

Revisiting Feminist Jurisprudence: A Rehabilitation

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Abstract

This paper seeks to revive feminist interest in jurisprudence. However, it does not do so by conducting a historical inquiry designed to restore forgotten female jurists or reveal women's contributions to the jurisprudential tradition. Instead, it comprises an invitation to rethink the encounter of jurisprudence with feminism. To this end it considers what counts as feminist jurisprudence, situating the rise of legal scholarship that defines itself as such, and setting out the notion of positionality as the criterion to judge what else can be included under this label. Thereafter it discusses the distinctive strands of what I deem to be feminist jurisprudence, before concluding with a call for a feminist re-imagining of jurisprudence as an activity both theoretical and pragmatic, and also as one which might hold hitherto un-thought possibilities for a feminist analysis and critique of law.

I. The invention of a tradition

Knowledge is one, but each separate part of it which applies to some particular subject has a name of its own; hence there are many arts (*technai*)...and kinds of knowledge or science (*epistemai*).

Plato (1991)

The concept of jurisprudence designates one such specific body of knowledge; the knowledge, that is, of law. More precisely, jurisprudence refers to the kind of knowledge that promises a deeper understanding of law; one which cares neither for doctrinal exegesis nor technical descriptions of legal rules, but, in embracing much broader horizons, engages with diverse conceptual inquiries into the ethical, political, philosophical and normative dimensions of legal study. Although somewhat lacking in clarity such a general description is accurate insofar as it conveys the principal characteristic that has been constitutive of the definition of jurisprudence throughout its history, namely that its concerns lie with the theoretical analysis and study of law and its institutions.¹

The history of jurisprudence has been long and venerable. Of Latin origin, the term itself is etymologically rooted in the words *iuris* (of law, of the right) and *prudencia* (wisdom, knowledge), a translation of the Greek word *phronesis*, which Aristotle (1994:

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¹ For a discussion of the difficulty of precisely defining the term 'jurisprudence', see Cotterrell (2003: 1-3) and Freeman (2008: 1-6).

VI. v-xiii) considered to be one of the intellectual virtues.² Though not the same as the virtue of wisdom, *phronesis* is itself a form of wisdom directed at distinguishing between good and bad in matters of conduct in life; not only of one's own and others' private conduct, but that in the polity as well. As part of the rational faculty, *phronesis* denotes excellence in deliberations concerned with practical affairs and is closely correlated with a person's age and experience. As such it does not merely designate an exceptional ability to exercise thought carefully and a capacity to understand and correctly judge a particular state of affairs. The process of deliberation *phronesis* inaugurates should culminate in a decision and a pronouncement of what ought to be done, together with an exposition of the most suitable means of expediting this objective.

What therefore distinguishes a judgement resulting from *phronesis* from one arrived at through wisdom alone is the close association of the former to ends that are to be attained by some form of action. So whilst one's virtuous disposition functions to ensure the rightness of an end, it is *phronesis* which commands the correct means for achieving this end. Although in being so closely connected with action the virtue of *phronesis* was seen as indispensable to those entrusted with the responsibility for the legislative and judicial functions, for the ancient Greeks it remained firmly entrenched in the ethical domain (Aristotle 1994: VI.viii.3-4).

It was with the writings of Cicero that *prudentia* migrated from the field of ethics to the 'science' of law, and the term 'jurisprudence' was formulated to designate the special kind of prudence associated with law. For if law, as its name signified, was right reason commanding right conduct, and hence the measure of what is good and bad, just and unjust, then prudence belonged to law such that law was prudence in itself (Cicero 2000: I.v.18, vi.19, xxii.58, 33). Yet it is not only its etymological birth that the concept of jurisprudence owes to Rome; its creation as a separate domain of knowledge is also of Roman heritage. During the latter years of the Republic a body of legal literature emerged comprised of interpretations, commentaries, responses and expert opinions covering important questions of law. Together these laid the foundations for a distinct tradition of the knowledge and study of law.³ There also appeared a new order of public personage, the Roman jurist, drawn from the elite classes, whose prudence in being associated with their own comprehensive knowledge and mastery of law's 'mysteries', became practically indistinguishable from that of law.⁴ Yet for these men, who bound themselves to jurisprudence out of love rather than necessity, law was not their sole pursuit. They were also actively immersed in public life, enjoying high status and

² Aristotle identifies intellectual virtues with forms of wisdom necessary for correct thinking and action, and sees them as being acquired through teaching. In contrast, he considers moral virtues as qualities of character acquired almost intuitively through habit and practice, and which lead the virtuous person almost instinctively to choose and act well.

³ For the rise and history of jurisprudence as a distinct domain of knowledge generally, see Kelley (1990: 41-7) and Pound (1959: 28-42). In regards to the time of the Republic, see Pantazopoulos (1968: 18-28) and Schiavone (2012: 31-41 and 112-27).

⁴ The Roman jurists as a class were clearly distinguishable from those who practiced law by giving legal advice on clients' requests (Cicero 2000: I.iv.14). The first foundational text of Roman jurisprudence appeared in the first century B.C., and is a systematic account of the *juris civilis* attributed to Quintus Mucius Scaevola. For a discussion of Scaevola's achievement, see Schiavone (2012: 177-95). For a more general discussion of the rise of the Roman jurists, see Stein (1999: 12-22) and Harries (2006: 27-50).

considerable authority in the roles of jurist, statesman and orator. Indeed, on account of the considerable dignity the *jurisprudentes* enjoyed, both as politically active citizens and as students and teachers of its law, the Roman citizenry could boast that they, unlike the Greeks, had entrusted the authority of their law to their most eminent men (Cicero 1989: 1.198, 253). Seeing no contradiction between a life in the service of law and one in the service of the people, these *jurisprudentes* recognised no incompatibility between different branches of learning. Though accepted as a specialised form of knowledge, jurisprudence was also open to influences from other disciplines, in particular, from rhetoric, philosophy, politics and ethics. And even though during the Roman Empire, when jurists were primarily tasked with advising government officials and the Emperor in legal matters, and with jurisprudence taking a more technical turn, concerning itself with the project of systematisation, its study continued to preserve its intellectual openness.⁵

Acclaimed as the most important legacy of Rome, its jurisprudence traversed European history and, through its systematisation in Justinian's sixth century A.D. codification as the *Corpus Juris Civilis*, shaped the paths of law and legal knowledge across the centuries to follow. Throughout this journey it also preserved its receptiveness to other disciplines. Renamed 'civil science' or 'civil wisdom' in the newly founded temples of knowledge, the medieval universities, jurisprudence did not simply engage with technical questions of law and hermeneutical methods for discovering the true meaning of received legal texts. It variously pursued debates over the most appropriate rhetorical and dialectical devices for law, delved into philosophical and theological discussions on the nature of justice and equity, and explored political arguments about the essential components of constitutions. Neither did it neglect issues concerning its own identity; whether, for instance, it should best be seen as a branch of literature, and therefore as one of the arts, as a form of prudence governed by experience, or, as a rational and universal science (Kelley 1976: 274, 1990: 135). Associated with right reason, the 'art of the good and the just', with the knowledge of things divine and human, and the mastery of the distinction between justice and injustice, it dethroned philosophy as the queen of sciences to become itself the 'true philosophy' (Digest 1888: I.1; Kelley 1976: 267; Justinian Institutes 1987: I.1).

Jurisprudence finally entered the English language in the early seventeenth century.⁶ Although gaining a near universal acceptance on the continent as true philosophy, upon arrival on English soil it dispensed with its links to Renaissance humanism and adopted a peculiar form. This is not to suggest English jurists of the time were ignorant of the continental legal methods and debates, or that there were no calls for the reception of the civil law as "...the most ancient and noble monument of the Roman's prudence and policy" (Starkey, in Mayer 1989: 175).⁷ It was simply that these voices were quickly

⁵ This openness was sustained through what has been described as 'a revolution-in conservation'. This involved adapting the jurisprudence of the Republic to the specific needs of Empire (Schiaivone 2012: 316-7).

⁶ The OED gives the earliest date as 1628 in the writings of Edward Coke. "For a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence".

⁷ Starkey's call for the reception of the Roman law in England was not the only one. For a discussion of such calls, see Helgerson (1994: 73-8); Goodrich (1990) and Coquillette (1981). For a discussion of the classical learning of English jurists, in particular of Coke, see Boyer (1997).

muffled, lost reminders of a ‘history of failures’ marking an alternative path English jurisprudence might once have taken.⁸ Turning away from the continental models that would have borne comparative, historical and philosophical methods into the study of law, English jurisprudence identified itself with what Coke called the law’s ‘artificial reason’ as distinct from the natural reason belonging to ordinary people. None other than the pragmatic and disciplined way of reasoning required by the practice of common law, it was only to be revealed through complete immersion in the long, hard and detailed study of common law’s historical record, the living archive of its cases. For it was here, in the collective deliberations and knowledge of learned and experienced judges, that the reason of common law was perfected and exposed, and it was only from here that it could be fully understood.⁹ What was born in the seventeenth century and released into history as the ‘orthodox’ or ‘classical common law jurisprudence’ was an endemic discourse wherein the study of law was of its practice rather than its theorisation. Here was a discourse whose language, replete with manifold images and symbols celebrating a single, unitary legal tradition, would remain steadfastly bound to the idea of a quintessentially English law, and ultimately, to a jurisprudence as insular as the history common law claimed for itself.¹⁰

Today questions about the Englishness of English law, though not entirely dispensed with, have been quietly set aside. Their marginalisation began with the rise of the ‘grand’ jurisprudential projects of the nineteenth century, such as those pursued by the Historical, Marxist, Analytical, and Sociological Schools, and culminated with the triumph of the Positivistic School in its variant forms.¹¹ The latter would come to dominate the jurisprudential scene down to the present day, remaining largely unchallenged prior to recent interrogations by what might loosely be described as critical and post-modern jurisprudence.¹² Nurtured in the shadow of epistemological questions posed by Kantian philosophy and neo-Kantianism, as well as the new ontologies created by the social science disciplines founded in the nineteenth century, these Schools have come to seek unequivocal answers to the ‘how’ and the ‘why’ of the development of law and its institutions. They explore the relationship of law to politics and confront the fundamental question of jurisprudence, what is law? Exploring the internal logic of law’s conceptions, its doctrines, forms of reasoning and its rules, as well as what the appropriate function of law is or should be, they also debate whether law should best be analysed as a self-contained system of norms or as a cultural and

⁸ I have borrowed the notion of ‘failed history’ from the work of Goodrich. For his discussion of the significance of the recovery of such histories and their critical potential, see Goodrich (1990: 43-50).

⁹ For a detailed discussion of the concept of the ‘artificial reason of law’, see Postema (2003: 1-11) and Grey (1980).

¹⁰ It has been argued that this insular jurisprudence was a result intended by the jurists of the time who, in committing to a project of consolidation of nationhood, resisted the ‘Romanization’ of common law (Helgerson 1994: 70-3).

¹¹ For a discussion of the rise of these Schools and the context in which this occurred, see Kelly (2004) and Veitch *et al.* (2012).

¹² For example: Douzinas, Warrington and McVeigh (1991); Davies (1996); and, Douzinas and Geary (2005). In the early twentieth century the realist school also posed a significant, though short-lived, challenge to positivism, but its influence was limited to North America and the Scandinavian countries. For a discussion of legal realism, see Cotterrell (2003) and Veitch *et al.* (2012).

social product of its times, and even consider whether, at a time of globalisation, a universal jurisprudence is either feasible or desirable.¹³

Women have certainly not loomed large during the long and revered history of jurisprudence. In fact they barely have been present at all; apparently there having been no female jurists, female authors of jurisprudential manuals, or female founders of jurisprudential schools. It could be argued that this should only be expected given that until recently women were systematically excluded from law and from politics, and whilst not forbidden an education, across all strata of society theirs was a curriculum devoid of law and philosophy. Yet, let us not forget that despite the diverse forms of exclusion imposed upon them down the years, women nevertheless have made substantial contributions to many forms of intellectual endeavour. Neither should we ignore the many ‘miracles’ performed by modern feminist scholarship in unearthing a rich heritage of women’s participation in virtually every field of knowledge and the arts.

Law, or to be more precise, the theoretical and philosophical questions of law with which jurisprudence has concerned itself, does not however seem to have benefitted from such excavations. It might be suggested that women have not been sufficiently interested in law or that their interest has been effectively blocked by the difficult, specialised, and obscure language of legal science. However, we know so very well that even at the height of women’s exclusion from English law, when the doctrine of coverture was in full force, women litigated and wrote lengthy critiques condemning the injustices they suffered at the hands of law. We should also be aware of the long tradition of women philosophers reaching right back to Hypatia; women who articulated their ideas in a language no less abstruse than that of law. So the question remains: if women have so ably authored treatises on the military arts, political theory, ethics and philosophy, topics which, like law, have been alien to their education, then why has there been such a dearth of contributions to legal theory and legal philosophy?

It is certainly the case that the study of law has been a particularly male domain, and one extremely hostile to the idea of women being in any way involved in jurisprudence. Since its birth in ancient Rome, right down through to modernity, the teaching of jurisprudence has been grounded in what the ancient Greeks called *mathesis*, and the renaissance scholars ‘discipline’. This was essentially a hierarchical mode of learning wherein the master, through instructing his ‘disciples’, imparted the ‘true doctrine’ and thereby preserved the continuity and coherence of law’s intellectual transmission (Kelley 1997: 12-6). Evidence of this is to be found in accounts of the history of jurisprudence, comprised of a series of great masters and their students whose writings and teaching both marked and formed this tradition. Furthermore, this mode of accounting differs little from that we see today, as attested to by the way jurisprudence is still taught in our contemporary schools of law (Veitch *et al.* 2012: 2).

Yet positing the practice of *mathesis* as sufficient reason for women’s absence from jurisprudence should perhaps also be dismissed on the grounds that the true history of its tradition might well have been otherwise. Although jurisprudence has been widely celebrated as Rome’s most important creation and legacy, it has also been its greatest

¹³ See, for example, Twining (2009).

invention, with its fair share of myth makers standing alongside its masters. The juristic tradition deriving from republican Rome is just one such *mythologem*; the collective identity of the *jurisprudentes* being essentially a constructed image imposed retrospectively by jurists via a culture of citation designed to ascribe continuity, authority, and disciplinary status to their own enterprise (Harries 2006: 49-50). Similarly, the uniquely English tradition unfolded in the writings of Edward Coke (who was actually dubbed ‘the great mythmaker’) wherein it is portrayed as reaching back to times immemorial, was just such another invention (Hill 1997). We might therefore be tempted to conclude that women realised very early on that jurisprudence was an invention and therefore not worthy of their interest. But this would only ring with a hint of truth had not feminist writings throughout their history applied their exceptional wisdom and well-honed critical skills to deal with any imagined and invented knowledge claims about them.

This lack of feminist interest in jurisprudence is not just a thing of the past. Modern feminist legal scholarship, which otherwise has left virtually no stone unturned, has also shied away from an explicit jurisprudential engagement with law. Some attempts to rectify this situation were made in the 1990s, but the enthusiasm was short-lived and has yet to be recovered. Herein lies the purpose of this paper; to revive feminist interest in jurisprudence. In attempting to do so, my intention is not to pursue a historical inquiry, one which seeks to restore forgotten female jurists or women’s contributions to the jurisprudential tradition. My intervention is not motivated by any wish to fill gaps in the history of jurisprudence’s by adding women.¹⁴ Rather, it comprises an invitation to rethink jurisprudence as an ‘invented’ tradition and suggest that a more fruitful feminist critique of law may arise from this encounter of jurisprudence and feminism, one I believe we were rather too quick to reject.

To this end the remaining text is divided into three parts. The first part considers what counts as feminist jurisprudence for the purpose of this paper. It historically situates the rise of a body of legal scholarship self-defined as feminist jurisprudence, whilst also setting out the notion of positionality as the criterion to judge what else is to be included under the label of feminist jurisprudence. The second part discusses the distinctive strands of what I deem to be feminist jurisprudence; and, the third, by way of concluding, calls for a feminist re-imagining of jurisprudence as an activity both theoretical and pragmatic, which might hold hitherto un-thought possibilities for a feminist analysis and critique of law.

II. Setting the scene

...this article demonstrates the necessity of making a feminist evaluation of our jurisprudence and of taking a jurisprudential view of feminism.

Scales (1980: 375)

¹⁴ No doubt this is a project of importance waiting to be undertaken, with some evidence to justify it. There are, for example, references to female orators in Rome in Valerius Maximus (2000: 8.3), whilst Goodrich (1996: 29-71) has unearthed a feminist jurisprudence exercised over the affairs of the heart in medieval France.

The terms ‘feminism’ and ‘jurisprudence’ first came together at a conference organised by women from Harvard Law School in April 1978 in celebration of the 25th anniversary of another first, that of female graduates from its hallowed halls. The subject of one of the conference panels, entitled *Towards a Feminist Jurisprudence*, was described as “a wildly philosophical exploration of the impact of feminism on the structures and principles that support the legal system” (Scales 1980: 375). And although, as Scales reports, the panellists concluded that perhaps there should best *not* be such a thing as a feminist jurisprudence, the term itself survived, thereafter appearing in the pages of the *Indiana Law Journal*, and subsequently making its way into the world of feminist legal scholarship (Scales 1980).¹⁵ By the mid-1980s it had become firmly established on both sides of the Atlantic, rooting itself in North America, the Antipodes and on the Continent of Europe.¹⁶ At the time feminist jurisprudence also attracted the attention of feminist scholars in British Universities, but here, despite being widely discussed, it failed to gather firm support in any great measure and was mostly viewed with a degree of scepticism reminiscent of the panel’s conclusions at its Harvard birthplace.

Despite being described as having ‘come of age’ by the late 1980s, within feminist commentary a singular or precise definition of feminist jurisprudence is remarkably hard to find (Littleton 1987: 2). True, given its highly pervasive nature jurisprudence cannot easily be demarcated as a subject area. Yet, whereas within mainstream jurisprudence this difficulty often has been a topic for discussion and at times even the focus of fierce debate, feminist legal scholars, whether through insufficient interest or perhaps because of the size of the subject, have shied away from attempting a definition of a feminist version.¹⁷ Most usually the field has been regarded generically, as a theoretical engagement with law and its methods, and with little elaboration as to what exactly this might entail. Sometimes, accounts of a contextual history of the rise of feminist jurisprudence or presentations of the substantive arguments of its specific strands have functioned as a substitute for a definition, whilst references to the diversity of its subject matter are offered as an explanation for this absence (e.g. Cain 1990; Smart 1991). In itself this lack of definition constitutes an invitation for setting criteria as to what counts as feminist jurisprudence and designating dividing lines between its different strands.

From its inception feminist jurisprudence was first and foremost a contemplation and affirmation of a theoretical and critical position towards law. At first glance this may seem as nothing particularly new or unusual, since women have a long tradition of critically engaging with law, one which stretches back way beyond arguably the highest profile instance; their nineteenth century campaigns for civil rights.¹⁸ Modern feminist legal scholarship, following the path our Victorian foremothers carved out within this tradition, continues to be deeply concerned with law’s impact upon women’s social reality. Feminist jurisprudence has however, differed markedly from all that had gone

¹⁵ For a useful historical exposition of the rise of feminist jurisprudence, see Littleton (1987).

¹⁶ Particularly in the Nordic countries, and especially Norway. See for example Dahl’s (1987) attempt to develop ‘Women’s Law’.

¹⁷ For an attempt to substantially engage with the question of feminist jurisprudence that does more than simply present it or argue for or against its presence, see Lacey (1998).

¹⁸ For a discussion of earlier feminist critical responses to law, see Drakopoulou (2000).

before. It emerged as an entirely novel project, an ambitious and daring undertaking wherein feminist legal scholars directly questioned the nature of law, asking what it is and how it works, rather than what law does to women. In exhorting the originality of feminist jurisprudence I do not suggest that confronting legal rules seen to exclude, discriminate against, marginalise or disempower women, is not of significance. Rather, I wish to draw attention to the qualitatively different type of encounter that the rise of feminist jurisprudence, with its peculiar way of interrogating the institution of law, initiated. For within the discursive space thereby created, feminism neither takes it upon itself to 'legislate' rules that benefit women, nor provide avenues through which law's liberal 'promises' might be fulfilled. Refusing to act in the name of law, it instead addresses the law as an equal, meeting it head-on; with 'her' thinking challenging law's rationality, and juxtaposing a voice and a mind of 'her' own to that of law's, to speak *of law to law*.

Of course, emphasising the position of the legal scholar towards law as the means of circumscribing feminist jurisprudence might attract some objections on the grounds that all forms of feminist inquiry in law are, in effect, based upon some sort of positioning. After all, feminism praises itself as being situated knowledge (Haraway 1991; Hekman 1992). However, I contend that what marks out feminist jurisprudence from other forms of feminist engagement with law is precisely its departure from the established, dominant conceptions of what a feminist position towards law is. I therefore identify the concept of positionality as the criterion for distinguishing what I consider to be feminist jurisprudence from other forms of legal scholarship.

In feminist literature the concept of 'positionality' first emerged in the context of identity politics. Here one's 'position', defined in reference to a complex of external conditions, which, as such, are prone to change, was regarded as key to better understanding one's identity. Shifting the emphasis to the woman's external situation in this way allowed the contextualisation of a network of important confounding variables, such as race, religion, sexuality or class, such that the identity of a 'woman' could be defined according to a constellation of parameters articulated in inherently mutable contexts, rather than as constituted by essential qualities, which thereby avoided the pitfalls created by ontological understandings of womanhood (Alcoff 1988: 433-4).

Subsequently adopted in feminist debates around the production of knowledge, the concept of positionality was utilised primarily in one of two ways. It was wielded critically in respect to bodies of knowledge, which, ignoring their own situatedness, claimed to be universal, neutral and objective. This allowed feminist scholars to effectively challenge these bodies of knowledge for being, for instance, male, colonial or racist. And, it also was employed in attempts to develop normative blueprints, most specifically in relation to securing best practice in feminist empirical research, particularly that carried out in the field.¹⁹ Here, it was suggested that a researcher's awareness of her own position and its function as part of the conditions of the production of knowledge could and should, through a greater understanding of the

¹⁹ For one of the earliest elaborations of the concept of positionality and that of situated knowledge, see Haraway (1991: 183-201). Positionality, perhaps because of its spatial aspect, was particularly closely theorised and discussed in relation to fieldwork undertaken by feminist geographers. See for example the extensive discussions by Rose (1997) and by Nagar and Geiger (2007).

power relationships involved, nurture a special sensitivity to those being researched. This double focus of positionality, initially associated with the question of female identity, the question of 'who speaks' and 'from where', and then subsequently linked to the question of feminist engagement with knowledge as one of reflexivity and self-reflexivity, is central to my discussion of what comprises a jurisprudential engagement with law.

Questions of position and identity, notably in the guise of 'who speaks', have not been alien to feminist legal scholarship's concerns with, and investigations of, law. Indeed, locating the problem with law primarily within the dyad of 'women and law' rather than the legal institution alone has had a major influence on the manner in which notions of identity have come to be understood within the modern feminist legal discourse.²⁰ Put simply, by placing the emphasis on 'law *in relation* to women' and targeting those legal norms blamed for oppressing them, the knowledge claims thereby raised do not directly address law's prudence, its workings, or its power structure. This is because these claims are not epistemologically grounded upon an interaction between the scholarship's own knowledge and wisdom, and that of law, but are mediated by claims about women's social reality and the many ways it is negatively impacted by the legal rule. Here, in order to assert knowledge of the ills law causes women to suffer, the epistemological gravity of the question 'who speaks' is relegated beyond the domain of law, to the social. So what becomes of the utmost importance in this epistemological arrangement is not the identity of the legal scholar, but that of the 'empirical woman-knower' articulating such ills - she to whom feminist legal scholarship must lend an ear so as to hear women's grievances and confidently assert and present them to law. Is it She who is entitled to speak as an all-inclusive 'We', or should this 'knower' be the many women of feminism who can only report their own experience of law through speaking as a 'we' grounded in particularity and difference, whether this difference is based upon race, ethnicity, religion, class, sexual orientation or a combination thereof?

Whatever the merits of different feminist approaches to the identity of the 'empirical woman-knower', they share an acknowledgement of positionality as a signifier of this identity and so treat it as epistemologically foundational. Yet, once these claims are translated into the language of law by the feminist scholar and are received in its interiority, the question of 'who speaks' becomes muted. It is as if, upon entering the realm of law, the identity of the legal scholar and her stance towards her object of inquiry ceases to be relevant or important. It effectively becomes conflated with that of the empirical woman 'knower', with the result by and large being that feminist legal scholarship neither sees the need to account for its own position and identity, nor reflects upon its very own attitude towards law as a body of knowledge and the way it engages with it.

Perhaps this seeming indifference is justifiable insofar as it is not the feminist legal scholars who originally assert which rules are harmful to women. They endorse claims deriving from women's everyday reality, explain to law 'why' and 'how' these rules harm women, and then adjudicate the case in order to identify and demand a solution. In effect, it is the social that validates their knowledge claims about women and law, *and*

²⁰ For a more detailed discussion of this approach to law, see Drakopoulou (2013).

their addressing the law. Standing as interlocutors of law, not in their own right, but as mediators between women and law, what is therefore of primary importance to this role is an account of how women and their claims are best submitted to law; an account that bears no reference to the particular identity of the feminist legal scholar or her positionality towards law as a body of knowledge. It is precisely this ascription of the role of the intermediary to the feminist legal scholar that gave rise to one of the most intense and painful debates to have taken place amongst feminist legal scholars over the past few decades; the central question being on whose behalf should the legal scholar stand before the law - whether she should represent an all-knowing Woman of Feminism capable of articulating a universal experience of law or represent women as equal or different to men, in terms of differences between women, as relational rather than autonomous subjects, or, as intersectional subjects.²¹

This displacement of the identity of the legal scholar and her positioning towards law distinguishes the form of engagement with law I characterise as 'women and law' from what I call 'feminist jurisprudence'; with accounts of identity and positionality lacking in the former and present in the latter. Although I borrow the concept of positionality as it emerges in the literature cited above, my own use is somewhat different. As do they, I employ it as a signifier of identity; though here the identity is that of the legal scholar. I too expect an account of positioning that denotes that of the scholar towards a particular body of knowledge and shows awareness of 'how' she engages with this knowledge. So just like they, I attach the requirement of self-reflexivity onto the criterion.

Unlike they however, I do not see positionality as a resource for judging the nature, quality and argument of the jurisprudential claims produced from self-reflexive engagement with legal knowledge. My intention is neither to critically evaluate the virtues and potentials of feminist jurisprudence, nor expose or chastise it for its faults. Rather, I seek to set it apart from other forms of engagement with law, delineate distinct accounts of positionality within its interiority, and explore alternative paths for understanding the relationship between feminism and law. In this sense I argue that the presence of positionality defines feminist jurisprudence as situated knowledge, and maintain that feminist legal scholarship must make its position towards law known and visible, clearly accounting for its relationship with law - how it speaks, thinks of, or imagines it, and how its mode of addressing law is justified epistemologically. Hence I see positionality as amounting to more than simply holding a particular view of law, for example, that law is sexist, patriarchal, or gendered, and demonstrating how and why this is so. It must also present such offerings in a self-conscious manner, as if holding 'a mirror to itself' (Robertson 2002: 785). This means that a certain degree of reflexivity becomes a necessary condition of positionality; for it is through reflexivity that an awareness and assessment of the power relationships present in the encounter of feminist jurisprudence with law, and consequently, of the political nature of this encounter, can be achieved.

Neither is my use of the trope of positionality exhausted in the choice of what is included in that which I term 'feminist jurisprudence'. I also employ it as a criterion for distinguishing its different strands. Traditionally, such distinctions were made by

²¹ See the discussions by Drakopoulou (2000a) and Grabham *et al.* (2009).

assigning feminist analyses of law to formal divisions between wider theoretical frameworks, or through reference to the substance of their argument. In the first instance, in a manner similar to the separation of nineteenth century mainstream jurisprudence into ‘schools of thought’, branches of feminist jurisprudence are identified as, for example, Marxist, liberal, radical or, most recently, postmodern (Jaggar 1983). In the second, following similarities in their method and argument of inquiry, works are gathered under a label referencing a core constitutive element that lends it the name, such as: ‘the master theory/dominance approach’, ‘the jurisprudence of care’ or ‘social harm’ (Cain 1990; Smart 1991; Munro 2007).

I myself follow neither the ‘way of Schools’ nor groupings according to core elements. The former, in setting theoretical similarities or differences as the primary criterion for ordering, I believe, contributes to the invention of traditions, since in an effort to fit arguments into pre-existing, well-established frameworks, unique specificities can be easily ignored, exaggerated, or lost. Similarly, the latter, by focusing on core shared features, almost inevitably causes other valuable details to be overlooked. In fact, I identify two distinct tropes of positionality, each with its own logic animating the way it addresses law. The first is that which identifies itself as ‘feminist jurisprudence’ and, utilising truth as the organising concept in its approach, positions itself towards law as if law were ‘an order of truth’. The second is of my own construction in that it neither entails a uniform approach to law nor would identify with the description of its engagement with law as a form of feminist jurisprudence. Here I have included different approaches that have all chosen to explore and position themselves towards law as a productive order. Distancing itself from notions of truth, this trope sees law more as involving some sort of performance. Permeated by a logic that prioritises notions of ‘creativity’, it engages with law’s imaginings, whether found in law’s practice, language or thought, and, positioning itself towards law as an ‘imagic’ order, understands law as a *techné*.

III. The anatomy of feminist jurisprudence

a) Feminist jurisprudence and law as the logic of truth

Black Feminists speak as women because we are women.

Lorde (1984: 60)

I want a law that will let us be women.

Ashe (1989: 383)

From the outset this strain of feminist jurisprudence, often identified with radical and Marxist feminist theory of the 1980s, turned its attention first and foremost to the delimitation of its own *locus standi* and, in so doing, gave a definitive account of the identity of the ‘knower’ and a clear answer to the question of ‘who speaks’ whilst also reflecting upon its own positionality, its mode of engagement with law. This place was one defined by collectivity and thus one from which a clear ‘we’ could be articulated: a

‘we’ that possessed a shared, unambiguous perspective as to what law is and how ‘we’ should engage with it. It was also considered a profoundly political place, since it offered a standpoint from which the recognition of friend and foe was never in doubt.²²

Indeed, in no other feminist legal texts is the identity of the ‘enemy’ so transparent and that of ‘friend’, acknowledged with such clarity. True, direct references to the friend/enemy dichotomy *per se* are not explicit in these writings, with terms, such as sister, sisterhood, or simply ‘women’, being those employed. Yet these terms are closely akin to the notion of friend, denoting an all-inclusiveness based on sympathy and affinity; an acknowledgement of a commonality of being and purpose, along with a group belonging, which, by definition, was constituted through the exclusion of others. A place was thus defined from which the voice of feminism spoke to and of law as if finding itself planted in a foreign and hostile ‘country’, rather than sharing a free, neutral territory where detached statements about women, the law and men could readily be made. As such this feminist standpoint of enunciation was one of partiality and ‘self-interest’, with the voice of those speaking it caring nothing for the promotion and defence of the interests of all people, but only for their own, the concerns of women as a specific group (Scales 1980: 375; MacKinnon 1983: 638, 1989: 83).

In choosing as its first jurisprudential act to reveal itself in an act of speaking, feminist jurisprudence also asserts itself as a direct converser of law, one communicating the uniqueness of the voice that speaks, the body that bears it, and the story this voice narrates. Acknowledging its organic relation with feminism it embarks upon an audacious jurisprudential inquiry into law’s prudence, setting at its heart the task of “seeing, describing and analysing the ‘harms’ of patriarchal law and legal systems...” (Wishik 1985: 66).²³ More specifically, in accounting for its positionality, feminist jurisprudence openly admits that its voice, akin to that of feminism more generally, takes shape, form and strength from all those reciprocal voices of women conversing through ‘practices of consciousness-raising’; the sharing of their distinct, everyday, mundane, and extraordinary experiences. Here, amidst the acts of speaking and hearing, and through reflecting upon what initially seemed a conversation between friends seeking to make real sense of their lives, private utterances are transformed into political ones and a political ‘common language’, one capable of articulating the collective reality and truth of women’s lives, emerges (MacKinnon 1982: 535-7, 1983: 639, 1991: 14; Cain 1990: 193-9; hooks 1991: 8).

It is through speaking this ‘common language’ emanating from ‘the Woman’s body’ and vocalising ‘the Woman’s story’ that feminist jurisprudence addresses and challenges law.²⁴ It offers a language replete with materiality and thought. For neither

²² It is remarkable how, even if the presence of the Schmittean distinction friend/enemy does not occur in feminist writings *per se*, they may be seen as grounded upon Schmitt’s understanding of the political (see Schmitt 2007: 66-7). Although the understanding of ‘the political’ and politics of radical feminism explicitly derives primarily from Marx and Althusser, its rhetoric is close to a Schmittean understanding. See the discussion of these terms in MacKinnon (1989: 157-9). For a discussion of the concept of the political generally and specifically in Schmitt, see Marchart (2007: 35-55).

²³ On the close relationship between feminist theory and feminist jurisprudence epistemologically and otherwise, see Wishik (1985: 64-7) and Robson (1990).

²⁴ Perhaps the best example of this is provided by MacKinnon (1987) where she presents her views on life and law in a series of speeches.

the knowledge claims it makes about law nor the rules it sets for its engagement with law can be severed from women's telling of their experiences of the discrimination, disempowerment or oppression suffered at the hands of law on account of their sex. Moreover, it is a language from within whose utterances a new way of knowing and thinking the law unfolds, one in which the epistemological primacy of speaking and hearing replaces the traditional emphasis on a clear division between the knower and known.

In valorising the identity of the speaker rather than the language and text of law (those well-established *loci* of mainstream jurisprudence), feminist jurisprudence not only claims possession of its own distinct way of knowing the law, but also posits the language and mind of law as the primary objects of its critical scrutiny.²⁵ Here a corporeal and situated voice and knowledge is juxtaposed to law's disembodied and defaced language and knowledge. Through its reliance upon knowledge thought and lived, knowledge rooted in the everyday life experiences of women, the language of feminist jurisprudence claims a vitality and plural materiality even though boasting a singularity of standpoint, 'the Woman's point of view'.²⁶ In sharp contrast, the language of law, nurtured by the tradition of legal texts and wise men, lacks the vigorous immediacy and temporality of speech. Scripted as a language of the intellect, a language of books and thought, its prudence is exposed in the immanent rationality and coherence of its own tradition; in the antiquity of its doctrines and principles, the sophistication of its modes of reasoning and interpretation, the scientific clarity of the categories and terms it uses, and through the logicity of its practices. If *logos* links law's life and mind - connecting law as speech and practice to law as thought and text - it is the sexed body that links feminist jurisprudence's voice to its thought. And so, before any arguments are made, this ineluctable juxtaposition has already shaped the nature and force of the challenge feminist jurisprudence posits to law.

The qualities of abstraction, objectivity and neutrality that are inexorably linked to modernity's law and its justice are those that comprise the first line of attack. Such qualities, feminist jurisprudence claims, are but hollow aspirations of the legal language and empty promises of the modes of reasoning upon which it rests; for there is no un-gendered reality and hence no un-situated legal standpoint. Law's persistent negations of its association with specificity or partiality, together with its assertions of the universal validity of the justice of its judgements, are not only deeply gendered, but, of course, their gender is profoundly masculine. Confronted by the 'common language' born out of the practice of consciousness-raising and articulated in the mode of 'thinking as a woman', these qualities are exposed for what they are; constituents of law's power and authority, and of a power and authority which participates in the construction and presentation of reality, and hence of women's reality, from the dominant, the male, point of view (MacKinnon 1982: 543, 1983: 636-8; West 1988: 65; Finley 1989: 886; Scales 1992: 25-6). Law's language, concepts, principles, and method

²⁵ This concern with the question of what law is and its approach from the standpoint of the speaker is evident in a number of key papers of the time. See, for example, Finley (1988, 1989), Scales (1986), and, of course, MacKinnon (1983).

²⁶ The voice has been associated more with the body, immediacy, etc.: see Arendt (1998: 181-8), Barthes (1985), and Cavarero (2005). See also MacKinnon (1987), the spirit of the introduction and, in particular, pp 1 and 16-17.

of reasoning and adjudicating are therefore together, but one manifestation, one idiom, through which the relationships of power and domination existing between men and women are established and communicated. And so, in representing the male gaze as universal and objective - in short, as a standpoint 'of view-lessness'- law not only denies sexual inequality to be constitutive of social reality, but, perhaps most importantly, is able to present force as consent, authority as participation, hierarchy as paradigmatic order, and control as legitimacy, and thereby shield itself from critique (MacKinnon 1983: 636-9; Scales 1986: 1385; West 1988: 60; Finley 1989: 892-5).²⁷

What began as a juxtaposition of the vocal and corporeal with the law's language and mind thus becomes a root and branch attack on law's claims to truth. For in unmasking what hitherto had been received as the natural and undisputable disposition of liberal law as a patriarchal fallacy, namely its commitment to equality, fairness and justice for all, feminist jurisprudence confronts law as an order of truth. Yet what makes this confrontation possible is not a persuasion grounded upon direct references to the social or legal reality of women. It is feminist jurisprudence's sophisticated epistemology; an epistemology that has passed into the literature as 'standpoint epistemology', though which is perhaps more accurately encapsulated by Cavarero's (2005: 14) expression 'the vocal phenomenology of uniqueness'.²⁸ It is this phenomenology that authorised feminist jurisprudence to posit itself as an interlocutor of equal status with law, enabled it to avoid simply chastising law for the ills it causes women to suffer, and allowed it to challenge law's hitherto unquestioned privileged and singular truth by positing its own, alternative one.

b) Feminist jurisprudence and law as *techné*

....I think it would be a good think for women to create a social order in which they can make use of their subjectivity with its symbols, images, its dreams and realities....

Irigaray (1993: 91)

Technocratic legal knowledge disqualifies the lifeworld knowledge students bring with them to the law school....

Thornton (1998: 382)

²⁷ In fact, Mackinnon (1983: 638) calls this reason of male dominance 'metaphysically near perfect'.

²⁸ For Cavarero, narration that takes place in 'consciousness-raising groups' allows the self to be constitutively exposed to the other, something she identifies as a political exposure. What is central in such narrations is not the question of 'What a Woman is', which can only lead to abstract and universal definitions, but rather 'Who speaks', which valorises plurality and relationality. Cavarero, following Arendt, argues that understanding the notions of person/subject in the abstract through subsuming them in the already philosophically established linguistic categories, is not the only way. Instead, she valorises an understanding of the person as a unique, particular existent that can only be revealed through the narration of that person's life story. It is in this context that voice becomes a significant element of personalisation as she seeks to understand narration from the perspective of the voice she conceives of as always embodied, rather than the language. For further discussion, see the excellent introductions by Kottman in Cavarero (2000, 2005).

The individual approaches discussed in this section, although not together comprising a coherent body of thought, do share a common attitude in their stance in respect to law; one which conforms to the criteria I set at the outset, those of positionality and reflexivity. It is this commonality which justifies my discussion of these approaches under a single unifying theme, a distinct trope of 'feminist jurisprudence'. Distancing itself from an understanding of law as an order of truth, this feminist jurisprudence refuses to articulate wide theoretical knowledge propositions concerning the nature of law, its power and claims, and instead posits law as the object of its inquiry. Its first distinguishing characteristic is therefore of a Cartesian disposition; the sharp distinction between inquirer and the object of her inquiry, with the feminist scholar as subject of the jurisprudential inquiry, and law as its object. Feminist jurisprudence of this trope does not enter into dialogue with law, caring not for 'who speaks' or 'from where'. Resting, as it does, upon the theoretical priority of the subject, it sets aside epistemological questions concerning the validity of voice, embodiment and personal narration, and instead privileges the thinking and observing qualities of the subject as the grounds upon which her ability to investigate established bodies of knowledge rests.

What attracts these feminist scholars' attention, what fuels their interest in law and gives rise to their relationship with it as one of inquiring subject and object of inquiry, is an understanding of law as a generative order; an order that produces understandings of empirical women. The presentation or, to be more accurate, re-presentation of women in law does precisely this; bringing into being and communicating a certain knowledge about them. And whether the *locus* of such knowledge is identified with the operation of legal discourse, with law's performativity, or with the effects of law's symbolic function, what is invariably at stake, what the feminist scholar contends with, are the projections of womanhood sustained by the legal language and text. Because the presentation of women in law is always a form of re-presentation, and therefore always involves a semblance of womanhood, the knowledge thereby produced can be no more than accomplishments of law's creative imaginings as to what women are.²⁹ It is this acknowledgement of law's imagic power, which, in endowing law with imagination and creativity, makes it possible to think of feminist jurisprudence, even if unwittingly, as positioning itself towards law as *techné*.³⁰

The idea of law as *techné*, as 'craft' or 'art', is in no way new, and is certainly not alien to feminist legal scholarship.³¹ The long history of jurisprudence is replete with references to the art of legislation or that of judgment. The realist movement in the United States, for example, adopted this notion of law as one of the key features

²⁹ There are sporadic references to this kind of creativity of law. See, for example, Schultz (1992: 322-4) and Deutscher (2000: 72-3).

³⁰ The word *techné* is a transliteration of a Greek term originally meaning skill and the correct method of producing a thing, and etymologically linked to the verb *tekto*, which means to bring to life, to produce, create, to cause something to happen.

³¹ In ancient Greece the notion of *techné* was closely linked to that of wisdom, at least up until Plato (Angier 2010: 5). In Hellenistic philosophy, especially the Stoics, *techné* was associated with philosophy and the art of living (Sellars 2003: 68-75). For a discussion of *techné* in ancient Greek literature, see Angier (2010: 1-12). For a discussion of law as 'craft', see Scharffs (2001). For a feminist discussion of the 'art and craft of writing judgments', see Rackley (2010: 44-56).

distinguishing it from legal positivism; with *techné* here being interpreted in the sense of ‘craft’ (Llewellyn 1960: 213-35). Constitutive of the definition of *techné* is an association with a particular type of achievement; a particular *telos* to be realised. In fact the essence of a *techné* lies precisely in the uniqueness of this *telos* in that only a specific set of expertise can enable it to be reached. A singularity of goal therefore distinguishes one *techné* from another; with each requiring its own *technéte*, the individual who possesses the skills necessary for achieving the goal. So the success of each depends on the *technéte*’s clear and systematic acquisition of the requisite knowledge, together with its accurate application. Aristotle (1994: 1140.9-10) defined *techné* as “...the trained ability of making something under the guidance of rational thought”, whilst Llewellyn (1960: 221) described it as “...the existence of some significant body of working knowhow...in some material degree transmissible and transmitted to the incomer”. Thus a fundamental property of *techné* is its being founded upon the stock of knowledge the *technéte* possesses, controls, and is able to effectively impart. That which belongs both to *techné* and law therefore is not merely the element of creativity: the fact that just as *techné* is closely linked to the notion of the artifice and the human power of creation, so too is law. The relationship of a *technéte* with her *techné*, is also akin to that of the jurist with law, being similarly marked by the rational understanding of a specific body of knowledge capable of transmission coupled with the mastery and control over the articulation and application of this knowledge. Both these elements, the recognition of law’s creativity as a knowledge producing order and the scholar as possessor of the necessary expertise to engage with law, mark the approach to law taken by this feminist jurisprudence.

The feminist urge to interrogate law’s creativity stems primarily from the identification of this creativity with law’s re-presentational power, and the association of this in turn with law’s normative domain. In short, it is the persuasion that law, in re-presenting women through its norms, also advances knowledge about them. Yet the representational function of the legal norm is not only a significant formative parameter in regards to knowledge about women, it also channels the female self to come to know her identity in terms of sameness and difference, and self and other. As such the normative knowledge about women law entails is of crucial importance for the self-apprehension of women as autonomous subjects instead of as the ‘other’ of man. The task the legal scholar sets herself however is not merely, nor even primarily, that of assaying degrees of resemblance between law’s re-presentation of women and that which it represents; in short, the re-presentation’s verisimilitude. Hence, the concern with the legal norm feminist jurisprudence exhibits does not manifest a wish to promulgate a politics of legal change aimed at instituting norms defining female identity and subjectivity in a more faithful way. Inherent in the idea of the legal norm is a sense of ‘normalisation’ conferring a quality of objectivity upon communicated norms and, in so doing, fixing the definitive contours of female identity. Replacing one set of legal norms with another simply substitutes one kind of fixity for another, whilst such local pressures leave the imagic power of law fully intact. It is precisely this power that this strand of feminist jurisprudence seeks to confront (Irigaray 1987: 72, 1987a: 1).

Broadly speaking two jurisprudential modalities can be identified here. The first offers an analysis of the significant political effects law’s power has, in particular with reference to female subjectivity. More specifically, law’s imaginings about women as

manifested in the legal norm are seen as something akin to the symptoms of a 'disease', the legal system's continuing commitment to a singular universal and male subject only. Law's persistent refusal to acknowledge the significance of sexual difference and thus the exclusion of the feminine from its body, language and mind, cannot be remedied by a programme of normative reform. However innovative this change may be it cannot 'cure' the absence of women as distinct subjects from law's imaginings simply by transforming it into a presence. This can only occur through a comprehensive project of 'symbolic change' (Irigaray 1994).

Yet such a change can never be rooted in a narrative of women's experience, in the 'true stories of women's lives'.³² It can only be accommodated by the displacement of gender, with sexual difference taking its place. And whether this displacement is associated with changes in law's performative function, such as those proposed by Cornell's 'ethical feminism', or with conceptions of the institution of law as part of the symbolic order - to thereby offer changes targeting law's imagic power - in both instances, feminist jurisprudence purports to open up a space for the respect and protection of women as sexed beings (Cornell 1993a: 140-6; Irigaray 1993). So against the conventional imaginings of law are juxtaposed feminist imaginings; imaginings which envisage a distinctively female identity grounded upon the notion of sexual difference. These are imaginings most usually presented as formulations of a woman's right to be represented as a sexuate being. Thus equal rights are replaced with equivalent rights, whilst other rights acknowledging sexual difference as irreducible, such as the right to virginity, motherhood and guardianship of the home, are demanded (Irigaray 1993, 1994; Cornell 1992: 235-7, 1998).³³

Although my discussion of this jurisprudential modality primarily refers to the work of Irigaray and Cornell, theirs are by no means the only examples. Yet, their work has been of fundamental significance to the development of this area. It has influenced many legal scholars who, like they, have offered their own feminist re-imaginings of the female subject before the law and have posited sexual difference as not only a structural element of the legal system, but also as the one, single indispensable condition for the recognition of Woman as a fully human subject, as a subject in Her own right.³⁴

The second jurisprudential modality, 'discourse analysis', is of a more pragmatic nature.³⁵ It concentrates its efforts on understanding the workings of law, its practices, techniques and technologies, and seeks to delineate the manner in which legal norms authorise gendered representations of womanhood. Here law becomes a terrain of clearly formulated statements and practices that both systematically create the objects of which they speak and constitute the subject positions from which these statements are made. Moreover, these are not objects that are empirically apprehended. They are seen as inventions by law that can be classified, constructed and identified according to

³² The significance of a women's narrative for addressing women's exclusion from law has been forcefully supported in the work of Robin West (1988). See also Cornell's critique of West (1993).

³³ For discussion of the parallels drawn between the work of Irigaray and Cornell, see Schwab (1996), Deutscher (2000) and Grosz (2008).

³⁴ See for example Porter (2000) and the papers in Heberle and Pryor (2008). See also the collection of papers published by the Milan Women's Bookstore Collective (1990), especially pp 60-80.

³⁵ For a comprehensive discussion of discourse analysis, see Goodrich (1987).

specific discursive statements and practices. In a similar fashion, the discursive subject positions under scrutiny do not reference natural persons, for example, real women, but describe representations of womanhood that are effected by the enunciations and practices constitutive of the discursive field.

The primary concern of discourse analysis is to illuminate the rules and processes by which law utilises specific rationalities, establishes its ‘truths’ and constitutes subject positions in the interiority of law. In so doing, it seeks to reveal how these rules and processes produce ‘outsiders’, whether these are forms of reasoning denounced as alien to its mind, ‘truths’ deemed alien to its language, or subjects silenced or otherwise made invisible before law’s eyes. This particular jurisprudential modality thus locates the exercise of law’s ‘creative’ power in the function and effects of the impersonal rules operating in the formation and regulation of the discourse. It offers an analysis that produces an anatomy of law’s prudence, which allows the feminist scholar as an expert of law possessing the unique traits required to read, interpret and understand legal practices, to confidently assert law’s representation of female subjectivity as neither natural nor transparent, but as merely one of law’s imaginings. What this jurisprudential modality targets therefore is law’s ability to proclaim what constitutes true or false knowledge about women; in other words, the very production of legal knowledge (Smart 1991; Chunn and Lacombe 2000: 7-12; Lacey 2002: 123-8; Gottel 2007; Fineman 2011; Mullally 2011).

IV. Conclusion or the prudence of law and the prudence of feminism.

...the refusal to accept the closed terrains of conventional thought is an anti-conservative step which hopefully, in the right contexts, can open the domain of law to potentially unthinkable possibilities.

Davies (1996:17)

In re-introducing the long-forgotten question of feminist jurisprudence in the manner I have I am aware that I am opening myself to criticism. Not only has feminist legal scholarship disowned and disavowed previous feminist engagements with jurisprudence, but the taxonomy I offer here might be seen as rather arbitrary. Indeed, neither of the feminist strands I identify as approaching law as *techné* would likely acknowledge themselves as jurisprudential modes. Indeed, this may be the case. Yet I would nevertheless maintain that casting the net of jurisprudence more widely across legal scholarship allows us to recapture and reassess the question of feminist jurisprudence. This is not to suggest that I employ the concept merely to finesse this ‘trick’. For the term ‘jurisprudence’ is more than merely a descriptive one. It also bears normative gravity; a gravity which has both shaped the fortunes of jurisprudence within feminist legal scholarship and fuelled my own desire to re-visit the topic as a potentially valuable, if not essential, activity for us to pursue.

The very label ‘jurisprudence’, as utilised formally in that work that does unequivocally identify itself as feminist jurisprudence, which MacKinnon’s writings most famously epitomise, has received a particularly ‘bad press’ within feminism. Critics have roundly attacked and comprehensively dismissed feminist jurisprudence primarily on two

grounds.³⁶ The first is that it adopts an essentialist understanding of womanhood, and the second, which is of greatest interest in the context of this paper, is that it mimics the conventional form of jurisprudence existing in our times, that of positivism. Any desire to engage with law's jurisprudential traditions is portrayed as inevitably succumbing to the temptation to reproduce the very jurisprudence it challenges (Smart 1989: 66-9). In aspiring to advance a general theory of law, feminist jurisprudence was castigated for mirroring the positivist mainstream by valorising an understanding of law as a coherent and rational body of knowledge resting upon *a priori* principles and as a distinct field of practice operating at some distance from society (Smart 1989: 66-9). Furthermore, critics warning against a feminist jurisprudence argue that those who embark on this venture, even if perhaps unintentionally, necessarily attribute undue significance to law; indeed, even fetishise it.

What seems to be at the heart of such critiques is the entirely distinct, largely alternative, conception of law, held by the critic. Thus, although jurists and critics alike both speak of law, this, their common object of thought, is not thought of in the same terms. For those who repudiate a jurisprudential approach, law does not comprise a uniform and monolithic body of knowledge bearing a singular ideology, be it male, patriarchal, or sexist. They argue that to confront law in this way obfuscates law's 'natural condition', which often is to behave in an incoherent, fragmented and at times contradictory manner, and that this effectively tears it away from its 'natural environment', that is, its social context (Smart 1989: 163-5; Roach-Anleu 1992: 432-4).³⁷ Thus in opposition to the pursuit of what it describes as a 'false quest', which thinks of law only in its own terms, thereby transforming the feminist intervention into an exclusively legal debate, these critics pose an analysis connecting law to the social structure; often supporting their position with empirical investigation; what we can term a 'law and society' approach (Smart 1989: 67).³⁸

It is to this dissonance that I wish to draw attention because its very presence caused me to think anew about feminist jurisprudence and the unwavering reproach that it has attracted. More specifically, it was the critics' reference to its unintended alliance to mainstream jurisprudence that led me to consider the debate in terms of the traditions represented by the interlocutors' arguments rather than the correctness or the persuasion of the substance of these arguments. Both the legal scholars and their critics belong to and speak from traditions of thought that conceive of law in their own distinctive ways and therefore each asks a different set of questions. Yet, although in their exchanges each speaks from a different position, the question of tradition does not enter the debate.

In unequivocally distinguishing itself from the jurisprudential approach to law, the 'law and society' approach overlooks its own alliance to the nineteenth century rise of positivism. Putting its trust in an epistemology grounded in principles derived from rational thinking and empirically verifiable data, positivism introduced a novel way of

³⁶ See, for example, the critiques of MacKinnon in Smart (1989: 76-82) and Cornell (1993: 96-111).

³⁷ This is not to suggest that Smart subscribes to this approach. I simply want to point out that her critical arguments directed at feminist jurisprudence can be seen as part of this approach.

³⁸ For further discussion of the value of empirical work in feminist encounters with law, see Currie (1992: 82-6).

understanding law. In asserting the empirical as the locus of truth, it elevated reality as a key measure of this truth such that the validity and utility of social institutions, including law, could only be thought of and evaluated in their social context and in relation to the functions they performed. Here, law, though still posited as distinct from society, was recognised as existing in a constant dynamic interaction with it; the result being that this association of law with the positivistic canon served to privilege women's empirical reality as the yardstick by which to judge the law and lead the feminist politics of legal reform to become the dominant form of feminist engagement with law it remains to this day.³⁹

In critically juxtaposing the presence of law as a distinct body of knowledge and practice to law in its social context, the critics of feminist jurisprudence too easily dismissed what now has passed into our history as a short-lived feminist experiment. Most importantly, they thwarted a concerted feminist engagement with the long standing tradition committed to the study of law's prudence.⁴⁰ What their criticism failed to pay attention to was that law in the western tradition is, and has long been, both a distinct practice *and* a body of knowledge; in fact a distinct tradition in itself. It is in this tradition, understood in terms of the particular styles, models, patterns and theories, that have shaped and sustained it, that law's power to oppress, privilege, exclude or include, inheres. And therefore, it is only through close examination of this tradition that the power of law to image the world can be laid bare.⁴¹

Clearly, a critical interrogation of law's prudence does not necessarily have to lead to a reconciliation with or reproduction of that prudence. It certainly does not mean an uncritical, blind acceptance of the limits law puts on its subject matter. Rather, it can be seen as an invitation to transgress these limits by setting against the prudence of law, that of the feminist jurist. Indeed, whether addressing law's prudence face to face, as the first trope does, or positing law as the object of its thought, as does the second trope, feminist jurisprudence in all its guises has already accepted this invitation. Thus the first trope, by privileging the question of 'who speaks', allies its critique and politics of law to an embodied ontology based on the method of consciousness-raising and, through this material relationship, challenges the prudence of law, revealing it to be nothing more than a male metaphysics. Similarly, of the two jurisprudential modalities under the second trope, one reveals law's philosophical and juridical traditions to be structured by the exclusion of the feminine, whilst the other exposes law's practices and techniques to function as technologies of gender.⁴²

³⁹ For a discussion of the rise of different schools of positivism in the nineteenth century, see Giddens (1979: 237-59). For an analysis of the relation of positivism to a feminist politics of legal reform, see Drakopoulou (2008: 344-7).

⁴⁰ This is not to suggest that feminist jurisprudence, in whatever guise, has no concern for the social. I simply want to emphasise that the social is not constitutive of their analysis of law.

⁴¹ For an exposition of different ways in which feminist legal scholarship can engage with the legal tradition, see the papers in the collection by Drakopoulou (2013a).

⁴² In relation to the first trope, see for example the analysis of law in Irigaray (1987, 1994). For a classic discussion of the notions of technology and technology of gender, see Foucault (1988) and de Lauretis (1987). See also the analysis of law as a gendering practice in Sheldon (1993) and Smart (1995).

Whatever the substantive and specific merits of each of these feminist encounters with jurisprudence, my contention is that they all have come into being as responses to specific theoretical and practical questions facing feminist legal scholarship. All have been formulated through critical reflection on law's continuing resistance to any change in its conduct towards women despite feminism's persistent analysis of its norms and suggestions for their reform. In short, they all distinguish themselves from the 'women and law' approach aimed at inserting or repositioning women within a space already delimited by law.⁴³ Similarly, in a self-reflexive manner, in their meeting with law's prudence they all acknowledge the traditions they ally themselves to. And whether they see it located in the words of law, in the entirety of its body, or in law's practices and techniques, they all, when setting off on their explorations of law's imagic power, dream of the birth of novel feminist jurisprudential traditions founding a different law and justice for living together (MacKinnon 1983: 640, 1987: 1-17, 215-28; Smart 1990, 1995; Irigaray 1996: 52-3; Cornell 1998: 174-86, 1999).

In reframing the question of 'women and law' as one of the law's imagic power and 'our living together', as a question lying at the intersection of the juridical and the political, these jurisprudential approaches may be better conceived of as meditations on theoretical and practical concerns with law rather than expositions of feminist legal theory.⁴⁴ It is this double nexus of the theoretical and practical marking this body of work, which justifies their recognition as articulations of a feminist prudence and confers upon them the label of 'jurisprudence'.⁴⁵

What I hope to have achieved with this paper is to bring to light what was latent in feminist legal scholarship and ask for it to be openly acknowledged. Feminist jurisprudence has undoubtedly initiated the most audacious projects we have attempted hitherto. In reflecting upon its aspirations rather than its faults, we feminist legal scholars should stop shying away from it and indeed dare to rehabilitate it. It is my contention that it is only when we boldly assert our commitment to such a project that we will be able to address the power that inhabits the prudence of law. And even if in challenging this we admit it to be nothing more than that of an invented tradition, our working both 'with' and against this tradition will enable us to think afresh about our positionality towards law, the questions we ask of law, and, in so doing, to invent and institute our own, alternative, feminist traditions.⁴⁶

⁴³ This approach, which posits the empirical woman and her experience as the yardstick against which feminist demands and critiques of law are to be measured, is intimately linked to the 'law and society' tradition and therefore was also made possible by the nineteenth-century epistemological prevalence of positivism. For a discussion of the rise of this approach in the nineteenth century, see Drakopoulou (2008).

⁴⁴ The etymology of the word theory, from the Greek *theoria*, designates a contemplative enterprise and as such is usually thought of in 'passive' terms, bereft of pragmatic concerns involving judgements about a course of action. Within feminist scholarship the term 'theory', though widely used, has rarely been the object of inquiry or debate. One exception is Bottomley (2000).

⁴⁵ Throughout its history the intellectual virtue of prudence has been associated with its Aristotelian definition as practical wisdom similar to the knowledge and skill required by *techné* in that they both utilise knowledge to determine and guide action (Aristotle 1994: 1140). For a discussion of the notion of prudence in the Renaissance, see Khan (1985: 19-54), and for one that associates prudence and legal interpretation, see Gadamer (2004: 306-19).

⁴⁶ For a discussion of the sort of questions we might wish to ask of law as feminist jurists, see Genovese (2013).

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