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Where We are Now and What's Still Wrong

I. Introduction

According to the Oxford legal philosopher Leslie Green, gender has nothing to do with general theory of law. To wit:

gender is of no relevance to general jurisprudence for, as far as anyone has shown, there is nothing about 'the very forms of law' that warrants calling them 'gendered', and no answer to leading problems in general jurisprudence depends on any thesis about gender.¹

It would seem that jurisprudence only concerns the conditions by which human beings are regulated, without a gender, without a sex. I have found the opposite to be true. Law has been an institution controlled by men, and with them in mind, with their very Personhood placed at the centre of it. This has been explicitly the case well into the twentieth century, all done with a straight face and apparently good intentions. As Joanne Conaghan has observed:

Close scrutiny suggests that the extent of gender's involvement in legal terrain goes well beyond the bricks and mortar to encompass significant aspects of legal architectural design. In particular, many of the conceptual and categorical structures of law have been revealed to have gender dimensions or implications: the distinction between public and private, the paradigmatic model of the legal subject, and tortious conceptualizations of harm, to name but a few.²

This book has focused on what Conaghan calls 'the paradigmatic model of the legal subject'. It has closely scrutinised his making and his nurturing, and found him to be consistently male.

My inquiry arose from a concern about the quality of legal scholarship and the quality of law. Legal scholarship (like other scholarship) is meant to be independent, based on a steady and fearless inquiry into the actual nature of its subject

¹ Leslie Green, 'Gender and the Analytical Jurisprudential Mind' 83 (2020) *MLR* 893, 911. See also Joanne Conaghan's powerful reply to Green in Joanne Conaghan, 'Gender and the Analytical Jurisprudential Mind: A Response to Leslie Green' (*The Modern Law Review Forum*, 20 August 2020), available at www.modernlawreview.co.uk/conaghan-green.

² Joanne Conaghan, *Law and Gender* (Oxford, Oxford University Press, 2013) 245–46.

(law), based on robust evidence about law and alert to its biases and how they might interfere with these requirements of good scholarship. Law itself is meant to be principled, fair, neutral, rational, committed to the equality of all and in service to society: in it, not above it; for it, not against it. What I found in writing this book is judicial and parliamentary reasoning and prominent legal scholarship about the nature of law which is still not of this kind. It is not robust, because it is not attentive to its orientation and its biases. And I have found law which is still not neutral and principled because it is not scrutinised for its fairness and neutrality, but is instead taken to be fair.

II. Controlling the Point of View and so Controlling the Story

Law's Persons, law's rights-bearing subjects, those with the best set of rights, have been made by powerful men who have been powerful because of the law that they have made. They have made the Legal Person in their own image, as they understood themselves to be. There is ample evidence that men of legal authority believed themselves powerful because of their innate superiority, not because of laws which worked in their interests, laws which they themselves forged. This circular and flawed reasoning calls for inspection.

Much of the male legal thinking I have considered leans on the idea that there is a prelegal being suitable for Personhood, and that being is a man, who is thought of as naturally and already superior (to women) before he enters the realm of law. The orthodox view is that these legal men first stood outside law, with all their superior qualities already formed, and then law was matched to these superior abilities. Mill was alert to the deficiencies of this thinking when he said that we do not know what women would be like in a world without patriarchy. Similarly with men. We do not know what men would be like in a world without patriarchy, a world in which they did not have built-in advantages, including the power to define and explain these basic existential matters of law.

Some of the most recognised jurists, right up to the twentieth century, actively opposed the personifying rights of women and promoted those of their own sex, which makes us doubt their objectivity and commitment to fundamental legal principles. This powerful bias calls into question the quality of all their scholarship, especially if we are to continue to turn to them for the exposition of general legal principle. However, the problem of legal patriarchy and its implications for law *in toto* is greater than this. It is bigger than the problem of individual jurists who maintained their reputation despite their active legal stance against women. It goes to law itself and to the way it has been populated, examined and understood, conceptualised and explained.

Much of the male control of women, and the promotion of men, through law, has been achieved by legal definition: by what goes inside and outside of basic legal

concepts such as the Legal Person and the explanation and justification of these concepts. It has been achieved by the official interpretation of legal terms. Men of legal authority have controlled the definition and explanation, the very story or narrative, of the Legal Person, in a manner that has hugely strengthened male interests, while often saying that they were doing the very opposite: that rights-stripping was in the interests of women.³

This inquiry has found that leading men of law controlled the stories of law, the definitions and the explanations, and deployed them to advance male interests and suppress those of women. Men of legal authority, at the highest levels, did this over centuries. They selected the boldest means possible to advance male interests and to erase or suppress the interests of women: they said who was and was not a Person and enforced it through law. Simply put, they employed their powers of control of legal definition and explanation of the concept of the Legal Person to erase women from important parts of law, especially those parts which entailed the exercise of public power, and so they preserved their own power and interests. They also tightly controlled the sex and reproductive lives of women, but not of men. And then they made very little of these unpleasant facts.

What I have discovered in the writing of this book is almost a female dystopia. As I pursued my inquiries, things just kept looking worse and worse for women and better and better for men, because of male legal decision-making and power, right up to the present day. Each time I pursued an avenue of investigation, I found that what leading legal men were doing to women, as opposed to what they said they were doing to women, was offensive and full of cant. I kept uncovering the highly deliberate actions of men of legal authority to block women from the polity and from the economy, from education and from law, and to curtail and control their sexual and reproductive freedom, using basic legal concepts.

This strenuous legal subjugation of women has inevitably shaped law: its orientation, its focus, its priorities, its very sense of a Person. I have not tried to solve or settle these matters of skewed and faulty reasoning because, simply put, this hard problem of law, its man problem, needs a good deal of thought and attention. We don't have the answers yet because the problem rarely features on the agenda of contemporary analytical jurisprudence. In the next chapter, however, I will suggest some lines of inquiry.

III. Wilful Blindness and the Cognitive (Limiting) Effects of Being with Like Minded and Like People (All Men)

As the philosopher-psychiatrist Iain McGilchrist observed, 'we see, at least consciously, only what we are attending to in a focussed way', such that our

³ William Blackstone did this; so did James Fitzjames Stephen; and so did the judges in nearly all of the Persons Cases.

attention 'is guided by our expectations of what it is we are going to see'.⁴ In other words, we experience what we know already and we do not experience what we do not expect to experience, so that changing how and what we see is difficult.

Our incapacity to see the most apparently obvious features of the world around us, if they do not fit the template we are already working with ... is so entrenched that it is hard to know how we can ever come to experience anything truly new.⁵

Or as the psychologist-philosopher William James similarly observed some time before, any change in thinking only ever represents a tiny graft on one's existing body of thought and knowledge.⁶ The impression gained that there is broad (and rational) agreement between users of legal language has been the result of the suppression of different and less powerful points of view, especially those of women. It has been a function of patrilineal obligation to male predecessors and an unwillingness of the more powerful members of the dominant legal community to step outside of their own narrow, but influential, community of meaning, and to question their own way of seeing the world.

At the heart of law and its analysis has been a sustained neglect of its anti-woman history, a wilful blindness, an acting as if this were not true. Women have been, in many ways, shut down by law and by its leading representatives and expounders and explainers. And then the fact of women's active exclusion from the legal power institutions has also been shut down, and then law has been declared to be a fully fleshed out and fair system, with fully-informed and wise authorities. When adjudicating on the membership of the population of Legal Persons, there has been little to no reflection on the fact that men have consistently been the preferred Persons and that men of legal authority have justified the sustained legal subjugation of women, from a position of self-interest, advantage and immense power. This is a compromised speaking position.

It is highly likely that the men of law saw and found what they wanted and expected to find, which was the superiority of their own sex and the inferiority of the other. After all male legal authorities were exclusively in charge of legal definition and explanation and what they were defining and explaining was their own powers and Personhood, to which they were completely accustomed and in which they had powerful vested interests. These are fertile conditions for confirmation bias.⁷ As Raymond Nickerson explained: 'Confirmation bias, as the term is

⁴ Ian McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (New Haven, Yale University Press, 2009) 163.

⁵ *ibid.*

⁶ See William James, *The Principles of Psychology* (New York, Henry Holt and Company, 1890), ch 11 of which is on the nature of attention.

⁷ For an account of Peter Wason's development of the idea of what has come to be known as confirmation bias, see Jonathan Evans and Philip Johnson-Laird, 'Editorial Obituary: Peter Wason (1924–2003)' (2003) 9 *Thinking and Reasoning* 177. Here Wason is described as 'one of the founders of the modern study of thinking and reasoning': at 178. See also PC Wason, 'On the Failure to Eliminate Hypotheses in a Conceptual Task' (1960) 12 *Quarterly Journal of Experimental Psychology* 129. Wason published pathbreaking work on this topic.

typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.⁸ This is what I have found consistently in law and its analysis.

Confirmation bias, group thinking and socially-patterned, rather than scientifically-derived, understandings are now well known impediments to good thinking.⁹ As Dan Kahan and associates have established, in their psychological investigations into what they term 'cultural cognition', there is a powerful 'disposition to form perceptions of fact congenial to one's values'.¹⁰ There is an 'unconscious influence of individuals' group commitments' on perception.¹¹ People tend to perceive in the same way that others in their social cohort tend to perceive. Kahan's experiments have shown that cultural values and interests affect perception and reasoning, though the perceiver may remain ignorant of this fact and convinced of their utter neutrality and perceptual accuracy. Kahan has called this 'cognitive illiberalism'.¹² Despite a genuine sense of their impartiality, and despite even a genuine endeavour to be impartial, tested observers have been shown to make their assessment of what they are seeing 'along cultural lines'.¹³ This is what I have found to be so in law.

There is a considerable body of evidence on how social affiliations and sympathies affect thought and the capacity to reason impartially. What may appear to the thinker, the reasoner, as objective, independent and rational decision-making turns out to be influenced by the thoughts of others one likes, trusts and associates with. In other words, reasoning is not independent and individual but social, so what one's friends and associates take to be true, and I would also say acceptable, one also takes to be true, and acceptable.¹⁴ Reasoning and fact finding therefore take a short cut, drawing on the thinking of trusted others. Men of legal power have operated in an 'echo chamber', with other men of their ilk, causing what is now labelled 'group think', to use the modern vernacular. They have been talking to themselves about themselves, without seeing themselves because they have been the only sex with power, to address and consider and answer to. There has been no comparator with sufficient power to subject them to official critical analysis.

⁸ Raymond Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175, 175.

⁹ There is a considerable literature on this phenomenon. As the Britannica entry on 'confirmation bias' states, '[r]esearch has shown that confirmation bias is strong and widespread and that it occurs in several contexts': Bettina J Casad and JE Luebering, 'Confirmation Bias' (*Britannica Encyclopedia*, 17 December 2024), available at www.britannica.com/science/confirmation-bias.

¹⁰ Dan M Kahan et al, "'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction' (2012) 64 *Stanford Law Review* 851, 901.

¹¹ *ibid* 851.

¹² *ibid* 854.

¹³ *ibid* 860. This point is developed in Dan Kahn and Donald Braman, 'The Self-Defence Cognition of Self Defence' (2008) 45 *American Criminal Law Review* 1.

¹⁴ See Steven Sloman and Philip Fernbach, *The Knowledge Illusion: Why we Never Think Alone* (New York, Riverhead Books, 2017), cited in Elizabeth Kolbert, 'Why Facts Don't Change our Minds' (*The New Yorker*, online, 19 February 2017), available at www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds.

Therefore, there is ever more reason for legal scholars to contemplate and to raise concerns about the intellectual implications of the all-male and socially-homogeneous constitution of their discipline for their understandings of law. We must examine law's 'implicit ways'.¹⁵ As Susanne Langer put it, such ways

are not avowed ... but simply followed ... They are what a German would call his 'Weltanschauung', his attitude of mind, rather than specific articles of faith. They constitute his outlook; they are deeper than facts he may note or propositions he may moot.¹⁶

As Thomas Kuhn observed about the development of knowledge in science: 'When the individual scientist can take a paradigm for granted, he need no longer, in his major works, attempt to build his field anew, starting from first principles and justifying the use of each concept introduced.'¹⁷ One could say this has happened in law, especially with its concept of the Legal Person.

There are few signs that the men of law imagined women as interlocutors or addressees: as those who needed to be engaged with and persuaded; as those whose interests needed to be also represented and satisfied; whose feelings needed to be considered. There are fewer signs that the incumbents of power reflected on the moral implications and effects of their incumbency. Could the men of law imagine women as the powerful ones, the status quo reversed? Actually, Dicey did, and when he did the numbers, he recoiled in horror. Or rather, he issued strong warnings about the threat that women posed to the well-running of the state. And so he opposed the legal empowerment of women.

If we pay attention to attention, how much attention is given to something, how much it is thought something needs to be attended to, and what is not attended to, then we can learn much. The male control of law and the effects of that control have been poorly attended to. This book has considered speaker and audience, that is, who has been imaginatively in the room of listeners and interlocutors and how this has affected both what is said and the nature of attention. It has considered how legal techniques and terms have been deployed and manipulated. It has considered the style and brevity of judgments and the tone adopted. It has considered the uses of time, with judgments whipping back centuries and then back to the present. And also the suspension of time, with principles floating outside of time and place.¹⁸

Having expected a rupture, a discontinuity, in the history of the common law, as women were Personified; having anticipated reflection on fundamental legal change, as the legal population effectively doubled; and having anticipated curiosity about the significance of this doubling of the population by the inclusion of

¹⁵ Susanne K Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art*, 3rd edn (Cambridge, Harvard University Press, 1971) 4.

¹⁶ *ibid.*

¹⁷ Thomas S Kuhn, *The Structure of Scientific Revolutions*, 1st edn (Chicago, University of Chicago Press, 1962) 19–20.

¹⁸ For some intriguing work on the relationship between law and time, see Emily Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (Toronto, University of Toronto Press, 2016).

women, for law generally, what I have found instead are continuities. As Sachs and Hoff Wilson once said: 'The judgment of Lord Mansfield's court outlawing the holding of slaves on English soil is famous; the many judgments rejecting women's claims to equality of treatment are not even known. Posterity too has its biases.'¹⁹

Lines of male legal authority have remained intact, reaching into the deep past and those ancient authorities can be called up at any time. They are rarely questioned. The reputations of legal and also religious men long past, if anything, have strengthened over time, even though their understandings of law and of human nature were derived not only from different times and places and peoples, but from different cosmologies, and even though each one of them avowed the natural superiority of the male and the natural inferiority of the female. Women have no legal lines of authority to draw upon, no authoritative forbears speaking for them to whom they can turn, because women were precluded from such authoritative roles, until recently. This author enjoys the new benefits.

Male partisanship in law, through the deployment of its basic concepts, described thus far, has been clear, pronounced, unprincipled and actively sustained, over centuries. It raises fundamental questions about the impartiality and the integrity of law and legal theory and especially about the formulation and the application of the principles of equality, legality and even the rule of law. These are all matters which should concern theorists of law. And yet the uses of law to secure male interests and to suppress those of women, all well documented (for the relevant cases, treatises and legislation are all on the record), are still treated as mundane and of little intellectual interest to those who theorise law and its conditions. They are set outside the order of business of mainstream legal theory.

The Persons Cases, which actively empowered men as Legal Persons and disempowered women (saying they were non-Persons), are of remarkably little jurisprudential concern, even though legal theorists are keenly interested in the nature of their legal subject: the legal actor, the bearer of rights and duties. Why didn't the so-called final Persons Case lead to a re-evaluation of law? Why hasn't the anti-woman thinking of some of law's most senior officials and theorists raised serious concerns about what has been going on in law's heartland and at the highest levels? Is it a matter of not seeing or not wanting to see or choosing not to deal with it? That is, not wanting to face the facts?

As Alfred North Whitehead once said, it is the claims and convictions and judgements which don't even come to mind as in need of defending which are often the most in need of inspection and most intractable to assessment.²⁰ It is vital to consider what is put into the realm of judgement, reasons, challenge and argument and what is the unconsidered setting of that judgement. In a monocultural world of male legal officials and legal thinkers, much has been placed outside the

¹⁹ Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Oxford, Martin Robertson, 1978) 50.

²⁰ See Alfred North Whitehead, *Science and the Modern World* (Cambridge, Cambridge University Press, 1925) ch 3.

realm of open inspection, reason, assessment and challenge, because what was said by legal men about themselves and about women was thought to be incontrovertibly so. Male dominance and control have been just the normal state of law and its order; they have appeared right and natural and given sense to judgement; as Wittgenstein might call it 'a seeing as' or as 'seeing an aspect'.²¹ And this limited seeing remains a problem and impairs legal thinking.

IV. Male Legal Power as Banal

Male power and its uses in law are still treated as normal, just part of the warp and woof of legal life. Men populating virtually all the positions of power in law, positions made exclusive to men by law and also the very active efforts of legal men to keep it that way, has hardly turned a hair. Albert Venn Dicey brought law's maleness to the fore. But his positive endorsement of that male domination was too much for his later analysts to cope with. And so they largely ignored Dicey's accurate observation that law was dominated and controlled by men. The maleness of law is perhaps its most defining feature, but it is not considered an interesting jurisprudential topic, in its own right, though it should be.

Male legal power has been so endemic, so implicitly accepted, that when there has actually been active plotting against women, by men of legal authority, the plotters have been treated not as male supremacists but as undiplomatic men who can be a little trying. That is doing patriarchy, but in ways that are too obvious. And the neglect of this male monopoly, the failures to object to the efforts of prominent men to sustain specific laws which controlled, excluded and demeaned women, means that the messages are still there, not in all their detail, but in the inheritance and atmosphere of law.

The fact that men of legal power have always addressed a male audience (other men of legal power) about the exercise of their own power, as Legal Persons, helps to explain an insensitivity to the effects of the perquisites of power on the quality of judgement. The Legal Person has been theorised and understood from an entirely male point of view, that of elite men of law. When point of view is tightly controlled by an elite, as it has been in law, much is not put into the zone of inspection and challenge. Incompatible ideas can be suppressed: ideas that would challenge the dominant view can be silenced or rendered unreliable, because they have no official vehicle for expression. The dominant or even exclusive cast of an argument or claim, the framing of a problem in a certain manner, becomes simply how things are. It becomes the natural reality, taking much as given, instead of a particular way of seeing, which is that of the powerful.

²¹ See Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edn (translated by GEM Anscombe) (New York, MacMillan Publishing, 1958) 205, 213. See also David B Seligman, 'Wittgenstein on Seeing Aspects and Experiencing Meanings' (1976) 37 *Philosophy and Phenomenological Research* 205.

And so there has been a tendency to naturalise the background patriarchal assumptions, the great sea of meaning in which the jurist swims, with his tribe or shoal of fellow believers. It is perhaps experienced as objective truth (the best, most reasoned and supportable understanding), because there have been so few effective voices of dissent, which have been allowed to count. Miranda Fricker has called this 'epistemic injustice': the silencing of the dissenting views of the less powerful group, by rendering them incredible and unreliable.²² Even though women vigorously protested their reduced legal state,²³ and even though the stripping of female rights was brutal and thorough,²⁴ women's views and interests have, perversely, been treated as naturally congruent with the lives of men.

There has been a silent understanding that the personification of men and the unpersoning of women do not need dealing with as real legal historical facts, and of some recency in their operation. It is taken as given that law can be theorised and understood as if these brutal facts are irrelevant: as if everyone had always come into the world in the same manner and was sent down the one law-enabling channel. This assumption is implicit every time a work of legal theory invokes a Legal Person without reference to their sex, or possible sex. The idea of an Individual as basic legal unit casts out of discussion the sustained maleness of law's subjects.

V. Male Power and Faulty Historical Reasoning

As a consequence, some very odd reasoning has been permitted, even endorsed and repeated. There has been a reliance on almost magical thinking, which is still not questioned seriously, as a package of ideas, in contemporary jurisprudence. These male-affirming stories of law have been sketchy, stretching over unreal time. Especially in the case law on the Legal Person, they have drawn on Roman, medieval, and ancient common law. They have taken place in vague places, lacking a sense or air of reality. They have not been tied to particular times or places, to specific jurisdictions and specific (real) laws and people.²⁵

There has been unconventional periodisation, as an historian might think of it. In the contemporary search for legal wisdom, for the deep principles of law,

²² See Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford, Oxford University Press, 2007).

²³ See, eg, Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Oxford, Hart Publishing, 2018).

²⁴ See Jane Purvis, 'What was the Cat and Mouse Act? The Reason why Suffragettes were Force-Fed' (*History Extra*, online, 10 July 2024), available at www.historyextra.com/period/edwardian/cat-mouse-force-feeding-suffragettes-hunger-strike/; Ian Miller, *A History of Force Feeding: Hunger Strikes, Prisons and Medical Ethics, 1909–1974* (Basingstoke, Palgrave Macmillan, 2016).

²⁵ This point has been well made by Lindsay Farmer and Nicola Lacey. See Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford, Oxford University Press, 2016); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford, Oxford University Press, 2016).

lines are still cast freely into the past, to millennia ago, to foreign lands and vastly different societies. (This is especially true of the writing of John Finnis, whose work I considered in the previous chapter.) The times and places of the production of legal knowledge seem irrelevant. The lines of legal learning might go back to three centuries before the common era, or to medieval times, to the early modern period or to the late Victorian. The deep or middle past and the present have been treated in essentially the same manner, especially in their understandings of the natures of men and women. Men have been thought of as innately, and hence timelessly, superior; women, in equal measure, have been thought inferior, and so ill-suited to the exercise of public authority. From Aristotle, to Aquinas, from Hale to Blackstone and to the twentieth century theorists, it has been treated as perfectly natural that men should govern and control women (including their sexuality) and that men should occupy exclusively all positions of influence. Equally, it has been unthinkable that women should govern men (and their sexuality) or exercise control over the explanatory systems of public and legal power.

The sustained and vigorous drive to keep women out of legal and political life, while retaining a sense of law as a fair and open, just and principled, institution has produced some startling history, odd periodisation, and curious reasoning. It has helped to preserve the reputations of ancient legal historical figures whose prejudiced and superstitious thinking have carried over from the pre-modern to the modern and even to the present day. This is not the official story of law, which tends not to see patriarchy as a defining characteristic of the legal world. But this unsaid account of law is fully supported by the evidence. Vested interests have led to fundamental flaws in legal perception and legal thought, in the deep past and up to the present.

The history of law and its Person has been a history by and for men and it is also a history of men: of half the population. However it has not been presented as such. According to prevailing explanations of law, it is a whole history even though implicitly half the population has been deemed irrelevant. As Gerda Lerner once observed:

By making the term 'man' subsume 'woman' and arrogate to itself the representation of all humanity, men have built a conceptual error of vast proportion into all of their thought. By taking the half for the whole, they have not only missed the essence of whatever they are describing, but they have distorted it in such a way that they cannot see it correctly. ... The androcentric fallacy ... cannot be rectified by simply 'adding women'. What it demands for rectification is a radical restructuring of thought and analysis which once and for all accepts that humanity consists in equal parts of men and women and that the experiences, thoughts, and insights of both sexes must be represented in every generalization that is made about human beings.²⁶

This point is fundamental. The history of women's legal lives has been removed *ab initio*, as barely counting, because women were deemed not to be Persons, for so

²⁶ Gerda Lerner, *The Creation of Patriarchy* (New York, Oxford University Press, 1986) 220.

many legal purposes, and the subjects of law were Persons, for to be a legal subject was to be a Person. So the story of law has been a half story. It has therefore been defined by its limitations, its exclusions, what it has taken out from the start. The concept of the Person has done a good deal of this work of instating men as The Story and ejecting women. But all the way along, there have been women living lives. As unpersons or quasi-persons, women have been living lives shaped and defined by law, though lives often damaged by law. So the deleted story is not so savoury. But logically women's legal lives are equally the story – and, based on the numbers, at least half the story – but still this is not how it has been seen. There remains a remarkable inattention to the historical facts of both women's and men's legal lives. Or we could say that the facts themselves have simply not changed legal minds.²⁷

If one considers the first few decades of the twentieth century, when women were trying to get the franchise, and so participate in political power, and were still being firmly pushed back, a little may be said of these political struggles over the retention of male power, and then much will be said about other political struggles, such as those of the Irish to achieve home rule. Numerically the man versus woman problem is vastly greater. It is not seen in this way. The political and legal lives of women, which were frankly a train wreck, are not discussed, merely accepted.

The successful efforts of the most senior legal official, the Lord Chancellor, to keep women out of the Upper House of Parliament in 1922 (whose effects endured for 40 years) does not rate a mention. The efforts to keep Ireland within the United Kingdom, which were occurring at the same time, are of great interest. The fact that the same person was embroiled in both matters (that is helping to secure independence for the Irish while securing the continued exclusion of women from the Parliament), is not noticed. As Bruce Lincoln has remarked, 'the frequent repetition of the same authoritative story can help to maintain society in its regular and accustomed forms'.²⁸

VI. Lessons from Other Disciplines

Law is not alone in its patriarchalism. In fact an alarming want of objectivity about men and women has been detected across disciplines.²⁹ An illustration of embedded patriarchal thinking in the discipline of history is to be found in EP Thompson's *The Making of the English Working Class* whose very purpose was to show the agency of the English Working Class, who were said to be 'present' at their own making. That is, they were active thoughtful parties to it. Thompson's aim was

²⁷ And on why facts do not necessarily change minds, see Kolbert (n 14).

²⁸ Bruce Lincoln, *Discourse and the Construction of Society: Comparative Studies of Myth, Ritual, and Classification* (Oxford, Oxford University Press, 1989) 25.

²⁹ See, eg, Caroline Criado-Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (London, Chatto & Windus, 2019).

to demonstrate their active history, to bring them in. This is a dignifying book about a group of people ill served by historians, intended to elevate an ignored or denigrated group and demonstrate their active involvement in the 'making' of their 'class'.

As historian Sandra Stanley Holton explains: 'EP Thompson remains a powerful influence in British social history, with his *The Making of the English Working Class* long ago achieving canonical standing among radical historians.'³⁰ And yet Thompson's classic book has 'absences and silences'³¹ when it comes to women. Simply stated, 'EP Thompson entirely leaves out of his account women domestic servants, despite their ubiquity in the period under consideration.'³²

According to Thompson, '[n]ext to the agricultural workers the largest single group of working people during the whole period of the Industrial Revolution were the domestic servants.'³³ And these workers were mainly women. However, this large population of female workers is noted but not discussed; they are not part of the story of the making of the working class. Thompson by necessary implication removes female domestic servants from the working class, from his class of workers (because he does not see them as workers). Holton regards this as 'an example of gender blindness that may include women within a historical account without interrogating the meaning of their presence.'³⁴ Women are both present and absent.

VII. Women as Anomalies in New Theories of the Person

If the position, the location, the context, the human coordinates have consistently and stably been from the point of view of men, if the point of view of law has always been not only from the male point of view but also relative to men, in community with other men, then law takes the male sex as its reference point. Men's position, their place in the world, their composition, their coordinates, their very biology, will appear the logical and necessary points of reference. In theory of the Person, this has happened and it is still happening. Men are treated as the standard Individuals, the reliable and physically stable beings in space (who have stayed the same) and the continuous beings over time (who have stayed the same). Women by contrast are problematic Persons, who are thought to form poor subjects for orthodox legal analysis.

This way of thinking – this exceptionalising of women – is apparent in two books on Legal Personhood by Visa Kurki which seek to offer a new definitive

³⁰ Sandra Stanley Holton, 'Challenging Masculinism: Personal History and Microhistory in Feminist Studies of the Women's Suffrage Movement' (2011) 20 *Women's History Review* 829, 831.

³¹ *ibid.*

³² *ibid.*

³³ EP Thompson, *The Making of the English Working Class* (London, Victor Gollancz, 1963) 211.

³⁴ Holton (n 30) 831.

account of the concept.³⁵ Though striving to be comprehensive in his coverage, Kurki excises women from his account of orthodox thinking about the Legal Person. The non-paradigmatic nature of women as Persons is the very reason he finds for setting women aside, from the outset, rather than investigating the treatment of this half of the population as apparently anomalous and therefore interesting beings. Implicitly the more paradigmatic man is instated as the subject. I am highlighting the work of Kurki because it illustrates the continuing problem in legal theory of excising women from the general analysis of the Legal Person, logically leaving us with the analysis based on men, as the archetypal Persons. Conceptual analysis is therefore skewed.

Another concerning effect of this skewed analysis is the failure to consider the use of male legal power to define and constitute law's subject, law's Person, thereby strengthening the rights of men and weakening the rights of women. These basic historical facts are commonplace legal knowledge and yet mainly neglected. With the Persons Cases, women were declared inferior beings in law, consistently ousted from positions of public power and legal authority in favour of men. In Kurki's first book, *A Theory of Legal Personhood*, this disabling of women as Persons is mentioned, euphemistically. We are told: 'The legal status of women has historically varied quite a bit from jurisdiction to jurisdiction, which is why it will not be a focal case when I assess the problems of the Orthodox View.'³⁶ However foetuses are to feature in this book, along with rivers, artificial intelligence and animals and whether they do, and should, qualify as Persons. As I said elsewhere, in a commentary on this book:

Though women are ... cast out of the analysis, curiously, foetuses are allowed in as awkward legal entities to be sure, but nevertheless considered informative. Their location in the world (inside, or as part of, a woman), and the nature of their dependence for life (on a woman), is not mentioned. To spell out the problem ... once you start talking about foetuses, you are talking about women, whether you refer to them or not. And so, women come right back into the analysis, but without acknowledgement of their reincorporation. Logically they become the invisible housing of the foetus. Foetuses are then implicitly treated as free-standing entities, as if you might perhaps encounter one when walking down the street. This individualisation of the foetus happens throughout the book.³⁷

This reluctance to consider women's Personhood is evident again in Kurki's follow up Cambridge Elements book, *Legal Personhood*,³⁸ which is largely silent about the relative legal statuses of women and men. We are told, in the Introduction,

³⁵ Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford, Oxford University Press, 2019); Visa AJ Kurki, *Legal Personhood* (Cambridge, Cambridge University Press, 2023).

³⁶ Kurki, *A Theory of Legal Personhood* (n 35) 15. And see my discussion of this problem in Kurki's theory of the Person in Ngaire Naffine, 'Hidden Presuppositions and the Problem of Paradigm Persons: Visa AJ Kurki's "A Theory of Legal Personhood"' (2021) 44 *Revus* 127.

³⁷ Naffine (n 36) 131.

³⁸ Kurki, *Legal Personhood* (n 35).

after a brief reference to slaves, that '[w]omen have also historically been denied some aspects of legal personhood in many Western jurisdictions, even though the status of women has varied from jurisdiction to jurisdiction.'³⁹ This instability and inferiority of female Legal Personhood, vis a vis men (who are the necessary and implicit comparator), is no longer given as a reason to set aside women, as Kurki did in his previous book. There he indicated that women were too atypical in their Personhood to deal with. In fact, the mention of women's unstable and variable legal status on the first page of the later book could lead one to anticipate that the problematic Personhood of women would now call for active consideration in a work of this nature and that it would be given due attention. Kurki even refers briefly to the doctrine of coverture, acknowledging its contraction of the Personhood of women. But he does not refer to the equal and opposite effect: the profound enlargement of men's Legal Personality, given that it was into the Personhood of men that women were absorbed.

Women and their non-paradigmatic Personhood then quietly drop from view (as does the paradigmatic Personhood of men), but not so the possible 'personhood' of the foetus, which is called a 'classical' subject in the Law of Persons. We are told that 'the legal status of foetuses remains highly controversial, primarily because of its connection to the question of abortion rights'.⁴⁰ Having said this, the foetus is then treated as an analytically distinct and discrete legal entity, absent the woman whose foetus it is. The foetus is conceptually detached and separated from the woman; it is implicitly treated as a free-standing conceptual and physical entity, despite its necessary location within a woman, who is bringing it into being. The implications of the Personhood of the foetus for the Personhood of the woman are not examined, despite their intimate connection.

Later in this book, John Finnis is cited as a natural law thinker, expert in the law of Persons. Finnis is quoted, at length, expressing his objections to *Roe v Wade* for its denial of Personhood to foetuses, which Finnis calls 'unborn children'.⁴¹ Kurki does not align himself with this position, but equally he raises no objection to Finnis's consistent, long-term, and religiously-oriented personification of the foetus and his efforts to make his view of the foetus law.⁴² Kurki starts to employ the term 'unborn children' himself, when referring to foetuses,⁴³ which seems to import some of Finnis's way of thinking into Kurki's own work.

The overturning of *Roe v Wade*⁴⁴ is mentioned by Kurki, and so too is its stated effect: that is the removal of women's constitutional right to abortion, so that 'states now enjoy significantly more freedom in determining the legal status of foetuses

³⁹ *ibid* 1.

⁴⁰ *ibid*.

⁴¹ See, eg, John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy & Public Affairs* 117, 142; John Finnis, 'Public Reason, Abortion, and Cloning' (1998) 32 *Valparaiso University Law Review* 361, 377.

⁴² Kurki, *Legal Personhood* (n 35) 29.

⁴³ *ibid* 34.

⁴⁴ *Roe v Wade*, 410 US 113 (1973).

and embryos.⁴⁵ Again, from this, it might seem that women's non-paradigmatic, unstable and diminished Personhood, especially when pregnant, is ripe for discussion. Some analysis of the legal status of women would surely throw light on the concept of the Person, which forms the subject of this book. But nothing more is said about the effects of these new American laws on the Personhood of women, if pregnant, as these laws reconfigure the legal status of the foetus.⁴⁶ The necessary effect on female Personhood is never teased out, even though it cries out for analysis by a Personhood scholar who wishes to provide an authoritative account of the concept of the Legal Person and especially of its most troubling parts.

The legal personification of the foetus is actually occurring in the United States and it is criminalising the lives of women if pregnant. As a writer for *The Guardian*, Carter Sherman observes: 'In 2018, Alabama became the first state in the country to enshrine a fetal personhood clause into its state constitution, after voters backed a measure to recognize "the rights of the unborn child", including the right to life.'⁴⁷ More recently, the Alabama Supreme Court decided that Alabama's Wrongful Death of a Minor Act applied to frozen embryos.⁴⁸ According to the Alabama Chief Justice:

In summary, the theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself.⁴⁹

To Mary Zeigler, an American expert on the law of Persons and reproduction:

[T]he Alabama ruling provides a roadmap for where the anti-abortion movement is now headed. That destination is enshrining 'fetal personhood' as the law of the land, giving fetuses the same rights as all other persons under the 14th Amendment – an outcome that would have extraordinary consequences.⁵⁰

These consequences, which will especially be felt by women, are not explored by Kurki. Having referred to the conceptual possibilities of 'foetal personhood', but not to the potential and actual implications of such Personhood for the Legal Personhood of women, Kurki moves on to consider the legal status of children

⁴⁵ Kurki, *Legal Personhood* (n 35) 1–2.

⁴⁶ *ibid* 30.

⁴⁷ Carter Sherman, 'States Push "Fetal Personhood" Bills Despite Outrage at Alabama IVF Ruling' *The Guardian* (online, 20 March 2024), available at www.theguardian.com/society/2024/mar/20/states-fetal-personhood-bill. See also Mary Ziegler, 'The Endgame in the Battle Over Abortion: The Arc of the Fetal Personhood Movement Signals where Republicans may be Headed' (*Politico*, online, 24 March 2024), available at www.politico.com/news/magazine/2024/03/24/personhood-abortion-legal-fight-00147138; Mary Ziegler, 'Personhood: The New War over Reproduction' (Yale University Press, April 2025).

⁴⁸ The case is *LePage v Center for Reproductive Medicine*, So 3d, WL 656591 (16 February 2024) involving the death of frozen embryos.

⁴⁹ *ibid* 37–38.

⁵⁰ Ziegler, 'The Endgame in the Battle Over Abortion' (n 47).

and people with cognitive disabilities (a longstanding juxtaposition in the law of Persons, when dealing with those of reduced legal status). Then a good deal is said about the 'emerging categories of legal personhood [which] have upset traditional boundaries of legal personhood'.⁵¹

Kurki considers the potential and actual Legal Personhood of animals, nature and artificial intelligence which he sees as the interesting development in the Law of Persons, perhaps the cutting edge of theory. He refers to 'the traditional boundaries of personhood' and how, in the context of these new candidates for Personhood, these boundaries are shifting, but he leaves unconsidered the shifting Personhood boundaries of women (and correlatively the boundaries of men), first mentioned, and only mentioned, on the first page. While fetuses and their Personhood receive some attention, remarkably perhaps, the Legal Personhood of women, as women, and especially when pregnant, is missing from the analysis.

This writing and theorising removes from basic and applied theory of the Person a good deal of women's lives, while leaving in the lives of men, the unstated default subjects. This is not only a conceptual and analytical problem, but it also has a direct bearing on the fundamental human rights of women. Legal theory is not separate from legal life. Conceptual analysis matters. Definition and theory matter. Accounts of the post *Dobbs* experiences of American women seeking life-saving health care when pregnant, and relief from the courts, make for gruelling and frightening reading.⁵² The decision is having broad deleterious effects on the health care of American women. As Claire Brindis et al report in *The Lancet*:

The *Dobbs* decision has ushered in a new era of uncertainty for reproductive rights and health-care access in the USA. The consequences extend far beyond the ability to choose abortion and impact diverse aspects of women's lives, health, and wellbeing. Indeed, access to contraception and in-vitro fertilisation is already under threat.⁵³

And as the dissenting judges asked in *Dobbs*:

Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur ... short of death, how much illness or injury can the State require her to accept consistent with the [Fourteenth] Amendment's protection of liberty and equality?⁵⁴

⁵¹ Kurki, *Legal Personhood* (n 35) 2.

⁵² See Diana Kasdan, 'Two Years After Dobbs: Pregnant Peoples' Lives are Still on the Line and the Texas Supreme Court Looks Away' (*American Bar Association*, 23 June 2024), available at www.americanbar.org/groups/crsj/publications/crsj-featured-articles/two-years-after-dobbs/.

⁵³ Claire D Brindis et al, 'Societal Implications of the Dobbs v Jackson Women's Health Organization Decision' (2024) 403 *The Lancet* 2751, 2753. See also Claire D Brindis et al, 'Health-Care Workforce Implications of the Dobbs v Jackson Women's Health Organization Decision' (2024) 403 *The Lancet* 2747. These authors report that '[h]ealthcare providers are increasingly constrained from delivering timely and effective care to pregnant individuals who need abortions, even when those procedures are medically necessary to safeguard their life or health': at 2747.

⁵⁴ *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022) 35–36 (Breyer, Sotomayor, and Kagan JJ).

The evidence emerging is disturbing. According to the US Secretary of Health:

In the two years since *Dobbs*, we have witnessed the devastating impacts. Many women, especially those in states with stringent abortion restrictions, have found themselves navigating care deserts, forced to travel great distances to receive essential services. These barriers disproportionately affect marginalized communities, exacerbating existing health disparities.⁵⁵

So legal theory of the Person, translated into law, shapes and limits and controls lives. And it is important for the legal theorist to acknowledge and to reflect on this. Holding truth to power is a vital part of the scholar's remit.

Another reason for taking up these two books by Kurki and inspecting their theories of the Person is that they illustrate the method by which the sex-divided nature of law, and the uses of legal power to advance male interests, are kept out of analysis. In the next and final chapter I will say more about this method, which I term a heuristic device, for it is a continuing analytical technique in legal theory. Put very simply, the method is to say almost nothing about the active uses of law to suppress the interests of women, through the deployment of its basic concepts. And then to proceed as if these legal deployments of power had never happened, by declaring that both women and men are now Persons; all has been dealt with. We are all Persons now, and for the purposes of analysis, we always were.

We see this in Kurki's short book-length analysis of Legal Personhood. Women do appear, quite frequently, as characters, and we know that they are women because they are given female names. We have women as Legal Persons entering contracts, looking over fences, owing money, being legal guardians and so on. Indeed, these invented Persons, created for the purposes of analysis, are implicitly treated as interchangeable with men. They could be women; they could be men. This implicit interchangeability of male and female characters is an heuristic device which enables theory to proceed unencumbered by the profoundly sex-divided history of the law of Persons and its continuing sex divisions. It looks like women have entered the story, fully, but this illusion is created by placing women only in particular settings where their sex, and their historically reduced status in law, does not seem to matter. I will explain this heuristic device more fully in the next chapter.

In 2020, Joanne Connaghan issued 'an invitation to the analytical jurisprudential community to engage more visibly and vigorously with questions of power, domination and inequality and to take more seriously the social and historical contexts within which jurisprudential questions take form, meaning, and

⁵⁵ 'Statement by the Secretary of Health and Human Services on the Second Anniversary of *Dobbs v Jackson Women's Health Organization*' (US Department of Health and Human Services, 24 June 2024), available at www.hhs.gov/about/news/2024/06/24/statement-secretary-health-and-human-services-second-anniversary-dobbs-v-jackson-womens-health-organization.html.

significance'.⁵⁶ This is a generous and important offer. She added: 'Students today quite properly have an appetite for knowledge which speaks directly and explicitly to pressing issues of concern in a deeply troubled, patently unjust, and dangerously unstable politico-legal environment.'⁵⁷

Conaghan's invitation has yet to be taken up. There is continuing complacency about the fact that male legal power has been almost total and a tacit understanding that legal analysis need not take this into account, though it has been the fundamental precondition. It is just what is. This habit of thought is not confined to law. It is to be found across the disciplines, if looked for. But this intellectual habit matters especially in law because of law's almost ontological commitment to equality, fairness, and principled justice.

Without this attention to both halves of the population, and their very different legal roles and lives, the suppression of one half by law, and the advancement of the other by law, there is a serious risk of legal intellectuals repeating another variety of coverture. Without a positive effort to make women genuine subjects of concern, within the understanding of law, there is an intellectual extinguishment of women. Similarly, without proper recognition of men as men within law, men too are not seen and understood for their place in law and how they have made themselves through it.

⁵⁶ Conaghan (n 1).

⁵⁷ *ibid.*