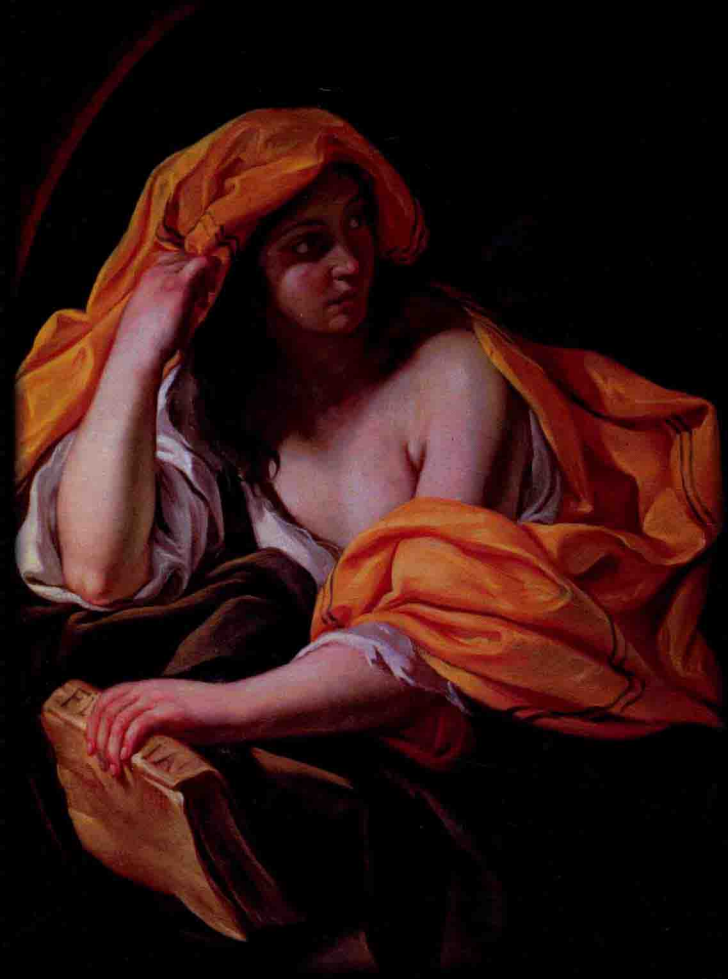

ROUTLEDGE

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FEMINIST ENCOUNTERS WITH LEGAL PHILOSOPHY

EDITED BY MARIA DRAKOPOULOU

Feminist Encounters with Legal Philosophy

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Feminist Encounters with Legal Philosophy

Presenting feminist readings of texts from the legal philosophical and jurisprudential canon, the papers collected here offer an interdisciplinary and critical challenge to established modes of reading law. Feminist approaches to law usually take the form of either critical engagements with legal doctrine, legal concepts and ideas, or critical assessments of the effects that specific areas of law have upon the lives of women. This collection, however, although rooted in feminist legal scholarship, takes the established canon of legal texts as the object of inquiry. Taking as their common starting point the fact that legal texts are plural and open to multiple readings, all the contributions in this collection offer subversive, but supplementary, interpretations of the legal canon. In this respect, however, they do not merely sustain an array of feminist styles and theories of reading; revealing and reappropriating the plural space of legal interpretation, they seek to open a hitherto unexplored arena for a feminist politics of law.

Feminist Encounters with Legal Philosophy is a thoroughly researched interdisciplinary collection that will interest students and scholars of Law, Philosophy and Feminism.

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Chapter 1

Introduction

Reading law reading women

Maria Drakopoulou

Interpretation, whether of cultural products, specific 'works' or of what Dilthey terms 'life expressions', by which he means all sorts of expressions of mental and practical life, has been among the most significant and productive forms of feminist critical practice in the Academy. Through the interpretation of established 'texts' of Western intellectual traditions feminist scholarship has been able to elucidate their deeper meanings, expose their patriarchal and phallocentric nature, and come to understand Woman's oblique, absent or negated relationship with the symbolic order as an excluded subject of the very language She Herself speaks. This scholarship forged an acute awareness of the pretensions to truth articulated by theoretical knowledge and, in abrogating its conceit of universalism and objectivity, revealed this knowledge to be grounded upon an erasure of sexual difference and a casting out of the feminine and the experience of women. Developing their own techniques of decipherment, feminist interpretative readings made powerful strategic interventions challenging reigning traditions and, through building solid bodies of critique within and across disciplines, allowed an intellectual participation that created possibilities for a new feminist politics that promised to transform knowledge and culture.

This political alliance of critique and interpretation did not leave feminist legal scholarship untouched; for hermeneutics as the practice of interpretation of sacred and legal texts had always lain at the heart of the study of law. Yet despite this legacy the interpretative acts of feminist legal scholars differed from those practised in other disciplines. While in philosophy, literature, history and politics, the decoding of foundational texts, an onslaught against the established canons and their dissection and reformulation became key objectives of feminist interpretative inquiry, in law this was not the case. Remaining faithful to the lessons of legal education, feminist legal scholarship read the law in accord with the learned hierarchy of the primary sources of what is defined as law. Treatises, statutes, case law, doctrines, principles and legal norms, all were interrogated so that the male, patriarchal or phallocentric conditions of their production could be unveiled, their complicity in acts of exclusion, oppression or discrimination identified, and their alignment with the law's power to affect women's lives acknowledged. The political gravity and significance of the hermeneutical enterprise in law has therefore lain not with an engagement with textual traditions of

legal philosophy and theory, but with the institutionally authorised loci that contemporary law, 'law in action', has inhabited.

The contributions in this collection go some way to redressing this state of affairs. Each engages with a part of law's textual heritage by targeting a specific author or text, one of canonical status in law's philosophical tradition, so that collectively considered they offer readings whose purpose is to reinscribe the feminine, sexual difference or womanhood, rather than reconstruct the canon. They reread these authors, not simply to contest and disrupt the knowledge their writings communicate, but to develop an intimate understanding of the philosophical tradition in law and so be ready and able, where possible, to appropriate the authority of its wisdom.

Given that these writings offer a range of approaches to the legal canon, for the sake of convenience they are presented in the chronological order of the authors they engage with. The collection therefore begins 'at the beginning' with Hanafin's 'A Voice Beyond the Law', which interrogates the metaphysics of Western subjectivity inaugurated by Plato. Reading Plato with Cavarero and Arendt, Hanafin posits two traditions side by side, each owning a distinct conceptual and experiential register. The one, the philosophical, obliterates sexual difference from its discourse with a universal subject it thinks of as non-relational, constant and irrevocably male. The other, the socio-symbolic practice of sexual difference, speaks of particularity, of a unique, relational and embodied subjectivity. Rejecting the Platonic construction of the subject as a response to the question 'What' (answerable only in abstract terms) in favour of the question of 'Who' (demanding reference to an irreducible concreteness and relationality) Cavarero, Hanafin argues, offers the possibility of transcending the masculine Platonic legacy and its inscription in political and legal thought. Yet this logic of identity does not expose just the failure of philosophy's contemplative subject to consider the 'Who', it does likewise for its mirror image, the universal humanist subject, and hence for the disembodied subject of abstract rights in law.

Cavarero rewriting the subject as 'blood and flesh unique existent' disrupts the male symbolic order of law because it cannot be contained within it, and instead demands its own space, what she calls the 'absolute local', a space wherein sexual difference thinking can be made practice. Hanafin suggests that in the context of law this practice entails the possibility of creating a female symbolic order, and posits Cigarini's example of Italian feminist lawyer/client praxis wherein novel ways of relating were found which, though articulated in the context of law, were at the same time set outside law by a refusal to speak in the words given to women by law.

In contrast to Hanafin's contribution, Denike's 'The Sex of Right Reason' focuses on a specific author and work, namely Thomas Aquinas' *Summa Theologica*. Like Hanafin, however, she is concerned with legacy, in this case the link between the *Summa*'s legal philosophy and contemporary discourses of human rights and humanitarian intervention. Focusing on Aquinas' anthropology and ideas of law, Denike argues that a teleological understanding of sexual

difference is constitutive of the *Summa*'s epistemology and ontology. By establishing a framework that allows an understanding of reason and rationality in dichotomous, opposingly defined terms it offers an ontology premised upon a binary categorisation of the qualities of the two sexes. Here, not only are Woman's rational capacities seen as inferior to Man's, but Her consequent intellectually inferior nature is seen to comprise a less perfect image of God, and Her lack of reason is 'compensated' for by Her identification with flesh, the body and carnal sin. This hierarchically arranged sexual economy in turn defines the relationship of the two sexes to law. Positing natural law as the human share in divine Reason, the *Summa* explains why Man, not Woman, has the authority to reign, determine questions of law, and legislate and enforce it. Denike warns us to be mindful of this self-same natural law operating today in international law discourses that speak of a common humanity and universal subject endowed with inalienable rights, but seemingly impervious to sexual difference.

Goodrich's 'The Accidental Feminist' offers a recovery of a significant, yet essentially lost, dimension of the genealogy of common law, that of its feminine origins. Essential to this reclamation is the title figure of Selden's text, Janus, the god of beginnings and transitions, gates and passages, and associated in Alciato's book of emblems with the philosopher Pythagoras, who engaged with philosophy as a way of life and with great prudence of judgment. Janus, Goodrich suggests, may have been chosen by Selden to signify a new beginning, a new interpretation of the common law, one wherein its 'backface' was both feminine and politically radical. In so positing a feminine *nomos* at the origin of common law Selden opens its prehistory to the mythologies of female and maternal Goddesses who legislated according to nocturnal laws, the 'Laws of the Second Venus', they whose traditions and oral legacies were preserved by the Druids, the first historical figures to appear in Selden's text. Yet, not only does the custodial role of the Druids point to common law's feminine origin, but in being deemed followers of Pythagoras they lived law as a way of life, a life wherein the plurality of sources and traditions of law meet and which, as Goodrich asserts, communicates a principle of *anima legis*, a custody of souls, distinctly Pythagorean and 'much wider than the masculine'. It is perhaps in this principle of *anima legis* whereby law becomes guardian of its subject's spiritual welfare, preserved in its Christianised form as law as 'nursing parent', that the feminine form of law persists. Yet for Goodrich the greatest value of *Jani Anglorum* lies not in Selden's 'accidental feminism', but in his method of history writing. Unlike official histories replete with linear and repetitive accounts of the past, Selden, perhaps more by chance than intention, opens up possibilities for a different kind of history, the sort Goodrich's reading intimates, a history that moves at the margins of texts, attending to the peripheral, the excluded and the repressed, and creating conditions of possibility for a radical challenge to common law's insular and imperial history.

The following chapters, those by Richardson and Drakopoulou, offer interpretative readings of important seventeenth-century political thinkers, of Hobbes and Pufendorf respectively. Both are born out of a dialogue with an existing

feminist body of work in the area, and both seek to evaluate the significance of these authors' received 'wisdom' for contemporary feminist politics of law. In 'Hobbes, Unhealthy Desires and Freedom' Richardson explores relationships of subordination and the production of consent, issues particularly pertinent to feminism and law. She does so through analysis of Hobbes' anthropology and theory of social action, according to which the individual is caused to act by desire and not through reason. However, not all actions produced by free will without external imposition are equally valued, for, as Richardson points out, Hobbes is critical of those that result from 'unhealthy desires', the individual performing such acts being seen as suffering 'emotional perturbations' akin to a form of 'physical disability'. This view of epistemological individualism sets Richardson's analysis apart from other feminist accounts of Hobbes and simultaneously supports her argument that his radical individualism provides the grounds for a resistance to and critique of women's relationships of subordination. She argues that if women's involvement in such relationships is understood from a Hobbesian perspective they can be resisted as 'unhealthy desires', as passions arising from inappropriate social interactions in a gendered society. At the same time Hobbes' material understanding of equality can be used to critique any attempt to 'naturalise' women's involvement in relations of subordination.

The objective of Drakopoulou's chapter 'Samuel Pufendorf, Feminism and the Question of "Women and Law"' is to critically reflect upon the feminist politics of law. Her starting point is that a common hermeneutical structure forms and informs both the feminist canonical readings of seventeenth-century civil philosophies and feminist 'readings' of the relationship between women and law. Offering an interpretation of the civil philosophy of Pufendorf that departs significantly from this hermeneutical structure shared between politics and law, Drakopoulou suggests that an alternative way of apprehending the relationship between women and law may be possible, and asks whether the presence of this common framework has served to foreclose other ways of thinking about this dyad.

Chaplin's contribution, 'Blackstone, Bentham and the Romance of Law', offers a Derridean and Irigarayan analysis of the problematic relationship between textuality and the feminine at a specific historical moment and specific 'location' (eighteenth-century literary and juridical discourses), which she accomplishes through a close reading of Reeve's *The Progress of Romance*, Blackstone's *Commentaries* and Bentham's *A Fragment on Government*. At the heart of her argument lies the historical tension between 'truth' and 'text' manifested as a particular ideal of literary and legal 'verisimilitude'. Represented in literature by realist fiction and in law by legal positivism, this verisimilitude is continuously disrupted by an explicitly gendered feminine form of writing, the undisciplined genre of romance. Chaplin argues that erasure of the feminine from the system of Western representation, that which Irigaray links to philosophy's forgetting the material maternal origin of the subject, denies the feminine a 'place' in the economy of 'Truth' that an *a priori* principle of Reason sustains.

Hence can the feminine only 'be' within this economy as a reminder or remainder of what Irigaray would call an 'originary matricide', or as Derrida's 'indecidable term', and which, although it cannot be accounted for, remains essential to the economy it escapes and disrupts. This Irigarayan conceptualisation of the feminine, together with Derrida's notion of theorisation of textuality, forms Chaplin's framework for exploring notions of 'text', 'truth' and 'woman' within her chosen texts. Romance fiction, as a feminine textual excess, is that which must be banished from the 'masculine' space of literary production of truth, as Chaplin's reading of Reeves demonstrates. Yet it is also fiction that consolidates the logocentric ideal of truth, since only its 'removal' reveals the truth the text mediates. Similarly, in her reading of the *Commentaries*, Chaplin finds English law's attempt to establish an origin by reference to national juridical tradition to be rooted in a collection of disparate and motley texts representing a feminine textuality while evoking a 'reflective imagination', a fiction, as a supplement to the reason of law.

Stone's 'Hegel on Law, Women and Contract' is also an intervention in current feminist debates, in particular those concerned with rethinking the nature/culture relationship. Although her interpretation of Hegel acknowledges the extensive feminist critique of his views about women, in particular his consigning them to the institution of family, she cautions that such views should not be looked at in isolation. She argues that since they form an integral part of Hegel's overarching philosophical system, once his association of women with the family is understood in the context of his organicist views, a different understanding arises. Hegel apprehends the social order as a living system, self-determining and freely organising itself into a concrete set of social institutions each with its own inbuilt purpose. Accordingly, each subsystem or institution, in fulfilling its function as part of the organic whole, requires its own dedicated functionaries, with women's bodily and psychological nature admirably preparing them as the guardians of the family's proper function.

Although accepting that these views about women are deeply conservative, Stone argues that they can actually help challenge the traditional valorisation of culture over nature, premised as it is upon an understanding of nature and biology as fixed and unchanging. Hegel's 'natural' allocation of women to the cultural institution of the family is predicated upon an understanding of culture and spirit as manifestations of a dynamic and self-organising nature. Relating Hegel's refusal to see nature and culture as oppositional to Grosz's work on sexual difference and nature, Stone proposes that his ideas, re-contextualised within feminism, can help us think afresh about the significance of natural and biological forces in cultural and social life.

Minkkinen's chapter 'Resonance: Why Feminists Do/Ought Not Read Kelsen' directly addresses the issue at the heart of this collection: feminism's engagement with established theoretical legal traditions. He asks how feminist legal theory can overcome tradition and attempts to answer this question through a reading of Kelsen's pure theory of law that explores the very notion of a tradition of legal

theory – how it presents itself and how it 'obliges', becomes prescriptive and thus normative. Minkkinen identifies a twin structure in Kelsen's edifice, one part descriptive, designating the proper objects of research, legal norms, the other prescriptive, the logic that validates his epistemology. Legal norms belong to the domain of normative 'ought' and the discipline of law is normative in that its study is not allowed to confuse the factual world with that of norms, offering instead propositions describing the manner by which one material fact (e.g. an act) is normatively linked to another (e.g. a sanction). Yet, while this normative structure is clearly descriptive, that which accounts for the logic of this description is prescriptive.

Kelsen's pure theory of law tells the legal scholar how law ought to be studied and offers a normative logic to follow, but it leaves no room for theoretical and critical discourse about the theory's own ideas and uniqueness. For this reason, Minkkinen maintains, it should be refused recognition as a theoretical tradition, and a different type of engagement with the legal text undertaken, one which partakes of a legal tradition, not by following its prescriptions, but by allowing the other to speak. This encounter is by no means uncritical, for, as Minkkinen, following Gadamer, asserts, the legal theorist always faces the other bearing her own prejudices, so that this encounter invariably takes the form of a question. It is through the resonance of this question that the feminist legal theorist first addresses tradition via her own prejudices and thereby allows tradition to question her and her prejudices. For Minkkinen this means that the principle task of theory, whether feminist or otherwise, is to safeguard and nurture this resonance.

Fletcher's 'Legal Form, Commodities and Reproduction: Reading Pashukanis' offers a critical reading of Pashukanis that focuses on his account of the relationship between commodity form, legal form and legal subjectivity in the context of the bourgeois commodity-producing society. Her reading is a methodological intervention into recent feminist discussions on law, gender and social reproduction, namely those concerning care labour and the consumption of this labour. Fletcher argues that applying Pashukanis' legal form analysis in these areas enables us to transcend a dichotomous way of thinking about them and better understand how commodification and law (commodity form and legal form) are linked, how law contributes to the generation of value and also how gender operates in this process. She shows us that commodification occurs in both instances even though such relationships are generally thought of as non-commodified, with reproduction and care labour seen more as a gift and consumers more as commodity users rather than as producers. Fletcher shows this commodification process to be closely linked to the recognition of particular subjectivities. In the case of reproductive exchange, a subject is constituted who, although not possessing goods in need of exchange, possesses a consciousness of control over care. In the case of reproductive consumption the subject not only impacts upon the creation of commodities, but is a key player in the market through securing exchange of goods and services for money. Not only does acknowledgment of

these subjectivities invoke their legal regulation, thus creating legal forms that in turn breathe life into new types of legal subjectivity, but this process may itself produce more law to regulate conflicts between these new legal subjects. Legal form analysis, Fletcher concludes, offers the possibility of analyses of social reproduction and its consumption that is free of assumptions about their gendered content.

Chryssostalis offers a reading of Arendt reading Schmidt that focuses on the notion of *nomos*, which, despite profound political and personal differences, figures prominently in the important works of both. Her exploration of *nomos* is, however, not merely an exegetical exercise. It recounts important reasons why feminist scholarship, particularly that in law, should hold close to Arendt's thinking on *nomos*. Chryssostalis' reading of Schmidt and Arendt references law, politics and community, and, through an etymology that identifies *nomos* with distribution, division or pasture, designates the spatial dimension of law. For Schmidt the concept becomes synonymous with land taking, such that law begins with an original act of land appropriation that not only determines all other subsequent legal relations on the soil, but establishes the process by which law and the legal order are instituted. In contrast, for Arendt the self-same etymology denotes a border-setting act constituting the *polis* as a political community, a space where people sharing action and speech come together, rather than a physical territory. For her, illimitable action is constitutive of political community, not law, with a wall-like *nomos* providing 'an enclosing boundary' within which this action is secured. Derived from the legislator's technique *nomos* thus bears the stability and permanence necessary for the continued existence of the *polis*, yet simultaneously reveals a conservative face in that it must often negate new beginnings and the transformative potential of political action itself. Chryssostalis asserts feminism must attend to this aspect of Arendtian *nomos*, for in order to think and build 'novel architectures of political and juridical spatiality' it cannot neglect the boundary nature of law and its function as a limit to political action and change.

In 'Ambiguities: Law, Morality and Legal Subjectivity in H. L. A. Hart's *The Concept of Law*' Cunliffe offers a reading of perhaps the most widely read jurisprudential treatise of the common law tradition. Hers though is not simply a feminist critique of Hart's legal positivism. She also wonders whether feminism can profit from it and suggests what lessons it can offer. Focusing upon Hart's description of a legal system as a union of primary and secondary rules imposing obligations upon officials and subjects alike, she distinguishes between being 'obliged' to follow law and having an obligation to do so, building her inquiry around the distinction Hart draws between law and morality. The thrust of her critique addresses his conception of the legal subject, which emerges as a single unitary and universal being who can exercise control and choice as to whether s/he complies, transgresses or even resists the law. Such a conception of subjectivity Cunliffe asserts, in valorising rationality, autonomy, self-interest, responsibility

and choice, ignores context and difference and inevitably models itself upon the naturalised, masculine, liberal, legal subject so familiar to feminism. Yet, even though Hart's analysis tends to negate women's experience and make systemic discrimination invisible, Cunliffe argues that his insights into the normative power of law can help feminism understand law's power to influence moral sensibility, and that his distinction between law and morality can aid in demystifying law's moral claims about women, minimise the power of moral discourse on law, and thereby make possible a space for an argument for change.