in English in 1953, it was not until 1957 that *The Second Sex* and 'Beauvoir's voice entered' Australian life.⁸⁵ Both Ann Curthoys, and Sylvia Lawson (in the wonderfully titled essay 'How Simone De Beauvoir died in Australia'), have written expressly to this question. Both argue, in different ways, and from slightly different temporal viewpoints, that Beauvoir's evocation of a particular kind of life, her attitude, her feeling, 'taught us how to live'.⁸⁶ (In Lawson's case, no longer an undergraduate like Curthoys when she read it in 1960, it also seemed to teach her and her friends how to leave their husbands.) It did not matter that Curthoys, reading De Beauvoir in Sydney in the 1960s, 'a port city struggling to become cosmopolitan',⁸⁷ lived in a present far removed from the intellectual milieu of Paris in 1949; or that for Lawson, 'to be caught reading [*The Second Sex*] in a coffee shop — or better still in Sydney, Lorenzini's wine bar — was decidedly chic, like smoking Gauloises, or serving vermouth with salami and black olives. It was also to leave oneself open to rebuke for precocity and pretension.'⁸⁸ What mattered was the rebelliousness of spirit, and the toughness in facing the concrete specificities of her own world, that made Beauvoir an exemplar. It was Beauvoir — through her writing — that showed women like Lawson, Curthoys and many others like them all over the country that it was possible 'to forge an alternative to the narrow options then facing women, and to live according to a different conception of femininity, intellectuality, independence, sexuality and friendship'.⁸⁹ These women and others, in Australia, were at the forefront of the intellectual feminist movement from 1969. They not only contributed to how to 'thematise' and transform the institutional and theoretical limits of their situation, but also attempted to live differently, for themselves. This is important to my consideration of how to write responsibly about jurisprudence and feminisms in Australia between 1960 and now. This is not just because of the historical point that Beauvoir in many ways already forms part of the intellectual and political traditions of Australian feminism

⁸⁴ Vingtes above note 25 at 138.

⁸⁵ Lawson Sylvia *How Simone De Beauvoir died in Australia: stories and essays* Sydney UNSW Press 2002 p 157.

⁸⁶ Curthoys above note 28 at 14.

⁸⁷ As above at 13.

⁸⁸ Lawson above note 85 at 179.

⁸⁹ Curthoys above note 28 at 13.

(existentialist, but also anarchist; Marxist, yet also liberal).⁹⁰ Rather, what I saw also in reading *The Second Sex* for the first time at 42 was that she was already present for me in my own experience, as a consequence of that intellectual — and personal — engagement. I did not read her then as Ann Curthoys might have done as a twenty year old in 1965 in order to shape my life. I realised the example of how to choose a life was, to a degree, already mine, already given through a hundred other conversations, about how to conduct oneself as particular kind of woman — feminist, educated, ‘Independent’. I exist as reader of this book, sometimes with discomfort, because of my experiences learning from, and in friendship with, those other Australian feminist readers (in particular Curthoys herself), and that therefore shapes how I can approach my writing projects. The inheritance from them — and also Beauvoir — is therefore not outside of the feminist self that I have fashioned since I was an undergraduate student. Although, then, Beauvoir writes of a way of living that I didn’t need to imagine, I must nevertheless acknowledge how the text made such imagining unnecessary. It had already helped shape my own persona, and how I try to conduct relationships with others, men and women; how I have made, and try to make, choices about the limits and freedoms of my own life. This is from the perspective of my intimate relationships: as daughter, mother, wife, lover, friend; but includes my institutional relationships also: as teacher, legal scholar, writer.

This leads to the second way in which Beauvoir and *The Second Sex* are part of my situation. If I take my persona of historian of jurisprudence seriously, this not only includes understanding what inheritances I carry in the practices of the feminist self, and the responsibility of a viewpoint (of its time, and locale) that speaks from that experience. It also infers paying attention to how feminist *projects* that accompanied the liberation of women’s thought and action in the past thirty years, in particular feminist engagement with law, has become institutionalised or accepted, and in what ways.

If we look to *The Second Sex* for an example of how to conduct ourselves institutionally, it is not a matter of transposition. The Australia of which I write is not Paris, 1949. Beauvoir was right to recognise the ways the lure and forms of law could both oppress, and promise liberation from oppression, for women in her own situation, her own time and place. Yet she could not have foreseen the inexorable rise of law as the primary idiom and discourse through which most political and moral demands would be made in our own. (It is hard to think of affecting change in the conditions of lives today without first making a demand or claim to and with law, often in rights or status based language.) Nor could she have foreseen the extent to which the ‘Independent woman’ of 1949 would become an institutional insider with law in the process. It is clear for example in thinking about our own ‘situation’ that the opportunities women created for themselves, especially since the 1970s, to change women’s lived oppression has been done in the practice and languages of liberal law, and through its institutions. These reforms and actions have been important and significant, and have lifted the impediments to many women’s opportunities

⁹⁰ Battersby above note 29 at 8 argues this tradition does not seek to replicate continental thinking, but distinguishes a different kind of Australian ‘intercontinental’ philosophical feminist tradition, in which ontology, ethics and politics are consistently considered as relational, and in which ‘imaginings that are represented as historically contingent and, therefore as mutable’. The point for me to take for my project is that in reading ‘feminist thought’ as an historian of this period it is important to read it through the local viewpoint, philosophically, but also jurisprudentially.

to realise a different kind of life for themselves. Yet as noted earlier, the way feminists have made choices in Australia about conducting themselves in relation to law has had other consequences, that are not always comfortable or easy to see. Although Beauvoir did not write, then, of a present in which the close relationship between feminists and a certain form of law existed in such a way as it does for us today (for in part, her very act of writing helped create it), she did offer a particular ethical position in how to think about women's relationship to men, and as a consequence to the institutions they perpetuate. This involves a question of conduct, and acknowledgment of complicity in the expression of one's freedom. Existential man, Beauvoir insists, is a 'free individual [who] takes the blame for his failures on himself, he takes responsibility for them'. In 1949, she was quite clear that for many women, because of their lack of choice in the making of their situation, they were not always responsible for their 'misfortune'.⁹¹ Yet, importantly, Beauvoir recognises too that for those women who *had* achieved the conditions for freedom in their lives, ('Independent woman') it was possible nevertheless to refuse autonomy through lack of recognition of, or complicity with, the forms or expressions of their Otherness to male rules, and male institutions. So for the 'independent women' today, who must include women who look and act and live much like I do — feminist, highly educated, economically independent — how can or should we think about our relationship to law as an institution that we have helped to concretely change, reform, critique, and engage?

Living in a relationship with law in this way is a 'problematic' Beauvoir did not necessarily consider, yet her ethics does show a way to conceptualise its forms and expression. This is because, as I have argued, Beauvoir in *The Second Sex* offers an exemplar of writing with and about feminism without sentimentality that orients the writer away from a tendency to engage in relentless political critique or moral assertion; and move towards an ethics of how we choose to act in specific times and places. She trains us to acknowledge how law's forms and customs are no longer wholly outside of ourselves, our experiences, our 'drama', our present situation. As a subject of legal feminism as well as a beneficiary, of it this suggests I can not deflect my history writing to archives or practices external to myself. Nor can I write about Australian 'law' as a feminist question without taking responsibility for how I conduct myself in relation to it. My experience is not divisible from my personae as historian, jurist, nor as a feminist; and this means that my practices of writing how women inherit a life with law must be understood as duty of office.⁹² This duty includes posing different questions to the present than the critical tradition of law and history usually allows feminism. It means writing about being in a relationship with law as part of our 'current state of things', to both acknowledge our agency in its localised reinventions, as well as our complicity with the conditions those reinventions produce. Thinking with Beauvoir thus offers me guidance on how to rejoin the tradition of conduct to that of critique. By considering how I inherit and inhabit my jurisprudence, with its duties and its pleasures, I can practice writing histories that came from a sense of being responsible for myself, and as a consequence, responsible for my relations with others. ●

⁹¹ Beauvoir above note 1 at 646.

⁹² This orientation owes a debt to and acknowledges the insights, idiom and ongoing jurisprudential project of Shaunnagh Dorsett and Shaun McVeigh: see Dorsett Shaunnagh and McVeigh Shaun *Jurisdiction* Routledge New York & Oxford 2012 pp 132–142.

